No. 15-_____

In The
Supreme Court of the United States

JOSEPH AND APRIL PARR, Husband and Wife, Individually and as Parents and Natural Guardians of SAMANTHA PARR,

Petitioners,

v.

FORD MOTOR COMPANY; McCAFFERTY FORD SALES, INC. d/b/a McCAFFERTY AUTO GROUP; McCAFFERTY FORD OF MECHANICSBURG, INC.; and McCAFFERTY FORD COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The Superior Court Of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Pennsylvania Superior Court *en banc* in affirming the Pennsylvania trial court err in failing to accord due deference to the Secretary of Transportation under the National Traffic and Motor Vehicle Safety Act of 1966 and your opinions in *Daubert* and *Kumho Tire* in permitting the automobile manufacturer product liability defense of "diving" and "torso augmentation" in civil cases subsequent to NHTSA's Final Rule of May 12, 2009, that "roof crush" not "diving" or "torso augmentation" causes death and crushing injuries in "roll over" accidents?

2. Did the Pennsylvania Superior Court *en banc* err in failing to accord due deference to the Secretary of Transportation under the National Traffic and Motor Vehicle Safety Act of 1966 and your opinions in *Daubert* and *Kumho Tire* in precluding references to NHTSA standards and rule making documents subsequent to the 2001 Excursion manufacture date?

3. Did Pennsylvania Superior Court *en banc* err in failing to accord due deference to the Secretary of Transportation under the National Traffic and Motor Vehicle Safety Act of 1966 and your opinions in *Daubert* and *Kumho Tire* in precluding epidemiological statistical evidence prepared by NHTSA, IIHS, FARS, and/or NASS as to rollover fatalities and injuries?

PARTIES TO THE PROCEEDING

Petitioners are Joseph and April Parr. Respondents are Ford Motor Company, McCafferty Ford Sales, Inc. d/b/a McCafferty Auto Group, McCafferty Ford of Mechanicsburg, Inc., and McCafferty Ford Company.

RULE 29.6 DISCLOSURE

Petitioners Joseph and April Parr are individuals rather than a corporation who commenced a strict products liability case based upon Ford's sale of a defective 2001 Excursion, which rolled over and its roof crush caused quadriplegic injuries to April Parr.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Joseph and April Parr, respectfully seek a writ of certiorari on the basis that the Superior Court of Pennsylvania *en banc* decided important federal questions on December 22, 2014 and the Pennsylvania Supreme Court denied the Parrs' Application for Reconsideration of Allowance of Appeal on July 22, 2015 in this case.

OPINIONS

The Majority Superior Court *en banc* Opinion appears at App. 1. The concurring Opinion by J. Wecht appears at App. 44. The Trial Court's March 1, 2013, Opinion by Judge Panepinto appears at App. 61.

RELEVANT ORDERS

1. The Trial Court's denial of the Parrs' Motion *in Limine* No. 1 to Preclude Ford from presenting evidence or argument regarding its "diving" or "torso augmentation theory" appears at App. 72.

2. The Trial Court's denial of Plaintiffs' Motion *in Limine* No. 8 to Preclude Defendant's experts Michael Leigh, Jeffrey Croteau, Catherine Corrigan, Ph.D., Roger Nightingale, Ph.D., and Harry L. Smith, Ph.D., and other defense experts from testifying that the 2001 Ford Excursion was Not Defective because of Having a Weak Roof and/or Testifying that there

was no causal Relationship Between April Parr's Broken Neck, Spinal Cord Injury, and Quadriplegia from Roof Crush Because April Parr Dove into the Roof Before any Significant Roof Crush appears at App. 75.

3. The Trial Court's granting of Ford's Motion *in Limine* No. 3 to Preclude all reference to NHTSA standards and rule-making after 2001 (manufacture date of the 2001 Excursion) appears at App. 73.

4. The Trial Court's grant of Ford's Motion *in Limine* No. 9 to preclude the Parrs from presenting any statistical evidence regarding rollover fatalities sustained by passengers in other 2001 Ford Excursions or other comparable vehicles, as prepared by NHTSA, the Insurance Institute for Highway Safety (IIHS), the Fatal Accident Reporting System (FARS), and/or the National Automotive Sampling System (NASS) appears at App. 76.

5. The Supreme Court of Pennsylvania's denial of Plaintiffs' Petition for Allowance of Appeal on May 27, 2015 appears at App. 77.

6. The Supreme Court of Pennsylvania's denial of Plaintiffs' Application for Reconsideration of its denial of Allowance of Appeal dated July 22, 2015 appears at App. 78.

JURISDICTION

The Supreme Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) based upon the Pennsylvania Superior Court's *en banc* Opinion of December 22, 2014, and the Pennsylvania Supreme Court's denial of Plaintiffs' Petition for Allowance of Appeal on May 27, 2015 and the Pennsylvania Supreme Court's denial of Plaintiffs' Application for Reconsideration of Plaintiffs' Petition for Allowance of Appeal on July 22, 2015, with respect to the federal questions presented in the case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

National Traffic And Motor Vehicle Safety Act of 1966, Public Law 89-563; 80 Stat. 718 – An Act to provide for a coordinated national safety program and establishment of safety standards for motor vehicles in interstate commerce to reduce accidents involving motor vehicles and to reduce the deaths and injuries occurring in such accidents.

Congress authorized the Secretary of Transportation to prescribe motor vehicle safety standards in an effort to "reduce traffic accidents and deaths and injuries resulting" therefrom. 49 U.S.C. §§ 301.01, 301.11.

STATEMENT OF THE CASE

Plaintiffs' expert, Donald Friedman provided a report on June 29, 2011 detailing the facts of the accident and challenging Ford and the automobile industry's 30 plus year defense that NHTSA's "roof crush" standards versus "diving," and "torso augmentation." Mr. Friedman's entire report was included in the Trial Court reproduced record at R. 127a-148a, and the Statement of the Case tracks Mr. Friedman's report.

April Parr is a 2001 Ford Excursion front seat passenger quadriplegic victim of a July 21, 2009 low speed right side rollover accident (approximately 12-15 miles per hour). R. 2097a, R. 2123a. The roof intrusion right above Mrs. Parr's head was a residual crush of eight inches, lateral crush of 4-6 inches, roof deformity deformation of about 11 inches and dynamic crush estimated to be 12-18 inches. R. 2114a, 2115a, 2123a. The strength of the Excursion roof in relation to its curb weight (SWR) was 1.19 rounded to 1.2 when measured at a 5 degree pitch, R. 2092a, R. 2016a-2117a, which by far was the weakest roof manufactured by a manufacturer discovered by Plaintiffs since roof crush regulations went into effect.

Occupants in the Parr Excursion were: Joseph Parr, age 42, 6'4" tall, 325 pounds, the driver; and April Parr, 38 years old, 5'7" tall, 203 pounds, right front-seat passenger. April had a seated height of 34-34.5 inches. Samantha Parr was the right rear bench passenger of the second row, 12 years old, 5'3" tall

and 123 pounds; Margaret Parr, Mr. Parr's mother, was the right second-seat passenger. Carilann and Tyler Parr, two older children, were seated on left driver's side. April Parr experienced a C5-7 spinous process fracture, C6 and C7 crush body fracture, and quadriplegia. Samantha Parr sustained a fractured skull and facial scarring. The three occupants on the right side which sustained significant crush were injured; whereas the three occupants on the left side where there was not significant crush were uninjured. Friedman report p. 3, R. 129a.

Plaintiffs presented a products liability "crashworthiness" case by filing a Complaint on December 28, 2009 and an Amended Complaint on August 26, 2011 contending that the 2000 Ford Excursion was defective because its roof was so weak that it could barely hold its own weight in a rollover crash.

In support, Mr. Friedman provided a **Summary Basis For Opinion**:

> The defect in roof strength, its causal relation to injury and means to mitigate those injuries and fatalities has been the subject of extensive research by NHTSA, IIHS, C*f*IR, industry and others in the scientific community besides myself, as follows:
>
> **NHTSA**
>
> In 1966 The National Highway Traffic Safety Administration (NHTSA) initiated regulatory research with the objective of reducing injuries and fatalities. In 1973

NHTSA issued a FMVSS 216 final rule testing vehicles statically to determine strength to weight ratio (SWR) compared to a performance criteria of the 1.5. In 1989 NHTSA, in a report to Congress, indicated that the final rule had no significant effect on reducing injuries and fatalities. In 2001 NHTSA requested comments on upgrading the roof crush rule. In 2005 NHTSA issued a notice of proposed rulemaking (NPRM) upgrading the criteria to 2.5, 3.0 or 3.5. In January 2008 NHTSA issued a supplementary notice of proposed rulemaking authenticating statistical research that Post crash negative Headroom was five times more likely to be injurious (more roof crush then original Headroom). In May 2009 NHTSA issued a final rule setting a two sided static criteria of 3.0 as well as a clear and unambiguous statement that "roof crush causes injury." In the context of the Parr rollover crash in the 2001 Ford Excursion, this regulation identifies the vehicle's SWR of 1.18 as defective and the 12 inches of residual crush (A pillar plus buckle) which is at least 5+ inches of post crash negative headroom over and above the 6+ inches of original headroom, as the cause of injury.

IIHS

The Insurance Institute for Highway Safety (IIHS) began publishing rollover fatality rates for individual vehicles in 2001. The Ford Excursion had the worst fatality rates of all vehicles in its class. In 2007

IIHS initiated a statistical analysis of rollover rates as a function of SWR and published their findings in March of 2008. They found that incapacitating and fatal injuries occurred to belted, unbelted and ejected drivers of mid-size SUVs as a function of vehicle SWR in 22,000 rollover crashes. They concluded that each increment increase in the FMVSS 216 SWR criteria would reduce injuries and fatalities by 24%. In the context of the Parr rollover crash in the 2001 Ford Excursion with a SWR of 1.2, IIHS indicates a 50% reduction in injuries and fatalities for a reinforced roof with an SWR of 3.2.

C*f*IR

C*f*IR (Center for Injury Research) is a nonprofit organization founded by Donald Friedman and Dr. Carl E. Nash in 2000. C*f*IR has submitted 34 comments and data sets to NHTSA rollover roof crush dockets, on two sided static tests and repeatable dynamic rollover tests. The focus in these submissions was to explain the relationship between the circumstances of rollover crashes and the measurement and effect of roof crush intrusion and its consequential injury potential. The data was collected on two machines developed for the purpose; thirty vehicles have been tested on a two sided static platen fixture (M216) and 50 vehicles have been tested on a dynamic repeatable rollover fixture (JRS). The M216 fixture results were validated with two studies of serious injury rollover crashes in the national accident

sampling system (NASS) and the adoption of the two sided concept by NHTSA. The JRS fixture results were validated and correlated with the IIHS and NHTSA statistical data. NHTSA has adopted the JRS fixture as a means of exploring rollover research procedures under contract with the University of Virginia (UVA).

INDUSTRY

From 1966 to 1973 the industry developed a position with respect to roof crush regulation through NHTSA, that while roof crush was related to injury in rollovers, there was no proof of a causal relationship between the two. In 1985 the first Malibu paper was published claiming there was no difference in the average potentially injurious impact (Pii) level in production or roll caged vehicles, thereby allegedly proving there was no causal relationship between the two. In 1990 the second Malibu paper was published claiming there was no difference in peak neck load in roll caged or production vehicles between occupants and vehicles in the same orientation. Further the peak neck load occurred before roof crush proving that the occupants were diving into the roof. In 1995 the industry published a statistical study of 60,000 rollovers of vehicles with various strength to weight ratio and found no correlation with injury. In commenting on the NHTSA request for suggestions in 2001 the industry again claimed there was no causal relationship between roof crush and injury.

In 2005 the industry published a second statistical study of 100,000 rollovers and again found no correlation with injury.

Federal Motor Vehicle Safety Standard 216 (FMVSS 216) final rule, dated May 12, 2009, directly contradicts industry claims. Nevertheless, in product liability litigation, defense experts continue to assert the mantra that "roof crush doesn't cause injury."

ACADEMIA

At the ESV conference in Amsterdam in 2001 an informal international cooperative group was formed to study rollover crashes. Participants included NHTSA, C*f*IR, Monash University in Australia, University of Birmingham and Bolton University in the UK. Since that time there have been a flood of academic studies using computer simulations and analyzing the Malibu and other rollover experiments. The resulting peer-reviewed papers criticize and refute the industry theory and claims about diving and support the contention that roof crush causes injury. Furthermore, a mixed group of academics, scientists, engineers, designers and experts have conducted a peer review of the applicability of the Jordan rollover system (JRS) to rollover research and found it exemplary.

Friedman report pp. 12-14, R. 138a-140a.

SUMMARY

> The tests indicate that the 2001 Ford Excursion is defective relative to NHTSA standards regarding roof strength in the circumstances of the Parr's crash and that the injuries to April Parr is the direct result of causally related roof crush.

Friedman report p. 22, R. 148a.

Mr. Friedman reported that the 03-08 Volvo XC 90 had an SWR of 4.6, the 98-08 C2500 Chevy Silverado Reinforced and the 95-05 S-10 Blazer Reinforced had SWR's of 5.2. (Friedman report p. 20, R. 146a) In comparison the 2000 Ford Excursion had an SWR of 1.2.

The Trial Court issued the Orders previously referenced along with the questions presented by the Trial Court's Orders.

Ford did not dispute that the 2001 Ford Excursion's roof-strength-to-weight ratio (SWR) was approximately 1.2, barely sufficient to hold its own weight, or that a stronger roof could have been designed. See R. 2099a-2100a; see also R. 351a (demonstrating that roof strengths ranged from 1.9 to 2.6 for utility vehicles and as high as 3.5 to 3.6 for various other automobiles designed and manufactured prior to 2001). Likewise, Ford did not dispute that in 2001 it was feasible to design and manufacture an Excursion with an SWR of 2, 3, or 4, or that a 1995 study conducted by GM referenced many vehicles with roof

strengths double and triple the Excursion's SWR of 1.2. R. 2099a-2100a.

Ford's corporate designee and Ford's experts all testified that roof strength is irrelevant in all rollover cases because there exists no causal relationship between roof deformation and occupant injuries. See, e.g., R. 2037a (testifying that increasing the roof strength ratio by a factor of 2, 3, or 4 "doesn't change the physics and the rotational forces that are acting on the occupant in that event. So if the occupant's head is on the roof when the roof hits the ground, it's just like that example I gave you. If you're sitting on the bumper of a vehicle that runs into a wall, you're at the point of impact and it doesn't matter what the strength of the roof or the structure is behind you, you're experiencing that impact into the wall or into the ground").

> If you're in a vehicle in a rollover, your body wants to move to the outside of the vehicle. So that's what puts your head very close to the roof or on the roof before the roof may have even touched the ground.
>
> * * *
>
> The deformation is an indication of the severity of the impact that that part of the roof experienced.
>
> * * *
>
> Beginning in the 60's and going through time, there's been numerous studies on how vehicles crush in rollovers or . . . how the roof

> crushes in rollovers and how people might be getting injured. . . .
>
> Ford Motor Company continues to do research in this area. . . .
>
> * * *
>
> The relationship to roof crush is the association that I mentioned earlier, the association with the impact severity.

Testimony of Michael Leigh, Ford designee, R. 1997a-2000a.

> If the science says that the stronger [roof] is safer in rollovers, we would make the roof stronger for rollover safety. . . .
>
> [NHTSA, academia epidemiological studies merely show] the associative relationship between the deformation, the crush, and the impact severity and the injury severity associated with the impact severity.

Testimony of Leigh, R. 2007a-2008a.

The Trial Court stated the issue involved in the case succinctly as:

> Both appellees and appellants presented extensive expert testimony during trial on the subject of 'roof crush' vs. 'diving' as a cause of appellant, April Parr's injuries. In the end, the jury concluded that Ms. Parr's injuries resulted from 'diving' not 'roof crush' and found for the appellees.

App. 66.

At pre-trial and at trial, Mr. Friedman and Ford's experts filed reports and in response to or in support of the various motions *in limine* filed affidavits at pre-trial expressing opinions based upon pre- and post-2001 NHTSA rulemaking, studies and statistical data, e.g., Dr. Catherine Corrigan's reports and bibliography. See R. 711a, R. 712a, R. 749a-752a.

Hugh DeHaven, the "father" of crashworthiness expressed his packaging principles in his 1952 publication pertaining to accident survival in airplane and passenger automobile accidents:

> 1. Human bodies can withstand forces of severe crashes without serious injury or death if they are properly "packaged" in their automobile.
>
> 2. The package should not open up or spill its contents and should not collapse under reasonable or expected conditions of force that expose the contents inside to damage.
>
> 3. Packaging structures which shield the inner container must not be made of brittle or frail materials, they should resist force by yielding and absorbing energy.
>
> 4. Articles inside the package should be held and immobilized inside the structure; and
>
> 5. Restraint of an object inside a package must be achieved by transmitting forces to the strongest parts of the packaged object.

Plaintiff Trial Exhibit P-19, R. 3312a-3317a.

Recognizing that in 1965, 52,000,000 accidents killed 107,000, temporarily disabled over 10,000,000, and permanently impaired 400,000 American citizens at a cost of approximately $18 billion, and recognizing that automobile accidents were the leading cause of death in the first half of an individual's life span, Congress passed the 1966 Highway Safety Act and created the Department of Transportation (DOT) and the Highway Traffic Safety Administration (NHTSA) in the mid-1960s. U.S. Recall News, "History of NHTSA," Tuesday, June 11, 2008, Plaintiff Trial Exhibit P-110(a), R. 267a-269a.

On October 22, 1971, Ford impliedly accepted but failed to follow DeHaven's Packaging Principle in the design of its vehicles since NHTSA's first 1973 minimal roof strength curb weight standard, SWR of 1.5 or 5,000 pounds:

> *Occupant Containment*
>
> When excessive conditions do exist and vehicle rollover occurs, then our aim becomes one of occupant protection. Road accident studies have shown that occupant ejection is the predominant cause of serious injuries and fatalities. If the occupant remains in the vehicle throughout the roll cycle, he stands an excellent chance that any injuries he sustains will be of a minor nature. Our test technique should demonstrate, therefore, that should rollover occur, an occupant would not be ejected.

> *Structural Integrity*
>
> A further factor that should be considered is the resistance of the vehicle roof structure to intrusion. The strength of a vehicle's roof must have a bearing on the integrity of the passenger compartment in a rollover type accident. The correlation between occupant safety and roof intrusion, however, is far from established. Gross intrusion can be equated with an increase in the severity of occupant injury, but these injuries may be more related to the associated increase in severity of the secondary impact of occupant to vehicle interior structure.

Ford document, "ESV Rollover Test Methods," Plaintiff Trial Exhibit P-13(62), R. 299a-300a.

Since the 1995 study [Edward A. Moffatt and Jeya Padmanaban, "The Relationship Between Vehicle Roof Strength and Occupant Injury In Rollover Crash Data," 39th Annual Proceedings, AAAM, Oct. 16-18, 1995, Plaintiff Trial Exhibit P-10(e), R. 348a-357a], Moffatt and Padmanaban and others, including in this case Dr. Catherine Corrigan referencing their 1995 and 2005 statistical studies, have continued to the present time to present in hundreds of cases their "diving" "torso augmentation defense."

A few weeks before Plaintiffs filed this Petition for Writ of Certiorari in *Bavlsik v. GM LLC*, 2015 U.S. Dist. LEXIS 108614 (E.D. Mo. Aug. 18, 2015) the trial judge in the case was called upon to address plaintiffs' motions to exclude the opinions of Jeya

Padmanaban. Ms. Padmanaban was the co-author of the 1995 and 2005 studies which started and perpetuated the automobile manufacturers' defense of "diving" "torso augmentation."

Plaintiffs in the case moved to exclude all of Ms. Padmanaban's 16 expert opinions which appear at pages *4-*8.

Ms. Padmanaban's opinions were based upon NASS/CDS Police-Reported State Accident data. Among her opinions were:

* * *

> 7. NASS/CDS data show that the serious injury rates from belted drivers in rollover crashes are comparable for vehicles with a roof strength to weight ratio than or equal to 4.0 for vehicles with a roof strength to weight ratio less than 4.0.
>
> * * *
>
> 9. There is no relationship between roof SWR and likelihood of fatality or serious injury for belted or unbelted occupants in rollovers.

* * *

Plaintiffs argue that Ms. Padmanaban's opinions are irrelevant and unreliable. They assert that Ms. Padmanaban's opinions, and therefore her testimony, are based on accidents dissimilar to the one at hand. Also, plaintiffs argue that Ms. Padmanaban's sample size is too small to be meaningful and

> what little data she has was manipulated and cherry-picked in order to come to pre-conceived conclusions.
>
> * * *
>
> Defendant counters that the data used by Ms. Padmanaban is the same type used by plaintiffs' own experts. Her testimony will be used to directly rebut the evidence and opinions to be offered by plaintiffs' experts. Finally, her opinions are premised on well-accepted and reliable principles, processes, data, and that the sample size is adequate.

Bavlsik, 2015 U.S. Dist. LEXIS 108614 at *6-*9.

The Trial Court referenced Your Court in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) and *Daubert Merrell Dow Pharms.*, 509 U.S. 579 (1993) and Fed. R. Evid. 702 advisory committee's note.

> Ms. Padmanaban has used two different databases to gather her statistics: the National Automotive Sampling System Crashworthiness Data System (NASS/CDS) and the police reported state accident database ("state database").
>
> * * *
>
> These two databases are used by NHTSA to conduct studies involving unsafe drivers, impact fire, pedestrians, and tire pressure, just to name a few. . . . The databases also assist NHTSA in conducting defect investigations, research rollover propensity, and the

> effectiveness of measures taken for occupant protection. . . .
>
> The databases have been tested, are in wide use by not only government agencies but also academic entities. The possibility of errors and small sample sizes are known and can be accounted for. This court finds the data and methods used by Ms. Padmanaban are reliable.
>
> * * *
>
> 3. Application to this case.
>
> In order to introduce comparative statistics in a strict liability claim, the evidence's proponent must show that the other accidents "occurred under circumstances substantially similar to those surrounding the accident in the instant case." [citation omitted]
>
> * * *
>
> b. Roof Strength Opinions
>
> Ms. Padmanaban's opinions on the roof strength of the subject vehicle as compared to other vehicles in its peer group are not admissible. She admits in her deposition that she has not controlled for several variables, which seem to indicate she is comparing wholly dissimilar accidents.

Bavlsik, 2015 U.S. Dist. LEXIS 108614 at *11-*16.

From 1998 to the present, there have been dozens of District, Circuit, and State cases that have addressed Ford and the industry's "diving" "torso

augmentation" defense with respect to the gatekeeping function of trial courts as expressed by Your Court in *Kumho*, *Daubert*, and Federal Rule of Evidence 702, e.g., *Jeong v. Honda Motor Co.,* Civil Action No. 95-0024-A/R, 1998 U.S. Dist. LEXIS 8124 (W.D. Va. Apr. 24, 1998) (1988 Honda); *Cartwright v. Am. Honda Motor Co.*, 2011 U.S. Dist. LEXIS 90398 (E.D. Tex. Aug. 13, 2011) (1997 Honda); *Betts v. GMC*, 2008 U.S. Dist. LEXIS 54350 (N.D. Miss. July 16, 2008) (1988 GMC Sierra); *Cabassa-Rivera v. Mitsubishi Motors Corp.*, 2006 U.S. Dist. LEXIS 100842 (D.C. P.R. May 1, 2006) (2002 Mitsubishi Lancer); *Graves ex rel. W.A.G. v. Toyota Motor Corp.*, 2012 U.S. Dist. LEXIS 63173 (S.D. Miss. May 4, 2012) (1995 Toyota); *Raley v. Hyundai Motor Co.*, 2010 U.S. Dist. LEXIS 12111 (W.D. Okla. Feb. 11, 2010) (1999 Sonata); *Tiller v. Ford Motor Co.*, 2006 U.S. Dist. LEXIS 4196 (M.D. Fla. Jan. 21, 2006) (1995 Lincoln Town Car).

In 1966, the National Highway Traffic Safety Administration (NHTSA) initiated regulatory research with the objective of reducing injuries and deaths from rollover accidents and from 1973 issued a FMVSS final rule that was amended to 2009 eventually requiring two-sided testing and roof strengths of 3 (SWR) strength to weight ratios. R. 1199a-1245a, R. 2459a-2505a.

Although the Ford Excursion series was manufactured and sold from 2000-2005 with the same 1.19 SWR and design, the Court's Motions *in Limine* Orders precluded Plaintiffs from referencing NHTSA standards and rulemaking after 2001, the manufacture

date of the Parrs' particular Excursion and precluded epidemiological and statistical data for the 2000-2005 Ford Excursion based upon NHTSA's FARS data from accident years 2000-2010. R. 3300a. This data revealed 161 rollover roof crush fatalities for 2000-2005 Ford Excursion series from 2000-2010. R. 3300a. And the Insurance Institute of Highway Safety epidemiological data rated the Ford Excursion as the most dangerous four wheel drive SUV in comparison with comparable SUVs. See Fatalities for 2000-2005 Ford Excursion Vehicles, R. 3300a at App. 80.

The Trial Court's and Superior Court's reliance upon manufacture date makes absolutely no sense. The Excursion design for 2000-2005 was virtually identical.

Following the Trial Court's and the Superior Court's reasoning a 2005 manufactured vehicle could use FARS and NASS data up to 2005 but a 2000 manufactured Excursion only up to 2000, even though they have the same design.

Studies by necessity must follow dates of manufacture and dates of accidents and the death and injury rates can only be compared many years later as to the accident data.

The May 12, 2009 NHTSA final rule designated that April Parr was one of 205 AIS III seriously injured victims in a target population designated by NHTSA's final rule as "potentially effected by improved roof strength required in 2009." R. 2463a. This data, like the IIHS data, was all precluded

by the Trial Court because of the particular Ford Excursion manufacture date of 2001. R. 2463a. Also see R. 1203a and the data that appears there (May 12, 2009):

Light vehicles with a GVWR above 2,722 Kilograms (6,000 pounds)

	AIS 3-5	*Fatalities*
Sole MAIS Injury	205	33

R. 1203a, Roof Crush Resistance; Phase-In Reporting Requirements; Final Rule, 74 Fed. Reg. 22348, 22351, tbl. 1 (May 12, 2009).

NHTSA in its May 12, 2009 rule specifically addressed:

III. The Role of Roof Intrusion in the Rollover Problem

* * *

Roof Crush as a Cause of Injury

* * *

Agency Response

> The agency agrees that as a general principle, a statistical correlation does not in itself prove that a causal relationship exists. However, the Strashny study was designed with a strict focus to only include injury scenarios where the intruding roof was the injury source. The study compared cases where there was intrusion to cases where there was no intrusion and found that as intrusion increases, the probability of, and

severity of injury also increases. The study controlled for crash severity using quarter turns, which is the best available metric for rollover severity. Contrary to SAFE's contention, the study does not compare crashes over 2 quarter turns as a group. Rather, it compares only crashes of similar severity as defined by each iterative quarter turn exposure. Thus, a vehicle that experienced 3 quarter turns would only be compared to other vehicles that experienced 3 quarter turns. SAFE's and Ford's arguments appear to imply that any difference in roof intrusion must be due to a difference in impact severity rather than roof strength or design, whereas the Strashny study, by controlling for quarter turns, attempts to minimize differences due to impact severity. Further, the study included only belted cases which minimized the impact of "diving" as an injury cause.

There are logical reasons to believe that a collapsing roof that strikes an occupant's head at the nearly instantaneous impact velocity experienced when structures deform might cause serious injury. These types of injuries were documented by Rechnitzer and Lane in a detailed investigation of 43 rollover crashes. The agency believes that the statistically significant relationship between roof intrusion and belted occupant injury found in the Strashny study indicates not just a suggestion, but a probability that increasing roof strength reduces injuries.

> Regarding the SAFE matched pair comparison project, the agency notes that the dummy necks used in the tests were not biofidelic. They are rigid structures that do not allow for the normal bending that occurs in the human spine. The agency believes that lateral bending plays an important role in determining the degree of injury sustained by humans in rollovers, and does not view these results as an adequate assessment of injury in humans during rollover crashes.

R. 1202a, 1230a-1231a, Final NHTSA Rule Supplementary Information, 74 Fed. Reg. 22350, 22378-22379.

The trial court stated the only liability issue in the case was "causation":

> Both appellees and appellants presented extensive expert testimony during trial on the subject of 'roof crush' vs. 'diving' as a cause of appellant April Parr's injuries. In the end, the jury concluded that Ms. Parr's injuries resulted from 'diving' not 'roof crush' and found for the appellees.

App. 66.

As a result of the Court's Motion *in Limine* Orders, Plaintiffs were precluded from introducing and having their experts testify as to dozens of studies by NHTSA and academia, including Matthew L. Brumbelow, *Roof Strength and Injury Risk in Rollover Crashes*, IIHS (March 2008), a study produced for the Insurance Institute for Highway Safety. R. 2841a-2860a. The study referenced model years of

1996-2004 for the Chevrolet Blazer and 1996-2001 for the Ford Explorer, 2847a, with the risk of driver fatality directly related to SWR, 2852a.

Traffic Safety Facts, a NHTSA publication, provides the 2010 scientific epidemiological position as to causation in its Research Note written by Rory Austin, Vehicle Safety Analysis Team Leader in the Mathematical Analysis Division of the National Center for Statistics and Analysis of NHTSA:

> This Research Note demonstrates a statistically significant relationship between the peak strength-to-weight ratio (SWR) obtained through laboratory roof strength testing and the maximum vertical roof intrusion in real-world rollovers from the National Automotive Sampling System – Crashworthiness Data System (NASS-CDS). The results from both categorical analysis of vehicles with similar SWR measures and linear regression support the hypothesis that passenger vehicles with a higher SWR measured in a roof crush test are likely to experience less vertical roof intrusion in rollover crashes than vehicles with a lower SWR. Support for the hypothesis also remains when controlling for other possible factors that may explain roof intrusion and in a sensitivity analysis focused on the variance in the sampling weights. This finding complements NHTSA's previous work that demonstrated a relationship between vertical roof intrusion and injury risk in rollovers and supports the validity of SWR as a measure of roof strength.

Rory Austin, *Roof Strength Testing and Real-World Roof Intrusion in Rollovers*, *Traffic Safety Facts*, NHTSA Traffic Safety Facts, DOT HS 811 365 (Aug. 2010). R. 534a-539a.

Contrary to the Superior Court's *en banc* majority findings, the NHTSA chart above (R. 1203a) includes not just fatalities, but injuries of *every* type – including *those of the type Mrs. Parr sustained*.

Virtually all SUVs and vehicles manufactured since 2009 have roof strength to weight ratios of 4-5 or higher.

Brumbelow, "Rollovers of the future: strong roofs, ESC, and curtain airbags," IIHS, Highway Loss Data Institute Presentation, SAE Government /Industry Meeting, 30 January 2013 (Plaintiffs/Appellants' Application for Reargument). Dr. Brumbelow included "increased roof strength" as a factor likely contributing to reduced rollover fatality rate. *Id.* See Fatality rates in 1-3 year old SUVs and cars from Brumbelow publication at App. 81.

Also see IIHS roof strength readings at App. 82.

> A good rating requires a strength-to-weight ratio of at least 4. In other words, the roof must withstand a force of at least 4 times the vehicle's weight before the plate crushes the roof by 5 inches. For an acceptable rating, the minimum required strength-to-weight ratio is 3.25. For a marginal rating, it is 2.5. Anything lower than that is poor.

Insurance Institute for Highway Safety, Highway Loss Data Institute | www.iihs.org

Engineers have concluded since 2001, 2009, and up to the present that the science states that the automobile "diving" "torso augmentation" when exposed to testing has no validity.

Frye v. U.S., 293 F. 1013 (D.C. Cir. 1923); *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

ARGUMENT: REASONS RELIED UPON FOR ALLOWANCE OF A WRIT

I. This case is controlled by science and the law should follow the science.

The liability issue is did "roof crush" or "diving" cause April Parrs' quadriplegia. Ford's corporate designee stated unequivocally that when the science proved that roof crush causes rollover injuries, Ford will make stronger roofs. NHTSA, IIHS, academia scientists, statisticians, and engineers have concluded since 2008 and 2009 that the science states that the Automobile "theory" when exposed to "testing" has no validity. *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923) and *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993) require under the court's gatekeeping role that after 2009 all vehicles under 10,000 pounds including any modern day Excursion must comply with the 2009 Rule of 3 SWR. Ford and the automobile industry

have been touting vehicles with roof strengths of 4, 5, and higher for their safety features.

The date of the science is irrelevant as to the "roof crush," "diving" issue and Congress through NHTSA makes this final decision as part of its role to legislate for the health and safety of the public, including April Parr. Ford, not the public, should pay April's medical bills, lost income, and custodial expenses. NHTSA, not a lay jury, should make this decision for April and future April victims of weak roofs.

The science issue has broad application to all areas where Congress and administrative bodies have the responsibility to reduce injuries and deaths from not only automobile accidents, but clean air and water, the things we eat and drink, the chemicals we spray, the medications we take, our home and our work place.

II. The Superior Court *en banc* Majority misapprehended the facts and issues, and failed to recognize the illogic of the Trial Court's admission of pre-2002 rulemaking, studies and testing offered by necessity by both sides based upon FARS, NASS GES, and/or fatalities only and/or without similarly situated proof, and/or without considering the role of government, and/or differentiation of epidemiological evidence, but precludes same for post-2001 identical rulemaking, studies and testing because the Parrs' Excursion was manufactured in 2001 when the only issue was "roof crush" or "diving" as the cause of April Parrs' quadriplegia.

The *en banc* majority determined that all issues were issues of discretion and failed to recognize that the case was presented by studies from both sides and the only distinction made by the Trial Court was admission or preclusion based upon the Parrs' Ford Excursion 2001 manufacture date and the publication date of NHTSA rulemaking and studies post-2001. The Trial Court ignored Corporate Designee Leigh's statement that he had never seen a roof crush injury and when science showed that roof crush caused injuries, Ford would make stronger roofs. See, p. 11-12, Statement of the Case. The Majority disregarded the fact that the 2001-2009 to the present science has concluded that "crush" not "diving" causes rollover injuries and since 2001 Ford and the industry has

been manufacturing and touting as "safety features" a strong roof of 4, 5 and higher SWRs.

III. The Superior Court *en banc* erred in affirming the Trial Court in denying the Parrs' Motion *in Limine* No. 1 to preclude Ford from presenting evidence of its "diving," "torso augmentation" theory, which was discredited and superseded by the National Highway Traffic Safety Administration (NHTSA's) Final Rule dated May 12, 2009.

NHTSA considered and specifically rejected the automobile industry's "diving," "torso augmentation," "associated" theory in its 2009 ruling. Despite the fact that NHTSA – the agency charged by Congress with making this determination – had already rejected Ford's argument that roof crush does not cause injuries of the type at issue in this case, the Trial Court allowed Ford to present its "diving/torso augmentation" theory for the jury's determination. In so ruling, the Trial Court failed to defer to the findings of a specialized administrative agency charged with making such decisions. See *Chevron U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837, 842-43 & nn.9, 11 (1984) (explaining that a court should afford deference to an agency ruling when it determines that the ruling is ***reasonable***, without regard to whether the court would have reached the same conclusion).

The Supreme Court addressed the appropriate degree of judicial deference to afford the FDA in cases where approved drugs potentially cause harm:

> "Through a series of complex federal statutes and regulations, the FDA, and its team of experts in toxicology, chemistry, pharmacokinetics, and biology, act as a 'gate keeper' to the United States marketplace."

Lance v. Wyeth, 85 A.3d 434, 456 (Pa. 2014); see *id.* at 444.

In the 1980 case of *Dawson v. Chrysler Corp.*, 630 F.2d 950 (3d Cir. 1980), the Third Circuit referenced the troubling public policy dilemma under which individual juries in the various states are permitted to establish national automobile safety standards. The result of such an arrangement predictably is not only incoherent in the safety requirements set by disparate juries but also in the possibility that a standard established by a jury in a particular case will conflict with other policies regarding the economics of the automobile industry as well as energy conservation. *Id.* at 953. The Third Circuit went on to discuss the admissibility of United States Department of Transportation's testing and conclusions, ultimately permitting Plaintiffs' experts to reference the effects of DOT's proposed improvements, which demonstrated "a dramatic increase in occupant protection." *Id.* at 958.

The Trial Court erred and the Superior Court *en banc* similarly erred in failing to give deference to

NHTSA's 2009 rule and permitting Ford to argue its "diving/torso augmentation" theory to a Philadelphia lay jury who found for Ford by citing *Campbell v. GM*, 975 F. Supp. 2d 485 (M.D. Pa. 2013) that the 2009 Final Order was not sufficiently explicit.

IV. The Trial Court committed an error of law and abused its discretion when it granted Ford's Motion *in Limine* No. 3 to preclude references to post-2001 NHTSA standards and rulemaking documents dated 2001 to present, on the basis that the Excursion was originally manufactured and sold in 2001.

The Superior Court *en banc* Majority adopted the Trial Court's reliance upon *Duchess v. Langston Corp.*, 769 A.2d 1131, 1142 (Pa. 2001), and the Court's discretion in its Motion *in Limine* Order despite the fact that *Duchess* dealt with defect and not "diving" "torso augmentation" which deals with causation. The Parrs' expert, Michael Freeman, Ph.D., epidemiologist testified that documents addressing the causal relationship between head and neck injuries sustained in rollover crashes and roof strength *are not date dependent.*, R. 2061a, p. 37. When a study is performed and/or conclusions are reached makes no difference as to the factual accuracy or scientific validity of the conclusions drawn from the studies, e.g., whether smoking causes lung cancer, whether the earth is the center of the universe, whether we are experiencing

global warming, whether pregnant women drinking alcohol may cause damage to their fetus, etc.

See Carol A. Crocca, Annotation, *Admissibility of Government Factfinding in Products Liability Actions*, 29 A.L.R. 5th 534 (1995). The vast majority of these purposes are not time-dependent. Cases throughout the entire country, in both state and federal courts, have admitted governmental fact-finding to, among other items: a) establish causation, b) establish notice of defect, duty to warn, or adequacy of warning, c) establish unreasonable danger or defect, d) establish damages or punitive damages, e) elicit direct testimony from, or cross-examine expert witnesses, and f) impeach witnesses or rebut other evidence.

The Majority was also in error in stating that the documents were not admissible to impeach Ford's expert witnesses.

The Majority fails to comprehend the importance of post-2001 NHTSA rulemaking, epidemiological studies, testing to impeach Ford's corporate representative and its experts with respect to Mr. Leigh's unequivocal statement "if the science says that the stronger [roof] is safer in rollovers, we would make the roof stronger for rollover safety." R. 2007a-2008a.

V. The Trial Court committed an error of law and abused its discretion when it granted Ford's Motion *in Limine* No. 9 and altogether precluded the Parrs from offering statistical evidence prepared by NHTSA, IIHS, FARS, and/or NASS as to rollover fatalities involving the 2001 Excursion and comparable vehicles on the basis that the Parrs were unable to prove that the statistics derived from other rollover accidents were virtually identical to the subject accident.

Two-hundred five (205) serious injuries per year from NHTSA, 161 potential rollover crush fatalities from the Ford Excursion alone, and the comparison of the Ford Excursion with other large SUVs is valuable information that the jury should have had available in determining liability in the instant case. The fact that the liability determination appeared under defect rather than causation is irrelevant because Ford and the automobile industry never disputed that they could have and did make vehicles with stronger roofs and have continued to increase and tout the safety of their vehicles' roof strength as a safety factor.

NHTSA, IIHS, and virtually all epidemiological studies, including the industry studies, referenced FARS, and NASS GES data. The trial court and the Superior Court permitted the 2001 and preceding documents and studies based on FARS and NASS, but precluded post-2001 studies based upon FARS

and NASS on the illogical reliance upon the similarly situated rule of *Hutchinson v. Penske Truck Leasing Co.*, 876 A.2d 978, 983 (Pa. Super. 2005).

The Insurance Institute for Highway Safety (IIHS), an independent, nonprofit, scientific organization dedicated to increasing highway safety, was initially founded in 1959 by three major insurance associations. IIHS's Highway Loss Data Institute (HLDI) supports the mission by performing scientific studies of insurance data regarding human/economic losses resulting from the operation of different types of vehicles and by publishing the results by vehicle make and model. IIHS provides important information that is relied upon by both NHTSA and the automobile industry. In this case, the Trial Court precluded IIHS evidence which compared mortality rates of the 2001 Ford Excursion in rollover accidents with those of other "large" or "extra-large" SUVs.

For example, IIHS published the following documents, of which the Parrs sought to admit evidence at trial:

- Insurance Institute for Highway Safety, Status Report, "The Risk of Dying in One Vehicle Versus Another," Vol. 40, No. 3 (March 19, 2005) [R. 1035a-1045a];
- Insurance Institute for Highway Safety, Status Report, "Driver Deaths by Make & Model: Fatality Risk in One Vehicle Versus Another," Vol. 42, No. 4 (Apr. 19, 2007) [R. 918a-925a];

- Insurance Institute for Highway Safety, Status Report, "Roll Over in Your SUV, and You Want the Roof to Hold Up So You're Protected," Vol. 43, No. 2 (March 15, 2008) [R. 1047a-1053a];
- Insurance Institute for Highway Safety, Status Report, "Institute Launches New Roof Strength Rating to Help Consumers Pick Vehicles that Will Protect Them in Rollovers," Vol. 44, No. 3 (March 24, 2009) [R. 1056a-1063a]; and
- Insurance Institute for Highway Safety, Status Report, "When Roadway Design Options Are Wide Open, Why Not Go Ahead and Build a Roundabout?" Vol. 40, No. 9 (Nov. 19, 2005) [R. 909a-915a].

The precluded publications' statistical data clearly demonstrated that the Ford Excursion, model years 2001-2004 had rollover driver and occupant death rates much higher than comparable "large" and "extra-large" SUVs. R. 919a; R. 922a. About half (or 68 of 115) of the deaths in 2001-04 Model Excursions during 2002-05 occurred in rollover crashes, again a much higher percentage than that of comparable "large" and "extra-large" SUVs. R. 922a; see R. 919a.

VI. There is no case in Pennsylvania or in the country that has precluded NHTSA rule-making and/or studies comparing the danger of comparable vehicles or the causation of deaths and/or injuries based upon the date of the manufacture of the subject vehicle.

Plaintiffs' counsel was counsel in *Campbell v. General Motors Corp.*, 975 F. Supp. 2d 485 (M.D. Pa. 2013). The *Callan Campbell* case involved a 1996 GMC Jimmy wherein like April Parr was a front seat passenger in an automobile accident that took place on August 17, 2004. Callan, like April Parr, is a quadriplegic. General Motors' defense, like Ford's defense in the instant case, was "diving" rather than "roof crush."

Callan Campbell filed an Omnibus Motion *in Limine* to Delineate Product Liability ("Crashworthiness") issues and virtually the same issues presented in *Parr* were presented in *Campbell*. Although the Superior Court *en banc* referenced *Campbell* as precedential with respect to due deference, the Trial Court and the Superior Court *en banc* failed to recognize *Campbell* as precedential for using NHTSA data in expressing opinions. Callan Campbell, like April Parr, was in the target population.

> 63. The product liability "crashworthy" issues in this case are based upon alleged design defects of stability, roof strength, the seat belt restraint system and lack of padding, and presents issues as to defect, causation,

> feasibility, practicability, and cost benefit, making all of the following types of evidence relevant and other types of evidence irrelevant:
>
> *Relevant*
>
> (a) NHTSA rulemaking from the 1960s to the present *see* (Plaintiff's Motion *in Limine* No. 1);
>
> (b) FARS, NASS, Polk, and IIHS data as to deaths, injuries, types of accidents, information gleaned from investigations of accidents (Plaintiff's Motion *in Limine* No. 2); and
>
> (c) statistical studies by NHTSA, IIHS, academia, Plaintiff's experts, consumer groups and the automobile industry finding and disputing causal relationships between roof strength and injuries and death (Plaintiff's Motion *in Limine* No. 3).

Plaintiffs' Omnibus Motion *in Limine* to Delineate Product Liability ("Crashworthiness") Issues at p. 54-55, *Campbell v. GM*, No. 1:11-cv-01215 (M.D. Pa.).

Ruark v. BMW of N. Am., L.L.C., Civil Action No. ELH-09-2738, 2014 U.S. Dist. LEXIS 11969 (D. Md. Jan. 30, 2014), adopts the reasoning of Judge Conner in *Campbell* and reputes the Common Pleas Philadelphia Judge and the Superior Court *en banc* in relating rulemaking studies to the date of manufacture.

VII. Recent events, including "VW Scandal Threatens to Upend CEO," "GM Admits to Criminal Wrongdoing" and Toyota Motor Corporation's penalty of 1.2 billion dollars suggest that motor vehicle manufacturers have been less than candid with respect to defects in their vehicles that have caused thousands of injuries and deaths and billions of dollars in damages.

The Wall Street Journal, Wednesday, September 23, 2015, included as a headline: "VW Scandal Threatens To Upend CEO." [William Boston, Mike Spector and Amy Harder, *VW Scandal Threatens to Upend CEO*, The Wall Street Journal, September 23, 2015, §A1] The Volkswagen scandal involved fraud in reporting to the U.S. Environmental regulators.

The Wall Street Journal Friday, September 18, 2015, had as its headline: "GM Admits to Criminal Wrongdoing," CEO Mary Barra's admission "People died in our cars":

> General Motors Co. admitted to criminal wrongdoing and agreed to pay a lower-than-expected financial penalty in the mishandling of a defective ignition switch, closing a chapter in a safety crisis that dented the auto maker's finances and reputation.
>
> * * *
>
> . . . Mary Barra, the company's chief executive, called the criminal settlement a "tough agreement." But, she said, "People were hurt

> and people died in our cars. That's why we're here today."
>
> * * *
>
> GM "didn't tell the truth in the way they should have to their regulator and to the public,". . . .

Mike Spector and Christopher M. Matthews, *GM Admits to Criminal Wrongdoing*, The Wall Street Journal, September 18, 2015, §B1.

The GM article referenced the 1.2 billion dollar settlement with Toyota Motor Corporation in a similar case. "Toyota admitted it misled U.S. consumers by concealing and making deceptive statements about unintended-acceleration issues with its vehicles." *Id.* at §B1.

Plaintiffs do not contend that Ford was guilty of criminal misconduct, but it may have in contending that "diving" or "torso augmentation" rather than roof crush has over the past 40 years caused thousands of injuries and deaths. If roof crush does not save lives and reduce injuries, why did NHTSA, IIHS and academia since 2009 demand stronger roofs that require the industry to spend billions of dollars and why does the industry make stronger roofs than required and tout stronger roofs as part of their advertising, and why have the deaths and serious injuries in rollover cases dramatically fallen with respect to vehicles manufactured and sold since 2005?

This is clearly a rhetorical question answered by the color graph on App. 81. It is answered also by the fact that occupants in Volvo vehicles who because of strong roofs did not die and sustain crippling injuries in rollover accidents. Plaintiffs' experts have referenced Volvo as the prime example to the motor vehicle industry that roof crush causes deaths and serious injuries and "diving" and "torso augmentation" do not. Presumably the laws of science and physics have occupants in Volvo's going up and out, having their heads at or near the roof, and they should have been killed and injured in the same numbers as other vehicles, but they were not.

VIII. If roof crush does not save lives and reduce injuries, why does NHTSA, IIHS, and Academia demand stronger roofs that require the industry to spend billions of dollars and why does the industry now tout stronger roofs as part of their advertising?

This is a rhetorical question and needs no explanation.

CONCLUSION

Your Court should accept this Petition because the motor vehicle industry should not be permitted to continue to defend rollover cases on the basis of "diving" "torso augmentation" theory because: (1) it is

contrary to the laws of science, (2) NHTSA has debunked the manufacturers' unscientific theory, (3) engineers, not jurors, should decide how people are killed and injured in rollover accidents, (4) the date of a vehicle's manufacture has no relationship to later epidemiological studies and NHTSA rules and regulations, (5) epidemiological studies and statistical data have demonstrated that over the past 10 years as roof strength has increased, the number of deaths and crippling injuries has decreased, (6) epidemiological evidence and statistical data assists jurors and should be admissible even if accidents are not identical, and (7) virtually everyone including the motor vehicle industry appropriately touts strong roofs as important to saving lives.

The motor vehicle industry – not the injured victims – state and federal governments, and/or insurance should be required to pay for the medical bills, lost earnings, general and punitive damages for the thousands of deaths and serious injuries that are caused by defective vehicles.

Respectfully submitted,

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2014 PA Super 281

JOSEPH AND APRIL PARR, HUSBAND AND WIFE, INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF SAMANTHA PARR,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellants	:	
v.	:	
FORD MOTOR COMPANY, McCAFFERTY FORD SALES, INC. d/b/a McCAFFERTY AUTO GROUP, McCAFFERTY FORD OF MECHANICSBURG, INC., AND McCAFFERTY FORD COMPANY,	:	No. 2793 EDA 2012
Appellees	:	

Appeal from the Judgment Entered August 31, 2012, In the Court of Common Pleas of Philadelphia County, Civil Division, at No. 002893, December Term, 2009.

BEFORE: FORD ELLIOTT, P.J.E., BENDER, P.J.E., BOWES, SHOGAN, ALLEN, OTT, WECHT, STABILE AND JENKINS, JJ.

OPINION BY SHOGAN, J.: **FILED DECEMBER 22, 2014**

Plaintiffs-Appellants, Joseph and April Parr ("the Parrs"), husband and wife, individually and as parents and guardians of their minor daughter, Samantha Parr, appeal from the August 31, 2012

judgment of the Court of Common Pleas of Philadelphia County, which was entered following the denial of the Parrs' motion for post-trial relief. Appellees are Defendants Ford Motor Company, McCafferty Ford Sales, Inc. doing business as McCafferty Auto Group, McCafferty Ford of Mechanicsburg, Inc., and McCafferty Ford Company (collectively "Ford"). Following our review of the voluminous record, and in consideration of the applicable law and arguments of the parties, we affirm.

On July 21, 2009, the Parrs' 2001 Ford Excursion, which they purchased as a "used" vehicle in 2007, was struck by a van that ran a stop sign, causing the Parrs' vehicle to spin clockwise, hit a guardrail, and roll down a nineteen-foot embankment. Amended Complaint, 8/26/11, at ¶¶ 14, 26-28; N.T., 3/8/12, at 30. Joseph Parr was driving at the time of the accident; his wife, April Parr, their three minor children, and Margaret Parr, Joseph's mother, were occupants of the vehicle. Amended Complaint, 8/26/11, at ¶¶ 20-25; N.T., 3/8/12, at 31. All passengers, who all wore their seatbelts, were injured; occupants on the driver's side of the vehicle, Joseph Parr and children Tyler and Carilann Parr, sustained comparatively minor injuries. Amended Complaint, 8/26/11, at ¶¶ 20-25, 31. Margaret Parr, Joseph Parr's fifty-seven-year-old mother, who sat in the second row on the passenger side, is not involved in this case, and her injuries were not identified in the amended

complaint. Amended Complaint, 8/26/11, at ¶ 25.[1] Daughter Samantha, who was sitting in the third row on the passenger side, sustained a fractured skull, broken collarbone, fractured eye orbital, a lacerated liver, and facial lacerations. Amended Complaint, 8/26/11, at ¶ 30. April Parr, sitting in the front passenger seat, sustained a spinal cord injury and was rendered a quadriplegic. Amended Complaint, 8/26/11, at ¶ 29; N.T., 3/8/12, at 33.

Emergency responders employed the jaws of life[2] to extract April Parr from the Excursion; during that process, the roof and pillar structures of the vehicle were destroyed. N.T., 3/9/12 (Afternoon Session), at 35-38. The parties stipulated that shortly after the accident in July 2009, the Parrs' Ford Excursion was released to the Parrs' insurer, which sold the vehicle, and the automobile was destroyed. N.T., 3/15/12 (Morning Session), at 30-31.

The Parrs filed a complaint against Ford Motor Company and the Ford dealership that sold them their 2001 Ford Excursion on December 28, 2009, and an amended complaint on August 26, 2011,

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[1] Parrs' Exhibit P-8, which is an expert report by Donald Friedman to Parrs' counsel dated June 29, 2011, describes Margaret Parr's injury as "a fractured hand." Parrs' Exhibit P-8, Report of Donald Friedman, 6/29/11, at 3.

[2] "Jaws of Life," a trademark of Hurst Performance, Inc., are hydraulic rescue tools used by emergency rescue personnel to assist vehicle extrication of crash victims. http://www.jawsoflife.com.

contending that April Parr's and Samantha Parr's injuries resulted from roof crush when the automobile rolled down the embankment. Amended Complaint, 8/26/11, at ¶¶ 28, 40. The Parrs alleged that the vehicle's roof and restraint system were defectively designed under the crashworthiness doctrine of strict products liability, and they asserted additional claims sounding in negligence. Amended Complaint, 8/26/11.

Trial in the matter commenced on March 6, 2012, and continued over the ensuing three weeks, culminating on March 23, 2012, with a defense verdict. The jury indicated on the verdict form that the Parrs did not prove: (1) that the Excursion's roof design was defective when it "left the control of Ford and that there was an alternative, safer design that was practicable under the circumstances," or (2) "that Ford was negligent in its design of the roof structure on the 2001 Ford Excursion when it left Ford's control and that there was an alternative, safer design that was practicable under the circumstances." Jury Verdict Form, 3/23/12, at ¶¶ 1, 3. The jury thus did not reach the issues of causation or damages.

The Parrs filed post-trial motions on March 29, 2012. Both parties filed briefs, and the trial court denied the motions on August 31, 2012, entering judgment in favor of Ford that day. This timely appeal followed on September 10, 2012, in which the Parrs challenge several pretrial evidentiary rulings and an aspect of the trial court's charge to the jury. Both the trial court and the Parrs complied with Pa.R.A.P.1925.

A panel of this Court filed a memorandum affirming the judgment in favor of Ford. ***Parr v. Ford Motor Company***, 2793 EDA 2012, ___ A.3d ___ (Pa. Super. filed December 24, 2013) (unpublished memorandum). Thereafter, the Parrs filed a motion for reargument *en banc*. We granted the motion and heard oral arguments on August 5, 2014. This matter is now ripe for disposition.

The Parrs raise the same four issues in this appeal that they identified in their Pa.R.A.P. 1925(b) statement, which are as follows:

> A. Whether the Trial Court committed an error of law and abused its discretion when it denied the Parrs' Motion *in Limine* No. 1 to preclude Ford from presenting evidence of its "diving," "torso augmentation" theory, which was discredited and superseded by the National Highway Traffic Safety Administration (NHTSA)'s Final Rule dated May 12, 2009?
>
> B. Whether the Trial Court committed an error of law and abused its discretion when it granted Ford's Motion *in Limine* No. 3 to preclude references to post-2001 NHTSA standards and rulemaking documents dated 2001 to present, on the basis that the Excursion was originally manufactured and sold in 2001?
>
> C. Whether the Trial Court committed an error of law and abused its discretion when it granted Ford's Motion *in Limine* No. 9 and altogether precluded the Parrs from offering statistical evidence prepared by NHTSA,

> IIHS, FARS, and/or NASS as to rollover fatalities involving the 2001 Excursion and comparable vehicles on the basis that the Parrs were unable to prove that the statistics derived from other rollover accidents that [sic] were virtually identical to the subject accident?
>
> D. Whether the Trial Court committed an error of law and abused its discretion when it denied the Parrs' Motion *in Limine* No. 10 to preclude Ford from: (a) presenting – and consequently filling the record with – evidence that the 2001 Excursion was not preserved; and (b) obtaining a spoliation charge when Ford suffered no prejudice resulting from the vehicle's destruction since neither party's experts had access to the vehicle and since Ford's theory was based upon the assumption that all occupants in rollover vehicles are injured in the same way?

The Parrs' Brief at 7-8.

We note initially that our Supreme Court adopted section 402A of the Restatement (Second) of Torts in ***Webb v. Zern***, 220 A.2d 853 (1966), and reaffirmed the Second Restatement's vitality in ***Tincher v. Omega Flex, Inc.***, ___ A.3d ___, ___, 2014 WL 6474923 *62 (Pa. filed November 19, 2014) ("Pennsylvania remains a Second Restatement jurisdiction"). Section 402A states:

> **§ 402A Special Liability of Seller of Product for Physical Harm to User or Consumer**

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property if
>
> > (a) the seller is engaged in the business of selling such a product, and
> >
> > (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> > (a) the seller has exercised all possible care in the preparation and sale of his product, and
> >
> > (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.[3]

RESTATEMENT (SECOND) OF TORTS, § 402A (1965).

In order to prevail in such a product liability case, the plaintiff must establish: (1) that the product was defective; (2) that the defect existed when it left the hands of the defendant; and (3) that the defect caused the harm. ***Reott v. Asia Trend, Inc.***, 7 A.3d

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[3] The term "seller" includes the "manufacturer" of a product. RESTATEMENT (SECOND) OF TORTS, § 402A, cmt. f.

830 (Pa. Super. 2010). A product is defective "when it is not safe for its intended use." ***Weiner v. American Honda Motor Co., Inc.***, 718 A.2d 305, 308 (Pa. Super. 1998).

The crashworthiness doctrine most typically arises in the context of motor vehicle accidents. ***See, e.g.***, ***Raskin v. Ford Motor Co.***, 837 A.2d 518 (Pa. Super. 2003). It was first explicitly recognized as a specific subset of product liability law by this Court in ***Kupetz v. Deere & Co., Inc.***, 644 A.2d 1213 (Pa. Super. 1994), and is defined as "the protection that a motor vehicle affords its passenger against personal injury or death as a result of a motor vehicle accident." ***Id.*** at 1218.

> A crashworthiness claim requires proof of three elements. First, the plaintiff must prove that the design of the vehicle was defective, and that at the time of design an alternative, safer, and practicable design existed that could have been incorporated instead. Second, the plaintiff must identify those injuries he or she would have received if the alternative design had instead been used. Third, the plaintiff must demonstrate what injuries were attributable to the defective design.
>
> In recognizing the crashworthiness doctrine in ***Kupetz***, this Court relied upon our Supreme Court's prior decision in ***McCown v. International Harvester Co.,*** 463 Pa. 13, 342 A.2d 381 (1975), which adopted the principle tenet of the crashworthiness doctrine,

> *i.e.*, manufacturers are strictly liable for defects that do not cause the accident but nevertheless cause an increase in the severity of injuries that would have occurred without the defect.

Gaudio v. Ford Motor Company, 976 A.2d 524, 532 (Pa. Super. 2009) (some citations omitted).

The parties herein differed regarding how the injuries to the Parrs occurred. The Parrs asserted that as the Excursion rolled down the embankment, the driver's side led the roll, and the roof over the "trailing" passenger side of the vehicle crushed into the passenger compartment. Amended Complaint, 8/26/11, at ¶ 27, 28. In support, the Parrs alleged that April Parr and Samantha Parr, who sat on the passenger side of the vehicle,[4] sustained significant injuries "as a result of the collapsing roof," whereas the passengers on the driver's side of the Excursion, "over which the roof did not significantly collapse," incurred minor injuries. ***Id.*** at ¶¶ 29-31.

Ford's position was premised on a "diving" and "torso augmentation" defense. Ford's experts opined that when the Excursion flipped upside down, centrifugal force pulled passengers out of their seats and pushed their heads against the vehicle's roof, a phenomenon called diving. N.T., 3/7/12 (Morning

[4] Notably absent is any reference to Margaret Parr, who also sat on the passenger side and who, according to Donald Friedman's report, sustained a fractured hand.

Session), at 36-38. April Parr's head theoretically was already in contact with the roof when the roof struck the ground as the vehicle rolled over; as her head came to an abrupt halt, her torso continued to move, causing her to break her neck. ***Id.*** This phenomenon is known as torso augmentation. ***Id.*** at 38. Mr. Michael J. Leigh, Ford's expert on roof strength who the Parrs called on cross-examination, explained Ford's theory regarding why April Parr sustained significant injuries compared to Joseph Parr, as follows:

> **Q.** Well, they [Joseph and April] both rolled over, they both were subjected to centrifugal force. But if you looked at that roof, the roof over April Parr had what we call crush or deformation of a total residual of 11 inches; is that right?
>
> **A.** I know that the roof was significantly deformed on that side of the vehicle. And that means that that part of the roof sustained a significant impact.
>
> And if the other side of the roof was not deformed like that, that means that side of the roof did not sustain a significant impact.
>
> And if the roof over Mr. Parr did not sustain a significant impact, then I'm not surprised that he did not get injured.
>
> But I would not be surprised at all that his head did touch the roof in that event because if he's that tall and experiencing centrifugal force, his head is going to touch the

roof, as well. He was just fortunate enough not to experience the impact that, unfortunately, his wife experienced.

Q. And you're saying it didn't come about from this 11 inches of crush or deformation? It just came from centrifugal force; right?

A. The deformation is an indication of the severity of the impact that that part of the roof experienced.

The injury that Mrs. Parr received is an indication of the severity of the impact that she experienced being in the same place as that part of the roof. So her injury and the deformation are associated with the impact, but it doesn't mean that the deformation of the roof caused her injury. You can't go that far.

All you can say is that the deformation and the injury are associated with the impact. And Mr. Parr didn't experience that severe of an impact. That's the difference.

N.T., 3/7/12 (Morning Session), at 39-41.

We proceed to address the Parrs' challenges to the trial court's evidentiary rulings. A motion *in limine* is used before trial to obtain a ruling on the admissibility of evidence. ***Northeast Fence & Iron Works, Inc. v. Murphy Quigley Co., Inc.***, 933 A.2d 664 (Pa. Super. 2007). "It gives the trial judge the opportunity to weigh potentially prejudicial and harmful evidence before the trial occurs, thus preventing the evidence from ever reaching the jury."

Commonwealth v. Reese, 31 A.3d 708, 715 (Pa. Super. 2011) (*en banc*). A trial court's decision to grant or deny a motion *in limine* "is subject to an evidentiary abuse of discretion standard of review." ***Id.***

> Questions concerning the admissibility of evidence lie within the sound discretion of the trial court, and we will not reverse the court's decision absent a clear abuse of discretion. ***Commonwealth Financial Systems, Inc. v. Smith***, 15 A.3d 492, 496 (Pa. Super. 2011) (citing ***Stumpf v. Nye***, 950 A.2d 1032, 1035-1036 (Pa. Super. 2007)). "An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a 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 (Pa. 2003).

Keystone Dedicated Logistics, LLC v. JGB Enterprises, Inc., 77 A.3d 1, 11 (Pa. Super. 2013). In addition, "to constitute reversible error, an evidentiary ruling must not only be erroneous, but also harmful or prejudicial to the complaining party." *Winschel v. Jain*, 925 A.2d 782, 794 (Pa. Super. 2007) (citing *McClain v. Welker*, 761 A.2d 155, 156 (Pa. Super. 2000)).

The Parrs' motions *in limine* numbers one, three, and nine all dealt with the issue of "roof crush" versus "diving" and "torso augmentation." In particular, the Parrs' motion *in limine* number one sought to

preclude Ford from presenting evidence of its diving/torso augmentation theory, which the Parrs asserted was discredited and superseded by the National Highway Traffic Safety Administration (NHTSA)'s Final Rule dated May 12, 2009. The Parrs assert Ford admitted that in 2001, comparable vehicles existed with much stronger roofs than that of the Excursion. Ford acknowledged that roof crush may cause injuries in some cases but defended, in this case, on the basis of its diving/torso augmentation theory.

The Parrs asserted pretrial, at trial, and in their appellate brief as follows:

> Although N[H]TSA's "roof crush" theory versus the industry's "diving/torso augmentation" was a heavily contested issue for years prior to *2001*, the year of the Excursion's manufacture, in 2009, NHTSA determined *once and for all* that "roof crush" and not "diving/torso augmentation" was the cause of head and neck injuries – such as those sustained by Mrs. Parr – among belted occupants in rollover accidents. NHTSA based its finding upon extensive epidemiological studies from 2001-2009, and resultantly promulgated its Final Rule on Federal Motor Vehicle Safety Standard (FMVSS) No. 216 on May 12, 2009, which required more stringent roof-crush standards.

The Parrs' Brief at 26 (emphasis in original). The Parrs reference the following:

Roof Crush as a Cause of Injury

A number of commenters including GM, Ford, [and] Nissan[5] . . . stated that the statistical correlation . . . found between roof intrusion and injury does not establish a causal relationship between roof deformation and injury. . . . [T]he studies . . . merely suggest that there is a relationship. . . . "[W]hen you compare rollover accidents that have significant roof/pillar deformation with other rollover accidents that have very little or no roof/pillar deformation, you are not comparing similar accidents with respect to roof-to-ground impact severity. Just the fact that two vehicles are in a rollover with greater than 2 quarter turns does not mean they are in the same or even similar impact severities." . . . Ford stated that "[t]he amount of roof deformation is only an indication of the severity of the impact between the roof and the ground." . . . GM stated that "[o]bservations of injury occurrence at the end of a rollover collision reveal nothing regarding the relationship of roof deformation, roof strength, or roof strength-to-weight ratio injury causation." Nissan stated that deformation and

[5] Various auto manufacturers criticized the NHTSA's reliance on a study that linked roof intrusion and serious injury, and commented that a statistical correlation did not establish a causal relationship between the two. The agency agreed, to an extent, acknowledging that "as a general principle, a statistical correlation does not in itself prove that a causal relationship exists." 74 Fed.Reg. 22348, 22379.

> injury severity are both independently associated with roof impact severity.

The Parrs' Brief at 17; "Federal Motor Vehicle Safety Standards; Roof Crush Resistance; Phase-In Reporting Requirements" ("FMVSS"), 74 Fed.Reg. 22348, 22378-22379 (final rule promulgated May 12, 2009) (codified at 49 C.F.R. §§ 571, 585) ("FMVSS 216 Final Rule"). The NHTSA has explained:

> [Some] arguments appear to imply that any difference in roof intrusion must be due to a difference in impact severity rather than roof strength or design. . . .
>
> There are logical reasons to believe that a collapsing roof that strikes an occupant's head at the nearly instantaneous impact velocity experienced when structures deform might cause serious injury. These types of injuries were documented . . . in a detailed investigation of 43 rollover crashes. The agency believes that the statistically significant relationship between roof intrusion and belted occupant injury . . . indicates not just a suggestion, but a probability that increasing roof strength reduces injuries.

The Parrs' Brief at 17-18; FMVSS 216 Final Rule, 74 Fed.Reg. at 22379.

As noted, the Parrs' motion *in limine* number one sought to preclude presentation of Ford's diving/torso augmentation theory to the jury, contending that after forty years of research, studies, tests, and experience, NHTSA specifically discredited this theory in

FMVSS 216 Final Rule, and validated "roof crush" as the cause of head and neck injuries sustained by belted occupants in rollover motor vehicle accidents. In light of that finding, the Parrs maintain, NHTSA amended the roof crush rule to require substantial increases in roof strength applicable to all consumer vehicles. The Parrs argue the trial court should have deferred to NHTSA's expertise to preclude Ford from introducing evidence of diving and torso augmentation at trial.

The trial court concluded that the Parrs' support for their motion was lacking and stated:

> [U]pon review of the documentation provided to the Court to support their motion, notably, the 2009 Amendment to the FMVSS (Federal Motor Vehicle Safety Standard) although suggestive of appellants' argument, failed to convince this Court that either of their arguments [was] meritorious. First, although the 2009 Amendment did cite statistical studies which found a correlation between roof crush and injury in rollover accidents, appellants' contention that the NHTSA amendment conclusively determined that a causal relationship existed between roof crush and head and neck injury in rollover accidents, to the exclusion of torso augmentation, was not proven. Although a correlation was shown[,] it did not provide, as appellants' were arguing, evidence showing that it was conclusive. As such, this Court determined that appellants' contention was without merit and denied their pre-trial motion which sought to

> preclude appellees from presenting evidence that "diving" or torso augmentation caused plaintiff, April Parr's injuries. Both appellees and appellants presented extensive expert testimony during trial on the subject of "roof crush" vs. "diving" as a cause of appellant, April Parr's injuries. In the end, the jury concluded that Ms. Parr's injuries resulted from "diving" not "roof crush" and found for the appellees.

Trial Court Opinion, 3/1/13, at 4-5.

Our review of FMVSS 216 Final Rule reveals that it did not categorically exclude diving/torso augmentation as a cause of head and neck injury in rollover crashes. The document merely states that in some cases roof crush "might" cause serious injury, which is a proposition with which Ford agreed.[6]

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[6] The Parrs suggested throughout trial that Ford's experts categorically denied that roof crush can ever cause injury; Ford's experts clearly disagreed. For example, Ford's biomechanical engineering expert, Dr. Catherine Corrigan, testified:

> I've seen instances where roof crush has caused injury. And I have not opined that it doesn't.
>
> * * *
>
> I have seen instances where deformation of the roof has contributed to the injury. I have seen instances where it has not.
>
> So the fact that there are researchers who have said that roof crush can cause injury, that would be correct.

N.T., 3/19/12 (Morning Session), at 29. Dr. Corrigan later reiterated that "there is plenty of data out there to show instances

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Nothing in NHTSA's conclusion categorically excluded torso augmentation or diving as a potential cause of injury in rollover crashes. Thus, the Parrs' position that NHTSA determined "once and for all" that roof crush and not diving/torso augmentation caused head and neck injuries, such as those sustained by Mrs. Parr, among belted occupants in rollover accidents, simply is not supported by the literature.

While we have not found a Pennsylvania appellate case directly on point, we cite with approval *Campbell v. Fawber*, 975 F. Supp.2d 485 (M.D.Pa. 2013).[7],[8] The ***Campbell*** Court considered this precise issue and rejected it out of hand.

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where roof crush does matter in injury and does cause injury. In this case, because of the kinematics, it was not the cause of the injury." ***Id.*** at 28. Ford's expert on roof strength, Michael J. Leigh, testified that "Ford doesn't dispute that there could be situations where roof crush or roof deformation causes an injury." N.T., 3/7/12 (Morning Session), at 7, 34.

[7] In their brief on reargument, the Parrs fail to acknowledge the federal court's decision in ***Campbell***.

[8] While "federal court decisions do not control the determinations of the Superior Court," ***Kleban v. National Union Fire Insurance Co.***, 771 A.2d 39, 43 (Pa. Super. 2001), whenever possible, Pennsylvania courts "follow the Third Circuit [courts] so that litigants do not improperly 'walk across the street' to achieve a different result in federal court than would be obtained in state court. [***Cellucci v. General Motors Corp.***, 676 A.2d 253, 255 n.1 (Pa. Super. 1996)] (citing ***Commonwealth v. Negri***, 213 A.2d 670 (Pa. 1965), and ***Murtagh v. County of Berks***,634 A.2d 179 (Pa. 1993))." ***NASDAQ OMX PHLX, Inc. v. PennMont Securities***, 52 A.3d 296, 303 (Pa. Super. 2012);

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> Nothing contained in the agency's response suggests that the final rule categorically excluded torso augmentation or diving as a cause of head and neck injury in a rollover crash. **To the contrary, the NHTSA's response was resolutely probabilistic**. Furthermore, [the plaintiff] has shown nothing in the NHTSA's regulations that would suggest that the agency's study of roof crush injuries could prevent a party from presenting at trial evidence of an alternative explanation.

Id. at 501 (emphasis added) (footnote omitted).[9] The trial court properly declined the Parrs' motion *in limine* number one and permitted Ford to put its diving/torso augmentation theory before the jury.

The Parrs next contend the trial court erred when it granted Ford's motion *in limine* number three

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Werner v. Plater-Zyberk, 799 A.2d 776, 782 (Pa. Super. 2002) (same).

[9] The Parrs assert that the NHTSA's conclusion that roof crush is a cause of injury is entitled to deference under ***Chevron v. National Resources Defense Council***, 467 U.S. 837 (1984). The Parrs' Brief at 29. In *Chevron*, the Supreme Court held that courts must give deference to an agency's reasonable interpretation of the statute that it administers. ***Chevron***, 476 U.S. at 842-843. This claim, as well, was addressed by the *Campbell* Court, and we concur with its conclusion, as follows: "The court disagrees with [the plaintiff's] argument that the NHTSA conclusively determined that roof crush is the *exclusive* cause of head and neck injury in rollover collisions and, therefore, it is unnecessary to address [the] *Chevron* argument." ***Campbell***, 975 F. Supp.2d at 502 n.4.

to preclude all references to NHTSA rulemaking documents after 2001 and particularly, NHTSA 216 Final Rule, "on the basis that the [2001] Excursion was designed, manufactured, and sold in 2001," eight years before the Final Rule's publication. The Parrs' Brief at 31. The Parrs sought to admit evidence of these rulemaking documents to establish causation, to dispute Ford's diving/torso augmentation theory, and to impeach Ford's experts' reliance upon that theory. The Parrs' Brief at 33. The Parrs maintain that the trial court relied upon precedent concerning whether this evidence was admissible to establish a "defect," which was inapplicable to the Parrs' theory of roof crush causation. They suggest the 2001 date may have relevance to notice or negligence, but it has no relevance to the issue of causation or impeachment. ***Id.***

Ford responds that the trial court acted within its discretion in excluding reference to post-2001 rulemaking activities that culminated in FMVSS 216 Final Rule. It suggests that evidence regarding a post-manufacture regulatory standard is irrelevant because it does not go to whether the Excursion's roof was defectively designed when it left the Ford plant in 2001. Ford maintains that the documents also do not prove causation, they merely suggest that the Parrs' causation theory is possible, and that issue was not in dispute because Ford admitted it at trial. Thus, Ford argues that any marginal relevance was far outweighed by the likelihood that evidence of inapplicable government standards was likely to mislead the

jury. Moreover, Ford maintains that the Parrs' claim is moot because the Parrs presented some of the evidence that they now assert was wrongly excluded.

In defending its decision to preclude references to NHTSA rulemaking documents after 2001, the trial court stated the following:

> Pennsylvania law requires that a plaintiff prove that an allegedly defective vehicle was defective at the time of manufacture. ***Duchess v. Langston Corporation***, 769 A.2d 1131, 1142 (Pa. 2001). However appellants sought to introduce NHTSA standards and rulemaking subsequent to the year the subject vehicle was manufactured. It was this Court's determination that the relevant time frame for assessing the design and/or defectiveness of the subject 2001 Ford Excursion was up to and including the year it was manufactured, 2001. The standards that were in place at that time (2001) were what was relevant to appellants' causes of action against the appellee, Ford Motor Company. At trial, appellees were permitted and did introduce evidence of NHTSA standards that existed up to the year 2001. This Court found appellants' contention that they should have been permitted to introduce NHTSA standards and rulemaking subsequent to the year 2001 without merit and accordingly granted appellees' pretrial motion precluding such evidence.

Trial Court Opinion, 3/1/13, at 5-6.

The trial court's order dated March 5, 2012, and filed March 27, 2012, relating to Ford's motion *in limine* number three, precluded reference to "FMVSS 216, the 2009 Amendments to FMVSS 216, or Related Notices of Proposed Rulemaking. . . ." Order, 3/27/12, at 1 (docket entry 145). Initially, the Parrs failed to note the place in the record where the trial court declined admission of fifteen studies and publications, which the Parrs asserted were erroneously excluded by the trial court, thereby hampering our ability to address the issue as to all of the documents.[10] We

[10] Indeed, the Parrs initially failed to include any notes of testimony in the record certified to us on appeal, and this Court was compelled to seek supplementation of the record through our Prothonotary. As we stated in ***Commonwealth v. Preston***, 904 A.2d 1, 6-8 (Pa. Super. 2006) (*en banc*) (some citations omitted):

> The fundamental tool for appellate review is the official record of the events that occurred in the trial court. ***Commonwealth v. Williams***, 552 Pa. 451, 715 A.2d 1101, 1103 (1998). To ensure that an appellate court has the necessary records, the Pennsylvania Rules of Appellate Procedure provide for the transmission of a certified record from the trial court to the appellate court. ***Id.*** The law of Pennsylvania is well settled that matters which are not of record cannot be considered on appeal. ***Commonwealth v. Bracalielly***, 540 Pa. 460, 658 A.2d 755, 763 (1995). Thus, an appellate court is limited to considering only the materials in the certified record when resolving an issue. ***Commonwealth v. Walker***, 878 A.2d 887, 888 (Pa. Super. 2005). In this regard, our law is the same in both the civil and criminal context because, under the Pennsylvania Rules of Appellate Procedure, any document which is not part of the officially certified record is

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address the claim as it pertains to the trial court's decision to preclude reference to the documents related to FMVSS 216 Final Rule.

The trial court granted Ford's motion *in limine* number three to the extent it sought to exclude reliance on NHTSA standards and rulemaking documents after 2001, the year the Parrs' Excursion was manufactured. It is undisputed that roof-strength standards in FMVSS 216 Final Rule did not apply to the Excursion because the vehicle, at 8,800 pounds, is beyond the "scope of [the] Safety Design Guideline, which stops at 8,500 pounds. . . ." N.T., 3/7/12 (Morning Session), at 53, 83. The rulemaking documents Ford sought to exclude in its motion *in limine* number

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deemed non-existent – a deficiency which cannot be remedied merely by including copies of the missing documents in a brief or in the reproduced record. ***Commonwealth v. Kennedy***, 868 A.2d 582, 593 (Pa. Super. 2005).

* * *

It is not proper for either the Pennsylvania Supreme Court or the Superior Court to order transcripts nor is it the responsibility of the appellate courts to obtain the necessary transcripts.

In the absence of specific indicators that a relevant document exists but was inadvertently omitted from the certified record, it is not incumbent upon this Court to expend time, effort and manpower scouting around judicial chambers or the various prothonotaries' offices of the courts of common pleas for the purpose of unearthing transcripts . . . [that] never were formally introduced and made part of the certified record.

three did not issue until years after 2001; they dated from 2005, when the NHTSA issued notice of proposed rulemaking to update FMVSS 216,[11] to 2009, when NHTSA issued the Final Rule. NPRM, "Federal Motor Vehicle Safety Standards; Roof Crush Resistance, 70 Fed.Reg. 49223 (proposed Aug. 23, 2005); FMVSS 216 Final Rule. Moreover, even after 2009, the updated standard did not apply to the Excursion. The FMVSS Final Rule does not apply to vehicles of the Excursion's gross vehicle weight grading (*i.e.*, between 6,000 and 10,000 pounds) until September 1, 2016. FMVSS 216 Final Rule, 74 Fed.Reg. at 22348; Ford's Motion *in Limine* No. 3, Exhibit D.

As we have stated, it is well settled that the decision to admit or exclude evidence is vested in the sound discretion of the trial court and will not be overturned on appeal absent an abuse of that discretion. *Keystone*, 77 A.3d at 11. Additionally, to be admissible, evidence must be relevant.

> "Evidence that is not relevant is not admissible." Pa.R.E., Rule 402, 42 Pa.Cons.Stat.Ann. Relevant evidence is defined as evidence "having any tendency to make the existence of any *fact* that is of consequence to the determination of the action more probable

[11] The August 19, 2005 Notice of Proposed Rulemaking ("NPRM") was not an adopted standard, it was an open docket to receive comments regarding the proposal by NHTSA. NHTSA issued an NPRM in 2008 as well. Ford's Motion in Limine No. 3, Exhibit B (docket entry 92).

> or less probable." Pa.R.E., Rule 401, 42 Pa.Cons.Stat.Ann. (emphasis added). Even if evidence is relevant, it may be excluded if its probative value is outweighed by, *inter alia*, the danger of unfair prejudice arising from its presentation to the fact-finder. Pa.R.E., Rule 403, 42 Pa.Cons.Stat.Ann. "'Unfair prejudice' supporting exclusion of relevant evidence means a tendency to suggest decision on an improper basis or divert the jury's attention away from its duty of weighing the evidence impartially." ***Commonwealth v. Wright***, 599 Pa. 270, 325, 961 A.2d 119, 151 (2008). "The function of the trial court is to balance the alleged prejudicial effect of the evidence against its probative value and it is not for an appellate court to usurp that function." ***Commonwealth v. Parker***, 882 A.2d 488, 492 (Pa. Super. 2005), *aff'd on other grounds*, 591 Pa. 526, 919 A.2d 943 (2007).

Lykes v. Yates, 77 A.3d 27, 33 (Pa. Super. 2013) (emphasis in original).

We conclude the trial court correctly found that the standard enacted in 2009, which is not applicable until 2016, cannot form the basis for liability in this case, where the vehicle in question was manufactured in 2001. Thus, evidence of the FMVSS 216 Final Rule in 2009 and rulemaking activities from 2005 and 2008 leading up to the amendment properly were excluded. The Parrs were compelled to prove that the Excursion was defective at the time it was made. ***See Duchess v. Langston***, 769 A.2d 1131, 1142 (2001) ("[O]ur jurisprudence requires that products are to be

evaluated at the time of distribution when examining a claim of product defect."). The FMVSS 216 Final Rule and rulemaking activities leading up to the amendment properly were circumscribed by the trial court's grant of Ford's motion *in limine* number three. ***See Dunkle v. West Penn Power Co.***, 583 A.2d 814, 816 (Pa. Super. 1990) ("[I]n a strict liability action against the manufacturer of a product, safety standards promulgated after the sale of the product are irrelevant and inadmissible to show that the product was defectively designed or contained inadequate warnings when manufactured."). ***See also Oberreuter v. Orion Industries, Inc.***, 398 N.W.2d 206 (Iowa App. 1986); ***Aller v. Rodgers Machinery Manufacturing Co., Inc.***, 268 N.W.2d 830 (Iowa 1978); ***Rice v. James Hanrahan & Sons***, 482 N.E.2d 833 (Mass. 1985); ***Cover v. Cohen***, 461 N.E.2d 864 (N.Y. 1984); ***Turner v. General Motors Corp.***, 584 S.W.2d 844 (Tex. 1979); ***Majdic v. Cincinnati Machine Co.***, 537 A.2d 334 (Pa. Super. 1988).

Moreover, we reject the Parrs' assertion that even if the post-2001 rulemaking evidence was inadmissible to prove a defect, it was admissible to prove causation. The Parrs' Brief at 33. As noted, we have determined that the FMVSS 216 Final Rule and related documents demonstrated that roof crush is one of several potential causes of injury in rollover accidents. The record reveals that Ford readily admitted that fact. N.T., 3/7/12 (Morning Session), at 33-34, 97; N.T., 3/19/12 (Morning Session), at 64-71;

N.T., 3/19/12 (Afternoon Session), at 27-28. Thus, the documents in question did not make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Pa.R.E. 401.

Further, despite the trial court's ruling on Ford's motion *in limine* number three, the Parrs did, in fact, place the NHTSA Final Rule's conclusion before the jury. ***See, e.g.***, N.T., 3/7/12 (Morning Session), at 63; N.T., 3/19/12 (Afternoon Session), at 33-36. Indeed, during his closing argument, the Parrs' counsel suggested to the jury, "And this business about diving, torso augmentation, they can't convince NHTSA of that fact; yet they're trying to convince you. . . ." N.T., 3/21/12 (Volume I), at 51. In addition, the evidence encompassed by Ford's motion *in limine* number three was cumulative to the myriad references by the Parrs to the NHTSA and roof crush causation. ***See, e.g.***, N.T., 3/7/12 (Morning Session), at 41-42, 57-87; N.T., 3/7/12 (Afternoon Session), at 21-24, 102-104, 123-132, 138-143; N.T., 3/8/12 (Morning Session), at 35-87, 104;. N.T., 3/8/12 (Afternoon Session), at 77; N.T., 3/15/12 (Afternoon Session), at 44-45; N.T., 3/19/12 (Morning Session), at 27-29; N.T., 3/19/12 (Afternoon Session), at 29-36, 72-83; N.T., 3/20/12 (Afternoon Session), at 28.

Also, in order for a trial court's ruling on an evidentiary matter to constitute reversible error requiring the grant of a new trial, the ruling must be both legally erroneous and harmful to the complaining party. ***Winschel***, 925 A.2d at 794. If the error in

the admission of the evidence had no effect on a verdict, the error does not require the grant of a new trial. Herein, the Parrs assert that the admission of the documents would have proven causation. As noted, however, the jury never reached the issue of causation. Jury Verdict Form, 3/23/12.

The Parrs further suggest the trial court should have allowed them to utilize the materials in order to impeach Ford's expert witnesses. The Parrs' Brief at 35-36. This argument fails. First, the record reveals that the Parrs **did** impeach Ford's experts with NHTSA's conclusions regarding roof crush. ***See, e.g.***, N.T., 3/19/12 (Afternoon Session), at 38-43 (impeaching Dr. Corrigan with NHTSA's conclusions); N.T., 3/7/12 (Morning Session), at 32-34 (impeaching Michael Leigh with NHTSA's conclusions); N.T., 3/20/12 (Afternoon Session), at 29-30 (impeaching Dr. Roger Nightengale, a research professor in the department of biomedical engineering at Duke University, with NHTSA's conclusions).

Second, Pa.R.E. 607(b) & cmt notes that "there are limits on the admissibility of evidence relevant to the credibility of a witness," including the provisions of Pa.R.E. 403 whereby the court "may exclude relevant evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Pa.R.E. 607(b); Pa.R.E. 403. Thus, as Ford asserts, "For the same reasons post-2001 NHTSA rulemaking documents were not admissible

for their truth," they were not available for impeachment. Ford's Brief at 32.

Finally, as Ford posits, "there was nothing to impeach Ford's witnesses on." Ford's Brief at 32. Ford's experts conceded that roof crush may be a cause of injury in some cases, ***see*** note 7 *supra*, which is precisely what the post-2001 NHTSA rulemaking documents demonstrate. Hence, we conclude the trial court did not abuse its discretion in granting Ford's motion in limine number three.

Next, related to the trial court's grant of Ford's motion *in limine* number nine, the Parrs contend that they should have been permitted to present statistical evidence prepared by NHTSA, the Insurance Institute for Highway Safety ("IIHS"), the National Center for Statistics and Analysis, Fatality Analysis Reporting System ("FARS"), and the National Automotive Sampling System ("NASS") concerning rollover fatalities involving Ford Excursions and other "comparable" vehicles. The Parrs assert that the trial court abused its discretion in granting Ford's motion *in limine* number nine to preclude post-2001 epidemiological studies and publications that demonstrated that 2001-2004 Ford Excursions had rollover driver and occupant death rates higher than comparable "large" and "extra-large" sport utility vehicles, on the basis that the Parrs could not satisfy the "substantially similar" test. The Parrs' Brief at 39.

Ford contends the trial court acted within its discretion in excluding the statistical studies because

they involved a wide variety of accidents, injuries, and vehicles. Ford asserts that because the Parrs failed to show the requisite similarity to the instant accident, the studies, and the statistics upon which they relied were not relevant within the meaning of Pa.R.E. 401.[12] Ford also avers that the studies were inadmissible hearsay and highly prejudicial. Finally, Ford counters that notwithstanding the trial court's ruling, the Parrs' counsel and experts presented many of these statistics to the jury.

The trial court stated the following regarding this issue:

> Appellants next argue that this court erred in granting Appellee's [sic] Motion in Limine No. 9 which sought to preclude any references during trial to statistical evidence of other dissimilar accidents. Both parties had an opportunity to argue this Motion *in Limine*

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[12] Pa.R.E. Rule 401(a) provides as follows:

Rule 401. Test for Relevant Evidence

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence. . . .

> While noting the rule is identical to F.R.E. 401, the comment to the Rule 401 states, in pertinent part: "Whether evidence has a tendency to make a given fact more or less probable is to be determined by the court in the light of reason, experience, scientific principles and the other testimony offered in the case." Pa.R.E. 401, cmt.

before this Court prior to trial. Appellants contend that this Court committed an error of law and/or abused its discretion when it granted Appellees' Motion in Limine No. 9. According to Appellants, this Court "altogether precluded Plaintiffs/appellants from offering statistical evidence prepared by NHTSA, The Insurance Institute for Highway Safety (IIHS), the Fatal Accident Reporting System, and/or the National Automotive Sampling System as to rollover fatalities involving the subject vehicle and comparable vehicles on the basis that Appellees were unable to prove that the statistics derived from other rollover accidents that [sic] were virtually identical to the one in the instant accident."

As [A]ppellants acknowledge, it was their burden, as the proponent of this evidence, to establish, to the court's satisfaction, the similarity between other accidents and the subject accident before this evidence could have been admitted for any purpose. ***Hutchinson v. Penske Truck Leasing Co.***, 876 A.2d 978 (Pa. Super. 2005). During argument before this Court, Appellants failed to show the required similarity between the subject accident and those contained within the statistical compilations. Notably, the IIHS reports, unlike the subject accident, involved fatalities. Appellants could not establish that the facts surrounding the accidents that comprised the statistical analysis they wished to introduce before the jury were substantially similar to those in the subject

> accident. As it was Appellants' burden, this Court found that they had not met their burden and granted Appellees' Motion to Preclude the Statistical Evidence.

Trial Court Opinion, 3/1/13, at 6-7. We agree with the trial court's conclusion that the Parrs failed to show that various expert reports and the relevant statistical studies and compilations upon which those reports relied were substantially similar to the instant case; thus, the trial court properly granted Ford's motion *in limine* number nine and circumscribed the evidence.

The Parrs were precluded from referencing (1) data compiled by IIHS, which contained fatality facts obtained from the FARS database; (2) IIHS evidence that compared mortality rates of Ford Excursions in rollover accidents to other large or extra-large sport utility vehicles from other manufacturers involved in rollover accidents; and (3) IIHS documents comparing roof strengths of various makes and models during rollover accidents. This Court has stated:

> Evidence of prior accidents involving the same instrumentality is generally relevant to show that a defect or dangerous condition existed or that the defendant had knowledge of the defect. However, this evidence is admissible only if the prior accident is sufficiently similar to the incident involving the plaintiff which occurred under sufficiently similar circumstances. The burden is on the party

> introducing the evidence to establish this similarity before the evidence is admitted.
>
> ***Lockley v. CSX Transp., Inc.***, 5 A.3d 383, 395 (Pa. Super. 2010) (citation omitted).
>
> "Determining whether and to what extent proffered evidence of prior accidents involves substantially, similar circumstances will depend on the underlying theory of the case advanced by the plaintiffs." ***Bitler v. A.O. Smith Corp.***, 400 F.3d 1227, 1239 (10th Cir. 2004). "If the evidence of other accidents is substantially similar to the accident at issue in a particular case, then that evidence will assist the trier of fact by making the existence of a fact in dispute more or less probable, and the greater the degree of similarity the more relevant the evidence." ***Id.*** "Naturally, this is a fact-specific inquiry that depends largely on the theory of the underlying defect in a particular case." ***Id.*** Accordingly, a wide degree of latitude is vested in the trial court in determining whether evidence is substantially similar and should be admitted. ***Lockley***, 5 A.3d at 395.

Blumer v. Ford Motor Co., 20 A.3d 1222, 1228-1229 (Pa. Super. 2011).

It is noteworthy, as well, that statistical compilations of accidents and studies that cite statistical compilations of accidents, must satisfy the substantial similarity test. ***Hutchinson v. Penske Truck Leasing Co.***, 876 A.2d 978 (Pa. Super. 2005). In ***Penske***, this Court rejected as "frivolous and illogical"

the claim that "expert reports do not constitute 'other accident' evidence because [the appellant] presented no single other accident to the jury but rather presented only the reports' conclusions from studies of hundreds of other accidents." ***Id.*** at 985. "To suggest, as [Mr.] Hutchinson does, that the underlying nature of this evidence of other accidents was transformed, merely because it was compiled, analyzed, and summarized to generate conclusions, defies both logic and common sense." ***Id.*** at 985-986.

It is clear that the Parrs were compelled to satisfy the substantial similarity test, and because they did not, the statistical compilations properly were excluded. Therefore, we agree with the trial court that the evidence in question did not meet the substantial similarity test. For example, the facts from the FARS database referenced by the Parrs included passenger vehicle **deaths** in frontal impacts and side impacts as well as rollovers, some involving single vehicle accidents and others occurring in multi-vehicle crashes. The Parrs' Brief at 38-39. Other publications and data the Parrs sought to admit reported mortality rates, roadway design, and roof strength evaluations of large luxury cars, large family cars, small pick-up trucks, with little or no mention of the specifics of each accident cited therein. ***Id.*** at 39-40. ***See, e.g.***, IIHS status report, "The Risk of Dying in One Vehicle Versus Another," Vol. 40, No. 3, March 19, 2005, the Parrs' Exhibit 13; the Parrs Brief at 39. The publications involved fatalities, not neck injuries, did not necessarily relate to Ford Excursions, and

failed to account for seat belt usage and other variables.

The record reflects that the Parrs did not present evidence as to the substantial similarity of the reports to the Excursion, the accident, or the circumstances in this case. Thus, none of the information in the reports was shown to be directly relevant to the Excursion and to the accident at issue. The Parrs made no attempt to demonstrate that the underlying accidents in the statistical compilations were substantially similar to the instant accident. The Parrs had the burden to prove substantial similarity, and they failed to carry the burden. ***Penske***.[13] The issue lacks merit.

The Parrs' final issue relates to whether the trial court committed an error of law and abused its discretion when it denied the Parrs' motion *in limine* number ten to preclude Ford from: (a) presenting evidence that the 2001 Excursion was not preserved and (b) obtaining a spoliation charge. Specifically, the Parrs contend the trial court erred in issuing a spoliation charge to the jury and in permitting extensive introduction of spoliation evidence where Ford was

[13] Despite the grant of Ford's Motion *in Limine* No. 9, the trial court permitted the Parrs to cross-examine Ford's experts with statistics and studies. ***See, e.g.***, N.T., 3/8/12 (Morning Session), at 49-56 (use of NASS studies); N.T., 3/15/12 (Afternoon Session), at 42-48 (use of NASS studies); N.T., 3/16/12 (Morning Session), at 124-125 (FARS data); N.T., 3/19/12 (Morning Session), at 4-6, 17-19 (use of IIHS data, use of NASS studies).

unable to demonstrate any prejudice that resulted from the destruction of the 2001 Excursion.

Ford proffers that the trial court's decision to instruct the jury that it could infer that the Excursion contained evidence unfavorable to the Parrs was within the court's broad discretion. The Parrs stipulated that they failed to preserve the vehicle even though they had ample opportunity to do so after retaining counsel. Thus, Ford never had the chance to examine the vehicle, and Ford's experts explained how the vehicle's absence negatively impacted their analyses. Ford maintains that any error in this regard was harmless because the Parrs asserted that the excluded evidence would have aided their case on causation, but the jury did not reach causation in returning a defense verdict. Thus, Ford responds that the Parrs cannot show that the trial court committed an error of law that controlled the outcome of the case.

The trial court resolved this issue as follows:

> This Court initially deferred ruling on the motion. However, prior to making a decision this Court did permit appellee, Ford, to introduce facts about the unavailability of the vehicle and its impact on the experts' investigation into the cause of the accident and the injuries sustained by the occupants. As such, [A]ppellants' counsel during cross-examination of [A]ppellees' experts called into question their opinions and conclusions, based upon the fact that the subject vehicle was not available for them to examine and inspect.

> Further, at trial the parties stipulated as to the facts surrounding the unavailability of the vehicle. Notably, [A]ppellants stipulated that two weeks after the accident and after hiring counsel, they released the vehicle to their insurance company who in turn sold the vehicle which was then destroyed. Appellants further stipulated that they did not attempt to locate the vehicle until after it had been destroyed and that appellees were not notified of legal action until after the vehicle was [destroyed].
>
> In light of the above stipulation and arguments and briefs of counsel, this Court denied [A]ppellants' Pre-trial Motion to Preclude and accordingly allowed the jury to make whatever conclusions it deemed proper. Accordingly, this Court gave a permissive adverse inference instruction to the jury, instructing that it could, but was not required to, draw a negative inference against appellants from the destruction and thus absence of the subject vehicle. Clearly appellants, despite their hiring of counsel and their knowledge of their pursuit of a legal action resulting from the accident, transferred the subject vehicle out of their possession resulting in it being subsequently destroyed, thereby preventing appellees from having the vehicle inspected so as to properly defend themselves from [A]ppellants' allegations.

Trial Court Opinion, 3/1/13, at 7-8.

"Spoliation of evidence" is the failure to preserve or the significant alteration of evidence for pending or future litigation. ***Pyeritz v. Commonwealth***, 32 A.3d 687, 692 (Pa. 2011). "When a party to a suit has been charged with spoliating evidence in that suit (sometimes called "first-party spoliation"), we have allowed trial courts to exercise their discretion to impose a range of sanctions against the spoliator." ***Id.*** (citing ***Schroeder v. Commonwealth, Department of Transportation***, 710 A.2d 23, 27 (Pa. 1998)) (footnotes omitted). This Court has stated:

> "When reviewing a court's decision to grant or deny a spoliation sanction, we must determine whether the court abused its discretion." ***Mount Olivet Tabernacle Church v. Edwin L. Wiegand Division***, 781 A.2d 1263, 1269 (Pa. Super. 2001) (citing ***Croydon Plastics Co. v. Lower Bucks Cooling & Heating***, 698 A.2d 625, 629 (Pa. Super. 1997) (recognizing that "[t]he decision whether to sanction a party, and if so the severity of such sanction, is vested in the sound discretion of the trial court")). Such sanctions arise out of "the common sense observation that a party who has notice that evidence is relevant to litigation and who proceeds to destroy evidence is more likely to have been threatened by that evidence than is a party in the same position who does not destroy the evidence." ***Mount Olivet***, 781 A.2d at 1269 (quoting ***Nation-Wide Check Corp. v. Forest Hills Distributors, Inc.***, 692 F.2d 214, 218 (1st Cir. 1982)). Our courts have

recognized accordingly that one potential remedy for the loss or destruction of evidence by the party controlling it is to allow the jury to apply its common sense and draw an "adverse inference" against that party. ***See Schroeder v. Commonwealth of Pa., Dep't of Transp.***, 551 Pa. 243, 710 A.2d 23, 28 (1998). Although award of summary judgment against the offending party remains an option in some cases, its severity makes it an inappropriate remedy for all but the most egregious conduct. ***See Tenaglia v. Proctor & Gamble, Inc.***, 737 A.2d 306, 308 (Pa. Super. 1999) ("Summary judgment is not mandatory simply because the plaintiff bears some degree of fault for the failure to preserve the product.").

To determine the appropriate sanction for spoliation, the trial court must weigh three factors: [14]

> (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously

[14] While our review suggests the trial court has not explained its decision in light of the weight of these factors, the Parrs do not state their issue in such a manner, and we are able to evaluate the issue despite the lack of the trial court's analysis.

> at fault, will serve to deter such conduct by others in the future.

Mount Olivet, 781 A.2d at 1269-70 (quoting ***Schmid v. Milwaukee Elec. Tool Corp.***, 13 F.3d 76, 79 (3d Cir. 1994)). In this context, evaluation of the first prong, "the fault of the party who altered or destroyed the evidence," requires consideration of two components, the extent of the offending party's duty or responsibility to preserve the relevant evidence, and the presence or absence of bad faith. ***See Mt. Olivet*****,** 781 A.2d at 1270. The duty prong, in turn, is established where: "(1) the plaintiff knows that litigation against the defendants is pending or likely; and (2) it is foreseeable that discarding the evidence would be prejudicial to the defendants." ***Id.*** at 1270-71.

Creazzo v. Medtronic, Inc., 903 A.2d 24, 28-29 (Pa. Super. 2006).

The record reveals that there is no dispute that the Parrs were responsible for the destruction of the Excursion and thus, were at fault. The stipulation concerning the destruction of the vehicle was as follows:

> Two days after the accident, on July 23, 2009, Mr. Parr took pictures of the subject Excursion while it was in storage at a nearby towing company.
>
> The Parrs retained [counsel] on August 4, 2009.

> On August 4, 2009, Mr. Parr released the Ford Excursion to Progressive Insurance Company.
>
> On August 27, 2009, [the Parrs] signed off on the title for the subject vehicle as a total loss.
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> The Excursion was sold on September 21, 2009, and, thereafter, destroyed by the purchaser.
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> [The Parrs] and their counsel did not attempt to locate the subject vehicle until October 9, 2009.
>
> [The Parrs] initiated this action by filing a complaint on January 5, 2010.
>
> No notice was given to Ford Motor Company or McCafferty Ford Sales of pending legal action prior to the date the vehicle was disposed of.
>
> No notice or opportunity to inspect the vehicle was given to Ford Motor Company or McCafferty Ford Sales prior to the date the vehicle was disposed of.

N.T., 3/15/12 (Morning Session), at 30-31.

We examine the factors to determine whether the trial court properly denied the Parrs' motion *in limine* number ten and chose the appropriate sanction to impose. Clearly, the Parrs alone had the capacity to preserve the Excursion given the fact that they hired counsel six to seven weeks before the vehicle's destruction. It was "foreseeable that discarding the

evidence would be prejudicial to the defendants," ***Mt. Olivet Tabernacle Church v. Edwin L. Wiegand Div.***, 781 A.2d 1263, 1271 (Pa. Super. 2001), because Mr. Parr took photographs of the vehicle two days after the accident, indicating that he recognized the vehicle's value as evidence.

Second, Ford clearly was prejudiced by the Excursion's destruction.[15] Multiple expert witnesses stated that their analyses would have been aided by examination of the vehicle. Even the Parrs' expert Dr. Geoffrey Germane testified, "[I]n a rollover crash, the vehicle is the best witness. It contains information about the rollover that might not be otherwise available." N.T., 3/15/12 (Morning Session), at 57. Furthermore, on cross-examination Ford expert Dr. Catherine Ford stated, "I can't say, unfortunately, exactly where [April Parr] impacted because we don't have the vehicle." N.T., 3/19/12 (Afternoon Session), at 17. Ford expert Dr. Harry Lincoln Smith testified that he "would have liked to" examine the Excursion,

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[15] We reject the Parrs' suggestion that they did not have an advantage over Ford because their experts similarly did not examine the Excursion. While no Pennsylvania case has stated as much, we underscore our agreement with other jurisdictions that a spoliator cannot avoid sanctions by arguing "he has been prejudiced by his own dereliction." ***Lord v. Nissan Motor Co., Ltd.***, 2004 WL 2905323 (D.Minn. Dec. 13, 2004); ***see also Trull v. Volkswagen of America, Inc.***, 187 F.3d 88, 95-96 (1st Cir. 1999) (rejecting the plaintiffs' arguments that the defendants were not unfairly disadvantaged because the plaintiffs' experts also could not examine the subject vehicle).

which was necessary in "making a complete analysis." ***Id.*** at 96.

Finally, the trial court had a range of sanctions from which to choose once it decided to impose one. Ford had requested that the trial court grant summary judgment as a sanction for the Parrs' destruction of the Excursion. Although the award of summary judgment against an offending party remains an option in some cases, its severity makes it an inappropriate remedy for all but the most egregious conduct. ***See Tenaglia v. Proctor & Gamble, Inc.***, 737 A.2d 306, 308 (Pa. Super. 1999) ("Summary judgment is not mandatory simply because the plaintiff bears some degree of fault for the failure to preserve the product."). Indeed, "dismissal of a complaint or preclusion of evidence regarding an allegedly defective product is an extreme action reserved only for those instances where an entire product or the allegedly defective portion of a product is lost, spoiled or destroyed." ***Mensch v. Bic Corp.***, 1992 WL 236965, at 2 (E.D.Pa. Dec. 17, 1992) (emphasis added); ***Woelfel v. Murphy Ford Co.***, 487 A.2d 23 (Pa. Super. 1985).

In the instant case, the trial court chose to charge the jury that it was permitted, although not required, to draw an adverse inference against the Parrs for destruction of the Excursion, which was the least severe of the possible sanctions. ***See Schroeder***, 710 A.2d at 28. The Parrs do not, and cannot, dispute that the permissive adverse inference instruction is a lesser sanction than outright dismissal or the grant of

summary judgment. ***See Schroeder***, 710 A.2d at 28 (instructing that "lesser sanction such as a jury instruction on the spoliation inference is warranted"). The trial court did not err in giving the lesser sanction of an adverse inference instruction.

Having concluded that the trial court did not abuse its discretion in any of the evidentiary rulings identified by the Parrs, and for the above stated reasons, the judgment in favor of Ford must be affirmed.

Judgment affirmed.

President Judge Emeritus Ford Elliott, President Judge Emeritus Bender, Judge Bowes, Judge Allen, Judge Stabile and Judge Jenkins join the Opinion.

Judge Wecht files a Concurring Opinion in which Judge OTT joins. Judgment Entered.

/s/ Joseph D. Seletyn
Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/22/2014

CONCURRING OPINION BY WECHT, J.:

FILED DECEMBER 22, 2014

It is a venerable, if somewhat time-worn, aphorism that hard cases make bad law. Thus, when confronted with a "hard" case that might be resolved on narrow grounds, it is prudent to rule no more broadly

than necessary. It is out of this concern that I depart to varying degrees from the learned majority's reasoning on three of the four issues before us, although, for the reasons set forth below, I join the majority's affirmance of the judgment entered by the trial court.

To begin, I join the majority's rejection of Joseph and April Parr's claim, presented on appeal as their first issue, that the trial court erred or abused its discretion in admitting evidence submitted by Ford Motor Company ("Ford") in support of its "diving/torso augmentation" theory of causation. Notwithstanding the Parrs' strenuous argument to the contrary,[1] there is an ongoing debate among experts regarding whether and to what extent "diving," "torso augmentation," and "roof crush" may be responsible in a given rollover accident for severe injuries and death. Where qualified experts venture competing theories, each to a reasonable degree of scientific certainty based upon information and analyses regularly relied upon by their scientific communities, the jury, not the court, must resolve the disagreement. ***See generally Rose v. Hoover***, 331 A.2d 878, 880 (Pa.

[1] ***See*** Brief for the Parrs at 26 ("Although [the National Highway and Transportation Safety Administration's] 'roof crush' theory versus the [automobile] industry's 'diving/torso augmentation' theory was a heavily contested issue for years prior to 2001, the year of the [Ford] Excursion's manufacture, in 2009, NHTSA determined once and for all that 'roof crush' and not 'diving/torso augmentation' was a potential cause of head and neck injuries – such as those sustained by Mrs. Parr – among belted occupants in rollover accidents." (emphasis omitted)).

Super. 1974) ("Once the court is satisfied that a basis in fact exists for the expert opinion, it is for the jury to determine the weight of the evidence.").

In their second issue, the Parrs contend that the trial court abused its discretion in granting Ford's motion *in limine* to exclude studies and data associated with rule-making by the National Highway and Transportation Safety Administration ("NHTSA") concerning vehicle roof strength standards that post-dated the date of manufacture of the 2001 Ford Excursion at issue in this case. The trial court, noting that post-manufacture standards have no bearing on the determination whether a given product is defective for purposes of a products liability claim, deemed the post-2001 proceedings leading up to the 2009 amendment to the Federal Motor Vehicle Safety Standard[2] irrelevant and excludable as such. ***See*** Trial Court Opinion ("T.C.O."), 3/1/2013, at 4-5; ***Duchess v. Langston Corp.***, 769 A.2d 1131, 1142 (Pa. 2001) ("[P]roducts are to be evaluated at the time of distribution when examining a claim of product defect.").

Before this Court, however, the Parrs do not contend that they sought the admission of this evidence for purposes of establishing a product defect. Rather, they contend that they sought to introduce the post-2001 rule-making proceedings to establish

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[2] ***See*** Federal Motor Vehicle Safety Standards; Roof Crush Resistance; Phase-In Reporting Requirements, 74 Fed.Reg. 22348 (May 12, 2009).

that roof crush, rather than diving/torso augmentation, caused Mrs. Parr's catastrophic injuries in this case, as well as to impeach Ford's witnesses who maintained otherwise. Brief for the Parrs at 34-36. They further assert that this evidence was admissible to establish the foundation for their causation experts' opinions. ***Id.*** at 36-37.

The majority recites a litany of bases upon which to reject the Parrs' arguments.[3] First, the majority notes the limited utility of this evidence for purposes of impeaching Ford's experts' attribution of Mrs. Parr's injuries to diving/torso augmentation, because Ford's experts conceded that roof crush may contribute to injury in certain cases. Maj. Op. at 23 (citing testimony). Because the majority finds – and I agree – that the documents in question reflected only NHTSA's conclusion that "roof crush is one of several potential causes of injury in rollover accidents," ***id.***, albeit perhaps in stronger terms than NHTSA previously had used,[4] and that Ford's experts admitted as much, "the documents in question did not make the

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[3] The majority reaffirms the trial court's rejection of this evidence for the purpose of establishing the defectiveness of the Ford Excursion when it left Ford's possession. Maj. Op. at 22-23. Because the Parrs do not pursue this issue on appeal, this commentary is *dicta*, albeit *dicta* based upon sound and settled law.

[4] ***See*** 74 Fed. Reg. at 22379 ("[NHTSA] believes that the statistically significant relationship between roof intrusion and belted occupant injury . . . indicates not just a suggestion, but a probability that increasing roof strength reduces injury.").

existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." ***Id.*** (citing Pa.R.E. 401 ("Test for Relevant Evidence")).

The majority also seems to assert that the Parrs successfully put the post-2001 rule-making before the jury in any event. ***Id.*** However, the majority's citations in support of that proposition do not sustain it. For example, the majority cites a passage from the Parrs' cross-examination of defense expert Michael Leigh, but the only NHTSA-related question posed to Leigh in the cited passage was as follows: "Do you not agree that all of the studies of NHTSA, all of the studies of academia, all of the studies except the ones where GM or Ford engaged the people [who] said that this is wrong, all of the studies say that; do they not?" **See** Notes of Testimony ("N.T."), 3/7/2012 (morning), at 63. Nothing about the context or wording of this question suggests that the Parrs were confronting Leigh with post-2001 data or studies. Similarly, the majority's citation of the testimony of Catherine Corrigan, Ph.D., on cross-examination concerned references to NHTSA findings in a 1995 article, which could not have invoked post-2001 NHTSA data or proceedings. ***See*** N.T., 3/19/2012 (afternoon), at

30-36.[5,6] More saliently, the majority observes that the excluded evidence ultimately was cumulative to the frequent and repeated introduction in impeachment of pre-2001 NHTSA findings that tended to support a causal connection between roof crush and serious injury, albeit in less affirmative terms than NHTSA used in connection with its 2009 amendment to Rule 216. Maj. Op. at 23-24 (citing testimony).

Finally, the majority correctly notes that the erroneous exclusion of admissible evidence requires relief only when the exclusion causes the complaining party prejudice. ***Id.*** at 24 (citing ***Winschel v. Jain***, 925 A.2d 782, 794 (Pa. Super. 2007)). The majority concludes that any error in this instance was harmless because the evidence in question pertained to causation, but the jury, having concluded that the 2001 Ford Excursion was not defective, never reached the question of what caused Mrs. Parr's injuries. ***See id.***

It is this last aspect of the majority's ruling that troubles me most. While the multifactorial framework

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[5] During the cited colloquy, the Parrs did refer to 2007 and 2008 studies, but those are distinct from the categorically excluded NHTSA rule-making evidence. I discuss non-NHTSA studies published after 2001 in connection with the Parrs' third issue, *infra*.

[6] The majority also cites in support of this claim comments in the Parrs' closing argument. Argument is not evidence. Accordingly, such comments are no substitute for evidence that is excluded improperly.

for establishing a strict products liability claim[7] is an important tool in giving shape to the plaintiff's burden of proof, the line between defect and causation sometimes blurs. For example, if the Parrs could establish that the overwhelming majority of rollover injuries and fatalities in other Ford Excursions arise from roof crush rather than diving/torso augmentation, and if the death or injury rate for Ford Excursions in accidents similar to the accident at bar was substantially higher than it is for other comparable vehicles, that might militate in favor of a finding of product defect. Thus, the validity of such evidence sometimes will affect the defect determination, even if it is presented nominally in support of causation. I would not say that an erroneous exclusion of such evidence, even if ventured primarily to establish causation, is harmless as a matter of law simply because the jury, faced with the evidence actually admitted at trial and ignorant of the evidence excluded, determined that the Excursion was not defective.

That being said, the entwinement of these considerations in a case like this raises countervailing concerns of particular application to this case. Pennsylvania Rule of Evidence 403 provides that "[t]he court may exclude relevant evidence if its probative value is outweighed by a danger of one or more of the

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[7] ***See*** Maj. Op. at 7 ("In order to prevail in . . . a product liability case, the plaintiff must establish: (1) that the product was defective; (2) that the defect existed when it left the hands of the defendant; and (3) that the defect caused the harm.").

following: unfair prejudice, confusing the issues, misleading the jury, . . . or needlessly presenting cumulative evidence." This Court has acknowledged that the probative value of prior accident evidence "is tempered by judicial concern that the evidence may raise collateral issues, confusing both the real issue and the jury." ***Whitman v. Riddell***, 471 A.2d 521, 523 (Pa. Super. 1984) (citing ***Stormer v. Alberts Constr. Co.***, 165 A.2d 87, 89 (Pa. 1960)); ***cf. Mt. Olivet Tabernacle Church v. Edwin L. Wiegand Div.***, 781 A.2d 1263, 1275 (Pa. Super. 2001) (acknowledging the possibility that "an open-ended argumentative exploration of possible similar incidents will confuse the jury and prejudice the defendant"). Moreover, other jurisdictions' case law and common sense soundly suggest that the introduction of government findings and standards may have an outsized prejudicial effect on a jury's deliberations with respect to the issues to which the evidence pertains. ***See*** Brief for Ford at 29 (citing ***City of New York v. Pullman***, 662 F.2d 910, 915 (2d Cir. 1981); ***Cover v. Cohen***, 61 N.Y.2d 261, 272 (N.Y. 1984)). Finally, because the governing standards require a plaintiff to establish that the allegedly defective product was defective at the time the manufacturer relinquished that product, evidence of post-manufacture standards and laws is not relevant to the question of design defect. ***See Duchess***, 769 A.2d at 1142. Consequently, the admission of NHTSA's post-2001 rule-making might have confused and unduly swayed the jury on the question of product defect, even if the trial court directed the jury to weigh NHTSA's conclusions only in considering

causation. Furthermore, the potential for prejudice would be considerable.

Conversely, while NHTSA's 2009 rule was based upon a stronger conclusion than it previously had reached regarding the correlation of roof crush and serious injury, it was not novel to NHTSA. As evinced by the very promulgation of roof strength standards nearly thirty years earlier, by 2001, NHTSA effectively had maintained for decades that mitigation of roof crush would reduce the risk of injury in rollover accidents. The Parrs undisputedly were allowed to introduce evidence of NHTSA's pre-2001 analyses and rule-making on this topic, an opportunity of which they availed themselves repeatedly. ***See*** Maj. Op. at 23-24 (citing various instances of the Parrs' reliance in cross-examination on pre-2001 NHTSA commentary). Furthermore, Ford's experts conceded that roof crush could cause or contribute to serious injuries in certain rollover accidents. Thus, while the evidence in question would be highly prejudicial, its probative value in support of causation would be quite limited.

While by and large I agree with the majority's reasoning, I believe that it is insufficiently sensitive to the complex balance of probative value and prejudicial effect such evidence may present in certain cases, including in this one. Thus, I believe that it is neither necessary nor advisable to opine that this evidence's exclusion was harmless as a matter of law. However, because the thrust of nearly thirty years of NHTSA discussions of the likely correlation between roof crush and injury was set before the jury and

Ford's expert witnesses acknowledged that roof crush might cause injury in certain circumstances, the jury was aware of the data and arguments supporting the Parrs' roof crush theory of causation. Measured against the risk of prejudice highlighted above, and viewed in light of our considerable deference to trial courts' evidentiary rulings, ***see Keystone Dedicated Logistics, LLC v. JGB Enters., Inc.***, 77 A.3d 1, 11 (Pa. Super. 2013), I cannot conclude that the trial court abused its discretion in excluding this evidence. Consequently, I would avoid the question of harmlessness, which need not be reached to affirm the ruling in this case, thus avoiding any risk that the concept might be applied too broadly in a future case.

The Parrs' third and related issue concerns the trial court's order granting Ford's motion *in limine* number 9. Therein, Ford maintained that the Parrs' expert reports "rely on . . . statistical studies and compilations involving motor vehicle accident data to reach conclusions that the subject Excursion . . . caused [the Parrs'] injuries. . . . [E]ach of these statistical studies is irrelevant and inadmissible [because the Parrs] cannot show that each [underlying] accident occurred under substantially similar circumstances as the Parr accident." Memorandum of Law in Support of Ford's Motion *in Limine* No. 9 at 3-4. As well, Ford urged the trial court to find that, even if relevant, the experts' supporting studies and datasets were so prejudicial in effect as to eclipse their probative value. ***See*** Pa.R.E. 403.

The majority provides an accurate account of the relevant law. ***See*** Maj. Op. at 28-30. For my purposes, it suffices to say that the proponent of prior accident evidence bears the burden of establishing that the prior accident or accidents are substantially similar to the accident at issue. ***See Blumer v. Ford Motor Co.***, 20 A.3d 1222, 1228 (Pa. Super. 2011). "It is not a matter of finding exact similarity between the incidents, but some similarity must be shown to prevent speculation." ***Harkins v. Calumet Realty Co.***, 614 A.2d 699, 705 (Pa. Super. 1992). Under Pennsylvania law, this burden applies equally whether the evidence in question consists of a single accident or a statistical compilation of accidents. ***See Hutchinson v. Penske Truck Leasing Co.***, 876 A.2d 978, 985-86 (Pa. Super. 2005). Furthermore, in ***Hutchinson***, this Court held that the proponent must establish the substantial similarity of the accidents underlying a compilation to the accident *sub judice* regardless of whether it is submitted to establish the existence or notice of a defect or causation. ***Id.*** at 985 (citing ***Spino v. John S. Tilley Ladder Co.***, 671 A.2d 726, 735 (Pa. Super. 1996)). In ***Hutchison***, we found reversible error where the trial court admitted prior accident evidence, ostensibly to establish the defendant's state of mind for purposes of punitive damages, where the plaintiff failed to establish substantial similarity of the prior accident evidence. ***Id.*** at 985-86; ***see also generally Majdic v. Cincinnati Mach. Co.***, 537 A.2d 334, 341 (Pa. Super. 1988). Therefore, the Parrs have no obvious source of relief for their

burden of establishing the requisite similarity, which I would find that the Parrs did not meet.

In their opposition to Ford's motion *in limine*, the Parrs were vague about precisely what studies and data compilations they wished to admit. More importantly, they never expressly sought to establish with particularity that each study and data compilation was compiled from accidents that were substantially similar to their own. Instead, they adopted a somewhat dubious interpretation of the deposition testimony of one of Ford's expert witnesses in another case as evidence that Ford somehow had conceded that "there is a direct relationship between the amount of roof crush and the risk of serious head, face, and neck injuries in rollover crashes," a proposition that, in any event, did not establish substantial similarity. The Parrs' Memorandum of Law in Opposition to Ford's Motion *in Limine* No. 9 at 5 (quoting deposition of Jeff Croteau, in which he appears to agree that there is a correlation between a "higher degree of roof collapse" and "a higher degree of head injury," but rejects the inference of causation between roof crush and injury exacerbation). Later, the Parrs argued that the evidence was admissible in the alternative to provide the foundation for their experts' opinions, ***see*** Pa.R.E. 703, or for purposes of impeachment of the credibility of Ford's expert witnesses, ***see*** Pa.R.E. 607(b). ***See*** The Parrs' Memorandum of Law in Opposition to Ford's Motion *in Limine* No. 9 at 8-9. However, the Parrs never made a case for the substantial similarity of the accidents underlying any

one study or data compilation. Oral argument on the parties' motions *in limine* brought no more information pertinent to the substantial similarity inquiry. In short, the Parrs failed to do before the trial court – and largely fail to do before this Court – what the law obliged them to do in order to rebut Ford's assertion that these studies were inadmissible for want of sufficient similarity.

As a rule, arguments not materially preserved in the trial court are beyond our purview. ***See*** Pa.R.A.P. 302(a); ***cf. Commonwealth v. May***, 584 Pa. 640, 887 A.2d 750, 761 (2005) ("The absence of contemporaneous objections renders . . . claims waived."); ***Commonwealth v. Baumhammers***, 960 A.2d 59, 73 (Pa. 2008) (deeming the absence of contemporaneous objections to constitute waiver notwithstanding the appellant's claim that the issues in question were raised before trial). Furthermore, while the Parrs asserted in their post-trial motion their general contention that the trial court improperly and categorically excluded post-2001 studies and compilations of data, they again failed to identify with particularity each study or data compilation **and** a basis upon which the trial court reasonably could find that the substantial similarity test was satisfied. This, too, constitutes waiver. ***See*** Pa.R.C.P. 227.1; ***Phillips v. Lock***, 86 A.3d 906, 918 (Pa. Super. 2013) (deeming waived for purposes of appeal issues that were not objected to at trial or raised in post-trial motions).

The majority so holds, but in doing so it arguably makes substantive conclusions about the evidence in

question, notwithstanding the waiver consideration that, elsewhere, the majority seems to find dispositive. ***See*** Maj. Op. at 30-31. In particular, the majority, like the trial court, seems to put a great deal of stock in the distinction between accident fatalities and the accident in question. ***See id.*** at 30; T.C.O. at 6-7. I would not suggest that such a distinction, standing alone, warrants a finding that a study is not sufficiently similar to be admitted, and it troubles me that the majority's opinion may, in a later case, be cited for that proposition. Whether a given injury leads to death (as was true in at least some of the compilations at issue) or quadriplegia (as is true in this case) may reflect a difference of degree rather than one of kind in the product defect and events that caused the injury. In this case, Mrs. Parr suffered a severed spinal cord. Certainly, a small difference in the kinematics of the injury could have resulted in fatal injury arising from a similar or identical mechanism, which, in turn, might support a finding of substantial similarity, provided other factors, too, pointed to that conclusion.[8]

Because I believe that the Parrs barely even tried to establish the substantial similarity of the studies and data compilations in this case, I would not reach the merits of their challenge to the trial court's substantive findings as to substantial similarity. I would

[8] In fairness to the majority, it notes other gaps in the Parrs' showing that the trial court did not address. Nonetheless, these unnecessary analyses, too, might provide bases for questionable rulings in future cases.

reject the Parrs' argument solely because they waived it. Accordingly, the details of the parties' dialogue with the trial court on the issue, as well as the trial court's own reasoning, are immaterial to this appeal. The Parrs simply failed to make the showing necessary to establish a basis for such a detailed review of the studies. I would deny relief strictly on that basis.

Finally, following considerable deliberation, I join the majority's ruling rejecting the Parrs' challenge to the trial court's decision to issue a permissive adverse inference instruction based upon the Parrs' alleged spoliation of the evidence, albeit with one reservation. The majority notes that the governing standard in determining whether a spoliation sanction is warranted requires the trial court to determine, *inter alia*, the degree of fault of the party who rendered the evidence unavailable and the degree of prejudice suffered by the opposing party arising from the unavailability of the evidence. Fault is determined by examining the alleged spoliator's duty to preserve the evidence and the presence or absence of bad faith. Finally, duty is established where the party responsible for the evidence knows that litigation is pending or likely and it is foreseeable that discarding the evidence would prejudice the defendants. ***See*** Maj. Op. at 34 (quoting ***Creazzo v. Medtronic, Inc.***, 903 A.2d 24, 28-29 (Pa. Super. 2006)).

The majority contends that "there is no dispute that the Parrs were responsible for the destruction of the Excursion and[,] thus, were at fault." ***Id.*** at 35.

However, this conclusion skips a critical analytic step in imputing fault to a party accused of failing to preserve evidence material to litigation. ***Cf. Eichman v. McKeon***, 824 A.2d 305, 314-15 (citing ***Baliotis v. McNeil***, 870 F.Supp. 1285, 1290 (M.D.Pa. 1994) for the proposition that "a component of fault is the presence or absence of good faith"). While it is undisputed that the Parrs relinquished the Excursion to their insurance company, it is not clear what, if any, representations or demands were made by the insurance company or by the Parrs or their counsel. Even if this does not implicate their legal duty, it certainly implicates the determination whether the Parrs acted in bad faith, an explicit element of the test for fault.

That modest reservation aside, I believe that our Supreme Court's decision in ***Schroeder v. Commonwealth, Dep't of Transp.***, 710 A.2d 23 (Pa. 1998), requires affirmance. In that strict products liability case, unlike in this case, the record indicated that plaintiff's counsel had made arrangements to preserve the damaged vehicle, agreeing to remit a storage fee to the company that salvaged the vehicle. Only later, the plaintiff released title to the insurance company. Thereafter, the insurer released title to the salvage company, which then disposed of the vehicle before certain experts could examine it, despite the pending litigation. ***Id.*** at 24-25. Our Supreme Court ruled that the trial court and Commonwealth Court had erred in granting summary judgment, the most extreme sanction for spoliation, and a ruling that reflected the trial court's finding of bad faith. However,

the Court directed that, on remand, the trial court provide an adverse inference instruction to the jury based upon the plaintiff's failure to preserve evidence that was manifestly material to their claims. ***Id.*** at 28. Given that the Supreme Court **compelled** the administration of such a jury instruction under circumstances where fault was no more clearly – and perhaps less clearly – established than in this case, thereby implicitly affirming the trial court's finding of bad faith, it would be incongruous to intrude upon the trial court's discretionary determination that such an instruction was called for in this case. Hence, like the majority, I would uphold the trial court's decision in this regard.

Judge Ott joins this concurring opinion.

Judgment Entered.

/s/ Joseph D. Seletyn
Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/22/2014

**IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT
OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

JOSEPH AND APRIL PARR, H/W, Individually and as Parents and Natural Guardians of SAMANTHA PARR	:	**DECEMBER TERM, 2009**
Plaintiffs	:	**NO. 2893**
v.	:	
FORD MOTOR COMPANY, ET AL.	:	**SUPERIOR COURT NO. 2793 EDA 2012**
Defendants	:	

OPINION

PAUL P. PANEPINTO, JUDGE, MARCH 1, 2013:

Plaintiffs/Appellants appeal this Court's Order of August 30, 2012, which denied Plaintiff's Motion for Post-Trial Relief and Entered Judgment in favor of Defendants and against Plaintiffs.

PROCEDURAL AND FACTUAL BACKGROUND

This crashworthiness action arises out of a two car motor vehicle accident that occurred on July 21, 2009. Plaintiffs were occupants of a 2001 Ford Excursion vehicle that was struck by another vehicle causing it to strike a guardrail and subsequently roll over

down a steep embankment. At the time of the accident, Joseph Parr was operating the subject vehicle and his wife, April Parr and daughter, Samantha Parr were occupants of the vehicle. Both April Parr and Samantha Parr were injured. April Parr sustained the more serious injury, namely, a spinal cord injury which resulted in quadriplegia.

Plaintiffs filed suit against defendants alleging, inter alia, that the roof and restraint system of the 2001 Ford Excursion were defectively designed. More specifically, Plaintiffs contended that plaintiff, April Parr's spinal injuries resulted from a roof crush. Of significance is the fact that following the accident, the subject vehicle was destroyed, prior to any expert being able to examine or inspect the vehicle.

Trial began in this matter on March 3, 2012 and concluded on March 23, 2012 with a jury verdict in favor of defendants, finding that Plaintiffs failed to prove that defendants were liable under both Strict Products Liability and Negligence theories. Plaintiffs timely filed Post-Trial Motions for a New Trial, which were Denied by this Court pursuant to an Order dated August 30, 2012. On September 10, 2012, Plaintiffs appealed the Order of this Court denying their Post-Trial Motions. On September 19, 2012 this Court entered an Order pursuant to PA R.C.P, 1925(b) requiring Plaintiffs to file a concise Statement of Errors Complained of On Appeal, Plaintiffs timely filed their 1925(b) statement and this opinion follows.

ALLEGATIONS OF ERROR

Plaintiffs' Rule 1925(b) statement raises the following four (4) issues on appeal:

1. **The Trial Court committed an error of law and/or abused its discretion when it denied Plaintiffs'/Appellants' Motion in Limine No. I to preclude Defendants/ Appellees from presenting evidence of their "diving," "torso augmentation," theory, which was discredited and superseded by the National Highway Traffic Safety Administration (NHTSA)'s Final Rule dated May 12, 2009.**

2. **The Trial Court committed an error of law and/or abused its discretion when it granted Defendants'/Appellees' Motion in Limine No. 3 to preclude references to NHTSA standards and rulemaking documents dated 2001 to present, on the basis that the subject vehicle was originally manufactured and sold in 2011(sic).**

3. **The Trial Court committed an error of law and/or abused its discretion when it granted Defendants'/Appellees' Motion in Limine No. 9 and altogether precluded Plaintiffs/appellants from offering statistical evidence prepared by NHTSA, The In]surance Institute for Highway safety (IIHS), the Fatal Accident Reporting System, 10and/or (sic) the National Automotive Sampling System as to rollover fatalities involving the subject**

vehicle and comparable vehicles on the basis that Plaintiffs/Appellees (sic) were unable to prove that the statistics derived from other rollover accidents that were virtually identical to the one in the instant accident.

4. **The Trial Court committed an error of law and/or abused its discretion when it denied Plaintiffs'/Appellants' Motion in Limine to preclude Defendants/ Appellees from (a) presenting – and consequently filling the record with – evidence that the subject vehicle was not preserved; and (b) seeking a spoliation charge when the Defendants/ Appellees suffered no prejudice resulting from the vehicle's destruction.**

DISCUSSION

Appellants first argue that this court erred in denying their Motion in Limine No. 1 which sought to preclude appellees from introducing at trial any evidence of their 'Diving' or Torso Augmentation Theory. Appellants also had an opportunity to argue their Motion in Limine No. 1 before this Court prior to trial. This Pre-trial Motion No. 1 had contended that appellant, April Parr's quadriplegic injuries had to have been caused by a roof crush and not by 'diving.' Appellees had argued that April Parr's injuries resulted from 'torso augmentation' or 'diving' which occurred when April Parr's torso, loading her neck as her head, which was against the roof of the vehicle

due to centrifugal force generated in the rollover accident, at the moment the roof struck the ground. Appellees contented [sic] that automobile roofs do not significantly deform or crush in rollover accidents until after the occupants have already 'dived' into the roofs and incurred their injuries. Appellants contended that the National Highway Safety Administration's (NHTSA) engineers and statisticians had discredited appellees' 'diving' theory as to the cause of April Parr's injuries.

Accordingly. Appellants contended at trial that this Trial Court should give deference to NHSTA as an administrative body and therefore preclude appellees from introducing at trial any evidence of 'diving' to support their defense of this product liability causes of action brought against them by appellees. However, upon review of the documentation provided to the Court to support their motion, notably, the 2009 Amendment to the FMVSS (Federal Motor Vehicle Safety Standard) although suggestive of appellants' argument, failed to convince this Court that either of their arguments were meritorious. First, although the 2009 Amendment did cite statistical studies which found a correlation between roof crush and injury in rollover accidents, appellants' contention that the NHTSA amendment *conclusively* determined that a causal relationship existed between roof crush and head and neck injury in rollover accidents, *to the exclusion* of torso augmentation, was not proven. Although a correlation was shown it did not provide, as appellants' were arguing, evidence showing that it

was conclusive. As such, this Court determined that appellants' contention was without merit and denied their pre-trial motion which sought to preclude appellees from presenting evidence that 'diving' or torso augmentation caused plaintiff, April Parr's injuries. Both appellees and appellants presented extensive expert testimony during trial on the subject of 'roof crush' vs. 'diving' as a cause of appellant, April Parr's injuries. In the end, the jury concluded that Ms. Parr's injuries resulted from 'diving' not 'roof crush' and found for the appellees.

Appellants next argue that this Court erred in granting Appellee's Motion in Limine No. 3 which sought to preclude any references during trial to NHTSA standards and rulemaking documents dated 2001 to the present, on the basis that the subject vehicle was originally manufactured and sold in 2001. Both parties had an opportunity to argue this Motion in Limine before this Court prior to trial. Pennsylvania law requires that a plaintiff prove that an allegedly defective vehicle was defective at the time of manufacture. *Duchess v. Langston Corporation*, 769 A.2d 1131, 1142 (Pa. 2001). However appellants sought to introduce NHTSA standards and rulemaking subsequent to the year the subject vehicle was manufactured. It was this Court's determination that the relevant time frame for assessing the design and/or defectiveness of the subject 2001 Ford Excursion was up to and including the year it was manufactured, 2001. The standards that were in place at that time (2001) were what was relevant to

appellants' causes of action against the appellee, Ford Motor Company. At trial, appellees were permitted and did introduce evidence of NHTSA standards that existed up to the year 2001. This Court found appellants' contention that they should have been permitted to introduce NHTSA standards and rulemaking subsequesnt [sic] to the year 2001 without merit and accordingly granted appelles' [sic] pre-trial motion precluding such evidence.

Appellants next argue that this court erred in granting Appellee's Motion in Limine No. 9 which sought to preclude any references during trial to statistical evidence of other dissimilar accidents. Both parties had an opportunity to argue this Motion in Liminc before this Court prior to trial. Appellants contend that this Court committed an error of law and/or abused its discretion when it granted Appellees Motion in Limine No. 9. According to Appellants, this Court "altogether precluded Plaintiffs/appellants from offering statistical evidence prepared by NHTSA, The Insurance Institute for Highway Safety (IIHS), the Fatal Accident Reporting System, and/or the National Automotive Sampling System as to rollover fatalities involving the subject vehicle and comparable vehicles on the basis that Appellees were unable to prove that the statistics derived from other rollover accidents that were virtually identical to the one in the instant accident."

As appellants acknowledge, it was their burden, as the proponent of this evidence, to establish, to the court's satisfaction, the similarity between other

accidents and the subject accident before this evidence could have been admitted for any purpose. *Hutchinson v Penske Truck Leasing Co.*, 876 A. 2d 978 (Pa. Super. 2005). During argument before this Court, Appellants failed to show the required similarity between the subject accident and those contained within the statistical compilations. Notably, the IIHS reports, unlike the subject accident, involved fatalities. Appellants could not establish that the facts surrounding the accidents that comprised the statistical analysis they wished to introduce before the jury were substantially similar to those in the subject accident. As it was appellants' burden, this Court found that they had not met their burden and granted Appellees' Motion to Preclude the Statistical Evidence.

Finally, Appellants argue that this Court erred when it denied their Motion In Limine which sought to preclude Appellees from (1) referencing or introducing evidence during trial that the subject vehicle was not preserved and (2) seeking a spoliation charge when, as Appellants contended, no prejudice resulted from the subject vehicle's destruction. Both parties had an opportunity to argue this Motion in Limine before this Court prior to trial.

This Court initially deferred ruling on the motion. However, prior to making a decision this Court did permit appellee, Ford, to introduce facts about the unavailability of the vehicle and its impact on the experts' investigation into the cause of the accident and the injuries sustained by the occupants. As such,

appellants' counsel during cross-examination of appellees' experts called into question their opinions and conclusions, based upon the fact that the subject vehicle was not available for them to examine and inspect.

Further, at trial the parties stipulated as to the facts surrounding the unavailability of the vehicle. Notably, appellants stipulated that two weeks after the accident and after hiring counsel, they released the vehicle to their insurance company who in turn sold the vehicle which was then destroyed. Appellants further stipulated that they did not attempt to locate the vehicle until after it had been destroyed and that appellees were not notified of legal action until after the vehicle was disposed.

In light of the above stipulation and arguments and briefs of counsel, this Court denied appellants' Pre-trial Motion to Preclude and accordingly allowed the jury to make whatever conclusions it deemed proper. Accordingly, this Court gave a permissive adverse inference instruction to the jury, instructing that it could, but was not required to, draw a negative inference against appellants from the destruction and thus absence of the subject vehicle. Clearly appellants, despite their hiring of counsel and their knowledge of their pursuit of a legal action resulting from the accident, transferred the subject vehicle out of their possession resulting in it being subsequently destroyed, thereby preventing appellees from having the vehicle inspected so as to properly defend themselves from appellants' allegations.

CONCLUSION

For all of the above reasons, this Court's Order of August 30, 2012 Denying Appellants Post-Trial Motion for a New Trial should be AFFIRMED.

BY THE COURT:

/s/ Paul P. Panepinto
PAUL P. PANEPINTO, J.

[3-1-2013]

JOSEPH and APRIL PARR, Husband and Wife, Individually and as Parents and Natural Guardians of SAMANTHA PARR Plaintiffs v. FORD MOTOR COMPANY, McCAFFERTY FORD SALES, INC. d/b/a McCAFFERTY AUTO GROUP, McCAFFERTY FORD OF MECHANICSBURG, INC. and McCAFFERTY FORD COMPANY Defendants	IN THE COURT OF COMMON PLEAS PHILADELPHIA COUNTY CIVIL ACTION-LAW DECEMBER TERM 2009 NO. 002893

ORDER

AND NOW, this 30th day of August, 2012, upon consideration of Plaintiffs' Motion and Brief for Post-Trial Relief and Defendants' Response in opposition, it is hereby ORDERED and DECREED that Plaintiffs' Motion for Post-Trial Relief is Denied. Judgment is entered in favor of Defendants and against Plaintiffs.

BY THE COURT:

/s/ Paul P. Panepinto/J.
Paul P. Panepinto J.

JOSEPH and APRIL PARR, Husband and Wife, Individually and as Parents and Natural Guardians of SAMANTHA PARR Plaintiffs v. FORD MOTOR COMPANY, McCAFFERTY FORD SALES, INC. d/b/a McCAFFERTY AUTO GROUP, McCAFFERTY FORD OF MECHANICSBURG, INC. and McCAFFERTY FORD COMPANY Defendants	IN THE COURT OF COMMON PLEAS PHILADELPHIA COUNTY CIVIL ACTION-LAW DECEMBER TERM 2009 NO. 002893 JURY TRIAL DEMANDED

ORDER

AND NOW, this 5th day of March, 2012, upon consideration of Plaintiffs' Motion *in Limine* No. 1, and Defendants' response thereto, **IT IS HEREBY ORDERED** that Plaintiffs' Motion is **DENIED**.

BY THE COURT:

/s/ Panepinto/J.
, **J.**

JOSEPH and APRIL PARR, Husband and Wife, Individually and as Parents and Natural Guardians of SAMANTHA PARR Plaintiffs v. FORD MOTOR COMPANY, McCAFFERTY FORD SALES, INC. d/b/a McCAFFERTY AUTO GROUP, McCAFFERTY FORD OF MECHANICSBURG, INC. and McCAFFERTY FORD COMPANY Defendants	IN THE COURT OF COMMON PLEAS PHILADELPHIA COUNTY CIVIL ACTION-LAW DECEMBER TERM 2009 NO. 002893 JURY TRIAL DEMANDED

ORDER

AND NOW, this 5th day of March, 2012, upon consideration of the Motion *in Limine* No. 3 of Defendants, Ford Motor Company, McCafferty Ford Sales, Inc. d/b/a McCafferty Auto Group, McCafferty Ford of Mechanicsburg, Inc., and McCafferty Ford Company To Preclude Reference to FMVSS 216, the 2009 Amendments to FMVSS 216, or Related Notices of Proposed Rulemaking, and Plaintiff's response thereto, **IT IS HEREBY ORDERED** that Ford's Motion is **GRANTED**. [to the extent the above came into effect subsequent to 2001 –]

BY THE COURT:

/s/ Panepinto/J.
, J.

JOSEPH and APRIL PARR, Husband and Wife, Individually and as Parents and Natural Guardians of SAMANTHA PARR Plaintiffs v. FORD MOTOR COMPANY, McCAFFERTY FORD SALES, INC. d/b/a McCAFFERTY AUTO GROUP, McCAFFERTY FORD OF MECHANICSBURG, INC. and McCAFFERTY FORD COMPANY Defendants	IN THE COURT OF COMMON PLEAS PHILADELPHIA COUNTY CIVIL ACTION – LAW DECEMBER TERM, 2009 NO. 002893 JURY TRIAL DEMANDED

ORDER

AND NOW, this 5th day of March, 2012, upon consideration of Plaintiffs' Motion *in Limine* No. 8, and Defendants' response thereto, **IT IS HEREBY ORDERED** that Plaintiffs' Motion is **DENIED**.

BY THE COURT:

/s/ Panepinto/J
, **J.**

JOSEPH and APRIL PARR, Husband and Wife, Individually and as Parents and Natural Guardians of SAMANTHA PARR Plaintiffs v. FORD MOTOR COMPANY, McCAFFERTY FORD SALES, INC. d/b/a McCAFFERTY AUTO GROUP, McCAFFERTY FORD OF MECHANICSBURG, INC. and McCAFFERTY FORD COMPANY Defendants	IN THE COURT OF COMMON PLEAS PHILADELPHIA COUNTY CIVIL ACTION – LAW DECEMBER TERM, 2009 NO. 002893 JURY TRIAL DEMANDED

ORDER

AND NOW, this 5th day of March, 2012, upon consideration of the Motion *in Limine* No. 9 of Defendants, Ford Motor Company, McCafferty Ford Sales, Inc. d/b/a McCafferty Auto Group, McCafferty Ford of Mechanicsburg, Inc., and McCafferty Ford Company To Preclude Statistical Evidence of Other Dissimilar Accidents, and all responses thereto, it is hereby **ORDERED** that the Motion is **GRANTED**.

BY THE COURT:

/s/ Panepinto/J
, **J.**

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

JOSEPH AND APRIL PARR, HUSBAND AND WIFE, INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF SAMANTHA PARR,	:	No. 46 EAL 2015
Petitioners	:	Petition for Allowance of Appeal from the Order of the Superior Court
v.	:	
FORD MOTOR COMPANY, MCCAFFERTY FORD SALES, INC., D/B/A MCCAFFERTY AUTO GROUP, MCCAFFERTY FORD OF MECHANICSBURG, INC., AND MCCAFFERTY FORD COMPANY,	:	
Respondents	:	

ORDER

PER CURIAM

AND NOW, this 27th day of May, 2015, the Petition for Allowance of Appeal is **DENIED**.

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

JOSEPH AND APRIL PARR, HUSBAND AND WIFE, INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF SAMANTHA PARR,	:	No. 46 EAL 2015
Petitioners	:	Application for Reconsideration
v.	:	
FORD MOTOR COMPANY, MCCAFFERTY FORD SALES, INC., D/B/A MCCAFFERTY AUTO GROUP, MCCAFFERTY FORD OF MECHANICSBURG, INC., AND MCCAFFERTY FORD COMPANY,	:	
Respondents	:	

ORDER

PER CURIAM

AND NOW, this 22nd day of July, 2015, the Application for Reconsideration is **DENIED**.

A True Copy
As Of 7/22/2015

Attest: /s/ John W. Person, Jr.
John W. Person Jr., Esquire
Deputy Prothonotary
Supreme Court of Pennsylvania

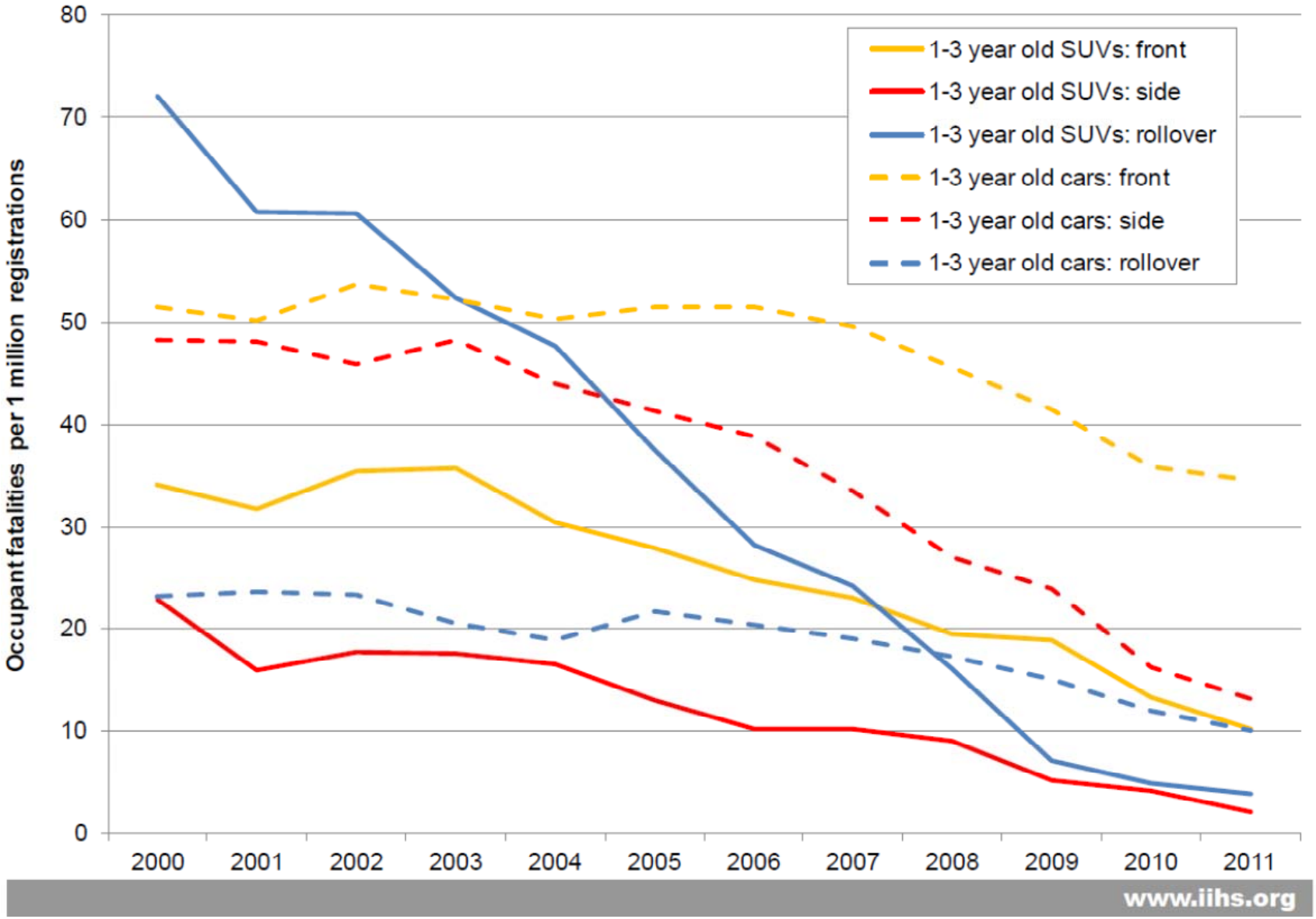
Fatalities for 2000-2005 Ford Excursion Vehicles					
FARS data from Accident Years 2000-2010					
Accident Year	**For Model Years**	**Rollover Roof Crush Related Fatalities**	**Rollover Ejections (F,P)***	**Total Fatalities**	**Vehicles**
2000	2000	5	5 F, 0 P	7	6
2001	2000-2001	8	4 F, 1 P	10	9
2002	2000-2002	19	11 F, 1 P	25	18
2003	2000-2003	17	10 F, 1 P	21	18
2004	2000-2004	13	4 F, 2 P	20	19
2005	2000-2005	15	6 F, 2 P	19	18
2006	2000-2005	12	5 F, 1 P	15	15
2007	2000-2005	13	6 F, 1 P	17	16
2008	2000-2005	20	7 F, 2 P	26	21
2009	2000-2005	26	12 F, 3 P	30	16
2010	2000-2005	13	4 F, 3 P	18	17
TOTAL 2000-2010	**2000-2005**	**161**	**74 F, 17 P**	**208**	**173**

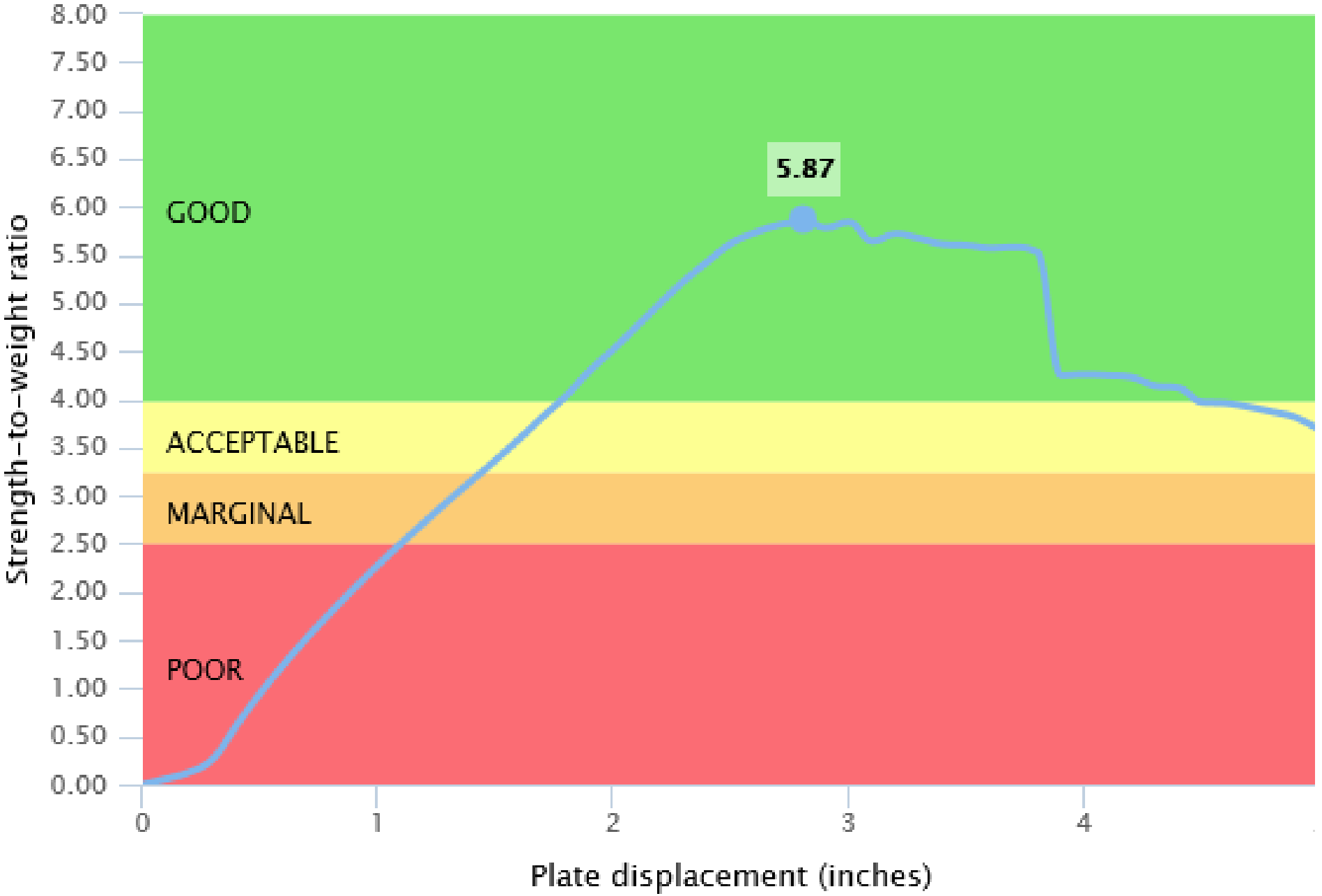
*F=Full, P=Partial

Note: 2000-2005 model years represent the sister and clone range for the 2001 Ford Excursion.

R. 3300a, Plaintiff Trial Exhibit P-13(241)

Fatality rates in 1-3 year old SUVs and cars




8.00
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Strength-to-weight ratio
5.87
GOOD
ACCEPTABLE
MARGINAL
POOR
0
1
2
3
4
Plate displacement (inches)