

<div data-bbox="186 220 829 462" data-label="Image"></div> <p style="text-align: center;"><i>Plaintiffs</i></p> <p>vs.</p> <p>FCA US LLC c/o CT Corporation Systems, Statutory Agent 4400 Easton Commons Way, Suite 125 Columbus, Ohio 43219</p> <p>and</p> <p>TRI STATE CONCRETE INC. c/o Dean Dillingham, Statutory Agent 1 Millikin Street, Suite A Hamilton, Ohio 45013</p> <p>and</p> <p>TRACY WAYNE MOORE 1226 North Frieda Drive Fairfield, Ohio 45014</p> <p style="text-align: center;"><i>Defendants.</i></p>	<p>CASE NO. 2018-07-1583</p> <p>COURT OF COMMON PLEAS BUTLER COUNTY, OHIO</p> <p>JUDGE HOWARD</p> <p><b>PLAINTIFF'S MOTION IN LIMINE TO ADMIT DEPOSITIONS OF SERGIO MARCHIONNE AND OTHER SIMILAR INCIDENT WITNESSES</b></p>
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In a previous case involving a post-collision fire in one of FCA's rear-tank Jeeps, the parties took several for-trial depositions addressing issues that are also present in this case. One such deposition was of Sergio Marchionne, FCA's then-Chairman and CEO, who was the sole FCA representative at the crucial meeting between FCA and government regulators where the fate of the recall was decided. *See* Marchionne Dep. 120:17-122:14 (Ex. 1). Mr. Marchionne is now deceased. The parties also deposed twelve witnesses about other similar incidents ("OSIs")

in which rear-tank Jeeps caught fire or leaked fuel after rear impact. These OSI depositions, each about thirty minutes long, were taken all around the country, from Texas to New Jersey, at significant expense. None of the OSI deponents live in Ohio.

Plaintiff seeks to use those depositions from *Walden v. Chrysler* in this case under Ohio Rule of Civil Procedure 32(A)(4). Plaintiff believes that using these pre-existing depositions is both procedurally proper and the sensible thing to do, since the Marchionne deposition cannot be retaken and the twelve OSI depositions need not be retaken. The parties have corresponded about the issue, and FCA disagrees. *See* Correspondence (Ex. 2). Plaintiff therefore files this motion. Plaintiff files the motion now, as opposed to waiting until later, so that all of the parties will know what depositions can be re-used and which will have to be retaken.

For the reasons that follow, Plaintiff respectfully asks the Court to hold that the following depositions<sup>1</sup> from *Walden v. Chrysler Group, LLC* may be presented to the jury in this case:

Marchionne, Sergio  
Alder, Kristine  
Coleman, Ronald  
Friend, Lauren  
Friend, Norma  
Geddes, Daniel  
Hensal, Lt. Jeffery

Kujawa, Frank  
Persinger, Howard  
Persinger, Travis  
Smith, Susan  
Smith, Thomas  
Turek, Lisa

## FACTS

**This is a relatively straightforward product liability case about a well-known danger.**

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[illegible]

Abundant evidence demonstrates that FCA has known for decades

<sup>1</sup> Both Plaintiff and FCA have copies of these transcripts. The transcript of the Marchionne deposition is attached as Exhibit 1. Plaintiff has not filed transcripts of the twelve OSI depositions with the Court because they would be collectively voluminous but will certainly do so if the Court prefers it.

about the dangers of rear-mounted gas tanks. *See* Complaint ¶¶ 13-30. FCA nonetheless manufactured, marketed, and sold the 2002-2007 Liberties, 1993-2004 Jeep Grand Cherokees, and 1993-2001 Jeep Cherokees (“the rear-tank Jeeps”) with exposed, rear-mounted gas tanks. Those exposed gas tanks are, as FCA’s own engineer conceded, “vulnerable to rear impact.” Estes Dep. 67:10-11 (Ex. 4). One of the ways that FCA knew about the vulnerability of its rear-tank Jeeps was through real-world collisions, as proven in part by the twelve OSI depositions mentioned in this motion. From those collisions and other sources, FCA knew about the vulnerability of its rear-tank Jeeps well before it sold the subject 2004 Liberty, and well before Ms. Deanna Gilreath burned in her Jeep on October 20, 2017.

The rear-tank Jeeps all have substantially similar gas tank designs—in all of them, the gas tank was located approximately ten inches from the extreme rear of the vehicle, and hanging down about six inches. *See* Subject Vehicle Measurement Data (Ex. 5). The gas tank locations were so similar that Marchionne, FCA’s Chairman and CEO, conceded that “tank-related fires with one of the Jeep models would prompt Chrysler to investigate others.” *Chrysler Group, LLC v. Walden*, 792 S.E.2d 754, 762-63 (Ga. Ct. App. 2016); *see also* Marchionne Dep. 43:08-17. The gas tank locations were so similar that “NHTSA investigated all of these rear-tank Jeep models in a single defect investigation and defined the defect as ‘the placement of the fuel tanks in the position behind the axle and how they were positioned, including their height above the roadway.’” *Walden*, 792 S.E.2d at 762.

The similarity of the Jeeps is visible. For the Court’s reference, photographs of the rear-tank Jeeps are below. The gas tanks are circled in red.



This case involves a 2004 Jeep Liberty, which is shown in the bottom right. The *Walden* case involved a 1999 Jeep Grand Cherokee, which is shown in the top right. In *Walden*, as in *Gilreath*, the Jeep was struck in the rear, the gas tank ruptured, and the resulting fire killed an occupant of the Jeep. *Walden*, 792 S.E.2d at 733.

#### LAW

Rule 32(A)(4) governs the use of these depositions. It says, in pertinent part, that “[w]hen another action involving the same subject matter is or has been brought between the

same parties or their representatives or successors in interest, all depositions lawfully taken in the one action may be used in the other as if originally taken therefor.” Civ.R. 32(A)(4). Such deposition testimony satisfies the hearsay exception at Rule 804(B)(1).

In sum, a deposition from one case can be used in another case if:

- A. the cases “involve[] the same subject matter” (Civ.R. 32(A)(4)),
- B. the cases have been “brought between the same parties or their representatives or successors in interest” (Civ.R. 32 (A)(4)), and
- C. the deponent is “unavailable as a witness at the trial” (Civ.R. 27(A)(4)).

### **APPLICATION OF LAW TO FACT**

Because all three of the requirements are met, the depositions from *Walden* can be used in *Gilreath*.

#### **A. “Same Subject Matter”**

*Walden* and *Gilreath* involve the same subject matter. Both cases involve fuel-fed fires following rear impact into a rear-tank Jeep. The deposition of Sergio Marchionne addresses that subject matter throughout, expressly addresses and identifies all of the rear-tank Jeep models (37:10-43:17), and addresses the NHTSA investigation into these Jeeps in significant detail (111:04-133:08). The twelve OSI depositions likewise address this subject matter—all twelve are about fire or fuel leakage following rear impact into a rear-tank Jeep.

Courts applying the federal counterpart<sup>2</sup> to Ohio's Rule 32 have written that "[t]here need only be a 'substantial identity of the issue'" to satisfy the "same subject matter" requirement. *Bushmaker v. A.W. Chesterton Co.*, 2013 WL 11079371, \*1 (March 1, 2013 W.D. Wis.). Courts have routinely found that this requirement is satisfied in cases involving similar but demonstrably different models of products. In *Runge v. Stanley Fastening Sys., L.P.*, a products liability case involving defective nail guns in the Southern District of Indiana, the plaintiff sought use of depositions taken in two prior actions against Stanley Fastening Systems. 2011 WL 6755161, \*1 (S.D. Ind. Dec. 23, 2011). The defendant argued that "the prior actions involved different nail gun models, different time periods, different injuries, and, thus, different subject matter." *Id.* The district court rejected that argument, holding that the "general thrust of the deposition excerpts cited by Plaintiff relate broadly to the general product history of the Stanley nail gun" and the use of one firing mechanism versus another. *Id.* As such, the district court found that, both factually and legally, the actions were all "sufficiently similar to the present case to permit use of the deposition excerpts." *Id.*; see also *Walker v. Blitz USA, Inc.*, 2009 WL 10669635, \*2-4 (N.D. Ga. Feb. 24, 2009) (permitting use of depositions from prior cases involving different model and sized gas containers).

Here, as in *Runge* and *Walker*, the cases involve "the same subject matter." Both *Walden* and *Gilreath* involved a gas tank located approximately ten inches from the extreme rear of the Jeep, and hanging down about six inches, that exploded in rear impact. The National Highway Traffic Safety Administration, the Georgia Court of Appeals, and even FCA's Chairman and

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<sup>2</sup> Ohio Rule of Civil Procedure 32(A)(4) closely resembles Federal Rule of Civil Procedure 32(a)(8):  
A deposition lawfully taken and, if required, filed in any federal- or state-court action may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later federal action.

Fed. R. Civ. P. 32(a)(8). For that reason, federal case law may be helpful, and since there is more federal case law than Ohio case law applying this rule, some of the citations in the following pages are to federal cases.

CEO have concluded that the rear-tank Jeeps were substantially similar. Therefore, the “same subject matter” test is satisfied.

B. “Same Parties or their Representatives or Successors in Interest”

*Walden* and *Gilreath* involve the same parties or their successors in interest. The real test is “whether the former testimony was given upon such an issue that the party-opponent in that case had the same interest and motive in his cross-examination that the present opponent now has.” *Rudge*, 2011 WL 6755161 at \*3; *see also Walker*, 2009 WL 10669635 at \*4 (noting that while plaintiffs in prior actions were all different, defendant “had a similar motive to develop the testimony of all deponents because the issues in the prior cases are substantially similar to the issues in this case.”). The rule has “been construed liberally in light of the twin goals of fairness and efficiency.” *Rudge*, 2011 WL 6755161 at \*3. As such, “total identity of parties . . . is not required.” *Id.*

Here, the defendant in the two cases is identical. *Walden* was filed against “Chrysler Group, LLC,” and during the course of the case (on December 16, 2014) the name of the defendant company changed to “FCA US, LLC.” The name change “d[idn’t] really change anything” because it remained “the same corporation.” Marchionne Dep. 10:25-11:13. “Chrysler Group, LLC” and “FCA US, LLC” are “identical.” Marchionne Dep. 11:13. Therefore, the defendant in *Walden* is the same as the defendant in *Gilreath*.

Plaintiff Dan Gilreath is a successor in interest. Here, Mr. Gilreath has the same “motive to develop the testimony” about this defect that the plaintiffs in *Walden* had. Moreover, even if Plaintiff were *not* a successor in interest, Plaintiff obviously consents to the use of these depositions, because Plaintiff is the one asking to use them. For that reason, “many cases have

held that a deposition can be offered against one who was a party to the former suit even though the party now using the deposition was not.” *Runge*, 2011 WL 6755161, at \*3. Therefore, what matters is not whether Plaintiff (the party seeking to use the depositions) is the same, but whether “FCA US, LLC” (the party opposing use of the depositions) is the same as “Chrysler Group, LLC” (the defendant from *Walden*). It is.

The “same parties” requirement is satisfied.

C. “Unavailable as a Witness at the Trial”

The deponents are unavailable. Sergio Marchionne is unavailable because he is deceased, as the parties have stipulated. Civ.R. 32(A)(3)(a); Correspondence (Ex. 2). The witnesses in the OSI depositions are unavailable because they all live “beyond the subpoena power of the court.” Civ.R. 32(A)(3)(b). Specifically, the OSI deponents live in the following places:

- Alder, Kristine: Medford, New Jersey (Alder Dep. 8:7-11);
- Coleman, Ronald: Athens, Georgia (Coleman Dep. 4:25-5:1-4);
- Friend, Lauren: New York, New York (Friend, L. Dep. 5:18-23);
- Friend, Norma: Scotch Plains, New York (Friend, N. Dep. 5:21-6:1);
- Geddes, Daniel: North Augusta, South Carolina (Geddes Dep. 5:24-6:3);
- Hensal, Jeffery Lt.: Canton, Georgia (Hensal Dep. 7:1-5);
- Kujawa, Frank: Hollywood, Florida (Kujawa Dep. 9:16-19);
- Persinger, Howard: Fayetteville, West Virginia (Persinger, H. Dep. 5:1-5);
- Persinger, Travis: Fayetteville, West Virginia (Persinger, T. Dep. 4:23-5:3);
- Smith, Susan: Kingwood, Texas (Smith, S. Dep. 4:20-24);



- Smith, Thomas: Baytown, Texas (Smith, T. Dep. 4:21-25); and
- Turek, Lisa: Pasadena, Maryland (Turek Dep. 6:7-11).

Therefore, the “unavailab[ility]” requirement is satisfied.

### CONCLUSION


Because all three parts of the test are satisfied, Plaintiff respectfully asks the Court to hold that the following depositions from *Walden v. Chrysler Group, LLC* may be presented to the jury in this case.

Marchionne, Sergio  
Alder, Kristine  
Coleman, Ronald  
Friend, Lauren  
Friend, Norma  
Geddes, Daniel  
Hensal, Lt. Jeffery

Kujawa, Frank  
Persinger, Howard  
Persinger, Travis  
Smith, Susan  
Smith, Thomas  
Turek, Lisa

Respectfully submitted this 28<sup>th</sup> day of August, 2019.

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## CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel of record with a copy of Plaintiff's **Motion in Limine to Admit Depositions of Sergio Marchionne and Other Similar Incident Witnesses** by e-mail and by depositing it in the United States Mail with adequate postage affixed thereon and addressed as follows:

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