

Plaintiff,

vs.

FCA US LLC
c/o CT Corporation Systems, Statutory Agent
4400 Easton Commons Way, Suite 125
Columbus, Ohio 43219

and

TRI STATE CONCRETE INC.
c/o Dean Dillingham, Statutory Agent
1 Millikin Street, Suite A
Hamilton, Ohio 45013

and

TRACY WAYNE MOORE
1226 North Frieda Drive
Fairfield, Ohio 45014

Defendants.

CASE NO. CV 2018-07-1583

COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

JUDGE HOWARD

**PLAINTIFF'S REPLY REGARDING
PLAINTIFF'S MOTION IN LIMINE TO
ADMIT DEPOSITIONS OF
SERGIO MARCHIONNE AND OTHER
SIMILAR INCIDENT WITNESSES**

The "subject matter" of this case is whether an automaker is liable when it puts the gas tank in a place that the automaker knows to be dangerous, warns nobody, and allows people to burn to death as a result.



This is not the first case to deal with that subject matter. In *Walden v. Chrysler*, the undersigned counsel deposed Segio Marchionne, FCA's Chairman and CEO. That testimony is irreplaceable. Marchionne was *the sole FCA representative* at the crucial meeting at Chicago O'Hare Airport on June 10, 2013 when FCA talked NHTSA into letting FCA escape the recall investigation by merely installing trailer hitches on some of its rear-tank Jeeps. See Marchionne Dep. 120:17-122:14. Marchionne's meeting was not transcribed, there is no memorandum about the meeting, and "there is no written record of what was being discussed." *Id.* at 132:20-133:08. Mr. Marchionne is now deceased. There is nobody else from FCA to depose about the meeting. FCA's position—that the evidence must now be lost forever, because one rear-tank Jeep involved in this same NHTSA investigation was not like another—is untenable, both practically and under the law.

Deanna Gilreath was not the first or last person to burn to death in a rear-tank Jeep. There were many, many victims before her, one of whom was Remington Walden. The undersigned knows of at least three other victims who have burned to death in rear-tank Jeeps *while this case has been pending*. If its own engineering documents weren't enough to put FCA

on notice of the danger that its customers were in, the rising death toll was. And *is*. That is what the other-similar-incident (“OSI”) depositions are about.

In Remington Walden’s case, twelve OSI depositions were taken around the country. There is no need to repeat them. The people who testified did not like re-living their experiences with Jeep fires the first time. They were eyewitnesses, investigating officers, or drivers of 2002-2007 Jeep Liberties, 1993-2004 Jeep Grand Cherokees, or 1993-2001 Jeep Cherokees (“the rear-tank Jeeps”) that got struck in the rear and either leaked fuel or burned as a result of the gas tank location. The undersigned met with many of them across kitchen tables. FCA has already cross-examined all of them. There is no need to make those people—who took time out of their lives, for no personal benefit, to tell painful stories about burning Jeeps—re-live the experience yet again merely because there is a new name at the top of this case caption.

There is a logistical reason not to re-take these twelve OSI depositions. *FCA has named thirteen expert witnesses* that it claims it intends to call at trial. That is a lot of depositions to take. Our trial date is approaching, and time is going to run short.

SAME SUBJECT MATTER

FCA appears to concede that *Gilreath* and *Walden* were “brought between the same parties or their representatives or successors in interest,” and that these thirteen deponents are “unavailable as a witness at trial.” *See* Civ. R. 32(A)(4); Civ. R. 27(A)(4). Therefore, the only disputed issue is whether the cases “involve[e] the same subject matter,” meaning that there is “a substantial identity of issues.” *Bushmaker v. A.W. Chesterton Co.*, 2013 WL 11079371, at *1 (W.D. Wis. March 1, 2013); *see also* Civ. R. 32(A)(4).

The answer is yes. Both cases involved Jeeps with exposed rear gas tanks that were

vulnerable to rear impact (as are millions of Jeeps that remain in the roads as the Court reads this sentence). The rear-tank Jeeps are substantially similar because:

1. They all have gas tanks mounted approximately 10 inches from the extreme rear of the vehicle. *See Subject Vehicle Measurement Data (Ex. A).*
2. They all have gas tanks hanging down approximately 6 inches. *See Subject Vehicle Measurement Data (Ex. A).*
3. All their gas tanks are exposed to rear impact, as the below photographs show:



4. FCA's Chairman and CEO admitted that if one of these rear-tank Jeeps exploded in rear impact, FCA "has and would look at" the other Jeeps with rear-mounted gas tanks.
Marchionne Dep. 43:08-17.
5. All the rear-tank Jeeps have solid, or "live," rear axles, such that when the Jeep is struck in the rear, the gas tank is squeezed between the striking vehicle and the Jeep's rear axle, which causes the tank to rupture because there is nowhere for the tank to go.
6. All the rear-tank Jeeps were all investigated in the very same NHTSA investigation, which 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."
7. Trial courts have held that these rear-tank Jeeps are "substantially similar," and have been affirmed. *Chrysler Group, LLC v. Walden*, 792 S.E.2d 754, 763 (Ga. App. 2016).
8. The rear-tank Jeeps are all midsize vehicles marketed to families in the United States.
9. Plaintiff's fuel systems expert, Fred Arndt, has so testified. *See* Arndt Aff. at ¶ 5 (Ex. B).

The question here is whether these twelve depositions must be repeated. Under Rule 32 that depends on whether *Gilreath* and *Walden* involve "a substantial identity of issues." *Bushmaker*, 2013 WL 11079371, at *1. FCA spends a lot of ink attempting to confuse that question: the *Gilreath* and *Walden* cases do not involve different "subject matter[s]" merely because an OSI that was admissible in *Walden* occurred at a different speed, involved a different striking vehicle, or occurred at a slightly different angle than the collision in *Gilreath*. Because both *Gilreath* and *Walden* share "a substantial identity of issues"—*i.e.*, whether FCA is liable for the post-collision fires in its rear-tank Jeeps—the same 'touchstones' apply for the determination

of substantial similarity. All twelve of the OSI depositions at issue here involve (1) rear impact, (2) into a substantially similar Jeep, (3) which was part of the NHTSA investigation, (4) resulting in fuel leakage or fire, (5) as to which FCA had notice. *See* Arndt Aff. at ¶ 6.

The central question for the jury, and the reason courts look for substantial similarity in OSIs, is whether the failure of one product would logically have alerted the manufacturer to the vulnerability of another product. In Jeep fire cases, the question is: *when FCA learned that one of these rear-tank Jeeps under NHTSA investigation kept exploding in rear impact, would that logically alert FCA that another of these rear-tank Jeeps under NHTSA investigation might also explode in rear impact?* “The rule follows where its reason leads; where the reason stops, there stops the rule.” Karl Llewellyn, *THE BRAMBLE BUSH*, 157-58 (1960). Marchionne has testified that the answer to this central question is “yes.” Marchionne Dep. 43:08-17.

8	Isn't it merely logical that if one of
9	these four vehicles gets hit in the rear and the gas
10	tank explodes and people burn to death, then
11	Chrysler ought to be looking at whether or not that
12	might happen in one of these other four vehicles
13	that similarly have gas tanks at the rear in the
14	same location?
15	MS. OWENS: Objection to the form.
16	A. I think it is one of the things that
17	Chrysler has and would look at, yes.

FCA'S REMAINING ARGUMENTS LACK MERIT

FCA's argument that these depositions cannot be used because "Plaintiff had to submit expert testimony" lacks merit. Opp. at 11. Whether there is "a substantial identity of issues" between *Gilreath* and *Walden* is a condition precedent to admissibility that the Court can decide as a matter of law. Ohio Evid. R. 104(A). Nonetheless, attached as Exhibit B is the affidavit of

Fred Arndt, an extraordinarily well-qualified fuel systems expert, who testifies that these rear-tank Jeeps have substantially similar fuel systems and that these twelve rear-impact collisions are substantially similar.

FCA's suggestion that "the fuel tank was not breached in the initial impact but was rather breached in the second impact" between the Jeep and "the GMC pickup" is fanciful. The driver of the GMC pickup specifically testified that he saw the Jeep on fire in his rearview mirror *before* his truck was struck. Collins Dep. 72:19-22. He and other eyewitnesses testified that the fire was *immediate*. See Collins Dep. 41:18-21; C. Todd Dep. 22:13-20; Huening Dep. 48:01-11 (collectively Ex. C).

FCA's argument that it "did not have the same motive when cross-examining the witnesses" is inaccurate, as a review of the transcripts reveals.¹ When cross-examining the OSI witnesses, FCA repeatedly attempted to suggest that something other than the gas tank exploded, that the witness could not accurately recollect what happened, or that the impact was excessively forceful. FCA can make those arguments again, if it desires. If FCA wants to argue to the jury that it should disregard these OSIs because they involve different models of rear-tank Jeeps, FCA is free to make that argument as well.

FCA'S CASE CITATIONS ARE UNAVAILING

FCA cites several non-binding cases, purportedly as persuasive authority, to support its position. Those cases do not support FCA's position.

¹ Plaintiff was reluctant to file them all because they are collectively voluminous, but that now appears necessary. Accordingly, collective attached as Exhibit D, please find the consolidated transcripts of Kristine Adler, Ronald Coleman, Lauren Friend, Norma Friend, Daniel Geddes, Lt. Jeffrey Hensal, Frank Kujawa, Howard Persinger, Travis Persinger, Susan Smith, Thomas Smith, and Lisa Turek.

FCA relies on *Hub v. Sun Valley Company*, 582 F.2d 776 (9th Cir. 1982),² for the proposition that it would be “unfair” to bind a defendant to a previous deposition “that did not cover the same issues in the later litigation.” Opp. at 5. *Hub* is distinguishable. In *Hub* the plaintiff sued his former employer alleging a Title VII retaliation claim. *Id.* 777. The plaintiff tried to use another deposition involving his former employer’s predecessor, but the court did not allow it. *Id.* Critically, the deposition did *not even involve the issue of retaliation.* *Id.* at 778. In that context, the court found that it would be unfair to bind the defendant who did not have the opportunity to cross examine the witness on retaliation. *Id.*

FCA accurately states outcome of *Powertrain, Incorporated v. Ma*, 88 F. Supp. 3d 679 (N.D. Miss. 2015), but the case is inapposite. In *Ma*, the district court excluded a deposition because the subject matter of the cases was *totally* unrelated. *Id.* at 690. The predicate case involved indemnification based on penalties assessed in response to purported violations of EPA standards. *Id.* The excluded deposition was from a trademark infringement case—not the same subject matter or even the same area of the law. *Id.*

FCA provides an out-of-context quote from *Essex Insurance Company v. Zota*, No. 04-60619-CIV, 2009 WL 10668279, at *1 (S.D. Fla. Feb. 5, 2009). Opp. at 5. In *Zota*, the district court opined that “[e]ven though the two lawsuits may have related factual content, they do not involve substantially identical issues.” *Zota*, 2009 WL 10668279, at *2. That case was a federal action to determine insurance coverage—the issues were interpretation of an insurance contract.

² This case supports Plaintiff’s position more so than FCA’s. The Ninth Circuit noted that Rule 32(a) is to be “construed *liberally in light of the twin goals of fairness and efficiency.*” *Hub*, 682 F.2d at 778.

Id. The excluded deposition was from a factually related negligence lawsuit, but simply did not involve the same legal issues or subject matter. *Id.*

The other authorities are equally unpersuasive. *E.g.*, *Wallace v. City of Tarpon Springs*, No. 8:05-CV-979-T-EAJ, 2007 WL 128839, at *1 (M.D. Fla. Jan. 12, 2007) (excluding deposition in a racial discrimination case because the deposition was from a case for malicious prosecution, false arrest, and battery); *In re Paramount Payphones, Inc.*, 256 B.R. 341 (Bankr. M.D. Fla. 2000) (excluding deposition in fraudulent transfer case because the deposition was in a fraudulent inducement case); *Thompson v. Atl. Richfield Co.*, 663 F. Supp. 206 (W.D. Wash. 1986) (the subject matter of the predicate case and the stricken deposition are entirely unclear from this opinion).

The requirements of Rule 32 “have been construed liberally in light of the twin goals of fairness and efficiency.” *Hub*, 682 F.2d at 778 (9th Cir. 1982). Courts uniformly hold that, to be admissible, the prior cases need not be exactly the same, so long as there is “a substantial identity of issues.” *Bushmaker*, 2013 WL 11079371, at *1–2 (allowing deposition where both cases involved product liability allegations concerning asbestos); *see also Re Maxus Energy Corp.*, No. 16-11501, 2019 WL 2581609, at *3 (Bankr. D. Del. June 24, 2019) (“Courts generally take an expansive approach in construing the ‘same subject matter’ requirement, so as to require only a substantial identity of issues between the two actions. The prior case need not involve identical issues ‘so long as liability is based upon the ‘same condemned behavior thought to have occurred.’”); *Coldwell v. RITECorp Env'tl. Prop. Sols.*, No. 16-CV-01998-NYW, 2018 WL 5043904, at *8 (D. Colo. Oct. 17, 2018) (allowing prior deposition because “the prior case involved substantially similar allegations”); *Illinois Tool Works, Inc. v. MOC Prod. Co.*, No.

09CV1887 JLS MDD, 2012 WL 3561984, at *4 (S.D. Cal. Aug. 17, 2012) (allowing deposition based on finding “same subject matter where both cases involved “automotive service equipment” although different types of equipment); *Runge v. Stanley Fastening Sys., L.P.*, No. 4:09-CV-00130-TWP, 2011 WL 6755161, at *2 (S.D. Ind. Dec. 23, 2011) (allowing deposition in product liability case involving different models because the depositions relate “broadly to general product history” and “any difference in [the] model . . . is inconsequential.”); *Walker v. Blitz USA, Inc.*, No. 1:08-CV-121-ODE, 2009 WL 10669635, at *4 (N.D. Ga. Feb. 24, 2009) (allowing deposition based on finding same subject matter because all cases involved “allegations that Blitz failed to warn consumers of the risks of using the gas cans and failed to instruct consumers as to the safe uses of the gas cans.”).

Thus, unlike the “persuasive” authorities cited by FCA, *Gilreath* involves the “same subject matter” as *Walden*. This case involves a Jeep with gas tank in the extreme rear. The Jeep was rear-ended, the gas tank was punctured, and the Jeep burned with Deanna Gilreath inside. *Walden* involved a Jeep with a gas tank in the extreme rear. The Jeep was rear-ended, the gas tank was punctured, and the Jeep burned with Remington Walden inside. The legal issues in both cases are *the same*—whether should FCA be liable for putting the gas tank in a place that it knew to be dangerous, warning nobody, and allowing people to burn to death as a result.

CONCLUSION

Marchionne’s deposition cannot be retaken, and the twelve OSI depositions need not be retaken. Plaintiff respectfully asks the Court hold that the thirteen depositions identified below can be used in *Gilreath*.

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 16th day of September 2019.

BUTLER LAW FIRM

BY: 

JAMES E. BUTLER, III
PHV – 20422-2019
Georgia Bar No. 116955
MATTHEW R. KAHN
PHV – 201501-2019
Georgia Bar No. 833433
MORGAN LYNDALL
PHV – 21481-2019
Georgia Bar No. 905112

10 Lenox Pointe
Atlanta, Georgia 30324
jeb@butlerfirm.com
matt@butlerfirm.com
morgan@butlerfirm.com
(t) 404 587 8423
(f) 404 581 5877

BUTLER WOOTEN & PEAK LLP

BY:  | 

JAMES E. BUTLER, JR.
PHV# 20416-2018
Georgia Bar No. 099625
RAMSEY B. PRATHER
PHV# 20413-2018
Georgia Bar No. 658395

105 13th Street (31901)
Post Office Box 2766
Columbus, Georgia 31902
jim@butlerwooten.com
ramsey@butlerwooten.com

(t) 706 322 1990
(f) 706 323 2962

HOLCOMB & HYDE, LLC

BY: Richard A. Hyde / JEB
RICHARD A. HYDE
Ohio Supreme Court No. 0042088
(Local Counsel/Sponsoring Attorney
For Plaintiff's Counsel)

332 High Street
Hamilton, Ohio 45011
513-892-8251
rhyde@hhgattorneys.com

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel of record with a copy of Plaintiff's Second Motion to Compel Defendant FCA US LLC by e-mail and by depositing it in the United States Mail with adequate postage affixed thereon and addressed as follows:

Elizabeth B. Wright
Conor A. McLaughlin
Brianna W. Stuart
Thompson Hine LLP
3900 Key Center
127 Public Square
Cleveland, OH 44114
elizabeth.wright@thompsonhine.com
conor.mclaughlin@thompsonhine.com
brianna.stuart@thompsonhine.com

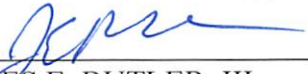
R. Kent Warren
McGuire Wood LLP
201 North Tryon Street
Suite 3000
Charlotte, NC 28202-2146
kwarren@mcguirewoods.com

Perry W. Miles IV
McGuire Woods LLP
Gateway Plaza
800 East Canal Street
Richmond, VA 23219-3916
pmiles@mcguirewoods.com

David T. Davidson
Matthew D. Davidson
Davidson Law Offices
2 S. Third Street, Suite 301
Post Office Box 567
Hamilton, OH 45011
ddavidson@davidsonlaw.org

This 16th day of September 2019.

10 Lenox Pointe
Atlanta, Georgia 30324
jeb@butlerfirm.com
matt@butlerfirm.com
morgan@butlerfirm.com
(t) 404 587 8423
(f) 404 581 5877

BY: 
JAMES E. BUTLER, III
PHV – 20422-2019
Georgia Bar No. 116955
MATTHEW R. KAHN
PHV – 201501-2019
Georgia Bar No. 833433
MORGAN LYNDALL
PHV – 21481-2019
Georgia Bar No. 905112