

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

CHELSEA PURSELL, A MINOR, RENEE	:	IN THE SUPERIOR COURT OF
DANIELLE AND JEFF PURSELL,	:	PENNSYLVANIA
INDIVIDUALLY AND AS THE PARENTS OF :		
AND ON BEHALF OF THEIR MINOR CHILD:		
CHELSEA PURSELL,	:	

Appellee

v.

VOLKSWAGENWERK AG, A FOREIGN	:
CORPORATION, VOLKSWAGEN OF	:
AMERICA, INC., A FOREIGN	:
CORPORATION, PPL ELECTRIC UTILITIES	:
CORPORATION, A PENNSYLVANIA	:
CORPORATION, KRISTOPHER YOUNG,	:

Appellee

APPEAL OF: VOLKSWAGENWERK AG AND:	:
VOLKSWAGEN OF AMERICA, INC.,	:

Appellant

No. 1701 EDA 2008

Appeal from the Judgment Entered May 9, 2008
 In the Court of Common Pleas of Bucks County
 Civil at No(s): 0500794-27-2

BEFORE: STEVENS, KLEIN*, and KELLY, JJ.

MEMORANDUM: **FILED DECEMBER 22, 2009**

This is an appeal from the May 9, 2008 judgment entered in the Court of Common Pleas of Bucks County in favor of Chelsea Pursell and her parents, Renee and Jeff Pursell, in the amount of \$10,925,849.24. In this complex and lengthy strict liability-crashworthiness case, Appellants

*Judge Klein did not participate in the consideration or decision of this case.

Volkswagenwerk AG and Volkswagen of America, Inc. (collectively Volkswagen) have presented numerous issues for our review. After careful consideration, we affirm.

The relevant facts and procedural history are as follows: On February 4, 2005, Chelsea Pursell, a minor, and her parents, Renee and Jeff Pursell (collectively the Pursells), filed a civil complaint against Volkswagen, as well as PP&L Electrical Utilities Corp. (hereinafter PP&L Electrical Utilities), Kristopher Young, and his mother, Kathy M. Candal a/k/a Kathy M. Young, raising claims of strict products liability as to Volkswagen and negligence as to all other parties in connection with an automobile accident occurring on May 28, 2004, in Allentown. Specifically, in their complaint, the Pursells averred that, on the day in question, sixteen-year-old Chelsea Pursell, who was wearing the available lap seat belt, was sitting in the center rear seat of a 1992 Volkswagen Jetta, which was owned by Ms. Candal and being operated by her eighteen-year-old son, Mr. Young, when the Jetta left the road and struck a utility pole head-on. The Pursells averred that, due to the defective design of the Jetta's center rear safety system, Ms. Pursell suffered catastrophic spinal cord and internal injuries, and the Pursells sought compensatory and punitive damages from Volkswagen. The Pursells also averred Mr. Young was negligent in driving the Jetta, Ms. Candal was vicariously liable, and PP&L Electrical Utilities was negligent with regard to the wooden utility poles.

Following extensive discovery, on June 29, 2007, Volkswagen filed a motion for summary judgment seeking dismissal of the Pursells' claim that the Jetta was defectively designed since the Jetta contained a center rear seat lap belt only and no lap/shoulder belt. Specifically, Volkswagen alleged that the claim was preempted by federal law since the federal government regulations do not require lap/shoulder belts to be placed in the center rear position.¹ By order entered on October 15, 2007, the trial court granted the motion. Specifically, the trial court held that "Plaintiff is precluded from presenting all evidence concerning a lap/shoulder seat belt. Nothing in this ORDER shall be construed as preventing all other theories of liability by Plaintiff against Volkswagen."

On October 14, 2007, after discovering that the Pursells had settled with PP&L Electrical Utilities, the trial court permitted Volkswagen to file a cross-claim against PP&L Electrical Utilities. Discovery continued with the litigants filing additional and/or supplemental expert reports. In November of 2007, the Pursells' expert submitted supplemental reports focusing on the unsafely designed center rear seat with lap belt that caused Ms. Pursell to "submarine" the lap belt. On December 7, 2007, Volkswagen filed a second motion for summary judgment asserting the Pursells' proffered evidence was

¹ Volkswagen cited to the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1381 *et seq.*, and regulations promulgated under the Safety Act, specifically Federal Motor Vehicle Safety Standards (FMVSS) 208, 49 C.F.R. § 571.208 (1991), which expressly provide the option of installing either a lap belt or a lap/shoulder belt in the center rear position.

insufficient to prove a claim of strict liability since (1) the expert proffered no alternative, safer, practicable design that would have prevented or reduced Ms. Pursell's injuries, other than the addition of a shoulder belt; however, a claim based on the absence of a shoulder belt was not permitted since summary judgment had previously been entered on the claim, (2) the expert did not conduct any testing or use any other methodology for the opinion, (3) the expert provided no evidence of the injuries Ms. Pursell would have sustained had the center rear seat belt been designed differently, and (4) the Pursells proffered no evidence to support a negligence theory. The trial court denied the second motion for summary judgment. N.T. 1/14/08 at 89-91.

Moreover, prior to trial, the Pursells filed motions *in limine* seeking, *inter alia*, the exclusion of evidence that Volkswagen complied with industry and governmental standards as to the design of the lap belt and seat. After hearing argument on the matter, the trial court granted the Pursells' motion, indicating "there shall be no mention of federal standards and compliance with federal standards by either party...." N.T. 1/14/08 at 17.

Also, the Pursells filed a motion *in limine* seeking to prevent Volkswagen from presenting the expert testimony of Leif Alfredsson, who was Volkswagen's senior safety test engineer, that comparative performance tests conducted by Volkswagen on nine different 1992 model year cars with various construction, contour, and seat belt geometry demonstrated the risk

of submarining in a frontal collision at 30 mph was non-existent. While Mr. Alfredsson was permitted to testify as to the test he conducted with a 1992 Jetta, he was prevented from testifying as to the test he conducted with nine other vehicles. **See** N.T. 1/14/08 at 25-26, 39.

In addition, the Pursells filed a motion *in limine* seeking to prohibit Volkswagen's expert, Jeya Padmanaban, Ph.D., who is a statistician, from testifying that, statistically, serious injuries infrequently occur to lap-belted passengers in the class of vehicles including the 1992 Jetta. The trial court granted the motion on the basis the data concerned vehicles and accidents, which were not substantially similar to the 1992 Jetta. N.T. 1/14/08 at 63-68; 1/17/08 at 54-55.

The case proceed to a jury trial on January 14, 2008. At trial, it was established that Chelsea Pursell was severely injured when Mr. Young lost control of the Jetta and crashed into a wooden utility pole at approximately 20-26 mph. According to the Pursells' expert, Ms. Pursell was wearing the lap belt provided in the rear center seat position; however, the lap belt failed to properly restrain Ms. Pursell. Of the three rear seat passengers in the Jetta, only Ms. Pursell was wearing her seat belt and only Ms. Pursell suffered severe and permanent injuries. Immediately after the crash, Ms. Pursell was still in her seat with her upper torso lying down on her thighs and she was unconscious. The Pursells proceeded against Volkswagen based

solely on strict products liability principles,² namely, their theory of recovery as to Volkswagen was that the design of the center rear seat and lap belt as a system was defective since it caused or allowed properly belted, seated occupants to slide underneath or “submarine” the belt in flat frontal collisions, resulting in the lap belt penetrating Ms. Pursell’s abdomen and severing her spinal cord. That is, the theory was that the seat bottom of the Jetta was so soft that it allowed Ms. Pursell to slide forward and under the lap belt, which then rode up over her pelvic crest and loaded into her abdomen, and that, if the Jetta had not been defectively designed, the lap belt would have stayed on her pelvis without “submarining” occurring. According to the Pursells’ expert, when the vehicle crashed into the utility pole, Ms. Pursell’s pelvis rotated under the belt before her torso pitched forward. The Pursells’ theory of recovery as to all other parties was predicated upon negligence principles.

After twelve days of trial, the jury returned a verdict in favor of the Pursells in the amount of \$10.2 million dollars.³ The jury found Volkswagen to be 39% liable, Mr. Young to be 51% liable, and PP&L Electrical Utilities to be 10% liable. On February 6, 2008, the Pursells filed a petition to add delay damages and mold the jury’s verdict, and on February 19, 2008, they filed

² Specifically, the Pursells’ theory against Volkswagen proceeded under the “crashworthiness doctrine,” which is a subset of strict products liability law that most typically arises in the context of vehicular accidents. ***See Gaudio v. Ford Motor Co.***, 976 A.2d 524 (Pa.Super. 2009).

³ The damages included \$8.7 million dollars in economic and \$1.5 million dollars in non-economic damages.

an amended petition. On February 11, 2008, Volkswagen timely filed a post-trial motion, which the trial court denied on February 13, 2008. On February 21, 2008, Volkswagen filed a motion for reconsideration of the denial of their post-trial motions, indicating that the February 13, 2008 order should be vacated since the order failed to make any provision for Volkswagen to file a supplemental post-trial motion within ten days of the filing of the transcripts as is required by Bucks County Local Rule 227.1(a). On February 25, 2008, the trial court granted Volkswagen's motion for reconsideration and vacated the February 13, 2008 order. Thereafter, the trial transcripts were received by counsel on March 27, 2008, and Volkswagen's supplemental post-trial motion was filed on April 7, 2008. The Pursells filed a response to the post-trial and supplemental post-trial motions, and by order filed on April 21, 2008, the trial court denied Volkswagen's request for post-trial relief.

On May 5, 2008, the trial court granted the Pursells' petition to mold/add delay damages. The trial court found the total delay damages to be \$1,569,151.24 and molded the verdict to \$10,925,849.24. On May 9, 2008, judgment was entered, and Volkswagen filed this timely notice of appeal. On June 6, 2008, the trial court ordered Volkswagen to file a Pa.R.A.P. 1925(b) statement, Volkswagen filed a timely statement on June 26, 2008, and the trial court filed a responsive Pa.R.A.P. 1925(a) opinion.

Volkswagen's first contention is that the trial court erred in granting the Pursells' motions *in limine*. Specifically, Volkswagen contends the trial court erred in excluding (1) evidence that the Jetta complied with FMVSS standards governing seat and seat belt design and performance, (2) evidence that the Pursells' expert's purported alternative design actually would have violated FMVSS's industry standards, (3) evidence that government-collected accident data showed almost no serious injuries to center rear seated occupants restrained with lap belts in frontal collisions of a force comparable to the force involved in the subject accident, and (4) evidence that comparative performance tests conducted by Volkswagen expert Leif Alfredsson on nine different 1992 model year cars with various construction, contour, and seat belt geometry demonstrated the risk of submarining in a frontal collision at 30 mph was non-existent.⁴

"When reviewing a trial court's ruling on a motion *in limine*, we use an abuse of discretion standard." ***Turner v. Valley Housing Development Corp.***, 972 A.2d 531, 535 (Pa.Super. 2009) (citation omitted).

Admission of evidence is within the sound discretion of the trial court and we review the trial court's determination regarding the admissibility of evidence for an abuse of discretion. To constitute reversible error, an evidentiary ruling must not only erroneous, but also harmful or prejudicial to the complaining party. For evidence to be admissible, it must be competent and relevant. Evidence is competent if it is material to the issue to be determined at trial. Evidence is relevant if it tends to prove or disprove a material fact. Relevant evidence is admissible if its probative value outweighs its prejudicial impact. The trial

⁴ We have renumbered Volkswagen's sub-issues.

court's rulings regarding the relevancy of evidence will not be overturned absent an abuse of discretion.

Estate of Hicks v. Dana Companies, LLC, 2009 WL 3855179, *12

(Pa.Super. filed 11/18/09) (*en banc*) (quotation and citations omitted).

Pennsylvania courts have previously rejected introduction of industry or government standards in evidence in strict liability actions. ***Lewis v. Coffing Hoist Division, Duff-Norton Co., Inc.***, 515 Pa. 334, 528 A.2d 590 (1987); ***Sheehan v. Cincinnati Shaper Co.***, 382 Pa.Super. 579, 555 A.2d 1352 (1989); ***Majdic v. Cincinnati Machine Co.***, 370 Pa.Super. 611, 537 A.2d 334 (1988) [(*en banc*)].

Cave v. Wampler Foods, Inc., 961 A.2d 864, 869 (Pa.Super. 2008)

(citation and quotation omitted).

In fact, recently, in ***Gaudio v. Ford Motor Co.***, 976 A.2d 524 (Pa.Super. 2009), this Court examined whether evidence of compliance with FMVSS standards in a products liability case premised upon the "crashworthiness doctrine" is admissible.⁵ Specifically, we stated the following:

We first note our agreement with the trial court's initial decision not to allow evidence of compliance with industry or government standards. In ***Lewis*** [*supra*], our Supreme Court concluded that "the question of whether or not the defendant has complied with industry standards improperly focuses on the quality of the defendant's conduct in making its design choice, and not on the attributes of the product itself." ***Id.*** at 342, 528 A.2d at 594. Accordingly, the Court held that "such evidence should be excluded because it tends to mislead the jury's attention from their proper inquiry," namely "the quality or

⁵ In ***Gaudio***, a driver of a Ford truck was killed when his air bag deployed. The plaintiff argued that, if the air bag had not deployed at all or, in the alternative, in a timely fashion, then the deceased would have suffered only minor injuries.

design of the product in question.”⁸ *Id.*

⁸ Ford argues that a decision of this Court, *Jackson v. Spagnola*, 349 Pa.Super. 471, 503 A.2d 944 (1986), compels a different result. In *Jackson*, we concluded that “[w]hile compliance with FMVSS is not conclusive as to the absence of liability under a theory of strict liability, compliance is of probative value in determining whether there was a defect.” *Id.* at 948. In our view, however, *Jackson* was implicitly overruled by our Supreme Court’s decision in *Lewis*, the first case from our Supreme Court to address evidence of compliance with industry or federal standards. In *Lewis*, the Court expressly rejected decisions from other courts permitting ‘manufacturer-defendants to prove that the quality or design of the product in question comports with industry standards or is in widespread industry use.’ *Lewis*, 515 Pa. at 343, 528 A.2d at 594; *see also Harsh [v. Petroll]*, 840 A.2d 404, 425 (Pa.Commw. 2003) (refusing to follow *Jackson* based upon *Lewis*).

The Supreme Court also indicated that “there is no relevance in the fact that such a design is widespread in the industry.” *Id.* at 342-43, 528 A.2d at 594.

In subsequent cases, the rationale in *Lewis* for excluding evidence of compliance with industry standards has been extended to exclude evidence of compliance with government standards. *See, e.g., Sheehan*[, *supra*] (evidence of compliance with ... [OSHA] standards excluded)...; *Majdic*[, *supra*] (evidence of compliance with American National Standards Institute...safety standards excluded); *Harsh v. Petroll*, 840 A.2d 404, 425 (Pa.Commw. 2003) (based upon *Lewis*, evidence of compliance with FMVSS standards is inadmissible in products liability actions); *but see Cave*[, *supra*] (evidence of compliance with a federal regulation directly relevant to prove defect “under the unique facts of this food products claim” admissible, so long as the evidence not used to demonstrate defendant’s due care in violation of *Lewis*).

Gaudio, 976 A.2d at 543-44 (citations omitted) (footnote in original).

In the case *sub judice*, Volkswagen contends it should have been permitted to introduce evidence that its seat and lap belt system complied with FMVSS standards with regard to all risks associated with submarining

and that the Pursells' expert's alternative design actually violated FVMSS standards. In making these claims, Volkswagen contends ***Jackson v. Spagnola***, 503 A.2d 944 (Pa.Super. 1986), compels the conclusion that such evidence was admissible, "***Jackson*** is the governing precedent on the admissibility of compliance with FMVSS," and the trial court erred in declining to follow ***Jackson*** on the ground it had been rejected by ***Lewis***. ***See*** Volkswagen's brief at 17. However, as discussed *supra*, this precise issue was previously addressed and rejected in ***Gaudio, supra***, wherein this Court found that ***Jackson*** was implicitly overruled by ***Lewis***. ***See also Estate of Hicks***, 2009 WL 3855179, at *17 ("We find that ***Jackson*** has been implicitly, if not directly, overruled by our Supreme Court's subsequent decision in ***Lewis***, and ***Sheehan*** properly applied ***Lewis*** in precluding the use of government standards.").⁶ Therefore, we agree with the trial court's conclusion to exclude evidence of FMVSS standards under controlling precedential authority.⁷ ***See*** Trial Court Opinion filed 10/30/08 at 9-11

⁶ In ***Estate of Hicks***, an *en banc* panel of this Court explained that "[a]s in ***Lewis*** and ***Majdic***, this Court's determination that governmental regulations are inadmissible in strict liability cases was based upon the general premise that the introduction of such evidence has the effect of shifting the jury's attention from the existence of a defect to the reasonableness of the manufacturer's conduct, which is irrelevant in strict liability actions." ***Estate of Hicks***, 2009 WL 3855179, *17.

⁷ We note that, in its reply brief, Volkswagen develops an argument that the Pursells "opened the door" for the introduction of evidence of compliance with industry and government standards. An issue may not be developed for the first time in a reply brief, and therefore, we decline to address this issue. ***See In the Interest of T.E.H.***, 928 A.2d 318 (Pa.Super. 2007).

(indicating introduction of FMVSS standards was improper under *Lewis, supra* and *Harsh, supra*).

Volkswagen further contends the trial court erred in granting the Pursells' motion *in limine* to prevent Volkswagen's expert, Dr. Padmanaban, from testifying that, statistically, serious injury infrequently occurs to lap-belted passengers in the class of vehicles including the 1992 Jetta. Dr. Padmanaban's opinion was based on the same databases used by the National Highway Traffic Safety Administration (NHTSA), which revealed almost no serious injuries resulted to center rear seated occupants restrained with lap belts in frontal collisions of a force comparable to the force involved in the subject accident. Since the data included "all makes and models of cars," the trial court granted the motion to preclude the testimony on the basis the accidents in the statistical report were not substantially similar to the accident at issue. **See** Trial Court Opinion filed 10/30/08 at 11; N.T. 1/17/08 at 54-55. Finding the situation at hand to be akin to that in *Harsh, supra*, we find no error in this regard.

In *Harsh, supra*, three passengers in a vehicle manufactured by General Motors died in a post-crash fire. The trial court prevented General Motor's expert from testifying regarding the frequency of post-crash fires based on statistics produced by the Fatal Accident Reporting System, the database maintained by the NHTSA. The Commonwealth Court concluded the trial court did not err on the grounds that General Motors had not

established a foundation for the testimony. **Harsh**, 840 A.2d at 429. Among other things, General Motor's expert could not identify the types of vehicles involved in the collisions or whether their occupants were killed as a result of the impact or the post-crash fire. **See id.** Therefore, the Commonwealth Court concluded that "there was no basis to prove that the incidents described in the statistical reports were sufficiently similar to the Harsh incident." **Id.**

Subsequent to **Harsh**, in **Gaudio**, a panel of this Court was asked to determine whether a trial court erred in permitting an expert to testify that NHTSA statistics reveal that only two fatalities have resulted from air bag deployments in Ford F-150s. Noting the statistics presented by Ford's expert were specifically limited to incidents involving Ford F-150s for the relevant years of manufacture, this Court concluded the trial court properly permitted the statistical evidence. **See Gaudio**, 976 A.2d at 546-547. In so doing, we specifically distinguished the case from **Harsh** on the basis the expert in **Harsh** had not so limited the statistical evidence and his opinions based thereon. **See Gaudio, supra.**

In the case *sub judice*, as Volkswagen admitted in the court below, the statistics to be presented by Dr. Padmanaban included all makes and models of cars. We conclude the situation is more akin to that presented in **Harsh**, as opposed to **Gaudio**, and therefore, we conclude the trial court did not err in precluding the proposed statistical testimony. **See Hutchinson v.**

Penske Truck Leasing Co., 876 A.2d 978 (Pa.Super. 2005) (holding “other accident” evidence is not admissible unless there is a “substantial similarity of conditions” between the accidents and the accident involving the plaintiff).

Volkswagen further contends the trial court erred in granting the Pursells’ motion *in limine* to prevent Volkswagen’s expert, Leif Alfredsson, from testifying that comparative performance tests conducted by Volkswagen on nine different 1992 model year cars with various construction, contour, and seat belt geometry demonstrated the risk of submarining in a frontal collision at 30 mph was non-existent. While Mr. Alfredsson was permitted to testify as to the test he conducted with regard to the rear seat belt system of a 1992 Jetta, he was prevented from testifying as to the test he conducted with nine other different-types of vehicles.⁸ **See** N.T. 1/14/08 at 25-26, 39. In ruling on the motion *in limine*, the trial court indicated it was not permitting testimony about the testing of nine other vehicles since there was no “evidence presented in the expert reports or any of the attachments to any substantial similarity between these other vehicles and the issues here. So we’ve already said there will be no other mention of make or model of cars.” N.T. 1/14/08 at 39. The court further noted there was “no offer in the readings that I have read of any substantial similarity, and there have been no offer[s] of any other relevancy

⁸ The nine other vehicles included a Ford Tempo, a Plymouth Acclaim, a Toyota Corolla, a Honda Civic, a Nissan Sentra, a Pontiac Sunbird, a Mercedes Benz 190, a BMW 318, and a Volvo 244. **See** Trial Court Opinion filed 10/30/08 at 13; Volkswagens’ Brief at 20.

as to why we need to bring in other make and models of cars." N.T. 1/14/08 at 25-26. In addition, in its opinion, the trial court explained that it was also proper to exclude the testimony since the evidence was an improper attempt by Volkswagen to demonstrate that its 1992 Jetta complied with industry standards with regard to the lap belt system. We find no abuse of discretion with regard to the trial court's exclusion of this testimony and rely on the trial court's well-reasoned opinion. Trial Court's Opinion filed 10/30/08 at 12-14. ***See generally Gaudio***, 976 A.2d at 547 ("[M]anufacturers may not attempt to prove the quality or design of their product by showing that it comports with industry or government standards or is in widespread industry use.") (citation omitted); ***Hutchinson v. Penske Truck Leasing Co.***, 876 A.2d 978 (Pa.Super. 2005) (in order to be relevant, "other accident" evidence must meet "substantial similarity" test).

Volkswagen's next contention is that the trial court erred in refusing to admit rebuttal evidence in response to testimony from the Pursells' expert, Alan Cantor, who is an aerospace engineer. In this regard, Volkswagen first contends the trial court should have permitted Volkswagen to rebut Mr. Cantor's testimony that Crash Test PA 1372⁹ evidenced occupant submarining of a properly seated and belted occupant, thereby demonstrating the Jetta's occupant restraint system was defective. Specifically, Volkswagen avers that Crash Test PA 1372 was completed by

⁹ As is discussed, Crash Test 1372, which was performed by Volkswagen, involved the making of a video depicting a crash test of the Jetta.

Volkswagen for an unrelated lawsuit and the crash test dummies used in the test were “pre-slumped” for purposes of the test, creating a result unreliable for the present case. Volkswagen alleges Mr. Cantor’s testimony suggested Crash Test PA 1372 was conducted under normal test protocol and the dummies in the test had not been intentionally “pre-slumped” for the purposes of the test. **See** N.T. 1/17/07 at 38-39, 47. Therefore, Volkswagen argues it should have been permitted to rebut the testimony with (1) the testimony of Lothar Seiber, a former Volkswagen engineer who conducted Crash Test PA 1372, and (2) the Pursells’ exhibit list, which constituted an admission when it listed Crash Test PA 1372 as a “test performed in connection with other litigation Guard/Lundberg.”¹⁰

We find that Mr. Seiber’s testimony and the exhibit list, which Volkswagen attempted to use to demonstrate Crash Test PA 1372 was performed with pre-slumped crash test dummies, would have been merely cumulative of Volkswagen expert Leif Alfredsson’s trial testimony. At trial, Mr. Alfredsson testified on several occasions that the crash test dummies had been placed by Volkswagen in a slouched or abnormal position for purposes of Crash Test PA 1372. N.T. 1/25/08 at 141-143. He also indicated

¹⁰ We note that, on cross-examination, Volkswagen’s counsel attempted to ask Mr. Cantor whether he was aware the plaintiffs’ exhibit list identified the test as “a test done in litigation in Guard and Lundberg.” N.T. 1/18/08 at 41. The trial court indicated the jury should disregard the question since “[h]ow it’s described by a paralegal or an attorney is irrelevant. The document which you’re talking about speaks for itself. How someone else wishes to characterize it is irrelevant to the jury.” N.T. 1/18/08 at 41.

that the lap belt used in the test had been placed in an abnormal position for testing purposes. N.T. 1/25/08 at 143. Therefore, the trial court properly excluded the evidence on the basis it was cumulative of other evidence. Trial Court Opinion filed 10/30/08 at 15-16. **See *Concorde Investments, Inc. v. Gallagher***, 497 A.2d 637, 641 (Pa.Super. 1985) (“The court may exclude evidence that is irrelevant, confusing, misleading, cumulative, or prejudicial.”) (citations omitted); Pa.R.E. 403. Finally, we note that Volkswagen cross-examined Mr. Cantor extensively as to what information he had regarding whether Volkswagen had created Crash Test PA 1372 for an unrelated lawsuit.¹¹ N.T. 1/17/07 at 47.¹²

¹¹ During cross-examination, the following exchange occurred:

Q: You told the jury that you didn’t recognize PA 1372 as a test that was taken for litigation, correct, Mr. Cantor?

A: I got the report. There was nothing in the report that said litigation. It said for the purpose of evaluating the restraint system.

Q: You didn’t inquire through counsel as to the purpose for which that test was taken?

A: I asked [the Pursells’ attorney] what this test was. He showed me what I saw which was the top which said purpose of test. We’ve had all the setup, all the information, and I’ve already read that to the jury.

N.T. 1/17/07 at 47. Also, Mr. Cantor denied that he had seen Crash Test PA 1372 prior to receiving it from Volkswagen for the present case. N.T. 1/18/08 at 80.

¹² We note that, intertwined with Volkswagen’s argument that it should have been permitted to offer certain evidence to rebut Mr. Cantor’s characterization of Crash Test PA 1372, Volkswagen contends the trial court should have precluded the Pursells from referring to the test in its closing argument to the jury. Specifically, Volkswagen contends the trial court permitted the Pursells’ counsel to “perpetrate a fraud” by exploiting the results of Crash Test PA 1372 when counsel knew the test was conducted for purposes of unrelated litigation. The trial court denied Volkswagen’s request

Next, with regard to the rebuttal of Mr. Cantor's testimony, Volkswagen alleges its expert, Murray Mackay, Ph.D., should have been permitted to rebut Mr. Cantor's testimony that (1) as a "general design principle," a lap belt must be designed to remain on the pelvis under all conditions and the 1992 Jetta violated this "general design principle," (2) the Pursells' proposed alternatively designed seat would have prevented Ms. Pursell's injuries under the circumstances of this case, and (3) the Jetta's rear seat had a "false ramp" and not an "anti-submarining" ramp.

At trial, Mr. Cantor testified that, as a "general design principle," in order to avoid submarining, a lap belt must be designed to remain on the pelvis under all conditions, and he suggested the 1992 Jetta's seat and lap belt system did not meet this principle. N.T. 1/17/08 at 73, 84. Volkswagen sought to have Dr. Mackay offer testimony to rebut Mr. Cantor's testimony, and, prior to Dr. Mackay testifying, the Pursells asked for a sidebar to discuss Dr. Mackay's report and proposed testimony. N.T. 1/28/08 at 54. With regard to the rebuttal of Mr. Cantor's testimony about the "general design principle" at issue, the following relevant exchange occurred between Volkswagen's counsel and the trial court:

to preclude the Pursells from discussing the test in closing arguments since the test had been admitted into evidence during trial. **See** Trial Court Opinion filed 10/30/08 at 18. Moreover, the trial court stated, "There's no evidence in this record that I have in front of me of any knowledge that [the Pursells' attorney] is misrepresenting that test. That's the only comment I can tell you." N.T. 1/29/08 at 61-62. We find no abuse of discretion in this regard.

[VOLKSWAGEN'S COUNSEL]: Yes. Your Honor. Mr. Coben said this is all addressing Federal Motor Vehicle Safety Standards 209 and the history relating to that. Well, it's true Mr. Cantor's report was also framed that way and Mr. Cantor's exhibits that were provided to us just prior to trial were all framed that way and then the Court ruled and then Mr. Cantor appropriately didn't talk about 209, but he talked about the principals. And I think the Court ruled on this that he could talk about the principle of 209. And so Dr. Mackay is merely doing the same.

THE COURT: What is he testifying to that we haven't heard already from your other witnesses?

[VOLKSWAGEN'S COUNSEL]: Your Honor, he is going to testify---

THE COURT: In this area, just this area we're talking about, which is potential for submarining, test 54591. We've already seen it with Mr. Alfredsson. I don't know if Dr. Corrigan referred to it, I think she did, but I have to go through my notes. What's he adding that's new?

[VOLKSWAGEN'S COUNSEL]: He is going to testify about the design of a restraint system. He's going to testify about the seat bottom and the seat bottom structure.

THE COURT: Haven't we heard that already?

[VOLKSWAGEN'S COUNSEL]: Not, I believe, in the detail that Dr. Mackay is going to cover. He is going to testify that a restraint system cannot be designed to remain on the pelvis under all conditions.

THE COURT: That we've heard. We've heard that from everybody.

[VOLKSWAGEN'S COUNSEL]: No, I don't believe—

THE COURT: Mr. Alfredsson said it. We can go back over his testimony.

[VOLKSWAGEN'S COUNSEL]: We could, Your Honor.

THE COURT: I know Dr. Corrigan said it.

[VOLKSWAGEN'S COUNSEL]: We could, Your Honor, but Dr. Mackay is an expert in, among other things, restraint system design. He does not employ—Dr. Corrigan was, of course, our kinematics expert. Mr. Alfredsson was employed by Volkswagen. Dr. Mackay—

THE COURT: Just because he's employed by Volkswagen doesn't mean he didn't testify to it.

[VOLKSWAGEN'S COUNSEL]: Of course, he did, Your Honor. But we are entitled to bring in an independent witness to testify to these facts and to amplify that testimony and explain it in detail why a restraint system cannot be designed to remain

under the pelvis under all conceivable circumstances, which directly rebuts Mr. Cantor's testimony in this courtroom, and the Volkswagen defendants have a clear right to put on that testimony.

* * *

THE COURT: So he's not going to testify about anything that anybody else testified to, and if there is, there would be an objection and you would expect me to sustain it.

[VOLKSWAGEN'S COUNSEL]: No, Your Honor, I would not expect you to sustain it. He can come at this from the perspective of somebody who is an expert in seat belt and safety systems design and performance.

N.T. 1/28/08 at 72-74, 88.

The trial court explained in its Pa.R.A.P 1925(a) opinion that, thereafter, the trial court excluded rebuttal testimony from Dr. Mackay on this issue because such would have been cumulative of evidence offered by other Volkswagen experts. **See** Trial Court Opinion filed 10/30/08 at 26-28. We find no abuse of discretion in this regard. **See *Concorde, supra*** (indicating court may exclude evidence that is cumulative of other properly presented evidence); Pa.R.E. 403.

Next, at trial, Mr. Cantor testified that the Pursells' proposed alternatively designed seat would have prevented Ms. Pursell's injuries under the circumstances of this case. N.T. 1/17/08 at 124. On direct examination, Volkswagen's counsel sought to ask Dr. Mackay the following question: "Do you have an opinion Dr. Mackay, about whether this alternative restraint that's been proposed, the alternative system that's been proposed by Mr. Cantor would be effective in preventing an occupant from moving down and under a lap belt under the circumstances of this case?" N.T. 1/28/08 at 142.

The trial court did not permit Dr. Mackay to answer this question. **See** N.T. 1/28/08 at 142-146.

We have reviewed the notes of testimony and have discovered that Volkswagen was permitted to ask its expert, Dr. Corrigan, this same question. Specifically, Volkswagen was permitted to ask Dr. Corrigan “[b]ased on the information that was provided in those reports, were you able to form an opinion as to whether the alternative seat and lap belt design would have prevented the injuries in this case?” N.T. 1/25/08 at 36-37. Dr. Corrigan replied, “No,” and indicated that there was insufficient data to answer this question. N.T. 1/25/08 at 37. Volkswagen has not explained on appeal what additional data Dr. Mackay had, which would have resulted in him answering this question differently, and the fact Volkswagen is not satisfied with its very own expert’s testimony is an insufficient reason to order a new trial and/or grant JNOV in this case.

Also, at trial, Mr. Cantor testified that the Jetta’s rear seat has a “false ramp” and not an “anti-submarining ramp.” Volkswagen contends the trial court’s ruling precluding Dr. Mackay from testifying about anything other than the foam used in the Jetta seat and the alternative design precluded Dr. Mackay from rebutting Mr. Cantor’s testimony about the “false ramp.” **See** Volkswagen’s Brief at 37. Volkswagen contends the trial court should have permitted Dr. Mackay to rebut Mr. Cantor’s testimony that the Jetta had a “false ramp.” The Pursells specifically argue this precise issue is

waived because Volkswagen did not present the issue in its court-ordered Pa.R.A.P. 1925(b) statement. **See** Pursells' Brief at 37. We agree and find waiver on this basis.¹³ **See** Pa.R.A.P. 1925(b)(4)(vii).¹⁴

Volkswagen's next contention is the trial court erred in "permitting the case to go to the jury" by denying its motions for compulsory non-suit and directed verdict on the Pursells' strict-liability-crashworthiness claims. Specifically, Volkswagen contends that its motion for compulsory non-suit should have been granted since the Pursells provided no reliable basis for Mr. Cantor's opinions on the defect and causation of Ms. Pursell's injuries and Crash Test 1372 did not provide a sufficient basis since it was created for litigation purposes only with the deliberate mispositioning of dummies. **See** N.T. 1/23/08 at 74-80 (where Volkswagen made its motion for compulsory non-suit). Volkswagen further contends its motion for a directed

¹³ In its reply brief, Volkswagen contends its "false ramp" issue was preserved in the Rule 1925(b) statement when Volkswagen averred generally "[t]he court committed reversible error in excluding as cumulative, outside the scope of his expert report, or otherwise improper, all the testimony of Dr. Mackay other than testimony from him about the limitations of the alternative design produced by Plaintiffs at trial." **See** Volkswagen's Reply Brief at 22. The trial court responded to this broad claim in its Pa.R.A.P. 1925(a) opinion, providing the reasons it limited Dr. Mackay's testimony. **See** Trial Court Opinion filed 10/30/08 at 26-28. We find no error.

¹⁴ Volkswagen also contends the trial court improperly excluded rebuttal testimony from Dr. Corrigan about the unsafe risks of the Pursells' alternative design and its potential to cause injury. The Pursells argue Dr. Corrigan's proposed testimony involved a risk-benefit analysis, which is irrelevant under Pennsylvania law. We agree. **See *Estate of Hicks, supra*** (discussing the fact Pennsylvania does not adhere to a risk-utility balancing approach).

verdict should have been granted since Mr. Cantor's expert opinions were based on Mr. Cantor's test, which the Pursells failed to produce, and the results of the test actually disproved their theory of liability. **See** N.T. 1/29/08 at 62-64 (where Volkswagen made its motion for a directed verdict).

Initially, we note that our standard of review for appeals from the denial of a motion for compulsory non-suit is as follows:

A motion for compulsory non-suit allows a defendant to test the sufficiency of a [plaintiff's] evidence and may be entered only in cases where it is clear that the plaintiff has not established a cause of action; in making this determination, the plaintiff must be given the benefit of all reasonable inferences arising from the evidence. When so viewed, a non-suit is properly entered if the plaintiff has not introduced sufficient evidence to establish the necessary elements to maintain a cause of action; it is the duty of the trial court to make this determination prior to the submission of the case to the jury.

A compulsory non-suit is proper only where the facts and circumstances compel the conclusion that the defendants are not liable upon the cause of action pleaded by the plaintiff.

Hoffa v. Bimes, 954 A.2d 1241, 1243 (Pa.Super. 2008) (quotation and citation omitted).

With regard to the denial of a directed verdict, our standard of review is as follows:

[W]e may only ask whether the trial court's decision was an abuse of discretion or an error of law that controlled the outcome of the case. The trial judge, however, may only grant a directed verdict motion where 'the facts are clear and there is no room for doubt. In so determining, the trial court must consider the facts in the light most favorable to the nonmoving party and must accept as true all evidence which supports that party's contention and reject all adverse testimony.

Isaac v. Jameson Memorial Hospital, 932 A.2d 924, 927 (Pa.Super. 2007) (quotation and quotation marks omitted).

In the case *sub judice*, the claims against Volkswagen were presented to the jury as strict liability-crashworthiness claims. That is, the Pursells argued that if the rear seat and lap belt of the Jetta were designed in a non-defective manner, Ms. Pursell would have suffered at most only minor injuries. **See Gaudio, supra** (indicating that case presented crashworthiness doctrine claims where the plaintiff averred that, if the air bag had not deployed at all or in a timely manner, the deceased's injuries would have been minimal).

To state a section 402A products liability claim in Pennsylvania, the plaintiff must prove that the defendant sold a product "in a defective condition," that the defect existed when the product left the defendant's hands, and that the defect caused the plaintiff's injuries.

* * *

The crashworthiness doctrine is a subset of strict products liability law that most typically arises in the context of vehicular accidents.

Gaudio, 976 A.2d at 531-32 (citations omitted).

The term "crashworthiness" means "the protection that a motor vehicle affords its passengers against personal injury or death as a result of a motor vehicle accident." **Kupetz v. Deere & Co., Inc.**, 644 A.2d 1213, 1218 (Pa.Super. 1994). "The doctrine extends the liability of manufacturers and sellers to situations in which the defect did not cause the accident or initial impact, but rather increased the severity of the injury over that which

would have occurred absent the design defect." *Gaudio*, 976 A.2d at 532 (quotation and quotation marks omitted). To avoid liability, a manufacturer must design and manufacturer products so that they are "crashworthy." **See id.** In a crashworthiness case, a plaintiff must prove: (1) the design of the vehicle was defective and, at the time of design, an alternative, safer, and practicable design existed that should have been incorporated instead, (2) the plaintiff must identify the injuries she would have received if the alternative design had been used; and (3) the plaintiff must show what injuries were attributed to the defective design. **See id.**

The case *sub judice* involved a classic "battle of the experts" as to the issue of whether the Jetta's rear seat and lap belt system were defective and an alternative, safer, practicable design existed, which would have resulted in, at most, minor injury to Ms. Pursell. As the trial court noted:

The evidence presented at trial created issues of fact for the jury such that Volkswagen was not entitled to a compulsory non-suit or directed verdict. Through the three week trial, the jury was presented with ample evidence, including testimony by multiple experts and numerous exhibits offered by Plaintiffs, to find the 1992 Jetta center rear seat system was defective in design and that Plaintiffs' proposed alternative design would have eliminated Plaintiff's injuries. Plaintiffs' expert, [Mr.] Cantor, testified:

"My conclusion was that the seating and restraint system in the center rear position was defective. And the reason it was defective, the main reason it was defective is because it allowed something called submarining." [N.T. 1/17/08 at 50].

[Mr.] Cantor further testified about Plaintiffs' proposed alternate design,

"And I went about to put in-come up with what I called an alternative design, which is what could we put in that seating position within technology from

the day this car was built, what technology was available to put in there that would have prevented submarining. And I set out to build that. I built it, and I tested it. So I evaluated that system and determined that the system would not—the alternative would not cause submarining. [N.T. 1/17/08 at 52].

[Mr.] Cantor continued to testify about the details of Plaintiffs' claim and alternative design for an entire day and a half of trial. [N.T. 1/17/08 and 1/18/08]. This testimony, along with other evidence presented by Plaintiffs, created issues of fact to be determined by a jury.

Trial Court Opinion filed 10/30/08 at 8-9 (footnotes omitted). **See** N.T. 1/17/08 at 33-40 (Mr. Cantor opines with reasonable degree of certainty the 1992 Jetta seat was defective and alternative design would have prevented serious injury to Ms. Pursell); N.T. 1/17/08 at 101-103 (Mr. Cantor testified the design included the alteration of the Jetta's seat by changing the seatback and seat bottom angles, adding a ramp beneath the seat cushions, adjusting the lap belt anchors, placing some special "rate-dependent" foam over the ramp, and carving some of the foam out of the cushioning); N.T. 1/18/08 at 158 (Dr. Brian Benda, a biomechanical engineer, testified the seat belt went "into Ms. Pursell's guts" because the rear center seat caused Ms. Pursell's pelvis to move forward and down and the belt moved over her pelvis into her abdomen; He further testified Mr. Cantor's proposed alternative design would have kept the seatbelt on Ms. Pursell's pelvis, resulting in no serious injury).¹⁵ We find no error in this regard and conclude

¹⁵ We note that, to the extent Volkswagen contends a directed verdict was necessary because Mr. Cantor's opinions were based on a test, which the

the trial court properly denied Volkswagen's motions for compulsory non-suit and directed verdict.¹⁶

We specifically note that we find unpersuasive Volkswagen's suggestions that compulsory non-suit or directed verdict should have been granted since (1) Mr. Cantor's own testing of the Jetta was consistent with the result of Volkswagen's test, which demonstrated the lap belt remained on the pelvis under circumstances of the accident as characterized by Mr. Cantor, (2) Mr. Cantor's opinions were unreliable since they were based on Crash Test PA 1372, which was conducted for unrelated litigation purposes with intentionally improperly seated dummies, and (3) Mr. Cantor's expert conclusory opinions were not reliable since "[a]ll of the tests shown to the jury demonstrated that the Jetta does not cause a properly positioned, properly belted occupant to submarine the belt in a flat frontal collision. [This] included [Mr.] Cantor's own test that he tried to hide from the jury." Volkswagen's Brief at 48. Volkswagen's assertions are nothing more than Volkswagen attempting to convince this Court to view the evidence in the

Pursells did not produce, we rely on the trial court's opinion discussing this issue. **See** Trial Court Opinion filed 10/30/08 at 23-25.

¹⁶ Volkswagen makes a passing reference to the fact it filed post-trial motions seeking a judgment notwithstanding the verdict (JNOV). "In reviewing a denial of JNOV we must determine only 'whether there was sufficient competent evidence to sustain the verdict, granting the verdict winner the benefit of every reasonable inference...'" **Hutchinson**, 876 A.2d at 984 (quotation omitted). For reasons similar to our conclusion the trial court did not err in denying the motions for compulsory non-suit and directed verdict, we conclude the trial court properly denied Volkswagen's request for JNOV.

light most favorable to them. However, as indicated previously, in ruling on motions for compulsory non-suit and directed verdict, the trial court was to examine the evidence in the light favorable to the plaintiffs, giving them the benefit of all reasonable inferences arising from the evidence. **See Hoffa, supra; Isaac, supra.** As the trial court properly did so in the case *sub judice*, we find no error.¹⁷

Volkswagen's next contention is that the trial court improperly denied Volkswagen's request for sanctions due to the Pursells' conducting of the trial by ambush. **See** N.T. 1/14/08 at 91-96 (where Volkswagen argued they were "ambushed" due to the Pursells failing to disclose in a timely manner their alternative, safer design); N.T. 1/23/08 at 71 (where trial court denied their request for sanctions). Volkswagen contends that, during trial, Mr. Cantor testified that there was an alternative, safer design for the rear seat and lap belt system of the 1992 Jetta. Specifically, as indicated *supra*, Mr. Cantor testified the design included the alteration of the Jetta's seat by changing the seatback and seat bottom angles, adding a ramp beneath the seat cushions, adjusting the lap belt anchors, placing some special "rate-dependent" foam over the ramp, and carving some of the foam out of the cushioning. N.T. 1/17/08 at 101-103. Volkswagen contends they were

¹⁷ Volkswagen suggests it was "wrongly denied a **Frye** hearing" to demonstrate that Mr. Cantor's opinions were not based on a proper methodology. **See** Volkswagen's Brief at 45. We decline to address this issue as it was not specifically raised in Volkswagen's court-ordered Pa.R.A.P. 1925(b) statement. **See** Pa.R.A.P. 1925(b)(4)(vii).

“ambushed” by the Pursells’ alternative, safer design theory in that (1) the Pursells identified Mr. Cantor’s alternative, safer design for the first time in their response to Volkswagen’s motion for sanctions and advised therein for the first time that Mr. Cantor had conducted a sled test of the alternative, safer design, and (2) the Pursells submitted an exhibit list signaling their intent to present evidence of an alternative design just days before the commencement of jury selection.

[T]he purpose of the discovery rules is to prevent surprise and unfairness and to allow a fair trial on the merits. Pennsylvania Rule of Civil Procedure 4019 provides for sanctions if a party fails to provide discovery. The decision whether to sanction a party, and if so the severity of such sanction, is vested in the sound discretion of the trial court. When a court refuses to impose sanctions, we must review the evidence to determine whether the court abused its discretion.

Dominick v. Hanson, 753 A.2d 824, 826 (Pa.Super. 2000) (quotations, quotation marks, and citations omitted).

We conclude the Honorable Robert J. Mellon has adequately addressed this issue in his Pa.R.A.P. 1925(a) opinion, and therefore, we find it unnecessary to address the issue further. **See** Trial Court Opinion filed 10/30/09 at 19-21.

In its final contention, Volkswagen challenges the trial court’s instructions to the jury. Volkswagen contends the trial court’s jury instruction gave no guidance as to how the jury was to decide if an alternative design was safer, and the trial court improperly instructed the jury that the Pursells did not need to produce an analysis of the risks or

effectiveness of their alternative design. Volkswagen suggests the trial court should have given the jury Volkswagen's proposed jury instructions (1) that the jury was to consider whether the alternative design was "safer overall," meaning did it eliminate the risk of submarining without creating other risks,¹⁸ and (2) whether the alternative design was "practicable under the circumstances," meaning could the alternative design have been made and sold, taking into account consideration of the technological, legal, cost and marketability of the product.¹⁹ Volkswagen argues that its proposed jury instructions on these two points contemplated that the jury would weigh the risk and utility of the 1992 Jetta seat against the risk and utility of the

¹⁸ Volkswagen's proposed instruction on this point was, in relevant part, as follows:

The proposed alternative design must be safer overall. If the risk of injury under the circumstances of the accident in this case is not eliminated by the proposed alternative design, then the proposed alternative design is not, in fact, a safer substitute product. Likewise, if the proposed alternative design trades off safety in one kind of crash in order to increase safety in another kind of crash, you may decide that the alternative was not safer overall and that Volkswagen's design therefore was not defective.

¹⁹ Volkswagen's proposed instruction on this point was, in relevant part, as follows:

To determine whether the design was practicable under the circumstances, you must find that not only was it technologically feasible, but also that it would have been possible within the context of the cost, technology, marketability, and safety considerations Volkswagen had to apply in designing the vehicle. Volkswagen was not required to view the safety of the seat and lap belt in a vacuum. Accordingly, you should consider, for example, whether Plaintiffs' alternative design may have been so cost prohibitive, uncomfortable, or dangerous to fellow passengers such that Volkswagen could not have been expected to use their design.

Pursells' alternatively designed seat and, therefore, ultimately, the trial court should have charged the jury under the risk-utility balancing approach enunciated in Section 2 of the Restatement (Third) of Torts, *Products Liability*, (1997).

Our standard of review regarding jury instructions is limited to determining whether the trial court committed a clear abuse of discretion or error of law which controlled the outcome of the case.

Error in a charge is sufficient ground for a new trial if the charge as a whole is inadequate or not clear or has a tendency to mislead or confuse rather than clarify a material issue.

Estate of Hicks, 2009 WL 3855179, *22 (quotations, quotation marks, and citations omitted).

"A trial court must instruct the jury on the correct legal principles applicable to the facts presented at trial. A trial court has wide latitude choosing the precise language of the charge, but in all instances must fully and adequately convey the applicable law to the jury." ***Gaudio***, 976 A.2d at 550 (citations omitted).

As Volkswagen has properly indicated, in a strict liability-crashworthiness case, in addition to proving the design of the vehicle was defective, plaintiffs must prove that "at the time of the design an alternative, safer, and practicable design existed that could have been incorporated instead." ***Gaudio***, 976 A.2d at 532 (citation omitted).

With regard to the Pursells' burden of proving an alternative, safer, and practicable design existed in this case with regard to the 1992 Jetta's

seat and lap belt system, the trial court instructed the jury, in relevant part, as follows:

If you find that the Volkswagen Jetta at the time it left Volkswagen lacked any element necessary to make it safe for its use or contained any design feature that made it unsafe for its use and that there was an alternative, safer, practicable design, then you have decided that the product was defective and the defendant is liable for all the harm caused by the defect.

* * *

Under the evidence presented in the claims made here, if you find the Jetta's rear seat lap belt system was defective and that the defect was a factual cause of [Ms.] Pursell's injuries, and if you find that an alternative design which was feasible, practicable and safer would have reduced the severity or avoided her injuries then Volkswagen is legally responsible.

While the Pursell family must provide evidence of an alternative design and a safer design, it is not required by law to establish every specification or produce plans for that safer design or an analysis of the risk and effectiveness of the suggested alternative, that they don't have to do in bringing forth evidence.

Let me say that again. The law does not require that they establish specifications and plans for a safer design or an analysis of the risks or effectiveness of the suggested design. If a different design was feasible when the Jetta was manufactured, then this element of the case has been satisfied. Something is feasible can be determined by asking yourself the question was it capable of being done or made.

N.T. 1/29/08 at 85, 89-90.

We conclude this was a correct and adequate statement of the law as it currently exists in Pennsylvania as it relates to the plaintiff's burden of proving that, at the time of the defective design, "an alternative, safer, and practicable design existed that could have been incorporated instead."

Gaudio, 976 A.2d at 532 (citation omitted).

We specifically decline Volkswagen's invitation to overrule existing law and introduce Section 2 of the Restatement (Third) of Torts into Pennsylvania's strict liability law, rather than continued adherence to Section 402A of the Restatement (Second) of Torts. As the *en banc* court recently stated in ***Estate of Hicks*** regarding the adoption of Section 2 of the Restatement (Third) of Torts:

Dana maintains that § 2 [the Restatement (Third) of Torts, *Products Liability*, (1997)], rather than § 402A [of the Restatement (Second) of Torts] (§ 402A) should govern this action, for the reasons stated in Justice Saylor's...concurring opinion in ***Phillips v. Cricket Lighters***, 576 Pa. 644, 841 A.2d 1000 (2003). Initially, we note that our Supreme Court in ***Phillips*** was divided. The late Chief Justice Cappy authored the lead opinion, reiterating the firm distinction in Pennsylvania law between strict liability and negligence theories as they apply to product liability cases. Justice Saylor wrote a concurring opinion, joined by Justices Castille and Eakin, taking issue with aspects of the lead opinion's statement that "negligence concepts have no place in strict liability law," particularly as related to product liability claims based on a design defect. 841 A.2d at 1012, 1014-15 (Saylor, J., concurring). Justice Nigro concurred in the result. Justice Newman wrote a concurring and dissenting opinion. Former Justice Zappala did not participate. Justice Saylor's concurrence advocated the adoption of the Third Restatement's risk-utility balancing approach. However, § 402A has remained the law in Pennsylvania since its adoption by our Supreme Court in ***Webb v. Zern***, 422 Pa. 424, 220 A.2d 853 (1966). While acknowledging that the view expressed by the concurrence in ***Phillips*** is dicta, Dana, nevertheless, seeks to have this Court overrule ***Webb*** and have § 2 of the Restatement (Third) of Torts become the law in this Commonwealth. Neither this Court nor the trial court has the authority to overrule the Supreme Court. ***See Foflygen v. R. Zemel, M.D. (PC)***, 615 A.2d 1345, 1353 (Pa.Super. 1992) (stating "As an intermediate appellate court, this Court is obligated to follow the precedent set down by our Supreme Court."); ***see also Bugosh v. Allen Refractories Co.***, 932 A.2d 901, 911 (Pa.Super. 2007), wherein this Court rejected the same argument noting that "[u]ntil and

unless our Supreme Court alters its approach to strict liability, we will continue to adhere to established principles.”), *appeal granted, Bugosh v. I.U. N. Am., Inc.*, 596 Pa. 265, 942 A.2d 897 (2008).²⁰ Consequently, the trial court did not err when it denied Appellants request to have this matter proceed pursuant to the Restatement (Third) of Torts, *Products Liability*, § 2 (1997).

Estate of Hicks, 2009 WL 3855179, at *25 (quotation, quotation marks, and footnote omitted) (footnote added).

In light of the aforementioned, we conclude the trial court did not abuse its discretion in refusing to give Volkswagen’s proposed points for charge regarding the Third Restatement’s risk-utility balancing approach.

For all of the foregoing reasons, we affirm.

Affirmed.

Judgment Entered.


Prothonotary

Date: _____

²⁰ We note that the Supreme Court dismissed the appeal as improvidently granted. *See Judith R. Bugosh v. I.U. N. Am.*, --- Pa. ---, 971 A.2d 1228 (filed June 16, 2009).