

IN THE SUPERIOR COURT OF PENNSYLVANIA

Docket No. 1417 EDA 2007

**DENISE COOL, Personal Representative
of the Estate of KIMBERLY COOL,
Plaintiff-Appellant,**

vs.

**GENERAL MOTORS CORPORATION and CHARLES RICHARD
ALTEMOSE,**

Defendants-Appellees.

**BRIEF OF APPELLEE GENERAL MOTORS CORPORATION WITH
SUPPLEMENTAL REPRODUCED RECORD CITATIONS**

*Appeal from the Order of the Court of Common Pleas of Philadelphia County
July 2004 Term, No. 2291, Entered on May 9, 2007*

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TABLE OF CONTENTS

	Page
COUNTER-STATEMENT OF THE QUESTIONS INVOLVED	1
COUNTER-STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PRECLUDING THIERWECHTER FROM OPINING ON OCCUPANT KINEMATICS AND INJURY CAUSATION BECAUSE HE WAS UNQUALIFIED TO DO SO AND HIS TESTIMONY WAS CUMULATIVE	5
A. Plaintiff Failed To Establish That Thierwechter Was Qualified To Testify As An Expert On The Subjects Of Occupant Kinematics And Injury Causation.....	6
1. Thierwechter Has Virtually No Experience In Occupant Kinematics, Let Alone Experience Sufficient To Qualify Him As An Expert.	7
2. Thierwechter’s Scant Education In Occupant Kinematics Is Insufficient To Qualify Him As An Expert.....	12
B. Plaintiff Failed To Show Thierwechter’s Testimony Was Not Cumulative.....	14
C. Exclusion of Thierwechter’s Occupant Kinematics Opinions Did Not Prejudice Plaintiff	17
II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FORBIDDING PLAINTIFF’S COUNSEL TO READ THIERWECHTER’S EXCLUDED OPINIONS TO THE JURY WHILE CROSS-EXAMINING GM’S EXPERTS	17
A. The Right To Cross-Examine May Be Restricted Where Necessary To Avoid Confusion, Distraction, Unfair Prejudice, Or Duplication	18
B. <i>Boucher v. Pennsylvania Hospital</i> Authorizes Cross-Examination About Opinions of Non-Testifying Experts Only In Circumstances Not Present Here.....	21
1. GM’s Experts Did Not Rely On Thierwechter’s Excluded Occupant Kinematics Opinions—Indeed, They Could Not Have, As Their Occupant Kinematics Opinions Directly Contradicted Thierwechter’s	22

TABLE OF CONTENTS

(continued)

	Page
2. GM's Experts Did Not Misrepresent The Content Of Thierwechter's Excluded Occupant Kinematics Opinions; There Thus Was No Impeachment Justification For Invoking His Inadmissible Opinions In Cross-Examination.....	24
C. None Of The Other Cases On Which Plaintiff Relies Supports Her Argument That She Should Have Been Permitted To Quote Thierwechter's Inadmissible Opinions In Cross-Examining GM's Experts.....	27
D. Plaintiff Cannot Show Prejudice.....	29
III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING FIELD ACCIDENT DATA ANALYSIS	29
A. A Defendant May Rebut Plaintiff's Causation Theory By Showing That A Neutrally Compiled Set Of Data On Reported Accidents That Are Similar To The Accident At Issue Includes No Instance In Which A Similarly Situated Passenger Has Been Injured In The Way Plaintiff's Experts Contend The Injured Party Here Was.....	30
B. A Defendant May Use Data Drawn From A Range Of Accidents To Rebut Plaintiff's Theory That An Alternative Design Was Overall Safer	38
C. A Manufacturer May Describe The Data It Considered In Designing The Product At Issue To Show That It Was Not Negligent.....	42
IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING DEPOSITION TRANSCRIPTS BECAUSE THE PLAINTIFF FAILED TO ESTABLISH THE PREREQUISITES FOR THEIR ADMISSION AS EITHER FORMER TESTIMONY OR PARTY ADMISSIONS.....	43
A. The Prior Depositions Are Not Admissible As Former Testimony.....	44
1. Plaintiff Failed To Satisfy Rule Of Civil Procedure 4020(a)(3).....	45
2. Plaintiff Failed To Satisfy Rule Of Evidence 804	46
3. Plaintiff Failed To Show The Prior Cases Were Similar To This Case.....	49
B. The Prior Depositions Are Not Admissible As Party Admissions	51
C. Plaintiff Cannot Show Prejudice.....	52
V. THE TRIAL COURT CORRECTLY PRECLUDED PLAINTIFF'S EXPERT ECONOMIST FROM FORECASTING FUTURE EARNINGS BASED ON A JOB FOR WHICH THE DECEDENT HAD NOT APPLIED.....	55

TABLE OF CONTENTS
(continued)

	Page
VI. THERE IS NO BASIS FOR REINSTATING PLAINTIFF’S CLAIM FOR PUNITIVE DAMAGES	59
A. Michigan Law Governs Claims For Punitive Damages Arising Out Of Conduct That Occurred In Michigan	60
B. Plaintiff Failed To Adduce Sufficient Evidence To Warrant Submitting A Punitive-Damages Claim To The Jury Under Pennsylvania Law	64
CONCLUSION	68

TABLE OF AUTHORITIES

	Page
CASES	
<i>Apple v. Ford Motor Co.</i> , 69 Pa. D. & C.4th 236 (2004)	64
<i>Ashland Oil, Inc. v. Miller Oil Purchasing Co.</i> , 678 F.2d 1293 (5th Cir. 1982)	62
<i>Azzarello v. Black Bros. Co.</i> , 480 Pa. 547, 391 A.2d 1020 (1978).....	66
<i>BMW of N. Am. v. Gore</i> , 517 U.S. 559 (1996).....	66, 68
<i>Baccare v. Mennella</i> , 246 Pa. Super. 53, 369 A.2d 806 (1976)	56
<i>Baerwald v. Florex</i> , 930 P.2d 816 (N.M. Ct. App. 1996).....	13
<i>Beaumont v. ETL Servs.</i> , 761 A.2d 166 (Pa. Super. 2000)	44, 52
<i>Bennett v. Graham</i> , 552 Pa. 205, 714 A.2d 393 (1998).....	6
<i>Bergman v. United Servs. Auto Ass'n</i> , 742 A.2d 1101 (Pa. Super. 1999).....	15
<i>Bilski v. Scientific Atlanta</i> , 964 F.2d 697 (7th Cir. 1992).....	32, 36
<i>Bordenkircher v. Hayes</i> , 434 U.S. 357 (1978).....	66
<i>Boucher v. Pennsylvania Hosp.</i> , 831 A.2d 623 (Pa. Super. 2003)	<i>passim</i>
<i>Box v. Swindle</i> , 306 F.2d 882 (5th Cir. 1962).....	22
<i>Boyette v. L.W. Looney & Son, Inc.</i> , 932 F.Supp. 1344 (D. Utah 1996).....	68
<i>Brand v. Mazda Motor Corp.</i> , 978 F. Supp. 1382 (D. Kan. 1997).....	68
<i>Brannan v. Lankenau Hosp.</i> , 254 Pa. Super. 352, 385 A.2d 1376 (1978).....	19, 21, 29
<i>Ceroli v. Comcast Corp.</i> , 2005 Phila. Ct. Com. Pl. LEXIS 344 (June 27, 2005)	48

TABLE OF AUTHORITIES

(continued)

	Page
<i>Chicchi v. Southeastern Penns. Transp. Auth.</i> , 727 A.2d 604 (Pa. Commw. Ct.)	27
<i>Christiansen v. Silfies</i> , 446 Pa. Super. 464, 667 A.2d 396 (1995).....	6
<i>Chrysler Corp. v. Wolmer</i> , 499 So.2d 823 (Fla. 1986).....	68
<i>Cipolla v. Shaposka</i> , 439 Pa. 563, 267 A.2d 854 (1970).....	61
<i>Collins v. Cooper</i> , 746 A.2d 615 (Pa. Super. 2000)	27, 28
<i>Colville v. Crown Equip. Corp.</i> , 809 A.2d 916 (Pa. Super. 2002).....	17
<i>Commonwealth v. Blasioli</i> , 454 Pa. Super. 207, 685 A.2d 151 (1996).....	5
<i>Commonwealth v. Brinton</i> , 275 Pa. Super. 304, 418 A.2d 734 (1980).....	18, 19, 21
<i>Commonwealth v. Colon</i> , 846 A.2d 747 (Pa. Super. 2004)	49
<i>Commonwealth v. Lebo</i> , 795 A.2d 987 (Pa. Super. 2002).....	48, 49
<i>Commonwealth v. Petroll</i> , 696 A.2d 817 (Pa. Super. 1997).....	14
<i>Commonwealth v. Rizzuto</i> , 566 Pa. 40, 777 A.2d 1069 (2001)	18
<i>Commonwealth v. Smith</i> , 545 Pa. 487, 681 A.2d 1288 (1996).....	50
<i>Commonwealth v. Smith</i> , 548 Pa. 65, 694 A.2d 1086 (1997).....	15
<i>CONRAIL v. Del. River Port Auth.</i> , 880 A.2d 628 (Pa. Super. 2005).....	47, 48
<i>Craddock v. Viechnicki</i> , 79 Pa. D. & C.4th 225 (2006).....	26
<i>Cruz v. Ford Motor Co.</i> , 435 F. Supp. 2d 701 (D. Tenn. 2006)	62, 63
<i>Dambacher v. Mallis</i> , 336 Pa. Super. 22, 485 A.2d 408 (1984).....	6, 8, 66
<i>Danziger v. Ford Motor Co.</i> , 402 F.Supp.2d 236 (D.D.C. 2005).....	62

TABLE OF AUTHORITIES

(continued)

	Page
<i>Davies v. State</i> , 688 S.W.2d 738 (Ark. 1983).....	19
<i>DiFrancesco v. Excam, Inc.</i> , 434 Pa. Super. 173, 642 A.2d 529 (1994).....	31, 36
<i>Dobelle v. Nat'l R.R. Pass. Corp.</i> , 628 F.Supp. 1518 (S.D.N.Y. 1986)	62
<i>Elcock v. Kmart</i> , 233 F.3d 734 (3d Cir. 2000).....	9
<i>Ellis v. Chicago Bridge & Iron Co.</i> , 376 Pa. Super. 220, 545 A.2d 906 (1988).....	66
<i>Espeaignette v. Gene Tierney Co.</i> , 43 F.3d 1 (1st Cir. 1994)	32
<i>Fanselow v. Rice</i> , 213 F.Supp.2d 1077 (D. Neb. 2002)	63
<i>Ferreira v. Wilson</i> , 344 Pa. 567, 26 A.2d 342 (1942)	21, 29
<i>Fitzpatrick v. Madonna</i> , 424 Pa. Super. 473, 623 A.2d 322 (1993).....	66
<i>Forrest v. Beloit Corp.</i> , 424 F.3d 344 (3d Cir. 2005).....	32, 33, 35
<i>Franklin Music Co. v. Am. Broad. Cos.</i> , 616 F.2d 528 (3d Cir. 1979).....	64
<i>G.J.D. v. Johnson</i> , 552 Pa. 169, 713 A.2d 1127 (1998)	65
<i>Grady v. Frito-Lay, Inc.</i> , 576 Pa. 546, 839 A.2d 1038 (2003)	3
<i>Greer v. Bryant</i> , 423 Pa. Super. 608, 621 A.2d 999 (1993)	58
<i>Griffith v. United Air Lines, Inc.</i> , 416 Pa. 1, 203 A.2d 796 (1964)	61, 64
<i>Hall v. Owens Corning Fiberglass Corp.</i> , 779 A.2d 1167 (Pa. Super. 2001).....	49
<i>Harsh v. Petroll</i> , 840 A.2d 404 (Pa. Cmtwlth. 2003).....	37, 64

TABLE OF AUTHORITIES

(continued)

	Page
<i>Hart v. W.H. Stewart, Inc.</i> , 523 Pa. 13, 564 A.2d 1250 (1980)	55
<i>Hawthorne v. Dravo</i> , 352 Pa. Super. 359, 508 A.2d 298 (1986).....	59
<i>Heath v. Suzuki Motor Corp.</i> , 126 F.3d 1391 (11th Cir. 1997)	40, 41
<i>Hernandez v. M/V Rajaan</i> , 841 F.2d 582 (5th Cir. 1988).....	59
<i>Hines v. Joy Mfg. Co.</i> , 850 F.2d 1146 (6th Cir. 1988).....	32
<i>Hutchinson v. Luddy</i> , 582 Pa. 114, 870 A.2d 766 (2005).....	65
<i>Hutchinson v. Penske Truck Leasing</i> , 876 A.2d 978 (Pa. Super. 2005).....	36, 37, 65
<i>Imbierowicz v. A.O. Fox Mem. Hosp.</i> , 841 N.Y.S.2d 168 (N.Y. App. Div. 2007)	58
<i>In re Agent Orange' Prod. Liab. Litig.</i> , 580 F.Supp. 690 (S.D.N.Y. 1984)	63
<i>In re Air Crash Disaster Near Chicago</i> , 644 F.2d 594 (7th Cir. 1981)	62
<i>In re Aircrash Disaster Near Monroe</i> , 20 F.Supp.2d 1110 (E.D. Mich. 1998).....	62
<i>In re Disaster at Detroit Metro. Airport</i> , 750 F.Supp. 793 (E.D. Mich. 1989).....	61, 62
<i>In re Hanford Nuclear Reserv. Litig.</i> , 497 F.3d 1005 (9th Cir. 2007)	22
<i>In the Interest of M.M.</i> , 547 Pa. 237, 690 A.2d 175 (1997).....	18
<i>Jackovich v. Gen. Adj. Bureau, Inc.</i> , 326 N.W.2d 458 (Mich. Ct. App. 1994)	60
<i>Jacobs v. Chatwani</i> , 922 A.2d 950 (Pa. Super. 2007)	3, 5, 29

TABLE OF AUTHORITIES

(continued)

	Page
<i>Jerominski v. Fowler, Dick & Walker</i> , 377 Pa. 458, 105 A.2d 320 (1954)	47
<i>Johnson v. Knebel</i> , 485 S.E.2d 451 (Ga. 1997)	7, 10, 11, 13
<i>Jones v. Pak-Mor Mfg. Co.</i> , 700 P.2d 819 (Ariz. 1985)	32
<i>Jones v. Winnebago Indus.</i> , 460 F.Supp.2d 953 (D. Iowa 2006).....	62
<i>Joy v. Bell Helicopter Textron</i> , 999 F.2d 549 (D.C. Cir. 1993).....	59
<i>Judge v. Am. Motors Corp.</i> , 908 F.2d 1565 (11th Cir. 1990).....	61
<i>Kaczkowski v. Bolubasz</i> , 491 Pa. 561, 421 A.2d 1027 (1980).....	56, 57
<i>Keener v. Mid-Continent Cas.</i> , 817 So. 2d 347 (La. Ct. App. 2002).....	8
<i>Kelly v. Ford Motor Co.</i> , 933 F.Supp. 465 (E.D. Pa. 1996)	63
<i>Kemp v. Pfizer, Inc.</i> , 947 F.Supp. 1139 (E.D. Mich. 1996)	61
<i>Kemp v. Qualls</i> , 326 Pa. Super. 319, 473 A.2d 1369 (1984).....	27
<i>Keus v. Brooks Drug</i> , 652 A.2d 475 (Vt. 1994)	24
<i>Kirkbridge v. Lisbon Contr.</i> , 521 Pa. 97, 555 A.2d 800 (1989)	64
<i>Koedding v. Kirkwood Contractors, Inc.</i> , 851 S.W.2d 122 (Mo. Ct. App. 1993).....	13
<i>Kovalev v. Sowell</i> , 839 A.2d 359 (Pa. Super. 2003)	12
<i>Kuchinic v. McCrory</i> , 422 Pa. 620, 222 A.2d 897 (1966)	62, 64
<i>Kuntz v. Firth</i> , 216 Pa. Super. 155, 264 A.2d 432 (1970)	44, 45, 46
<i>Martin v. Johns-Manville Corp.</i> , 508 Pa. 154, 494 A.2d 1088 (1985).....	64

TABLE OF AUTHORITIES
(continued)

	Page
<i>Mecca v. Lukasik</i> , 366 Pa. Super. 149, 530 A.2d 1334 (1987).....	58
<i>Micciche v. Eastern Elevator Co.</i> , 435 Pa. Super. 219, 645 A.2d 278 (1994).....	37
<i>Miles v. Ford Motor Co.</i> , 922 S.W.2d 572 (Tex. Ct. App. 1996).....	68
<i>Miller v. Brass Rail Tavern, Inc.</i> , 541 Pa. 474, 664 A.2d 525 (1995).....	6, 7, 14
<i>Montgomery v. Mitsubishi Motors Corp.</i> , 2006 U.S. Dist. LEXIS 46585 (E.D. Pa. July 11, 2006).....	41
<i>Morales v. Am. Honda Motor Co.</i> , 151 F.3d 500 (1998).....	37
<i>Nationwide Mut. Ins. Co. v. Walter</i> , 290 Pa. Super. 129, 434 A.2d 164 (1981).....	64
<i>Olsen v. United States</i> , 521 F.Supp. 59 (E.D. Pa. 1981).....	68
<i>Palmer v. Volkswagen of Am., Inc.</i> , 905 So. 2d 564 (Miss. Ct. App. 2003).....	41, 43
<i>Pandit v. Am. Honda Motor Co.</i> , 82 F.3d 376 (10th Cir. 1996).....	32
<i>Pascale v. Hechinges</i> , 426 Pa. Super. 426, 627 A.2d 750 (1993).....	9
<i>Philip Morris USA v. Williams</i> , 127 S. Ct. 1057 (2007).....	68
<i>Phillips v. Cricket Lighters</i> , 584 Pa. 179, 883 A.2d 439 (2005).....	64, 65, 67
<i>Phillips v. Cricket Lighters</i> , 576 Pa. 644, 841 A.2d 1000 (2003).....	42, 66
<i>Quintana-Ruiz v. Hyundai Motor Corp.</i> , 303 F.3d 62 (1st Cir. 2002).....	11
<i>Rafferty v. Markovitz</i> , 602 N.W.2d 367 (Mich. 1999).....	60
<i>Rafter v. Raymark Indus., Inc.</i> , 429 Pa. Super. 360, 632 A.2d 897 (1993).....	27

TABLE OF AUTHORITIES

(continued)

	Page
<i>Reed v. Hutchinson</i> , 331 Pa. Super. 404, 480 A.2d 1096 (1984)	13, 14
<i>Reich v. Purcell</i> , 432 P.2d 727 (Cal. 1967)	61
<i>Richards v. Michelin Tire Corp.</i> , 21 F.3d 1048 (11th Cir. 1994)	68
<i>Riley v. Warren Mfg.</i> , 455 Pa. Super. 384, 688 A.2d 221 (1997)	66
<i>Rosenthal v. Ford Motor Co.</i> , 462 F.Supp.2d 296 (D. Conn. 2006)	62
<i>Safety Ins. Co. v. McCleod</i> , 2002 Mass. Super. LEXIS 262 (Mass. Super. Ct. July 19, 2002)	7, 11
<i>Satcher v. Honda Motor Co.</i> , 52 F.3d 1311 (5th Cir. 1995)	68
<i>Schindler v. Sofamor</i> , 774 A.2d 765 (Pa. Super. 2001)	66
<i>Spino v. John S. Tilley Ladder Co.</i> , 548 Pa. 286, 696 A.2d 1169 (1997)	<i>passim</i>
<i>Thorndike v. DaimlerChrysler Corp.</i> , 266 F.Supp.2d 172 (D. Me. 2003)	10, 11
<i>Tran v. Toyota Motor Corp.</i> , 420 F.3d 1310 (11th Cir. 2005)	40
<i>Troxel v. A.I. Dupont Inst.</i> , 431 Pa. Super. 464, 636 A.2d 1179 (1994)	60
<i>Trull v. Volkswagen of Am.</i> , 187 F.3d 88 (1st Cir. 1999)	32, 41
<i>Volkswagen of Am. v. Marinelli</i> , 628 So. 2d 378 (Ala. 1993)	43
<i>Walker v. General Motors Corp.</i> , 383 Pa. Super. 400, 557 A.2d 1 (1989)	16, 18
<i>Washington v. DeSantiago</i> , 68 P.3d 1065 (Wash. 2003)	48
<i>Welch v. Gen. Motors Corp.</i> , 949 F.Supp. 843 (N.D. Ga. 1996)	68

TABLE OF AUTHORITIES
(continued)

	Page
<i>Westinghouse Credit Corp. v. M/V New Orleans</i> , 39 F.3d 553 (5th Cir. 1994)	59
<i>Wexler v. Hecht</i> , 847 A.2d 95 (Pa. Super. 2004)	6
<i>Wilson v. Rivers</i> , 593 S.E.2d 603 (S.C. 2004)	13
<i>Woods v. Lecureux</i> , 110 F.3d 1215 (6th Cir. 1997)	59
<i>Yacoub v. Lehigh Valley Med. Assocs.</i> , 805 A.2d 579 (Pa. Super. 2002)	12
<i>Yarchak v. Trek Bicycle Corp.</i> , 208 F.Supp.2d 470 (D.N.J. 2002)	13
STATUTES, RULES, AND REGULATIONS	
49 C.F.R. § 571.207	67
Pa.R.A.P. 1925(a)	3
Pa.R.A.P. 1926	45
Pa.R.C.P. 4003.5(c)	9
Pa.R.C.P. 4004(a)(2)	51
Pa.R.C.P. 4007.1(e)	51
Pa.R.C.P. 4020	44, 48, 52
Pa.R.C.P. 4020(a)	44, 51
Pa.R.C.P. 4020(a)(2)	44, 51, 52
Pa.R.C.P. 4020(a)(3)	<i>passim</i>
Pa.R.C.P. 4020(a)(3)(B)	44, 45
Pa.R.E. 403	32
Pa.R.E. 702	15

TABLE OF AUTHORITIES
(continued)

	Page
Pa.R.E. 803(25).....	44, 51
Pa.R.E. 804	<i>passim</i>
Pa.R.E. 804(a).....	44, 45, 46
Pa.R.E. 804(a)(1)	46
Pa.R.E. 804(a)(2)	46
Pa.R.E. 804(a)(3)	46
Pa.R.E. 804(a)(4)	46
Pa.R.E. 804(a)(5)	44, 46, 47
Pa.R.E. 804(b)(1)	44, 45, 49

OTHER AUTHORITIES

3-22 LOUIS FRUMER & MELVIN FRIEDMAN, PRODUCTS LIABILITY (Supp. 2007).....	7, 12, 33
ALAN J. WATTS, LOW-SPEED AUTOMOBILE ACCIDENTS: ACCIDENT RECONSTRUCTION AND OCCUPANT KINEMATICS, DYNAMICS AND BIOMECHANICS (3d ed. 2003)	11
DAVID G. OWEN, MADDEN & OWEN ON PRODUCTS LIABILITY (3d ed. 2000)	42
David G. Owen, <i>Problems in Assessing Punitive Damages Against Manufacturers of Defective Products</i> , 49 U. CHI. L. REV. 1 (1982).....	68
RESTATEMENT (2D) CONFLICTS (1971)	62, 63
RESTATEMENT (3D) OF TORTS: PRODUCT LIABILITY (1998)	40
W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS (5th ed. 1984)	68

COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

(1) The trial court barred a police officer from opining on occupant kinematics because his only exposure to the topic before forming his opinions was in part of two 5-day classes. Plaintiff proffered a qualified expert to testify to identical opinions. The opinions pertained to causation, which the jury never reached. Did the trial court abuse its discretion in denying a new trial?

(2) The trial court barred cross-examination of defendants' experts about the same inadmissible opinions, on which the experts neither relied nor testified. The opinions pertained to an issue the jury never reached. Did the trial court abuse its discretion in denying a new trial?

(3) Controlling for relevant variables, a defense expert cited accident data showing similar injuries in similar accidents were not caused in the way plaintiff alleged happened here. That analysis pertained only to causation, an issue the jury never reached. The expert also discussed data he had considered showing that plaintiff's alternative design was unsafe in a range of accidents. The trial court overruled plaintiff's objection that the defendant failed to show substantial similarity of the data. Did the trial court abuse its discretion in denying a new trial?

(4) The trial court excluded transcripts of depositions of defendant's employees in prior cases because plaintiff failed to show the witnesses were unavailable to testify and that the prior cases were similar to this one. Did the trial court abuse its discretion in denying a new trial?

(5) The trial court barred plaintiff's damages expert from estimating lost future wages of an R.N. based on an out-of-state R.N. position because plaintiff failed to show that decedent applied for or would have been hired for that job. The jury never reached the issue of damages. Did the trial court abuse its discretion in denying a new trial?

(6) The trial court dismissed plaintiff's punitive damages claim because the law of the state where the conduct occurred denies them and at worst the defendant used lawful cost-benefit analysis in designing the product. Did the trial court abuse its discretion in denying a new trial?

COUNTER-STATEMENT OF THE CASE¹

Late at night on January 25, 2003, Kimberly Cool, a 22-year-old Maryland resident, was riding in the front passenger seat of her 1999 Chevrolet Cavalier Z-24 as her boyfriend, Richard Altemose, drove down a two-lane street in Oxford Township, Pennsylvania. R.65b, 68b–72b. Altemose was speeding and drunk. *Id.* The police later surmised that he tried to pass a pick-up truck he had been tailgating when Cool yanked the steering wheel to the right. R.70b. Altemose overcorrected, the car veered off the road, glanced off one tree, hit a dual-trunk tree, and then hit a third tree before coming to rest. R.96–137b, 183b–202b. Cool died in the accident. R.60b–61b.

Cool’s mother, plaintiff Denise Cool, filed this wrongful death and survival action against Altemose, alleging that he negligently caused Cool’s death. R.31a–32a. Plaintiff also named GM, the manufacturer of the car, as a defendant, asserting strict liability and negligence counts and alleging that the design of the car seats in the Cavalier was not crashworthy. R.9a–30a.

The trial focused on plaintiff’s theory that Cool died because the right front car seat was defective, in that it deformed (or “collapsed”) under what plaintiff alleged was a rearward force that caused her to ramp up and hit the rear seat back. R.141b–43b. She contended that a more rigid seat would have been safer. R.150b–51b. But it was undisputed that the car seat was already stronger than required by federal safety standards. R.359b. GM’s experts showed that deformation is necessary to absorb energy from the collision into the seat rather than into the body of the occupant; and showed that the seats functioned as intended. R.293b–382b. GM presented evidence that Cool died not because she moved rearward but because her head hit a vertical bar

¹ GM agrees with plaintiff’s procedural statement at App. Br. 7–9.

just to her right (the B-pillar) after the side impact with the dual-trunk tree. R.207b–40b. GM presented data from prior similar accidents confirming that plaintiff’s theory about how Cool was injured had never occurred in any similar accident reported in federal databases. R.282b–92b. GM showed that using a more rigid seat, as plaintiff proposed, could increase the risk of whiplash or severe neck injury in accidents. R.336b–48b.

On January 10, 2007, the jury returned its verdict. It unanimously found that Altemose’s negligence caused Cool’s death and awarded plaintiff \$2,000,000 in damages on that verdict. R.390b–91b. By an 11-1 vote, the jury found that GM’s car seat design was not defective, and by a 10-2 vote, that GM had not negligently designed the car seat. R.389b. Plaintiff filed a motion for a new trial, which the trial court denied. R.1896a. On June 29, 2007, Judge Sheldon Jelin issued his Pa.R.A.P. 1925(a) opinion. R.1931a–35a.

SUMMARY OF ARGUMENT

Much of this appeal is an academic exercise. Plaintiff appeals the trial court’s denial of a new trial on six separate grounds. Only parts of two of those six grounds (see Parts III.B and IV) could even conceivably call into question the jury’s verdict that the car seat in GM’s 1999 Cavalier is neither defectively nor negligently designed. The remaining issues pertain only to causation or damages. Because the jury did not reach those issues, the Court need not either.

Both the denial of a new trial and the evidentiary rulings plaintiff attacks were within the trial court’s discretion (*Jacobs v. Chatwani*, 922 A.2d 950, 966 (Pa. Super. 2007)) and should not be reversed unless an abuse of discretion “controlled the outcome of the case” (*Spino v. John S. Tilley Ladder Co.*, 548 Pa. 286, 696 A.2d 1169, 1171 n.6 (1997) (internal quotations omitted)). “An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous.” *Grady v. Frito-Lay, Inc.*,

576 Pa. 546, 839 A.2d 1038, 1046 (2003). Plaintiff's showing falls far short of that threshold.

Plaintiff contends that the trial court erred in barring a police officer from opining for her on occupant kinematics. Because he had no exposure to that field beyond attending parts of two five-day courses prior to forming his opinions, and plaintiff's other experts testified to the same opinions, the trial court properly limited his testimony. Part I.

Plaintiff also avers that the trial court was wrong to stop her from quoting those inadmissible opinions in cross-examining GM's experts. But because the experts neither relied on nor misrepresented those inadmissible opinions, the proposed cross-examination was improper. Part II. In any event, because the inadmissible opinions pertained only to causation—an issue the jury did not reach in finding for GM—these rulings could not have affected the verdict.

Plaintiff contends accident data used by GM's expert were not shown to be substantially similar to the accident at issue. But in rebutting the now-moot issue of causation, the expert controlled for relevant variables. Part III.A. And rebutting plaintiff's contention that an alternative design would have been safer required considering the alternative design's performance in a full range of accidents (Part III.B), just as rebutting plaintiff's contention that GM was negligent in its design required a showing that it had considered the full range of risks (Part III.C).

Although plaintiff argues that the exclusion of deposition transcripts from prior cases was improper, she failed to show the deponents were unavailable to testify at the time of trial, or that GM had an adequate opportunity and similar motive to develop the testimony in those cases. Regardless, plaintiff presented the same evidence to the jury in other forms. Part IV.

Plaintiff's last two contentions pertain to damages—a now-moot issue because the jury found GM not liable. The trial court properly barred plaintiff's economist from projecting Cool's lost wages based on a salary for another job in another state for lack of evidence that Cool applied for or would have gotten that job. Part V. Finally, the trial court was correct to dismiss

plaintiff's claim for punitive damages: That issue is governed by the law of the state where the allegedly tortious conduct occurred, which bars punitive damages. Even if Pennsylvania law applied, plaintiff's evidence was insufficient because it suggested at most that GM had engaged, as it should, in a cost-benefit analysis in designing the challenged car seat. Part VI.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PRECLUDING THIERWECHTER FROM OPINING ON OCCUPANT KINEMATICS AND INJURY CAUSATION BECAUSE HE WAS UNQUALIFIED TO DO SO AND HIS TESTIMONY WAS CUMULATIVE.

Plaintiff contends that the trial court abused its discretion in refusing to permit the police officer who investigated the accident, Corporal Thierwechter, to testify as an expert in occupant kinematics and injury causation. Specifically, plaintiff argues, this police officer should have been allowed to testify not only to his observations at the accident scene and his opinions regarding how the vehicles likely moved during the accident, but also his opinions about how Cool likely moved and was fatally injured during the accident, *i.e.*, that a “rear line of force * * * caused [Cool] to load her seatback * * * caus[ing] [Cool] to [ramp back in her seat and] strike her head [on the rear seat] with sufficient force to cause her fatal injuries.” App. Br. 14.

“It is well established that only expert testimony which assists the jury is admissible, and the trial court has broad discretion in making this determination.” *Commonwealth v. Blasioli*, 454 Pa. Super. 207, 685 A.2d 151, 167 (1996) (citations omitted), *aff'd*, 552 Pa. 149, 713 A.2d 1117 (1998); *accord Jacobs*, 922 A.2d at 956. Far from an abuse of discretion, the trial court's conclusion that plaintiff failed to show that this police officer possessed expertise to opine about these issues was correct. Thierwechter's own testimony at voir dire established that whereas “accident reconstruction” studies the movements of vehicles in accidents, “occupant kinematics” studies the movement of bodies in accidents; and that Thierwechter has no significant experience

or training in the latter field. Moreover, the trial court correctly concluded that Thierwechter's excluded testimony would have been entirely cumulative of the testimony of the qualified expert whom plaintiff was also proffering on occupant kinematics, Dr. Wayne Ross. In any event, plaintiff cannot show she was prejudiced by the trial court's ruling because the jury rejected plaintiff's claims on a ground wholly independent of the question of causation of plaintiff's injuries to which Thierwechter's excluded opinions pertained.

A. Plaintiff Failed To Establish That Thierwechter Was Qualified To Testify As An Expert On The Subjects Of Occupant Kinematics And Injury Causation.

Plaintiff emphasizes that the standard for qualification as an expert under Pennsylvania law is a "liberal" one. App. Br. 17 (quoting, *e.g.*, *Miller v. Brass Rail Tavern, Inc.*, 541 Pa. 474, 480, 664 A.2d 525, 528 (1995)). But a liberal standard is still a standard and this one requires a court to shield the jury from opinions uninformed by relevant expertise yet rendered under its mantle. The Pennsylvania Supreme Court has instructed that a proffered expert's "pretension to specialized knowledge" to render a particular opinion must be "reasonable." *Miller*, 664 A.2d at 528. Further, experts are permitted only to render opinions that are informed by the specific field(s) in which they have expertise, not to speculate outside their fields. *See, e.g.*, *Christiansen v. Silfies*, 446 Pa. Super. 464, 667 A.2d 396, 404 (1995).

Moreover, this Court has made clear that where, as here, the subject of an opinion is highly "specialized," it does not suffice for "[t]he scope of the witness's experience and education [to] embrace the subject in question in a general way." *Wexler v. Hecht*, 847 A.2d 95, 99 (Pa. Super. 2004) (quoting *Dambacher v. Mallis*, 336 Pa. Super. 22, 485 A.2d 408, 419 (1984)); *accord Bennett v. Graham*, 552 Pa. 205, 714 A.2d 393, 395 (1998) (holding that accident reconstruction is such a specialized field that "basic police training and experience" is "insufficient to demonstrate specialized knowledge"). Courts routinely hold that occupant kinematics is a highly

specialized field, requiring knowledge of the “forces and stresses exerted by an automobile collision on a human body” and of “human physiology, anatomy, biomechanics, or osteology,” and accordingly is a field in which accident reconstructionists—who study the movement and speed of vehicles in a collision—may not be assumed without evidence to possess expertise. *Johnson v. Knebel*, 485 S.E.2d 451, 455–56 (Ga. 1997); *see also, e.g., Safety Ins. Co. v. McCleod*, 2002 Mass. Super. LEXIS 262, at *7 (Mass. Super. Ct. July 19, 2002) (attached at tab A); 3-22 LOUIS FRUMER & MELVIN FRIEDMAN, PRODUCTS LIABILITY § 22.11[3]–[4] (Supp. 2007); *infra*, pp. 10–12.

Plaintiff’s proffer in support of her claim that Thierwechter had expertise to opine about occupant kinematics and to assess a cause of injury and death falls far short of the mark. Indeed, she resorts to misrepresenting Thierwechter’s experience and education to argue to the contrary.

1. Thierwechter Has Virtually No Experience In Occupant Kinematics, Let Alone Experience Sufficient To Qualify Him As An Expert.

Plaintiff accuses the trial court of focusing exclusively on the deficits in Thierwechter’s education in occupant kinematics, and ignoring his alleged experience in that area, in ruling on his qualifications. App. Br. 18–19. It is true that “a witness may be qualified to render an expert opinion based on * * * experience.” *Miller*, 664 A.2d at 528; *accord* Pa.R.E. 702 (witness may be “qualified as an expert by knowledge, skill, experience, training or education”). But plaintiff failed to show that Thierwechter had such experience.

Plaintiff claims that (a) Thierwechter’s “CV [Curriculum Vitae] notes * * * numerous assignments of accident reconstruction cases, some of which entailed an evaluation of occupant kinematics” (App. Br. 20 (citing R.2039a–52a)); and (b) “Thierwechter testified that occupant kinematics * * * is part and parcel to accident reconstruction” and that his 15 years as an accident reconstructionist therefore necessarily entailed substantial experience in occupant kinemat-

ics (App. Br. 19). Both claims misrepresent Thierwechter’s proffer at voir dire and the latter claim—that accident reconstruction and occupant kinematics are “part and parcel” with one another—also is belied by case law and authoritative treatises.

(a) Plaintiff is incorrect in claiming that Thierwechter’s “CV notes * * * numerous assignments of accident reconstruction cases, some of which entailed an evaluation of occupant kinematics.” App. Br. 20. Thierwechter’s CV does not note any assignments of any case involving occupant kinematics. *See* R.716a–19a. Indeed, the words “occupant kinematics” appear nowhere on his entire CV—not in courses taken, experience, certifications, or cases worked. *Id.* Rather, his CV relates entirely to police work and accident reconstruction. *Id.*

The CV does total the number of accident reconstructions Thierwechter has undertaken and completed to date. R.719a. But Thierwechter’s testimony establishes that plaintiff’s statement in her appellate brief that “some” of those accident reconstructions tabulated on Thierwechter’s CV “entailed an evaluation of occupant kinematics” (App. Br. 20) is false. Thierwechter testified at voir dire regarding only *one* accident reconstruction that he has ever done that in any way involved kinematics—not “some” such reconstructions (and also testified that this purported reconstruction did not appear on his CV). R.77b–78b. Specifically, Thierwechter testified he served as an expert in a “Dauphin County case” captioned *Commonwealth v. Whitaker*, No. 3398-204, in which “occupant kinematics was an issue.” *Id.*

But a single encounter with a subject does not render one an expert in it (*see, e.g., Dambacher*, 485 A.2d at 416–17)—particularly in a highly specialized field (*see, e.g., Keener v. Mid-Continent Cas.*, 817 So. 2d 347, 351–53 (La. Ct. App. 2002) (exposure to “orthopedics, neurosurgery, and radiology” during one-year internship does not qualify physician with accident reconstruction training as expert on spinal disc injury causation in car accidents)). That is especially true where, as here, the supposed expert’s sole encounter with the subject was testifying.

See, e.g., Elcock v. Kmart, 233 F.3d 734, 744 n.5 (3d Cir. 2000).

Moreover, this single encounter with occupant kinematics occurred in “late July of 2005” (R.78b)—more than two years *after* Thierwechter formed his opinions in this case and wrote his accident report (R.955a). It therefore fails to support plaintiff’s contention that the occupant kinematics opinions Thierwechter proffered were based on experience and accordingly worthy of credence by the jury. At the time Thierwechter formed these opinions, he had no experience. Plaintiff insists that determining an expert’s qualifications at the time the expert’s report is prepared “defies both common sense and logic.” App Br. 19 n.1. But an expert may testify at trial only as to the opinions and theories disclosed in the expert’s pretrial report. *See, e.g., Pa.R.C.P.* 4003.5(c); *Pascale v. Hechinges*, 426 Pa. Super. 426, 627 A.2d 750, 754 (1993). And training or experience obtained after an expert’s opinions have been fixed fails to substantiate their credibility.

(b) Endeavoring to compensate for Thierwechter’s lack of experience in occupant kinematics, plaintiff resorts to contending that occupant kinematics are really “part and parcel” with accident reconstruction and that specific experience in occupant kinematics was therefore unnecessary. App Br. 19–21. Although Thierwechter described accident reconstruction and occupant kinematics in that manner in his pre-trial deposition (R.730a), he proffered very different testimony in voir dire. In voir dire, rather than describing any purported overlap between accident reconstruction and occupant kinematics, Thierwechter defined the two as distinct and different fields. He testified that “accident reconstruction” is the study of “[h]ow the vehicle or vehicles move through a collision sequence.” R.2045a. By contrast, he testified, “occupant kinematics” is the study of “the way an occupant will move in relation to the vehicle [in] which he is traveling * * * during a collision.” *Id.* And Thierwechter had no trouble identifying with specificity which accident reconstruction he had done that actually involved occupant kinematics—the sin-

gle Dauphin county case that occurred after he had formed his opinions in this case (R.77b–78b). Such identification would have been impossible if the two fields were really so indistinct as to render an expert in one *de facto* an expert in the other. Indeed, following voir dire, plaintiff’s counsel conceded he had failed to elicit testimony showing that “the two fields [of accident reconstruction and occupant kinematics] interrelate, one with the other.” R.80b.

Plaintiff now attempts to gloss over this conceded deficit in her proof by simply asserting that “both fields are interrelated in that they deal specifically with applying principles of physics and mathematics to determine what may have occurred during a collision.” App. Br. 20–21. But, as the U.S. District Court for the District of Maine observed, “mere knowledge of Newton’s laws of motion is not a sufficient basis for asserting expertise in the field of occupant kinematics.” *Thorndike v. DaimlerChrysler Corp.*, 266 F.Supp.2d 172, 184 (D. Me. 2003). Indeed, even an engineer—who presumably possesses far greater familiarity with “principles of physics and mathematics” (App. Br. 20) than Thierwechter—will not be assumed to have sufficient knowledge to render an expert opinion about how a body moved and sustained injury within a vehicle, as Thierwechter sought to do here. *Id.*; accord *Johnson*, 485 S.E.2d at 455–56 & n.16.² As the Supreme Court of Georgia explained, “in order to possess the expertise required to render an expert opinion as to the proximate cause of physical injuries * *, a witness must have” not only general knowledge of engineering—which includes knowledge of the basic principles of physics and mathematics—but also “at least some training or experience in deducing the effects of automobile collisions upon human passengers” and “expert knowledge in the realms of human

² In *Thorndike*, the court let an expert opine on an occupant’s movement and cause of injury because he held engineering and medical degrees, opined regularly on biomedics, and additionally reviewed a study on the movement of a crash-test dummy during a sled test and an actual sled test to help him assess the specific forces about which he was opining. 266 F.Supp.2d at 184. Obviously, Thierwechter’s qualifications and analysis fall far short of that threshold.

physiology and anatomic structure.” *Id.* Thierwechter, of course, did not even purport to have such expertise.

As the United States Court of Appeals for the First Circuit has explained, “accident reconstruction experts measure the Delta V [*i.e.*, the changes in velocity] of the car environment, rather than that of a specific occupant” (*Quintana-Ruiz v. Hyundai Motor Corp.*, 303 F.3d 62, 65 (1st Cir. 2002)) while experts in “biomechanical analysis, occupant kinematics, [and] injury causation” determine “the response of the human body to acceleration and impact forces, such as in accidents” (*id.* at 66); and different experts accordingly are offered to testify to those distinct opinions (*id.* at 65–66). *See also Thorndike*, 266 F.Supp.2d at 177–78, 184 (describing how accident reconstruction expert modeled “the movement of the vehicles involved in the collision” and how occupant kinematics expert modeled “the [driver’s] motion”). Indeed, some authorities would further distinguish the rejected Thierwechter opinions on the causation of Cool’s injuries as involving biomechanics, which is the study of the effects of forces on the human body. *See ALAN J. WATTS, LOW-SPEED AUTOMOBILE ACCIDENTS: ACCIDENT RECONSTRUCTION AND OCCUPANT KINEMATICS, DYNAMICS AND BIOMECHANICS* § 14.1 (3d ed. 2003) (defining kinematics as “induced body motions * * * that can occur without consideration of the forces * * * applied,” dynamics as “the corresponding forces and induced stress and strain states,” and biomechanics as the “combination of kinematics and dynamics when applied to a biological entity”).

Accordingly, courts have held that “an expert in accident reconstruction would not be qualified to testify as to the nature or extent of injuries sustained by an accident victim, but rather only as to the nature and circumstances of the accident.” *McCleod*, 2002 Mass. Super. LEXIS 262, at *7. And treatises caution that litigants “should be wary of allowing a reconstructionist to extend his or her expertise too far from the accident itself. For example, many reconstructionists are not truly competent in the area[] of * * * biomechanics, which is what happens to the human

body during the accident sequence.” 3-22 FRUMER & FRIEDMAN, *supra*, § 22.11[3].

In any event, even if accident reconstruction and occupant kinematics were so similar that expertise in one field qualifies one as an expert in the other (which, as shown above at pages 9–11, and as Thierwechter’s own testimony reflects, they are not), plaintiff’s counsel’s conceded failure to present testimony at voir dire establishing such overlap between the two fields waives any error on this ground. As this Court has explained, for an expert in one field to be treated as a *de facto* expert in another, the party proffering the expert must lay a proper foundation of “overlap” between the two fields; and where she has failed to do so, the opinion should be excluded. *Yacoub v. Lehigh Valley Med. Assocs.*, 805 A.2d 579, 592 (Pa. Super. 2002); *see also Kovalev v. Sowell*, 839 A.2d 359, 364 (Pa. Super. 2003) (“it [is] incumbent upon [the party] to further develop the record if [the witness] d[oes] in fact possess any specialized knowledge”).

In sum, the trial court did not abuse its discretion in concluding that Thierwechter’s experience reconstructing the movement of vehicles did not, in and of itself, qualify Thierwechter to opine about body movement and injury causation. *Cf. Yacoub*, 805 A.2d at 592.

2. Thierwechter’s Scant Education In Occupant Kinematics Is Insufficient To Qualify Him As An Expert.

Plaintiff next mischaracterizes Thierwechter’s education, vaguely stating that he had taken “a series of courses” pertaining to occupant kinematics. App. Br. 18. But when Thierwechter was asked to identify which of his courses “[we]re of particular focus on * * * occupant kinematics” (R.73b), he was perfectly clear about which touched on the subject, and they were few indeed. Before preparing his accident report in this case in April 2003, he attended only two training courses that even had portions on occupant kinematics: he took a five-day course in 1997 on “Advanced Vehicle Collision Investigation, Level II” that “had a segment on occupant kinematics” and he took a five-day “applied physics course” in 2002 that “had a segment which

dealt with occupant kinematics.” R.73b–75b, 79b.

Having been exposed to segments of two five-day courses, five years apart, does not constitute expertise. Even assuming that an entire eight-hour day of each course was devoted to occupant kinematics—which is a stretch, given the breadth of the stated topics of the seminars—Thierwechter received at most 16 hours of training. This Court has held that even 24 hours of coursework in accident reconstruction—a less complex field—is insufficient to qualify a police officer as an expert in accident reconstruction. *Reed v. Hutchinson*, 331 Pa. Super. 404, 480 A.2d 1096, 1098–1100 (1984). Sixteen hours of coursework to acquire not only knowledge of how bodies move and interact with different car cabins and their internal restraints, but also “expert knowledge in the realms of human physiology and anatomic structure,” must likewise be insufficient. *Johnson*, 485 S.E.2d at 455. As the trial court pointedly noted, “If I were to take a general course in medicine and it had a segment in surgery, could I then testify as an expert in surgery? Certainly not. Just because I had two courses, even if [I] had two *full* courses in a particular subject, does not qualify me as an expert.”³ R.1947a–50a (emphasis added).⁴

³ Thierwechter testified that, in 2005, he took a 5-day “‘Crush’ Damage and Energy course” in which “there was some discussion [of occupant kinematics].” R.75b. But that class occurred after he prepared his accident report in this case, and thus is irrelevant. *See supra*, p. 9. In any event, even assuming that a full day was devoted to occupant kinematics, he received at most only 24 hours of total training—insufficient exposure to confer expertise. *Reed*, 480 A.2d at 1098–1100.

⁴ Thierwechter’s lack of qualification to opine about occupant kinematics and injury causation is perhaps best illustrated by comparison to others whom courts *have* qualified. *See, e.g., Yarchak v. Trek Bicycle Corp.*, 208 F.Supp.2d 470, 501 (D.N.J. 2002) (“25 years as a professor of biomechanics” deemed sufficient); *Wilson v. Rivers*, 593 S.E.2d 603, 605 (S.C. 2004) (MD and PhD in “human physiology,” with “training in biomechanics” deemed sufficient); *Baerwald v. Florex*, 930 P.2d 816, 819 (N.M. Ct. App. 1996) (BA and MA in mechanical engineering with emphasis in biomechanical engineering and experience performing biomechanical research deemed sufficient); *Koedding v. Kirkwood Contractors, Inc.*, 851 S.W.2d 122, 125 n.3 (Mo. Ct. App. 1993) (PhD in orthopedic biomechanics and 25 years experience performing biomechanical

(cont’d)

The case on which plaintiff relies, *Commonwealth v. Petroll*, 696 A.2d 817 (Pa. Super. 1997), is not to the contrary. Plaintiff cites *Petroll* for the proposition that a police officer “may testify as an expert in accident reconstruction, even though he had only investigated one accident * * * and had been found qualified as an expert in the field of accident reconstruction on one other occasion.” App. Br. 21. Plaintiff fails to mention that the police officer in that case had also taken over 300 hours of coursework on accident reconstruction, performed between 20 and 26 accident reconstructions, and been certified as a member of the National Association of Accident Reconstruction Specialists. 696 A.2d at 834–35. If anything, this case exemplifies how far Thierwechter’s comparatively paltry qualifications come from comprising “expertise.”

In sum, because Thierwechter had scant coursework and no experience in occupant kinematics, and plaintiff failed to adduce any other evidence that Thierwechter had a “reasonable pretension to specialized knowledge” (*Miller*, 664 A.2d at 528), the trial court was well within its discretion in declining to qualify Thierwechter as an expert. *See Reed*, 480 A.2d at 1098–1100.

B. Plaintiff Failed To Show Thierwechter’s Testimony Was Not Cumulative.

Even if Thierwechter possessed the relevant qualifications, his occupant kinematics testimony was properly excluded on an independent ground: It was entirely cumulative of the occupant kinematics testimony proffered by plaintiff’s other expert, Dr. Wayne Ross. R.1932a–33a. Plaintiff proffered Dr. Ross to testify—and he did testify—as an “occupant kinematics” expert. He opined that a rearward force during the accident caused Cool’s seatback to recline, causing her to ramp up in her seat and receive a fatal injury by hitting her head on the rear seat-

(... cont’d)

research, including work on Challenger shuttle disaster, deemed sufficient). While we do not suggest that these qualifications set a threshold minimum, they are illustrative.

back. Thierwechter's testimony would merely have repeated those very same opinions.⁵

The purpose of expert testimony is "to assist the trier of fact to understand the evidence or to determine a fact in issue." Pa.R.E. 702. Cumulative expert testimony does not serve that purpose and accordingly may be excluded by the trial court. *See, e.g., Commonwealth v. Smith*, 548 Pa. 65, 694 A.2d 1086, 1092 (1997) (holding that it was not an abuse of discretion to exclude "expert psychiatric testimony" because it "would have been cumulative to the testimony" of another expert on the same subject); *Bergman v. United Servs. Auto Ass'n*, 742 A.2d 1101, 1105, 1107–08 (Pa. Super. 1999).

Under these principles, the trial court's preclusion of Thierwechter's testimony on occupant kinematics was not an abuse of discretion. Indeed, at the hearing on the post-trial motions, when the court asked whether Thierwechter's testimony would have been cumulative, plaintiff's counsel's response was not to identify any point on which Thierwechter's and Dr. Ross's testimony would not have overlapped. Instead, counsel argued merely that Thierwechter, as a police officer, would have special credibility in the eyes of the jury. R.1949a–51a. But the possibility that the jury might have been impressed by Thierwechter is not a sufficient basis to justify admission of testimony plaintiff implicitly admitted was entirely cumulative. Moreover, in response to the trial court's stated concern that Thierwechter's and Dr. Ross's occupant kinematics

⁵ Compare R.964a (Thierwechter proffering opinion that the "impact [with a tree] also resulted in a violent counterclockwise rotation. During this rotation the passenger traveled up the seatback as it laid flat, striking her head at the top right on the back of the rear seat.") with R.142b–43b (Dr. Ross testifying that "this vehicle * * * hits a tree * * * [a]nd because it's rotating very quickly, [Cool] moves rearward. The seatback fails. * * * She goes into the back seat here and impacts her head."); compare also R.964a (Thierwechter proffering opinion that "Cool died as a result of blunt force trauma to the head" when she "str[uck] her head at the top right on the back of the rear seat") with R.144b (Dr. Ross testifying that Cool "hits that area [of the rear seatback] and breaks her skull").

testimony was cumulative, plaintiff failed to state a preference that, if she were limited to one occupant kinematics witness, it should be Thierwechter. *See id.*

Plaintiff suggests Thierwechter had something unique to offer as an expert on occupant kinematics because “[h]e was the only expert witness at the scene of the accident.” App. Br. 15–16. But that too is incorrect. All of the visual observations Thierwechter made at the scene were recorded in his accident report (R.957a–64a) and duly made available to the other experts, who relied on them. Moreover, Thierwechter was permitted to testify regarding these visual observations. R.81b–112b, 123b–25b, 140b–41b. Thus, Thierwechter was permitted to share with the jury his observation that, some two hours after the accident (R.81b), when he finally arrived on the scene, Cool’s body was resting in the position shown in a photograph taken by another officer. R.82b (discussing Pl. Ex. 2-724). But Thierwechter’s on-site visual observation of Cool’s position two hours after the accident put him in no better position than plaintiff’s other occupant kinematics expert witness to opine about how Cool got there.

Plaintiff contends that the limitation of Thierwechter’s testimony prevented plaintiff’s experts from testifying “to the basis of their conclusions” because they had relied on Thierwechter’s report. App. Br. 24. But this Court has clearly ruled that, where, as here, a police officer’s accident report is inadmissible because it contains opinions the officer is not qualified to make, testimony by a party’s expert that he “reli[ed]” on those excluded opinions is likewise inadmissible. *Walker v. General Motors Corp.*, 383 Pa. Super. 400, 557 A.2d 1, 3 (1989). “Clearly, where evidence is inadmissible directly from its source, it is no less inadmissible indirectly through another.” *Id.* (quoted at Op. 3, R.1933a). In sum, because plaintiff failed to point to any fact or opinion she did not or could not present through her other experts, the trial court did not abuse its discretion in precluding Thierwechter’s testimony and limiting plaintiff to one expert on occupant kinematics.

C. Exclusion of Thierwechter’s Occupant Kinematics Opinions Did Not Prejudice Plaintiff.

Even if the trial court abused its discretion in precluding Thierwechter’s testimony on the subject of occupant kinematics, plaintiff has not met her burden of establishing that the limitation prejudiced her case. To be entitled to a new trial, plaintiff must show that the trial court’s abuse of discretion “controlled the outcome of the case” by affecting the jury’s verdict. *Spino*, 696 A.2d at 1171 n.6 (internal quotation marks omitted).

The excluded Thierwechter opinions pertained solely to the issue of injury causation: how Cool’s body moved and how she sustained her fatal injury. Yet the jury’s verdict sheet specifically reflects that the jury found GM “not liable” on a wholly independent ground: that the car seat was not defective or negligently designed in the first place. R.389b (noting that jury answered “[n]o” to the questions whether they found “that there was a defect in the design of the right front passenger seat of the 1999 California Chevrolet Cavalier occupied by Kimberly Cool such that it was not crashworthy” and whether GM was “negligent in the design of the right front passenger seat of the 1999 Cavalier”); *see also* R.388b. That is a sufficient ground for a verdict for GM. *See Colville v. Crown Equip. Corp.*, 809 A.2d 916, 922–23 (Pa. Super. 2002). Thierwechter had not offered to opine about that independent issue of defect or negligence. *See generally* R.955a–77a (Thierwechter Report). Accordingly, the exclusion of Thierwechter’s opinions could not have affected the outcome of the case.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FORBIDDING PLAINTIFF’S COUNSEL TO READ THIERWECHTER’S EXCLUDED OPINIONS TO THE JURY WHILE CROSS-EXAMINING GM’S EXPERTS.

At trial, plaintiff attempted an end-run around the trial court’s exclusion of Thierwechter’s unqualified occupant kinematics opinions by seeking to quote those opinions while cross-examining GM’s experts. The trial court properly rejected that ploy, reasoning that to hold

otherwise would allow plaintiff to put before the jury precisely the inadmissible opinions that had warranted exclusion. R.1933a (quoting *Walker*, 557 A.2d at 3). The trial court’s decision was correct. Thierwechter’s occupant kinematics opinions were not the product of expertise, yet because they appeared in the accident report of an investigating police officer, they bore that imprimatur. These unqualified opinions would have been just as prejudicial and non-probative if referenced in cross-examination as they would have been if admitted on direct—indeed, more so because they would not themselves have been subjected to cross-examination. None of the exceptions plaintiff invokes for referring in cross-examination to inadmissible opinions applies.

A. The Right To Cross-Examine May Be Restricted Where Necessary To Avoid Confusion, Distraction, Unfair Prejudice, Or Duplication.

Plaintiff suggests that the scope of her right to cross-examination is virtually all encompassing and that a trial court may not preclude cross-examination regarding even prejudicial and unreliable evidence. App. Br. 25–26. The permissible scope of cross-examination, however, has never been so broadly defined. To the contrary, this Court has made clear that a trial court has “broad discretion to limit the scope of cross-examination” whenever the risk of distraction or unfair prejudice exceeds the potential benefits of probing the witness’s credibility or the accuracy of the testimony: “In determining the scope of cross-examination the trial court may consider whether the matter is collateral, whether cross-examination would be likely to confuse or mislead the jury, and whether it would waste time.” *Commonwealth v. Brinton*, 275 Pa. Super. 304, 418 A.2d 734, 736 (1980) (internal quotation marks omitted).

Thus, for example, a trial court may—indeed should—bar a party from cross-examining a witness as to “baseless accusations intended to blacken a witness’s character” because such cross-examination is more unfairly prejudicial and distracting than probative. *Commonwealth v. Rizzuto*, 566 Pa. 40, 777 A.2d 1069, 1082 (2001); see also *In the Interest of M.M.*, 547 Pa. 237,

690 A.2d 175, 178 (1997) (affirming bar on cross-examining witness on alcohol consumption because there was no reason to suspect witness had been intoxicated). A trial court may and should forbid cross-examination of a witness regarding ill-grounded opinions for the same reasons.⁶ See *Brinton*, 418 A.2d at 736. Had the trial court permitted cross-examination of GM's experts about Thierwechter's inadmissible opinions, the jurors were likely—as plaintiff emphasizes throughout her brief (*e.g.*, App. Br. 16, 22)—to have accepted those opinions as true because Thierwechter's neutrality lent them credibility. But the trial court had correctly held as a matter of law that Thierwechter was not sufficiently competent in occupant kinematics for his opinions on that topic to have greater weight than those of an ordinary person, let alone greater weight than those of real experts.

Indeed, the only point of plaintiff's attempt to quote Thierwechter's report in cross-examination was to show that someone with supposedly greater credibility than GM's experts disagreed with their conclusions—in other words, to exploit the false impression that Thierwechter's occupant kinematics opinions were the product of expertise. We know that because, at trial, plaintiff's other expert, Dr. Ross, offered opinions that were essentially identical to the occupant kinematics and injury causation opinions in Thierwechter's report that were held inadmissible. See *supra*, pp.14–15. Plaintiff was thus able to cross-examine GM's experts extensively

⁶ For example, Pennsylvania courts regularly preclude cross-examination of expert witnesses regarding opinions in treatises because the expert witnesses did not acknowledge them to be authoritative. *E.g.*, *Brannan v. Lankenau Hosp.*, 254 Pa. Super. 352, 385 A.2d 1376, 1383 (1978), *rev'd on other grounds*, 490 Pa. 588, 417 A.2d 196 (1980). Absent endorsement or reliance by the expert, hearsay opinion is insufficiently reliable to be introduced to the jury even in cross-examination because of the risk that the jury will assume the opinion to be true. See *Davies v. State*, 688 S.W.2d 738, 740 (Ark. 1983) (trial court erred in allowing prosecutor to cross-examine a defense expert witness with assertion from medical text “not shown to be reliable” because it risked giving “the jury a basis for believing” the opinion). The same principle applies here.

about the substance of those opinions—which were also Thierwechter’s.⁷ The only fact the trial court’s ruling prevented plaintiff from bringing out in cross-examination, therefore, was that *Thierwechter shared* the opinions of her other experts: a point the judge correctly ruled was irrelevant, given that Thierwechter lacked any particular expertise to assess the matter.

Any suggestion that the prejudicial effect of telling the jury that Thierwechter, the investigating police officer, shared plaintiff’s experts’ kinematics opinions could have been avoided by a limiting instruction directing the jury not to consider Thierwechter’s inadmissible opinions for the truth of the matter asserted must be rejected. First, the instruction would have made no sense, given that the only purpose for which plaintiff’s counsel invoked Thierwechter’s kinematics opinions in cross-examining GM’s experts was to persuade the jury of their truth, by reference to Thierwechter’s comparatively greater credibility. (As we show below in Part I.B, plaintiff’s claim that reference to these opinions served other purposes—to explore the foundations of GM’s experts’ testimony and to impeach the experts regarding misrepresentations regarding the content of Thierwechter’s reports—is incorrect.) Second, even if there were some purpose other than to persuade the jury of the truth of Thierwechter’s opinions, the imprimatur bestowed on those opinions by Thierwechter’s position as the investigating police officer likely would have so impressed the jury that a limiting instruction likely would have been ineffective.

Had the trial court permitted Thierwechter’s inadmissible kinematics opinions to be quoted in cross-examination, GM’s only hope of establishing that these opinions lacked underpinning in experience, knowledge, or training would have been to interrupt its case in chief to

⁷ See, e.g., R.241b–44b (cross-examining Dr. Corrigan on Cantor’s conclusions that dent in rear seatback was caused by contact with Cool’s rather than Altemose’s head); R.245b–46b (cross-examining Dr. Corrigan on whether Cool slid out from under her seat belt during the crash); R.383b–85b (cross-examining Dr. Viano on basis for conclusion that dent in rear seatback was caused by contact with Altemose’s head, not Cool’s).

recall Thierwechter to expose these facts by questioning him regarding his qualification. The trial court was well within its discretion in forbidding the use of Thierwechter's speculative opinions in cross-examination to avoid having the jury be (1) distracted by such collateral litigation to show Thierwechter's lack of qualification, (2) confused by an instruction not to consider Thierwechter's opinions for the truth of the matter they asserted, or (3) misled by the official nature of Thierwechter's opinions into believing that his opinions were the products of expertise. *Cf. Brinton*, 418 A.2d at 736 (trial court may exercise its discretion to prohibit cross-examination that would confuse, prejudice, or distract the jury on a collateral matter).

Moreover, the trial court's ruling may also be sustained on the ground that the cross-examination plaintiff proposed was entirely duplicative. *See id.* As noted, plaintiff had ample opportunity to cross-examine GM's witnesses regarding why they rejected the theories contained in the inadmissible opinions because her other experts testified to the very same theories. Where, as here, the appellant was not "deprived in any significant way of the opportunity to develop" a competing theory contained in an inadmissible opinion, and "the jury was fully informed about and able to appraise appellant's contention" regarding the merits of the competing theory, "[t]he trial judge's ruling that counsel could not cross-examine" an expert witness about the inadmissible opinion "was well within the judge's discretion." *Brannan*, 385 A.2d at 1383; *accord Ferreira v. Wilson*, 344 Pa. 567, 26 A.2d 342, 346 (1942).

B. *Boucher v. Pennsylvania Hospital* Authorizes Cross-Examination About Opinions of Non-Testifying Experts Only In Circumstances Not Present Here.

Pennsylvania courts hold that opinions even of a non-testifying "expert"—which Thierwechter was not—generally may not be used in cross-examining an expert witness because of the risk that the jury will assume that those opinions are reliable when they have not been so shown. In *Boucher v. Pennsylvania Hospital*, 831 A.2d 623 (Pa. Super. 2003), the Court indi-

cated that an expert witness could not be cross-examined regarding the opinion of a non-testifying expert, which the expert witness had reviewed, unless either (1) the testifying expert witness had relied on the opinion in forming his own (*id.* at 628–29) or (2) the non-testifying expert’s opinion was being used to impeach the expert witness regarding a misrepresentation of the opinion or of another factual matter (*id.* at 629–33). In neither situation is the opinion being offered for the truth of the matter asserted; rather, it is being used in the first instance to explore the foundation for the expert witness’s opinion, and in the second to impeach the expert. The rule *Boucher* states is the rule in most jurisdictions. *See, e.g., In re Hanford Nuclear Reserv. Litig.*, 497 F.3d 1005, 1029–30 (9th Cir. 2007); *Box v. Swindle*, 306 F.2d 882, 886–87 (5th Cir. 1962).

Plaintiff acknowledges that “[t]he Superior Court’s decision in *Boucher* * * * is controlling” here. App. Br. 36. Accordingly, she attempts to shoehorn her attempted use of Thierwechter’s excluded opinions into the two exceptions *Boucher* recognized to the general bar against referencing opinions of non-testifying experts in cross-examination. But the record flatly belies plaintiff’s contention that either exception applies.

1. GM’s Experts Did Not Rely On Thierwechter’s Excluded Occupant Kinematics Opinions—Indeed, They Could Not Have, As Their Occupant Kinematics Opinions Directly Contradicted Thierwechter’s.

Invoking the first exception, plaintiff contends that it was permissible to read from Thierwechter’s inadmissible occupant kinematics opinions in cross-examining GM’s experts because they supposedly “relied on” those opinions in forming their own. App. Br. 28. Exploration of Thierwechter’s inadmissible opinions therefore was necessary, plaintiff contends, for a complete review of the foundation for GM’s experts’ opinions. App. Br. 26–29. But, as plaintiff’s citations (*see* App. Br. 28) confirm, GM’s experts testified only that they had “reviewed”—not that they had “relied on”—Thierwechter’s occupant kinematics opinions. Under *Boucher*, that is not enough. As *Boucher* explained, an exception to the bar is warranted where an expert wit-

ness’s “reliance on the [opinion of the non-testifying expert] provides its own indication of the [opinion]’s trustworthiness.” 831 A.2d at 628. Where, as here, the expert witness has merely “*review[ed]* * * * materials” and not relied on them, that “indici[um] of reliability” is lacking and the cross-examination may be barred. *Id.* at 628–29 & n.2 (emphasis added).

Plaintiff insists that Dr. Catherine Ford Corrigan, GM’s occupant kinematics expert, and Dr. David Viano, GM’s biomechanical injury-causation expert, not only reviewed but also “*relied upon* the Report of Corporal Thierwechter in forming their conclusions.” App. Br. 28 (emphasis added). But the transcript segments plaintiff cites belie that characterization. *See, e.g.*, R.2104a (Dr. Corrigan agreeing on cross-examination that she had “reviewed” and “read those reports very thoroughly”); R.264b (Dr. Viano, having been asked whether he had “synthesized” the analyses of Thierwechter and Bailo, responding to the contrary that he had “reviewed both [those reports] * * * and made my own decisions as to the actual vehicle kinematics and occupant motions”).

The only “reliance” these experts indicated on Thierwechter’s report was on its factual observations and accident reconstruction opinions about what happened to the vehicle—not on Thierwechter’s inadmissible occupant kinematics opinions. R.265b (Dr. Viano, on direct, testifying that he had prepared an exhibit “using Steve Bailo’s reconstruction, relying upon * * * Thierwechter’s investigation as well, to try to show what happened *to the vehicle* in this crash”) (emphasis added).⁸ Such reliance on Thierwechter’s report for the factual observations and opinions he was qualified to render and to which he did testify does not justify use in cross-

⁸ Similarly, although Dr. Viano’s expert report—which was not shared with the jury—recites portions of Thierwechter’s report in relating the materials reviewed, it does not suggest that Dr. Viano relied on Thierwechter’s occupant kinematics or injury causation opinions. Indeed, no reference is made to those opinions anywhere in the analysis section. R.1024a–27a.

examination of those opinions he was not qualified to render and to which he was not permitted to testify. *See, e.g., Keus v. Brooks Drug*, 652 A.2d 475, 479 (Vt. 1994) (holding that lower court erred in allowing cross-examination of expert medical witness regarding opinion of treating doctor contained in medical records because expert witness had “used the reports only for the purpose of obtaining a history of the injury”). Indeed, plaintiff’s suggestion that GM’s experts “relied on” Thierwechter’s occupant kinematics and injury causation opinions in forming their own opinions is ludicrous; their opinions contradicted Thierwechter’s. *See id.* Accordingly, Thierwechter’s precluded opinions were an impermissible ground for cross-examination. *Id.*

2. GM’s Experts Did Not Misrepresent The Content Of Thierwechter’s Excluded Occupant Kinematics Opinions; There Thus Was No Impeachment Justification For Invoking His Inadmissible Opinions In Cross-Examination.

Plaintiff next invokes the second *Boucher* exception, arguing that she needed to quote Thierwechter’s inadmissible opinions to impeach Drs. Corrigan and Viano on their supposed testimony “that they agreed with Corporal Thierwechter” (App. Br. 29, 33), which she claims created the false impression that Thierwechter shared GM’s experts’ occupant kinematics opinions. App. Br. 28–29. But again, the statements plaintiff cites indicate only that these experts agreed with Thierwechter’s factual observations and accident reconstruction opinions. There thus was no false impression to correct regarding Thierwechter’s unqualified occupant kinematics opinions and no necessity to read those opinions to the jury.

Specifically, plaintiff cites (App. Br. 29) Dr. Corrigan’s testimony that “with respect to the features of the accident that I’m most interested in, it seemed to me that the corporal’s analysis and Mr. Bailo’s analysis were entirely consistent” (R.203b). Plaintiff invokes this exchange (App. Br. 29) as an instance in which “the Court allowed the Defendant’s experts to testify that they agreed with Corporal Thierwechter without having these claims challenged” (App. Br. 33).

Plaintiff neglects to inform the Court, however, that Dr. Corrigan went on to clarify that “the features of the accident that [she was testifying she was] most interested in” were “the interaction between the vehicle and what’s being referred to as the dual-trunk tree.” R.203b–04b. Specifically, Dr. Corrigan invoked “the work of Mr. Bailo, consistent with the work of Corporal Thierwechter,” showing “that the principal direction of force was approximately 3:30 to 4 o’clock, associated with that dual-trunk tree impact.” R. 205b. That is an accident reconstruction opinion about the movement of vehicles. *See supra*, pp. 7, 9–12. At no point did Dr. Corrigan suggest that she agreed with Thierwechter’s excluded opinions that Cool’s body ramped back in her seat and hit the rear seat of the car, causing her death.

Plaintiff likewise argues that quoting the inadmissible Thierwechter opinions was necessary to “impeach” (App. Br. 34) Dr. Viano’s purported testimony that he “agreed with Corporal Thierwechter” (App. Br. 33). But Dr. Viano offered no such testimony regarding Thierwechter’s occupant kinematics opinions. Plaintiff’s assertion that “[s]ignificantly, Viano also testified that he used the Corporal’s diagrams and ‘points in time that he had to describe what Kim’s movement would be at impact with the dual trunk tree’ for his own analysis” excises the quotation in a way that grossly mischaracterizes Dr. Viano’s testimony. App. Br. 29 (selectively quoting R.2124a and mis-citing to R.2127a). Contrary to plaintiff’s claim, the quotation comes not from Dr. Viano, but from GM’s counsel. *See* R.2124a. Moreover, the transcript reveals that GM’s counsel was referring to *Alan Cantor’s* description of Cool’s movement—*not Thierwechter’s*.⁹

⁹ GM’s counsel first pointed Dr. Viano to GM Ex. 467, an enlarged portion of a diagram of the movement of Cool’s car from Thierwechter’s accident report, upon which additional markings had been added by hand. R.266b. The original diagram contains no pictures of movement of bodies, only movement of the car (R.970a). GM’s counsel asked Dr. Viano whether he recalled “where I”—*i.e.*, GM’s counsel—“drew” pictures on top of Thierwechter’s diagram of vehicle movement “to describe what” Alan Cantor had testified “Miss Cool’s movement would be

(cont’d)

See R.266b–67b, 270b. Dr. Viano at no time referred to Thierwechter’s opinions about Cool’s body movements or any diagram in which Thierwechter purported to depict them.

In any event, GM’s experts’ statements of agreement with the factual observations and accident reconstruction opinions of Thierwechter could not have misled the jury into believing that GM’s experts agreed with the occupant kinematics and injury causation opinions of Thierwechter. Because those inadmissible opinions had not been put before the jury, the jury did not know of their existence. In short, unlike in *Boucher*,¹⁰ 831 A.2d at 632, there was no “mischaracterization by the testifying expert” of the opinion of a non-testifying expert to be exposed through reference to the non-admitted (and in this case inadmissible) opinion in cross-examination. See *Craddock v. Viechnicki*, 79 Pa. D. & C.4th 225, 255 (2006) (“In *Boucher*, the Superior Court allowed the use of records and reports not in the record to refute the testimony of an expert medical witness about the existence of such reports in forming his opinion. * * * It is not suggested here that Dr. Glazerman mischaracterized any reports upon which he based his expert medical opinion. Accordingly, *Boucher*[’s exceptions are] inapplicable to this situation.”), *aff’d*, 909 A.2d 891 (Pa. Super. 2006), *appeal denied*, 591 Pa. 693, 917 A.2d 314 (2007).

(... cont’d)

at impact with the dual-trunk tree.” R.266b–67b; see also R.165b–69b (GM’s counsel cross-examining Cantor, drawing upon Thierwechter diagram, and marking it GM Ex. 467). Dr. Viano responded “yes.” he recalled GM’s counsel having drawn those pictures based on Cantor’s description of Cool’s body movements. R.267b. As for GM Ex. 1500.1, referenced at R.269b–77b, it shows enlarged portions of that same diagram of vehicle movement from Thierwechter’s report, upon which Dr. Viano drew stick figures to show how Viano believed the occupants moved inside the vehicle” at “three points of time.” R.269b.

¹⁰ In *Boucher*, the expert witness asserted that “none of the medical records or reports he reviewed supported the presence of a cephalohematoma.” 831 A.2d at 631. But a record the expert had reviewed did contain the opinion that a cephalohematoma was present. The witness thus misrepresented the contents of the records he had reviewed and impeachment on that ground was appropriate. *Id.* at 631–33. Here, by contrast, GM’s experts never made such a “categorical assertion” that “none” (*id.* at 633) of the materials they had reviewed reflected a contrary view.

C. None Of The Other Cases On Which Plaintiff Relies Supports Her Argument That She Should Have Been Permitted To Quote Thierwechter’s Inadmissible Opinions In Cross-Examining GM’s Experts.

The other cases cited by plaintiff similarly fail to support her argument. In most, as in *Boucher*, the court allowed reference to materials not in evidence to cross-examine an expert witness who had misrepresented the content of those materials—a justification inapplicable here, as shown above, pp. 24–26.¹¹ In other cases, the court allowed reference to materials not in evidence not to challenge the opinion the expert witness was offering, as plaintiff sought to do here, but rather for a non-hearsay purpose such as to undermine the expert witness’s credibility and reliability by showing he had failed to review pertinent records.¹² Plaintiff also cites *Collins v.*

¹¹ In *Chicchi v. Southeastern Penns. Transp. Auth.*, 727 A.2d 604 (Pa. Commw. Ct.), *appeal denied*, 560 Pa. 750, 747 A.2d 371 (1999), for example, an expert witness testified that he had reviewed the medical records of a man who had been struck by a train and that the man had not been “under the influence of any mind-altering drug * * * at the time of the accident.” *Id.* at 608. The court permitted the expert to be cross-examined about a contradictory drug test result that appeared in the medical records that the expert had not disclosed. *Id.*

¹² In *Rafter v. Raymark Indus., Inc.*, 429 Pa. Super. 360, 632 A.2d 897 (1993), for example, the court held that an expert medical witness who testified that “he had reviewed ‘all of [plaintiff’s] x rays dating back almost 20 years’” and they contained “‘no evidence of any asbestos related change’” could be cross-examined to show that the expert medical witness had “failed to review Dr. Chon’s report [accompanying one of the x-rays] which stated that at least one of [plaintiff’s] x-rays did show an asbestos-related change.” 632 A.2d at 900. Cross-examination showing that the expert medical witness had “failed to review” a key medical record was aimed at “diminishing the impact and reliability of [the expert witness’s] opinion” rather than for the truth of the opinion asserted. *Id.* And in *Kemp v. Qualls*, 326 Pa. Super. 319, 473 A.2d 1369 (1984), a medical record showing that treating physicians other than defendant failed to diagnose a pulmonary embolism was used to cross-examine the expert medical witness not to argue for the truth of the matters therein asserted (*i.e.*, not to show that the plaintiff did not have a pulmonary embolism), but rather to undermine the expert witness’s assertion that it would have been glaringly apparent “to a physician exercising reasonable care” that the patient had a pulmonary embolism; the hearsay comprised an example of another treating physician who did not find a pulmonary embolism. 473 A.2d at 1372. Here, by contrast, plaintiff was seeking to use Thierwechter’s excluded and inadmissible occupant kinematics opinions for the truth of the matter asserted—*i.e.*, to challenge the truth of GM’s expert witnesses’ contrary opinions about how Cool’s body moved and how she sustained her fatal injury.

Cooper, 746 A.2d 615, 618 (Pa. Super. 2000), for the proposition that an opinion contained in medical records, upon which the expert medical witness had not relied, could be used for the limited purpose of cross-examining the expert witness. App. Br. 27. But that suggestion in *Collins* was purely dicta: the issue was neither raised nor litigated in the case. 746 A.2d at 618–19. Indeed, it was the party whose counsel had been *permitted* thus to cross-examine the opposing party’s expert medical witness on the basis of the medical records who had brought the appeal. *See id.* The contention on appeal was that, in addition to using the un-admitted medical records to cross-examine the expert, the cross-examiner should have been permitted to admit those medical records and have them considered as substantive evidence; and the Court resoundingly rejected that argument. *See id.*

Moreover, all of these cases can be distinguished on the ground that in each, the opinion at issue was proffered by a treating physician and contained in a medical record that had some indicia of reliability. Here, in stark contrast, the trial court specifically found that the excluded opinion was not the product of expertise and therefore lacked reliability. Further, even assuming that opinions contained in records that an expert witness has reviewed may in some circumstances be used in cross-examination, none of the cases plaintiff cites suggests that a trial court lacks discretion to bar reference to opinions that are likely to “confuse” and “mislead” the jury by giving it the impression that it was to consider the opinion for the truth of the matter asserted, or reference to which would lead to distracting collateral litigation; or that would duplicate other testimony. *See supra*, pp. 18–21.

D. Plaintiff Cannot Show Prejudice.

Even if the court’s ruling could somehow be found to be error, plaintiff cannot show that it caused her prejudice. She was able to cross-examine GM’s experts extensively as to the basis for their opinions and the reasons why they rejected Dr. Ross’s and Alan Cantor’s conclusions,

which were the same as Thierwechter's excluded conclusions. Nothing substantive could have been gained by cross-examination specifically mentioning that the conclusions were held by Thierwechter. *See supra*, pp. 19–21. Accordingly, plaintiff suffered no prejudice. *See Brannan*, 385 A.2d at 1383; *Ferreira*, 26 A.2d at 346 (holding that the trial court did not abuse its discretion in precluding the cross-examination of an expert on basis of his opinions because the expert was “extensively examined and cross-examined” and “[t]he members of the jury heard enough to enable them to appraise the weight to be given the expert[’s] conclusions”); *Jacobs*, 922 A.2d at 966–67. In any event, like plaintiff’s complaint regarding the exclusion of Thierwechter’s occupant kinematics opinions from evidence, this issue goes only to injury causation and not to defect and therefore could not have affected the jury’s verdict. *See supra*, p. 17.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING FIELD ACCIDENT DATA ANALYSIS.

Plaintiff next contends that the trial court abused its discretion in refusing a new trial on the ground that GM’s design expert, Dr. Viano, presented data from the National Highway Traffic Safety Administration’s (“NHTSA’s”) National Accident Sampling System (“NASS”), the Fatal Accident Reporting System (“FARS”), and other NHTSA reports. App. Br. 37–44. NASS includes decades of information compiled by accident reconstructionists and biomechanical experts who comprehensively analyze thousands of accidents per year to develop safety information for regulators and industry. R.2146a–47a. FARS includes data on every automobile accident nationwide in which an occupant dies within 30 days of the crash. R.2147a–48a.¹³ Controlling for factors establishing substantial similarity to Cool’s accident, Dr. Viano analyzed these

¹³ NHTSA further describes the NASS and FARS databases on its website. *See* <http://www-nrd.nhtsa.dot.gov/departments/nrd-30/ncsa/NASS.html> (describing NASS data as derived from “random” sample of accidents nationwide, which are then “carefully stud[ied]” by “field researchers”); <http://www-nrd.nhtsa.dot.gov/departments/nrd-30/ncsa/FARS.html> (FARS).

field accident data to rebut plaintiff's experts' causation theory—specifically, to show that, in reported accidents similar to Cool's, several thousand injuries like Cool's have occurred as a result of contact with the B-pillar and no injuries like Cool's have occurred as a result of contacting the rear seat back. *See* Part III.A, *infra*.

Dr. Viano also presented data to show that plaintiff's expert's proposed alternative design—a more rigid seat—could cause different injuries (such as whiplash or severe neck injury) in a range of accidents. *See* Part III.B, *infra*. Much of the latter data were field accident data Dr. Viano had actually considered in the course of designing car seats at GM, and these data influenced the design of the 1995, and in turn 1999, Cavalier. These data thus were introduced not only to show that plaintiff's alternative “stiffer seat” design was not overall safer (Part III.B, *infra*) but also to show that, in designing the 1999 Cavalier car seat, GM properly considered the full range of risks presented by seats of varying stiffness, and thereby to rebut plaintiff's theory that it was negligent (Part III.C, *infra*).

Plaintiff complains that the data Dr. Viano reviewed were not “substantially similar” but fails to explain either how they could have been more similar or how making them more similar would have made them more probative. App. Br. 39. Dr. Viano controlled for similarity in the factors relevant to his analyses and the accidents comprising the specific data subsets Dr. Viano analyzed thus were “substantially similar,” as we next explain.

A. A Defendant May Rebut Plaintiff's Causation Theory By Showing That A Neutrally Compiled Set Of Data On Reported Accidents That Are Similar To The Accident At Issue Includes No Instance In Which A Similarly Situated Passenger Has Been Injured In The Way Plaintiff's Experts Contend The Injured Party Here Was.

At trial, plaintiff's expert Dr. Ross opined that, given the physics of Cool's accident, her skull fracture was “consistent with” his theory that she hit the rear seat of the car and “inconsistent with” GM's kinematics showing that she hit the B-pillar. R.145b–46b. In support of this

opinion, Ross cited no data from previous similar accidents. R.146b–49b. There is a reason for that: Out of hundreds of thousands of reported accidents in NASS, no right-front passenger (like Cool) has ever suffered a skull fracture like Cool’s by contact with the rear seat of any car, in a side or even a rear impact accident. Rather, the data report that such injuries reported in similar accidents all resulted from contact with the B-pillar or another fixture in the car. R.2150a–52a. At trial, Dr. Viano introduced these federal data to rebut plaintiff’s theory of injury causation. Dr. Viano also rebutted a key assumption of Ross’s analysis—that the side impact created a 5 o’clock line of force (R.143b)—by showing that, in 14 years of data from reported tow-away crashes with a 5 o’clock side impact and external damage like that which Cool’s car sustained, no near-side occupant had suffered any serious injury or been killed. R.2154a–56a.

Plaintiff complains that the accidents underlying the data were not shown to be substantially similar to Cool’s accident. App. Br. 39–40 (citing R.2147a–56a and GM Exs. 475.1, 475.2, and 1522.1). But Dr. Viano established that the data he reviewed were from accidents that were substantially similar in all relevant respects: same crash severity (“tow-aways”), same kind of accident, same line of force, same alleged part of the interior of the car with which the body impacted, and same specific injury sustained (R.2150a–56a), and some datasets also controlled for the same location of the occupant and the same part of the car’s exterior that evidenced damage (*see id.*), among other variables.

To the extent plaintiff is suggesting the trial court abused its discretion by declining to require GM to show even greater similarity, she errs. Her contention rests upon a complete distortion of the substantial-similarity doctrine, which balances the probative value of evidence of prior accidents against any unfairly prejudicial effect that evidence might have. *See, e.g., Di-Francesco v. Excam, Inc.*, 434 Pa. Super. 173, 642 A.2d 529, 536 (1994) (“as evidence becomes more dissimilar, the potential confusion created could prejudice a jury’s decision”), *appeal dis-*

missed, 543 Pa. 627, 674 A.2d 214 (1996); *see also* Pa.R.E. 403; *accord, e.g., Forrest v. Beloit Corp.*, 424 F.3d 344, 354 (3d Cir. 2005) (admissibility of evidence of prior accidents “turns on a balancing of its probative value versus its prejudicial effect”); *Trull v. Volkswagen of Am.*, 187 F.3d 88, 98 n.9 (1st Cir. 1999) (same). Under any reasonable analysis, the narrowly selected data Dr. Viano used were “substantially similar.”

When defendants proffer evidence of prior accidents to rebut a plaintiff’s theory of causation or defect, the evidence often comes in the form of testimony that other consumers have used similar products under similar circumstances without incident. *See, e.g., Spino*, 696 A.2d at 1174. As the Arizona Supreme Court pointed out in a decision cited approvingly by the Pennsylvania Supreme Court in *Spino*, 696 A.2d at 1173, such testimony can be misleading when a particular witness’s lack of knowledge of prior accidents does not tend to support the conclusion that none have occurred. *Jones v. Pak-Mor Mfg. Co.*, 700 P.2d 819, 824 (Ariz. 1985). Moreover, “generalized assertions concerning an alleged absence of accidents over an extended period of time can be directly rebutted only with specific evidence of prior occurrences, but such evidence may be difficult or impossible for a plaintiff to obtain in cases where the defendant has not kept records concerning the safety history of its products.” *Forrest*, 424 F.3d at 357.¹⁴

Accordingly, the Pennsylvania Supreme Court—like most courts nationwide (*see, e.g., Pandit v. Am. Honda Motor Co.*, 82 F.3d 376, 380–81 (10th Cir. 1996); *Espeignnette v. Gene Tierney Co.*, 43 F.3d 1, 10 (1st Cir. 1994); *Bilski v. Scientific Atlanta*, 964 F.2d 697, 700 (7th Cir. 1992); *Hines v. Joy Mfg. Co.*, 850 F.2d 1146, 1154 (6th Cir. 1988))—has held that defendants

¹⁴ Courts also have pointed out that “testimony concerning the absence of prior accidents ‘does not tell us how many near-accidents * * * may have occurred.’” *Forrest*, 424 F.3d at 357 (quoting *Jones*, 700 P.2d at 826). This concern is not implicated here because this case is a crashworthiness case, which necessarily assumes that an accident has occurred.

may introduce “evidence of the non-existence of prior claims” so long as the defendant establishes “that [the witnesses introducing such evidence] would have known about the prior, substantially similar accidents involving the product at issue.” *Spino*, 696 A.2d at 1173; *accord* 3-18 FRUMER & FRIEDMAN, *supra*, § 18.02[2] (“In products liability cases based upon allegations of design defect * * *, most courts routinely admit evidence regarding the absence of other occurrences or accidents involving the product in issue.”). The Court in *Spino* thus allowed the defendant to rebut causation by showing an absence of reported prior similar accidents within a large, neutrally compiled set of reported incidents. *See* 696 A.2d at 1170–71, 1174.

That is precisely what GM did here. Dr. Viano rebutted causation by showing an absence of reported prior accidents similar to Cool’s in which anyone had suffered an injury like Cool’s in the manner plaintiff’s experts hypothesized (by contrast to the thousand-plus accidents similar to Cool’s in which such injuries had occurred in the manner in which defendant’s experts described) within the entire, large, neutrally compiled set of reported incidents in the NASS and FARS databases. Further, these federal databases are just as accessible to plaintiff as to GM, answering any concern (*Forrest*, 424 F.3d at 357) that rebuttal information was comparatively inaccessible to plaintiff. Indeed, plaintiffs’ experts testified they have relied on similar data in other cases (R.148–49b (Ross); R.163b–64b (Cantor)), although they chose not to do so here—presumably because these data undermined their far-fetched causation theory.

To rebut Ross’s assertion that Cool’s injuries were “consistent” with contact with the rear-seat and “inconsistent” with contact to the B-pillar (R.145b), Dr. Viano looked at data of accidents that were, like Cool’s, tow-away crashes involving right front passengers who sustained serious brain injuries and low skull fractures during side impacts—and, to cover plaintiff’s contention that the accident involved a rear line of force—all rear impacts as well. R.2149a–53a. Dr. Viano showed federal data establishing that, “in [such] side impacts,” although “1893 [front]

passengers had a serious brain injury and rear skull fracture due to B-pillar contact[.]” “*no* cases of a right front passenger * * * having that injury due to a [rear] seatback contact” were reported. R.2152a (emphasis added).¹⁵ Further, to show that even *drivers* in similar accidents do not suffer injuries like Cool’s due to contact with the rear seatback, Dr. Viano similarly reported that, of the 1,930 drivers the federal data showed had experienced injuries like Cool’s in side impacts, *none* was due to a seatback contact. R.2150a–51a. Then, to rebut plaintiff’s experts’ key assumption that Cool’s accident involved a 5 o’clock line of force, Dr. Viano explained that he looked at *every* reported side impact in the past 14 years with a 5 o’clock angle of impact and external patterns of damage to the vehicle similar to that which Cool’s vehicle sustained, and *none* resulted in the near-side occupant being seriously injured or killed. R.2154a–55a. These findings controlled for substantial similarity and were plainly highly probative to show it was unlikely that Cool’s injury was caused by contacting the rear seat, as plaintiffs’ experts contended, or with the line of force they hypothesized.

Plaintiff insists (App. Br. 39–40) that the accidents in these data sets were insufficiently similar without explaining how narrowing them would have made them more probative. Presumably, she objects that they included data from accidents involving cars in addition to the Cavalier.¹⁶ But narrowing the sample size to include only accidents involving Cavaliers would

¹⁵ In fact, in side impacts, 54% of right-front passengers who suffered injuries similar to those Cool sustained did so because of contact with the B-pillar. R.2153a. Again, by contrast, none of those persons who suffered injuries like Cool’s in such accidents sustained them by contact with the rear seatback, as Ross testified must have happened to Cool. R.145b.

¹⁶ Plaintiff also complains that the data did not distinguish between contacts with front and rear seats. App. Br. 40. That is false. Dr. Viano specifically explained that he verified that the only right front passengers who had sustained an injury like Cool’s in a side impact from contacting a seat had hit the *driver’s* seat—not the rear seat as plaintiff’s experts contend occurred here. R.2152a–53a. Plaintiff’s other complaint—that Dr. Viano began his presentation on this subject by showing the jury an exhibit containing data about all severe head injuries in all kinds of acci-

(cont’d)

have left open the possibility that this accident was merely the first involving a Cavalier to occur in the manner that plaintiff hypothesized, although such accidents might be common in different vehicles. The same is true of other variables, such as speed and use of seat belts: The data showing an absence of any similar accident involving *any* vehicle at *any* speed *with or without seat belts*, in which someone has suffered an injury like Cool's as a result of contact with the rear seat back, are thus *more* probative because they include these accidents, not less.¹⁷

Indeed, the Pennsylvania Supreme Court squarely held in *Spino* that defendants may rebut causation by showing an absence of reported prior similar accidents within a data set that includes different products and less similar incidents. There, the trial court had permitted the defendant to rebut the plaintiffs' theory of causation by using a data set comprising a "chronological log of reported claims covering [all of the defendant's different] ladder products, including the type 3 ladder [at issue in the case]," which reported no claim that *any* ladder manufactured by defendant had failed in the manner the plaintiffs had alleged. *Spino*, 696 A.2d at 1170–71.

(... cont'd)

dents (App. Br. 40 (citing GM Ex. 475.2))—is also baseless. Dr. Viano briefly referred to these data showing the relative frequency of severe head injuries in different kinds of accidents merely to place the data addressing plaintiff's expert's contentions about causation in context and to illustrate the sort of accident details included in NASS data. *See* R.2150a. Plaintiff does not explain how this background data could have misled the jury or caused her prejudice.

¹⁷ In fact, the Third Circuit has held that, in proffering evidence that no prior similar accidents had occurred, a defendant may so narrowly "focus solely upon the single [allegedly defective product at issue]" that it "so dilute[s] the probative value of the testimony in question as to render it inadmissible." *Forrest*, 424 F.3d at 358. In that case, the defendant had manufactured "multiple other [products] of similar or identical design," but said nothing about their safety records. *Id.* at 359. Although the Third Circuit applied the substantial-similarity rule rather than Pennsylvania law in reaching this conclusion, the court singled out "the well-reasoned decision in *Spino* [as] provid[ing] useful guidance" (*id.* at 354), and then-Judge Alito concurred in the judgment because he concluded that Pennsylvania law applied and compelled the same result (*id.* at 362). Dr. Viano's use of NASS and FARS data thus entirely avoided this problem of myopically disregarding other similar products.

Rather than reversing the trial court’s ruling because the log was “comprehensive and reflective of all reports, claims or problems involving [any of the defendant’s various] ladders”—and thus not limited to reports involving the precise product (type of ladder) at issue and the specific circumstances of the plaintiffs’ accident (*id.* at 1174)—the Pennsylvania Supreme Court instead cited this over-comprehensiveness as a reason for holding that the trial court “had a sufficient factual basis” for concluding that the foundational requirements for admitting the evidence—including substantial similarity—were met. *Id.* The *Spino* Court thus recognized that defendants seeking to show an absence of similar reports of incidents may use a large data set that includes both highly similar and less similar incidents. *See also, e.g., Bilski*, 964 F.2d at 700. In any event, unlike in *Spino* where the data set (the chronological log of incidents) included not only different products, but also every kind of accident that could occur with those products, the data subsets Dr. Viano analyzed controlled for similar kinds of accidents. *See supra*, p. 34–35.

Indeed, the cases cited by plaintiff (App. Br. 42–44) confirm that the data set may include different products provided the same forces are at work. In *DiFrancesco*, the Court allowed the plaintiff to introduce evidence of similar prior accidental firearm discharges even though they involved guns made by other companies and guns that, unlike the derringer at issue, lacked safeties, because those “variables” did not affect whether the guns would “fire accidentally after a collision with another object” as alleged. 642 A.2d at 535–37. And in *Hutchinson v. Penske Truck Leasing*, 876 A.2d 978 (Pa. Super. 2005), *aff’d*, 922 A.2d 890 (Pa. 2007), the Court reiterated that “Pennsylvania courts do not require that ‘other accident’ evidence involve only products from the same manufacturer as the product at issue.” *Id.* at 986 n.4.

Courts in other jurisdictions agree with the Supreme Court’s decision in *Spino* that defendants may use large, neutrally compiled data sets of accident reports to show an absence of similar incidents. For example, in a product liability case involving a particular kind of minibike,

the U.S. Court of Appeals for the Sixth Circuit held that “the ‘substantially similar’ requirement was met” even though “the accident statistics at issue” covered not only “minibikes” but also “small vehicles of the same sort.” *Morales v. Am. Honda Motor Co.*, 151 F.3d 500, 512 (1998).

Although three of the four decisions plaintiff cites (App. Br. 42–44) excluded other-accident evidence, they did so to address a problem not present here—that the data set consisted *entirely* of *dissimilar* accidents. Such data are not probative of whether a product caused the plaintiff’s injury or any other issue. For example, in *Hutchinson*, the Court held that plaintiff had improperly submitted “expert reports[] summarizing hundreds of other accidents” to show the defendant truck maker’s knowledge of an alleged design defect. 876 A.2d at 981, 985. The plaintiff had “presented no evidence” at all “as to the substantial similarity of the [accidents summarized in the] reports to the truck, the accident, or the circumstances in this case.” *Id.* By contrast, Dr. Viano used data carefully selected for substantial similarity to the accident at issue.

In *Harsh v. Petroll*, 840 A.2d 404 (Pa. Cmtwlth. 2003), *aff’d*, 548 Pa. 606, 887 A.2d 209 (2005), the court similarly upheld the trial court’s ruling precluding testimony about accident data drawn from FARS because the witness “did not have sufficient information about the statistics * * * to somehow show their relevance to the tragedy that occurred in this case.” *Id.* at 430. Indeed, the witness could provide essentially no details at all about the prior accidents, such as “the nature of the impacts, i.e., rear end collision, frontal collision, or rollover collision; whether the occupants were killed as a result of the impact or as a result of the post-collision fire.” *Id.* at 429. In stark contrast, Dr. Viano controlled for the potentially relevant variables including same kind of impact, same alleged direction of force, same precise injury, same precise point of the interior with which the occupant’s body allegedly impacted, same degree of seriousness (“tow away”), and even in some instances the same external car damage and other variables.

In *Micciche v. Eastern Elevator Co.*, 435 Pa. Super. 219, 645 A.2d 278 (1994), a prod-

ucts liability action involving an elevator alleged to be defective because it mis-leveled, this Court affirmed the exclusion of service reports that had been proffered to show the defendant knew about the defect. 645 A.2d at 280. The Court explained that “the notations on the reports and work slips were not sufficiently self-explanatory so as to allow the jury to infer the elevator had mis-leveled” in any of those incidents and the underlying complaints “did not explain the circumstances under which the elevator allegedly malfunctioned.” *Id.* Thus, there was no way to determine whether any of the prior incidents involved mis-leveling at all.

In sum, the trial court did not abuse its discretion in admitting this evidence to rebut causation. But even if it did, plaintiff is not entitled to a retrial because any such error would not call into doubt the jury’s verdict that the car seat was neither defective nor negligently designed.

B. A Defendant May Use Data Drawn From A Range Of Accidents To Rebut Plaintiff’s Theory That An Alternative Design Was Overall Safer.

Plaintiff also challenges Dr. Viano’s use of data drawn from NASS, FARS, NHTSA reports, and other sources to rebut plaintiff’s theory that a rigid seat is a superior alternative design to GM’s yielding seat. App. Br. 39–40 (citing GM Exs. 438, 440, 375–76, 278, 430 380–82, 406–07). The substantial-similarity doctrine does not apply to the use of data to show that the alternative design a plaintiff’s expert proposed could increase the risk of injury in different types of accidents because to apply the doctrine would be to bar this relevant evidence entirely. Defendants could be deemed liable for failing to implement a so-called safety feature touted by plaintiffs that actually would make the product more dangerous overall.

To support plaintiff’s contention that GM’s yielding seat was defective or negligently designed, her design expert, Alan Cantor, opined that Cool “would have been able to walk out of the crash with minor bruising” if her Cavalier had contained a more rigid seat (R.150b–51b), and he proposed an alternative “ultra-strong seat” (R.161b). Although he agreed that design engi-

neers must “consider other risks in designing a seat for the overall world of accidents” (R.160b), he never described having considered any risks that his own alternative design might pose. Dr. Viano rebutted Cantor’s contentions by presenting what Cantor ignored: the data vindicating GM’s decision to use a yielding rather than a rigid seat in the Cavalier based on comparative performance of the two designs in a broad range of accidents. Specifically, Dr. Viano used data to demonstrate the comparatively favorable performance of a yielding seat in preventing whiplash and other neck injuries,¹⁸ the rarity of more critical injuries in rear impacts,¹⁹ and the compara-

¹⁸ Exhibit 430 correlated the historical increase in seat strength with the increasing frequency of whiplash. R.2166a. Exhibit 380 shows a similar correlation when seat strength increased in Europe. R.2167a. Exhibit 381 contains accident data showing that “a seat that was much stiffer and stronger” than the car seat at issue “develops earlier and more load on the occupant,” which “translates into more neck response” and thus more whiplash injury. R.342b–43b. Exhibit 382 was a graph showing the relative acceleration between the top of the torso and the head of occupants in low-speed collisions in stiffer seats; it revealed that women in particular are vulnerable to whiplash injuries because “they have thinner, smaller necks, [and] are less tolerant to the forces applied to the chest.” R.343b–44b. Exhibit 406 shows data showing that “[w]hen the seat is stiffer and more rigid,” the forces act upon the occupant “earlier” and “cause[] them * * * more rapidly [to] accept the velocity of the crash,” which is “completely opposite” to the accepted method of protecting occupants in collisions by allowing them to experience accelerations only “gradually.” R.344b. And Exhibit 407 shows data relating the stiffness of the seat to the amount of “rotation of the seatback” during a rear collision. R.345b. These data showed that, due to the forces exerted on occupants in rear impacts, more rigid seatbacks like those plaintiff proposed result in increased whiplash injuries.

¹⁹ Data showing the rarity of critical injuries like Cool’s in rear impacts allowed the jury to assess the trade-off manufacturers face between the alleged benefits of stiffer seats in preventing serious injuries like Cool’s against the disadvantages of stiffer seats in causing more whiplash injuries. Exhibit 438 reflects data from a NHTSA report on seatback strength that showed the distribution of occupant injuries in automobile accidents by type of impact (*i.e.*, frontal, side, or rear impacts), revealing that “rear [impacts]” constitute only “3 percent” of “moderate or serious injur[ies]” and “2 percent” of “fatalities in crashes.” R.2160a. From these data, the NHTSA concluded that while “more research is needed on seats,” seats meeting the current federal standard for seatback strength—as it was uncontested the seats in the 1999 Cavalier did—are “performing well in the field.” R.2161a. Similarly, Exhibit 440 is a graph that relates the level of acceleration experienced in a collision to the severity of injuries that resulted by type of crash (*i.e.*, frontal, side, or rear impacts). R.2161a–62a. That graph reveals that, in crashes with the same acceleration that occurred here, only 0.26 percent of occupants in rear collisions were critically injured while 6.9 percent of occupants in side impacts were critically injured. R.2162a–63a.

tive importance of preventing whiplash and other neck injuries.²⁰ These data showed, for example, that a significantly stiffer seat could increase whiplash injuries and that whiplash injuries are among the most common injuries in low-speed rear impacts. R.2163a–68a; R.342b–45b. The reason such data are probative is that a product that is safer in a few accidents but much less safe in many is not, in fact, safer: “It is not sufficient that [an] alternative design would have reduced or prevented the harm suffered by the plaintiff if it would also have introduced into the product other dangers of equal or greater magnitude.” *See* RESTATEMENT (3D) OF TORTS: PRODUCT LIABILITY § 2 cmt. f (1998).

The substantial-similarity doctrine does not prohibit GM from using data from a broad range of accidents to support these propositions. As the United States Court of Appeals for the Eleventh Circuit has explained, the doctrine “does not apply to situations * * * where * * * the evidence is ‘pointedly dissimilar’ and ‘not offered to reenact the accident.’” *Tran v. Toyota Motor Corp.*, 420 F.3d 1310, 1316 (11th Cir. 2005) (quoting *Heath v. Suzuki Motor Corp.*, 126 F.3d 1391, 1396-97 (11th Cir. 1997)). In *Tran*, the court rejected the plaintiff’s attempt to use the substantial-similarity doctrine to preclude Toyota from relying upon accident data derived from a variety of dissimilar accidents to defend the design of its automatic shoulder belt. 420 F.3d at 1312, 1316. Because Toyota relied upon the data “to demonstrate the [passenger restraint] system’s overall effectiveness in a wide array of accidents” rather than to “reenact the accident [at issue],” the court held that the data had been properly admitted into evidence. *Id.*

Other courts have allowed auto makers to introduce NASS and FARS data to critique the

²⁰ Exhibit 375 is a slide from a NHTSA presentation that shows that whiplash injuries occur more often than other types of injuries in rear impacts. R.2163a–64a. Exhibit 376 is a slide that shows that whiplash injuries occur even in low speed collisions. R.2164a. These data supported GM’s contention that designing a seat to reduce whiplash injuries is important.

operation of a proposed alternative design in dissimilar accidents. For example, the Mississippi Court of Appeal affirmed a trial court's decision to allow a Volkswagen expert to use NASS data involving accidents with "various Delta Vs" and different vehicles to show that "there would be increased danger to occupants by employing the higher air bag deployment threshold" that plaintiffs suggested. *Palmer v. Volkswagen of Am., Inc.*, 905 So. 2d 564, 596 (Miss. Ct. App. 2003), *rev'd in part on other grounds*, 904 So. 2d 1077 (Miss. 2005). Similarly, in *Trull*, 187 F.3d at 97–98 & n.9, the U.S. Court of Appeals for the First Circuit rejected a substantial-similarity challenge to expert testimony about FARS data covering *all* fatal frontal collisions to show that the plaintiff's proposed "safer alternative"—that Volkswagen use both lap and shoulder belts in the rear seats instead of just lap belts—was unsound because the combination of lap and shoulder belts does not overall save more lives.

Courts similarly hold that the substantial-similarity doctrine permits the introduction of evidence involving dissimilar vehicles to "illustrat[e] the physical principles behind [certain] accidents." *Heath*, 126 F.3d at 1396. A federal district court applying Pennsylvania law accordingly held that a defendant may use data about dissimilar accidents to explain how changing a vehicle's "static stability factor" could affect the "vehicle's potential to roll over." *Montgomery v. Mitsubishi Motors Corp.*, 2006 U.S. Dist. LEXIS 46585, at *15–*16 (E.D. Pa. July 11, 2006) (attached at tab B).

Under these principles, Dr. Viano's use of data to rebut plaintiff's claim that an alternative, stiffer design would have been safer did not run afoul of the substantial-similarity doctrine even though those data included information about a broad range of accidents. The point of introducing those data was to show that the yielding car seat design could reduce the overall risk of injury. Dr. Viano also used the data to demonstrate general principles about accidents in which rear forces are present, as plaintiffs' experts contended was true in Cool's accident. Without the

ability to rely upon data showing safety performance in a broad range of accidents, the jury would have been deprived of the ability to evaluate GM's claims about the relative merits of plaintiff's alternative design. In any event, plaintiff has failed to explain how these data could have confused the jury. In sum, the trial court was well within its discretion in concluding that the substantial-similarity doctrine did not require that the analysis be excluded.

C. A Manufacturer May Describe The Data It Considered In Designing The Product At Issue To Show That It Was Not Negligent.

Most of the data described in Part III.B, above, were admissible for a second, wholly independent reason: as the trial court recognized, they were "'field accident analysis' [data that Dr. Viano] used" and that influenced the design of the 1995 and 1999 Cavalier seats (and culminated in the design of the 1997 "W" car seat that was one of plaintiff's proposed alternative designs). R.1933a; *see also* R.2159a, 2161a, 2165a–68a (describing his "research in the 1990s" as including data in GM Exs. 440, 430, and 380); R.342b–45b (same for GM Exs. 381–82, 406–07); R.247b–63b (describing changes in design of GM car seats including Cavalier as a result of these data). These data reflect the risks of seat backs of varying stiffness in the range of accidents in which the seats could be involved. GM's consideration of such data at the time the Cavalier seat was designed was probative to refute plaintiff's claim that GM's design of the Cavalier seat was negligent.

Dr. Viano's explanation of the data that informed GM's design choices was critical to allow the jury to assess plaintiff's negligent design claim. As the Pennsylvania Supreme Court has explained, such a claim "revolves around an examination of the conduct of the defendant" and requires "inquir[y] into the reasonableness of the manufacturer's conduct in creating" the product. *Phillips v. Cricket Lighters*, 576 Pa. 644, 841 A.2d 1000, 1008 (2003). Because, in designing products, manufacturers must consider *all* their "foreseeable uses and abuses" (DAVID G.

OWEN, MADDEN & OWEN ON PRODUCTS LIABILITY § 2:1, 44–45 (3d ed. 2000)), evidence showing that a manufacturer considered the overall safety of the product—not just the safety of the product in one particular kind of accident—supports its claim that it used due care in selecting a particular design. Moreover, to design car components that will perform well in all foreseeable accidents, automotive design engineers routinely use field accident data from NASS and FARS showing risks in a broad range of accidents. R.283b.²¹ Dr. Viano’s testimony that he considered such data and that they influenced the design of the Cavalier seat at issue therefore tended to refute plaintiff’s claim that GM had deviated from the standard of care of an ordinary manufacturer in designing the challenged seat.

Finally, because much the same evidence was used to evaluate Cantor’s alternative design (Part III.B) and to show GM’s lack of negligence (Part III.C), plaintiff suffered no prejudice even if its admission for one of the two purposes was an abuse of discretion. And, as noted, its use of different data, which were controlled for substantial similarity to the accident at issue, to rebut causation (Part III.A) could have had no effect on the verdict even if wrongly admitted.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING DEPOSITION TRANSCRIPTS BECAUSE THE PLAINTIFF FAILED TO ESTABLISH THE PREREQUISITES FOR THEIR ADMISSION AS EITHER FORMER TESTIMONY OR PARTY ADMISSIONS.

Plaintiff proffered deposition testimony of four former GM employees in prior cases. R.51b. The trial court correctly precluded its admission because plaintiff failed to show—or

²¹ *Accord, e.g., Volkswagen of Am. v. Marinelli*, 628 So. 2d 378, 387 (Ala. 1993) (noting expert’s testimony that essentially all “stud[ies] of automobile-related deaths ha[ve] been based on FARS data and that the automotive industry publishes papers based on the FARS data”); *Palmer*, 905 So. 2d at 596 (noting experts’ testimony that “NASS data is of the type reasonably relied upon by experts” in biomechanics and occupant kinematics and that “NASS data is reasonably relied upon by those in the air bag design field”).

even aver—that the witnesses were unavailable to testify in person, as required by Rule of Civil Procedure 4020(a)(3) and Rule of Evidence 804(a). Nor are the statements party admissions admissible under Rule of Civil Procedure 4020(a)(2) and Rule of Evidence 803(25).

A. The Prior Depositions Are Not Admissible As Former Testimony.

Rule of Civil Procedure 4020(a), which governs “Use of Depositions at Trial,” authorizes use of a deposition “so far as admissible under the rules of evidence,” if the witness is outside the Commonwealth or more than 100 miles from the courthouse. Rule of Evidence 804 in turn expressly conditions admissibility at trial of “[t]estimony * * * in a deposition * * * in the course of * * * another proceeding” (Pa.R.E. 804(b)(1)) on a showing that the party against whom the testimony is offered had an “adequate opportunity and similar motive to develop the testimony” (*id.*) and “the declarant is unavailable as a witness” (Pa.R.E. 804(a)). “Unavailability” is defined as requiring, *inter alia*, “the proponent of a statement [to show she] has been unable to procure the declarant’s attendance” by “process or other reasonable means.” (Pa.R.E. 804(a)(5)).

Because Rule 4020(a), by its plain terms, authorizes admission of a deposition only “so far as admissible under the rules of evidence,” this Court has unequivocally held that the use of prior deposition testimony at trial is “controll[ed]” by “*both* Pa.R.C.P. 4020 and Pa.R.E. 804.” *Beaumont v. ETL Servs.*, 761 A.2d 166, 173 n.10 (Pa. Super. 2000) (emphasis added).²² To establish unavailability, plaintiff’s burden therefore was to satisfy both rules, which together require the proponent of former deposition testimony to establish that (a) the deponent is either more than 100 miles from the courthouse or “outside the Commonwealth” (Pa.R.C.P.

²² Ignoring *Beaumont*, plaintiff invokes *Kuntz v. Firth*, 216 Pa. Super. 155, 264 A.2d 432 (1970), for the proposition that the proponent of a deposition need satisfy only Rule 4020(a)(3)(B) and not the unavailability requirement of Rule 804. App. Br. 50. But *Kuntz* was decided in 1970—28 years before the Rules of Evidence were adopted. See *Beaumont*, 761 A.2d at 173 (noting adoption of Rules of Evidence on May 8, 1998).

4020(a)(3)(B)); (b) the deponent is “unavailable” (Pa.R.E. 804(a)); and (c) the prior action is so similar that the other party would have had an “adequate opportunity and similar motive” to develop the testimony (Pa.R.E. 804(b)(1)). Because plaintiff failed to make any of these showings, let alone all as required, the deposition transcripts were properly excluded.

1. Plaintiff Failed To Satisfy Rule Of Civil Procedure 4020(a)(3).

Plaintiff concedes that, to use prior deposition transcripts at trial based on witness unavailability, she was required to satisfy the requirements of Rule of Civil Procedure 4020(a)(3). App. Br. 48–49. The only portion of that rule she invokes is subsection (a)(3)(B), which required her to show “the witness is at a greater distance than one hundred miles from the place of trial or is outside the Commonwealth.” Lacking any evidence that the deponents met these criteria at the time of trial, plaintiff suggests that GM conceded the point below. App. Br. 50. GM did nothing of the kind. Instead, GM forcefully argued that the depositions must be excluded because plaintiff failed to show that any of the deponents was unavailable. R.663a.

In response, plaintiff nakedly asserted, without explanation or evidence, that the deponents were “located outside of [Pennsylvania].” R.676a. But neither in her brief (*id.*) nor in the hearing (R.49b–59b) below did she give any explanation for that claim. In fact, it was not until filing her brief in this Court—which is too late—that plaintiff finally asserted that all of the deponents resided in Michigan “[a]t the time the[ir] depositions were taken.” App. Br. 49–50.²³ Even if the Court were to excuse plaintiff’s tardiness in supporting her contention that the deponents were outside the Commonwealth (which it shouldn’t), those depositions predated this trial by many years—some by more than a decade. *See* R.16b (Dep. Tr. of Richard Neely, *Hibbard v.*

²³ Plaintiff did not submit the depositions themselves to the trial court until *after the verdict* by way of a stipulation under Pa.R.A.P. 1926 (R.1063a–64a).

GM (Sept. 26, 1995)); R.9b (Dep. Tr. of Ted Bertacini, *Hibbard v. GM* (Aug. 8, 1996)); R.36b (Dep. Tr. of Lloyd Heck, *Stilts v. GM*. (Dec. 2, 2003)); R.24b (Dep. Tr. of Richard Hoffman, *Stilts v. GM* (Dec. 2, 2003)). Plaintiff thus had—and still has—literally no basis for stating where the witnesses might have been located at the time of the trial.

That long delay thus distinguishes this case from the situation the Court faced in *Kuntz v. Firth*, 216 Pa. Super. 155, 264 A.2d 432 (1970) (cited at App. Br. 50–51). There, the deponent testified only 15 days before trial that she would be departing imminently for a college located more than 100 miles away from the courthouse, thus giving rise to the natural inference—which the trial court “concede[d]”—that she would not be returning in time for trial. 264 A.2d at 433. Here, in contrast, plaintiff cannot claim the benefit of a similar inference.

2. Plaintiff Failed To Satisfy Rule Of Evidence 804.

Plaintiff’s failure to satisfy Rule 4020(a)(3), alone, is sufficient basis to sustain the trial court’s ruling. But there is more: Plaintiff effectively conceded that she failed to meet her additional burden under Rule 804 to show that each deponent was “unavailable as a witness.” Rule 804(a) defines the term “unavailable as a witness” as meaning a witness is subject to privilege (*id.* 804(a)(1)), refuses to testify (*id.* 804(a)(2)), cannot remember (*id.* 804(a)(3)), cannot be present because of death or illness (*id.* 804(a)(4)), or “is absent from the hearing ***and the proponent of the statement has been unable to procure [his or her] attendance * * * by process or other reasonable means***” (*id.* 804(a)(5) (emphasis added)). Plaintiff acknowledged she made ***no*** effort to procure the attendance of, or even to locate, any of the deponents. *See infra*, p. 49–50.

Instead, plaintiff declares that the witnesses were necessarily “unavailable” within the meaning of Rule 804 because she had asserted that they “were more than 100 miles from the Courthouse, and outside the jurisdiction of the Commonwealth[]” within the meaning of Rule 4020. App. Br. 52. But such a showing, if she had made it (which she did not, *see supra*, Part

IV.A.1), does not satisfy Rule 804(a), which neither includes absence from the Commonwealth or distance from the courthouse as a definition of “unavailability,” nor otherwise indicates that satisfaction of Rule 4020(a)(3), which sets out those criteria, suffices. To the contrary, the text of Rule 804(a)(5) makes clear that mere absence or distance is by definition *insufficient* to establish “unavailability,” mandating that “the proponent of the statement” must show she “*has been unable to procure the declarant’s attendance * * * by process or other reasonable means*” (*id.* 804(a)(5) (emphasis added)).²⁴

This Court has unequivocally confirmed that an absent declarant “will not be deemed to be unavailable upon mere assertion of such by the proponent; rather the proponent must exhibit the efforts taken to procure the declarant’s attendance.” *CONRAIL v. Del. River Port Auth.*, 880 A.2d 628, 630 (Pa. Super. 2005); *see also Jerominski v. Fowler, Dick & Walker*, 377 Pa. 458, 105 A.2d 320, 322 (1954) (“It [is] incumbent on the [proponent of the deposition] * * * to show the unavailability of the witness or the exercise of due diligence on her part in attempting to locate her” because it is “axiomatic that the oral testimony of a witness in court is always preferred over a deposition which is merely secondary evidence and not admissible unless it is proven that better evidence cannot be produced.”). For example, in *CONRAIL*, the plaintiff wished to introduce the prior trial testimony of a witness whom no one disputed had vanished into the witness protection program. 880 A.2d at 631. Because the plaintiff could not demonstrate that he had

²⁴ If this Court were to disregard its holding in *Beaumont* and to adopt the reading that plaintiff urges—under which prior deposition testimony need satisfy only the requirements of Pa.R.C.P. 4020(a)(3) to be admissible, and need not satisfy the additional requirement in Rule 804 that the deponent be actually “unavailable” to testify—it would create the bizarre situation that parties seeking to use former *trial* testimony, which is plainly subject to Rule 804, would bear a far steeper burden of demonstrating unavailability than parties seeking to use former *deposition* testimony, subject to Pa.R.C.P. 4020(a)(3). Such a result would be, to say the least, unjustifiable, particularly given that a party’s motive for cross-examination is typically far greater at trial than at deposition. Plainly, that is not what the drafters of the rules intended.

undertaken “reasonable measures” to locate the witness and procure her attendance, however, this Court held that the witness was not unavailable and the testimony would be barred. *Id.*

The Court reached a similar conclusion in *Commonwealth v. Lebo*, 795 A.2d 987 (Pa. Super. 2002), construing the similarly worded former testimony exception applicable in criminal trials. In *Lebo*, the prosecutor sought to introduce a transcript of an absent witness’s testimony at a preliminary hearing because an army officer had told the prosecutor that the witness “was in boot camp, presumably in South Carolina.” *Id.* at 990. The prosecutor, however, “did not offer any information regarding whether [the state] had subpoenaed [the witness].” *Id.* at 991. Accordingly, this Court excluded the transcript because the Court “c[ould not] conclude that the Commonwealth made a good faith effort to locate [the witness] and have her present for trial.” *Id.*; accord *Ceroli v. Comcast Corp.*, 2005 Phila. Ct. Com. Pl. LEXIS 344, at *13–*14 (June 27, 2005) (attached at tab C) (precluding use at trial of the deposition of witness because “alleging that [the witness] was in Europe” failed to “satisfy the requirements of Pa.R.E. 804 and Pa.R.C.P. No. 4020”), *aff’d*, 907 A.2d 1128 (Pa. Super. 2006).

Plaintiff did not even approach her burden of establishing the deponents’ unavailability. Her counsel conceded that he made no effort whatsoever to ascertain their current locations, much less to procure their testimony by subpoena if they were within the jurisdiction or by a request that they voluntarily return to testify, if they were not.²⁵ When, at the pre-trial hearing on GM’s motion in limine, the trial judge asked plaintiff’s counsel why he had not sought to depose the witnesses, he explained that he had not bothered to do so because he “had their depositions

²⁵ *Cf. Washington v. DeSantiago*, 68 P.3d 1065, 1068–69 (Wash. 2003) (Washington equivalent to Pa.R.E. 804(a)(5) requires proponent to make “good-faith effort” to procure witness’s attendance by subpoena and, if “witness beyond the reach of a subpoena,” to try to obtain the witness’s “voluntary attendance”) (internal quotation marks omitted)

already * * * [f]rom other cases against GM.” R.56b. Similarly, at the hearing on the post-trial motions, when the trial judge asked plaintiff’s counsel, “[d]id you request of General Motors to take the depositions of these five individuals?” (R.1972a), plaintiff’s counsel acknowledged that he “may not have because I already had their depositions. We decided rather than fight that fight, subpoena these guys all over the country, we’ll just use the depositions that we already have because they’ve been deposed a number of times” (R.1973a).

Plaintiff’s counsel thus conceded that he did not make any effort—much less a reasonable and good faith effort—to procure the witnesses’ testimony. Just as the plaintiff in *CON-RAIL* could not establish unavailability by simply asserting that the witness was in the witness protection program and the prosecutor in *Lebo* could not do so by asserting that the witness was in boot camp in South Carolina, plaintiff cannot establish unavailability by simply asserting that the GM employees were out of state a decade ago when they were deposed and are now retired. Even assuming these assertions to be true, they say nothing about where these witnesses were at the time of trial, let alone whether they were available to testify. Accordingly, the trial court did not abuse its “discretion” to “determin[e] * * * ‘the sufficiency of proof of unavailability.’” *Hall v. Owens Corning Fiberglass Corp.*, 779 A.2d 1167, 1171 (Pa. Super. 2001) (citations omitted); *cf. Lebo*, 795 A.2d at 990–91 (trial court has discretion to determine what constitutes the requisite “good faith effort to locate a missing witness”) (citations omitted).

3. Plaintiff Failed To Show The Prior Cases Were Similar To This Case.

Even if plaintiff had established that the GM employees were unavailable, Rule 804(b)(1) also required her to demonstrate that “the party against whom the testimony is now offered * * * had an adequate opportunity and similar motive to develop the testimony.” *See Commonwealth v. Colon*, 846 A.2d 747, 756 (Pa. Super. 2004). She entirely failed to make that showing.

Although plaintiff asserted that *Stilts* and *Hibbard*—the two cases in which the deposi-

tions were taken—were “products liability action[s] on [GM’s] seatback design” (R.677a), she failed to explain prior to the trial court’s ruling precisely what the alleged seatback defects in those cases were (*see id.*). Although plaintiff belatedly suggests in her appellate brief that those “cases all involve the same GM ‘yielding’ seat design, which was alleged to be defective in causing catastrophic injury to each plaintiff” (App. Br. 52), she failed to present such an assertion to the trial court and even now offers nothing beyond her own say-so to demonstrate it. As it is the burden of the “proponent of the hearsay statement to convince the court of its admissibility under one of the exceptions” (*Commonwealth v. Smith*, 545 Pa. 487, 681 A.2d 1288, 1290 (1996)), and she failed to make any statements, let alone present evidence, showing the similarity of the allegations, the depositions were properly barred.

Moreover, the little information the record reveals about those cases suggests that they were quite different. Both *Stilts* and *Hibbard* involved rear impacts, not passenger-side impacts like the case at bar. *See, e.g.*, R.26b (Hoffman discussing “rear impacts”); R.11b (Bertacini) (same); R.39b (Heck) (same); R.18b (Neely) (same). They involved different crash dynamics, including different points of impact and injuries. GM thus would not have had a similar motive to develop the testimony. R.1933a–34a. Indeed, *Stilts* involved “a Geo Metro.” R.170b. Although plaintiff asserted without support that Heck’s testimony related to an internal standard “that applied to all General Motors seats across the board” (R.173b), GM’s counsel explained without contradiction that the Geo Metro is “built by the Suzuki Motor Company in Japan” and “simply sold” and “marketed * * * by General Motors.” R.171b. Further, the fact that GM did not bother to ask Heck any questions in cross-examination during the deposition strongly implies that the issues present here were insignificant to that case. R.48b.

Aside from a lack of demonstrated motive to elicit similar testimony in those proceedings, there was also a lack of opportunity to do so. The state of knowledge when the *Hibbard*

depositions were taken, more than a decade ago, was not as great as it is now. Testimony in those depositions was based on then-current, now outdated, knowledge about the performance of yielding car seats. In the succeeding years, significantly more evidence has accumulated establishing that yielding seats are preferable to stiffer models because they tend to prevent one of the most frequent injuries in rear-impacts: whiplash. *See* R.2163a–68a (Dr. Viano discussing NHTSA study “in the early 2000 timeframe” and his own research “start[ing] * * * in 1999” to investigate the relationship between whiplash and stiff seats). That subsequently developed evidence could not have been discussed in depositions taken ten years ago.

Indeed, it is highly probable that the reason plaintiff did not try to acquire current testimony from these deponents was concern that they might disavow their statements in light of current evidence or that GM might elicit testimony putting their statements more fully in context. In sum, the trial court did not abuse its discretion in determining that the depositions are inadmissible as former testimony under Rule of Evidence 804 and Rule of Civil Procedure 4020(a)(3)(B).

B. The Prior Depositions Are Not Admissible As Party Admissions.

Invoking the deponents’ status at the time of their depositions as former GM employees, plaintiff contends (App. Br. 50) that their depositions qualify as party admissions. Pa.R.E. 803(25); Pa.R.C.P. 4020(a)(2). But one of the deponents was *not* an employee at the time of his deposition (R.10b (Bertacini)) and in any event, a deponent’s status as an employee does not render his testimony a binding party admission.

Rule of Civil Procedure 4020(a)(2) is explicit on this point. Even if deposition testimony would be “admissible under the rules of evidence” for party admissions (*id.* 4020(a)), plaintiff must also show that the deponent was a “party or * * * one who at the time of taking the deposition was an officer, director, or managing agent of a party or a person designated under Rule 4004(a)(2) or 4007.1(e) to testify on behalf of a * * * corporation * * * which is a party” (*id.*

4020(a)(2)). Plaintiff does not contend, let alone show, that the deponents were officers, directors, managing agents, or corporate designees of GM at the time they were deposed. And any suggestion that Rule 4020 does not apply to prior deposition testimony must be rejected, as the plain terms of the Rule establish. *See Beaumont*, 761 A.2d at 173; *supra*, p.45. Accordingly, the trial court correctly ruled that the depositions were not admissible on this alternative ground.

C. Plaintiff Cannot Show Prejudice.

Even if the prior depositions were so obviously admissible that their exclusion rose to the level of an abuse of discretion, the trial court properly denied a new trial because the decision did not affect the verdict. *Spino*, 696 A.2d at 1171 n.6. Had the jury heard the depositions, it would have considered the context of the snippets upon which plaintiff relies; and the snippets presented no theories or evidence different from other evidence and argument plaintiff presented.

1. Plaintiff argues that Heck testified that GM's 6,600 inch-pound standard for seatback strength "had nothing to do with safety and how the seat would actually perform in a rear impact" because he had explained that it was formulated in response to a customer complaint that a seat had collapsed when the customer was reaching into the backseat. App. Br. 46 (citing Heck Dep. at 20–23). But Heck clarified that he had nothing to do with testing the seats for crashworthiness and safety; that task was outside his "area of concern." R.45b; *see also* R.38b (confirming that he "never got involved in dynamic testing," which subjects vehicles to "crash forces"). Moreover, Heck never claimed that his 1979 study was the only reason that GM adopted the seat standard. To the contrary, he explained that other groups at GM had been performing "dynamic tests"—*i.e.*, crash tests—to "evaluat[e] how the seat would perform in a rear impact" (R.44b)—an assessment of crashworthiness that presumably includes safety performance. *See* R.46b. Accordingly, Heck's deposition testimony does not undermine GM's contention that the seat in the 1999 Cavalier was neither defective nor negligently designed.

2. Plaintiff's contention that Bertacini testified that, as "Chairman of the Seat Safety Task Force, he determined that there was no * * * engineering rationale for what GM had been doing on seat strength in rear impacts" and that the "primary objective of the [Task Force] was to develop a rationale * * * that could be used in lawsuit defense" (App. Br. 46–47 (citing Bertacini Dep. at 25–38)) grossly distorts Bertacini's testimony. He testified only that he could not "recall reading or finding documentation of the basis for [GM's] guideline" on seatback strength. R.14b. But he emphasized that he knew that "there was a guideline * * * and there were those who had looked at * * * how cars were performing in rear impacts." *Id.* Notably, Bertacini testified that his task force concluded that the seats "were performing reasonably in the field." R.15b. And he testified that the impetus for the task force did *not* come from the legal group, although "eventually, the lawyers from the Legal Staff got involved" in order to "understand[] what we were doing and whether or not it had some relationship to what they were doing on legal cases." R.12b.

Bertacini's mere lack of familiarity with the engineering rationale for GM's seat design would have been unlikely to faze the jury. Dr. Viano explained at trial that the suggestion that there was no "due care analysis for GM seat design" until the 1990s was entirely incorrect (R.313b–14b), and he traced the "basis for the way GM designs seats" as far back as a 1961 study establishing the desirability of "seatback yielding to reduce neck injuries." R.314b; *see generally* R.314b–41b (explaining history of GM's study of yielding seats to reduce injuries).

In any event, plaintiff had ample opportunity to persuade the jury that GM lacked a safety or engineering rationale for its seat design by using other internal GM documents. Plaintiff's design expert read a portion of a 1992 memorandum written by a GM lawyer, which stated that there are "[n]o GM tests or data to support assertions of reduced neck loading and head impact potential with 'yielding' seats. No GM tests or data to support assertions that more rigid seats

can enhance injuries.” R.162b; *see also* R.386b–87b (reading memo during closing argument). Not only would Bertacini’s deposition testimony have been redundant of this memorandum, the memorandum is potentially much more damning because a jury hearing Bertacini’s deposition transcript would also have heard his clarifications and rebuttals.

3. Plaintiff argues that Neely’s testimony that, while testing seatback strength, “at certain speeds” dummies would “ramp” out of the seat and thus had to be “tethered” in place (R.19b–23b) contradicted Dr. Viano’s testimony that he found that “the use of seatbelts would substantially increase the retention of an occupant.” App. Br. 47 (quoting R.2157a). In fact, however, the two statements are not inconsistent. Dr. Viano never claimed that seat belts always kept crash-test dummies in their seats regardless of the impact speed and in fact specifically testified that “rare[ly]” they ramped back in the seats despite seatbelts. R.280b–81b.

4. Finally, plaintiff points to Hoffman’s testimony that “engineers in the safety area had been concerned about the strength of GM front seatbacks,” and that “he and other GM safety engineers had witnessed GM’s front seatbacks collapsing during testing.” App. Br. 48 (citing Hoffman Dep., at 25). But plaintiff fails to mention that Hoffman explained that these statements—which were read to him during his deposition from a memorandum written in 1992—were taken out of context. Hoffman explained that the crash tests in question were tests of the fuel system, not the seats, and so it was unclear whether the seats used in the tests were “being used for the second time” or even were “seat[s] for that particular vehicle.” R.34b. While the results called for further inquiry (R.33b), Hoffman emphasized that the notion that “there was a problem with inadequate seat back strength causing seat backs to collapse in rear impacts” was “[t]otally false.” R.26b–27b; *accord* R.35b (“There was never recognized * * * that we had that there was a problem with seat back collapse causing injury in the field.”).

In addition, plaintiff had ample opportunity to, and did, argue that GM’s front seatbacks

were collapsing during tests. Indeed, plaintiff's design expert played *videotapes* of several such tests to the jury, arguing that they revealed that "as the crash is completed the dummy's head disappears [from view], indicating that the seat collapsed." R.153b; *see generally* R.152b–59b. Hoffman's testimony would have added nothing that the videos did not provide.

In sum, viewed in context, the snippets from the *Stilts* and *Hibbard* depositions, even if improperly excluded, do not undermine the verdict: Although plaintiff presented virtually all of the same evidence to the jury in different, potentially more persuasive, forms, the jury still ruled for GM. Accordingly, even if the trial court had abused its discretion in excluding the deposition transcripts (which it did not), plaintiff has failed to show that the error was not a harmless one.

V. THE TRIAL COURT CORRECTLY PRECLUDED PLAINTIFF'S EXPERT ECONOMIST FROM FORECASTING FUTURE EARNINGS BASED ON A JOB FOR WHICH THE DECEDENT HAD NOT APPLIED.

Plaintiff contends that the trial court abused its discretion in precluding Dr. Andrew Verzilli, plaintiff's damages expert, from testifying about one of his several estimates of Cool's lost future earnings. But the ruling could not have affected the verdict because the jury determined that GM was not liable. "[A]n erroneous evidentiary ruling on damages, in a case where the jury has found for the defendant on the liability issue, is harmless and does not entitle the plaintiff to a new trial." *Hart v. W.H. Stewart, Inc.*, 523 Pa. 13, 564 A.2d 1250, 1252 (1980).

In any event, the ruling was not an abuse of discretion. Using the same assumptions about how Cool's earnings would have grown over time, the estimates began with different assumed starting salaries. R.2b–3b. Verzilli based the starting salary for the first estimate on Cool's salary at her last job as a registered nurse at a Maryland hospital near where she lived with her mother. R.1b. Because it was Verzilli's mistaken "understanding that just prior to her death, Ms. Cool was offered employment * * * at Hershey Medical Center" in Harrisburg, Pennsylvania, an area with higher nurses' salaries, he based the second (higher) estimate on starting

salaries at Hershey. R.1b–2b. The trial court allowed Verzilli to present only the first estimate because it found plaintiff had not established a foundation for the second: “there is absolutely no evidence that [Cool] submitted an application, let alone was offered a position at [Hershey Medical Center].” R.1934a.²⁶

The Pennsylvania Supreme Court has ruled that claims for lost future earnings “must be supported by a reasonable basis for calculation.” *Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027, 1030 (1980) (internal quotation marks omitted) (holding that “reliable economic testimony” is admissible to calculate lost future earnings). Evidence of “a mere possibility” of wages the decedent might have earned “is not admissible in evidence.” *Baccare v. Mennella*, 246 Pa. Super. 53, 369 A.2d 806, 807 (1976) (internal quotation marks omitted).

Plaintiff failed to show that Cool would have applied for and gotten a job at Hershey Medical Center. Before ruling on the issue, the trial court permitted plaintiff to introduce the deposition testimony of three witnesses whom plaintiff’s counsel claimed (R.176b) would corroborate Verzilli’s assumption that Cool was offered employment at Hershey: Colleen Duerr, one of Cool’s instructors in nursing school (R.888a); Angie Myers, Cool’s supervisor before Cool became a registered nurse (R.947a–49a); and Cathy Valentine, one of Cool’s coworkers (R.921a–22a). Their testimony did not support plaintiff’s offer of proof.

The only one of these three witnesses who addressed the subject at all was Ms. Valentine,

²⁶ In a supplemental report, Verzilli offered a third, even higher estimate that assumed that Cool’s starting salary would have been the average “\$58,000 annual[]” salary “for a Registered Nurse in Harrisburg.” R.1030a; *see also* R.2b (“the mid-range average earnings for Registered Nurses” in Harrisburg “is in the range of \$45,300 to \$62,200”). Plaintiff does not even argue that the trial court abused its discretion in precluding this estimate, and for good reason: attributing to Cool—who had been a registered nurse only a short time—a starting salary equal to the average salary of all registered nurses in the area, including those with decades of experience, is unsustainable. Moreover, the estimate used the average salary as of June 2006—more than three and a half years after Cool had died. R.1030a.

who testified that, in the month before the accident, she and Cool had visited Hershey to “check[] it out.” R.923a. During the “maybe 30 minute[]” visit, they “talk[ed] with the people that were in charge of the floor,” but rather than seeking a job, they “were just basically going to see what [Hershey] was like.” R.923a, 925a. Both women then left with nothing more than employment applications. R.925a. Although Ms. Valentine later applied, was hired, and worked at Hershey, she did not know whether Cool had even filled out an application. R.925a–31a. Nor did plaintiff present any testimony from anyone at Hershey that another position was available or that Hershey would have hired Cool had she applied. Accordingly, there was no “reasonable basis” for the foundation for Dr. Verzilli’s second estimate (*Kaczkowski*, 421 A.2d at 1030).

In urging that her bare assertion that Cool aspired to work at Hershey is sufficient foundation for the precluded estimate, plaintiff casts Cool as falling under the decisions allowing experts extra leeway in projecting the future earnings of children and adolescents who obviously had not yet begun their careers. App. Br. 53–54. She thus asserts: “[b]efore her death, [Cool] had worked part-time *as a nursing assistant* at the Villa St. Michael Center,” and that she “was in the process of applying for her *first job as a registered nurse* and hoped to obtain such a position at the Hershey Medical Center.” App. Br. 53 (citing R.177b–79b, 182b) (emphasis added). Plaintiff’s suggestion that Cool’s movement to Hershey merely reflected the natural progression from nursing assistant to her first job as a registered nurse is false. Cool was, in fact, *already* a registered nurse in Maryland—not a “nursing assistant”—at the time of her death, as the testimony unequivocally establishes.²⁷ The question thus is not whether we can assume that Cool

²⁷ Plaintiff herself testified at trial that her daughter had “resign[ed from] * * * the [nursing assistant] position” and was promoted at Villa St. Michael on September 5, 2002, to “the position [of] Registered Nurse, RN” (R.177b–78b). Cool’s former coworker, Angie Myers, similarly testified in a deposition played to the jury that she had “met [Cool] when she worked * * * as a
(cont’d)

would, in the ordinary course, have progressed from a position as a nursing assistant to a position as a full registered nurse—Cool had already done that at the time she died. Rather, the question is whether the trial court abused its discretion in concluding that there was no reasonable basis for assuming that Cool would have left the R.N. position she already had for another R.N. position at a different hospital in a different state, for which she had not even applied. In similar situations, courts have declined to allow a jury to assume that the decedent would have made a lucrative location change. *See, e.g., Imbierowicz v. A.O. Fox Mem. Hosp.*, 841 N.Y.S.2d 168, 173 (N.Y. App. Div. 2007) (reversing award based on decedent’s lost earnings as a construction worker “in Albany, Schenectady and Troy” rather than in “Delaware County, the much more rural area where decedent have lived and worked” because “there was no evidence that decedent would have or could have worked in Albany, Schenectady or Troy”).

Moreover, the policy of the cases regarding children is not implicated here. The trial court was not faced with the unfairness of a mother being deprived of a recovery for the death of her child simply because the child did not begin a career. *See Greer v. Bryant*, 423 Pa. Super. 608, 621 A.2d 999, 1005 (1993) (assuming that infant would share productivity potential of her mother “is certainly more ‘proper’ than ignoring that potential altogether”); *Mecca v. Lukasik*, 366 Pa. Super. 149, 530 A.2d 1334, 1340 (1987) (“[i]t is particularly difficult to project future wage loss of a deceased child, * * * but this item of damages has not been denied by any

(... cont’d)

nursing assistant [at Villa St. Michael]. And then she went on to become an RN, and I worked with her also while she was an RN at the same facility.” R.947a. Moreover, Dr. Verzilli’s first estimate, about which he testified, was expressly based on Cool’s salary in the job as a “registered nurse” at the time of her death. R.1b.

court”).²⁸ Because Cool was already a registered nurse, the trial court appropriately required Verzilli to base her projected future earnings on her actual past earnings absent evidence that she had applied for or would have gotten a more lucrative position in a different state.²⁹

VI. THERE IS NO BASIS FOR REINSTATING PLAINTIFF’S CLAIM FOR PUNITIVE DAMAGES.

Plaintiff argues that, if the Court orders re-trial, it should reinstate her punitive damages claim because the trial court incorrectly invoked the coordinate-jurisdiction rule. App. Br. 55. This argument is a red herring. The only relevant question at this point is whether the law and facts adduced by plaintiff supported submitting a claim for punitive damages to a jury. As to that question, plaintiff says precious little; and what she does say is wrong. Under Pennsylvania choice-of-law principles, her claim for punitive damages is governed by Michigan law, which does not allow punitive damages at all. Moreover, even if Pennsylvania law applied, plaintiff failed to adduce any evidence that GM’s actions rose to the level of egregiousness necessary to trigger liability for punitive damages under Pennsylvania’s strict standard.

²⁸ In *Hawthorne v. Dravo*, 352 Pa. Super. 359, 508 A.2d 298 (1986), the decedent was a young man who had been working for three months assisting journeyman plumbers for minimum wage. 508 A.2d at 307. The court permitted an expert to forecast the decedent’s lost earnings as a journeyman plumber because his boss testified that he “had been interested in advancing in the plumbing business,” had repeatedly asked about joining the plumbers’ union, and had the necessary “aptitude.” *Id.* Here, by contrast, the question is not whether Cool would have advanced to the natural next level of her profession, as plaintiff’s brief misleadingly suggests (App. Br. 52–53), but rather whether she would have moved to another state where wages were higher to get a job that was the same as the one she currently had.

²⁹ *Accord, e.g., Woods v. Lecureux*, 110 F.3d 1215, 1222 (6th Cir. 1997) (decedent adult’s expressed plans to “take up plumbing or some other trade” an inadequate foundation for wage projection); *Joy v. Bell Helicopter Textron*, 999 F.2d 549, 569 (D.C. Cir. 1993) (inadequate foundation for estimate of future earnings as consultant); *Hernandez v. M/V Rajaan*, 841 F.2d 582, 587 (5th Cir. 1988) (reversing award of lost future wages based on average wage of full-time longshoreman because decedent’s “tax returns show that he had been a part-time longshoreman for the three years preceding his injury”), *overruled on other grounds, Westinghouse Credit Corp. v. M/V New Orleans*, 39 F.3d 553 (5th Cir. 1994).

A. Michigan Law Governs Claims For Punitive Damages Arising Out Of Conduct That Occurred In Michigan.

Although, as we explain below (at 65–69), Pennsylvania law permits punitive damages under limited circumstances in product-liability actions, Michigan law precludes them entirely. *See, e.g., Rafferty v. Markovitz*, 602 N.W.2d 367, 369 (Mich. 1999) (“[O]nly compensatory damages generally are available in Michigan, and * * * punitive sanctions may not be imposed.”); *Jackovich v. Gen. Adj. Bureau, Inc.*, 326 N.W.2d 458, 464 (Mich. Ct. App. 1994) (“[T]he [Michigan] Supreme Court also has provided that an award of punitive damages for punishing a defendant is prohibited in Michigan.”). Even if plaintiff’s evidence were sufficient to raise a jury question on punitive liability under Pennsylvania law—which it is not—under Pennsylvania’s choice-of-law principles, Michigan law governs her claim for punitive damages.

In determining which state’s law applies to a particular issue, Pennsylvania courts apply a “combination of the ‘governmental interest’ analysis and the ‘significant relationship’ approach of Section 145 of the Restatement (Second) of Conflicts.” *Troxel v. A.I. Dupont Inst.*, 431 Pa. Super. 464, 636 A.2d 1179, 1180 (1994). This approach requires the court to assess qualitatively each state’s “contacts with the accident” and “‘policies and interests underlying the particular issue before the court,’” and then apply the law of the state with the “greater interest in the application of its law” to the particular issue. *Id.* at 1181 (citation omitted).

Michigan’s contacts in this case are materially more substantial than Pennsylvania’s. Cool is a Maryland resident, although she purchased the Cavalier in Pennsylvania and the accident happened to occur there. In contrast, the principal place of business of GM is in Michigan and GM made all of the design decisions that Plaintiff’s lawsuit attacks—including the design of the 1999 Cavalier’s car seat—in Michigan.

Moreover, GM’s automotive design activities in Michigan comprise precisely the type of

conduct that Michigan seeks to shield from punitive damages. Michigan's bar on punitive damages "is informed by the economic desire to encourage socially useful enterprise by relieving entrepreneurs from what the legislature regards as an oppressive risk of liability." *Judge v. Am. Motors Corp.*, 908 F.2d 1565, 1570–71 (11th Cir. 1990) (internal quotation marks omitted); *see also In re Disaster at Detroit Metro. Airport*, 750 F.Supp. 793, 805 (E.D. Mich. 1989). By barring punitive damages, Michigan affords needed predictability to manufacturers who must balance costs and benefits in designing their products and thereby guards against the over-deterrence that can result from "excessive financial liability." *Kemp v. Pfizer, Inc.*, 947 F.Supp. 1139, 1143 (E.D. Mich. 1996). To permit punitive damages to be recovered under Pennsylvania law in this case would frustrate these policies and prevent Michigan from applying its own law to conduct occurring within its borders.

By contrast, Pennsylvania has no interest in applying its law to award plaintiff punitive damages. To begin with, Cool resided in Maryland, not Pennsylvania. As the United States Court of Appeals for the Eleventh Circuit has explained, the state where the accident occurred "has little or no interest in [how survivors should be] compensat[ed] when none of the parties reside there." *Judge*, 908 F.2d at 1572 (quoting *Reich v. Purcell*, 432 P.2d 727, 731 (Cal. 1967)). Indeed, Pennsylvania abandoned the *lex loci delicti* rule in part because of the undesirability of surprising out-of-state visitors with the application of the law of the place where an accident fortuitously occurred. *See Cipolla v. Shaposka*, 439 Pa. 563, 267 A.2d 854, 856–67 (1970); *Griffith v. United Air Lines, Inc.*, 416 Pa. 1, 203 A.2d 796, 801 n.10 (1964).

Moreover, numerous courts have held that even the domiciliary state has little, if any, in-

terest in applying its punitive damages laws to conduct occurring outside the state.³⁰ In addition, it is well established that where—as here—the place of injury “is fortuitous,” the “place where the defendant’s conduct occurred” is entitled to “particular weight” in determining the applicable law. RESTATEMENT (2D) OF CONFLICTS § 145 cmt. e (1971). For example, over 40 years ago the Pennsylvania Supreme Court held that the law of “the situs of the accident” should not be applied when it is “wholly fortuitous,” as in the case of an airplane accident (*Kuchinic v. McCrory*, 422 Pa. 620, 624, 222 A.2d 897, 900 (1966)) and as in the case at bar.³¹

Furthermore, because the purpose of punitive damages is to punish the defendant for its conduct, “the state of dominant interest” is “the state where the conduct took place.” RESTATE-

³⁰ See, e.g., *In re Air Crash Disaster Near Chicago*, 644 F.2d at 613 (domiciliary state has no interest in applying its own law to availability of punitive damages for out-of-state conduct because its interest is satisfied “[o]nce the plaintiffs are made whole by recovery of the full measure of compensatory damages to which they are entitled” under that state’s law); *Cruz v. Ford Motor Co.*, 435 F. Supp. 2d 701, 705–06 (D. Tenn. 2006) (determining law for punitive damages by looking to state where allegedly defective product was designed rather than state where plaintiff resided); *Danziger v. Ford Motor Co.*, 402 F.Supp.2d 236, 239 (D.D.C. 2005) (“The District of Columbia, home of the Plaintiffs * * *, is interested in their compensatory recoveries but not punitive damages.”); *In re Aircrash Disaster Near Monroe*, 20 F.Supp.2d 1110, 1111 (E.D. Mich. 1998) (“a decedent’s state of domicile has no interest in the punitive damages issue”); *In re Disaster at Detroit Metro*, 750 F.Supp. at 805 (“the domicile or residence of the plaintiff is not relevant to an evaluation of the choice of law issues concerning punitive damages because the decision by a state on whether to allow punitive damages focuses solely on corporate regulatory versus corporate protective policies”); *Dobelle v. Nat’l R.R. Pass. Corp.*, 628 F.Supp. 1518, 1528–29 (S.D.N.Y. 1986) (“the interest of plaintiff’s domicile has little relevance since punitive damages are designed to punish a defendant, not to compensate a plaintiff”).

³¹ Accord, e.g., *Ashland Oil, Inc. v. Miller Oil Purchasing Co.*, 678 F.2d 1293, 1305 (5th Cir. 1982) (law of the place where “all of the egregious misconduct of [the defendant occurred]” rather than where injury happened to occur “control[s] the issue of whether punitive damages shall be assessed”); *Rosenthal v. Ford Motor Co.*, 462 F.Supp.2d 296, 304–05 (D. Conn. 2006) (noting that courts “have expressly found that the place of injury is not important in product liability cases, where the injury could have occurred anywhere”); *Jones v. Winnebago Indus.*, 460 F.Supp.2d 953, 970 (D. Iowa 2006) (“in a products liability case, the place where the design, manufacture, and marketing conduct relating to the allegedly defective product occurred is of relatively greater weight than the place of injury”).

MENT (2D) CONFLICTS § 145 cmt. c.; *see also, e.g., Cruz*, 435 F.Supp.2d at 706 (“the States with the most significant interests are those in which the conduct occurred and in which the principal place of business and place of incorporation of the defendant are located”) (quotation marks omitted); *Fanselow v. Rice*, 213 F.Supp.2d 1077, 1084 (D. Neb. 2002) (same); *In re ‘Agent Orange’ Prod. Liab. Litig.*, 580 F.Supp. 690, 705–06 (S.D.N.Y. 1984) (“the only jurisdictions concerned with punitive damages are those * * * with whom the defendants have contacts”).

Thus, choice-of-law principles endorsed by Pennsylvania’s Supreme Court and other jurisdictions militate strongly in favor of applying Michigan law. Indeed, a federal district court sitting in diversity and applying Pennsylvania’s choice-of-law rules concluded that Michigan law governs the availability of punitive damages in a case highly similar to this one. *See Kelly v. Ford Motor Co.*, 933 F.Supp. 465 (E.D. Pa. 1996). That case arose out of a Pennsylvania resident’s fatal car accident in Pennsylvania, allegedly caused by defects in the design of a Ford Bronco. *Id.* at 467. Like GM, Ford Motor Company has its principal place of business in Michigan, and all of its conduct at issue—the design and testing of the Ford Bronco—occurred within Michigan, just as GM’s did here. *Id.* Balancing Pennsylvania’s interest in protecting its own residents against Michigan’s interest in insulating its citizens from “excessive financial liability,” the court held that Michigan’s contacts were more significant and that its law should apply. *Id.* at 469, 471. Here, Pennsylvania lacks even the interest in protecting a resident that was superceded in *Kelly*: Unlike the decedent in *Kelly*, who lived in Pennsylvania, Cool resided in Maryland. Accordingly, because Michigan law precluding punitive damages applies, the trial court did not err in rejecting plaintiff’s claim for punitive damages.³²

³² Below, plaintiff relied on two decisions applying Pennsylvania law to punitive-damages claims against product manufacturers by out-of-state plaintiffs who were injured in Pennsyl-
(cont’d)

B. Plaintiff Failed To Adduce Sufficient Evidence To Warrant Submitting A Punitive-Damages Claim To The Jury Under Pennsylvania Law.

Even if Pennsylvania law were applicable to plaintiff's claim for punitive damages, the trial court did not err in dismissing that claim. The Pennsylvania Supreme Court has made clear that not every tort will support the "extreme remedy" of punitive damages. *Phillips v. Cricket Lighters*, 584 Pa. 179, 883 A.2d 439, 445 (2005) (quoting *Martin v. Johns-Manville Corp.*, 508 Pa. 154, 494 A.2d 1088, 1098 n.14 (1985), *rev'd on other grounds sub nom.*, *Kirkbridge v. Lisbon Contr.*, 521 Pa. 97, 555 A.2d 800 (1989)). To the contrary, punitive damages are an extreme measure intended "to deter and punish egregious behavior." *Martin*, 494 A.2d at 1096. Thus, "an award of punitive damages must be supported by evidence of conduct * * * more serious than the mere commission of the underlying tort." *Franklin Music Co. v. Am. Broad. Cos.*, 616 F.2d 528, 542 (3d Cir. 1979).

To present her claim for punitive damages to the jury, plaintiff was required to adduce

(... cont'd)

vania. R.134a–36a (citing *Harsh v. Petroll, supra*, and *Apple v. Ford Motor Co.*, 69 Pa. D. & C.4th 236 (2004)). But in *Harsh*, the court did not consider whether to apply the law of the state where the auto maker designed the vehicle; rather, it rejected the manufacturer's request to apply the law of the state where the plaintiff had resided and purchased the car. 840 A.2d at 419. Although the *Apple* court did reject the application of the law of the state where the auto maker designed the vehicle, it did so because denying punitive damages would thwart a purported Pennsylvania policy "to protect * * * visitors to [Pennsylvania] by deterring manufacturers from manufacturing products which may enter Pennsylvania that are defective and dangerous." 69 Pa. D. & C.4th at 240. This Court need not and should not follow *Apple* because the rationale embraced by the district and county court judge would effectively revive the *lex loci delicti* rule for accidents that occur in Pennsylvania—in contravention of the Pennsylvania Supreme Court's rejection of that rule because of the "unjust results" of inflexibly subjecting out-of-state visitors to the forum's law. *Griffith*, 203 A.2d at 801; *see also Kuchinic*, 222 A.2d at 900 (rejecting the application of the law of "the situs of the accident" because where the accident occurred is "wholly fortuitous"); *Nationwide Mut. Ins. Co. v. Walter*, 290 Pa. Super. 129, 434 A.2d 164, 168 (1981) (same, because it "was by mere happenstance that the automobile was involved in an accident while located in Pennsylvania").

evidence from which a jury could reasonably find that GM's "actions [were] so outrageous as to demonstrate willful, wanton or reckless conduct." *Hutchinson v. Luddy*, 582 Pa. 114, 870 A.2d 766, 770 (2005) (internal quotation omitted); *see also G.J.D. v. Johnson*, 552 Pa. 169, 713 A.2d 1127, 1129 (1998). To present a jury issue on recklessness (the only conceivable basis for punitive damages here), plaintiff was required to adduce evidence that GM's "conduct create[d] an unreasonable risk of physical harm to another [and that] such risk [was] substantially greater than that which is necessary to make [GM's] conduct negligent." *Phillips*, 883 A.2d at 445 (quoting *Hutchinson*, 870 A.2d at 771). "[A] showing of mere negligence, or even gross negligence, will not suffice to establish that punitive damages should be imposed." *Id.*³³

None of plaintiff's evidence would have established that GM's conduct was reckless (much less willful or wanton). The "outrageous" conduct of which GM is accused is using cost-benefit analyses in designing the 1999 Cavalier seat. Viewing plaintiff's proffered evidence in the light most favorable to her claim, the jury could have concluded that "GM had knowledge of the propensity of its seat design to collapse and injure occupants" and had designed a safer seat, but "failed to correct its design" in the "1999 Cavalier" because of cost concerns. App. Br. 56. Thus, plaintiff claimed below that GM's engineers had "calculated that the safer high retention seat back its engineers developed would save 376–470 lives per year." R.292a, 342a. She further alleged that, although the newer seat was to be installed in GM cars by the 1997 model year, GM did not to put the seat in the 1999 Cavalier "to be price competitive with [its] cheapest model against the Ford Focus and Dodge Neon." R.295a, 434a ("includ[ing] these safety fea-

³³ In the trial court, Plaintiff cited *Hutchinson v. Penske Truck, supra*, for the proposition that "an award of punitive damages is proper where Defendant had knowledge of the product defect." R.140a. But *Hutchinson* held merely that evidence of a defendant's "knowledge or intention" is relevant to the punitive-damages inquiry and thus admissible (876 A.2d at 984)—not that a defendant's knowledge is sufficient to submit a punitive-damages claim to the jury.

tures as standard equipment in the low segment” would “caus[e] a significant loss of sales”).

This cost-benefit analysis, however, is precisely what Pennsylvania law *requires the trial court* to do in determining whether to submit to the jury the issue of whether GM is liable at all. Under Pennsylvania law, before a product-liability claim may be presented to the jury, the trial court must undertake a “risk/utility” analysis to determine whether the product at issue is “unreasonably dangerous.” *Azzarello v. Black Bros. Co.*, 480 Pa. 547, 391 A.2d 1020, 1026 (1978) (strict liability); *see also Phillips*, 841 A.2d at 1008–09 (similar balancing to determine existence of duty for negligence claim). Under that standard, the “court is essentially making a social policy determination and acting as both a social philosopher and a risk-utility economic analyst.” *Schindler v. Sofamor*, 774 A.2d 765, 772 (Pa. Super. 2001) (citing *Fitzpatrick v. Madonna*, 424 Pa. Super. 473, 623 A.2d 322, 324 (1993)). Factors that trial courts must consider include “the adverse consequences to the product and to the consumer that would result from a safer design” (*id.* (quoting *Dambacher*, 485 A.2d at 423 n.5) and “[t]he manufacturer’s ability to eliminate the unsafe character of the product without impairing its usefulness or *making it too expensive* to maintain its utility” (*id.* (quoting *Riley v. Warren Mfg.*, 455 Pa. Super. 384, 688 A.2d 221, 225 (1997) (emphasis added)). If the utility of a product outweighs its risk to consumers, the trial court must dismiss the claim. *See, e.g., Ellis v. Chicago Bridge & Iron Co.*, 376 Pa. Super. 220, 545 A.2d 906, 914–15 (1988).

If a manufacturer cannot be held liable *at all* for employing a decision whose benefits outweigh its risks, it follows inexorably that a manufacturer cannot be punished for engaging in a cost-benefit analysis. “To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.” *BMW of N. Am. v. Gore*, 517 U.S. 559, 573 n.19 (1996) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)).

Indeed, in a case that is indistinguishable in relevant respects from this one, the Pennsyl-

vania Supreme Court held that manufacturers are not subject to punitive damages merely for making a cost-benefit analysis. In *Phillips v. Cricket Lighters*, the plaintiff rested her claim for punitive damages on evidence that the defendant “knew of the dangers posed by young children playing with butane lighters,” but “chose not to place [child resistant] features on their lighters unilaterally as [it] feared that [its] adult customers would not opt to buy such a product * * * after test-marketing such a product in France.” 883 A.2d at 446. The Court ruled that the plaintiff had not mustered sufficient evidence to support a claim for punitive damages. Emphasizing that the butane lighters complied with applicable safety regulations, the Court “flatly reject[ed]” the “assertion that [the manufacturer’s] weighing of financial concerns in determining whether to incorporate additional safety features into its product on a unilateral basis establishes that [the manufacturer] acted wantonly.” Rather, the Court held, this evidence “shows simply that [the manufacturer was] considering all of the myriad elements that affect decisions a for-profit entity must make in manufacturing and marketing commercial products.” *Id.* at 448.

Just like the plaintiff in *Phillips*, plaintiff here relies on evidence that GM was aware of the risk posed by the seat in the 1999 Cavalier but chose not to change the design because of the desire to ensure that GM’s budget car remained affordable to consumers. Indeed, one of the pieces of evidence plaintiff trumpeted most loudly below is a marketing study concluding that “offering [safer seat] technologies as standard equipment in the low segment [of automobiles] is * * * causing a significant loss of sales.” R.434a. Moreover, here, just as in *Phillips*, plaintiff offered no evidence to contradict GM’s proof (*see, e.g.*, R.359b–60b) that the car seat complied with the applicable safety standard set by government regulators: Federal Motor Vehicle Safety Standard (“FMVSS”) 207, 49 C.F.R. § 571.207.

Indeed, the fact that plaintiff never questioned the seat’s compliance with FMVSS 207 should be an absolute bar to punitive damages. Courts nationwide have held that compliance

with applicable regulations bars punitive damages.³⁴ Otherwise, the threat of unpredictable and large punitive awards could either bankrupt auto makers or force them to design every vehicle to adhere to the standard of absolute safety at any price that one judge and jury mistook for Pennsylvania law. *Cf. Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1062 (2007) (imposing “one State’s (or one jury’s) ‘policy choice,’ say as to the conditions under which (or even whether) certain products can be sold, upon ‘neighboring states’ with different public policies” through a large punitive award would violate due process) (quoting *Gore*, 517 U.S. at 571–72). Because auto makers would have to design every car to function in a crash like a Bradley Armored Personnel Carrier, the threat of punitive liability would raise the price of cars—not to mention their maintenance costs, fuel consumption, and emissions—to extreme levels. Accordingly, the trial court correctly ruled that evidence that GM engaged in a cost-benefit analysis is insufficient to support plaintiff’s claim for punitive damages.

CONCLUSION

³⁴ See, e.g., *Olsen v. United States*, 521 F.Supp. 59, 67–70 (E.D. Pa. 1981) (punitive damages unavailable under Pennsylvania law for failure to perform roof crush tests that were not required by federal regulations), *aff’d*, 688 F.2d 823 (3d Cir. 1982); *Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1316–17 (5th Cir. 1995) (vacating punitive award in part because no regulator had ever required the use of leg guards on motorcycles); *Richards v. Michelin Tire Corp.*, 21 F.3d 1048, 1058 n.20 (11th Cir. 1994) (NHTSA’s decision not to require additional warnings precluded finding of wantonness necessary for imposition of punitive damages); *Brand v. Mazda Motor Corp.*, 978 F. Supp. 1382, 1394–95 (D. Kan. 1997) (compliance with FMVSS bars punitive damages); *Welch v. Gen. Motors Corp.*, 949 F.Supp. 843, 844–46 (N.D. Ga. 1996) (same); *Boyette v. L.W. Looney & Son, Inc.*, 932 F.Supp. 1344, 1348 (D. Utah 1996) (punitive damages unavailable because defendant’s warnings complied with federal regulations); *Chrysler Corp. v. Wolmer*, 499 So.2d 823, 826 (Fla. 1986) (punitive damages unavailable in part because defendant’s vehicle satisfied applicable FMVSS); *Miles v. Ford Motor Co.*, 922 S.W.2d 572, 589–90 & n.7 (Tex. Ct. App. 1996) (same), *rev’d in part on other grounds*, 967 S.W.2d 377 (Tex. 1998); see also W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 36, at 233 n.41 (5th ed. 1984) (“In most contexts * * * compliance with a statutory standard should bar liability for punitive damages.”); David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 41–42 & n.196 (1982) (compliance with NHTSA standards “should be * * * a conclusive defense” to punitive damages).

GM respectfully requests that the Court affirm the judgment of the Court of Common Pleas. Even if the Court finds that plaintiff has prevailed with respect to any or all of the first, second, third (Subsection A), fifth, or sixth issues presented, it still should affirm the judgment below because reversal on those issues, all relevant only to causation, would not call into question the jury's verdict that GM's car seat was neither defective nor negligently designed.

Respectfully submitted,

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