FIRST DIVISION
BARNES, P. J.,
MARKLE and HODGES, JJ.

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September 1, 2026

In the Court of Appeals of Georgia

A26A0988. ROBERTSON et al. v. TOYOTA MOTOR CORPORATION et al.

A26A0989. TOYOTA MOTOR CORPORATION et al. v. ROBERTSON et al.

HODGES, Judge.

Charles Robertson died in his sleep from carbon monoxide ("CO") poisoning, with contributing toxic effects from his consumption of fentanyl and methadone, after he left his 2015 Lexus GS 350 running in the attached garage below his apartment. Robertson's father, individually and as the administrator of Robertson's estate (the "estate"), sued Mid-America Apartments and its property manager ("MAA"), as well as Toyota Motor Corp. and others involved in the manufacture, distribution, and sale of the vehicle ("Toyota"). The estate claimed, among other things, that MAA was negligent in failing to install a CO detector/alarm in Robertson's residence and that Toyota was negligent in its design, manufacture, and sale of a vehicle that lacked both an automatic shut-off feature and an adequate warning/alarm system that would activate when the engine was left running.

MAA moved for summary judgment and Toyota moved for partial summary judgment. The trial court granted MAA's motion and denied Toyota's. The trial court also excluded the testimony of three of the estate's expert witnesses, and allowed the expert testimony of another estate expert.

The parties filed cross-appeals, which are consolidated for our review. In Case No. A26A0988, the estate argues that the trial court erred in granting MAA's motion for summary judgment and in excluding the testimony of three of its expert witnesses. In Case No. A26A0989, Toyota argues that the trial court erred in denying its motion for partial summary judgment[1] and in refusing to exclude the testimony of one of the estate's experts. For the reasons that follow, we affirm in Case No. A26A0988 and we affirm in part and reverse in part in Case No. A26A0989.

Case No. A26A0988

[1] Following oral argument in this case, Toyota filed a supplemental appellate brief stating that its enumeration of error in Case No. A26A0989 regarding a trial court ruling on the estate's failure to warn claim is now moot. As a result, we will not address that enumeration.

1. In its first enumeration, the estate argues that the trial court erred in granting MAA's motion for summary judgment pursuant to OCGA § 44-7-14.

"We review the grant or denial of a motion for summary judgment de novo, and we must view the evidence, and all reasonable inferences drawn therefrom, in the light most favorable to the nonmovant." *Usry v. City of Sandersville*, 374 Ga. App. 439 (913 SE2d 72) (2025). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law[.]" OCGA § 9-11-56(c).

OCGA § 44-7-14 provides:

> Having fully parted with possession and the right of possession, the landlord is not responsible to third persons for damages resulting from the negligence or illegal use of the premises by the tenant; provided, however, the landlord is responsible for damages arising from defective construction or for damages arising from the failure to keep the premises in repair.

"Under OCGA § 44-7-14, a landlord not in possession of a rental property ... is responsible only for damages arising from either 'defective construction' or 'the failure to keep the premises in repair.'" *WCE Holdings B, LLC v. Lewis*, 363 Ga. App.

29, 31 (870 SE2d 522) (2022), quoting OCGA § 44-7-14. Nor is a landlord who is not in possession of a rental property responsible for "'damages resulting from the negligence ... of ... the tenant.'" *Martin v. Johnson-Lemon*, 271 Ga. 120, 122(1) (516 SE2d 66) (1999), quoting OCGA § 44-7-14.[2]

It is undisputed that MAA was an out-of-possession landlord and that Robertson was a tenant at MAA Gardens under a written lease, the validity of which has not been contested. In its complaint, the estate asserted that MAA owed Robertson "a duty to maintain the property in a reasonably careful manner and to protect its occupants from unreasonable risk of harm[,]" and that MAA was negligent in failing to install a CO alarm.

MAA moved for summary judgment, arguing that under OCGA § 44-7-14, an out-of-possession landlord cannot be liable in tort to its tenant unless the damages arise from defective construction or a failure to keep the premises in repair. It contended that the estate had raised neither claim. The trial court agreed. As the trial

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[2] Our Supreme Court also has determined that in cases such as this that involve an out-of-possession landlord, assessing a landlord's liability based upon principles of common law negligence or pursuant to OCGA § 51-3-1, "which sets forth the general duty owed by an occupier of land to invitees, ... is inapplicable[.]" *Martin*, 271 Ga. at 123(1).

court determined and the estate concedes, the estate has not asserted a faulty construction claim. The only issue before us, then, relates to damages caused by any failure to repair. As outlined above, however, the complaint does not assert that the apartment was ever out of repair; it only claims, as the trial court found, that MAA failed to "maintain" the apartment. Also, in depositions, Robertson's father specifically stated that he was not alleging that MAA had failed to repair anything in the apartment.

The estate's appellate brief does not directly address the trial court's finding that it never alleged a failure to repair. Although we review an appeal from the grant or denial of a motion for summary judgment de novo, *Usry*, 374 Ga. App. at 439, we still must evaluate whether an argument was preserved for review. See *OVIP, Inc., v. Blockbuster Textiles, LLC*, 289 Ga. App. 276, 278(1) (656 SE2d 907) (2008) (finding, in appeal from grant of summary judgment, that this Court will not consider issues presented for the first time on appeal).

Here, as noted above, the complaint alleges only a failure to maintain the premises. In *Gainey v. Smacky's Invs., Inc.*, 287 Ga. App. 529 (652 SE2d 167) (2007), this Court determined that an out-of-possession landlord's duty under OCGA § 44-7-

14 arises "only in instances where there is a duty to repair and notice has been given of the defect. *Such duty does not include a duty of maintenance*." *Gainey*, 287 Ga. App. at 530(2)(a) (punctuation omitted; emphasis added). Accord *Karle v. Belle*, 310 Ga. App. 115, 117 (712 SE2d 96) (2011) (finding, where tenant alleged that landlord failed to inspect or maintain a water heater, that "OCGA § 44-7-14 does not impose a 'duty of maintenance' on an out-of-possession landlord").

Pertinently, our Supreme Court has viewed a claim similar to the estate's as a maintenance issue, rather than a repair issue. In *Martin*, a tenant's guest dove into a swimming pool at a rental property, hit his head, and drowned. 271 Ga. at 121. Analogous to the lack of a CO detector in the instant case, the swimming pool lacked depth markers. Id. The *Martin* Court examined the landlord's statutory duty to repair, noting,

> it is not alleged, and is not shown in the record, that the swimming pool ever was in a state of disrepair. A repair contemplates an existing structure which has *become* imperfect, and means to supply in the original structure that which is *lost or destroyed*, and thereby *restore* it to the condition in which it originally existed, as near as may be.

Id. at 123(2)(a) (punctuation omitted; emphasis added). In *Martin*, there were "no allegations or evidence ... that the pool was in need of restoration to its original condition due to loss or destruction[.]" Id. In the instant case, there are likewise no allegations or evidence that Robertson's apartment was in need of restoration to any "original condition"; the estate's contention that the apartment lacked a CO monitor before Robertson took possession clearly does not show, nor does Robertson allege, that the apartment had deteriorated from its "original condition[.]" See id. As *Martin* established, "[b]y its plain and unambiguous terms, OCGA § 44-7-14 does not impose a duty of maintenance on an out-of-possession landlord, only a duty of repair." Id.[3] The estate has not alleged that the apartment was out of repair.

The estate points to *Thompson v. Crownover*, 259 Ga. 126, 129(4) (381 SE2d 283) (1989), a plurality opinion of the Supreme Court which found that a jury question existed regarding whether landlords failed to exercise reasonable care "to repair" a

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[3] We note that because the goal of OCGA § 44-7-14 was to "expressly limit the potential liability of out-of-possession landlords[,]" see *Martin*, 271 Ga. at 125(3), the Supreme Court has interpreted the statute "narrowly," see *Cham v. ECI Mgmt. Corp.*, 311 Ga. 170, 175(2)(a) n. 4 (856 SE2d 267) (2021), and instructed that "any alteration or expansion of an out-of-possession landlord's statutory liability must emanate from the legislature and not from the courts[.]" *Martin*, 271 Ga. at 125(3).

tenant's broken heater and "whether the condition of the heater constituted a violation of the housing code." In *Thompson*, the Court noted that the

> public policy of this [S]tate supports the position advanced by The Restatement of Law Second, Property, § 17.6 which follows: A landlord should be subject to liability for physical harm caused to the tenant ... by a dangerous condition *existing before or arising after* the tenant has taken possession, if he has failed to exercise reasonable care *to repair* the condition *and* the existence of the condition is in violation of: (1) an implied warranty of habitability; or (2) a duty created by statute or administrative regulation.

Id. at 129(3) (punctuation omitted; emphasis added).

The estate contends that the lack of a CO monitor was a "dangerous condition" that existed before Robertson took possession of the apartment, rendering it "unfit for residential purposes" regardless of whether any code violation existed.[4] This is essentially an implied warranty of habitability argument.

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[4] The estate does not contend that the lack of a CO monitor in the apartment was a violation of any applicable and mandatory housing, fire, or safety code, nor does it contend that any Georgia statute explicitly requires the presence of a CO monitor in residential leased properties. Compare OCGA § 25-2-40 (requiring the installation of smoke detectors in, among other locations, new dwellings). Rather, the estate asks us to expand a landlord's duty to include the installation of CO monitors. There is, however, no statutory duty for a landlord to do so, and any expansion of a landlord's duty may only come from the legislature. *Martin*, 271 Ga. at 125(3).

We note, at the outset, that the language *Thompson* quotes from the Restatement still provides that the landlord's duty is to "repair[,]" not to maintain. 259 Ga. at 129(3). See also *Martin*, 271 Ga. 123(2)(a). The estate has not alleged a failure to repair, nor has it shown that it preserved for review arguments based upon the condition of the apartment prior to Robertson's taking possession of it. As a result, contrary to the estate's argument, no fact questions have been preserved regarding whether the premises were in repair prior to Robertson's taking possession, or whether Robertson knew there was no CO monitor when he took possession. *OVIP, Inc.,* 289 Ga. App. at 278(1); Court App. R. 25(a)(5) (providing that "[a]t a minimum, the appellant's brief must include ... [a] statement of the case that ... identifies how each enumerated error was preserved for review, with appropriate citations to the record").

The estate draws its implied warranty of habitability argument from *Thompson*, and bases this argument on OCGA § 44-7-13, which is inapplicable here. The estate's interpretation, as it acknowledges in its appellate brief, is not in accordance with Supreme Court precedent. The applicable version of OCGA § 44-7-13[5] provided that

[5] The statute was amended to is present version effective July 1, 2024 (Ga. L. 2024, p. 91 § 2); Robertson died in 2023.

a landlord "must keep the premises in repair[,]" which the estate argues has historically established the landlord's duty to "rent and maintain the premises in repair[,]" as opposed to OCGA § 44-7-14, which the estate argues "does not create a duty to keep premises in repair so much as it recognizes such a duty exists and creates an exception or defense to OCGA § 44-7-13[.]" The estate concedes, while noting that it is raising the issue for preservation purposes, our Supreme Court's determination that OCGA § 44-7-13 does not create tort liability; it creates contract liability.[6] See *Colquitt v. Rowland*, 265 Ga. 905, 906(2) (463 SE2d 491) (1995) (observing that OCGA § 44-7-13 "imposes contractual, but not tort, liability on a landlord"); see also *Langley v. MP Spring Lake, LLC*, 307 Ga. 321, 326 (834 SE2d 800) (2019) (interpreting *Colquitt* to mean "the duties imposed by OCGA § 44-7-13 sound only in contract, not in tort"). We find no error in the trial court's grant of summary judgment to MAA.

2. Relevant to its claims against MAA, the estate argues that the trial court erred in excluding the expert opinion of J. P. Gingras, a forensic accountant who prepared damages calculations related to Robertson's lost wages, benefits, and

[6] The estate's complaint did not address contract liability.

household services, and the expert opinion of Paul Kastes, a property management and standard of care expert.[7] Because of our decision in Division 1, supra, affirming the trial court's grant of summary judgment to MAA, we need not reach these contentions of error.

3. Relevant to the enumerations involving Toyota, which will be discussed further in Case No. A26A0989, infra, the estate argues that the trial court erred in excluding the testimony of its expert witness, Peter Leiss, an automotive mechanical engineer whose testimony addressed CO exposure risk and remediation related to the Toyota Smart Key System, a push-button ignition with a key fob that was installed in Robertson's 2015 Lexus GS. We find no error in the trial court's exclusion of this expert's testimony.

We review a trial court's ruling on a motion to exclude expert testimony for an abuse of discretion. *Miller v. Golden Peanut Co.*, 317 Ga. 22, 30(2) (891 SE2d 776) (2023). OCGA § 24-7-702(b) ("Rule 702(b)") provides that:

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[7] Because the estate fails to provide any record citations to Kastes' proffered testimony or any other relevant record evidence save the trial court's order, this argument is, in any case, abandoned. Court App. R. 25(d)(1)(i).

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise, if:
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> (1) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
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> (2) The testimony is based upon sufficient facts or data;
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> (3) The testimony is the product of reliable principles and methods; and
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> (4) The expert has reliably applied the principles and methods to the facts of the case.

"Rule 702(b) requires a trial court to sit as a gatekeeper and assess the reliability of proposed expert testimony, applying the principles identified in *Daubert v. Merrell Dow Pharmaceuticals*, 509 US 579 (113 SCt 2786, 125 LE2d 469) (1993), and its progeny." *Sterigenics US, LLC v. Mutz*, 377 Ga. App. 624, 626(1) (923 SE2d 176) (2025) (punctuation omitted).[8] Our Supreme Court has determined that

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[8] See *State v. Almanza*, 304 Ga. 553, 558(2) (820 SE2d 1) (2018) ("[W]e look to federal appellate precedent until a Georgia appellate court decides the issue under the new [evidence] Code.").

> [r]eliability is examined through consideration of many factors, including whether a theory or technique can be tested, whether it has been subjected to peer review and publication, the known or potential rate of error for the theory or technique, the general degree of acceptance in the relevant scientific or professional community, and the expert's range of experience and training. There are many different kinds of experts and many different kinds of expertise, and it follows that the test of reliability is a flexible one, the specific factors neither necessarily nor exclusively applying to all experts in every case.

Nat'l Emergency Med. Servs., Inc. v. Smith, 368 Ga. App. 18, 23-24(1) (889 SE2d 162) (2023). The estate bore the burden of establishing the reliability of Leiss' expert testimony. Id. at 24(1).

The trial court, however, excluded Leiss' proffered opinions, finding, "Leiss appears to have limited knowledge of the facts of this case and there are gaps in his knowledge of important facts and data that are specific to this case." Specifically, the trial court found that although Leiss reviewed other incidents alleging deaths and injuries involving Toyota vehicles with push-button ignitions, he did not explain how he tested his hypothesis to support his conclusions in any meaningful way.

The estate first argues that the trial court's findings of fact and discussion of legal issues in its order are insufficient. The estate, however, cites to no legal authority for any requirement that a trial court make detailed findings in ruling on a motion to exclude expert witness testimony. OCGA § 24-7-702 contains no such requirement. See *CSX Transp., Inc. v. McDowell*, 294 Ga. App. 871, 872-73(1)(a) (670 SE2d 543) (2008) (determining, where a party asserted that a trial court order analyzing the admissibility of expert testimony did not contain specific findings, that "the Georgia General Assembly did not include any such requirement" in the predecessor statute to OCGA § 24-7-702; the Court then "decline[d] to impose such a requirement[,]" and noted that, "[g]enerally, a trial court will be presumed to have performed its duties").

According to the estate, Leiss would have opined that Toyota could have foreseen the risk of CO poisoning from a driver inadvertently leaving the engine running after exiting the vehicle, that the Smart Key System design was unsafe and defective because it did not include an automatic shut-off feature, and that an automatic shut-off feature was technologically and economically feasible in the 2015 Lexus.

The record citations the estate provides show that (i) although Leiss did not examine Robertson's vehicle, he spoke to and reviewed the notes, photos, and videos taken by one of his colleagues, who did examine the car; (ii) although Leiss did not look at any exemplar 2015 Lexus GS vehicles with the Smart Key System, he did examine different Lexus and Toyota models from 2006 and 2017; and (iii) he spent more than 100 hours, over the past 12 years, investigating fact patterns that were "substantially similar" to that presented in the instant case. Leiss also deposed, however, that while he looked at some data from Robertson's vehicle, he was unable to access other data, he had not performed any tests in forming his opinion and, other than looking at owners' manuals for Ford vehicles, he had done no benchmarking or surveys of similar vehicle technology.

While the estate is correct that Leiss' reliance on his assistant's examination of Robertson's vehicle is not necessarily a bar to the admission of his expert testimony, see *Rainbow Real Invs. v. Red Oak Village Condo. Ass'n*, 376 Ga. App. 458, 473(3)(a)(ii) (919 SE2d 487) (2025) ("[O]ur law is clear that an expert may base his opinion on personal knowledge as well as on facts or data supplied by others."); OCGA § 24-7-703 (providing that experts may base their opinions on facts and data learned from others), it does not appear that Leiss examined any exemplar Lexus vehicles from the same model year as Robertson's car, and, as noted above, Leiss acknowledged being unable to access certain types of data from the vehicle. The estate does not point to Leiss' knowledge of, as the trial court put it, "facts and data that are *specific* to this case." (Emphasis added.) In particular, the estate points to nothing showing Leiss' opinions on the design of the Lexus were the product of reliable principles and methodologies. In fact, the estate does not discuss what methodologies Leiss used, nor does the estate show that Leiss reliably applied any principles and methodologies to the specific facts of the case. OCGA § 24-7-702(b)(3), (4). See generally *Cash v. LG Elecs.*, 342 Ga. App. 735, 740(1)(b) (804 SE2d 713) (2017) (affirming trial court's ruling excluding an expert's opinion where the expert had created his own methodology which had not been peer-reviewed or otherwise obtained approval within the scientific community, the expert could not name a publication that purportedly had published an article on the methodology, and the methodology included unrealistic manipulations).

Here, the estate has provided no information to this Court regarding Leiss' methodology in assessing the design at issue. Indeed, the trial court's order specifically noted Toyota's contention that Leiss' design defect opinion was based on insufficient facts and data and an unreliable methodology, and the court found that although Leiss asserted that he had applied "the scientific method to his work ... he failed to conduct a number of tests and evaluations" and did not show how he tested his hypotheses. "In determining whether expert testimony is reliable, the trial court *must* consider whether the methodology by which the expert reaches his conclusions is sufficiently reliable." *Miller*, 317 Ga. at 30(2) (punctuation omitted; emphasis added).

Leiss also opined on the feasibility of Toyota replacing the Smart Key System with an automatic shut-off feature. The estate argues that this part of his opinion was based on "myriad facts and data[,]" specifically, that at least two Ford vehicles from the same model year as Robertson's Lexus had an automatic shut-off feature, that a 2013 GM vehicle had been recalled and retrofitted with such a feature, and that Toyota added a shut-off feature to some 2020 Lexus models simply by updating the software on the existing Smart Key System hardware. The estate does not show, however, that Leiss conducted any analysis regarding how the other manufacturer's vehicles that were examined compared to the 2015 Lexus in terms of the feasibility of installing or retrofitting the Lexus with automatic shut-off features, nor, as noted above, did the estate show that Leiss conducted any testing to see how or if this would have worked on the specific vehicle model at issue. See generally *Hayward v. The Kroger Co.*, 317 Ga. App. 795, 797(1)(b) (733 SE2d 7) (2012) ("Nothing in *Daubert* ... requires a trial court to admit opinion evidence which is connected to existing data only by the ipse dixit of the expert.") (citation and punctuation omitted).

Finally, although Leiss deposed that this type of alteration would have been economically and technically feasible, when asked for the basis of his opinion, he did not offer a definitive answer for how Toyota specifically (as opposed to other automakers), could have done this in the 2015 model at issue here given that certain security features prevented such a change in part of the Lexus technology, nor has the estate directed us to any specific testimony or evidence regarding cost feasibility. See *Banks v. Ici Ams., Inc.*, 264 Ga. 732, 736(1) n. 6 (450 SE2d 671) (1994) (recognizing that alternative safe design factors include the ability of the manufacturer to eliminate the dangers without making the product too expensive).

Given the apparent lack of factual specificity in Leiss' opinion and the lack of evidence of the methodology undergirding his opinions, we cannot say the trial court abused its discretion in excluding Leiss' testimony. See *United States v. Gayden*, 977 F3d 1146, 1153(II)(C) (11th Cir. 2020) (finding that appellate courts review the denial of a *Daubert* motion for abuse of discretion, a standard that "places a heavy thumb – really a thumb and a finger or two – on the [trial] court's side of the scale") (citations and punctuation omitted). See *Emory Univ. v. Willcox*, 355 Ga. App. 542, 546(2) (844 SE2d 889) (2020) (finding that trial courts should "not admit an expert's opinion if it is so fundamentally unsupported that it can offer no assistance to the jury") (punctuation omitted).

Case No. A26A0989

After the estate filed its appeal in Case No. A26A0988, Toyota filed a cross appeal in Case No. A26A0989. In the orders appealed from in Case No. A26A0989, the trial court denied Toyota's motion for partial summary judgment on the issue of punitive damages, and denied Toyota's motion to exclude the expert testimony of one of the estate's expert witnesses.

3. Toyota argues that the trial court erred in denying its motion to exclude certain opinions from one of the estate's experts, William Vigilante, a human factors expert focused on making products and environments safer.

As outlined above, we review the trial court's decision to admit expert witness testimony for an abuse of discretion, *Miller*, 317 Ga. at 30(2), and the estate, as the proponent of Vigilante's testimony, bore the burden of showing he was qualified and that his testimony was reliable and would assist the trier of fact. *Nat'l Emergency Med. Servs., Inc.*, 368 Ga. App. at 23-24(1).

(a) As an initial matter, Toyota contends that the trial court erred because it "was invited to employ an incorrect standard to review the reliability" of the expert testimony. A mere "invitation" by one party or another asking a trial court to employ an incorrect standard does not amount to trial court error; trial court error occurs when a trial court takes an action that is erroneous.

Specifically, Toyota argues that the trial court erred "if the trial court contemplated" an outdated standard, that is, cases which predate the 2013 Evidence Code and which provide that the standard for assessing the admissibility of an expert's opinion is not whether the opinion is speculative, but whether it is "wholly" so. See, e. g., *Layfield v. Dep't of Transp.*, 280 Ga. 848, 850(1) (632 SE2d 135) (2006). We note that this Supreme Court case has not been overruled and that the trial court's order found, without elaboration, that Vigilante's testimony was based upon sufficient facts and data, that his opinions were the product of reliable principles and methods, and that he reliably applied those principles and methods to the facts of the case. Toyota has not shown error.

(b) Toyota's substantive contention of error is three-fold. It argues that the trial court should have excluded Vigilante's opinions on certain issues because (i) his standard of care analysis is unreliable, (ii) he failed to test his alternative warnings system properly, and (iii) his quantification of the risks of Toyota's warning system via the National Safety Council's ["NSC"] risk ranking system is unreliable.

(i) Toyota argues that although Vigilante "claimed" he tested Toyota's actions against the standard of care for a reasonably prudent product manufacturer and its responsibility to identify, assess, and mitigate hazards related to the danger posed by inadvertent exposure to CO from keyless ignition vehicles, Vigilante testified that he had not been asked to identify any other manufacturers for the 2015 model year that met this standard of care for implementing "an effective warning system." It only argues — without clearly articulating why — that Vigilante's inability to discuss other manufacturers' compliance or lack thereof with the standard of care rendered his opinion regarding Toyota's compliance unreliable. See *Vatave v. Canopy Workforce*

Solutions, 372 Ga. App. 233, 236(1) n. 3 (904 SE2d 43) (2024) (reiterating that arguments in briefs are not evidence).

(ii) Toyota next contends that Vigilante failed to test his proposed alternative warnings system properly because he did not test it with a representative sample of the target population, even though his own writings and other industry literature recommend that this be done.

Vigilante deposed, however, that Toyota had produced its own studies on audible warnings using human subjects, and that in addition to these, he also relied on standards and human factors guidelines for the design of audible and visual warning systems. According to Toyota, this means that Vigilante failed to satisfy *Daubert*, citing *Kumho Tire Co., Ltd. v. Carmichael*, 526 US 137, 152(II)(B) (119 SCt 1167, 143 LE2d 238) (1999), for the proposition that, to ensure the reliability and relevancy of expert testimony, the expert must "employ[] in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." Although Toyota appears to be correct that Vigilante did not conduct his own studies using humans, it fails to explain why such studies were necessary to the reliability of his testimony in light of the fact that Vigilante noted that Toyota had its own study using human subjects which, apparently, he had reviewed, along with other materials. As *Kumho Tire* recognized, "the relevant reliability inquiry should be flexible, [] its overarching subject should be validity and reliability, and [] *Daubert* was intended neither to be exhaustive nor to apply in every case." 526 US at 158(III)(B) (citation and punctuation omitted).

Although Toyota concedes that "human subject testing may not always be required of every expert," it argues that such testing was necessary in this instance. The automaker, however, fails to articulate why it was necessary here other than to reiterate that because Vigilante did not run such a test, his rigor fell below that required in his field. In other words, Toyota never presents an argument regarding why this lack of testing rendered Vigilante's opinion *substantively* unreliable. The estate contends that Vigilante's testimony had other indicia of reliability, including other types of testing of, for example, the decibel level of the warning beeps on Robertson's Lexus versus the ambient noise of the running engine; examination of data in light of industry standards; and various methods of testing his hypotheses. Vigilante also deposed that he tested the subject vehicle's warning system against the standard of care for the design and development of audible and visual warnings. See

Brady v Elevator Specialists, Inc., 287 Ga. App. 304, 306-07(1) (653 SE2d 59) (2007) (upholding trial court's refusal to exclude expert opinion that company failed to follow industry standards, recognizing that "in some cases, the relevant reliability concerns may focus upon personal knowledge or experience" and the expert's opinion was based on "his personal knowledge of the elevator industry, his review of the elevator maintenance records, and the deposition testimony of [the company's] mechanics") (punctuation omitted). Accord *Kumho Tire Co.*, 526 US at 150(II)(B). "Provided an expert witness is properly qualified in the field in which he offers testimony, and the facts relied upon are within the bounds of the evidence, whether there is sufficient knowledge upon which to base an opinion goes to the weight and credibility of the testimony, not its admissibility." *Brady*, 287 Ga. App. at 307(1) (punctuation omitted).

(iii) Finally, Toyota argues that Vigilante's opinion is unreliable because he used the NSC's hazard ranking system to quantify the risks associated with Toyota's warning system.

Toyota contends that Vigilante's opinions applying the NSC ranking in the instant case are rendered unreliable because when he used components of the NSC system, he did so while working at IBM, which involved different issues than automobiles and CO emissions, and that he has never published on his use of the NSC's system to evaluate the risk of CO exposure by keyless ignition vehicles or in the context of audible or visual alerts. In support of these contentions, Toyota cites to four pages in publications Vigilante authored. While it is true that these four pages do not address the topics at issue, neither do they show that Vigilante has *never* written on these topics.

Even assuming that Vigilante has never published using the NSC ranking system in the contexts at issue, Toyota cites no legal authority showing that an expert must publish on the specific topic about which he is to testify in order for his opinion to be admissible. As *Daubert* recognized, "The fact of publication (or lack thereof) in a peer reviewed journal thus will be a relevant, *though not dispositive*, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised." 509 US at 594(II)(C) (emphasis added). Accord *Butler v. Union Carbide Corp.*, 310 Ga. App. 21, 34-35(Appendix) (712 SE2d 537) (2011). Publication "is not a sine qua non of admissibility; it does not necessarily correlate with reliability[.]" *Daubert*, 509 US at 593(II)(C).

The estate also notes, correctly, that Toyota does not challenge the validity or reliability of the NSC hazard ranking system itself. In addition, the estate points out, citing to a publication on product safety engineering, that such standards are designed to apply across industries. Toyota does not refute this.

(iv) As to the factors outlined above in Division 3(b)(i), (ii), and (iii), which Toyota argues render Vigilante's specified opinions unreliable, based upon the authority in *Kumho Tire*, 526 US at 158(III), *Daubert*, 509 US at 594(II)(C), and *Brady*, 287 Ga. App. at 307(1), we find no abuse of the trial court's discretion in its decision to admit Vigilante's expert opinions. See *Gayden*, 977 F3d at 1153(II)(C) (recognizing that when reviewing the denial of a *Daubert* motion, appellate courts place "a thumb and a finger or two" on the trial court's side of the scale) (punctuation omitted).

4. Toyota contends that the trial court erred in denying its motion for partial summary judgment on the estate's punitive damages claims because, since the estate withdrew its claim for pain and suffering, such damages are not available for the remaining wrongful death claim. We agree.

Punitive damages are not available in wrongful death actions because Georgia courts recognize that a "double penalty" would result if recovery for both the full value of the life of the decedent and punitive damages were allowed. *Engle v. Finch*, 165 Ga. 131, 134 (139 SE 868) (1927). Our courts have viewed wrongful death damages as inherently "penal in that the measure of the recovery is the full value of the life of the deceased, irrespective of its real value to the person in whom the cause of action is vested." Id. See *Roseberry v. Brooks*, 218 Ga. App. 202, 209(4) (461 SE2d 262) (1995) (punctuation omitted) (recognizing that punitive damages are not available in a wrongful death action and finding, in that case, that punitive damages were available only for causes of action alleging negligence resulting in pain and suffering).

The estate counters that, despite this Supreme Court precedent — which it argues should be overturned — it can bootstrap a punitive damages claim to its still extant claims for pecuniary damages for Robertson's funeral and ante mortem expenses. In support, the estate cites *Woodbury v. Whitmire*, 246 Ga. 349 (271 SE2d 491) (1980), which provides

> [w]here a plaintiff pleads and proves actual pecuniary loss for which he or she seeks compensatory damages, and the tort complained of is of such an aggravated nature to warrant a charge on punitive damages, it is permissible for the jury to award both compensatory damages for the injury done and additional or punitive damages to either compensate for

> wounded feelings or to deter the defendant from similar, wrongful conduct.

Id. at 350-51(3) (citation omitted). *Woodbury*, however, is not a wrongful death case. The estate also argues that funeral expenses have become "a true survival action" as they are viewed as debts incurred by the deceased that survive that person's death. Here, however, any claims for funeral and ante mortem expenses would have "grow[n] out of [Robertson's] wrongful death[,]" and, as such, would not be eligible for punitive damages. See *Gay v. Piggly Wiggly S.*, 183 Ga. App. 175, 180(2) (358 SE2d 468) (1987) (emphasis omitted) (finding that where such expenses are derived from the wrongful death, OCGA § 51-4-5 constitutes a "true wrongful death provision rather than a mere survival statute"). See also *Bibbs v. Toyota Motor Corp.*, 304 Ga. 68, 79-80(3) (815 SE2d 850) (2018) (recognizing that "wrongful death damages and personal injury damages are often distinguishable, but sometimes overlap, and where they do, double recovery is impermissible").

This refusal to permit double recovery is consistent with *Engle*, which the estate contends should be overturned. *Engle* is a nearly 100-year-old Supreme Court case holding that a wife suing for the homicide of her husband may not recover punitive or exemplary damages in addition to a sum representing the full value of his life. 165 Ga. at 133-34. As the estate explicitly recognizes, of course, "this Court cannot overturn *Engle*[.]" Because well-settled Supreme Court precedent holds that punitive damages are not available in a wrongful death claim, the trial court erred and its denial of Toyota's motion for partial summary judgment on the issue of punitive damages must be reversed.

In sum, in Case No. A26A0988, we affirm the trial court's grant of summary judgment to MAA, and we affirm its exclusion of the testimony of expert witness Leiss. In Case No. A26A0989, we affirm the trial court's denial of Toyota's motion to exclude some of the testimony of expert witness Vigilante, and we reverse the denial of Toyota's motion for partial summary judgment on the issue of punitive damages.

Judgment affirmed in Case No. A26A0988; judgment affirmed in part and reversed in part in Case No. A26A0989. Barnes, P. J., and Markle, J., concurs.