

2005

Jody Best v. Damiler Chrysler Corporation, and Larry H. Miller Chrysler Jeep : Brief of Appellee

Utah Court of Appeals

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JODY BEST,

Appellant,

vs.

DAIMLERCHRYSLER
CORPORATION and LARRY H.
MILLER CHRYSLER JEEP,

Appellees.

BRIEF OF APPELLEES

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APPELLEES

FILED
UTAH APPELLATE COURTS
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LIST OF PARTIES TO THE PROCEEDINGS

Plaintiff Jody Best (represented by attorney John Walsh) sued three defendants: DaimlerChrysler Corporation (“DCC”), Larry H. Miller Chrysler Jeep (“Miller”) and Dan Worth d/b/a Worth’s Custom Body and Paint (“Worth”).

DCC was initially represented by Patricia Christensen of Parr, Waddoups, Brown Gee & Loveless in Salt Lake City. The representation of DCC was subsequently assumed by Dale Lambert and Nathan Alder of Christensen & Jensen, P.C., in Salt Lake City. On May 1, 2001, Peter Jones of Hall & Evans, L.L.C., in Denver, entered his appearance *pro hac vice* as co-counsel on behalf of DCC.

Miller was originally represented by Donald Winder and John Holt of Winder & Haslam, P.C., in Salt Lake City. The representation of Miller was subsequently assumed by Dale Lambert and Nathan Alder of Christensen & Jensen, P.C., and Peter Jones of Hall & Evans, L.L.C.

Worth was represented throughout by Kara Pettit of Snow Christensen & Martineau in Salt Lake City. Although all three defendants were initially appellees in this appeal, Worth has been dismissed.

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COMMENT REGARDING REFERENCES TO BRIEF OF APPELLANT

Contrary to Rule 24(f), U.R.A.P., the first six pages of text in the Brief of Appellant are not paginated. Defendants will refer to those pages by capital letters A-F.

JURISDICTION

The Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(j).

ISSUES PRESENTED FOR REVIEW

ISSUE NO. 1: Did the trial court correctly enter summary judgment?

Standard of review: An entry of summary judgment is reviewed for correctness. Hall v. NACM Intermountain, Inc., 988 P.2d 942, 945 (Utah 1999). The appellate court determines whether the trial court correctly held that there were no disputed issues of material fact. Ron Shepherd Ins. v. Shields, 882 P.2d 650, 654 (Utah 1994).

Preservation in record: This issue was preserved in the briefs submitted for and against, and at the hearing on, defendants' renewed motion for summary judgment. (R. 1393-1566, 1574-1612, 1624-1700, 1996).

ISSUE NO. 2: Did the trial court properly consider the affidavits submitted by defendants' expert witness, Michael Cassidy?

Standard of review: The trial court has discretion to determine the qualifications of an expert witness. Schindler v. Schindler, 776 P.2d 84, 89 (Utah App. 1989).

Preservation in record: Plaintiff did not preserve this issue.

ISSUE NO. 3: Should the judgment be affirmed on the alternative basis that the trial court erred and/or abused its discretion when allowing plaintiff to "substitute" Gregory Barnett for her previously undisclosed (or at best, improperly disclosed) expert witness, Dru Dickson, in responding to the motions for summary judgment?

Standard of review: "Whether a trial court has erred in granting or denying a motion to designate a substitute expert is a legal question, which we review for

correctness; however, we afford a trial court very broad discretion in ruling on such a motion.” Boice v. Marble, 982 P.2d 565, 568 (Utah 1999).

Preservation in record: The impropriety of plaintiff’s attempt to “substitute” Barnett for Dickson was presented in numerous pleadings (R. 245-248, 919-973, 985-988, 1073-1074, 1094-1114, 1120-1131, 1144-1219, 1251-1257, 1261-1264, 1269-1298, 1397-1398) and at the hearing on the original motions for summary judgment. (R. 1998).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

This case does not focus on any constitutional provisions, statutes or rules.

NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION BELOW

This is a products liability case for personal injury allegedly received when the airbag in an automobile (the “Duster”) deployed for no apparent reason while plaintiff was driving at low speed in a parking lot. (R. 1-3, 72-74). With plaintiff’s permission, defendants’ expert witness (Michael Cassidy) inspected the Duster, removed various components from the airbag system for testing and determined that they were free from defects. (R. 462-463 at ¶¶ 19-21; 1641-1643). Plaintiff’s counsel was given the results of these tests shortly after they were obtained. (R. 144).

In her designation of over thirty expert witnesses plaintiff listed a person named “Dru Dickson” without indicating his qualifications or area of testimony. (R. 245-248). Although defendants asked plaintiff to provide more information concerning her expert witnesses, she never did. (R. 480 at ¶ 10; 933, 937-939). After defendants moved for summary judgment, plaintiff first sought time to respond, arguing that her expert witness

had disappeared, then filed responses supported by an affidavit from her newly-designated “supplemental” expert, Gregory Barnett. (R. 441-794, 808-920, 985-999, 1024-1093). Defendants moved to strike the supplemental designation, and plaintiff filed a motion to “substitute” Barnett for Dickson. (R. 1094-1114, 1120-1140, 1144-1145, 1147-1264, 1269-1364). The court agreed that plaintiff had not properly disclosed Dickson; reluctantly allowed plaintiff to substitute Barnett; and denied the motions for summary judgment without prejudice, pending Barnett’s deposition. (R. 1573 at 16:16-17:20; 20:20-23:1; 33:18-37:14; 1364).

After deposing Barnett and learning he had no factual basis for the opinions stated in his affidavit, defendants filed renewed motions for summary judgment. (R. 1393-1566, 1624-1923). In supporting affidavits, Cassidy explained how he had tested the airbag sensors and determined they were free from defects. (R. 1421-1433, 1549-1559, 1641-1648). Finding that Barnett’s conclusory assertions failed to contradict Cassidy’s detailed analysis, the court determined it was uncontradicted that the airbag sensors were free from defects and entered summary judgment. (R. 1981-1984, 1999 at 43:14-45:8).

STATEMENT OF FACTS RELEVANT TO ISSUES PRESENTED FOR REVIEW

I. UNDERLYING FACTS

Plaintiff admitted all of the following facts either in pleadings filed in the trial court or in the Brief of Appellant (hereafter the “Appellant’s Brief”) filed on appeal.

A. The Duster

In April 1993, DaimlerChrysler Corporation (“DCC”) manufactured a Plymouth Duster automobile, bearing vehicle identification number 3P3XP6439PT598491 (hereafter the “Duster”). (R. 1398 at ¶ 1; 1587 at ¶ 1). The Duster contains seatbelts for the driver and all passengers, in addition to an airbag system designed to protect the driver in frontal collisions. (R. 1399 at ¶ 5; 1587 at ¶ 5). The driver’s airbag system includes two front impact sensors, the airbag module and the airbag system diagnostic module (“ASDM”), which also houses the “safing sensor”. (R. 1399 at ¶ 7; 1587 at ¶ 7). The ASDM “monitors critical input and output circuits within [the] air bag system, ensuring they are operating correctly.” (R. 1611 at left). The safing sensor is “an integral sensor in [the] circuitry of [the] system, which is used to fire [the] air bag module.” (Id.). The airbag module is mounted in the steering wheel. (R. 1399 at ¶ 6; 1587 at ¶ 6).

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. (R. 1399 at ¶ 8; 1587 at ¶ 8).¹ The “clockspring” is a rotary device located between the steering wheel and the steering column which facilitates the transmission of electric energy from the stationary steering column of the Duster to the moveable steering wheel. (R. 1399 at ¶ 9; 1587 at ¶ 9). Coils of flat wire inside the clockspring uncoil and re-coil as the

¹ A diagram showing the relation of the steering wheel to the clockspring and airbag module is submitted in the Addendum at Tab 5.

steering wheel is turned and released. (R. 1399 at ¶ 9; 1587 at ¶ 9). There is sufficient flat wire inside the clockspring to permit the steering wheel to turn approximately one and one-half revolutions without damaging these wires. (R. 1399 at ¶ 9; 1587 at ¶ 9).

The “steering column” connects the steering wheel to the body of the Duster. (R. 1399 at ¶ 10; 1587 at ¶ 10). In particular, the steering column connects with the “steering rack and pinion” (hereafter the “steering rack”) mounted to a beam under the engine compartment of the Duster. (R. 1399 at ¶ 10; 1587 at ¶ 10). A point of attachment between the steering column and the steering rack is a universal joint called the “upper steering coupler”. (R. 1400 at ¶ 10; 1587 at ¶ 10).² The upper steering coupler is visible inside the passenger compartment of the Duster, just above the floor and immediately behind the brake pedal. (R. 1400 at ¶ 11; 1587 at ¶ 11). The design of the Duster allows sufficient clearance between the brake pedal and upper steering coupler so that the brake pedal does not contact the upper steering coupler. (R. 1400 at ¶ 11; 1587 at ¶ 11). In the Duster as built, the brake pedal may be depressed to its full extent without contacting the upper steering coupler. (R. 1400 at ¶ 11; 1587 at ¶ 11).

DCC maintains a system of quality control which requires the inspection of every vehicle as it rolls off the assembly line. (R. 1398 at ¶ 2; 1587 at ¶ 2). This system for maintaining quality control was in place and operational at DCC for many years before April 1993 and continued thereafter. (R. 1398 at ¶ 3; 1587 at ¶ 3). The Duster was inspected as part of the DCC quality control system in place in April 1993. (R. 1399 at ¶

² A diagram showing the relation of the steering wheel to the steering column and upper steering coupler is submitted in the Addendum at Tab 6.

4; 1587 at ¶ 4). These inspections included examining the brake pedal and upper steering coupler and depressing the brake pedal to its full extent. (R. 1400 at ¶ 12; 1587 at ¶ 12). If the Duster's brake pedal had contacted the upper steering coupler, either with the brake released or the pedal fully depressed, the Duster would not have passed these inspections. (Appellant's Brief at pp.13, 25).

The Duster at issue was first sold to a consumer on July 28, 1993. (R. 1400 at ¶ 14; 1587 at ¶ 14). Two years later, Jody and Ron Best purchased the Duster as a "used" vehicle in May of 1995. (R. 1401 at ¶ 16; 1587 at ¶ 16). At that time, the Duster had been driven approximately 16,700 miles. (R. 1401 at ¶ 17; 1587 at ¶ 17).

B. Accidents and Repair History

On September 13, 1996, as plaintiff Jody Best was driving the Duster, a vehicle traveling at about 65 miles per hour "slammed into" the front left section of the Duster with sufficient force to drag the Duster across four lanes of traffic. (hereafter the "1996 Accident"). (R. 1401 at ¶¶ 18-23; 1588 at ¶¶ 18-23). Due to the force and direction of impact in the 1996 Accident, the airbag of the Duster properly deployed. (R. 1402 at ¶ 24; 1588 at ¶ 24). The Duster was "badly damaged" on the front end, particularly to the driver's side (left side). (R. 1402 at ¶ 25; 1588 at ¶ 25).

The Best's insurer considered the Duster a total loss, but the Bests insisted the Duster be repaired. (R. 1402 at ¶¶ 26-30; 1588 at ¶¶ 26-30). Dan Worth d/b/a Worth's Custom Body and Paint ("Worth") performed the repairs, including the replacement of airbag components. (R. 1403 at ¶¶ 31 and 35; 1588 at ¶¶ 31 and 35; 1710 at ¶ 2; 1925 at ¶ 2). All parts used by Worth to repair the Duster, including the airbag system, were

purchased from Larry H. Miller Chrysler Jeep (“Miller”). (R. 1710 at ¶ 3; 1925 at ¶ 3). After Worth completed the repairs to the Duster from the 1996 Accident, the Duster was returned to the Bests. (R. 1403 at ¶ 36; 1588 at ¶ 36).

On July 16, 1997, another automobile “slammed into the left ... side” of the Duster (hereafter the “1997 Accident”). (R. 1403 at ¶ 37; 1588 at ¶ 37). In the 1997 Accident, the other vehicle was traveling about 40 miles per hour when the driver “lost control”; the vehicle “spun around 180 degrees” and hit the Duster. (R. 1404 at ¶ 38; 1588 at ¶ 38). The airbag of the Duster did not deploy in the 1997 Accident³. (R. 449 at ¶ 39; 1026 at ¶ 39; see also 1404 at ¶ 39; 1589 at ¶ 39).

The Duster suffered damage to the left fender, left door (driver’s door), right fender, bumper and possibly the frame in the 1997 Accident. (R. 1404 at ¶ 40; 1589 at ¶ 40). Worth repaired this damage as well. (R. 1404 at ¶ 41; 1589 at ¶ 41). Following the repairs from the 1997 Accident, the Duster was returned to Jody Best and appeared to perform satisfactorily. (R. 1404 at ¶ 42; 1589 at ¶ 42).

On September 21, 1999, plaintiff was driving the Duster in the parking lot of a shopping center when the airbag deployed for no apparent reason, striking plaintiff and allegedly causing her injury. (R. 1404 at ¶ 44; 1589 at ¶ 44). By that time the Duster had been driven approximately 67,000 miles. (R. 1406 at ¶ 52; 1591 at ¶ 52).

³ This was a side collision, not a frontal collision. (See R. 1026 at ¶¶ 37 and 40.)

II. TRIAL COURT PROCEEDINGS

A. Plaintiff's Expert Witness Disclosures

On May 19, 2000, before this lawsuit was filed, counsel for DCC requested assurances from plaintiff's counsel that the Duster would be "preserved and maintained without destruction or alteration of any kind." (R. 141). Seven months later, on December 19, 2000, plaintiff filed her complaint against DCC. (R. 1-3).

On July 17, 2002, DCC requested plaintiff to identify everyone "who has inspected, tested, evaluated or repaired" the Duster's steering mechanism, and to identify her expert witnesses on liability issues, including a brief summary of the relevant information possessed by each expert. (R. 116-126 at ¶¶ 10.e and 12). Plaintiff having not answered these interrogatories by August 26, 2002, counsel for DCC wrote to plaintiff's counsel requesting immediate responses. (R. 112 at ¶¶ 3-5 and 139).

On August 7, 2002, plaintiff filed an amended complaint adding Miller and Worth as defendants. (R. 72-74). At a scheduling meeting pursuant to Rule 26(f), U.R.C.P., held on September 23, 2002, the parties agreed that plaintiff would designate her expert witnesses and have them ready for deposition by April 7, 2003. (R. 192-193 at ¶ 1; 194 at ¶ 3(e); and 197). In October of 2002, plaintiff's counsel agreed with Miller's counsel that plaintiff would not disassemble the Duster absent prior notice to the defendants and permission to observe. (R. 1998 at 18:16-23).

Plaintiff having not responded to DCC's interrogatories by December 13, 2002, DCC filed a motion to compel. (R. 111-147). On January 9, 2003, the court granted the motion to compel, ordering plaintiff to answer the discovery by January 31, 2003. (R. at

151-152). On February 12, 2003, almost six months after they were due, plaintiff responded to DCC's discovery requests. (R. 215 at ¶ 19; 477-492). With respect to the question about expert witnesses, although plaintiff admitted using the services of an expert, she did not disclose his name. (R. 480 at ¶ 10). These discovery responses were never supplemented. (R. 1282 at ¶ 1).

On March 4, 2003, the court signed the Case Management Order submitted by the parties. (R. 197-199). As agreed, plaintiff was to designate her expert witnesses and have them ready for deposition by April 7, 2003. (R. 198 at ¶ 5). On March 7, 2003, plaintiff filed a motion to extend the various deadlines in the Case Management Order by ninety days. (R. 201-205). All three defendants opposed the motion, pointing out plaintiff's repeated failures to respond to discovery requests. (R. 212-233).

On April 7, 2003, plaintiff filed a "Designation of Expert Witnesses" in which she listed four police officers, nineteen doctors, five hospitals, unidentified "experts from the National Highway Safety Transportation Board", unidentified "experts from the N. H. T. S. A., Office of Defects Investigation", and a person named Dru Dickson. (R. 245-248). Plaintiff did not identify the subject area on which any of these purported experts were expected to testify, the basis for their opinions, or their qualifications. (*Id.*). Plaintiff's entire description of Dru Dickson consisted of the following: "Dru Dickson, Sandy Utah, 577-9421." (R. 248 at ¶ 30).

On May 16, 2003, the court ruled on plaintiff's motion to extend the deadlines in the Case Management Order by ninety days. (R. 348-349). Noting that the case had

already suffered “significant delays,” the court nonetheless extended the deadlines in the case management order by sixty days. (R. 349).

After Miller and Worth were added as defendants, defense counsel arranged for a second inspection of the Duster to occur in late July 2003. (R. 815 at ¶ 16; 902 at ¶ 5; 929-933). Cassidy planned to participate in this inspection. (R. 933). However, before this inspection could take place, plaintiff’s counsel informed counsel for Worth that the Duster had been disassembled and inspected at his request, in derogation of preservation agreements with defense counsel. (R. 901-902, see ¶ 6). This unidentified person disassembled the dashboard and removed the clockspring from the steering column (R. 991-990, see ¶¶ 6-7; 1067-1069, see ¶¶ 14-15; 1893-1895, see ¶¶ 6, 7), thereby damaging the clockspring to such an extent that further testing of it was useless. (R. 897-898 at ¶¶ 7-12; 1888-1889 at ¶¶ 2-3). On July 9, 2003, counsel for DCC asked plaintiff’s counsel to identify the person who disassembled the Duster and to supplement plaintiff’s response to the interrogatory about expert witnesses. (R. 1335). In July and August of 2003, counsel for Worth also asked plaintiff’s counsel to identify the person who did this. (R. 1338-1339, 1341).

Pursuant to the Case Management Order as amended, the time to designate expert witnesses expired on June 6, 2003. (R. 198 at ¶ 5; 349). Plaintiff never supplemented her designation of expert witnesses nor responded to any of the inquiries about who disassembled the Duster. (R. 1281-1285 at ¶¶ 1, 3-5).

B. The Original Motions for Summary Judgment.

In early September 2003, the defendants filed three separate motions for summary judgments, based in large measure on plaintiff's failure to designate an expert witness to testify regarding liability issues. (R. 441-795, 808-918). On September 16, 2003, plaintiff asked the court for an "open-ended" extension of time to respond to these motions, asserting that her expert witness had moved and was no longer available. (R. 919). Defendants opposed this request, pointing out that plaintiff failed to disclose the identity of her liability experts or the person who disassembled the Duster. (R. 921-973).

On October 22, 2003, the court granted plaintiff ten days to respond to the motions for summary judgment. (R. 985-987). In its order, the court noted:

While all three of the defendants have filed separate oppositions or objections to plaintiff's Motion for Enlargement of Time, they all speak to the protracted nature of this case, the plaintiff's prior repeated requests for extensions of time and the fact that this matter has been delayed principally because of the plaintiff's failure to respond to discovery and otherwise prosecute her case.

This time, the plaintiff has not replied to the defendants' oppositions, leaving uncontroverted their assertions concerning her repeated failure to move this matter forward.

As the defendants point out, the plaintiff has never identified an expert witness and the time for doing so has now expired.

(R. 985-986 and n.2).

Eight days later, on October 30, 2003, plaintiff retained Gregory Barnett as an expert witness. (R. 1047 at ¶ 1). On November 1, 2003, Barnett signed an affidavit stating his opinions about alleged defects in the Duster's airbag system. (R. 1047-1052). On November 3, 2003, plaintiff submitted her responses to the defendants' motions for

summary judgment, supported largely by the Barnett affidavit. (R. 1024-1072, 1081-1093). On the same day, plaintiff submitted a “Supplemental Designation of Expert Witnesses” in which she provided the name, address, telephone number, area of testimony and background qualifications for Barnett. (R. 1073-1080).

Defendants Miller and Worth moved to strike the “supplemental designation” and Barnett’s affidavit. (R. 1120-1131, 1144-1215, 1251-1264, 1269-1271). In its reply memorandum in support of its motion for summary judgment, DCC argued that Barnett’s affidavit was not admissible because he had not been timely disclosed. (R. 1094-1114). In response to these arguments, plaintiff explained that Barnett was merely a “substitute” for Dickson and was “merely the same witness with a new name.” (R. 1233).⁴ On December 17, 2003, plaintiff filed a “Motion to Substitute Expert Witness” in which she asked the court for permission to substitute Barnett for Dickson. (R. 1272-1276). All defendants opposed plaintiff’s motion to substitute. (R. 1281-1347, 1354-1360).

Defendants’ motions for summary judgment, plaintiff’s motion to substitute Barnett for Dickson and defendants’ motions to strike Barnett’s affidavit came on for hearing on April 5, 2004. (R. 1361-1362, 1998). During that hearing, when queried by the court as to “who tore this thing apart?” plaintiff’s counsel explained that Dickson disassembled the Duster’s dashboard and steering column at his request. (R. 1998 at

⁴ In support of her position, plaintiff argued that DCC had three times designated a supplemental expert witness after the deadline for naming experts. (R. 1231-1232). In fact, DCC had never designated a previously undisclosed expert witness after the deadline for doing so; it had only cross-designated one expert witness previously disclosed by Worth. (R. 1236-1238).

13:9-18). The court then noted that Dickson had not been properly disclosed; that Dickson “could have been an expert on anything” and that he “could have been there to testify about the color of the road for all we know”. (Id. at 16:20-21:7). Plaintiff’s counsel agreed with these observations. (Id. at 17:1-19).

The court found these failures sufficient reason to deny plaintiff’s motion to substitute. (Id. at 21:14-16). Nonetheless, the court believed that if he denied the motion his ruling could be overturned on appeal. (Id. at 21:16-22). Therefore, the court reluctantly granted the motion to substitute, even though he found “the way [plaintiff’s counsel] handled this [to be] extremely poor”. (Id. at 22:2-4).

The court made clear, however, that the order granting substitution was not a license for Barnett to conduct further analysis, perform more testing or develop new opinions. (Id. at 34:13-36:22). Defendants could depose Barnett and explore the basis for his opinions, but Barnett would be restricted to the opinions previously formed and stated in his affidavit. (Id. at 35:19-21). The court warned plaintiff’s counsel that Barnett “is going to have to base his conclusions in his affidavit on what he knew at the time he made them” and that if Barnett’s opinions “aren’t based on anything, I expect to hear this matter again”. (Id. at 34:14-16; 35:19-22; 36:19-21). Plaintiff’s counsel made no objection or response to these comments and never said that Barnett needed to conduct additional testing. (See id. at 34:11-37:16).

The court then denied the bulk of the motions for summary judgment without prejudice, allowing defendants to depose Barnett. (Id. at 33:12-16; 34:13-16; 36:12-37:14). The court did, however, enter an order of partial summary judgment in favor of

Miller, dismissing all claims for negligent repair against Miller. (R. 1365-1366). Plaintiff has not appealed that order.

C. The Renewed Motions for Summary Judgment

The defendants deposed Barnett on May 20, 2004. (R. 1540). At this deposition, defendants learned that when Barnett signed his affidavit on November 3, 2003, he had not inspected the Duster and did not know how many accidents the Duster had been involved in, the nature of the damage suffered in those accidents, nor what repairs had been performed to correct that damage. (R. 1406 at ¶¶ 53 and 54; 1591 at ¶¶ 53 and 54; 1712-1713 at ¶¶ 16-22; 1926 at ¶¶ 16-22). The sole basis for Barnett's opinions were photographs of the Duster and a video tape of a diagnostic examination of the Duster's airbag system. (R. 1713 at ¶ 23; 1926 at ¶ 23).

Defendants filed renewed motions for summary judgment in late 2004. (R. 1393-1566, 1703-1922)⁵. Plaintiff filed responses supported by a supplemental affidavit from Barnett in which he contradicted statements made in his deposition. (R. 1574-1612, 1924-1939). DCC and Miller filed a reply memorandum supported by a third affidavit from their expert witness, Michael Cassidy. (R. 1624-1700).

On January 24, 2005, the court held a hearing on the renewed motions for summary judgment. (R. 1999). At this hearing, although plaintiff's counsel moved to strike Cassidy's third affidavit on the ground that it was unfair for DCC and Miller to submit an affidavit with their reply memorandum, he never told the court that his expert

⁵ At this point, DCC and Miller were represented by the same counsel and filed a combined motion.

(Barnett) needed to perform additional testing. (R. 1999 at 13:21 – 14:12). Rather, plaintiff's counsel repeatedly asserted that Barnett could conclusively determine the Duster's airbag system was defective simply by looking at pictures of a computer read-out. (Id. at 16:8 – 19:4; 20:5-19; 25:8 – 26:9; 27:20 – 28:5). The court found this assertion unconvincing in light of the uncontradicted evidence that Cassidy had examined and tested the various components of the airbag system and found the sensors and ASDM to be free from defects. (Id. at 26:10 – 25; 28:25 – 30:18).

The court also pressed plaintiff's counsel for evidence that the repairs performed by Worth were performed in a negligent manner, and concluded that he had none. (Id. at 37:9 – 39:14). The court then granted summary judgment in favor of Worth on the ground that plaintiff had no evidence that the repairs performed by Worth were performed in a negligent manner. (Id. at 41:22 – 43:13; R. 1964-1965).

With respect to the renewed motion for summary judgment filed by DCC and Miller, the court found the evidence to be uncontradicted that the sensors in the airbag system were tested and determined to be free from defects. (R. 1999 at 44:15 – 45:8). The court therefore granted summary judgment for DCC and Miller on plaintiff's claims for strict liability and negligence. (Id.; R. 1981-1983). Plaintiff appealed from both summary judgment orders, but dismissed her appeal from the order concerning Worth before the briefing commenced.

SUMMARY OF ARGUMENT

Defendants' expert witness (Cassidy) examined the Duster; tested the electrical circuits in the airbag system; conducted a fault code scan of this system; removed the

front sensors and ASDM for testing; and determined they were free from defects. Plaintiff's expert witness (Barnett) did not examine the Duster or test any of its components. His opinions are based on pictures of the fault code scan conducted by Cassidy or another examiner. Barnett's conclusory opinions fail to raise a genuine issue of fact because the fault code scan is only the first step in the analysis, as Barnett admits. The fault code scan indicates only that there is a fault somewhere in the electrical circuit, as Barnett admits. To determine the exact location of that fault the components of the circuit must be tested, as Barnett admits. Barnett, however, did not conduct such testing. Faced with the results of Cassidy's complete analysis and Barnett's admittedly incomplete review, the court properly found it was uncontradicted the front sensors and ASDM were free from defects.

Cassidy's analysis also determined that the short circuits which caused the airbag to deploy were the result of replacing the steering rack with an improper part in early 1999. Barnett's testimony fails to address this aspect of Cassidy's opinions. Thus, it is uncontradicted that the short circuits which caused the airbag to deploy were the result of modifications to the Duster for which defendants were not responsible.

Plaintiff never challenged the admissibility of Cassidy's opinions on evidentiary grounds. The record also demonstrates that Cassidy is an airbag systems engineer and was well qualified to render opinions concerning the Duster's airbag system.

The court should not have allowed plaintiff to "substitute" Barnett for Dickson. Plaintiff never properly designated Dickson. Plaintiff ignored all requests from defendants to identify her liability expert witnesses and the person who disassembled the

Duster contrary to agreement of counsel. Plaintiff having engaged in dilatory and obstructionist tactics which frustrated the progress of this case at every stage, the court abused its discretion when allowing plaintiff to “substitute” Barnett for Dickson.

ARGUMENT

I. THE TRIAL COURT PROPERLY ENTERED SUMMARY JUDGMENT.

To recover from DCC on her claim for product liability, plaintiff must show that the Duster contained a defect when it was first sold in 1993. Utah Code Ann. § 78-15-6; Lamb v. B&B Amusements, Corp., 869 P.2d 926, 929 (Utah 1993); Bishop v. Gen Tec, Inc., 48 P.3d 218, 225-226 (Utah 2002). If plaintiff is unable to demonstrate that the Duster contained a defect when it was first sold, her claim against DCC must fail. Kleinert v. Kimball Elevator Co., 854 P.2d 1025, 1027 (Utah App. 1993). To recover from Miller plaintiff must show that the components of the airbag system sold to and installed by Worth following the 1996 Accident were defective when Miller sold those components to Worth. No admissible evidence indicates that the Duster contained a defect when sold by DCC in 1993 or that the replacement components of the airbag system were defective when sold by Miller in 1996. Therefore, the trial court properly entered summary judgment.

A. There Is No Factual Dispute That All Components of the Duster’s Airbag System Except the Damaged Clockspring Were Free From Defects.

The only evidence which plaintiff offered to demonstrate the existence of a defect in the Duster’s airbag system was the conclusory testimony of her expert, Barnett. However, as will be demonstrated below, Barnett’s conclusory statements fail to raise a

genuine issue of material fact regarding the existence of a defect in the airbag system when the Duster was built or when the replacement parts were sold.

To raise a genuine issue of fact, an affidavit must do more than reflect the affiant's opinions and conclusions. Webster v. Sill, 675 P.2d 1170, 1171 (Utah 1983). Rather, affidavits must enumerate specific evidentiary facts which support the conclusions presented. Butterfield v. Okubo, 831 P.2d 97, 102 (Utah 1992). Conclusory affidavits lacking factual support do not raise a genuine issue of material fact. Brown v. Wanlass, 18 P.3d 1137, 1139 (Utah 2001); Norton v. Blackham, 669 P.2d 857, 859 (Utah 1983); Williams v. Melby, 699 P.2d 723, 725 (Utah 1985).

The same rules apply, perhaps with greater force, to affidavits submitted by expert witnesses. Gaw v. Utah, 798 P.2d 1130, 1137, n.10 (Utah App. 1990); Butterfield, supra, 831 P.2d at 102-104. Thus, the opinions stated in an affidavit submitted by an expert witness must rest upon specific facts that logically support that opinion. Butterfield, supra, 831 P.2d at 104; American Concept Insurance Co. v. Lochhead, 751 P.2d 271, 274 (Utah App. 1988). The bare assertion that an expert has reviewed certain facts and bases his opinion on them will not suffice. Butterfield, supra, 831 P.2d at 104.

In addition, expert testimony must reveal a "logical nexus" between the facts in evidence and the expert's opinions. Patey v. Lainhart, 977 P.2d 1193, 1198 (Utah 1999); Highland Construction Co. v. Union Pacific Railroad Co., 683 P.2d 1042, 1051 (Utah 1984). Even when considering a motion for summary judgment, a court is not compelled to accept a factual assertion in an affidavit which is demonstrably false. United States v.

Various Slot Machines, 658 F.2d 697, 701 (9th Cir. 1981), cited with approval in Butterfield, supra, 831 P.2d at 103.

1. Cassidy's Detailed Analysis of the Duster and Its Airbag System Revealed That All Components Except the Damaged Clockspring Were Free From Defects.

The expert witness retained by DCC, Michael Cassidy, inspected the Duster on March 9, 2001. (R. 462 at ¶ 19; 1424 at ¶ 19; 1641 at ¶ 2). Plaintiff's attorney was present during this inspection. (R. 462 at ¶ 19; 1424 at ¶ 19). Using his diagnostic equipment and skills as an airbag systems engineer, Cassidy performed an electronic analysis of the various components of the airbag system. (R. 463 at ¶ 21; 1425 at ¶ 21). As the first step in this electronic analysis, Cassidy conducted a "fault code scan" by connecting a "Diagnostic Readout Box" ("DRB") to the Duster's ASDM (airbag system diagnostic module). (R. 1550 at ¶¶ 3-4). The DRB indicated "front sensor short" and "safing sensor short." (R. 1048-1049 at ¶ 12; 1534-1535 at ¶ 12).

The "front sensor short" message on the DRB means that there is a short circuit somewhere in the electrical circuit that encompasses the front sensor, clockspring and related wiring. (R. 1552 at ¶ 7). Similarly, the fault message "safing sensor short" means there is a short circuit somewhere in the electrical circuit that encompasses the safing sensor, clockspring and related wiring. (R. 1643 at ¶ 8; 1552 at ¶ 7). To determine the specific location of the short circuits giving rise to these fault code messages, these electrical circuits must be physically inspected. (R. 1643 at ¶ 8; 1552-1553 at ¶ 7-8). Cassidy did this by disconnecting a wire at the base of the steering column, bypassing the clockspring, and attaching a testing device designed to simulate the electronic resistance

of the airbag. (R. 1552 at ¶ 7). Prior to bypassing the clockspring, the airbag warning lamp in the instrument cluster on the dashboard was illuminated. (Id.). After bypassing the clockspring, the airbag warning lamp was no longer illuminated, indicating the system no longer had short circuits. (Id.). This led Cassidy to conclude, by process of elimination, that both of the short circuits discovered in the fault code scan of the ASDM occurred in the clockspring, because eliminating the clockspring from the system “fixed” these short circuits. (Id.).

With the permission of plaintiff’s counsel, Cassidy also removed the left and right front sensors and ASDM for laboratory analysis. (R. 1641-1642 at ¶ 2). Cassidy then took these components to the facilities of TRW, Inc., in Detroit for electronic testing. (R. 1642 at ¶ 3). TRW manufactured these specific components for the Duster’s airbag system and has the equipment for testing these components as they come off the assembly line. (Id. at ¶ 4). The purpose of this testing is to ensure that the sensors (and other components) meet specifications and function properly. (Id. at ¶ 5).

At Cassidy’s request and under his supervision, technicians at TRW tested the left front sensor, right front sensor and ASDM using the same type of test conducted on new sensors as they come off the assembly line. (R. 1642-1643 at ¶¶ 5-6). Each component performed within specifications and functioned properly. (Id.). No short circuits or other faults were discovered in the front sensors or the ASDM. (Id. at ¶ 6). In addition, because the safing sensor is located within the ASDM, the results of this electronic analysis necessarily demonstrated that the safing sensor was also free of short circuits or other faults. (Id.). On May 10, 2001, counsel for DCC provided to plaintiff’s counsel the

results of TRW's analysis of these components. (R. 1441). Based on his electronic analyses of the Duster's airbag system, Cassidy concluded that the "airbag system crash sensors were in place . . . and operational." (R. 463 at ¶ 21; 1425 at ¶ 21).

During his March 9, 2001 inspection, Cassidy also looked closely at the steering rack underneath the Duster. (R. 462 at ¶ 20; 1424 at ¶ 20; 1553 at ¶ 9). This component was not the original equipment supplied by DCC but an after-market part. (R. 462 at ¶ 20; 1424 at ¶ 20; 1553 at ¶ 9). It was also the incorrect part for the Duster and did not fit properly, causing the steering column to be misaligned and the upper steering coupler to contact the brake pedal when turning the steering wheel. (R. 463 at ¶¶ 22-23; 1425 at ¶¶ 22-23; 1553 at ¶ 9). The steering rack was still in new condition whereas the remainder of the components on the underside of the Duster were rusted and showed extensive wear and weathering. (R. 1553 at ¶ 9). From this, Cassidy concluded that the steering rack was recently installed on the Duster, probably within the last six months before the airbag inadvertently deployed in September of 1999. (*Id.*).⁶

Cassidy also inspected the area inside the passenger compartment of the Duster, near the brake pedal where the driver's feet rest. (R. 463-464 at ¶ 22-23; 1425-1426 at ¶¶ 22-23; 1553 at ¶ 9). He could clearly see that the upper steering coupler contacted the brake pedal. (R. 463 at ¶ 23; 1425 at ¶ 23). In the Duster as manufactured in 1993, the upper steering coupler would not have contacted the brake pedal. (R. 463 at ¶ 23; 1425 at ¶ 23⁷). If the upper steering coupler had contacted the brake pedal when the Duster rolled

⁶ Plaintiff submitted no factual material to contradict this. (See Section I.4 below).

⁷ Plaintiff admitted this fact. (R. 1400 at ¶ 11; 1587 at ¶ 11)

off the assembly line in April 1993, the Duster could not have passed the quality control inspection program then in place. (R. 463-464 at ¶ 23; 1425-1426 at ¶ 23⁸). Cassidy also turned the steering wheel and found that it over-rotated (i.e., turned more than one and one-half revolutions). (R. 463 at ¶ 22; 1425 at ¶ 22; 1553 at ¶ 9).⁹

From his examination of the steering rack, upper steering coupler and steering wheel; his electronic analysis of the airbag sensors and the ASDM; and his wiring test of the airbag electrical circuits, Cassidy concluded that the installation of an improper steering rack caused a misalignment of the steering column, which in turn allowed for over-rotation of the steering wheel. (R. 463 at ¶ 22; 1425 at ¶ 22). The wires inside the clockspring were then damaged by repeated over-rotation of the steering wheel during normal use. (R. 463 at ¶ 22; 1425 at ¶ 22). The condition which allowed the steering wheel to over-rotate and damage the wires inside the clockspring did not exist in the Duster when it was first sold in 1993. (R. 463 at ¶ 22; 1425 at ¶ 22). Nor did it have any relation to the replacement airbag components sold by Miller to Worth. (R. 1562 at ¶ 6).

2. Barnett's Conclusory Statements Fail to Raise a Genuine Factual Dispute.

In opposition to Cassidy's detailed analysis of the Duster and its airbag system, plaintiff submitted the conclusory opinions of her expert, Barnett.¹⁰ Barnett did not examine the Duster, test any of its components, nor review its accident and repair history. (R. 1406 at ¶¶ 53, 54; 1591 at ¶¶ 53, 54; 1712-1713 at ¶¶ 16-22; 1926 at ¶¶ 16-22).

⁸ Plaintiff admitted this fact as well. (Appellant's Brief at pp. 13, 15).

⁹ Plaintiff submitted no factual material to contradict this. (See Section I.4 below).

¹⁰ In the trial court, defendants repeatedly pointed out the conclusory nature of Barnett's opinions. (R. 1100, 1127, 1136-1137, 1147-1148, 1191-1192, 1252, 1256).

Rather, Barnett's opinions are based entirely upon photographs of the results of a fault code scan conducted by "some young kid". (R. 1048-1050 at ¶¶ 11-15, 23; 1534-1536 at ¶¶ 11-15, 23; 1540 at 13:2-12; 22:24-23:2; 35:17 – 36:4; 1713 at ¶ 23; 1926 at ¶ 23; 1595). The fault code scan indicated a short circuit in the front sensor and safing sensor of the airbag system. (R. 1048-1049 at ¶ 12; 1534-1535 at ¶ 12). Plaintiff asserts that these read-outs "speak for themselves" and "conclusively establish" that "the airbag inappropriately deployed because of two defective parts": the front sensor and the safing sensor. (R. 1594; 1999 at 27:5-13).

Barnett's conclusory statements regarding the front sensor lack a logical nexus to the facts. Barnett admits the read-outs from the fault code scan on the DRB are inconclusive and do not indicate exactly where in the front sensor circuit a short occurred. (R. 1540 at 29:13 – 30:9; 34:15 – 35:7; 36:5-12). Barnett further admits that in order to determine the exact location of a short circuit within the front sensor circuit, the various components of this circuit must be physically examined. (*Id.* at 30:9-13; 35:7-16; 36:8-10). Barnett has not done this, however, as he never inspected the Duster. (*Id.* at 10:4-15; 22:24-23:2).

At his deposition, Barnett explained that when the DRB displays the fault message "front sensor short," this indicates a fault somewhere in the front sensor circuit, not necessarily in the front sensor itself:

A: Okay. This is the proprietary scanner that dealers have at a Chrysler dealer. And it says, "1 of 1 codes, front sensor short."

* * *

Q: Now, what does that screen mean to you?

* * *

A: Well, it's saying that you have – it's reading a fault in the front sensor circuit.

Q: And what does that mean?

A: Well, you have to understand that this device here – what it's looking at, resisted values throughout the circuit. If you have a short or something that's outside of its parameters, it doesn't necessarily mean that we have a bad sensor, but its something in that circuit. It's giving you a push in that direction.

Q: So it could be a problem in the circuit as distinct from the component itself?

A: Yes, . . .

(R. 1540 at 29:10 – 30:9; emphasis added). In order to determine whether the fault was in the front sensor itself, rather than somewhere else in the front sensor circuit, Barnett admitted he would need to remove the front sensor and examine it:

A: . . . I would suggest starting with the component itself and then checking the circuit after that.

Q: And in order to do that, you'd have to take the device out of the vehicle and – and examine it; right?

A: If you're meaning the front sensor, that's correct.

Q: That is what I mean.

(Id. at 30:9-13). Barnett, however, did not do this. (R. 1713 at ¶ 22; 1928 at ¶ 22).

Again, at his deposition, Barnett explained that when the DRB displays the fault message “front sensor short,” there could be a problem in the DRB or in the front sensor. In order to determine where the fault was occurring, Barnett admitted he would need to test the front sensors:

Q: Okay. Now, you say the front sensor shorted out. Did you conclude from looking at the photographs how long the front sensor had shorted out before the airbag deployed?

A: Now, we don't know that the front sensor is shorted. You can get a false reading from the computer and go out and test your front sensors, and they can test good.

Q: So that's inconclusive, then?

A: That's correct.

(R. 1540 at 36:5-12; emphasis added). However, Barnett has not conducted such a test. (Id. at 10:4-6; R. 1603 at ¶ 7).

The conclusion that the DRB read-outs identify faults in a circuit rather than faults in a component is supported by statements in the repair manual submitted by Barnett. This manual states: “Each circuit monitored by [the] ASDM has a corresponding fault code (message) assigned to it. For a description of fault codes, see DIAGNOSTIC FAULT CODES (MESSAGES).” (R. 1611, left side). Included among the fifteen possible fault codes are the messages “front sensor short” and “safing sensor short”. (R. 1612, right side). Thus, according to the repair manual submitted by Barnett, the DRB read-outs “front sensor short” and “safing sensor short” refer to faults in the front sensor and safing sensor circuits, not to faults in the sensors themselves.

Barnett reaches his conclusion regarding the front sensors by taking only the first step in an analysis which he admits requires additional steps. In contrast to Barnett, Cassidy in fact removed the front sensors, tested them, and found that they were free from defects. Barnett’s conclusory assertion, resting upon an admittedly incomplete analysis, does not contradict the results of Cassidy’s complete analysis.

In his supplemental affidavit submitted after his deposition, Barnett reversed his position and asserted that he need not inspect the Duster or the electrical circuits within the airbag system in order to determine exactly where the problem was located. (R. 1575-1577 at ¶¶ 7-9, 14, 18). Rather, Barnett concluded that the front sensor, safing sensor and/or ASDM were defective because the DRB read-outs said “front sensor short” and “safing sensor short,” and no further testing was needed in light of these fault code

messages. (Id. at ¶¶ 7-10, 14, 18). Barnett's change of position does not raise a genuine issue of material fact.

A witness may not raise a factual issue by submitting an affidavit which contradicts his own deposition, absent an explanation for the discrepancy. Webster, supra, 675 P.2d at 1172-1173; Gaw, supra, 798 P.2d at 1140. When a witness fails to provide an explanation for the contradiction between his deposition and his affidavit, the court should disregard the affidavit. Floyd v. Western Surgical Associates, Inc., 773 P.2d 401, 403 (Utah App. 1989); Harnicher v. University of Utah, 962 P.2d 67, 71 (Utah 1998); Brinton v. IHC Hospitals, Inc., 973 P.2d 956, 973 (Utah 1998).

Barnett's attempt to explain the contradiction between his supplemental affidavit and his deposition by drawing a distinction between diagnosing a fault in an airbag system before the airbag has deployed and diagnosing a fault in the same system after the airbag has deployed is unavailing. (See R. 1577-1579 at ¶¶ 19-22). In paragraph 20 of his supplemental affidavit, Barnett asserts that "If the system deployed, diagnostics are not performed as the part is automatically discarded." (R. 1606). This statement fails to raise an issue of fact because Barnett does not specify what "part" he is referring to: the sensors or the airbag. Of course, after an airbag has deployed, the airbag is discarded. Barnett then states: "However, if one wishes to see if one or both front sensors are good or bad, the part must be physically inspected." (Id.). This sentence is referring to the situation after "the system deployed" and contradicts the assertions that testing is not necessary. In Barnett's words (taken from paragraph 20 of his supplemental affidavit),

“If the system deployed” and “one wishes to see if one or both front sensors are good or bad,” those sensors “must be physically inspected.”

Similarly, in paragraph 22 of his supplemental affidavit, Barnett admits that “computer modules can set false cods” [sic: “codes”]. (R. 1607). Because the fault code messages may be “false,” further testing is necessary, as Barnett admitted in his deposition. Accordingly, the contradictory assertions in Barnett’s supplemental affidavit fail to raise a genuine issue.

Viewing the read-outs on the DRB, Barnett also concluded that there was no defect in the clockspring, because if the clockspring were defective the DRB (according to Barnett) would have so indicated. (R. 1049 at ¶¶ 13, 15; 1535 at ¶¶ 13, 15). This assertion rests upon the assumption that the DRB can indicate a short circuit in the clockspring. (R. 1059 at ¶¶ 13, 15; 1535 at ¶¶ 13, 15; 1540 at 25:3 – 26:3; 37:18 – 38:15). However, the DRB does not have this vocabulary. (R. 1551-1552 at ¶ 6). In Cassidy’s second affidavit submitted in support of the renewed motion for summary judgment, Cassidy explained that the DRB is not capable of displaying the message “clockspring” or “clockspring short.” (*Id.*). In Barnett’s second affidavit submitted in opposition to the renewed motion for summary judgment, Barnett did not contradict these statements by Cassidy. (R. 1602-1607). Thus, it is uncontradicted that the DRB is not capable of displaying the message “clockspring” or “clockspring short.” That being the case, Barnett’s conclusory opinion that the fault did not occur in the clockspring lacks a logical nexus to the facts and therefore fails to raise a genuine factual issue.

The determination that the DRB is not capable of displaying the message “clockspring” or “clockspring short,” is supported by statements in the pages from the repair manual submitted by Barnett. At the top right corner of page 76, this manual states “For a description of fault codes, see DIAGNOSTIC FAULT CODES (MESSAGES).” (R. 1611). On the following page, under the heading “DIAGNOSTIC FAULT CODES (MESSAGES),” the manual lists a series of fault code messages. (R. 1612). Neither “clockspring” nor “clockspring short” is among them.

In his supplemental affidavit, Barnett asserts that a fault message of “safing sensor short” on the DRB conclusively establishes a fault in the ASDM and not the clockspring.¹¹ (R. 1604-1605 at ¶¶ 9-11, 14). Barnett reaches this conclusion by reliance on a statement in a repair manual which indicates if the message “safing sensor short” appears, the ASDM should be replaced. (R. 1604-1605 at ¶¶ 9, 15; 1612).¹² Barnett’s conclusory reliance upon this statement lacks a logical nexus to the facts.

The selected pages from the repair manual attached to Barnett’s affidavit are incomplete and do not take the analysis to conclusion. (R. 1643 at ¶ 9.a). The bottom right-hand corner of the third page Barnett submitted refers to “The following diagnostic

¹¹ Presumably this assertion is intended to support the conclusion that a short circuit occurred in the safing sensor, because the safing sensor is contained in the ASDM.

¹² The manual referred to is not a DCC publication. (R. 1644 at ¶ 9.a). As can be seen on the pages of this manual attached to Barnett’s affidavit, various illustrations are reproduced “courtesy of Chrysler Corp.” (R. 1610). If this manual were a publication of DCC or its predecessor, Chrysler Corporation, there would be no need to obtain permission from DCC or Chrysler to reproduce these illustrations.

charts and illustrations.” (R. 1612). These “diagnostic charts and illustrations” are not attached to Barnett’s affidavit.

Moreover, the selected pages from the repair manual attached to Barnett’s affidavit do not simply indicate that the ASDM should be replaced, and then stop. To the contrary, the second of the three pages submitted by Barnett explains that a “verification test” or “system operational check” should always be performed after a component is replaced “to ensure proper system operation”:

After component replacement, perform a system operational check to ensure proper system operation. See SYSTEM OPERATION CHECK¹³.

* * *

When using diagnostic charts, DO NOT skip any steps in chart or incorrect diagnosis may result. * * * Always perform TEST VER-1 – VERIFICATION TEST after repairs are made.

(R. 1611, emphasis in original). Thus, after inserting a new ASDM and/or front sensor, the mechanic would not stop, but would then perform a “verification test” or “system operation check” to determine if the fault had been corrected. The fact that such testing is required, after a component is replaced, indicates that merely replacing the component may not solve the problem, and, therefore, that the problem may not have been located in that component. Here, for example, if the ASDM had been replaced after the airbag icon illuminated and before the incident of September 1999, the problem would not have been solved. (R. 1644 at ¶ 9.b).

Thus, the fault code message “safing sensor short” does not necessarily mean that the fault lies in the safing sensor (or ASDM) and not in the clockspring. In contrast,

Cassidy's complete analysis demonstrated that the fault occurred in the clockspring and not the sensors. Barnett's conclusory reliance upon an incomplete passage from a repair manual therefore does not raise a genuine issue of fact.

In his supplemental affidavit, Barnett asserts that "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." (R. 1604 at ¶ 12). This assertion contradicts itself. If the clockspring is part of the "output portion of the circuit," then the clockspring is by definition part of the circuit. (R. 1646 at ¶ 14). Certainly a party cannot create a factual issue by self-contradiction.

Barnett asserts that the short circuits could not have occurred in the clockspring because if the clockspring had been defective, the short circuits "would have occurred immediately after the Plaintiff took possession of the subject vehicle in 1996," following repair of the damage from the 1996 Accident. (R. 1050 at ¶ 22). This conclusory assertion fails to address the nature of the problem in the clockspring.

The condition inside the clockspring which led to the short circuits which in turn caused the airbag to deploy was created by the repeated over-rotation of the steering wheel during normal use after the improper steering rack was installed in 1999. (R. 463 at ¶ 22; 1425 at ¶ 22; 1553 at ¶ 9). The clockspring would therefore not have short-circuited immediately after the damage from the 1996 Accident was repaired, because the flat wires were incrementally damaged by repeated over-rotation of the steering wheel,

¹³ In fact, this message appears twice, once at the top left and again at the bottom left of page 76 of the repair manual. (R. 1611).

not catastrophically damaged in a single event. (R. 463 at ¶ 22; 1425 at ¶ 22; 1553 at ¶ 9). Moreover, the improper steering rack was not installed until 1999. (1553 at ¶ 9).

B. Plaintiff's Miscellaneous Arguments Fail to Raise a Genuine Factual Issue.

Accepting Cassidy's observation that the steering column is misaligned, plaintiff asserts that DCC is nonetheless responsible for the resulting damage to the clockspring because the steering column and steering rack are both DCC parts. (Appellant's Brief at pp.15, 33, 35). This assertion is not supported by the record. Rather, plaintiff is attempting to create a factual issue by crisscrossing statements from Barnett and Cassidy which relate to different subjects.

Cassidy stated – based on his inspection of the underside of the Duster – that the original steering rack had been replaced by an “after-market” part, some time in early 1999. (R. 462-463 at ¶ 20; 1424 at ¶ 20; 1553 at ¶ 9). Cassidy also noted that this replacement steering rack was the incorrect part for the Duster, causing the steering coupler to hit the brake pedal when the steering wheel was turned. (R. 463 at ¶ 23; 1425 at ¶ 23; 1553 at ¶ 9). Barnett did not dispute any of these observations. Rather, Barnett asserted that all of the parts used to repair the Duster after the 1996 Accident were official DCC parts. (R. 1049-1050 at ¶¶ 18-19; 1535-1536 at ¶¶ 18-19).

Barnett's assertion does not contradict Cassidy's observation because the steering rack was not replaced as part of the repairs following the 1996 Accident but was replaced in early 1999. (R. 1553 at ¶ 9). Moreover, the components used by Worth during the 1996 repairs were purchased from Miller, and Miller never sold a steering rack to Worth.

(R. 1562-1563 at ¶ 6). Thus, Cassidy's observation that the steering rack is not an official DCC part remains uncontradicted.

Plaintiff concedes that the "steering column apparatus" is so badly misaligned that the Duster would not have passed DCC's quality control inspection program in 1993 in this condition. (Appellant's Brief at pp.12-13, 25). Nonetheless, plaintiff asserts that the deployment of the airbag in September 1999 caused this misalignment and "apparently rearranged the entire column." (Appellant's Brief at pp.11-13). This assertion fails to raise a genuine issue of material fact for at least two reasons. First, plaintiff never made this assertion in the trial court, but offers it for the first time on appeal. Matters not presented to the trial court will not be considered on appeal. Franklin Financial v. New Empire Development Co., 659 P.2d 1040, 1044 (Utah 1983); Salt Lake City Corp. v. James Constructors, Inc., 761 P.2d 42, 46 (Utah App. 1988).

Second, there is absolutely no evidence that the misalignment of the steering column was caused by the deployment of the airbag. To overcome this gap, plaintiff erroneously asserts that "A simple review of the pictures shows that the car could not be driven at all because of the way the steering column was broken and down on the brake." (Appellant's Brief at p.25). The "pictures" do not support this assertion. Although the "pictures" show the steering coupler contacting the brake pedal, they do not show that "the car could not be driven". (See R. 1431-1433).

Plaintiff asserts that the clockspring could not have caused the airbag to deploy because the clockspring is not the source of electrical energy or electrical signals but "is merely a conduit for the electrical signal to pass through." (Appellant's Brief at pp.7, 9,

10). It is true that the clockspring is not a source of electrical energy but is merely a conduit through which electrical energy and signals pass. (See R. 460 at ¶ 11; 1422 at ¶ 11). However, it does not follow from these facts that damage to the wires inside the clockspring could not cause the airbag to deploy.

To the contrary, electrical energy passes through wires inside the clockspring, from the battery to the airbag module in the steering wheel. (R. 460 at ¶ 11; 1422 at ¶ 11). Plaintiff admitted this. (R. 1399 at ¶ 8; 1587 at ¶ 8). Since electrical energy passes through the clockspring from the battery to the airbag module, a short circuit in the clockspring could certainly cause the airbag to deploy. (R. 463 at ¶ 22; 1425 at ¶ 22). Plaintiff simply fails to understand how the clockspring operates.

Relying on a statement in Barnett's affidavit, plaintiff asserts that the clockspring could not have been damaged because it is a "sealed unit." (Appellant's Brief at pp.24-25). The record does not support this assertion. Barnett's statement relates to damage caused by "disassembling" the Duster. (R. 1050 at ¶ 21; 1536 at ¶ 21). It has no bearing on damage caused by repeated over-rotation of the steering wheel during normal use.

Plaintiff asserts that both Cassidy and Barnett "conducted the exact same test to determine how the airbag wrongfully deployed" and "were absolutely consistent in their methodology." (Appellant's Brief at pp.28-29). This assertion strays wide of the truth. Cassidy actually inspected the Duster; Barnett did not. Cassidy actually tested the various components of the Duster's airbag system; Barnett did not. Cassidy actually conducted a fault code scan, whereas Barnett merely looked at pictures of the scan conducted by Cassidy or another examiner. (R. 1550-1551 at ¶ 4; 1595).

The only point in common between the methodology employed by Cassidy and that employed by Barnett is that both included a fault code scan (or at least pictures of the results of a fault code scan) as part of their analysis. Both experts looked at the same fault code readings; therefore both used the same starting point. (R. 1550-1551 at ¶ 4). Barnett, however, looked only at the results of the fault code scan and then offered his opinions, even though he admits that further steps must be taken. In contrast, Cassidy conducted a fault code scan and then followed through with a complete analysis: he isolated the clockspring by means of a wiring test; he removed the sensors and ASDM for testing; and he carefully inspected both the interior and exterior of the Duster. Cassidy had a factual basis for his conclusions; Barnett did not.

Plaintiff asserts that if the DRB cannot indicate a short circuit in the clockspring, then Cassidy could not determine that the fault occurred in the clockspring, because Cassidy relied upon the results of a fault code scan conducted with a DRB. (Appellant's Brief at p.23). Plaintiff forgets that in addition to conducting a fault code scan, Cassidy also tested the front sensors and ASDM and performed a wiring test of the steering column. Thus, Cassidy was able to pinpoint the location of the short circuits by conducting a more thorough analysis than simply reading the results of a fault code scan.

C. It Is Uncontradicted that the Short Circuits Inside the Clockspring Which Allowed the Airbag to Deploy Were Caused by the Installation of an Improper Steering Rack.

In her response to the renewed motion for summary judgment, plaintiff denied defendants' assertions that the steering rack on the Duster was replaced with an after-market steering rack; that this after-market steering rack was not the proper part for the

Duster; that this improper replacement of the steering rack caused the steering column to be misaligned; that this misalignment of the steering column allowed the steering coupler to contact the brake pedal and allowed the steering wheel to over-rotate; that the over-rotation of the steering wheel during normal use damaged the flat wires inside the clockspring; and that this damage to the wires inside the clockspring led to the short circuits which caused the airbag to deploy. (R. 1405-1406 at ¶¶ 46-50; 1589-1591 at ¶¶ 46-50). Indeed, this is the only significant portion of the factual assertions made by DCC in its renewed motion for summary judgment which plaintiff did deny. (Compare R. 1398-1406 at ¶¶ 1-58 with 1587-1591 at ¶¶ 1-58). These pro-forma denials do not raise a genuine factual issue, however.

In attempted compliance with former Rule 4-501(2)(B), R.J.A. (now Rule 7(c), U.R.Civ.P.), plaintiff supported her denials of these factual assertions by reference to Barnett's original affidavit, supplemental affidavit, and deposition, and unspecified discovery responses. (See R. 1589-1591 at ¶¶ 46-50). Plaintiff referenced the exact same material in regard to each factual assertion. (Id.). However, plaintiff did not submit the unspecified discovery responses with her opposition. Thus, the entire basis for plaintiff's denials of these assertions in defendants' statement of material facts must be found in the referenced portions of Barnett's affidavits and deposition, or there is none.

Space limitations preclude defendants from reviewing the referenced material in detail. Nonetheless, suffice it to say that nowhere in the referenced material does Barnett address the steering rack, steering column, steering wheel, or the subject of over-rotation. In this material, the only relevant points which Barnett attempts to make (in his

conclusory way) are that the short circuits could not have occurred in the clockspring because the DRB did not display a read-out which said “clockspring”; that the clockspring could not have been damaged during the disassembly of the Duster because it is a sealed unit; and that if the clockspring had been damaged during the repair of the Duster following the 1996 Accident, the airbag would have deployed before September of 1999. The underlying flaws in these assertions have already been demonstrated.

Thus, it is uncontradicted that the steering rack is an after-market part and not the correct part for the Duster; that the installation of this improper steering rack caused a misalignment of the steering column (as evidenced by the steering coupler contacting the brake pedal); that this misalignment of the steering column allowed the steering wheel to be over-rotated; that the repeated over-rotation of the steering wheel during normal use damaged the flat wires inside the clockspring; and that this damage to the wires inside the clockspring led to the short circuits which caused the airbag to deploy. In fact, plaintiff now concedes that the steering column is out of alignment as evidenced by the steering coupler contacting the brake pedal. (Appellant’s Brief at pp.12-13, 25).

D. The Court Properly Found It Was Uncontradicted That All Components of the Airbag System Except the Damaged Clockspring Were Free From Defects.

Believing the court “ruled that the ASDM (on board computer) was defective instead of the sensors being defective,” plaintiff argues that the court “was merely substituting one defective [DCC] part for another.” (Appellant’s Brief at p.1; see also pp. 9 and 50). Before exposing the many flaws in this argument it is necessary to understand what the court actually ruled and why.

During the hearing on the renewed motions for summary judgment, plaintiff's counsel repeatedly asserted that Barnett could conclusively determine the existence of defects in the airbag system merely by looking at the fault code messages or "read-outs" from the ASDM displayed on the DRB. (R. 1999 at 16:20 – 18:19; 20:5-15; 21:12-15; 25:8-12). Based on these read-outs, plaintiff argued to the trial court that defects in the front sensors caused the airbag to deploy. (Id. at 27:5-13). Counsel for DCC and Miller, however, explained that Cassidy actually removed these sensors, tested them and found them to be free from defects. (Id. at 4:11 – 5:3; 8:9-17; 22:1-18; 24:1-5).

Faced with uncontradicted evidence that Cassidy actually tested the sensors and found them to be free from defects, the court was incredulous that plaintiff would rely solely on the computer read-outs from the fault code scan. (Id. at 16:21 – 25:13-24). Recognizing that computers are not infallible and that Cassidy had actually tested the sensors and found them to be free from defects, the court found it to be uncontradicted that the sensors were not defective. (Id. at 25:24 – 26:25; 27:5 – 29:12; 43:14 – 44:14). Exercising his "responsibility as a gatekeeper for expert witnesses," and noting that "there has to be some logical basis" for an expert's opinions, the court found Barnett's conclusory reliance on the fault code messages to be "pretty short sighted," because the computer could err. (Id. at 28:6 – 30:14).

Plaintiff now argues that it was erroneous to enter summary judgment on this basis, because the computer is also a DCC part. This new argument must be rejected for at least three reasons. First, plaintiff asserted in the trial court that the computer was functioning properly and that the inadvertent deployment was caused by defects in the

front sensors. (Id. at 14:19 – 24; 21:7-9; 27:5-13). Plaintiff cannot now reverse her position and argue that a defect in the computer caused the deployment. Zions National Bank v. National American Title Insurance Co., 749 P.2d 651, 654 (Utah 1988) (appellate court will not consider issues raised for first time on appeal).

Second, plaintiff's argument confuses two computers: the airbag system diagnostic module built into the Duster and the digital read-out box which is a separate tool. If plaintiff is now arguing that the ASDM might be defective, this argument is refuted by the uncontradicted evidence that Cassidy also tested the ASDM and found that it was free from defects. (R. 1642-1643 at ¶ 6). On the other hand, if plaintiff is now arguing that the DRB is defective, this argument is specious because the DRB could not possibly have caused plaintiff's injuries and plaintiff asserted no claim against anyone for a defect in the DRB. (See R. 73 at ¶¶ 11, 12).

Third, even if actual tests of a physical component are not necessarily more reliable than a computer read-out, the judgment should nonetheless be affirmed. Alphin Realty, Inc. v. Sine, 595 P.2d 860, 861 (Utah 1979) (correct result reached for incorrect reason will be affirmed). Although the fault code read-outs on the DRB may not have been erroneous, the undisputed evidence demonstrated that they were inconclusive and that further testing was necessary to determine the specific location of the fault.

As Cassidy explained in his affidavits, the fault code message "front sensor short" means that there is a short somewhere in the electrical circuit encompassing the front sensors, clockspring and related wiring. (R. 1552 at ¶ 7). As Barnett admitted in his deposition, the DRB is "looking at resisted values throughout the circuit"; therefore a

read-out of “front sensor short” on the DRB is “inconclusive” and “doesn’t necessarily mean that we have a bad sensor, but it’s something in that circuit.” (R. 1540 at 29:10-30:9; 36:5-12; emphasis added). As Barnett explained in his deposition, the fault code message “front sensor short” gives “you a push in that direction,” but further testing is needed to determine exactly where the short circuit occurred. (*Id.* at 29:10-30:13; emphasis added). As Cassidy explained in his affidavit, in order to determine the specific location of an electrical short in the front sensor circuit, the various components of this circuit must be physically inspected. (R. 1552-1553 at ¶¶ 7-8). As Barnett admitted in his deposition, in order to determine if the short was in the front sensors rather than somewhere else in the front sensor circuit, he would need to remove the front sensors and examine them. (R. 1540 at 30:9-13). Thus, the court correctly concluded that the computer read-outs must be followed by physical tests of the components at issue to determine the actual location of the short circuits.

Cassidy did in fact test the individual components of the airbag’s electrical circuits; Barnett did not. These tests showed that the front sensors, safing sensor and ASDM were free from defects. They also showed that the short circuits occurred inside the clockspring, as the result of damage to the flat wires caused by the installation of an improper steering rack. Plaintiff submitted no evidence to contradict any of these points. Therefore, the trial court properly found that the airbag system (aside from the damaged clockspring) was free from defects. In fact, plaintiff now admits that the sensors were “operational” (i.e., free from defects). (Appellant’s Brief at p.17).

II. THE TRIAL COURT PROPERLY ACCEPTED CASSIDY’S AFFIDAVITS.

Plaintiff expends nearly twenty pages arguing that the court should not have considered Cassidy’s affidavits because they were inadmissible for various reasons. (Appellant’s Brief at pp.3-21). This entire argument lacks merit.

First, plaintiff having not challenged the admissibility of Cassidy’s affidavits on evidentiary grounds (see R. 1036-1046, 1585-1601, 1573; 1996), she cannot now argue that they fail to comply with the requirements of Rule 56(e), U.R.C.P. Strange v. Ostlund, 594 P.2d 877, 880 (Utah 1979); Fox v. Allstate Ins. Co., 453 P.2d 701, 702-703 (Utah 1969); Howick v. Bank of Salt Lake, 498 P.2d 352 (Utah 1972). This rule applies to assertions that the affiant lacks personal knowledge, Strange, supra; Fox, supra; Howick, supra; that the affidavit is conclusory, Salt Lake City Corp. v. Jones Constructors, Inc., 761 P.2d 42, 45-46 (Utah App. 1988); Franklin Financial v. New Empire Development Co., 659 P.2d 1040, 1043-1044 (Utah 1983); that the entire affidavit is inadmissible because it was never notarized, Hobelman Motors, Inc. v. Allred, 685 P.2d 544, 546 (Utah 1984); or that it suffers from other problems apparent “on the face” of it. D&L Supply v Saurini, 775 P.2d 420, 421 (Utah 1989).

Plaintiff’s argument that Cassidy’s affidavits are inadmissible because he did not say “I submit the following declaration under oath” is also purely semantic. Each of Cassidy’s affidavits begins with the statement that Cassidy “makes the following affidavit.” (R. 459 at p.1; 1421 at ¶ 1; 1549 at p.1; 1641 at p.1). An affidavit is by definition “a declaration upon oath.” Webster’s New Twentieth Century Dictionary of the English Language, Unabridged (Second Edition 1978). It therefore makes no

difference whether Cassidy said “I make the following affidavit” or “I make the following declaration upon oath.” The fact that plaintiff did not find Cassidy’s affidavits to be objectionable in the trial court indicates the sufficiency of the language used.

Plaintiff’s assertion that Cassidy lacks the qualifications to opine about automobile airbag systems is equally lacking in merit. Cassidy is an “airbag systems engineer.” (R. 463 at ¶ 21; 1425 at ¶ 21). He obtained a degree in electrical engineering in 1980 and has worked in the automotive industry for thirty-three years, holding various engineering-related positions. (R. 459-460 at ¶ 2; 1421-1422 at ¶ 2). He worked for fifteen years as a Product Analysis Senior Specialist at DCC (or its predecessor), and at one time was the manager of electrical engineering for the Jeep Division of American Motors. (R. 459-460 at ¶ 2; 1421-1422 at ¶ 2). He is familiar with industry practices in the design, testing and manufacturing of automobiles in general, and with the design of the Duster’s airbag system in particular. (R. 459-460 at ¶¶ 2, 9; 1421-1422 at ¶¶ 2, 9).

Cassidy’s familiarity with the design of the Duster’s airbag system is reflected in, and confirmed by, his minute knowledge of the individual components and operation of the Duster’s airbag system, front sensors, ASDM, steering column, clockspring, and related elements. (See R. 460-461 at ¶¶ 7-14; 1422-1423 at ¶¶ 7-14). Plaintiff admitted all of these details. (R. 1399-1400 at ¶¶ 5-11; 1587 at ¶¶ 5-11). It is also plain that Cassidy is familiar with the manufacturing and testing of airbag components, the proper use of a DRB, and the correct procedure for diagnosing a fault in an airbag system. (R. 1550-1554 at ¶¶ 3, 6, 7, 10, 11; 1642-1648 at ¶¶ 4-17). It is little wonder that plaintiff did not attempt to challenge Cassidy’s qualifications in the trial court.

On appeal, plaintiff admits that the details Cassidy noticed when examining the Duster “would require a certain level of expertise.” (Appellant’s Brief at p.14). In fact, plaintiff tries to buttress the qualifications of her expert by asserting (erroneously) that Barnett followed the same methodology as Cassidy when evaluating the Duster’s airbag system. (Appellant’s Brief at pp.28-29).

As examples of Cassidy’s purported lack of personal knowledge, plaintiff asserts that Cassidy’s statement of the Duster’s vehicle identification number (“VIN”) and year of manufacture is “rank speculation.” (Appellant’s Brief at p.7). It is difficult to take this assertion seriously. Cassidy could determine the Duster’s VIN because he inspected the Duster. (R. 462 at ¶ 19; 1424 at ¶ 19; 1550-1553 at ¶¶ 4, 7, 9). Plaintiff also admitted the Duster’s VIN and year of manufacture. (R. 1398 at ¶ 1; 1587 at ¶ 1; see also 1041 at ¶ 2).

Although plaintiff never objected to any statement in Cassidy’s affidavits on evidentiary grounds, she did argue on procedural grounds that the court should not consider Cassidy’s second supplemental affidavit submitted with defendants’ reply memorandum. (R. 1999 at 13:21-14:12). Plaintiff asserts that the trial court erred in considering this affidavit because it purportedly “stated new facts that had not been raised in either of the prior motions for summary judgment.” (Appellant’s Brief at p.46). This argument errs in both premise and conclusion.

Upon considering a motion for summary judgment, the court “may permit affidavits to be supplemented . . . by . . . further affidavits.” Rule 56(e), U.R.C.P. The trial court thus has discretion whether to allow supplemental affidavits. Vermont

P.I.R.G. v. United States, 247 F. Supp. 2d 495, 505 (D. Vt. 2002). Here, the trial court did not abuse its discretion in considering Cassidy's second supplemental affidavit.

Plaintiff asserts that Cassidy "stated new facts" in his second supplemental affidavit which had not been raised earlier, because he "claimed that he had conducted specific tests on the alleged defective parts and found them to be defective [sic] free." (Appellant's Brief at p.46). This assertion is contradicted by the record. In his second supplemental affidavit, Cassidy merely described the tests (and their results) which had been made known to plaintiff's counsel in May of 2001, and which were summarized in Cassidy's original affidavit.

Plaintiff's counsel was present when Cassidy inspected the Duster in March of 2001 and gave permission for Cassidy to remove the sensors and ASDM for testing. (R. 462 at ¶ 19; 1424 at ¶ 19; 1641-1642 at ¶ 2). Counsel for DCC then forwarded the results of this testing to plaintiff's counsel in May of 2001. (R. 1441). Cassidy summarized the results of this testing in his original affidavit submitted in support of both the original and renewed motions for summary judgment. (R. 463 at ¶ 21; 1425 at ¶ 21). In his second supplemental affidavit, Cassidy simply explained the details of how this testing and electronic analysis were conducted. (R. 1461 at ¶¶ 2-7). Thus, the trial court did not abuse its discretion by accepting this supplemental affidavit.

III. THE TRIAL COURT DID NOT PRECLUDE PLAINTIFF'S EXPERT FROM CONDUCTING ANY TESTING.

Plaintiff asserts that it was reversible error for the trial court to preclude Barnett from conducting additional testing and then to rule against plaintiff on the ground that

Barnett had not conducted sufficient testing. (Appellant's Brief at p.A, Argument Two; p.E, ¶ 14; p.2 and p.50). This assertion lacks merit for two fundamental reasons. First, plaintiff never told the trial court that Barnett needed to do additional testing. Second, plaintiff's theory of the case rests upon the assertion that the DRB conclusively indicates the existence of defects in the airbag system and that no further testing is necessary.

Plaintiff was required to designate her expert witnesses by June 2003. (R. 198 at ¶ 5; 349). Plaintiff having not properly disclosed an expert witness on liability by September 2003, defendants moved for summary judgment. (R. 441-794, 808-918). Plaintiff first sought an open-ended extension of time to respond to the motions, not to conduct testing; then filed her response supported by Barnett's affidavit and his "supplemental designation"; then moved to substitute Barnett for Dickson. (R. 919, 1024-1051, 1073, 1272).

Although noting that plaintiff's designation of Dickson was clearly inadequate; that plaintiff had failed to respond to requests for information regarding her experts; and that the case had already suffered extensive delays; the court nonetheless reluctantly allowed plaintiff to substitute Barnett for Dickson. (R. 1364; 1998 at 21:3-23:1). In doing so, however, the court carefully explained that Barnett would be restricted to the factual basis for the opinions stated in his original affidavit he possessed when he signed that affidavit. (R. 1998 at 22:13-19; 33:18-35:22; 37:5-9). Plaintiff neither objected nor made any comment regarding these restrictions. (See id. at 22:13-23:3; 33:25-37:15).

Moreover, plaintiff believes that because the fault code scan of the airbag system indicated short circuits in various components, these components must be defective.

(Appellant's Brief at pp.1, 17; R. 1594-1595; 1048-1050 at ¶¶ 11-13, 23; 1534-1536 at ¶¶ 11-13, 23). Her expert flatly asserted that he need not examine the Duster or any components in order to determine conclusively that the airbag system was defective. (R. 1603-1604. at ¶¶ 7, 8, 9). In fact, plaintiff asserted that a fault code scan is so simple that a "ninth grade drop-out" could perform the test. (R. 1598). In plaintiff's words, "The expert testimony required is not that of a rocket scientist". (R. 1598).

At the hearing on the renewed motions for summary judgment, plaintiff repeatedly argued that the fault code scan conclusively showed the existence of defects in the airbag system. (R. 1999 at 14:13-19:4). It was plaintiff's position that Barnett needed to know only two things in order to determine conclusively that the airbag system was defective: that the airbag deployed, and "those readings on the computer". (Id. at 19:2-4; 20:5-13). Confronted by evidence that DCC tested the sensors and found them to be free from defects, plaintiff maintained her reliance on "that computer" as "the gospel on what happened on this airbag." (Id. at 25:8-12). Consistent with her position that the fault code scan conclusively showed the existence of defects in the airbag system, plaintiff never told the trial court that Barnett needed to do additional testing. (See R. 1999). Plaintiff cannot now reverse her position, raise a new issue on appeal, and argue that Barnett needs to do additional testing.

Further, according to the plaintiff, "Mr. Barnett is merely a substitute witness for Dru Dickson" and is "merely the same witness with a new name". (R. 1233). If these statements are true, then Barnett had formulated his opinions in April of 2003 and needed to conduct no additional testing. (See R. 1233, 1274).

Thus, the court did not “preclude” Barnett from conducting additional testing because plaintiff never said that Barnett needed to perform additional testing. Rather, the court merely followed a common sense rule: “If Mr. Barnett [is] going to render all these opinions, he better have the basis for [them] when he made the opinions; otherwise, these motions are well taken.” (R. 1999 at 35:12-15). That was well within the court’s discretion. See Campbell Mack & Sessions v. Debry, 38 P.3d 984, 988-989 (Utah App. 2001) (request to conduct further discovery in response to motion for summary judgment is committed to court’s discretion).

IV. PLAINTIFF SHOULD NOT HAVE BEEN ALLOWED TO “SUBSTITUTE” BARNETT FOR DICKSON.

The summary judgment in favor of DCC and Miller may be affirmed on the alternative basis that Barnett’s affidavits are inadmissible because plaintiff should not have been allowed to “substitute” Barnett for Dickson. A judgment properly entered may be affirmed on appeal, for any reason raised in the trial court. Nova Casualty Co. v. Able Construction, Inc., 983 P.2d 575, 578 (Utah 1999). Whether the trial court erred in granting a motion to designate a substitute expert witness is a legal question which the appellate court reviews for correctness. Boice v. Marble, 982 P.2d 565, 568 (Utah 1999). Here, the trial court erred in allowing plaintiff to “substitute” Barnett for Dickson.

When a party has properly designated an expert witness who unexpectedly becomes unavailable, a substitution may be allowed. Boice, *supra*, 982 P.2d at 568-569. However, when a party never properly designates his first expert witness, substitution of a new expert witness should not be allowed. This rule is supported by comparing Boice

to Arnold v. Curtis, 846 P.2d 1307, 1309-1310 (Utah 1993). In Boice, a substitution was allowed because the original expert was properly disclosed and the motion to substitute was filed only eight days after the original expert decided not to testify and before discovery had closed. 982 P.2d at 568-569. In Arnold, however, the Supreme Court upheld the trial court's refusal to consider on motion for summary judgment an affidavit submitted by an expert witness who was not properly designated. 846 P.2d at 1309-1310. Explaining the difference between Boice and Arnold, the Supreme Court in Boice observed that Boice had complied with the court's scheduling orders whereas Arnold had not. 982 P.2d at 569.

An analogy also may be drawn to cases involving attempts to "supplement" an earlier expert report by a new report with entirely different opinions. In such situations, the attempt to file a "supplemental" report is not allowed. Keener v. United States, 181 F.R.D. 639, 641 (D. Mont. 1998); Schweizer v. DeKalb Swine Breeders, Inc., 954 F. Supp. 1495, 1510 (D. Kan. 1997); Beller v. United States, 221 F.R.D. 689, 694-695 (D. N.M. 2003); Coles v. Perry, 217 F.R.D. 1, 3-4 (D.D.C. 2003).

Here, plaintiff never properly designated Dickson as an expert witness. Although expert reports were not required (R. 198 at ¶ 5), the proper designation of an expert certainly requires more than a mere statement of his name and city of residence. To serve any purpose, it must also include his area of expertise and the general subject of his testimony. The deficiency in plaintiff's attempted designation of Dickson is underscored by the fact that when designating Barnett as a "supplemental" expert witness plaintiff provided his area of expertise and the general subject of testimony. (R. 1073-1080).

The trial court correctly found that plaintiff had not properly designated Dickson as an expert witness. In October 2003 the court observed: “the plaintiff has never identified an expert witness and the time for doing so has now expired.” (R. 986 at n.1). In April 2004 the court further observed that Dickson had not been properly disclosed and that Dickson “could have been there to testify about the color of the road for all we know.” (R. 1998 at 16:20 – 21:7). Although the court found these failures sufficient reason to justify striking Barnett’s affidavit, it nonetheless granted the motion to substitute, believing this was a discretionary matter and a contrary ruling could be overturned on appeal. (Id. at 21:14-22).

In so ruling, the court erred. Plaintiff having not properly designated Dickson as an expert witness, Barnett was not a “substitute” for anyone. Rather, Barnett was simply a newly designated expert witness, uncovered after defendants filed their motions for summary judgment. Nor did plaintiff “immediately” move to substitute Barnett upon learning of Dickson’s disappearance. (See Appellant’s Brief at p.E, ¶¶ 12-13). To the contrary, plaintiff learned that Dickson had moved before September 16, 2003 (R. 919); she did not file her “supplemental” designation of Barnett until November 3, 2003 (R. 1073); and she did not move to “substitute” Barnett for Dickson until December 17, 2003 (R. 1272), nearly six months after discovery had closed (R. 197 at ¶ 2; 349). To allow a substitution on these facts is to nullify the disclosure requirements of Rule 26.

Although stating that an order granting a motion to substitute expert witnesses is reviewed for “correctness,” the Supreme Court in Boice also added that trial courts are afforded “very broad discretion in ruling on such a motion.” 982 P.2d at 568. If the trial

court had discretion to consider plaintiff's motion to substitute Barnett for Dickson, when Dickson was never properly disclosed in the first place, the order allowing that substitution was an abuse of discretion. Discretion is abused when an order exceeds the limits of reason. Debry, supra, 38 P.3d at 988. An order precluding a witness from testifying is appropriate when the disobedient party has demonstrated "persistent dilatory tactics frustrating the judicial process." Morton v. Continental Baking Co., 938 P.2d 271, 274-275 (Utah 1997); W.W. & W.B. Gardner, Inc. v. Park West Village, Inc., 568 P.2d 734, 736-738 (Utah 1977).

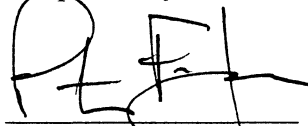
Here, plaintiff's persistent dilatory tactics frustrated the judicial process at every step. Plaintiff did nothing to advance her case for over one year until the court threatened dismissal for failure to prosecute. (R. 54). She ignored discovery requests until the court granted DCC's motion to compel and ordered her to respond. (R. 151-152). Although plaintiff could have commenced discovery on March 12, 2002 (R. 69 at ¶ 1), she did not in fact commence discovery until April 7, 2003 – the date upon which discovery was originally scheduled to be completed. (R. 261-292; see also 197 at ¶ 2). She never answered interrogatories seeking the identity of her expert witnesses, despite the court order (R. 960 at ¶ 10); she refused to identify Dickson as the person who disassembled the Duster despite three letters from defense counsel seeking to know who did this (R. 933-939); and then, adding insult to injury, she relied upon Dickson's disappearance as grounds for seeking an open-ended extension of time to respond to the motions for summary judgment and as a basis upon which to "substitute" Barnett. (R. 919, 1272-

1276). Given these facts, the order allowing plaintiff to substitute Barnett for Dickson was an abuse of discretion.

CONCLUSION

For the reasons stated above, DCC and Miller respectfully ask the Court to affirm the entry of summary judgment, either on the grounds that Barnett's conclusory assertions fail to raise a genuine issue of material fact or on the grounds that Barnett should not have been allowed to submit affidavits in the first place.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'P. F. Jones', written over a horizontal line.

Peter F. Jones, Esq.
Malcolm S. Mead, Esq.
HALL & EVANS, L.L.C.
1125 17th Street, Suite 600
Denver, Colorado 80202-2052

and

Karra J. Porter, Esq.
CHRISTENSEN & JENSEN, P.C.
50 S Main Street, Suite 1500
Salt Lake City, UT 84144-0103

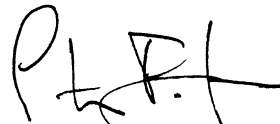
ATTORNEYS FOR
DEFENDANTS- APPELLEES
DAIMLERCHRYSLER
CORPORATION and LARRY H.
MILLER CHRYSLER JEEP

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 4 day of November, 2005, a true and correct copy of the foregoing BRIEF OF APPELLEES, was deposited in the United States mail to the parties listed below:

Karra J. Porter
Christensen & Jensen, PC
50 S Main Street, Suite 1500
Salt Lake City, UT 84144-0103

John Walsh
Attorney at Law
2319 Foothill Drive, Suite 1270
Salt Lake City, UT 84109

A handwritten signature in black ink, appearing to read "P. Jones", is written over a horizontal line.

Peter Jones
Hall & Evans, LLC
Attorneys for Appellees

ADDENDUM

- TAB 1:** Minute Order granting plaintiff's "Motion to Substitute Expert Witnesses"
- TAB 2:** Transcript of ruling on plaintiff's "Motion to Substitute Expert Witnesses"
- TAB 3:** "Order Granting Defendants' Motion for Summary Judgment"
- TAB 4:** Transcript of ruling on defendants' renewed motion for summary judgment
- TAB 5:** Diagram of steering wheel, airbag and clockspring
- TAB 6:** Diagram of steering wheel, steering column and related components

Tab 1

3RD DISTRICT COURT - SALT LAKE COURT
SALT LAKE COUNTY, STATE OF UTAH

JODY BEST, : MINUTES
Plaintiff, : OUTSTANDING MOTION HEARING
:
:
vs. : Case No: 000909904 PI
:
DAIMLER CHRYSLER CORPORATION
Et al, : Judge: TIMOTHY R. HANSON
Defendant. : Date: April 5, 2004

Clerk: evelynt

PRESENT

Plaintiff's Attorney(s): JOHN WALSH
Defendant's Attorney(s): KARA PETTIT
JOHN W HOLT
PETER F JONES

Video

Tape Number: 4/5/04 Tape Count: 10:11/11:14

HEARING

This matter is before the Court for oral argument regarding outstanding motions. Appearances as shown above.

Plaintiff's motion to substitute expert is granted.

Defendant's objection to experts affidavit is denied.

Defendant's motion regarding negative repair is granted.

Motion regarding defective parts is denied.

Deposition of plaintiff's expert is to be scheduled within 60 days. Plaintiff's counsel is to produce experts file, as of time of deposition.

Summary Judgment as to Worth and Chrysler are denied.

Tab 2

1 IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE CITY

2 SALT LAKE COUNTY, STATE OF UTAH

3 -o0o-

4 JODY BEST,

5 Plaintiff,

6 vs.

7 DAIMLER CHRYSLER
8 CORPORATION, LARRY H.
9 MILLER CHRYSLER JEEP and
DAN WORTH,

10 Defendants.

)
)
) Case No. 000909904

)
) SUMMARY JUDGMENT MOTIONS

)
) (Videotape Proceedings)

11 -o0o-

12
13 BE IT REMEMBERED that on the 5th day of April,
14 2004, commencing at the hour of 10:11 a.m., the above-
15 entitled matter came on for hearing before the HONORABLE
16 TIMOTHY R. HANSON, sitting as Judge in the above-named
17 Court for the purpose of this cause, and that the
18 following videotape proceedings were had.

19 A P P E A R A N C E S

20 For the Plaintiff:

JOHN T. WALSH
Attorney at Law
2319 Foothill Drive, #270
Salt Lake City, Utah 84109

22 For the Defendant,
23 Daimler Chrysler
24 Corporation:

PETER E. JONES
Attorney at Law
Hall & Evans
1125 17th Street
Denver, Colorado 80202

1 THE COURT: Yeah.

2 MS. PETTIT: We still don't really know that and--
3 and if that's the truth, then why didn't he disclose it--
4 disclose that to us back in June of 2003? And why didn't he
5 disclose it to us that he was having difficulty finding him?
6 It--it's just far too little far too late.

7 THE COURT: All right. Well, it's your motion to
8 substitute. You get the last say, Mr. Walsh. Have you got
9 anything besides, they did it wrong and I've had a hard time?

10 MR. WALSH: When we learned that Mr. Dixon was
11 unavailable in September, I think it's fair to say we, with
12 great dispatch, we tried to find a new expert. We contacted
13 Mr. Barnett in California, he instructed us as to how he
14 wanted the information for his opinion. We immediately got on
15 it. We didn't retain him until the very last minute, he said
16 he wouldn't render opinion until he got money up front and he
17 hadn't formulated an opinion and that's why the time was as
18 late as it is, your Honor.

19 I'd submit it, your Honor.

20 THE COURT: All right. Thank you. Well, I'm
21 prepared to rule on this.

22 With regard to the plaintiff's motion to substitute
23 expert witnesses, the plaintiff claims here that the expert
24 that was originally retained, Mr. Dixon, has now become
25 unavailable. And there's nothing in this record that would

1 suggest that Mr. Walsh knew about it before he had to get an
2 affidavit to respond to the motions for summary judgment.

3 The only real issue here is whether or not Mr. Dixon
4 was named as an expert in the original designation, and he
5 was; but--at least, he was listed as an expert. And--and
6 clearly, the--the identification was inadequate. He didn't
7 even say what he was going to be an expert on.

8 And I know there were requests after that that were
9 made to clarify that and those were not responded to until we
10 find out that Mr. Dixon has disappeared. If I had evidence
11 that Mr. Dixon had not disappeared or that he in fact has been
12 available or that he wasn't retained as an expert, I might be
13 inclined to make a different ruling here, but I don't.

14 I--so, when Mr. Dixon was named timely, he just
15 wasn't identified properly and that is, frankly, is enough to
16 deny the substitution, but I'm trying to be a realist here and
17 that is, I know exactly what's going to happen by the
18 appellate courts. They would say, well, the rules are rules,
19 but...

20 And, you know, maybe I'm particularly sensitive to
21 that, but I just heard--heard one of those from the Supreme
22 Court. And so what it boils down to is some more delay and
23 this case has been pending four years, a few more months of
24 delay isn't going to make much difference, assuming that Mr.
25 Barnett's affidavit is sufficiently adequate to meet the

1 motions here.

2 So, I'm going to allow the substitution, even
3 though, Mr. Walsh, in all candor, I think it's--I think the
4 way you've handled this is extremely poor. And you haven't
5 done what you're supposed to. And I say once again, do not
6 come down to this Court and say, Gee, I didn't do it right but
7 neither did they. I just won't accept that anymore. I'm
8 sorry, but it's just not going to work.

9 But in any event, there's enough here so that
10 there's no reason to send up to one of the courts to reverse
11 me to send it back to try it again at a later date, assuming
12 this is the trial of the case.

13 Motion to substitute the expert witness is granted.
14 Mr. Barnett has--and I assume he's done all that he's going to
15 do because he's not going to get in anymore great discovery
16 and get anything that he's done. He's made his opinions, you
17 can depose him, find out what the bases are, assuming that his
18 affidavit is sufficient to defeat these motions here today.
19 And then we'll be done. Otherwise, discovery's completed.

20 All right. That's the order with regard to the
21 substitution of witnesses and it denies the motion to strike
22 the supplemental--actually, the supplemental designation is--
23 is now moot, because the supplemental designation has become a
24 motion to substitute.

25 So, the objections by the various defendants to the

1 Gregory Barnett affidavit is denied.

2 All right. Let's hear the motions. I'll hear
3 Chrysler's motion first.

4 MR. HOLT: Your Honor, I think your ruling probably
5 moots my motion.

6 THE COURT: Okay. Motion denied.

7 MR. HOLT: Going--going to attempt to get a
8 deposition, I think we need to do that first and perhaps I
9 would request the Court to postpone ruling on that motion
10 until we take his deposition and then if I find it
11 appropriate, I'll supplement the motion.

12 THE COURT: No. What I want is a new motion.

13 MR. HOLT: All right.

14 THE COURT: Doesn't do me--I'm not going to read all
15 this, you know--

16 MR. HOLT: That's fine.

17 THE COURT: --ten inches of material all again three
18 months from now.

19 MR. HOLT: That's fine. I'll do it that way then,
20 your Honor.

21 THE COURT: All right. Now, what about Larry
22 Miller?

23 MR. JONES: Your Honor, as I indicated, we have a
24 separate basis for motion for summary judgment that doesn't
25 get into the issues surrounding expert witnesses.

TRANSCRIBER'S CERTIFICATE

STATE OF UTAH)
 : SS.
COUNTY OF SALT LAKE)

I, Toni Frye, do hereby certify:

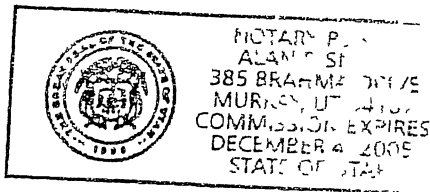
That I am a transcriber for Alan P. Smith, Certified Shorthand Reporter and a Certified Court Transcriber of Tape Recorded Court Proceedings; that I received an electronically recorded videotape of the within matter and under his supervision have transcribed the same into typewriting, and the foregoing pages, numbered from 1 to 37, inclusive, to the best of my ability constitute a full, true and correct transcription, except where it is indicated the Videotape Recorded Court Proceedings were inaudible.

I do further certify that I am not counsel, attorney or relative of either party, or clerk or stenographer of either party or of the attorney of either party, or otherwise interested in the event of this suit.

Dated at Salt Lake City, Utah, this 8th day of
November, 2004.

Toni Frye
Transcriber

Subscribed and sworn to before me this 10th day
of November, 2004.



Alan P. Smith
Notary Public

(S E A L)

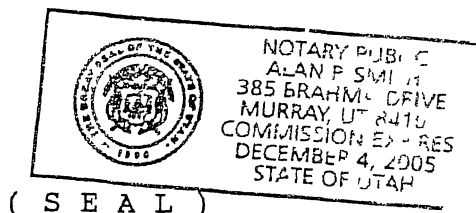
REPORTER'S CERTIFICATE

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

I, Alan P. Smith, Certified Shorthand Reporter, Notary Public and a Certified Court Transcriber of Tape Recorded Court Proceedings within and for the State of Utah, do certify that I received an electronically recorded videotape of the within matter and caused the same to be transcribed into typewriting, and that the foregoing pages, numbered from 1 to 37, inclusive, to the best of my knowledge, constitute a full, true and correct transcription, except where it is indicated the Videotape Recorded Court Proceedings were inaudible.

I do further certify that I am not counsel, attorney or relative of either party, or clerk or stenographer of either party or of the attorney of either party, or otherwise interested in the event of this suit.

Dated at Salt Lake City, Utah, this 10th day of November, 2004.




Notary Public

Tab 3

Peter F. Jones (6260)
Hall & Evans L.L.C.
1125 17th Street, #600
Denver, Colorado 80202
(303) 628-3300

Dale Lambert (1871)
Nathan Alder (7126)
Christensen & Jensen, P.C.
50 South Main, # 1500
Salt Lake City, Utah 84144
(801) 355-3431

*Attorneys for Defendant DaimlerChrysler Corporation
and Larry H. Miller Chrysler Jeep*

FILED DISTRICT COURT
Third Judicial District

MAR - 7 2005

SALT LAKE COUNTY

By _____
Deputy Clerk

FILED DISTRICT COURT
Third Judicial District

MAR - 7 2005

SALT LAKE COUNTY

Emily Thompson
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

JODY BEST,

**ORDER GRANTING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

Plaintiff

vs.

DAIMLERCHRYSLER CORPORATION, et. al.,

Case No. 000909904

Defendants.

Judge Timothy R. Hanson

The Motion for Summary Judgment of Defendants DaimlerChrysler Corporation and Larry H. Miller, came on for hearing before this Honorable Court on January 24, 2005. After reviewing all Briefs and Affidavits in support of and opposed to the relief

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prayed in those Motions, hearing arguments of Counsel, and being fully advised in the premises, the Court finds and rules as follows:

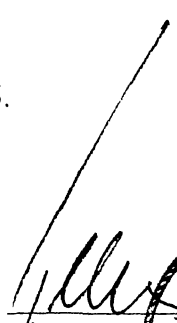
1. Plaintiff has identified one expert witness, Gregory Barnett, to testify against Defendants on all liability issues.

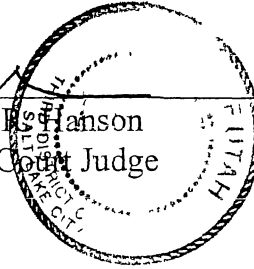
2. Plaintiff's only identified expert witness related to liability has not inspected the subject vehicle nor any components of said vehicle, which at any time existed on the subject vehicle. Mr. Barnett has based his opinions in this matter solely upon review of a videotape of an inspection of certain data recording equipment conducted by others.

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.

WHEREFORE, the Court finds Plaintiff's Brief and Affidavits in opposition to Defendants' Motions For Summary Judgment do not create a relevant, material, or substantive issue of fact, and judgment must therefore and hereby is entered granting Defendants' Motions for Summary Judgment and dismissing with prejudice all claims of Plaintiff against DaimlerChrysler Corporation and Larry H. Miller.

Dated this 7 day of March 2005.


Timothy R. Hanson
District Court Judge

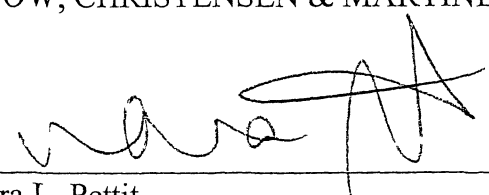


APPROVED AS TO FORM:

John Walsh
Attorney for Plaintiffs

APPROVED AS TO FORM:

SNOW, CHRISTENSEN & MARTINEAU



Kara L. Pettit
Attorneys for Dan Worth

CLERK OF COURT'S CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Order was served this 7 day of March, 2005, by placing same in the United States mail, first-class postage prepaid, properly addressed as follows:

John Walsh
2319 South Foothill Drive, Suite 270
Salt Lake City, UT 84109

Robert Tingey
Larry H. Miller Management Company
9350 South 150 East, Suite 1000
Sandy, Utah 84070

Kara L. Pettit
Snow, Christensen & Martineau
P.O. Box 45000
Salt Lake City, Utah 84145

Nathan D. Alder
Christensen & Jensen, P.C.
50 South Main, Suite 1500
Salt Lake City, UT 84144

Peter F. Jones
Hall & Evans, L.L.C.
1125 Seventeenth Street, Suite 600
Denver, CO 80202

E. Thompson

Tab 4

STATE OF UTAH

Defendants.

1999

1 SALT LAKE CITY, UTAH - JANUARY 24, 2005

2 JUDGE TIMOTHY R. HANSEN PRESIDING

3 P R O C E E D I N G S

4 THE COURT: The record will show that we are in
5 session in the matter styled Best versus Daimler Chrysler,
6 and others. It's case number 000909904. Appearances please.

7 MR. WALSH: John Walsh on behalf of plaintiff, Jody
8 Best who is also present with her husband, Ross, to my left.

9 MR. JONES: Good morning, Your Honor, Peter Jones
10 and Nathan Alder on behalf of Daimler Chrysler Corporation
11 and the dealership, Larry Miller.

12 THE COURT: Okay.

13 MS. PETTIT: Kara Pettit here on behalf of Dan
14 Worth.

15 THE COURT: All right. I have a Renewed Motion for
16 Summary Judgment on a number of issues that were authorized
17 at the taking of plaintiff's expert's deposition. I have
18 Chrysler's Renewed Motion for Summary Judgment, Larry
19 Miller's Renewed Motion for Summary Judgment, and Worth's
20 Renewed Motion for Summary Judgment. I've read the materials
21 that have been submitted, both in support of and in response
22 to the renewed motions and so I will be pleased to hear from
23 the counsel. How do you want to proceed? Does Chrysler want
24 to go first?

25 MR. JONES: If that is to your satisfaction, Your

1 in wrong." Well, that isn't enough. That's not going to any
2 jury. That's not enough. And so the motion for negligent
3 repair as to Dan Worth is granted as well. There's just no
4 evidence to support a claim for negligence of repair in the
5 record at this point in time.

6 And I don't think you can claim, as a plaintiff,
7 "Well, somebody else might put some evidence in that they
8 are, but we don't know what it might be, they're just
9 claiming it was," and have that get past a motion. That's
10 just not going to work. If we were at the end of the
11 plaintiff's case and there wasn't any evidence more than in
12 the record now, then there wouldn't be any claim for
13 negligent repair. I couldn't submit it to a jury.

14 The issue with regard to the strict liability
15 claims and defective part claims, as to Chrysler and Miller,
16 the dealer, is not as straight forward but, counsel, as I
17 look through this, even taking into account everything that's
18 been said here, really what I've got from the plaintiff is,
19 the plaintiff's expert is, "I looked at the computer, the
20 computer said that the two front sensors are at fault and
21 that's, and the airbag deployed. Therefore, the two front
22 sensors are defective, and that's my opinion. And we as
23 mechanics all rely upon these computers." Well, fine. But
24 unfortunately, there is no evidence that rebuts what the
25 evidence is after the computer readout showed it was

1 defective, but they were not defective. The evidence is
2 apparently un rebutted, that even though the computer says
3 these two front sensors were defective and the airbag
4 deployed, we all know that, that the two front sensors were
5 not defective. And so computer was wrong. And I don't think
6 this case can go to a jury on, "My, the computer says it's
7 so, therefore it is." Wrong. Computers don't work
8 sometimes. Computers are wrong sometimes. And I don't buy
9 off that Mr. Barnett is a computer wizard along with being a
10 computer expert and everything else. And so, the only
11 evidence I've got is that after the onboard computer said
12 there was a defect, the testing showed there was no defect.
13 The only logical conclusion of that is that the computer was
14 wrong.

15 Motion for summary judgment on all the remaining
16 claims against, or the strict liability claims and the
17 negligence claims against Chrysler and Miller are granted as
18 well. Plaintiffs just haven't shown that there is a
19 relationship between the failure of the, the alleged failure
20 of the front sensors, and the deployment of this airbag,
21 because these front sensors weren't defective. And if one of
22 the appellate courts wants to say that computers are
23 infallible and can't ever make a mistake and you're entitled
24 to rely upon it, then so be it, but we're not going to try
25 this case to find that out because I don't think it can.


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 front sensors were defective as claimed by the plaintiff. In fact, the evidence is all to the contrary and it's undisputed.

(Whereupon the hearing was concluded)

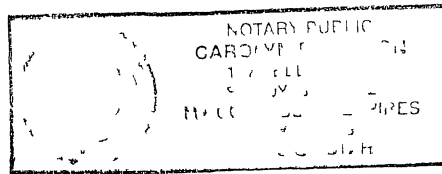
CERTIFICATE

I HEREBY CERTIFY that the foregoing transcript in the before mentioned proceedings held before Judge Timothy Hanson was transcribed by me from a video recording and is a full, true and correct transcription of the requested proceedings as set forth in the preceding pages to the best of my ability.

Signed this 27th day of June, 2005 in Sandy, Utah.


Carolyn Erickson
Certified Shorthand Reporter
Certified Court Transcriber

My Commission expires May 4, 2006



Tab 5

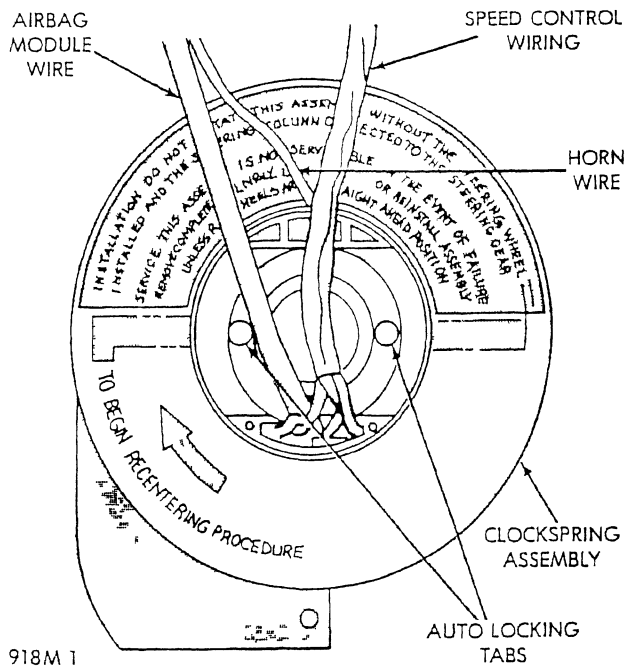


Fig 10 Clockspring (Auto-Locking)

STEERING WHEEL

WARNING: BEFORE BEGINNING ANY AIR BAG SYSTEM REMOVAL OR INSTALLATION PROCEDURES, REMOVE AND ISOLATE THE BATTERY NEGATIVE (-) CABLE (GROUND) FROM THE VEHICLE BATTERY. THIS IS THE ONLY SURE WAY TO DISABLE THE AIR BAG SYSTEM. FAILURE TO DO THIS COULD RESULT IN ACCIDENTAL AIR BAG DEPLOYMENT AND POSSIBLE PERSONAL INJURY.

WHEN AN UNDEPLOYED AIR BAG ASSEMBLY IS TO BE REMOVED FROM THE STEERING WHEEL DISCONNECT BATTERY GROUND CABLE AND ISOLATE ALLOW SYSTEM CAPACITOR TO DISCHARGE FOR TWO MINUTES BEGIN AIR BAG REMOVAL

REMOVAL

- (1) Make sure front wheels are straight and steering column is locked in place
- (2) Disconnect battery negative cable and isolate
- (3) Wait two minutes for the reserve capacitor to discharge before removing undeployed module
- (4) Remove four nuts attaching air bag module from the back side of steering wheel
- (5) Lift module and disconnect connector from rear of module
- (6) Remove speed control switch and connector if so equipped or cover
- (7) Remove steering wheel retaining nut
- (8) Remove steering wheel with steering wheel puller Tool C 3428B

INSTALLATION

- (1) If the clockspring is not properly positioned or

if front wheels were moved follow the clockspring centering procedure before installing steering wheel. With the front wheels in the straight ahead position Position the steering wheel on the steering column. Making sure to fit the flats on the hub of the steering wheel with the formations on the inside of the clockspring. Pull the air bag and speed control wires through the lower larger hole in the steering wheel and the horn wire through smaller hole at the top. Make sure not to pinch wires (Fig 11)

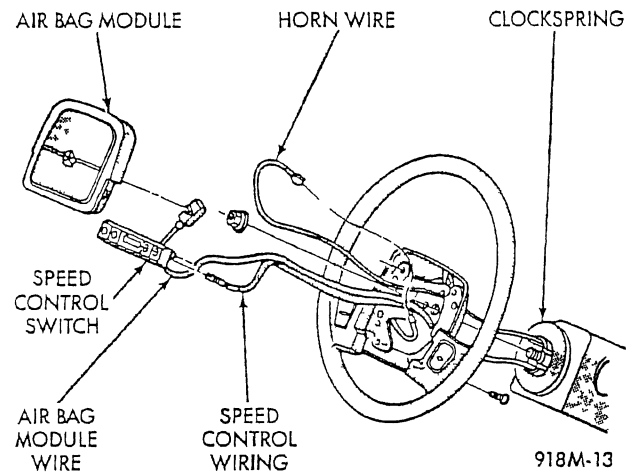


Fig. 11 Steering Wheel Wiring

- (2) Install retaining nut and tighten to 61 N•m (45 ft lbs) torque
- (3) Connect horn wiring lead
- (4) Connect 4-way connector to speed control switch and attach switch to steering wheel
- (5) Connect air bag lead wire to air bag module, and secure module to steering wheel
- (6) Do not connect negative battery cable. Refer to Air Bag System Check for proper procedure

STEERING COLUMN SWITCHES

This procedure covers the removal and installation of the steering wheel and clockspring. Once the steering wheel and clockspring have been removed, refer to the appropriate section of this service manual for switch replacement.

WARNING: BEFORE BEGINNING ANY AIR BAG SYSTEM REMOVAL OR INSTALLATION PROCEDURES, REMOVE AND ISOLATE THE BATTERY NEGATIVE (-) CABLE (GROUND) FROM THE VEHICLE BATTERY. THIS IS THE ONLY SURE WAY TO DISABLE THE AIR BAG SYSTEM. FAILURE TO DO THIS COULD RESULT IN ACCIDENTAL AIR BAG DEPLOYMENT AND POSSIBLE INJURY.

WHEN AN UNDEPLOYED AIR BAG ASSEMBLY IS TO BE REMOVED FROM THE STEERING WHEEL DISCONNECT BATTERY GROUND CABLE AND ISOLATE ALLOW SYSTEM CAPACITOR TO DISCHARGE FOR TWO MINUTES BEGIN AIR BAG REMOVAL

This diagram was authenticated by Michael Cassidy and submitted with his original affidavit. (R. 460-461 at ¶ 12; R. 466; 1422-1423 at ¶ 12; R. 1427).

Tab 6

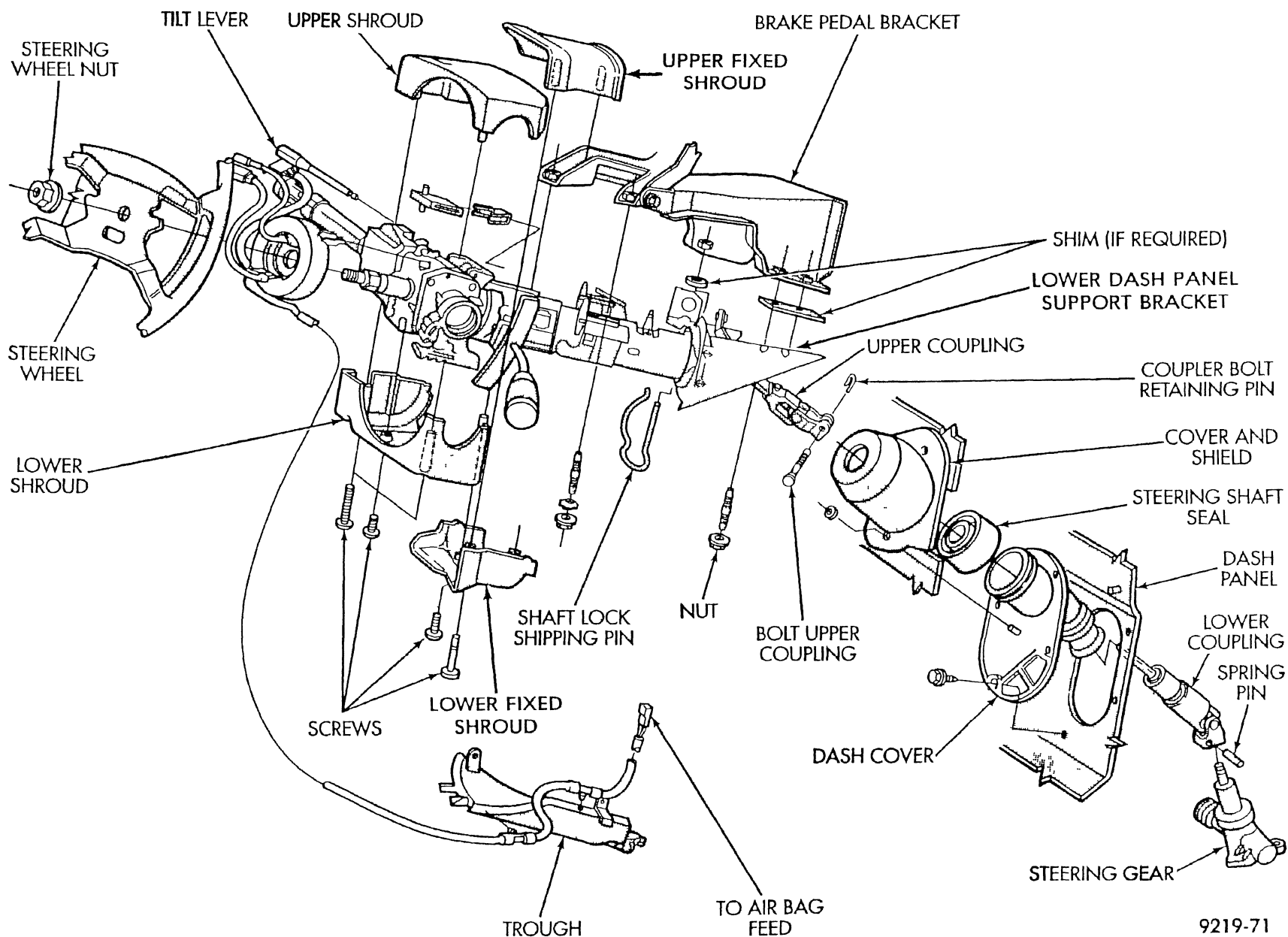


Fig. 1 Acustar Standard and Tilt Steering Column

This diagram was authenticated by Michael Cassidy and submitted with his original affidavit. (R. 461 at ¶ 13; R. 471; 1423 at ¶ 13; R. 1430).