

2005

Jody Best v. Daimler Chrysler Corporation and Larry H. Miller Chrysler Jeep. : Reply Brief

Utah Court of Appeals

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BEFORE THE UTAH COURT OF APPEALS

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JODY BEST,

Plaintiff-Appellant,

vs.

DAIMLER CHRYSLER CORPORATION and,)
LARRY H. MILLER CHRYSLER JEEP.

Defendant-Appellees.

)

COURT OF APPEALS CASE

)

NO. 20050225

)

DISTRICT COURT CASE

NO. 000909904

)

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REPLY BRIEF OF THE APPELLANT

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

HONORABLE TIMOTHY R. HANSON

PRESIDING

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ORAL ARGUMENT REQUESTED
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UTAH APPELLATE COURTS

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ARGUMENT ONE

IT WAS REVERSABLE ERROR FOR THE TRIAL COURT TO CONCLUDE AS A MATTER OF LAW THAT THERE WERE NO DEFECTIVE PARTS

In the Blue Brief, the Appellant referred this Court the case of Brick Co. vs. Robinson Brick Co., 780 P.2d 827 (Utah Ct. App. 1989) which holds that all evidence and all inferences must be drawn in favor of the non-moving party in reference to Summary Judgments.

Appellant suggested that the Lower Court did not do that as the Lower Court merely substituted one defective part for another.

In other words, the Trial Court merely concluded that there were no defective Sensors as reflected by the ASDM (on board computer) rather there must be a defective computer.

Hence the Trial Court merely substituted one defective Daimler Chrysler part for another Daimler Chrysler part.

Appellees never address this undisputed fact and apparently concede the same by not addressing it at all.

Appellant submits that this admission by the Appellees is perhaps even more telling, because the Appellees have never explained any reason why the ASDM was somehow faulty or otherwise could not be relied on in the first place.

The ASDM is an industry wide device used universally to determine and permanently record what set off the air bag.

The ASDM literally takes a snap shot of the event and permanently saves the same for conclusive proof of what happened. It literally produces a picture of the events that set off the air bag.

This picture is much like a snap shot of the final second of a horse race, showing undisputedly that last instance of what occurred.

Everyone in this action agrees that this snap shot showed that the following occurred at the very instance that the airbag wrongfully exploded in the Appellant's face:

- a. Squib initiator open,
- b. Squib short,
- c. Safing sensor open,
- d. Front sensor short.

At no time either in the Lower Court or on Appeal do the Appellees ever explain why this snap short was in error.

It is as if Appellees just assume that the picture was in error and everyone should join in with the same assumption.

Appellees even go further than this and suggest both to the Lower Court and to this Court that "short" really does not mean "short" rather it means "clockspring."

Now that this Court has the Red Brief, it can see that there never is any kind of explanation as to why the camera (ASDM) (on board computer screen) would take a picture of two defective parts, when in reality these are not defective, rather they are just fine and it is the clockspring that is the problem.

The Appellees do not come before this Court and **show** this Court **where** in the Record or the Transcript it was established as a matter of law and not even disputed that everyone found that it was the clockspring that was defective instead of the sensors.

Appellant submits that they want it both ways.

They want it so that the Court concludes that it is not the Sensors, which are undisputedly shown on the picture screen, while at the same time they want the Court to conclude that it is not the picture screen either.

They expect this Court to conclude that they can have it both ways, and to hold it was the clockspring that was defective and not the Sensors and not the camera.

Appellees never claim that they opened up the Sensors and examined the inner parts and concluded that there were no shorts in the same and the same holds true with the computer.

Rather they claim that they ran two tests to see if it worked okay after the wrongful explosion.

Appellant suggests that each of these tests were ridiculous as outlined in the Blue Brief.

Furthermore, Appellant submits that this case is not like “we found the problem and here it is.”

Rather it is merely the Defendants’ expert that opines it was the clockspring and the Appellant’s expert that unequivocally states it is not just my

opinion that it was the Sensors that shorted, it is conclusively established by the ASDM and this is all supported by the Official Daimler Chrysler Manuel.

In the face of this evidence, the Appellees have never explained in the Trial Court or in the Red Brief, why does this Daimler Chrysler ASDM show two shorts, when it really is the “clockspring.”

Appellant’s expert witness, who was established as an “expert’s expert” as he instructs other “experts” in this exact field, stated that the industry is such that when the on board camera takes the picture of the last instance, that picture does not lie.

This expert testified unequivocally that there were not just one defective Sensor there were two defective Sensors and both of them were Daimler Chrysler official parts.

Now after all of the dust has settled, it is important to note that Appellees have offered no explanation as to why the ASDM took a picture of two defective Sensors when they really were not defective Sensors it was a clockspring that was defective.

A fortiori, Appellees have not shown where there is no question of fact by virtue of the two inconsistent positions and how it is that it is neither the Sensors nor the ASDM but it is really the clockspring.

ARGUMENT TWO

IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO PRECLUDE THE PLAINTIFF'S EXPERT FROM DOING ADDITIONAL TESTING AND THEN HOLDING AGAINST THE PLAINTIFF FOR HAVING DONE NO ADDITIONAL TESTING

In the Blue Brief, the Appellant claimed that Judge Hanson had ruled that Plaintiff's expert would not be allowed to conduct additional testing in reference to Plaintiff's airbag system.

The Appellees admit in their Red Brief that such was the ruling by the Court.

It is further undisputed that Plaintiff engaged their expert witness on October 30, 2003 and he rendered his opinion on November 1, 2003, some two (2) days later.

It is further undisputed that Judge Hanson, on page 1982 of the Record ruled that since Plaintiff's expert did not do additional testing, Defendants were entitled to Summary Judgment.

Appellant submits that Rule 56 of the Utah Rules of Civil Procedure has its place when there are really no genuine material issues of fact in dispute and one party is entitled to judgment as a matter of law, however, it was an abuse of discretion and reversible error for the Trial Court to prevent the testing and then hold because there was no testing, Defendants prevail.

In the case of Timm vs. Dewsnup, 851 P.2d 1178 (Utah, 1993) the Utah Supreme Court held that Summary Judgment should only be granted when there is no prejudice to either side in presenting their evidence for consideration.

As noted in the Blue Brief the actual tests run by the Defendants were not sound in the first place.

In addition, as noted in the Blue Brief, the tests results were first presented to the Court in the Reply Memorandum after Plaintiff had submitted all of her Responsive Affidavits and Responsive Memorandum.

At page 13 and page 14 of the Transcript is the following regarding the exact tests that the Court relied on as found in the Third Affidavit of Michael Cassidy:

“ . . . (BY MR. WALSH) I think it’s, first off, important that I move to strike the affidavit Michael Cassidy filed after our response. We filed our response; I think it was on the 7th or towards the end of the seventh of December or the first part of November. And he, under the rules, is not entitled to come in with a subsequent affidavit, tried to up his response to whatever my expert said. I don’t get a chance to respond to his expert when he does that. There’s nothing in Rule 7 that allows it. Nothing in Rule 4-501 that allows it and it’s unfair for him to submit a second affidavit from his client, responding to my affidavit because I don’t get a chance in any of the filings, then, to respond to that second affidavit. So I move to strike the December 14th affidavit of Michael Cassidy.”

Appellant submits that this Affidavit is the only time that the Appellees presented tests performed on the Sensors.

Nowhere in the prior Affidavits, Exhibits, etc., had the Appellees shown these test results on the Sensors to the Court.

Because of the unfair filing of the same, the Plaintiff was not able to rebut the same yet this is the heart of Judge Hanson's ruling as he held that these were un rebutted.

However, they are only un rebutted because they were submitted after Plaintiff had filed her Responsive Memorandum and her Responsive Affidavit.

On page 45 of the Transcript, Judge Hanson stated the basis for his ruling as follows:

“Prepare an appropriate order from both defendants outlining the reasons that I'm dismissing this matter and then if somebody else wants to look at it, fine. But at this point and time I can't come to any other conclusion other than the fact that there's just not sufficient evidence to conclude that these two Sensors were defective as claimed by the plaintiff. In fact, the evidence is all to the contrary and it's undisputed.”

Plaintiff was never allowed to address the tests on the Sensors, as they were all part of the Affidavit of Michael Cassidy that Plaintiff objected to, as noted above.

Bottom line, Defendants submit the tests on the Sensors in an Affidavit of Michael Cassidy after Plaintiff had filed her Responsive Memorandum and her Responsive Affidavit of Gregory Barnett.

Plaintiff timely objected to the same.

However, the Court allowed the same and then concluded as a matter of law that the Plaintiff had not disputed this new evidence so Summary Judgment against the Plaintiff was granted.

Plaintiff was never allowed to present to the Trial Court the flaws regarding the tests on the Sensors, as outlined in the Blue Brief.

Plaintiff is never allowed to show the Trial Court that the tests regarding the said Sensors are in fact meaningless, as they are all based on the notion that any short in the Sensors would of necessity always be present and show up in all subsequent testing.

Hence a test, like tests given to all cars coming off the ramp at the factory, would not necessarily show the short, or in this case both shorts.

As noted in the Blue Brief, such a premise is disingenuous as shorts by their very nature are present some of the time and not present some of the time.

The tests were not the kind where one who is qualified opens up the Sensors and examines each individual part and then after testing each minute element of the same, concludes that there is no part with any short in the same.

In this case, Judge Hanson ruled that the Plaintiff did not use the same method as the Defendants for determining defective parts regarding testing and therefore as a matter of law, Plaintiff is out.

This matter was clearly a battle of the experts, assuming the Court found Mr. Cassidy to be an expert when he failed to show the Court any basis as to why he would have any knowledge regarding Plymouth Dusters and why he would have any knowledge regarding the Duster airbag system.

Here Plaintiff's Expert relied on a picture taken at the instance that the airbag wrongfully exploded in the Plaintiff's face. A picture taken by a Daimler Chrysler Computer, which showed conclusively, what set off the airbag.

The Computer, even at this stage of the appeal, has never been shown to have any kind of problem and frankly no one even claims that the computer or the picture was unreliable for any reason whatsoever.

Because of the state of the art in the airbag industry, all one expert would have to know is that the airbag went off and what the pictures show as why and that is all undisputed now even on appeal.

Plaintiff submits that it is a Daimler Chrysler computer taking a Daimler Chrysler picture on a Daimler Chrysler screen, which all of the same is even now undisputed.

Appellees have never even claimed that they tested this computer with any kind of test and found any problems.

In fact, the Appellees have never explained in any way why the picture was somehow unreliable for any reason whatsoever.

Notwithstanding all of the above, the Trial Court held that since Mr. Cassidy claimed to have tested the Sensors and Mr. Barnett had not, the case was over.

The actual ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT bears this out as found on page 1982 of the Record:

“... #3. The actual airbag system components of the subject vehicle, which Mr. Barnett concludes from the review of the videotape were defective and caused Plaintiff's injuries, were individually tested and found not to be defective. The Affidavit of Defendants' Expert Witness, Michael Cassidy, related to the evaluation and testing of these individual airbag components, is uncontested. Therefore, the Court concludes there is no question of fact remaining on Plaintiff's theories of Liability or Causation.”

Appellant respectfully submits to this Court that the Trial Court prevented any further testing of the airbag components by the Plaintiff's Expert Witness and then ruled against the Plaintiff on the basis that her Expert had not tested the said airbag components.

The Utah Supreme Court held in Brandt vs. Springville Banking Co. 353 P.2d 460 (Utah, 1960) that trial courts should be reluctant to grant Summary Judgment as the same many times prevents a fair resolution of disputes.

Here, Appellant respectfully submits that the Summary Judgment is particularly unfair because Plaintiff was not allowed to respond to new evidence submitted in the Affidavit filed by Michael Cassidy after the Plaintiff had filed her Responsive Memorandum and Responsive Affidavit.

Furthermore, it was particularly unfair because the Court decided the case on testing that was not allowed to the Plaintiff.

ARGUMENT THREE

THERE WERE DISPUTED MATERIAL ISSUES OF FACT THAT PRECLUDED SUMMARY JUDGMENT

Appellant submits that the Red Brief confirms that there were many material issues of fact in dispute before the Lower Court.

At page 4 of the Red Brief, the Appellees make the following statement:

“Electrical power from the battery and electronic information from the ASDM and sensors are delivered to the airbag through insulated copper wires which are embedded in a ‘wiring harness’ and which run from the

dashboard of the Duster, inside the steering column, through a device called a ‘clockspring’ and into the steering wheel. . .”

By virtue of the foregoing it is clear that all parties to this action agree that electrical power to explode the airbag does not originate in the clockspring, rather it originates in the Sensors and ASDM, which then merely sends an electrical current through the clockspring to the airbag.

Appellant submits that to say that there was a short in the clockspring that caused the airbag to wrongfully explode in the face of the Appellant is without merit.

Appellant submits that a short in the clockspring would merely interfere with a signal rather than create one.

There can be no question, however, that this is the undisputed position of the Appellees in this action.

Appellant in the Blue Brief shows this Court where her expert witness Gregory Barnett in his multiple Affidavits showed just how ridiculous this position is and therefore at the very core of the controversy there were material issues of fact in dispute.

Appellees claim to have run a test that they used to establish that it was the clockspring that malfunctioned at the time in question.

As noted in the record at page 1602 and following is the Affidavit of the Plaintiff’s expert, where he stated the following:

“#12. The Affidavit of Mr. Cassidy is faulty because the clockspring is not part of the front Sensor circuit and so running a wire around the clockspring will indicate nothing because it is the output portion of the circuit and not the input

portion of the circuit. One would need to measure from the front Sensors as indicated in Exhibit A, attached hereto.

#13. As noted in the wiring diagram, which is part of Exhibit A, attached hereto Mr. Cassidy in his test measured the wrong end of the circuitry as he measured the output wire instead of the input wire.

...

#17 Affiant submits that the tests allegedly completed by Mr. Cassidy are at best ridiculous and are only confusing to the Court.”

Appellant submits that by virtue of the foregoing there were material issues of fact as basic as the methods used by the different experts.

Appellees claim that they should prevail because they performed tests on the different parts, yet at the same time the Appellant submits that the tests allegedly performed by the Appellees were not only unsound they were “ridiculous and are only confusing to the Court.”

As a result Appellant submits there were genuine issues of material fact in dispute precluding Summary Judgment.

It is important to note that the Appellees never claim to have dismantled the clockspring, inspected the individual components and then located any short in the wiring.

As a result the best case that the Appellees can make is a mere opinion as to what occurred here.

In contrast, the Appellant’s expert testified that he was not giving merely his opinion; he could state conclusively that it was two shorts in the Sensors that were defective.

As a result, Summary Judgment was inappropriate as the matter boiled down to a battle of the experts.

Appellant pointed out in her Blue Brief that the Lower Court merely had stated claims with no evidence from the Appellees expert because the purported Affidavits were not under oath and did not establish requisite qualifications of their expert.

Appellees respond without showing this Court where their expert established any qualifications to make him an expert on the Plymouth Duster nor on its airbag.

They do suggest two things that, A) Appellant did not preserve the issue before the Lower Court and B) the Appellant did not point out to this Court where their expert is not qualified.

As to the first point at page 26 of the Transcript Appellant pointed out to Judge Hansen that all he had before him was “theory”.

As to the second point Appellees misapprehend Rule 56 of the Utah Rules of Civil Procedure, as it is not the responsibility of the Appellant to establish that the Appellees expert was unqualified, rather it is the responsibility of the Appellees to establish the requisite qualifications of their own expert.

It is clear in the Blue Brief that the Appellees never have established the requisite qualifications of their own expert.

In addition, Appellees seem to claim that all it takes to make an Affidavit an Affidavit is to use the word Affidavit.

Appellant submits that if that were the case then every time “Affidavit” appears in a memorandum it would change all memoranda to Affidavits.

It is clear in Rule 56 of the Utah Rules of Civil Procedure that Appellees must produce admissible evidence to support their claims.

Under Appellees theory if the word Affidavit appears in letters, diaries, love notes, and Christmas lists then they are all Affidavits per se.

Again it is noted on page 26 of the Transcript where Appellant pointed out to the Lower Court that all the Judge had was theory, because it was clear as pointed out in the Blue Brief Appellees produced no evidence by any expert qualified in Plymouth Dusters and its airbag system.

There can be no question that the Appellees were not entitled to Summary Judgment, as there were clear questions a fact in dispute.

In the Red Brief the Appellees claim that their tests are dispositive.

It is clear, however, that Appellees never claim to have dismantled the ASDM (on board computer) inspected the individual components and then located any problem in the same.

As a result the best case that the Appellees can make is a mere opinion as to what occurred here, and that opinion is based on exclusions.

It is also clear that they never claim to have dismantled the Sensors, inspected the individual components and then located any problem in the same.

As a result the best case that the Appellees can make is a mere opinion as to what occurred here, and that opinion is based on exclusions.

Appellant submits that the simplest way to explain the fallacy of the Appellees position is to evaluate the system based upon the standard in the industry.

As noted above the built in camera takes a picture of the airbag system that is displayed on the computer screen and perfectly and permanently preserves the same.

Appellees claim that the computer that showed the two shorts was not defective.

Yet this is the same ASDM computer that sent the signal through the clockspring to explode the airbag in the Plaintiff's face.

Appellees give no explanation as to how this computer can perform perfectly yet send the wrong message to the detonator in the airbag.

As noted in the Red Brief this ASDM computer is part of the circuitry that caused the airbag to explode.

Appellees give no explanation as to why this Daimler Chrysler part would read two shorts and then explode the airbag while operating perfectly.

In a simple statement the computer sent the wrong message but it was working perfectly.

In the face of the same the Appellees claim that even though this camera took a picture at the very instance when the airbag exploded and showed two shorts, still it was not the Sensors and it was not the camera (ASDM) that was defective it was the clockspring.

This conclusion is based on tests that the Appellant's expert calls "ridiculous".

Appellant submits that there can be no question that most of the experts testimony severely clashed both as to the meaning of the results of various tests as well as the methodology in reference to the same.

In addition the fundamental premise of the Appellees position standing alone creates a basis for the Lower Court to deny the Motion for Summary Judgment.

The fundamental flaw is found on page 4 of the Red Brief, where as noted above, the Appellees confirm for this Court that the current that exploded the airbag did not originate in the clockspring.

Counsel submits that if there were defective wiring or shorts in the clockspring then that would merely prevent the transmission of the signal to the airbag rather than create the original signal for the airbag.

Hence any shorts in the clockspring would only be manifested when there would be a failure of the airbag to deploy when it should have deployed rather than a deployment when it should not have deployed.

This is all based on the admission by the Appellees that no electrical current originates in the clockspring.

Hence the position standing alone would create a basis for the Lower Court to deny the Defendants Motion for Summary Judgment.

Appellant therefore submits that there were disputed material issues a fact that clearly precluded Summary Judgment.

ARGUMENT FOUR

APPELLANT SUBMITS THAT THE RED BRIEF MERELY DIVERTS THE COURTS ATTENTION FROM THE REAL ISSUES

Appellant submits that the whole of the Red Brief merely diverts the Court's attention from the real issues before this Court.

In the Red Brief, the Appellees claim that Barnett merely provided the Court with conclusions instead of facts, and therefore the Lower Court granted Summary Judgment.

It is clear however, that this was not the basis stated by the Court as found in the transcript at page 45 and also in the Record at page 1982.

At page 45 of the Transcript, Judge Hanson stated that it was the test results that were submitted for the first time to the Court by the Defendants, after the Plaintiff had filed her Responsive Affidavit and her Responsive Memoranda.

“Prepare an appropriate order from both defendants outlining the reasons that I’m dismissing this matter and then if somebody wants to look at it, fine. But at this point and time I can’t come to any other conclusion other than the fact there’s just not sufficient evidence to conclude that these two front sensors were defective as claimed by the Plaintiff. In fact, the evidence is all to the contrary and it’s undisputed.”

When the Appellees prepared the final order for the Court to sign in granting the Summary Judgment, they spelled out exactly what the Court had done and that the Court considered the tests submitted for the first time to the Court in the after the fact Affidavit of Michael Cassidy and that was the sole basis for granting the Summary Judgment.

At page 1982 of the Record, the ORDER GRANTING DEFENDANTS'

MOTION FOR SUMMARY JUDGMENT states:

“3. The actual airbag system components of the subject vehicle, which Mr. Barnett concludes from the review of the videotape were defective and caused Plaintiff's injuries, were individually tested and found not to be defective. The Affidavit of Defendants' Expert Witness, Michael Cassidy, related to the evaluation and testing of these individual airbag components, is uncontested. Therefore, the Court concludes there is no question of fact remaining on Plaintiff's theories of Liability and Causation”.

Appellant submits therefore that when Appellees state in their Red Brief that when Appellant's expert submitted his Affidavit he gave mere conclusion which were rejected out of hand because they were mere conclusions only diverts this Court's attention from the real facts.

As noted above it was the inappropriate Affidavit of Michael Cassidy, which Appellant timely objected to, that formed the sole basis for the granting of the Defendants Motion for Summary Judgment.

In the Red Brief, the Appellees claim that the Appellant destroyed the evidence and did so in breach of an agreement between Counsel.

This again is merely a diversion, as Daimler Chrysler was the first Defendant to inspect and run tests on the Duster.

Appellees had the Plaintiff's car taken to the local Larry Miller Dealership, where the vehicle was placed on the racks and the Defendants conducted every single test they wanted and this was done before any tests were run on the clockspring etc., by the Plaintiff.

Hence, to state here on Appeal that the Plaintiff destroyed evidence before the Defendants could conduct whatever testing that they wanted is first not true and second a diversion.

It is important to note, contrary to the claims of the Appellees, that there never was any evidence destroyed at any time.

When Appellant had the vehicle inspected by Dru Dickson, Mr. Dickson carefully removed parts and examined the same.

These parts were put back into the subject vehicle and have never been destroyed in any way or tampered with in any way.

Therefore, for the Appellees to claim in their parade of horrors that Plaintiff destroyed or tampered with the evidence and that that formed the basis for the granting of the Summary Judgment is without merit.

The reason the Court granted the Defendants Motion for Summary Judgment was based solely on the inappropriate Affidavit of Michael Cassidy.

In the Red Brief, the Appellees attempt to divert this Court's attention from the real issues presented by claiming that the Lower Court should not have allowed the substitution of Plaintiff's Expert witness Dru Dickson by Gregory Barnett.

Appellees have made this claim in their parade of horrors argument to this Court.

They go beyond this claim and anticipate the Appellant's response by stating that Appellant may claim that Daimler Chrysler did the same, however, when

Daimler Chrysler designated after the deadline they only did it once and it was to identify an Expert already identified by a co-defendant.

A simple review of the record will show that the Daimler Chrysler had several designations beyond the deadline and not just one as claimed.

Furthermore, the record shows that even if the position were true as claimed by the said Defendants that they did it only once, well Appellant did it only once, so how can the Appellees complain.

Additionally, if they felt they needed to make the designation after the deadline for the same so as to disclose their expert, then it is disingenuous to argue that there was no prejudice to the Appellant because he was already designated by a co-defendant.

Appellees claim that the Court granted their Motion for Summary Judgment because allegedly Barnett gave an Affidavit inconsistent with his Deposition, and one cannot give inconsistent positions and thereby create a question of fact.

Counsel agrees with the case law and the theory as set out in Floyd vs. Western Surgical Associates, Inc. 773 P.2d 401, (Utah App. 1989), Harnicher vs. University of Utah, 962 P.2d 67, (Utah, 1998) and Brinton vs. IHC Hospitals, Inc. 973 P.2d 956, (Utah, 1998).

However the same does not apply to this matter.

At page 32 of the Transcript it was pointed out to Judge Hanson where Mr. Barnett's testimony was taken completely out of context.

It was pointed out to Judge Hanson where the Appellees had asked a hypothetical question in the Deposition without the benefit of a post deployment picture of the problem with an airbag system.

Appellees then attempted to make it appear that Mr. Barnett had stated inconsistent statements in his Affidavits and his Deposition.

That was not the case, as Mr. Barnett explained in his Affidavits, that one line of questioning had to do with a post deployment scenario and the other line of questions were a pre-deployment scenario.

The difference being the post deployment gives a picture of exactly what had malfunctioned at the time of the wrongful explosion, whereas the pre-deployment does not give one the same unequivocal information.

Again, as noted above this whole line of reasoning is merely a diversion because Judge Hanson did not base his reasoning on this claim by the Appellees, rather the whole Summary Judgment was based upon the tests which were submitted to the Court for the first time in the Affidavit of Michael Cassidy, after the Responsive Affidavit and the Responsive Memorandum were filed by the Appellant.

Appellees claim to have given the test results to Counsel for the Appellant and somehow that is fair game to give it to the Court after the Responsive Affidavit and Responsive Memorandum were filed.

Counsel submits that this too is merely a diversion, as merely giving the “ridiculous test results” of a “ridiculous test” to Counsel has nothing to do with filing

the same with the Court and making the same part of the Motion for Summary Judgment.

Counsel for the Appellees did not make these test results part of the original filing of the Motion for Summary Judgment and therefore Counsel for the Appellant is not on notice of what the claims are that are being raised with the Court.

It is only after the Appellant responds to the Summary Judgment that Appellees show the Court the test results for the first time.

These were appropriately objected to at the time of oral argument as noted on page 13 of the transcript and therefore they should have been stricken.

However, instead of being stricken they form the sole basis for the granting of the Motion for Summary Judgment.

Hence, here on Appeal to suggest that Appellees sent over their test results on another occasion and therefore they are appropriate to submit to the Court after the Responsive Affidavit and the Responsive Memorandum is merely a diversion.

As another diversion the Appellees claim that Mr. Cassidy had to be well qualified because he submitted a statement showing where he had done minute testing, etc.

Appellant submits that merely doing minute testing proves nothing and especially where the testing whether big or little is ridiculous.

Appellant's expert, as pointed out above, showed the Lower Court where Mr. Cassidy had his testing backwards and the same showed nothing.

The very position of Mr. Cassidy in claiming that the clockspring caused the wrongful deployment is entirely inconsistent with the statement in the Red Brief that no signal and no electrical current did nor could have originated in the clockspring, as all power came from the battery and the ASDM.

Hence, no matter whatever testing was done by Mr. Cassidy, such will never raise his own expertise by his own bootstraps.

Another diversion by the Appellees is their claims that Appellant never did refute their steering rack argument nor the column on brake pedal argument.

Appellant submits that with her unequivocal position that the Sensors faulted, based on the picture produced by the ASDM, she cannot say with any greater clarity that the steering rack argument and the column on brake pedal argument are absurd and refuted in every way.

Appellees claims of dilatory and obstreperous conduct by the Plaintiff is merely a diversion aimed at tainting the judgment of this Court.

The Lower Court based its Summary Judgment on the test results being submitted to the Court after the Appellant responded to the Defendants' Motion for Summary Judgment and all of the attempts to make Plaintiff look bad will not change the bottom line facts.

As noted above the Summary Judgment itself states that it was based on the said test results and nothing more.

Appellees argue in the Red Brief that the Trial Court erred in allowing the substitution of Appellants expert from Dru Dickson to Gregory Barnett.

It is important to note however that Appellees have never cross-appealed the Judge's ruling.

Additionally the Appellees are in no position to be pointing the finger in the first place.

The Appellees made multiple post deadline designations regarding experts, however they admit to only one in the Red Brief.

As noted above Appellant did it only once with the Courts approval based upon the fact that Dru Dickson had left the area with no forwarding address or phone number.

Through no fault of the Appellant she was without an expert.

In contrast the Appellees were not caught by surprise with their expert witness designation and they provided no explanation to the Lower Court as to why they should be allowed to designate any expert beyond the deadline.

Hence, Appellees are in no position to claim that the Lower Court erred in allowing the Appellant to substitute her expert witness.

More importantly, the Appellees have made no showing of any prejudice in any way.

Appellees could show no prejudice to Judge Hanson and cannot show any prejudice here.

Hence it is another diversion to suggest that Judge Hanson erred in allowing the substitution.

CONCLUSION

Appellant submits that it stands to reason that the clockspring has to be totally functional for any message to even arrive at the airbag.

If the clockspring had not functioned properly then the signal would have shorted there and the airbag would not have deployed, as a short in the clockspring wiring would merely interfere with the signal.

Appellant submits that it is hard to argue with a picture, especially a picture that unequivocally shows not just one but two faulty parts.

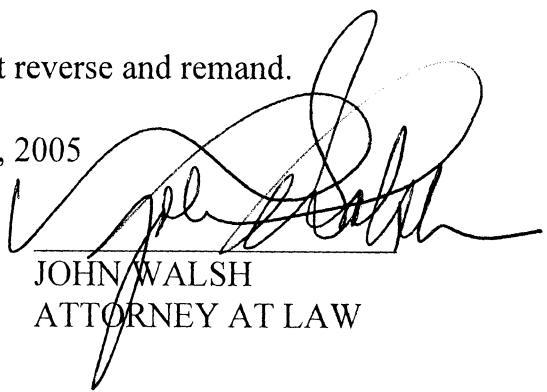
At no time did the Appellees even claim to have examined the individual parts of the Sensors, the individual parts of the ASDM, nor the individual parts of the clockspring.

At no time have the Appellees ever given any kind of explanation as to why the ASDM (a Daimler Chrysler part) would read Sensors, but really mean clockspring.

Appellant's expert, armed with a photo of the faults, created by a system built exclusively with Daimler Chrysler parts could state as a matter of fact that it was the Sensors that caused the airbag to wrongfully explode in the Appellant's face.

Appellant request that this Court reverse and remand.

Dated this 16th day of November, 2005

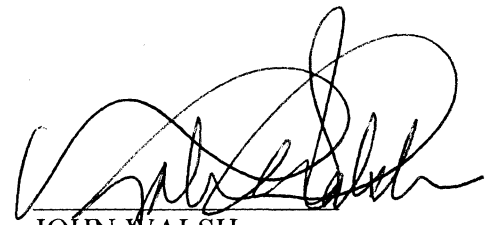


JOHN WALSH
ATTORNEY AT LAW

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed two true and correct copies of the foregoing
REPLY BRIEF to the Defendants- Appellees, by mailing the same to Peter F. Jones, Hall &
Evans, L.L.C., 1125 17th STREET, SUITE 600, DENVER COLORADO, 80202.

Dated this 16th day of November, 2005



JOHN WALSH
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