

2005

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

Utah Court of Appeals

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Peter F. Jones; Hall and Evans, LLC.

John Walsh.

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BEFORE THE UTAH COURT OF APPEALS

-----00000000000000000000-----

JODY BEST,

)

Plaintiff-Appellant,

)

COURT OF APPEALS CASE

NO. 20050225

vs.

)

DISTRICT COURT CASE

NO. 000909904

DAIMLER CHRYSLER CORPORATION and,)

LARRY H. MILLER CHRYSLER JEEP.

)

Defendants-Appellees.

-----00000000000000000000-----

BRIEF OF THE APPELLANT

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

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PRESIDING

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ORAL ARGUMENT REQUESTED
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UTAH APPELLATE COURTS
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NAMES OF THE PARTIES

ALL OF THE PARTIES ARE IDENTIFIED IN THE CAPTION.

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STATEMENT SHOWING JURISDICTION

The Court of Appeals has jurisdiction in this matter pursuant to 78-2a-3(2)(j), as this is an appeal from a court of record regarding a Summary Judgment.

STATEMENT OF THE ISSUES:

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

Standard of review: Under Rule 56 of the Utah Rules of Civil Procedure the Trial Court must view all evidence in light most favorable to the non moving party and the Appellant Court must do the same, offering no deference to the Trial Court. Themy v. Seagull Enters., Inc., 595 P.2d 526 (Utah 1979)

This issue was raised before the Trial Court in the Memorandum of Points and Authorities filed in opposition to the Motion for Summary Judgment and was also raised with the Court at the hearing held on January 24, 2005, as reflected in the Transcript beginning at page 13.

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

Standard of review: Under Rule 56 of the Utah Rules of Civil Procedure the Trial Court must view all evidence in light most favorable to the non moving party and the Appellant Court must do the same, offering no deference to the Trial Court. Themy v. Seagull Enters., Inc., 595 P.2d 526 (Utah 1979)

This issue was raised before the Trial Court in the Memorandum of Points and Authorities filed in opposition to the Motion for Summary Judgment and was also raised with the Court at the hearing held on January 24, 2005, as reflected in the Transcript beginning at page 13.

ARGUMENT THREE - THERE WERE DISPUTED MATERIAL ISSUES OF FACT THAT PRECLUDED SUMMARY JUDGMENT

Standard of review: Under Rule 56 of the Utah Rules of Civil Procedure the Trial Court must view all evidence in light most favorable to the non moving party and the Appellant Court must do the same, offering no deference to the Trial Court. Themy v. Seagull Enters., Inc., 595 P.2d 526 (Utah 1979)

This issue was raised before the Trial Court in the Memorandum of Points and Authorities filed in opposition to the Motion for Summary Judgment and was also raised with the Court at the hearing held on January 24, 2005, as reflected in the Transcript beginning at page 13.

ARGUMENT FOUR - IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO CONSIDER DEFENDANTS' AFFIDAVIT FILED AS PART OF THEIR REPLY MEMORANDUM

Standard of review: Under Rule 56 of the Utah Rules of Civil Procedure the Trial Court must view all evidence in light most favorable to the non moving party and the Appellant Court must do the same, offering no deference to the Trial Court. Themy v. Seagull Enters., Inc., 595 P.2d 526 (Utah 1979)

This issue was raised before the Trial Court in the Memorandum of Points and Authorities filed in opposition to the Motion for Summary Judgment and was also raised with the Court at the hearing held on January 24, 2005, as reflected in the Transcript beginning at page 13.

DETERMINATIVE LAW

According to Rule 56(c) of the Utah Rules of Civil Procedure the Trial Court may not grant summary judgment if there are any "genuine issues as to any material fact."

(c) *Motion and proceedings thereon.* The motion, memoranda and affidavits shall be filed and served in accordance with CJA 4-501. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATEMENT OF THE CASE

The above referenced matter is on appeal from an order of the District Court granting a Motion for Summary Judgment.

NATURE OF THE CASE

The Trial Court granted the Defendants Motion for Summary Judgment on the basis that there was no genuine issue of material fact and that the Defendants were entitled to judgment as a matter of law.

This matter is being appealed as the appellant believes that there were many genuine issues of material fact precluding Summary Judgment.

COURSE OF PROCEEDINGS

In this action the Defendants filed two Motions for Summary Judgment.

The Court denied the first with allowing additional discovery and after of the completion of the same granted the second Motion for Summary Judgment.

DISPOSITION OF THE TRIAL COURT

The Court decided in the above referenced matter based upon the Affidavits on file and the Memoranda filed by the respective parties.

STATEMENT OF FACTS

1. Appellant and her family, in 1995, purchased one used 1993 Sundance, Plymouth Duster. (Note record at page 1041).
2. On or about September 21, 1999 Appellant was operating the Duster in a parking lot at approximately 800 East and 7000 South, in Midvale, Utah, when she was merely

shifting from reverse to forward, after pulling out of a parking space, and the airbag in the Duster exploded in her face. (Note record at page 1042).

3. Appellant had barely placed the car in the forward gear and began accelerating when the explosion occurred. (Note record at page 1042).

4. Appellant was not involved in any kind of collision, nor did she hit any bumps, rocks, etc. that would have jarred the car in any way. (Note record at page 1042).

5. Appellant immediately went in and out of consciousness and remembers some of the events that followed. (Note record at page 1042).

6. When the emergency vehicles arrived there was a discussion regarding calling a Life Flight Helicopter to take Appellant to the hospital, however Appellant was transported by ambulance to the Cottonwood Hospital since it was so much closer and a Life Flight Helicopter would take too long. (Note record at page 1042).

7. Appellant's injuries included severe head and face trauma, trauma to her abdomen and chest, severe headaches, as well as burns from her legs to her head, she has experienced blood clots, problems with her respiration, internal injuries, both immediate and long term memory loss and very severe Post-Traumatic Stress Syndrome. (Note record at page 1042)

8. Appellant has had to have her face reconstructed and has had to have parts of her abdomen removed. (Note record at page 1042)

9. Appellant has been to the hospital several times, has seen many, many doctors and is currently, even at the time of this writing, still under medications and under a doctor's care. (Note record at page 1042).

10. Appellant still has excruciating headaches, has numbness on the top of her head, and has had long term Post-Traumatic Stress Disorder Syndrome and Disassociative Disorder, and still has continuing significant difficulty recalling events in her life. (Note record at page 1042).

11. Appellant originally brought an action against Defendant, Daimler Chrysler Corporation and then filed an Amended Complaint naming Larry H. Miller, Chrysler Jeep, and Dan Worth dba Worth's Custom Body and Paint. (Note record at page 72 and following)

12. The Appellant filed a timely designation of expert witnesses, however her expert witness Dru Dixon closed down his business and moved, with no forwarding address. (Note transcript on April 5, 2004 at page 4 and following).

13. Immediately thereafter Appellant moved the Lower Court for an authorization allowing Gregory Barnett to be substituted as Plaintiff's expert witness on liability. (Note record at page 1073)

14. The Lower Court allowed the same however, the Judge specifically ordered that Gregory Barnett would not be allowed to do any additional research and testing of the subject vehicle after the date of November 1, 2003, even though he had only been engaged on or about October 30, 2003. (Note transcript at page 11, 22 and 33-37 of the April 5th hearing)

15. All three Defendants filed Motions for Summary Judgment and the Trial Court held for the Defendants on the alleged basis that Mr. Gregory Barnett had not done requisite research and testing on the subject vehicle.

16. Gregory Barnett's opinion regarding defective parts was based on the Daimler Chrysler on board computer read out done at a Daimler Chrysler Dealership, using Daimler Chrysler equipment, operated by a Daimler Chrysler Dealer employee and the Daimler Chrysler Official Vehicle Manual. (Note transcript at pages 13 through 22).

SUMMARY OF THE ARGUMENT

In this action the Honorable Timothy R. Hanson granted the Defendants Motion for Summary Judgment holding that there were no defective parts in the airbag system. However the Lower Court in reality held that there was a defective Daimler Chrysler Computer instead of defective Daimler Chrysler Sensors. So either way the Motion was not well taken.

The Trial Court limited the expert witness of the Plaintiff from doing additional testing and then held against the Plaintiff for her failure to do additional testing.

There were many genuine material issues of fact in dispute precluding Summary Judgment.

This case really reflects a battle of the experts.

Lastly the Court allowed the Defendants to submit a new Affidavit in their Reply Memorandum over the objection of the Plaintiff specifically referring the Court to the Code of Judicial Administration and the Utah Rules of Civil Procedure.

ARGUMENT ONE

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

It is undisputed that after the 1996 accident the Daimler Chrysler Plymouth Duster had repairs done to the airbag system using Daimler Chrysler replacement parts. Note Record at page 552 and following.

It is undisputed that the sensors and the ASDM (onboard computer) were all Daimler Chrysler parts. Note Record at page 552 and following.

It is undisputed that the Plaintiff took the Daimler Chrysler Plymouth Duster to a Daimler Chrysler dealership and had a Daimler Chrysler mechanic, using Daimler Chrysler equipment conclude that there were two shorts in the airbag system, ie: Squib Short and Front Sensor Short. Note Record at page 991 and following.

It is undisputed that the Official Daimler Chrysler Manual located at page #1651 and following of the Record, shows that the subject readings indicated defective parts.

When the Trial Court ruled that the ASDM (onboard computer) was defective instead of the sensors being defective, the same provided no basis for granting the Summary Judgment as the Trial Court was merely substituting one defective Daimler Chrysler part for another Daimler Chrysler part. Note Transcript at pages 43, 44 and 45 of the hearing on January 24th, 2005.

In as much as disposition of the case by Summary Judgment denies the non moving party the benefit of a trial on the merits any doubt concerning questions of fact including all evidence and reasonable inferences drawn from the evidence must be resolved in favor of the Plaintiff.

Brick Co. v. Robinson Brick Co., 780 P.2d 827 (Utah Ct. App. 1989)

ARGUMENT TWO

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

At page #4 of the Transcript of April 5, 2004, it was established that the Plaintiff had retained a substitute expert witness on October 30, 2003 and that he had done his initial analysis and submitted his Affidavit on November 1, 2003, some two (2) days or so later.

At page #22 the Trial Court ordered that this substitute expert would not be allowed to do any additional testing on the subject vehicle. (Also note transcript at pages 11 and 33-37)

As noted on page #1981 of the Record in the ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, the Trial Court held against the Plaintiff because the Plaintiffs expert had conducted no additional testing.

Appellant submits that since Summary Judgment prevents the parties from fully presenting their case to the Court, the Court should be reluctant to invoke the procedure. Brandt v. Springville Banking Co., 10 Utah 2d 350, 353 P.2d 460 (Utah, 1960).

Appellant respectfully submits that it was an abuse of discretion and a reversible error for the Trial Court to prevent testing and then hold against the Plaintiff for not having done additional testing.

Since the Summary Judgment is a drastic remedy, strict compliance with the rules is required and the same should be granted only when there is no prejudice to either side from presenting their evidence to the Court. Timm v. Dewsnap, 851 P.2d 1178 (Utah, 1993).

ARGUMENT THREE

THERE WERE DISPUTED MATERIAL ISSUES OF FACT THAT PRECLUDED SUMMARY JUDGMENT

According to Rule 56(c) of the Utah Rules of Civil Procedure the Trial Court may not grant summary judgment if there are any “genuine issues as to any material fact.”

(c) Motion and proceedings thereon. The motion, memoranda and affidavits shall be filed and served in accordance with CJA 4-501. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

This matter was a classic case of a battle between the experts.

The Defendant’s expert Mike Cassidy suggested in his affidavits by way of exclusion that the airbag wrongfully deployed because of a problem in the clock spring which was housed in the steering column.

The Plaintiff’s expert Gregory Barnett conclusively stated under oath that it was the defective parts and not the clock spring that caused the airbag to wrongfully deploy.

Appellant submits that the Affidavit of Mike Cassidy, dated August 26th, 2003, did not constitute a basis for the Court to grant Summary Judgment for the following reasons:

1. At page 459 of the record Mr. Cassidy’s Affidavit starts out:

“MICHAEL P. CASSIDY, being above the age of 21, and fully capable of attesting to the facts hereinafter, makes the following Affidavit.”

This purported Affidavit does not start off with “State of Utah”, “County of Salt Lake”, that the Affiant is “first duly sworn” nor that the paragraphs that follow were “true to the best of Affiant’s knowledge, information and belief”.

There is no requirement that the Affiant be over the age of 21 and so the reference to the same frankly is meaningless.

The language that Mr. Cassidy is “fully capable of attesting to the facts hereunder” is also meaningless as it does not even suggest that the statements are true. Rather it suggests that Mr. Cassidy is able to attest.

This approach placed no evidence before the Court.

The policy of Rule 56(c) of the Utah Rules of Civil Procedure is that “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits” provide sworn testimony upon which the Court can decide that there is no evidence to support the non moving party’s position.

For Mr. Cassidy to start off his statement with the idea that he is both 21 and fully capable of attesting to facts does not amount to sworn testimony and therefore what he has to say may be interesting, but surely provides the Court no basis to summarily dispose of the Plaintiff’s claims.

Hence this is not an Affidavit, it is merely his “Statement of Claims”.

2. At page 459 of the Record, Mr. Mike Cassidy tells the Lower Court what qualified him to render an expert opinion on airbags. He said in paragraph #2 as follows:

“2. I was previously employed by Daimler Chrysler Corporation (“DCC”), formerly Chrysler Corporation, as a Product Analysis Senior Specialist. I worked in this position for over 15 years. I worked for 33 years in the automotive industry

and have held various engineering related positions, including Manager, Jeep Electrical Engineering. I attended the University of Toledo and received a Bachelors Degree in Electrical Engineering in 1980. I have knowledge of industry practices in design, testing and manufacturing of automobiles.”

Appellant submits that if this is all Mike Cassidy can say about his background, including his skills, his education and his experience he is not a qualified witness to render any kind of opinion regarding airbags and their deployment.

At no time did Mr. Michael Cassidy supply the Court with any kind of Curriculum Vitae

While the most recent rule regarding the testimony of expert witnesses is very broad, here Mr. Cassidy provides the Lower Court with no basis to suggest that he has any knowledge, any skill, any experience, any training, or any education regarding airbags and their deployment.

According to Rule 702 of the Utah Rules of Evidence one must meet certain criteria in order to offer an expert opinion:

Rule 702. Testimony by experts.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Here Mr. Cassidy does not show the Court any basis whatsoever that he has any knowledge, skill, expertise, training or education regarding the Plymouth Duster.

Additionally Mr. Cassidy does not show the Court any basis whatsoever that he has any knowledge, skill, expertise, training or education regarding airbags.

The Utah Rules of Civil Procedure at Rule 56(e) provides the following:

“(e) Form of affidavits; further testimony; defense required.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The Court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits, when a motion for summary judgment is made and supported as provided in this rules, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate shall be entered against him.

Appellant submits that not only is the Affidavit of Mike Cassidy a mere unsworn “Statement of Claims”, it fails to enlighten the Court in any way as to how Mr. Cassidy has any expertise whatsoever that is relevant to the Plymouth Duster and specifically relevant to the airbag and its deployment.

In the case of Gaw v. State, 798P.2d 1130 (Utah Ct. App 1990) the Court of Appeals held that an expert witness giving an expert opinion must state in his Affidavits sufficient facts upon which the opinion is based and the facts must be those typically relied upon by experts in the field. Also note Butterfield v. Okubo, 831 P.2d 97 (Utah 1992).

He says in paragraph #2 that he worked for Daimler Chrysler for 15 years, however this does not shed any light whatsoever as to why he would have any knowledge regarding the Plymouth Duster and its airbag.

Rather it does show that he is a biased witness and this is really born out when this Court looks at his conclusions regarding the clock spring, as the clock spring could not have possibly caused the deployment, according to the Official Daimler Chrysler Manual, as the clockspring is merely a conduit for the electrical signal to pass through and is not the originator of the signal nor does it have any electrical current in it whatsoever except as sent through it by the ASDM.

3. Many of the paragraphs beginning with paragraph #3 and following are on their face rank speculation.

Mr. Cassidy provides no explanation whatsoever how he would know what is in paragraph #3 of his statement.

He states “3. In April 1993, DCC manufactured a Plymouth Duster automobile, bearing vehicle identification number 3P3XP6439PT598491 (hereinafter the “Duster”).”

How does Mr. Cassidy know this? Was he there? Did he see this? Is this statement based upon his personal observation and he just happens to remember the VIN?

Many of the paragraphs following are similarly rank speculation.

In the case of Utah Farm Prod. Credit Ass’n v. Watts, 737 P.2d 154 (Utah 1987) the Supreme Court held that even when there are big corporations with lots of employees, Affidavits still must be based on personal knowledge and the Affiant must set out his means and sources for his information. Also note Strange v. Ostlund, 594 P.2d 877 (Utah 1979), Treloggan v. Treloggan, 699 P.2d 747 (Utah 1985).

Additionally hearsay testimony and opinion testimony if not admissible at trial is surely not admissible in Affidavits. Walker v. Rocky Mt. Recreation Corp., 29 Utah 2d

274, 598 P.2d 538 (1973), Western States Thrift & Loan Co. v. Blomquist, 29 Utah 2d 58, 504 P.2d 1019 (1972). Also note Norton v. Blackham, 669 P.2d 857 (Utah 1983).

Surely there is nothing in his “Statement of Claims” to enlighten the Lower Court as to why he would have any knowledge whatsoever regarding this testimony.

Another classical example in Mr. Mike Cassidy’s “Statement of Claims” is paragraph #6 wherein he states: “6. The Duster was inspected as part of the DCC quality control system in place in April 1993.”

Here Mr. Cassidy tells the Court that he has knowledge that this Duster was in fact inspected.

Again how does he know this? Was he there, or was he working in the Jeep Department as suggested in paragraph #2?

In the case of Treloggan v. Treloggan, 699 P.2d 747 (Utah 1985) the Utah Supreme Court held that an Affidavit must be based upon personal knowledge and that unsubstantiated opinions and beliefs are not sufficient.

On their face these paragraphs may not seem that important, however in the final analysis they form the predicate upon which Mr. Cassidy bases his conclusions and therefore they become the heart of the controversy in the battle between the experts.

In the case of Murdock v. Springville Mun. Corp., 1999 UT 39, 982 P.2d 65 the Appellate Court held that it was appropriate for the Trial Court to strike affidavits when the facts were not asserted on personal knowledge nor set out with sufficient foundation

At paragraph #9 Mr. Cassidy makes the following claim: “9. I am familiar with the design of the driver air bag system in the Duster.”

What does this mean?

Does this suggest he saw a picture once and therefore he is familiar with it? Is he reading the manual out loud, and therefore he can say “I am familiar with the design”?

This conclusion fails to enlighten the Court in any way as to how it is Mr. Cassidy is qualified to render an expert opinion.

On page #2 of Mr. Cassidy’s “Statement of Claims” Mr. Cassidy makes an interesting statement in paragraph #11:

“11. 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, along the steering column, through a device called a “clockspring” and into the steering wheel.

From this particular paragraph it appears that all parties agree that no electrical charge originates in the clockspring.

It is significant to note that the “(e)lectrical power from the battery and electronic information from the ASDM and sensors are delivered to the airbag”.

As noted below when Judge Hanson made his ruling it appears that he concluded as a matter of law that the sensors were not defective and that the computer (ASDM) was defective.

If the ASDM was faulty then the Plaintiff should have survived the Motion because Judge Hanson was merely substituting one defective Daimler Chrysler part for another defective Daimler Chrysler part.

The fact that no electrical charge originates in the clockspring is confirmed by Mr. Cassidy’s “Statement of Fact” #12:

A

“12. 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. Coils of flat wire inside the clockspring uncoil and re-coil as the steering wheel is turned and released. 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. The drawing labeled “Fig. 10” on Exhibit A attached to this affidavit is a diagram of a clockspring on a Duster the drawing labeled “Fig. 11” on the same exhibit is an exploded diagram of a steering wheel on a Duster, showing the relation of the clockspring and wires to the steering wheel.”

Appellant submits that the first sentence is most significant in establishing that at the heart of the controversy before Judge Hanson was a disputed material issue of fact. The statement that “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.” further establishes that no electrical current originates in the clockspring.

The clockspring merely provides a conduit for an electrical signal, originating in the sensors, or the ASDM to pass to the airbag for it to explode.

Hence the idea that there is a short in the clockspring could never cause the deployment without the electrical signal originating somewhere else.

Therefore when Gregory Barnett in his Affidavit swore that he could conclusively establish that the clockspring could not cause the deployment, this is consistent with this part of the “Statement of Claims” by Mr. Cassidy and absolutely in harmony with figure 10 and figure 11 in Exhibit A attached to Mr. Cassidy’s “Statement of Claims.”

There can be no question in reference to paragraph’s #11 and #12 of Mr. Cassidy’s “Statement of Claims” that there was a genuine issue of the disputed material fact.

Paragraph #13 Mr. Cassidy's "Statement of Claims" shows exactly how the current passes through the clockspring and by virtue of the diagrams referenced in paragraph #13 one can see how the clockspring could not possibly cause the airbag to explode.

Paragraph #14 of Mr. Cassidy's "Statement of Claims" bears out the magnitude of the exploding airbag into the face and abdomen of Jody Best, as it apparently rearranged the entire steering column.

In paragraph #14 Mr. Cassidy's "Statement of Claims" he states the following:

"14. The universal joint known as the upper steering coupler is visible inside the passenger compartment of the Duster, just above the floor and immediately behind the brake pedal. 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. Stated differently, when the Duster rolls off the assemble line, the brake pedal may be depressed to its full extent without contracting the upper steering coupler.

It is important to note as stated in the Statement of Facts #4 that the airbag exploded in the Appellant's face without "any kind of collision, nor did she hit any bumps, rocks etc. that would have jarred the car in any way."

Therefore the damage to the steering column referred to by Mr. Cassidy in his "Statement of Claims" #14 shows the damage done to the vehicle exclusively caused by the exploding airbag.

It is not helpful to the Trial Court for Mr. Cassidy to suggest that the damaged steering column etc. was not in the same condition as the vehicle was at the time it came off the assembly line.

Mr. Cassidy seems to suggest that somehow this exonerates Daimler Chrysler that things were so different or modified and therefore how could Daimler Chrysler be liable as this is not the way the car was manufactured.

Appellant submits that Mr. Cassidy's statement is tantamount to suggesting to the Court that the exploded airbag was not in the same condition of the airbag when the Duster came off of the assembly line and therefore DCC is not liable.

The pictures attached to Mr. Cassidy's "Statement of Claims" show the steering column apparatus forced down on the break pedal and that it was all caused by the exploding airbag.

The vehicle was not even operable after the airbag exploded as the steering column is clear down on the break as depicted in the photographs.

Appellant submits that the damaged steering column etc. is absolutely no basis for Mr. Cassidy to conclude that somehow Daimler Chrysler is not liable because surely this Duster did not come off the assembly line with this damaged steering column, brake, etc.

Appellant submits that paragraph #14 Mr. Cassidy's "Statement of Claims" is surely not useful to the Court in concluding as a matter of law that Daimler Chrysler is not liable.

In paragraph #15 of Mr. Cassidy's "Statement of Claims" he suggests that the quality control inspections would have caught this steering column damage back in 1993.

In paragraph #15 of his alleged Affidavit he states:

"15. The vehicle quality control inspections conducted in April 1993, and to which the Duster was subjected, included an examination of the area within the passenger compartment where the driver's feet rest, as

well as the brake pedal and upper steering coupler. The examinations also included testing the brakes by depressing the brake pedal to its full extent.

As noted above Appellant submits that this paragraph is as useful to the trial Court as it would be for Mr. Cassidy to state that when the vehicle came off the assembly line the airbag was not in the exploded condition as it was when Mr. Cassidy did his inspection.

Appellant submits that paragraph #16 has exactly the same flaws noted above:

“16. Had the inspections of the Duster revealed that the brake pedal contracted the upper steering coupler, either with the brake released or the pedal fully depressed, the Duster would not have passed the inspections but it would have been returned to the assembly line for correction of this problem.

Appellant surely agrees that had the airbag already deployed and had the steering column already been damaged that the Duster would not have passed inspection in 1993.

Paragraph #17 is totally void of any foundation.

There is nothing in the “Statement of Claims” that suggests why Mr. Cassidy can state:

“17. The Duster was first sold to a consumer on July 28, 1993.”

As noted above the statement is not under oath and the Trial Court is given absolutely nothing to show why Mr. Cassidy has any personal knowledge as to the statement.

It appears that Mr. Cassidy read this somewhere and here restated it.

The Utah Supreme Court held in the case of A& M Enters., Inc. v. Hunziker, 25 Utah 2d 363, 482 P.2d 700 (1971) that Affidavits must be based upon personal knowledge and personal observations and if not they are incompetent and of no effect.

Here Mr. Cassidy however does not state that he was there when it was sold, he does not state where he read it, he does not state how it is that his source is somehow reliable, etc.

As such, this is not evidence and is not useful to the Court in any way and clearly is not contemplated under Rule 56 of the Utah Rules of Civil Procedure.

Paragraph #18 of Mr. Cassidy has the exact same flaws, here he states:

“18. When the Duster was first sold to a consumer in 1993 it had virtually zero miles on the odometer.”

As noted above without the requisite foundation this statement is not evidence and can not be the basis under Rule 56 for the Court to conclude that the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact...”

Paragraph #20 may appear to be simple observations by Mr. Cassidy, however the specifics of the said paragraph would require a certain level of expertise to have made these specific observations.

Paragraph #20 states:

“20. During the inspection, I observed the Duster had undergone significant and numerous repairs to the front of the vehicle, which included, but are not limited to the following:

- Replacement of front clip sheet metal components
- Replacement of the original equipment manufacturer (“OEM”) steering rack with an after-market steering rack;

- Replacement of the front cross member with an after-market front cross member;
- Replacement of the OEM airbag module;
- The driver side airbag had been deployed more than once; and
- Impact damage to the vehicle's subassemblies and from components, indicating prior impact damage.

Mr. Cassidy does not enlighten the Court anywhere as to how he would be qualified to make these observations.

Appellant submits that if these observations were material then the Affidavit of Gregory Barnett as found on page 1049 of the Record clearly establishes a disputed material Statement of Fact, as Mr. Barnett stated in paragraph #18:

“18. The Mopar Auto Parts that were used to replace the parts in the subject vehicle after the 1996 deployment, are the official line of parts by Daimler Chrysler, and would not be after market parts nor used parts. Hence, the replacement parts were from the original manufacturer.”

Hence the controversy before Judge Hanson was reduced to a mere “battle of the experts”.

Defendant's expert claims that the replacement parts were not Daimler Chrysler parts and Plaintiff's expert claims that they were Daimler Chrysler replacement parts.

Again a classic dispute of material facts which precludes the granting of a Rule 56 Motion for Summary Judgment.

Before going on to paragraph #21, Appellant's Counsel submits that it would be helpful to state a personal experience as a teenager which will be helpful hopefully in evaluating the content of paragraph #21 of Mr. Cassidy.

As a teenager while passing through high school, Appellant's Counsel helped clean an elementary school each day after school. He scrubbed and cleaned toilets, washed bathroom floors and vacuumed and swept the classrooms.

His official title was a "Sanitary Engineer".

The fact that he had the term "Engineer" really qualified him for nothing.

Appellant's counsel respectfully submits that this same holds true in paragraph #21 of Mr. Cassidy's statement because he too claims to be an "Engineer".

However Mr. Cassidy does not explain anywhere how that could be unless it is by virtue of his electrical engineering degree which he apparently obtained in 1980.

However, if Mr. Cassidy is suggesting that since he has a Electrical Engineering Degree he is qualified to make expert opinions on airbags, the same is without merit.

Appellant's Counsel submits that it is somewhat of a comment on the obvious that one could surely get a Bachelors Degree in Electrical Engineering and yet have no knowledge whatsoever regarding airbags.

Additionally Mr. Cassidy does not explain to the Court anything about his "diagnostic equipment" as suggested in paragraph #21 of his statement.

The Utah Appellate Courts has routinely held that for Affidavits to be of any effect they must set forth facts as to make the same admissible in evidence. Norton v. Blackham, 669 P.2d 857 (Utah 1983), Preston v. Lamb, 20 Utah 2d 260, 436 p.2d 1021 (1968).

With this foundational void in mind Mr. Cassidy states the following in paragraph #21 as found at page 463 of the Record:

“21. Utilizing my diagnostic equipment and skills as an airbag systems engineer, I performed electronic analyses of the various components of the airbag system, and determined the following:

- Airbag system crash sensors were in place in the Duster and operational;
- The airbag safe sensor indicated that the system had detected a short circuit in the Duster’s wiring harness, approximately 40 minutes of driving prior to the airbag deployment that is the subject of this lawsuit; and
- A secondary short circuit within the steering column of the Duster, between the steering wheel and steering rack, caused the airbag to deploy.

Appellant submits that if the Trial Court looked beyond the fact that there was no sworn statement constituting evidence, and if the Trial Court looked beyond the fact that there was no foundation for Mr. Cassidy to even address the issue, this paragraph #21 raises the most disputed statements of material fact, for the following reasons:

a. The statement that “Airbag system crash sensors were in place in the Duster and operational” is not helpful to the Court.

The fact that the sensors are where they should be in the car is of no significance.

The fact that they were operational is of no significance, because the claim is that there was a short in the system and the mere fact that they are operational does neither prove nor disprove the short that was displayed on the ASDM.

Here the Daimler Chrysler Computer showed that there were two shorts that caused the airbag to deploy.

In Mr. Cassidy’s Supplemental Statement he states on page #3 in paragraph #5 as found on page #1551 of the Record that there were two shorts that caused the airbag to deploy according to the Daimler Chrysler ASDM:

- A. Squib initiator open
- B. Squib short
- C. Safing sensor open
- D. Front sensor short

As a result for Mr. Cassidy to state that the “Airbag system crash sensors were in place in the Duster and operational” is not helpful to the Court because the issue is not whether or not they were there and whether or not they were operational, the issue is whether or not there was a short or in this case two (2) shorts.

Appellant’s Counsel submits that we have all had experiences with shorts in our vehicle’s electrical system that seem to work fine when we are at the mechanic, but seem to short out when he is not around and able to detect the same.

Counsel submits that it is a comment on the obvious to suggest that the “Airbag system crash sensors were in place in the Duster and operational” during all the time prior to deployment and at all times following the deployment but just malfunctioned in a split second causing the airbag to explode in Appellant’s face at the time in question.

As noted above, this statement Mr. Cassidy is not at all helpful and can not be the basis under Rule 56 for the Court to conclude that the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact...”

The additional flaw in this bullet found in paragraph #21 of Mr. Cassidy’s Statement located on page #463 of the Record is that Mr. Cassidy does not tell the Trial

Court (a) what he means when he says that the sensors are operational and (b) how he determined the same.

The sensors are little compact units that react to a crash setting and after sensing a crash they signal the computer to send an electrical signal through the clock spring to explode the airbag.

With that in mind, what did Mr. Cassidy do to determine that the sensors were operational in a crash setting.

Again there is just a glaring lack of foundation and without the requisite foundation this statement is not evidence and can not be the basis under Rule 56 for the Court to conclude that the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact...”

The second bullet suggested by Mr. Cassidy states the following:

The airbag safe sensor indicated that the system had detected a short circuit in the Duster’s wiring harness, approximately 40 minutes of driving prior to the airbag deployment that is the subject of this lawsuit; and

There is nowhere in the Record where Mr. Cassidy explains how he would know what he claims in the second bullet.

In fact his Supplemental Affidavit impeaches this conclusion as he states in the Supplemental Affidavit that he determined the clockspring to be the cause by excluding any other cause.

Specifically in paragraph #6 of the Supplemental Affidavit of Michael Cassidy as found on page #3 of the Affidavit located at page #1551 of the Record Mr. Cassidy impeaches his #2 bullet when he states the following:

“6. In paragraphs 13-15 of Mr. Barnett’s affidavit, Mr. Barnett assumes that if the short circuits in the airbag system been located in the clockspring assembly, the DRB II would have displayed a message reading “clockspring” or “clockspring short” during the fault code scan. Similarly, at his deposition, Mr. Barnett stated the DRB II is capable of displaying the message “clockspring”. (See Barnett Dep. At 25:25-26:3) To the contrary, the DRB II does not have as part of its “vocabulary” a message display stating “clockspring short” or “clockspring.” Attached hereto as Exhibit A are pages from “1990 Chrysler Motors Powertrain Diagnostic Procedures” manual pertaining to “Passive Restraint System”. Page ii in Exhibit A lists the “Specific Fault messages” the DRB II is capable of displaying. A message indicating “clockspring short” or “clockspring” is not among them. Further, attached hereto as Exhibit B is the page from the “Chrysler Corporation Guide to DRB III” listing all messages that unit is capable of displaying. Again, “clockspring short” or “clockspring” is not among them. Stated differently, neither the DRB II nor the DRB III can display a message identifying a fault in the clockspring. In summary, the DRBII cannot identify the clockspring as the specific location of the short circuits.”

As a result Mr. Cassidy is bound by the same equipment limitations and therefore suggests in his Supplemental Affidavit that he did not have the ability to establish bullet number two as the basis for the wrongful deployment.

In paragraph #5 of Mr. Cassidy’s Supplemental Affidavit he identifies the ASDM scan as his way of determining what caused the airbag to deploy.

Then in paragraph #6 he points out to the Court what it cannot detect.

This then impeaches his second bullet found in paragraph #21.

Appellant submits that there is no foundation to support the conclusion by Mr. Cassidy that somehow there was a problem in the Duster's wiring harness and that the same occurred forty minutes before the airbag in fact deployed.

Counsel for the Appellant suggests that it is unbelievable to suggest that the electrical circuit shorted and then forty (40) minutes later the airbag exploded. This forty (40) minutes is not literally forty minutes it is far more than forty minutes as according to Mr. Cassidy it was "approximately 40 minutes of driving prior to the airbag deployment..."

Therefore according to Cassidy there could have been days or even weeks of driving between the time that the short occurred and the time the airbag imploded.

Lastly in reference to paragraph #21 of Mr. Cassidy's "Statement of Claims" as found on page #463 of the Record he makes the third conclusion which states:

"A secondary short circuit within the steering column of the Duster, between the steering wheel and steering rack, caused the airbag to deploy."

Here again Mr. Cassidy does not tell the Court how in the world he came to this conclusion.

He starts off by suggesting that there was a secondary short circuit however he has never told the Court what was the primary short circuit.

He does not show the Court how it is he can establish that the secondary short circuit occurred in the steering column and how he can establish that it was located between the steering wheel and the steering rack.

As noted above, according to Mr. Cassidy's diagrams from the Official Daimler Chrysler Manual, the circuit does not originate in the clock spring rather the circuit originates in the sensors and then passes through the ASDM and from there up the steering column and activates the airbag.

Hence Mr. Cassidy's third bullet is conclusively impeached by his own Exhibits which are attached pages from the Official Daimler Chrysler Manual.

Therefore the conclusions of Mr. Cassidy are not only totally lacking in foundation they are squarely inconsistent with the Official Daimler Chrysler Manual attached as Exhibits to his own Affidavit.

As noted above the faulty predicates stated by Mr. Cassidy come full circle in showing how paragraph #22 is without merit.

Paragraph #22 of Mr. Cassidy's alleged Affidavit as found on page #463 of the Record states as follows:

"22. Damage to the wires inside the clockspring caused the short circuits which led to the inadvertent airbag deployment. The wires inside the clockspring were damaged by repeated over-rotation, caused by improper installation of the steering rack and pinion. In particular, the improper replacement of the steering rack (either through improper installation or use of an incorrect part) caused a misalignment of the steering column, which in turn allowed for over rotation of the steering wheel. After this improper replacement of the steering rack, the wires inside the clockspring were damaged by repeated over-rotation of the steering wheel during normal use. The condition which allowed the steering wheel to over-rotate and repeatedly damage the wires inside the clockspring – improper alignment of the steering column—did not exist in the Duster when it was manufactured and first sold in 1993.

These conclusions by Mr. Cassidy are impeached with his Supplemental Affidavit as found pages #1549 and following of the Record which establishes that Mr. Cassidy used the same equipment that was used by Mr. Barnett.

Mr. Cassidy has stated that this equipment cannot show the clock spring as the defective part, while at the same time he purports to suggest the exact opposite.

This is born out in paragraphs #4 and #5 of Mr. Cassidy's Supplemental Affidavit located at pages #1550 and #1551 of the record which state:

"4. With reference to paragraph 11 of Mr. Barnett's affidavit, the "fault code scan" he requested of the Duster from Plaintiff's husband, Ross Best, was performed by me during an inspection of the vehicle on March 9, 2001 in the presence of Mr. Best. The photos appended to Mr. Barnett's affidavit as "Exhibit B", depicting the DRB II readouts, are the identical readouts I witnessed and photographed during my March 9, 2001 inspection of the Duster. These photos of the DRB II readout were produced to the Plaintiff with DCC's expert disclosures on May 7th, 2003.

5. With reference to paragraph 12 of Mr. Barnett's affidavit, the "Squib Air Bag Deployed" and "Squib Indicator Activated" messages during the fault code scan indicate that when the ASDM was scanned, the airbag had in fact deployed, rather than the existence of any fault or defect in the airbag system. Mr. Barnett did not read the codes recorded at the March 9, 2001 inspection correctly.

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

All parties agree the airbag had deployed before March 9, 2001 when these readings were taken.

Counsel for the Appellant submits Mr. Cassidy never explains to the Court how in any of his Affidavit the ASDM malfunctioned.

He lays out in his Supplemental Affidavit how the Daimler Chrysler Computer shows that there were two shorts, one in the Squib Sensor and the other in the Front Sensor.

Mr. Cassidy seemed to say to the Trial Court that even though the Daimler Chrysler ASDM showed that it was the sensors that were defective parts, somehow it really does not mean that because what it really mean it is the clock spring.

As noted in Argument One Mr. Cassidy purported to establish that it was the clock spring that caused the wrongful deployment, however Mr. Cassidy provides no explanation as to why the Daimler Chrysler ASDM was inaccurate when it showed the Daimler Chrysler Squib Short, and when it showed the Daimler Chrysler Front Sensor Short.

This is all the more incredible as Mr. Cassidy purports to completely disregard the Official Daimler Chrysler Manual while at the same time referring to the same and attaching copies as Exhibits to his Affidavits.

Appellant submits that perhaps what is not found in paragraph #22 is most telling about Mr. Cassidy's Affidavit.

He does not say that he personally inspected the clockspring and found damaged wires.

There is good reason why he could make no claim to the same as the clock spring comes in a sealed unit.

As noted in paragraph #21 of the Affidavit of Gregory Barnett as found on page #1050 of the record, Mr. Barnett states the following under oath:

“21. The clockspring is a sealed unit, and comes in and out of the vehicle as a packaged part, and one would have to break the seal of the packaged clockspring in order to damage any part of the insides of the clockspring when disassembling the subject vehicle.”

As a result there was clearly a question of fact in reference to the wrongful deployment and again a classic case of the battle of the experts.

Perhaps the most absurd conclusion stated by Mr. Cassidy is found in paragraph #23 of his Affidavit as found on page #463 and #464 of the Record:

“23. This improper alignment of the steering column also allowed the upper steering coupler to contact the brake pedal. Exhibits D and E attached to this affidavit are photographs depicting the driver’s foot rest area of the passenger compartment of the Duster, showing the relation of the upper steering coupler to the brake pedal. These photographs clearly show the upper steering coupler contacting the brake pedal. In the Duster as manufactured in 1993, the upper steering coupler would not have contacted the brake pedal. If the upper steering coupler had contacted the brake pedal when the Duster rolled off the assembly line in April 1993, the Duster could not have passed the quality control inspection program then in place.”

This conclusion, like Mr. Cassidy’s analysis as noted in paragraph #14, #15 and #16 with the accompanying photographs, show the steering column etc. after the airbag had exploded and changed everything.

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.

Mr. Cassidy suggests that the Duster could not have passed inspection in this damaged condition.

All parties agree that the Duster would not have passed inspection in this damaged state of being following the wrongful deployment.

This conclusion is disingenuous at best because it is like suggesting that with the airbag all blown out the top of the steering column the Duster would not have passed inspection.

For Mr. Cassidy to argue in his Affidavit that somehow that damaged Duster following the wrongful deployment somehow exonerates Daimler Chrysler from liability is not only enlightening as to the specific paragraph of Mr. Cassidy, it is also most enlightening on the competency of the rest of his Affidavit, and it also goes to how biased he is for Daimler Chrysler in searching for a safety net for Daimler Chrysler in its attempt to keep from being liable.

Appellant submits that it is significant for the Court to note that following the signature of Mr. Cassidy on page #464 of the Record is the following:

“Before me personally appeared **MICHAEL P. CASSIDY**, on this /26/ day of August 2003, as Affiant herein, and made oath that he is the same person described in and who executed the above Affidavit, and he acknowledged to me that he executed the same.

Witness my hand and official seal.

[seal]

/s/Angela S. Bohnsack
NOTARY PUBLIC”

By virtue of the foregoing even at the end of the purported Affidavit of Mr. Cassidy he never swears to anything except that he is the one that signed the document.

Hence the Lower Court was provided no sworn testimony by Daimler Chrysler upon which to rule on the Motion for Summary Judgment

Counsel for the Appellant submits that there is no basis in the record under Rule 56 for the Court to conclude that the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact...”

The flaws outlined above in reference to Mr. Cassidy’s purported Affidavit as found on page #459 of the Record are duplicated in the Supplemental Affidavit of Michael Cassidy as found on page #1549 of the Record.

Again this purported Affidavit starts off with “MICHAEL P. CASSIDY, being over the age of 21 and fully capable of attesting to the facts hereinafter, makes the following affidavit:”

This statement does not show “State of Utah”, “County of Salt Lake”, that the Affiant is “first duly sworn” nor that the paragraphs that follow were “true to the best of Affiant’s knowledge, information and belief”.

The lack of foundation as to Mr. Cassidy being an expert witness is reiterated in paragraph #1 of the Supplemental Affidavit which states:

“1. This affidavit is a supplement to the affidavit I earlier prepared in this case, dated August 26, 2003, and submitted to the Court as Exhibit 1 in the Exhibits in Support of Daimler Chrysler Corporation’s Motion for Summary Judgment.”

Again there is nothing in the Supplemental Affidavit that shows the Court that Mr. Cassidy is qualified in any way to render an expert opinion on the Plymouth Duster nor the airbag deployment system therein.

Here Mr. Cassidy does not show the Trial Court that he has any “scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue”

As a result Mr. Cassidy presents no evidence to the Court as to how there is foundation as to any of his qualifications, and therefore aids the Trial Court to conclude that the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact...”

Paragraph #3 of the Supplemental Affidavit of Mr. Cassidy as found on page 1550 of Record shows this Court how Mr. Cassidy ran his tests to determine what caused the wrongful deployment:

“3. Some of the terminology used in Mr. Barnett’s affidavit is inaccurate or misleading and requires clarification. An engineer with training in airbag systems and instruction in Daimler Chrysler Corporation (“DCC”) vehicles performs a “fault code scan” or an electronic analysis of the various components of the airbag system of a DCC vehicle in the following manner: First, the engineer connects a “Diagnostic Readout Box II” (or “DRB II”) to the airbag system diagnostic module (“ASDM”) on the underside of the instrument panel of the vehicle. When the vehicle is turned on, voltage from the vehicle’s battery powers the DRB II and causes it to display certain messages. Because the DRB II can be used to check other systems, the engineer must select the “passive restraint system” program from the general menu. The DRB II will then read the “non-volatile memory” (that part of the memory which is not erased) from the ASDM. The ASDM is a rectangular electrical module about three inches by four inches by five inches, with a sensor (the “safing sensor”) in it. Contrary to the misleading assertions in Mr. Barnett’s affidavit, the “fault code scan” of the ASDM with the assistance of DRB II in the manner described above.

It is apparent from this paragraph that both engineers conducted the exact same test to determine how the airbag wrongfully deployed.

Mr. Cassidy in paragraph #3 merely reiterated how Mr. Gregory Barnett should conduct the test and the same is absolutely consistent with the way that Mr. Gregory Barnett in fact completed the tests as described in his deposition.

All Mr. Cassidy can say in paragraph #3 is that the experts may have used varying terms in how they describe their testing, however they were absolutely consistent in their methodology.

This is specifically born out in paragraph #4 of Mr. Cassidy's "Statement of Claims" as found on page #1550 of the Record which states:

"4. With reference to paragraph 11 of Mr. Barnett's Affidavit, the "fault code scan" he requested of the Duster from plaintiff's husband Ross Best, was performed by me during an inspection of the vehicle on March 9, 2001 in the presence of Mr. Best. The photos appended to Mr. Barnett's affidavit as "Exhibit B", depicting the DRB II readouts, are the identical readouts I witnessed and photographed during my March 9, 2001 inspection of the Duster. These photos of the DRB II readout were produced to plaintiff with DCC's expert disclosures on May 7, 2003.

Not only did the experts conduct the exact same tests but the experts using Daimler Chrysler testing equipment came up with the exact same results as noted by Mr. Cassidy on page #1551 of the record as stated in paragraph #5:

"5. With reference to paragraph 12 of Mr. Barnett's affidavit, the "Squib Air Bag Deployed" and "Squib Indicator Activated" messages during the fault code scan indicate that when the ASDM was scanned, the airbag had in fact deployed, rather than the existence of any fault or defect in the airbag system. Mr. Barnett did not read the codes recorded at the March 9, 2001 inspection correctly.

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

All parties agree the airbag had deployed before March 9, 2001 when these readings were taken."

In paragraph #6 of Mr. Cassidy's "Statement of Claims" as found on page #1551 of the Record Mr. Cassidy makes a big deal as to whether or not the DRB II actually shows the word "clockspring" on the scan.

Appellant submits that this is clearly an attempt to inappropriately challenge Mr. Barnett on the basis of form over substance.

It is absolutely clear from Mr. Barnett's Affidavit and from his deposition that one can conclusively establish that it was not the clockspring that caused the wrongful deployment, rather it was the defective parts from Daimler Chrysler.

Mr. Barnett clearly makes the point that the scan will not read "Squib Short" nor "Front Sensor Short" when in fact the problem is with the clockspring.

Frankly it is interesting to note that Mr. Cassidy is taking the position that even though the Daimler Chrysler Equipment says that it is the Squib Short and the Front Sensor Short that caused the wrongful deployment, it is really the clockspring notwithstanding.

In paragraph #7 of the Statement of Claims of Mr. Cassidy he establishes a classic material dispute of fact when he states:

"7. Contrary to the implications of paragraphs 13-15 of Mr. Barnett's affidavit, the DRB II cannot discern the differences between a short circuit somewhere in the front sensor or safing sensor circuits, and a short circuit in the clockspring. The "front sensor" message on the DRB II means that there is a short circuit somewhere in the electrical circuit that encompasses the front sensor, clockspring and related wiring. In order to determine the specific location of the short circuit, one must physically inspect this electrical circuit. During my March 9, 2001 inspection of the Duster, I tested this circuit by by-passing the clockspring (located in the steering wheel assembly). I did this by disconnecting a wire at the base of

the steering column and attaching a testing device which contains a 1-amp fuse designed to simulate the electronic resistance of the airbag. Prior to by-passing the clockspring, the airbag warning lamp in the instrument cluster on the Duster's dashboard was illuminated. After by-passing the clockspring, the airbag warning lamp in the instrument cluster was no longer illuminated, indicating the system no longer had short circuits. This proves to a reasonable degree of engineering probability that both of the short circuits discovered in the fault code scan of the ASDM occurred in the clockspring. Eliminating the clockspring from the system "fixed" these short circuit conditions."

On page #1866 in the Supplemental Affidavit of Gregory J. Barnett at paragraph #16 Mr. Barnett stated that he actually teaches other experts on how to conduct the diagnosis and repairs of airbags.

Then in paragraph #18 on page #1866 of the Record Mr. Barnett suggests that the tests run by Mr. Cassidy are "ridiculous and are only confusing to the Court":

"16. Affiant submits that he would know best what the standard in the industry would be as he actually teaches other experts on the diagnosis and repair of airbag systems.

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

At page #1865 of the Record Mr. Barnett explained in his Affidavit why the tests run by Mr. Cassidy was "ridiculous and confusing to the Court".

He states in paragraph #12 and #13 as follows:

"12. The Affidavit of Mr. Cassidy is faulty because the clockspring is not part of the front sensor circuit and so running a wire around the clockspring will indicate nothing because it is the output portion of the circuit and not the input portion of the circuit. One would need to measure from the front sensors as indicated in Exhibit A, attached hereto.

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

Hence the Trial Court had a clear question of fact preventing the granting of the Motion for Summary Judgment.

Again at page #1553 of the Record Mr. Cassidy highlights another genuine issue of material fact wherein he states in paragraph #8 as follows:

“8. Without inspecting the Duster, and in particular, without actually testing the front sensor/safing sensor electrical circuit in the matter described above, no engineer could determine the specific location of the short circuits that caused the airbag to deploy. Stated differently, an engineer would not rely upon the “front sensor” readout of the DRB II alone in determining the specific location of the short circuit in the Duster’s airbag electrical system.”

Mr. Gregory Barnett could not differ more as found on page #1603 and #1604 of the Record of his Affidavit as he states in paragraphs #7 through #11 as follows:

7. It is true that Affiant has never inspected the vehicle and it is also true that he has not inspected the Safing Sensor Circuit, however, Affiant submits that he needs to do neither one in order to conclusively establish that the clockspring was not the cause of the deployment of the airbag.

8. Affiant can conclusively state under oath that when the Safing Switch indicates a short that conclusively establishes that it was not the clockspring that caused the air bag to explode because the signals showing the Safing Switch short would have to pass through the clockspring in order to register on the scan.

9. Hence there is no need to conduct any further examination of the airbag system as shown on page 77 of Exhibit A attached hereto as when there is a Safing Sensor short the diagnostic fault codes mandate that the ASDM must be replaced, as defective.

10. Hence once the Safing Switch shorts as reflected on the scanner the same conclusively establishes that there were defective parts in the airbag system.

11. Additionally this indicates conclusively that it was not the clockspring that caused the air bag to deploy.”

Appellant submits there were clearly genuine material issues of fact that precluded summary judgment.

In paragraph 9 of Mr. Cassidy's Statement of Claims as found on page #1553 of the Record he raises additional issues of fact:

"9. When I inspected the Duster on May 9, 2001, I looked closely at the steering rack. This component was not the original equipment supplied by the vehicle manufacturer. Rather, it was an after-market part. It was also the incorrect part for this vehicle and did not fit the vehicle properly, causing the steering shaft to hit the brake pedal when turning the steering wheel. 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. This leads me to conclude, within a reasonable degree of engineering probability, 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."

Here again we have another genuine issue of material fact as found at page #1049 and #1050 of the Record in paragraphs #18 and #19 of Mr. Gregory Barnett's Affidavit wherein he states:

"18. The Mopar Auto Parts that were used to replace the parts in the subject vehicle after the 1996 deployment, are the official line of parts by Daimler Chrysler, and would not be after market parts nor used parts. Hence, the replacement parts were from the original manufacturer.

19. Hence the replacement parts used after the 1996 accident were from the original manufacturer, Daimler Chrysler."

Mr. Cassidy impeaches his own Affidavit as found at page #1553 and #1554 in paragraphs #10 and #11 as follows:

"10. In my work as Product Analysis Senior Specialist for Daimler Chrysler Corporation ("DCC"), formerly Chrysler Corporation (see my original affidavit at paragraph 2), I became familiar with the inspection

requirements and quality control procedures followed by companies who supplied parts to DCC for inclusion in DCC automobiles. All such suppliers maintained strict inspection requirements and quality control procedures which ensured that every part supplied to DCC was free from defects and complied with DCC specifications. These same vendors supplied replacement parts to DCC dealerships for use in DCC automobiles after the initial sale. These vendors followed the same inspection requirements and quality control procedures before shipping replacement parts to DCC dealerships as they followed before shipping parts to DCC for inclusion in new automobiles.

11. The clockspring which Larry H. Miller Chrysler Jeep (“Miller”) sold to Dan Worth d/b/a/ Worth’s Custom Body and Paint (“Worth Repair”) and which Worth Repair installed in the steering column of the duster was supplied to Miller by an outside vendor under contract with DCC. As such, it necessarily complied with DCC specifications and was subjected to the inspection regimen and quality control procedures of this vendor. If the clockspring had contained a defect which allowed a short circuit to occur, it would not have passed the inspection system and quality control procedures of this vendor and would not have been shipped to Miller.”

This statement is totally inconsistent with what Mr. Cassidy stated at page #462 of the Record, wherein he stated in paragraph #20 as follows:

“20. During the inspection, I observed that the Duster had undergone significant and numerous repairs to the front of the vehicle, which included, but are not limited to the following:

- Replacement of front clip sheet metal components;
- Replacement of the original equipment manufacturer (“OEM”) steering rack with an after-market steering rack;
- Replacement of the front cross member with an after-market front cross member;
- Replacement of the OEM airbag module;
- The driver side airbag had been deployed more than once; and
- Impact damage to the vehicle’s subassemblies and framing components, indicating prior impact damage.

This problem is compounded before the Trial Court because not only is Mr. Cassidy inconsistent in his statement of claims, there is a dispute as to whether or not the replacement parts were Daimler Chrysler parts.

As noted above Mr. Greg Barnett established at page #1049 and page #1050 that the parts in the Daimler Chrysler at the time the airbag wrongfully deployed were Daimler Chrysler parts.

The Trial Court had the receipts showing the replacement parts and that they were undisputedly Daimler Chrysler products as found on page #552 and following of the Record.

Appellant respectfully submits that there can be no question that there were several genuine material issues of fact that precluded summary judgment.

As noted in the Transcript of January 24, 2005, at page 26 Appellant raised these issues with the Trial Court to point out that all the Court had before it was theory.

In addition to the challenge to Mr. Michael Cassidy's "Statement of Claims", Appellant submits that the Affidavits of Gregory Barnett clearly establish how the wrongful deployment was due to Daimler Chrysler defective parts and was not caused by a defective clockspring.

The Utah Supreme Court has held that it takes only one sworn statement of disputed fact to prevent Summary Judgment. Holbrook Co. v. Adams, 542 P.2d 191 (Utah 1975).

Beginning at page #1047 of the Record Mr. Barnett states the following:

"STATE OF CALIFORNIA)

: ss.
COUNTY OF ORANGE)

GREGORY J. BARNETT being first duly sworn on his oath deposes and says that the following is true and correct to the best of his knowledge, information and belief:

1. Affiant was engaged to act as an Expert Witness for the Plaintiff in the above entitled action on or about October 30, 2003.

2. Affiant is certified as a Four Level Master by A.S.E. and has received special training in Supplemental Restraint Systems (airbags).

3. Affiant also has a Masters Degree in Engineering Management and attaches hereto his Curriculum Vitae as Exhibit A which is by this reference incorporated herein.

4. Affiant has testified in Court and has been certified as an Expert Witness at least seventeen times.

5. Affiant has actually been engaged by various manufacturers to act as an instructor regarding Supplemental Restraint Systems (airbags).

6. Affiant has been certified as an Expert Witness in the areas identified in Exhibit A in arbitrations at least thirty five times.

7. Affiant has been engaged in excess of one hundred times to act as an Expert Witness in Supplemental Restraint System cases.

8. Affiant has been engaged by the State of California to act as their Expert Witness in both Civil and Criminal Actions.

9. The subject vehicle has a built in memory in the airbag system, that records the activity of the airbag system and establishes in its built in computer what occurred to the airbag immediately before deployment.

10. This built in system is known as a Fault Code Scan, and one can merely take the said vehicle to a dealer, who have the systems from the Manufacturer to run the subject scan.

11. Affiant requested that a Fault Code Scan of the subject vehicle be performed and Affiant has reviewed the pictures showing what the scan indicated. The pictures are attached hereto as Exhibit B.

12. The Fault Code Scan Indicator shows in the subject pictures that the following occurred, at the time that the airbag exploded in the face of the Plaintiff:

- a. Front Sensor shorted out.
- b. Squib Air Bag deployed.
- c. Squib Indicator activated.
- d. Safing sensor shorted.
- e. Front sensor shorted.

13. The subject pictures show that there were multiple faults that occurred when the airbag deployed, however the pictures show that the clock spring was not defective and did not cause the airbag to deploy.

14. The pictures show that the airbag system was defective in that the Fault Code Scan reads that there was a front end collision that caused the airbag to deploy at the time that the same exploded in the Plaintiff's face.

15. The Fault Code Scan pictures show that the airbag did not deploy in September, 1999 from any problem with the clockspring, because ~~if it had caused the same, then the clockspring would show on the scan,~~ which it does not.

16. In the Supplemental Restraint Systems industry, and particularly in references to Airbags, only Dealers are allowed to have the equipment to test airbags systems. To determine from a repair stand point, after the 1996 accident, one would need to go to a dealer to have the system checked, as they would be the only ones with the requisite software and equipment to test the system. Additionally, one would have to go to a dealer with the requisite software and equipment to determine that the repairs were complete and correct.

17. As a general rule, after the repairs were made to the airbag system in 1996, only a dealer would have the OEM software equipment to "rearm" the airbag system, to make it functional and complete and safe to return to the owner.

18. The Mopar Auto Parts that were used to replace the parts in the subject vehicle after the 1996 deployment, are the official line of parts by Daimler Chrysler, and would not be after market parts nor used parts. Hence, the replacement parts were from the original manufacturer.

19. Hence the replacement parts used after the 1996 accident were from the original manufacturer, Daimler Chrysler.

20. The airbag system on the subject vehicle is designed to take a significant blow to the front of the subject vehicle before the airbag deploys, which is more than a mere fender bender, but the kind of impact that would cast the driver into the windshield. The damage to the vehicle would be a destroyed front bumper and damage to hood and grill at a minimum.

21. The clockspring is a sealed unit, and comes in and out of the vehicle as a packaged part, and one would have to break the seal of the packaged clockspring in order to damage any part of the insides of the clockspring when disassembling the subject vehicle.

22. If the clockspring had contributed to the deployment of the airbag, the same would have occurred immediately after the Plaintiff took possession of the subject vehicle in 1996, as the same would have deployed upon a U-turn or other sharp turn of the steering wheel.

23. According to the pictures attached hereto as Exhibit B, it is apparent that there were defective parts in the subject vehicle that caused it to deploy in 1999.

24. Defective repairs were a contributing factor to the airbag deploying in 1999. The defective repairs include the work performed immediately after the 1996 accident as well as repairs made after each accident in which the vehicle was in between 1996 and the time of deployment.

25. In my expert opinion both defective parts and defective repairs were contributors to the deployment of the airbag in 1999.

26. The defective repairs and the defective parts were the proximate causes of the airbag deploying in the Plaintiff's face in September of 1999.

27. The air bag is designed to explode in the driver's face upon a severe frontal impact of the car at 50 milliseconds from the time of impact and hits the driver of the vehicle at approximately 200 miles per hour.

28. The air bag system was clearly unreasonably dangerous due to the defects as described above.

Dated this 1 / day of November, 2003.

/s/ Gregory J. Barnett
GREGORY J. BARNETT

Subscribed and sworn to this 1 / day of October, 2003.

/s/ Marice R. Santos
NOTARY PUBLIC

Residing in Orange County, California

My commission expires June 3, 2005 ”

In the Supplemental Affidavit of Gregory Barnett as found at page #1602 of the Record Mr. Barnett established questions of fact regarding the standard of the industry regarding the diagnosis and repair of airbags; how the clockspring could not have been the cause for the wrongful deployment; how the tests run by Mr. Cassidy were ridiculous; and how Mr. Barnett had been misquoted in his deposition, etc.

Beginning at page #1602 is the following:

STATE OF CALIFORNIA)
 : ss.
COUNTY OF ORANGE)

Gregory J. Barnett being first duly sworn on his oath deposes and says that the following is true and correct to the best of his knowledge, information and belief.

1. Affiant signed an Affidavit in the above entitled action on or about November 1, 2003, and by this reference Affiant incorporates each and every paragraph and statement contained therein and by this reference each of these is made a part of this Supplemental Affidavit.

2. Attached hereto is Exhibit A which is the manual for the airbag system for the Daimler Chrysler Duster which is the subject of this action.

3. These pages are part of the official publication of the Air Bag Service and Repair Manual which is used by the industry and relied on everyday from coast to coast all across America in diagnosing and repairing air bag systems.

4. Affiant has actually used this manual when he has acted as an instructor for various manufacturers regarding Supplemental Restraint Systems (air bags).

5. Affiant submits that this specific manual and/or the information contained therein is used nationwide for air bag service and repair.

6. Affiant has reviewed the MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DAIMLER CHRYSLER CORPORATIONS AND LARRY H MILLER CHRYSLER JEEP'S RENEWED MOTION FOR SUMMARY JUDGMENT and submits that many of the representations regarding Affiant's deposition are misstated and most misleading.

7. It is true that Affiant has never inspected the vehicle and it is also true that he has not inspected the Safing Sensor Circuit, however, Affiant submits that he needs to do neither one in order to conclusively establish that the clockspring was not the cause of the deployment of the airbag.

8. Affiant can conclusively state under oath that when the Safing Switch indicates a short that conclusively establishes that it was not the clockspring that caused the air bag to explode because the signals showing the Safing Switch short would have to pass through the clockspring in order to register on the scan.

9. Hence there is no need to conduct any further examination of the airbag system as shown on page 77 of Exhibit A attached hereto as when there is a Safing Sensor short the diagnostic fault codes mandate that the ASDM must be replaced, as defective.

10. Hence once the Safing Switch shorts as reflected on the scanner the same conclusively establishes that there were defective parts in the airbag system.

11. Additionally this indicates conclusively that it was not the clockspring that caused the air bag to deploy.

12. The Affidavit of Mr. Cassidy is faulty because the clockspring is not part of the front sensor circuit and so running a wire around the clockspring will indicate nothing because it is the output portion of the circuit and not the input portion of the circuit. One would need to measure from the front sensors as indicated in Exhibit A, attached hereto.

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

14. Any physical inspection or examination of the subject vehicle is not necessary once the Safing Switch short is detected on the scanner, as this conclusively establishes that there are defective parts in the ASDM module. This combined with the "Squib Air Bag deployed" conclusively establishes that the clock spring did not cause the air bag to explode into Plaintiff's face and abdomen.

15. As noted on pages 75, 76 and 77 attached hereto Mr. Barnett's opinions rely upon the types of facts or data which automotive engineers would reasonably rely as they are based expressly upon the standard in the industry, ie: the Air Bag Service and Repair Manual for the 1993 Domestic and Imported Models.

16. Affiant submits that he would know best what the standard in the industry would be as he actually teaches other experts on the diagnosis and repair of air bag systems.

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

18. Affiant submits that he need to do no further examination of the airbag system to determine that there were defective parts that caused the airbag to deploy as the scanner is what any competent mechanic would use to determine the problems in the air bag system.

19. In the Affiant's Deposition at pages 29 and 30 he stated the following:

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

A. Okay. Now, what it's talking about is, the front sensor is also known as a discriminating sensor, and there are two of them – one on the left and one on the right, mounted to the core support of this particular type of vehicle

Q. All right. Does it mean anything else 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 is, 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 it is 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, 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.

20. This statement is totally consistent with my prior Affidavit of November 1, 2003 and this Affidavit because if you are performing diagnostics on a non-deployed SRS system and the system shows this fault code, further diagnostics on the circuit are performed. If the system deployed, diagnostics are not performed as the part is automatically discarded. There is no reason to perform any diagnostics on a part which needs to be replaced. However, if one wishes to see if one or both front sensors are good or bad, the part must be physically inspected.

21. In the Affiant's Deposition at pages 36 he stated the following

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 air bag deployed?

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

Q. So that's inconclusive, then?

A. That's correct.

22. This statement is totally consistent with my prior Affidavit of November 1, 2003 and this Affidavit because computer modules can set false codes. The length of time from when the code was set can not be determined. However, a front sensor code will cause the dash icon to illuminate. If dash icon is illuminated, SRS system should not deploy.

Dated this 24th day of November, 2004.

/s/ Gregory J. Barnett
GREGORY J. BARNETT

Subscribed and sworn before me on this 24th day of November, 2004.

/s/ Eva De La Torre
Notary Public

Residing at: Costa Mesa, California

My commission expires: October 14, 2008

Again at page 1956 of the Record Mr. Barnett in his Second Supplemental Affidavit clearly established questions of fact in reference to the Official Daimler Chrysler Manual; how the built in computer in the Duster was state of the art; how the Defendants have failed to show why the computer was wrong and how the clockspring could not possibly have caused the wrongful deployment.

Beginning at page #1956 of the Record is the following:

“STATE OF CALIFORNIA)
 : ss.

COUNTY OF ORANGE)

Gregory J. Barnett being first duly sworn on his oath deposes and says that the following is true and correct to the best of his knowledge, information and belief.

1. Affiant signed an Affidavit in the above entitled action on or about November 1, 2003, and by this reference Affiant incorporates each and every paragraph and statement contained therein and by this reference each of these is made a part of this Second Supplemental Affidavit.

2. Affiant signed an Affidavit in the above entitled action in November, 2004, and by this reference Affiant incorporates each and every paragraph and statement contained therein and by this reference each of these is made a part of this Second Supplemental Affidavit.

3. In response to the Memorandum and the Affidavit filed by the Plaintiff herein, the Defendants submitted the Second Supplemental Affidavit of Michael P. Cassidy.

4. Attached to the Second Supplemental Affidavit of Michael P. Cassidy, is Exhibit F.

5. Exhibit F, is represented to be the official "BODY DIAGNOSTIC PROCEDURES" manual for the "DRIVER SIDE", "AIR BAG SYSTEM".

6. At page 30 of Exhibit F, the Test begins at the top as follows:

- a. Start test 4A
- b. With the DRBII read active codes.
- c. Does the DRBII show "Safing Sensor open" and/or "Safing Sensor short"? (if Yes, then)
- d. Perform Test 13A

7. Hence, according to the Official Manual put out by Defendant Daimler Chrysler, the technician is to "Perform Test 13A"

8. Test 13A on page 75 provides the following:

- a. Start Test 13A
- b. Warning: Make sure the battery is disconnected before proceeding.
- c. Replace the Air Bag System Diagnostic Module (ASDM). * Figs. 1, 2 and 3.

9. Hence, according to the official Daimler Chrysler "Body Diagnostic Procedures" manual **submitted by the Defendant herein**, when the code reads

“Safing Sensor open” and/or “Safing Sensor short” one is required to “REPLACE THE AIR BAG SYSTEM DIAGNOSTIC MODULE” as defective.

10. Affiant submits that Daimler Chrysler’s own manual conclusively establishes that when you have the readings as outlined in the prior Affidavits and in the Affiant’s Deposition, you every time “Replace the Air Bag System Diagnostic Module” as defective.

11. Affiant submits that the references to the Deposition regarding the front end sensors, regarding claims of inconsistency are without merit because they are all taken out of context.

12. The air bag industry, and Defendant Daimler Chrysler specifically in this case have developed through the years a program to install, maintain and repair air bags.

13. Here the system entails a computer designed and installed by Daimler Chrysler to establish universally what is defective in their airbag system.

14. Defendants experts suggest that the Dusters computer malfunctioned yet have provided not even a shred of evidence to support the same.

15. Every dealer across the nation when finding the computer read out would conclude that there was a defective module.

16. This is conclusively established by the Defendants own manual attached as Exhibit F to the Reply Memorandum.

17. Affiant submits that the most glaring problem with the Clockspring theory maintained by the Defendants is that no matter how bad the Clockspring was electronically the same can not cause the various readings on the Dusters computer.

18. Hence the Clockspring theory maintained by the Defendant has no merit because the readings on the Dusters computer would not read as they do had it been the Clockspring that malfunctioned.

Dated this 7/ Day of January, 2005.

/s/ Gregory Barnett
GREGORY BARNETT

Subscribed and sworn before me on this 7/ day of January, 2005.

/s/ Eva De La Torre
Notary Public

Residing at: Costa Mesa, California

My commission expires: October 14, 2008 ”

Appellant submits that Summary Judgment can only be granted when it clearly appears that there are no issues of material fact in dispute, which if resolved in favor of the Plaintiff would entitle her to recovery. University Club v. Invesco Holding Corp., 29 Utah 2d 1, 504 P.2d 29 (1972). Also note Snyder v. Merkley, 693 P.2d 64 (Utah 1984).

ARGUMENT FOUR

IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO CONSIDER DEFENDANTS' AFFIDAVIT FILED AS PART OF THEIR REPLY MEMORANDUM

In this action the Defendant filed a Second Supplemental Affidavit of Michael P. Cassidy as part of their Reply Memorandum.

This Second Supplemental Affidavit stated new facts that had not been raised in either of the prior Motions for Summary Judgment.

Mr. Cassidy claimed that he had conducted specific tests on the alleged defective parts and found them to be defective free.

At the time of the hearing on January 24th, 2005, at pages #13 and #14 of the Transcript, Counsel for the Appellant moved to strike the same as being in violation of the rules as well as being inherently unfair.

Beginning at page #13 of the said Transcript is the following:

MR. WALSH: Your Honor, let me get to the bottom of our position and show you the question of fact and then I can answer whatever questions you may have of me. I think it's, first off, important that I move to strike the affidavit of Michael Cassidy filed after our response. We filed our

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

The Trial Court did not only not strike the Affidavit of Michael Cassidy the Court found the Affidavit to be the basis for granting the Summary Judgment as noted on page #44 and #45 of the Transcript of January 24th, 2005.

The "ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT" expressly states that the grounds for granting the same were based on the SECOND SUPPLEMENTAL AFFIDAVIT OF MICHAEL P. CASSIDY, which states at page #1982 of the Record as follows:

"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.

It is important to note that Rule 56 of the Utah Rules of Civil Procedure expressly provides that the Code of Judicial Administration Rule 4-501 is controlling.

The first sentence of Rule 56(c) states, "The motion, memoranda and affidavits shall be filed and served in accordance with the CJA 4-501..."

Appellant submits, that given the opportunity, Appellant's expert would show that the tests claimed by the Respondent that show the parts were not defective was not an appropriate test.

At page #1642 of the Record states that the tests administered to the two sensors was the "same type of test conducted on new sensors as they come off the assembly line."

Appellant submits that such a test is obviously inappropriate.

Hypothetically, consider an older car having a short in the electrical system with the power shorting out unpredictably from time to time. The owner takes the car to the mechanic when there is no short, and the mechanic submits the electrical system to a test and finds there is no short.

The conclusion reached then would show conclusively that there was no short in the system.

In a nutshell Defendant filed a two Motions for Summary Judgment and never submitted any evidence regarding the testing of the component parts.

Plaintiff responded to each of the said Motions with both memoranda and affidavits.

After all of the above Defendant submits an Affidavit suggesting that the specific components had been individually tested and the same allegedly showed that the said components were not defective.

Plaintiff timely objected to the same and moved to strike the same.

The Trial Court, notwithstanding, concluded that the Defendant was entitled to summary judgment all based upon the untimely Affidavit as un rebutted.

Appellant submits that the tests allegedly run on the individual components is per se invalid, in addition to the Affidavit being untimely and inherently unfair.

Appellant respectfully submits that it was reversible error for the Trial Court to grant the Summary Judgment, in violation of the above stated rules.

Since Summary Judgment is a drastic remedy strict requirements to the rules regarding the same must be followed. Timm v. Dewsnup, 851 P.2d 1178 (Utah, 1993).

The Trial Court should not grant Summary Judgment unless it can hold as a matter of law that the Plaintiff could not produce evidence that would support a finding in their favor on any material issue of fact. Billings v. Union Bankers Ins. Co., 819 P.2d 803 (Utah, 1991), Krantz v. Holt, 819 P.2d 352 (Utah 1991), Bridge v. Backman, 10 Utah 2d 366, 353 P.2d 909 (1960).

The appellate Courts have routinely held, in particularly in the Summary Judgment context that both sides should be given a complete opportunity to present evidence to support their claims. Drysdale v. Ford Motor Co., 947 P.2d 678 (Utah 1997).

Since Summary Judgment denies the non moving party of her day in Court the moving party must show that they are entitled to judgment as a matter of law, and such showing must preclude all reasonable possibilities that the Plaintiff, if given a trial, could produce evidence which would support a judgment in her favor. Bullock v. Desert Dodge Truck Ctr. Inc., 11 Utah 2d 1, 354 P.2d 559 (1960).

In fact the showing must rise to the level that Defendant precludes as a matter of law the awarding of any relief to the Plaintiff. Tanner v. Utah Poultry & Farmers Coop.,

11 Utah 2d 353, 359 P.2d 18 (1961). Also note FMA Acceptance Co. v. Leatherby Ins. Co., 594 P.2d 1332 (Utah 1979).

The Defendant would have to show that there was no reasonable possibility that the Plaintiff could prevail at trial. Judkins v. Toone, 27 Utah 2d 17 492 P.2d 980 (1970). Frederick May & Co. v. Dunn, 13 Utah 2d 40,368 P.2d 266 (1962). Also note Reliable Furniture Co. v. Fidelity & Guar. Ins. Underwriters, 16 Utah 2d 211, 398 P.2d 685 (1965).

CONCLUSION

Appellant respectfully submits that it was reversible error for the Trial Court to grant the Summary Judgment when it held that it was the Daimler Chrysler Computer as the defective part instead of the Daimler Chryslers Sensors being defective.


Additionally, Appellant submits that it was reversible error to prevent the Plaintiff's expert from doing additional testing and then holding against the Plaintiff for failing to do additional testing.

There were clearly questions of material fact and the Court should not have allowed the Defendants to submit a new Affidavit in their Reply Memorandum.

RELIEF SOUGHT

Appellant requests that this Court reverse the Trial Court and remand the matter to the Trial Court for a Jury Trial on the merits.

Respectfully submitted this 24th day of August, 2005.




JOHN WALSH
ATTORNEY AT LAW

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed two true and correct copies of the foregoing BRIEF OF THE APPELLANT to the Defendants-Appellees, by mailing the same to PETER F. JONES, HALL & EVANS, L.L.C., 1125 17TH STREET, SUITE 600, DENVER COLORADO, 80202.

Dated this 24th day of August, 2005.



JOHN WALSH
ATTORNEY AT LAW

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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

Eugene 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

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

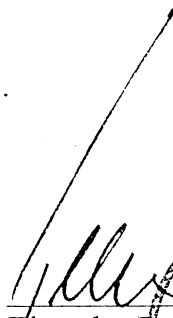
1. Plaintiff has identified one expert witness, Gregory Barnett, to testify against Defendants on all liability issues.

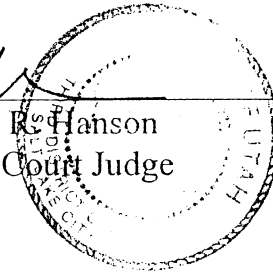
2. Plaintiff's only identified expert witness related to liability has not inspected the subject vehicle nor any components of said vehicle, which at any time existed on the subject vehicle. Mr. Barnett has based his opinions in this matter solely upon review of a videotape of an inspection of certain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

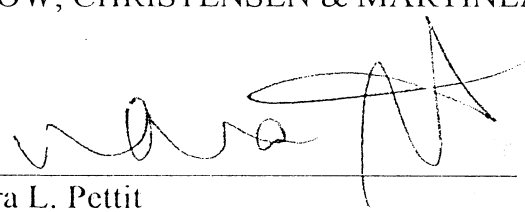


APPROVED AS TO FORM:

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