NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

JOHN HUNTER AND BARBARA HUNTER, HUSBAND AND WIFE, Appellants v. GENERAL MOTORS CORPORATION, SATURN CORPORATION, HOLMAN SATURN AT ENGLISH CREEK, JOSEPH HOLMAN, HOLMAN ENTERPRISES, D/B/A SATURN AT ENGLISH CREEK, Appellees	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 847 EDA 2013

Appeal from the Order February 1, 2013
In the Court of Common Pleas of Philadelphia County
Civil Division at No(s): December Term, 2006 No. 872

BEFORE: BENDER, P.J.E., PANELLA, J., and LAZARUS, J.

MEMORANDUM BY BENDER, P.J.E. **FILED MAY 29, 2014**

John Hunter and Barbara Hunter, husband and wife, appeal the orders entered by the Court of Common Pleas of Philadelphia County on March 3, 2009, March 5, 2009, and October 6, 2009, as made final and appealable by the order entered on February 1, 2013.[1] The orders in question made several evidentiary rulings and granted Holman Saturn at English Creek and Holman Enterprises, d/b/a Saturn at English Creek, (collectively, Holman)

[1] In the February 1, 2013 order, the trial court severed the claims against General Motors Corporation and Saturn Corporation, both of whom remain in bankruptcy proceedings, from this litigation.

summary judgment in this products liability action. We reverse in part; vacate; and remand.

Appellants were injured on December 21, 2004, when their 2003 Saturn VUE was involved in a single car accident. The accident occurred in South Carolina, while Appellants were traveling from Florida to their home in New Jersey. According to Appellants, Mr. Hunter was awake and alert at the time. Mr. Hunter was driving north on Interstate 95, at approximately 60 mph, sometime between 11:30 p.m. and 12:00 midnight, when their vehicle inexplicably veered to the left off the roadway and proceeded onto a sloped, grassy median. Mrs. Hunter was a passenger in the vehicle. Mr. Hunter performed emergency maneuvers, turning the steering wheel right and then sharply to the left. The car rolled several times, coming to rest upright.

Appellants had purchased the vehicle from Holman in August 2003. The vehicle remained under warranty and registered fewer than 20,000 miles at the time of the accident. Appellants assert that their vehicle was maintained properly and that their vehicle had not been involved previously in an accident. Further, according to Appellants, the vehicle was not driven in "off-road" conditions, nor had Appellants previously employed "hard,

sharp or extreme steering maneuvers." ***See*** Affidavit of John Hunter at 3 (unnumbered).[2]

In August 2004, Appellants received a letter from Saturn Corporation, addressing media reports regarding the safety of the VUE. The letter provided in relevant part:

> [T]here have been some recent media reports of rollover tests conducted on the VUE by the National Highway Traffic Safety Administration (NHTSA), the results of which have led the agency to start an investigation. These tests, which were recently adopted, include a sharp left turn at set speeds between 35 and 50 mph, followed by over correction to the right. Though the VUE did not rollover during the tests, the rear suspension was damaged by wheel contact with the pavement, thus preventing the vehicle from completing the test. It is important to note that the suspension damage was a result of the severity of the test; at no time did the suspension damage cause loss of control of the vehicle.
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> … Saturn has decided to issue a customer satisfaction recall.
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> To complete this [] recall, Saturn will replace certain rear suspension components and increase the recommended cold inflation tire pressure to reduce the risk of suspension damage.

Letter of Saturn Corporation, August 2004.

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[2] Appellants failed to paginate the reproduced record, which approaches 1000 pages, in violation of Pa.R.A.P. 2173. Moreover, to the extent Appellants reference page numbers in the table of contents that precedes the reproduced record, the table of contents is inaccurate. These failures complicated review of Appellants' claims. On at least one occasion, a similar violation resulted in the dismissal of an appeal. ***See Stefanovits v. Magrino***, 583 A.2d 841 (Pa. Cmwlth. 1990).

The test that precipitated the customer satisfaction recall is known as the Dynamic Maneuvering Test, colloquially identified as the Fishhook Test, and is described in a Field Performance Evaluation Report authored by General Motors Corporation (GM):

> NHTSA instituted the Dynamic Maneuvering Test in the 2004 model year to assess the dynamic performance of vehicles with respect to stability and rollover propensity. The test supplements the existing static stability factor and generates a star rating for the vehicle. The NHTSA static stability factor is an engineering calculation based on the track width (the distance between two wheels on the same axle) and the height of the center of gravity above the road. The Dynamic Maneuvering Test consists of a sharp left turn (-270 degrees) at a series of speeds between 35 and 50 mph, followed by an over correction of 540 degrees to the right. NHTSA testing of [] two [2004 Saturn] VUE vehicles resulted in deformation of the toe link due to high loading induced by the tire debeading and subsequent rim to ground contact. Both vehicles behaved in the same manner.
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> …
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> The two vehicles involved in the NHTSA Dynamic Maneuvering Test are the only cases.
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> *NHTSA has identified four field cases where VUE vehicles were involved in single vehicle rollovers and the rear suspension was deformed. However, the deformation of the toe links in these vehicles was not the same as in the NHTSA-tested vehicles. The NHTSA-tested vehicles collapsed at the knuckle, while the field cases bent at the center, indicating different loading characteristics.*

GM Field Performance Evaluation Report at 1 (emphasis added).

Beginning in October 2004, Appellants repeatedly inquired as to the availability of suspension replacement parts. However, the repairs had not

been completed in December 2004, prior to Appellants' accident, due to the unavailability of replacement parts.

In December 2004 and January 2005, Appellants received identical letters from Saturn, notifying Appellants that parts inventories were sufficient to complete the suspension repairs and providing additional information regarding the nature of problem. The letters provided in part:

> The rear suspension lateral link assemblies of certain model year 2002-2004 Saturn VUE vehicles may deform if subjected to a handling maneuver similar to that performed in the National Highway Traffic Safety Administation's (NHTSA's) newly implemented Dynamic Maneuvering Test ("Fishhook" Test). Deformation of the lateral link could result in the tire and wheel tipping inward until the tire contacts the trailing arm. If the tire were to contact the trailing arm, tire rotation would be inhibited.

See, e.g., Letter of Saturn Corporation, December 2004. According to Appellants, they received the December letter from Saturn prior to leaving for Florida, but were without sufficient time to arrange for the repairs. Nevertheless, a representative of Saturn had assured Appellants in October 2004 that their vehicle was safe to drive.

Appellants commenced this action in December 2006, claiming strict liability, negligence, and breach of warranty. According to Appellants, the rear suspension system of their vehicle was defective, and this defect (1) caused their vehicle to leave the travel portion of the roadway and (2) caused their vehicle to roll over several times. ***See*** Complaint, ¶¶ 14, 16, and 19.

The trial court issued a case management order, establishing a lengthy period for discovery. At the close of discovery, Appellants failed to submit timely an expert report addressing the engineering and/or automotive issues central to their allegations. On this ground, in August 2008, Holman filed a motion for sanctions, seeking an order barring Appellants from introducing testimony from any expert not identified in compliance with the case management order. Appellants opposed this motion as improperly filed and premature, asserting their right to supplement the record, with appropriate expert reports, in response to a motion for summary judgment. The trial court agreed, denying Holman's motion "as improperly filed." Order, 10/22/2008 (Hon. Sandra M. Moss).

Concurrent with their motion for sanctions, Holman filed its first motion for summary judgment, based solely on the ground that Appellants had failed to produce an expert report to address Appellants' claim that the rear suspension system of their vehicle was defective. Appellants opposed the motion. According to Appellants, they were proceeding under a malfunction theory to prove a defective condition of the vehicle, and as such, they were not required to support their claims with expert testimony. The trial court denied Holman's motion for summary judgment without explanation or opinion, ***see*** Order, 10/22/2008 (Hon. Joseph A. Dych), and trial was scheduled for March 2009.

Despite their argument that they need not present expert testimony, Appellants also supplemented the record with an expert report authored by an automotive engineer, R. Scott King, BSME. Mr. King's report was presented in summary form. His conclusions are preceded by the following caveat:

> According to the information provided by your office, the incident vehicle has been preserved. However, it has not been produced for inspection. *Such an inspection will be required by this office in order to determine if the vehicle overturned because of the recall failure.*

Appellants' Expert Report, at 2 (unnumbered) (emphasis added). In this context, Mr. King reached the following conclusions:

> 1. The incident vehicle had a defective condition, as evidenced by the recall/customer satisfaction program, which could lead to suspension collapse upon a series of extreme opposite-turn maneuvers. Such a collapse could increase the risk of vehicle rollover.
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> 2. The Saturn VUE was driven off-road and engaged in maneuvers that created conditions under which the recall defect phenomenon is known to occur.
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> 3. The available physical evidence, as depicted in the photographs, is consistent with the occurrence of the recall phenomenon during the accident sequence.
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> 4. The available physical evidence, as depicted in the photographs, is consistent with a conclusion that the recall phenomenon occurred and caused or contributed to the cause of the rollover of the Saturn VUE.
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> 5. A recall to replace certain rear suspension components and increase cold inflation tire pressure to reduce the risk of suspension damage had been announced by Saturn/GM in August 2004, at which time the recall repair could not be

> performed due to the unavailability of necessary replacement parts.

Id. at 2-3.

Prior to trial, in February 2009, Holman filed several motions *in limine*. Holman sought to preclude opinion testimony of Mr. King, asserting (1) the belated and incomplete disclosure of the basis for his opinions, (2) irrelevance, and (3) lack of foundation. Holman also sought to preclude Appellants from misrepresenting the contents of certain documents and sought to apply South Carolina law. These motions were granted by the trial court without explanation. Appellants filed a motion *in limine* to preclude reference to or introduction of statements of Alan Rouse, Carole Craddock, and Arthur Cook, Jr.[3] Appellants' motion was denied without explanation.

Following the trial court's decision to preclude the opinion testimony of Mr. King, Holman filed a motion for nonsuit, asserting Appellants' inability to meet its burden of proving that an alleged defect in the rear suspension system of their vehicle caused it to go out of control; leave the roadway; and roll over. According to Holman, the vehicle's suspension system was beyond the knowledge, skill, and experience of laypeople, thus requiring expert testimony. Moreover, Holman asserted that Appellants' reliance upon

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[3] Trooper Alan Rouse is a police officer who responded to the scene of the accident. Carole Craddock and Arthur Cook, Jr. are emergency medical personnel who also responded to the scene.

the malfunction theory was misplaced, as Appellants' claims were merely speculative.

The trial court determined that Holman's motion was identified more appropriately as a motion for summary judgment and indicated it would treat it accordingly. Thereafter, Holman filed a second, formal motion for summary judgment, based solely on the absence of automotive expert testimony. Appellants responded, again asserting that their allegations were not dependent upon expert testimony but identified the following circumstantial evidence in support of their allegations: (1) affidavits of John Hunter and Barbara Hunter; (2) letters from Saturn Corporation dated August 2004, December 2004, and January 2005; (3) the expert report of R. Scott King, BSME; and (4) the GM Field Performance Evaluation Report. ***See*** Appellants' Memorandum (filed in support of their response in opposition to Holman's second motion for summary judgment). Concurrently, and again contrary to their argument that no expert testimony was necessary, Appellants filed a motion to reconsider the trial court's order precluding Mr. King's expert testimony. In October 2009, the trial court (1) denied Appellants' motion to reconsider and, in support thereof, issued an analysis concluding that Mr. King's report was legally incompetent; and (2) granted Holman summary judgment on all claims, concluding that the absence of expert testimony was fatal to Appellants' case. Notably, the trial

court did not address Appellants' malfunction theory of the case. ***See*** Findings and Order, 10/06/2009 (Hon. Allan L. Tereshko).

After a lengthy delay due in part to federal bankruptcy proceedings, the trial court entered an order to sever the action pursuant to Pa. R.C.P. 213 on the stipulation of the parties, thus removing General Motors Corporation and Saturn Corporation from this case. Appellants appealed and filed a court-ordered Pa. R.A.P. 1925(b) statement. The trial court issued an opinion.

Appellants raise the following issues, restated and renumbered for ease of analysis:

> 1. Whether the trial court violated the coordinate jurisdiction rule in entertaining Holman's motion to preclude the expert testimony of R. Scott King and, thereafter, Holman's second motion for summary judgment;
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> 2. Whether the trial court erred in granting Holman's motion to preclude the expert testimony of R. Scott King, based on its conclusion that the report was legally incompetent;
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> 3. Whether the trial court erred in granting Holman's motion to apply South Carolina law;
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> 4. Whether the trial court erred in granting summary judgment to Holman where genuine issues of material fact existed pursuant to Appellants' malfunction theory of the case;
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> 5. Whether the trial court erred in granting Holman's motion to preclude Appellants from misrepresenting the contents of documents; and
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> 6. Whether the trial court erred in denying Appellants' motion to preclude reference to or introduction of the statements of Alan Rouse, Carole Craddock, and Arthur Cook, Jr.

See Appellants' Brief, at 8.

Initially, we address Appellants' contention that the trial court violated the coordinate jurisdiction rule when it ruled on Holman's motion to preclude the expert testimony of Mr. King and, thereafter, Holman's second motion for summary judgment. In support of this contention, Appellants argue that Holman questioned the sufficiency of Mr. King's report prior to the court's disposition of Holman's motion for sanctions and first motion for summary judgment. Therefore, Appellants conclude that because the trial court denied these early motions, it was precluded from considering Holman's later motions. We disagree.

> The coordinate jurisdiction rule is one of
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> > a family of rules [that] embody the concept that a court involved in the later phases of a litigated matter should not reopen questions decided by another judge of that same court or by a higher court in the earlier phases of the matter. … [U]pon transfer of a matter between trial judges of coordinate jurisdiction, the transferee trial court may not alter the resolution of a legal question previously decided by the transferor trial court.

Commonwealth v. Starr, 664 A.2d 1326, 1331 (Pa. 1995) (citations omitted).

> Departure from [the rule] is allowed only in exceptional circumstances such as where there has been an intervening change in the controlling law, a substantial change in the facts or evidence giving rise to the dispute in the matter, or where the prior holding was clearly erroneous and would create a manifest injustice if followed.

Id. at 1332; ***see also Goldey v. Trs. Of Univ. of Pa.***, 675 A.2d 264, 266-68 (Pa. 1996) (rejecting the exception espoused in ***Solcar Equip. Leasing Corp. v. Pa. Mfrs. Ass'n***, 606 A.2d 522 (Pa. Super. 1996) (erroneously holding that the coordinate jurisdiction rule did not apply where an initial order is issued without an opinion)).

The coordinate jurisdiction rule did not affect the trial court's authority to consider and rule on either (1) Holman's motion seeking to preclude King's testimony or (2) its second motion for summary judgment. As detailed in our exposition of the procedural history, the sole basis for Holman's early motions was the failure of Appellants to submit timely an expert report relevant to the automotive issues central to their complaint.

Appellants suggest that Holman made arguments attacking the substance of Mr. King's report in its reply memorandum, filed in support of its first motion for summary judgment, and that these arguments somehow altered the motion. This is not persuasive. Holman never amended its motion. No substantive issues were properly before the trial court, nor is it apparent from the record that the trial court considered anything but Holman's procedural argument. ***See, e.g., Farber v. Engle***, 525 A.2d 864, 866-67 (Pa. Cmwlth. 1987) (concluding that, under the circumstances, where it was impossible to ascertain whether an initial determination of the trial court was made on procedural grounds, subsequent analysis of the

merits by a judge of coordinate jurisdiction was not improper) (cited favorably by ***Goldey***, 675 A.2d at 266).

Appellants' subsequent submission of the report authored by Mr. King substantially altered the evidence of record before the court and rendered moot the premise of Holman's earlier motions. Thus, the trial court properly denied those motions. However, the substantial change in evidence also created a far different context within which the trial court was permitted to address Holman's subsequent motions. Accordingly, the coordinate jurisdiction rule is not applicable. ***Starr***, 664 A.2d at 1332.

In their next issue, Appellants contend that the trial court erred in granting Holman's motion *in limine* to preclude the expert testimony of Mr. King.[4] According to Appellants, Mr. King's conclusions were supported by an adequate factual foundation. Further, Appellants assert that the court engaged in inappropriate fact-finding; made credibility determinations; and its failure to view the evidence in the light most favorable to Appellants constituted reversible error. ***See*** Appellants' Brief at 21-26 (citing in

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[4] Appellants also appeal the order denying their motion to reconsider the court's order granting Holman's motion to preclude Mr. King's testimony. We review the court's disposition of a motion to reconsider for an abuse of discretion. ***See Dahl v. Ameriquest Mortg. Co.***, 954 A.2d 588, 593 (Pa. Super. 2008). In light of our analysis, we conclude the trial court abused its discretion in denying Appellants' motion to reconsider.

support, for example, ***Glaab v. Honeywell, Int'l, Inc.***, 56 A.3d 693 (Pa. Super. 2012) (vacating the trial court's award of summary judgment)).

Appellants have conflated the well-known standard by which the court evaluates a motion for summary judgment with the appropriate evidentiary standard. The admissibility of expert testimony is not a disputed issue of fact resolved against the moving party. ***See General Elec. Co. v. Joiner***, 522 U.S. 136, 142-43 (1997) (reversing the court of appeals for failing to examine the trial court's admissibility ruling with the appropriate deference, despite its impact upon summary judgment); ***Snizavich v. Rohm & Haas Co.***, 83 A.3d 191, 194-95 (Pa. Super. 2013) (applying the evidentiary standard of review where the exclusion of expert testimony resulted in the grant of summary judgment); ***Croydon Plastics Co., Inc. v. Lower Bucks Cooling & Heating***, 698 A.2d 625 (Pa. Super. 1997) (applying distinct standards of review first to a discovery sanction resulting in the exclusion of expert testimony and, thereafter, to the grant of summary judgment).

We review a trial court's evidentiary decisions for an abuse of discretion. ***See Schmalz v. Mfrs. and Traders Trust Co.***, 67 A.3d 800, 802-03 (Pa. Super. 2013); ***Smith v. Paoli Mem'l Hosp.***, 885 A.2d 1012, 1016 (Pa. Super. 2005) ("Decisions regarding the admission of expert testimony, like other evidentiary decisions, are within the sound discretion of the trial court."). In this context,

> [d]iscretion is abused when the course pursued represents not merely an error of judgment, but where the judgment is

> manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill will.

Schmalz, 67 A.3d at 803 (quoting ***Catlin v. Hamburg***, 56 A.3d 914, 922 (Pa. Super. 2012)).

Before we may address properly Appellants' contention, however, we must examine first the context within which Holman challenged Mr. King's proffered testimony. As noted previously, Holman sought to preclude this testimony on the grounds that Appellants' disclosure was untimely, incomplete, and without proper foundation. Essentially, Holman based its motion on allegations that Appellants violated their discovery obligations.

It is long established that the purpose of our rules governing the discovery of expert testimony is to prevent surprise. ***See Miller v. Brass Rail Tavern, Inc.***, 664 A.2d 525, 530 n.3 (Pa. Super. 1995). Rule 4003.5 provides in part:

> (1) A party may through interrogatories require
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> …
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> (b) the other party to have each expert so identified state the substance of the facts and opinions to which the expert is expected to testify and *a summary of the grounds for each opinion*. The party answering the interrogatories may file as his or her answer a report of the expert or have the interrogatories answered by the expert. The answer or separate report shall be signed by the expert.

Pa.R.C.P. 4003.5(a)(1)(b) (emphasis added). Thus, compliance requires only that a party submit a *summary* report of his expert's testimony. ***Id.***

An expert's report is sufficient, provided it enables the opposing party to prepare a rebuttal witness. ***See Feden v. Consol. Rail Corp.***, 746 A.2d 1158, 1163 (Pa. Super. 2000); ***Kaminski v. Emp'rs Mut. Cas. Co.***, 487 A.2d 1340, 1344 (Pa. Super. 1985) ("By allowing for early identity of expert witnesses and their conclusions, the opposing side can prepare to respond appropriately[.]"). Thereafter, an expert is permitted to provide a reasonable explanation or even an enlargement of his written word, provided his subsequent testimony remains within the fair scope of his pre-trial report. ***See Daddona v. Thind***, 891 A.2d 786, 806 (Pa. Cmwlth. 2006) (citing ***Hickman v. Fruehauf Corp.***, 563 A.2d 155 (Pa. Super. 1989)).

We have reviewed Mr. King's report. Mr. King states that he relied upon "a police report, data related to a manufacturer's safety recall/customer satisfaction program, and photographs of the incident vehicle." Appellants' Expert Report, at 1 (unnumbered). Based upon his interpretation of this evidence and his expertise, Mr. King arrived at several conclusions. Nevertheless, the report is sparse, totaling three pages and citing evidentiary support for his conclusions generally. For example, Mr. King cites "evidence, as depicted in the photographs" in support of his conclusion that "the recall phenomenon" may have occurred. Appellants' Expert Report, at 3 (unnumbered). Mr. King does not identify what photographs support this conclusion, nor does he attach them to his report.

Generally, if the recipients of discovery believe that their opponent has not sufficiently complied, they have numerous options available to them short of seeking the complete preclusion of an expert's proposed testimony. ***See Kurian v. Anisman***, 851 A.2d 152, 162 (Pa. Super. 2004) (stating that the preclusion of expert testimony is a drastic sanction in support of which, a trial court must find prejudice and such prejudice may not be assumed) (discussing ***Gerrow v. John Royle & Sons***, 813 A.2d 778, 781-83 (Pa. 2002) (plurality)); ***Reeves v. Middletown Athletic Ass'n***, 866 A.2d 1115, 1130 (Pa. Super. 2004) (concluding, despite noting that discovery was complete, that failure to consider expert testimony submitted in response to motion for summary judgment without discussing prejudice constituted an abuse of discretion). For example, recipients may pursue more limited sanctions, ***see*** Pa.R.C.P. 4019, or seek additional discovery from the court:

> Upon cause shown, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions concerning fees and expenses as the court may deem appropriate.

Pa.R.C.P. 4003.5(a)(2); ***see, generally, Cooper v. Schoffstall***, 905 A.2d 482 (Pa. 2006); ***see also Checchio v. Franklin Hosp. – Torresdale Div.***, 717 A.2d 1058, 1059 (Pa. Super. 1998) (reporting that the trial court ordered a deposition of expert in response to motion *in limine*). If a proposed expert's conclusions are not supported properly, suggesting

reliance upon an unaccepted methodology, a ***Frye*** hearing may be appropriate.[5]

Here, though, Holman sought no less drastic relief from the trial court, but requested the complete preclusion of Mr. King's testimony. Further, in support of their prayer for relief, Holman alleged prejudice in only cursory terms. To the extent Mr. King's report failed to identify the factual foundation for his opinions with sufficient specificity, Holman could have sought additional discovery or requested Mr. King's deposition. They did not. Alternatively, to the extent they believed or could demonstrate that Mr. King's conclusions were without adequate scientific foundation, they could have challenged the methodology supporting his opinions in the context of a ***Frye*** hearing. They did not.

Moreover, the timing of Holman's motion *in limine* is not lost upon this Court. Appellants filed their expert report in September 2008; Holman filed its motion in February 2009, one month before trial was scheduled to commence. A failure to challenge timely the sufficiency of a party's compliance with discovery obligations has been deemed by this Court to be a waiver of the opposing party's right to relief. ***See Linker v. Churnetski Trans. Inc.***, 520 A.2d 502, 505-06 (Pa. Super. 1987) (finding the

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[5] ***See Frye v. United States***, 293 F. 1013 (D.C. Cir. 1923) (concluding that novel scientific evidence is admissible providing the methodology that underlies the evidence has general acceptance).

preclusion of expert testimony an abuse of discretion where defendant did not move to compel production); ***Mecca v. Lukasik***, 530 A.2d 1334, 1341 (Pa. Super. 1987) (rejecting appellants' complaints of inadequate discovery where they failed to depose expert).

It does not appear that the trial court considered a less severe penalty, nor did it expressly find that Holman was prejudiced by the paucity of detail. ***Kurian***, 851 A.2d at 162. To the contrary, the trial court ignored these crucial considerations and proceeded to evaluate the substantive merits of Mr. King's report.

In so doing, the court determined that the report of Mr. King was legally incompetent. The competency of an expert's testimony is "a question of law subject to plenary review." ***City of Phila. v. W.C.A.B. (Kriebel)***, 29 A.3d 762, 769-70 (Pa. 2011); ***see also Thierfelder v. Wolfert***, 52 A.3d 1251, 1261 (Pa. 2012) (regarding questions of law, "our standard of review is *de novo*").

> [E]xpert testimony is incompetent if it lacks an adequate basis in fact. While an expert's opinion need not be based on absolute certainty, an opinion based on mere possibilities is not competent evidence. This means that expert testimony cannot be based solely upon conjecture or surmise. Rather, an expert's assumptions must be based upon such facts as the jury would be warranted in finding from the evidence. Accordingly, the Pennsylvania Rules of Evidence prescribe a threshold for admission of expert testimony dependent upon the extent to which the expert's opinion is based on facts and data[.]

Gillingham v. Consol Energy, Inc., 51 A.3d 841, 849 (Pa. Super. 2012) (quoting ***Helpin v. Trustees of University of Pennsylvania***, 969 A.2d 601, 617 (Pa. Super. 2009)).

Rule 703 prescribes:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Pa.R.E. 703.

Were the procedural posture of this case different or the evidentiary record developed more fully, for example, with the addition of testimony from a deposition or ***Frye*** hearing, the paucity of detail included in Mr. King's report would be troubling. ***See, e.g., Snizavich***, 83 A.3d at 193-94 (evaluating competency based upon testimony from a ***Frye*** hearing); ***Gillingham***, 51 A.3d at 849 (evaluating competency following trial, in the context of a motion for judgment notwithstanding the verdict); ***Checchio***, 717 A.2d at 1059 (affirming summary judgment after concluding that expert testimony, taken by court-ordered deposition, was incompetent). However, in our view, the record here was insufficient to enable the trial court to make an informed legal judgment regarding competency.

Mr. King provided, in summary fashion, an adequate factual basis for his conclusions. To the extent Holman disputes those conclusions, in the course of a trial, Holman may "present its own countervailing facts and

figures and/or expert testimony to convince the fact-finder that the weight to be given to the other side's expert testimony should be little or none." ***Primavera v. Celotex Corp.***, 608 A.2d 515, 521 (Pa. Super. 1992) (discussing the proper role of expert and jury in the context of an expert's synthesis of information); ***see also Glaab***, 56 A.3d at 698 (discussing the deference due scientific opinion in the context of summary judgment and noting that expert disputes must be resolved by the trier of fact).

In summary, the trial court should have evaluated Mr. King's opinions as a function of Appellants' compliance with their discovery obligations, mindful of the far more limited record compiled and Holman's failure to seek additional discovery clarifying Mr. King's opinions in a more timely fashion. In this regard, the court should have considered less drastic remedies to cure any deficiency in Mr. King's report or, in the alternative, set forth analysis finding prejudice such that the only curative action was the complete preclusion of his testimony. Absent a more developed record, we conclude Mr. King's report was sufficient, and the court's legal determination to the contrary was flawed. For these reasons, we deem the court's errors an abuse of its discretion.

Nevertheless, we are constrained to agree with the trial court on the matter of Mr. King's inability to testify authoritatively, without conjecture or surmise, on the issue of causation. ***See Gillingham***, 51 A.3d at 849.

Appellants offer no coherent argument in support of their claim that Mr. King's causation opinions were legally sufficient.

As noted previously, Mr. King acknowledged that he did not inspect the vehicle and stated unequivocally that "[s]uch an inspection will be required by this office in order to determine if the vehicle overturned because of the recall failure." Appellants' Expert Report, at 2 (unnumbered). While it is true that Mr. King concluded thereafter that the photographic evidence supported a conclusion that "the recall phenomenon occurred and caused or contributed to the cause of the rollover of the Saturn VUE," we may not ignore the context within which Mr. King offered these conclusions. Expert testimony must be rendered with sufficient certainty in order to enable the fact finder to "find as fact what the expert gave as opinion." ***Hamil v. Bashline***, 392 A.2d 1280, 1285 (Pa. 1978) (quoting ***McMahon v. Young***, 276 A.2d 534, 535 (Pa. 1971)). Based upon Mr. King's acknowledgement that an inspection of the vehicle was necessary, his conclusions regarding causation represent "mere possibilities," and not competent expert testimony. ***Gillingham***, 51 A.3d at 849. Further, we observe that these are the only conclusions offered by Mr. King regarding causation. Thus, Mr. King's report does not address any other possible causes for Appellants' accident and injuries. ***Daddona***, 891 A.2d at 806.

Accordingly, for the aforementioned reasons, the order of court granting Holman's motion *in limine*, precluding the testimony of Mr. King, is

reversed, except to the extent that it precludes Mr. King from offering any expert testimony regarding causation.[6]

We need not address the remaining issues in detail. In their third issue, Appellants contend that the trial court erred in granting Holman's motion *in limine* to apply South Carolina product liability law. We exercise *de novo* review of the trial court's determination that South Carolina product liability law applies. ***See Travelers Cas. & Sur. Co. v. Ins. Co. of North America***, 609 F.3d 143, 157 (3d Cir. 2010) (applying Pennsylvania choice of law rules).

> In Pennsylvania, the choice of law analysis is a two-step process. First, the trial court determines whether a true conflict exists between the laws of the competing states. If a false conflict exists, no further analysis is necessary. A false conflict exists if only one jurisdiction's governmental interest would be impaired by the application of the other jurisdiction's law. In such a situation, the court must apply the law of the state whose

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[6] At oral argument, Appellants represented to the Court that Mr. King was not offered an opportunity to inspect the vehicle and suggested that this was due to Holman's refusal to accommodate Mr. King. The record does not support this representation. Appellants' previous automotive expert inspected the vehicle in July 2008. Thereafter, that expert withdrew from this matter without explanation. Mr. King's report was submitted in September 2008. At no point, from July through September 2008, and thereafter until February 2009, when Appellants responded to Holman's motion *in limine*, did they request the trial court's assistance in obtaining additional access to the vehicle. Appellants filed no motion to compel; they submitted no answer in response to Holman's motion, attempting to justify or correct Mr. King's failure to inspect the vehicle. Even in the context of their motion to reconsider, again, Appellants' sought no relief from the court. Further, at no point following the submission of Mr. King's report did Appellants attempt to amend or supplement his report. Thus, we conclude that this argument is devoid of merit.

> interests would be harmed if its law were not applied. If the court determines that a true conflict exists, it then analyzes the governmental interests and determines which state has the greater interest in the application of its law.

Harsh v. Petroll, 840 A.2d 404, 418 (Pa. Cmwlth. 2003) (quotations and citations omitted).[7] Pursuant to this analysis, our courts have concluded that where the site of an accident is purely fortuitous, the state in which injury occurred has little interest in the outcome of litigation "unless it can be said with reasonable certainty that [a] defendant acted in reliance on that state's rule." ***Griffith v. United Air Lines, Inc.***, 203 A.2d 796, 806 (Pa. 1964); ***see, e.g., Kuchinic v. McCrory***, 222 A.2d 897 (Pa. 1966); ***Troxel v. A.I. DuPont Inst.***, 636 A.2d 1179, 1182 (Pa. Super. 1994); ***see also LeJeune v. Bliss-Salem, Inc.***, 85 F.3d 1069, 1071-72 (3d Cir. 1996); ***Reyno v. Piper Aircraft Co.***, 630 F.2d 149 (3d Cir. 1980) (applying Pennsylvania choice of law analysis), *rev'd on other grounds*, 454 U.S. 235 (1981).

According to Appellants, the differences in the product liability law of Pennsylvania and South Carolina constitute a "false conflict," because the occurrence of their accident in South Carolina was merely fortuitous. We agree. At the time of their accident, Appellants were traveling from Florida

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[7] A "false conflict" has also been found "where the laws of the two jurisdictions would produce the same result on the particular issue presented." ***Sheard v. J.J. DeLuca Co., Inc.***, --- A.3d ---, at *7 (Pa. Super. 2014) (quoting ***Williams v. Stone***, 109 F.3d 890, 893 (3d Cir. 1997)).

to their home in New Jersey. The accident could have occurred at any point in between. Moreover, it cannot be said with any certainty that Holman acted in reliance upon South Carolina law. Accordingly, on remand, the trial court shall apply Pennsylvania product liability law.

In their fourth issue, Appellants contend that the trial court erred in granting summary judgment to Holman, where genuine issues of material fact existed pursuant to Appellants' malfunction theory of their strict liability claim. Holman moved for summary judgment based solely on the trial court's decision to preclude the testimony of Mr. King. For its part, the trial court did not address Appellants' reliance on malfunction theory, baldly concluding in one brief paragraph, without citation to authority, that the absence of expert testimony in support of Appellants' claim that their vehicle was defective required the grant of summary judgment. Appellants maintain, however, that they need not rely on expert testimony to establish a *prima facie* case.

In reviewing an order granting summary judgment, our scope of review is plenary, and our standard of review is the same as that applied by the trial court. ***See Lackner v. Glosser***, 892 A.2d 21, 29 (Pa. Super. 2006).

> [A]n appellate court may reverse the entry of a summary judgment only where it finds that the lower court erred in concluding that the matter presented no genuine issue as to any material fact and that it is clear that the moving party was entitled to a judgment as a matter of law. In making this assessment, we view the record in the light most favorable to

> the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. As our inquiry involves solely questions of law, our review is *de novo*.

Jones v. Levin, 940 A.2d 451, 453 (Pa. Super. 2007) (quoting ***Payne v. Commonwealth Dep't of Corrections***, 871 A.2d 795, 800 (Pa. 2005)).

Malfunction theory "encompasses nothing more than circumstantial evidence of product malfunction." ***Barnish v. KWI Bldg. Co.***, 908 A.2d 535, 541 (Pa. 2009) (citing ***Rogers v. Johnson & Johnson Prods., Inc.***, 565 A.2d 751, 754 (Pa. 1989)). It permits "a plaintiff to prove a defect in a product with evidence of the occurrence of a malfunction and with evidence eliminating abnormal use or reasonable, secondary causes for the malfunction." ***Id.***

Suitable circumstantial evidence includes:

> (1) the malfunction of the product; (2) expert testimony as to a variety of possible causes; (3) the timing of the malfunction in relation to when the plaintiff first obtained the product; (4) similar accidents involving the same product; (5) elimination of other possible causes of the accident; and (6) proof tending to establish that the accident does not occur absent a manufacturing defect.

Id. at 542-43 (quoting ***Dansak v. Cameron Coca-Cola Bottling Co.***, 703 A.2d 489, 496 (Pa. Super. 1997)); ***see also Wiggins v. Synthes***, 29 A.3d 9, 15 (Pa. Super. 2011). Although expert testimony is "certainly desirable," this Court has recognized that "it is not essential." ***Wiggins***, 29 A.3d at 15.

Based on this authority, the trial court erred as a matter of law. We discern no requirement that Appellants rely on expert testimony to establish

liability pursuant to malfunction theory. In response to Holman's motion for summary judgment, Appellants identified evidence, which, if believed by a fact-finder, will establish a *prima facie* case. Accordingly, we vacate the order granting Holman summary judgment and remand for trial.

In their fifth and sixth issues, Appellants contend that the trial court erred further in certain evidentiary matters. These issues are not dispositive of the rights or interests of either party. In light of our decision to remand this matter, we decline to address them. Nevertheless, we observe that the trial court's decision granting Holman's motion *in limine* to preclude Appellants from misrepresenting the content of documents was without prejudice to Appellants' right to submit the documents to the court. Appellants will have that opportunity. Presumably, the trial court will then consider the parties' arguments regarding the actual content of the documents, mindful that the credibility of expert testimony is for the trier of fact. ***See, generally, Primavera***, 608 A.2d at 518-21. As for Appellants' motion *in limine* to preclude reference to or introduction of statements by Alan Rouse, Carole Craddock, and Arthur Cook, Jr., Appellants may object to this evidence when it is proffered.

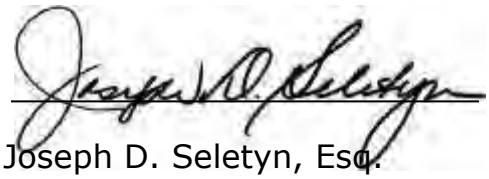
Order entered March 3, 2009, granting Holman's motion *in limine* to preclude the testimony of R. Scott King, reversed in part.

Order entered March 5, 2009, granting Holman's motion *in limine* to apply South Carolina law, reversed.

Order entered October 6, 2009, denying Appellants' motion to reconsider and granting Holman's motion for summary judgment, vacated.

Case remanded. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/29/2014