

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2009-CA-01815

KELLY GRANT, Individually and as Personal  
Representative of the Estate and Heirs-at-Law  
and/or Wrongful Death Beneficiaries of  
MAKAYLA MAGGARD, Deceased, a Minor

APPELLANT

v.

FORD MOTOR COMPANY

APPELLEE

Appeal from the Circuit Court of Clarke County, Mississippi

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**BRIEF OF APPELLEE**  
**FORD MOTOR COMPANY**

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**ORAL ARGUMENT NOT REQUESTED**

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**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Kelly Grant, plaintiff/appellant;
2. Estate, heirs, and wrongful death beneficiaries of Makayla Maggard, deceased, a minor, plaintiffs/appellants, through personal representative Kelly Grant;
3. Stacey Lea Sims of Morris, Sakalarios & Blackwell, PLLC, Hattiesburg, Mississippi, counsel for plaintiff/appellant;
4. Ford Motor Company, defendant/appellee;
5. Walker W. Jones, III, Cable M. Frost, Everett E. White, of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Jackson, Mississippi, counsel for defendant/appellee; and
6. Michael B. Wallace and Rebecca Hawkins of Wise Carter Child & Caraway, P.A., Jackson, Mississippi, counsel for defendant/appellee.

This, the 3<sup>rd</sup> day of June, 2011.

  
\_\_\_\_\_  
Michael B. Wallace

## STATEMENT REGARDING ORAL ARGUMENT

The Circuit Court of Clarke County, the Honorable Lester F. Williamson, Jr., presiding, dismissed Kelly Grant's wrongful death action for failure to present admissible evidence on multiple indispensable elements of her claim. Grant's brief on appeal wholly fails to establish that she raised a genuine issue of material fact on any of these essential elements, much less all of them.

Crucially, the Court excluded, for two separate reasons, the opinion of Grant's proffered expert on biomechanics, who sought to explain how the fatal injuries to Grant's infant daughter actually occurred. The Court found that the witness was not qualified to offer an expert opinion and that the opinion he offered was not sufficiently reliable to be admitted. Grant offers no reason to believe that any further discovery would have overcome either of these defects. On this dispositive issue, her appeal borders on being frivolous, within the meaning of M.R.A.P. 34(a)(1).

The other issues Grant raises are adequately addressed in the briefs, and the decisional process would not be aided by oral argument, within the meaning of M.R.A.P. 34(a)(3). Oral argument should therefore be denied.

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## STATEMENT OF THE CASE

### I. Nature of the case

In this products liability action, Kelly Grant sued Ford Motor Company, 1:9,<sup>1</sup> alleging that defects in her two-door 1996 Ford Probe (which had previously been flooded, wrecked, totaled, salvaged, and rebuilt<sup>2</sup>) caused her three-year-old daughter, Makayla Maggard, to suffer a fatal head injury when the vehicle was broadsided from the left by Doris Riley, who ran a stop sign as Grant was driving down Highway 45 at 60 to 70 miles per hour. 3:426, 7:925, 7:938, 4:504, R.E.4, 13:1916, 17:2414.

After the Circuit Court of Clarke County, the Honorable Lester F. Williamson, Jr., presiding, found that Grant's sole expert, Dr. Charles W. Benedict, was not qualified to present testimony in the area of biomechanics and that his opinions as to biomechanics, structural integrity, and the restraint system were unreliable and should thus be excluded, 12:1680-96, R.E.12, Ford moved for summary judgment, 10:1421-26, which the Circuit Court granted, 11:1636, R.E.16.

### II. Course of the proceedings

Grant filed this action in 2002. 1:9. In addition to Ford, she also sued Doris Riley, who settled, and various companies allegedly responsible for the child seat in which Makayla was

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<sup>1</sup> The record is cited as follows: "[volume]:[page(s)]." The Record Excerpts of Appellant are cited as "R.E.[tab number]." Ford's record excerpts are cited as "F.R.E.[tab number]."

<sup>2</sup> Ford sought summary judgment due to evidence that the Probe, before Grant's accident, had been flooded, wrecked (at least twice), rebuilt and then reintroduced into the stream of commerce. 12:1726-13:1930. Title documents show the Probe was a salvage vehicle that had been rebuilt with used and possibly aftermarket parts; both parties' experts had found repair filler on the rear quarter panel from another wreck; and there was rust damage from a previous flood. *Id.* Ford thus submitted that Grant could not prove that "no material change in that product occurred after leaving the manufacturer's control." *Wolf v. Stanley Works*, 757 So.2d 316, 319 (Miss. App. 2000). *See also* MISS. CODE ANN. § 11-1-63(a) (manufacturer not liable "if the claimant does not prove by the preponderance of the evidence that at the time the product left the control of the manufacturer or seller ... [t]he product was defective"). The Circuit Court, however, denied this motion, 8:1132-B, due to a "dispute as to the materiality of changes to [Grant's] Ford Probe subsequent to its manufacture." 8:1132-A.

sitting at the time of the accident,<sup>3</sup> 1:9-17, but these other defendants were also voluntarily dismissed. 1:3.

**A. Benedict's opinions**

The docket reflects little activity in the remainder of 2004, 2005, and most of 2006. 1:2-8. In November, 2006, a scheduling order was entered requiring Grant to submit information regarding her expert witnesses by April, 2007. 1:99. She thereafter supplemented her interrogatory responses by naming Dr. Charles W. Benedict ("Benedict") in Tallahassee, Florida, as the witness to support her allegation that, "[w]ith respect to side integrity, the vehicle is completely uncrashworthy" because "[t]he B-pillar<sup>4</sup> was not strong enough, the geometry of the restraints was compromised, and the door should not have been ripped from its hinges," and "[t]he seatbelt that held the Evenflo carseat inside the vehicle was compromised." 1:103. According to Grant, alternative designs included "the use of better metal, a stronger B-pillar, more welds to the frame of the vehicle." 1:103-04.

In April of 2007, Grant submitted her designation of expert witnesses, 1:120-24, R.E.2, and stated that Benedict was to testify as to "[a]ccident reconstruction," "[v]ehicle crashworthiness," and "[r]estraint systems," 1:137. The attached summary stated little more than that the vehicle's restraint system did not restrain the car seat and thus was inherently defective and unreasonably dangerous, and that the vehicle itself was also "inherently defective and unreasonably dangerous in that it did not adequately protect its occupant as it should have in a collision of this magnitude." *Id.*

In August of 2007, Grant again supplemented her interrogatory responses, 4:497-500, R.E.4, and this time attached a July 27, 2007, report by Benedict. 4:501-05, R.E.4. In that

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<sup>3</sup> Two of those companies later filed for bankruptcy and then removed the case to federal court. 1:42-43, 1:70-92. The federal court, however, remanded the action in the spring of 2004. 1:93-97.

<sup>4</sup> The B-pillar is the post in front of the back side window in this two-door vehicle. *See* 12:1722.

report, Benedict stated his conclusions, “[b]ased on the ... facts and [his] education, training and experience,” 4:504, R.E.4, that the design of the door hinges was defective, the design and manufacturing of the spot welding was defective, and the design of the seatbelt for the left rear seat, where Makayla’s child seat was located, was defective. *Id.* According to Benedict, the B-pillar separated from the roof and rocker panel<sup>5</sup> and came into contact with Makayla in the back seat, causing her fatal injuries. 4:505, R.E.4. In his opinion, but for the combination of the seatbelt’s releasing during the accident and the failure of the door hinges and spot welds, Makayla “would not have sustained the injuries which led to her death.” *Id.*

Ford attempted to flesh out Benedict’s opinions at his deposition in June of 2008. 7:946-1046, R.E.5. He confirmed that he would offer testimony as to accident reconstruction and alleged defects as to structural integrity and the seat restraints, and stated that he would also offer opinions on “the injury mechanism with respect to Makayla,” *i.e.*, biomechanics. 7:947-48, 7:980, R.E.5 at 8-10, 138. As explained hereafter in Section II.B of the Statement of the Case, Benedict later attempted, unsuccessfully, to supplement his opinions, almost a year after the close of discovery and barely three months before trial. Importantly, however, Benedict offered no new opinion on biomechanics.

### **1. Biomechanics**

Benedict testified that his formal training and education in biomechanics consisted of one project he worked on with a professor some forty years earlier while getting his engineering degree,<sup>6</sup> that he did not take any courses in the area, but that he had taught one-day courses four

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<sup>5</sup> The rocker panel is “the portion of the body paneling of a vehicle that is situated below the doorsills of the passenger compartment.” *See* [www.merriam-webster.com/dictionary/rocker+panel](http://www.merriam-webster.com/dictionary/rocker+panel); 7:926.

<sup>6</sup> Benedict received his undergraduate degree in engineering in 1968, his master’s in 1969, and his doctorate in 1971. 1:125.

times at Lynn University as a visiting instructor.<sup>7</sup> 7:981-82, R.E.5 at 144-45. He has published no articles in the area. 7:982, R.E.5 at 145.

Benedict believed that the forces during the accident pushed the B-pillar, which had come loose due to the alleged failure of the door hinges and spot welds,<sup>8</sup> to go past the car seat initially,<sup>9</sup> towards the rear of the vehicle, but then, as the accident forces diminished, to rebound. 7:1032, R.E.5 at 337-39. This same diminution of forces is what, in his opinion, caused the seatbelt to release, and the car seat then rotated to the left and caused Makayla to be hit in the head by the B-pillar as it was rebounding. *Id.* According to Benedict, Makayla's fatal head injuries resulted from this contact with the B-pillar and, but for the disintegration of the side of the vehicle due to the alleged failure of the hinges and welds combined with the alleged defect of the seatbelt, then Makayla would not have suffered "any injuries of any significance at all." 7:1035, R.E.5 at 351.

Benedict did not review all of Makayla's medical records but had a biomedical engineer and a videographer in his office give him reports. 7:961-62, R.E.5 at 62-65. Nor did he take any measurements of the Probe vehicle to substantiate his theory.<sup>10</sup> Specifically, he did not measure the distance from the car seat to the interior trim, 7:1033, R.E.5 at 342; the depth of the crash intrusion from the other vehicle, 7:994, R.E.5 at 194-95; or how far the B-pillar had to travel to contact Makayla or the distance between Makayla's head and the interior trim, B-pillar, or any

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<sup>7</sup> In an affidavit he filed later in the case, Benedict stated he had taught this course three times. 9:1310, R.E.7 at ¶ 10.

<sup>8</sup> According to Benedict, once the hinges broke, the car door "accordioned" back into the rocker panel and B-pillar, and this caused welds in the rocker panel to come undone, or "unzipped," and the B-pillar to be loosened from both the rocker panel and roof. 7:989, 7:994, R.E.5 at 175, 196.

<sup>9</sup> Makayla was in a car seat in the rear of the vehicle on the driver's side, 1:32, which was the primary point of impact. *See* 12:1720-22, F.R.E.3.

<sup>10</sup> Benedict had both the subject vehicle as well as an exemplar Probe vehicle for use in developing his opinions. 7:960, 7:1002, R.E.5 at 57-58, 225.

other component in the Probe, 7:1033, R.E.5 at 342.<sup>11</sup> Nor did he calculate the forces necessary to cause the type of brain injury that Makayla received, 7:1037, R.E.5 at 359, or the force that the B-pillar generated, after the diminution of the initial force of the crash, when it allegedly “sprang back” and hit Makayla on the rebound, 7:1032, R.E.5 at 340. Benedict said he could “probably” calculate the force needed to cause an injury such as Makayla’s, but he did not think this was “necessary” “[b]ecause she got the injuries in the accident.” 7:1037, R.E.5 at 359. Although he said he could do some research regarding what types of forces are necessary for various kinds of injuries, Benedict summed up his scientific analysis of Makayla’s injury by stating, “[t]he fact of the matter is, she got whacked in the head and she had a brain injury.” 7:1037, R.E.5 at 360.

## 2. Seatbelt

As for the seatbelt, Benedict started from the premise that it must have come unlatched during the accident because he believed Grant’s deposition testimony that she had properly latched it around the car seat, 7:1029, R.E.5 at 327-28, and another witness had stated that, after the accident, the seatbelt was not latched. Benedict admitted that the witness had also stated that he was not sure of that fact, but, in Benedict’s opinion, this resulted from “browbeating” by Ford’s counsel. 7:1006, 7:1026-27, R.E.5 at 243, 316-17.

Benedict surmised that the forces in the collision caused the retractor on the seatbelt to move backward, thereby loading, or putting tension on the belt itself, which would also pull the

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<sup>11</sup> Ford’s accident reconstructionist had measured eight inches of deformation at the base of the B-pillar, 17:2416, and Ford’s biomechanics expert, after reviewing Makayla’s CT scans and noting the type of brain injury she suffered as well as taking measurements of an exemplar surrogate in the car seat in the Probe, noted that this amount of intrusion would have caused Makayla’s head to have “contacted the interior trim by the left rear seating position just behind the left B-pillar approximately 60 ms after the initial contact by the Camry.” 17:2418. *See also* 12:1720, F.R.E.3. Moreover, if Grant had steered right to avoid the approaching vehicle, as she had testified in her deposition, this would have placed Makayla’s head even closer to the left side interior. *Id.*

He disagreed with Benedict’s theory that the B-pillar caused the brain injury because, had that been the cause of her injury, she would have likely had a depressed fracture, but she had no fractured bones in her head or skull. Rather, “[t]he broad area of swelling on the left face/head and the lack of any fractures is consistent with Mistress Makayla Maggard’s head hitting a flat compliant surface, not the B-pillar in the area of the D-ring.” 17:2419.

latch plate back. 7:1008, R.E.5 at 249-51. When those forces dissipated after the duration of the collision cycle, which he felt “looked like it was about a tenth of a second,” then the latch plate of the belt would rebound “down into the slot” and would at that point push down the release mechanism, or ejection spring, causing the seatbelt to unlatch.<sup>12</sup> *Id.* Benedict stated that this was “an inertial unlatch.” *Id.* He also stated that while most inertial unlatch testing that is done addresses upward forces, the latch plate in this case was actually subjected to a downward force. 7:1018, R.E.5 at 281.

As to what sort of testing he had done to support this theory, Benedict said that he “pushed the latch plate down as far as it would go”; the release button “went down with it.” 7:1020, R.E.5 at 291-92. He then “held the button in that position, snatched on the latch plate and it came out.” *Id.*

Other than snatching the latch plate out while holding down the release button, Benedict had conducted no tests, even though he had obtained exemplar belts and buckles “[i]n case we wanted to do any testing.” 7:1020-21, R.E.5 at 289-94. *See also* 7:1026, R.E.5 at 314. He also testified that he was not relying on any other testing done by himself or others. 7:1021, R.E.5 at 293-96. He had not conducted any tests or done any calculations to determine the amount of force required for the unlatch to occur as he described it. 7:1018-19, R.E.5 at 284-85. As summarized by Benedict:

I haven’t done any dynamic speed calculations or force calculations. And I haven’t measured the static force required for the latch plate to push the, push the spring down.

7:1019, R.E.5 at 285.

Finally, Benedict also testified that he did not know of any studies or papers discussing

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<sup>12</sup> Although Benedict initially referred to the latch plate actually pushing the release button itself down, *id.*, he later clarified that the latch plate does not actually push down the release button, but rather “pushes down on the same mechanism that the button pushes down on.” 7:1010, R.E.5 at 257.

the rebound unlatch situation that he described. 7:1021-22, R.E.5 at 296-97.

### 3. Structural integrity

Benedict's opinions regarding structural integrity focused on two areas—the door's hinges and the spot welds on the driver's side door.<sup>13</sup>

#### a. Hinges

In Benedict's opinion, the door hinges were defective because they "fail[ed] due to foreseeable forces such as those imparted in this accident ...." 4:504, R.E.4. He contended that Ford should "beef them up until they are strong enough to withstand foreseeable forces." 7:992, R.E.5 at 187. However, Benedict admittedly did not quantify the forces in this accident, nor had he done any testing to support this opinion. 7:992, 7:1001, R.E.5 at 187-88, 221-22. Nor did he know what material the hinges and related components were comprised of, 7:993, R.E.5 at 189-91, even though, as noted above, he had access to both the subject vehicle and an exemplar.<sup>14</sup>

On the day of his deposition, Benedict did have someone measure the thickness and width of the door hinge area, and he did a calculation to determine that the pin would shear at 1,125 pounds of rearward force. 7:985, 7:992, R.E.5 at 159-60, 185-86. He had not done these measurements previously because he "forgot to, really" but had done "an estimate." 7:991, R.E.5 at 182. This calculation was based on an assumption that the steel at issue was 50,000 PSI, although he did not know whether that was what Ford used or not. 7:993, R.E.5 at 190. He also believed that the force must have been less than 5,000 pounds because of his view of the

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<sup>13</sup> With regard to both of these areas, Benedict repeatedly cited his lack of access to design documents and specifications from Mazda, the lead design engineer on this particular vehicle, to argue that he was not able to calculate or determine certain information without the data from those documents. 7:966, 7:993, 7:1000-02, R.E.5 at 84, 189, 217-21, 223-25. See Section II.C of the Statement of the Case, *infra*.

<sup>14</sup> When it was pointed out that some of the information he said he needed regarding the bolts and thread size could have been taken by looking at those still in the unwrecked side of the subject vehicle, Benedict again stated that he would at least need the design documents in order to know the type of metal and its hardness or strength. 7:993, R.E.5 at 190-91.

webbing of the seatbelt; he stated that the webbing is required to withstand 5,000 pounds of force and it had not broken in this accident. 7:985-86, R.E.5 at 159-61.

He could not say how much bigger the hinges would have to be so as not to be defective, 7:1002, R.E.5 at 225, but he did think that the Probe hinge should have been as big as the hinge in his Mercedes, which he could tell was “much stronger, because [he] looked at it.” 7:1001, R.E.5 at 222.

**b. Spot welds**

With regard to the welds on the driver’s side of the Probe, Benedict’s report stated only that “[t]he design and manufacturing of the spot welding [was] inherently defective and unreasonably dangerous because these spot welds failed and the sheet metal tore in this foreseeable accident.” 4:504, R.E.4. At his deposition, he stated that, without the design drawings, he could not “compare what’s on the car to what was supposed to be on the car,” but nevertheless stated that “there is not near enough” welds and that “some of the welds are pretty poor” or “really bad.” 7:966, R.E.5 at 84. In his opinion, “[i]t is just crappy welding.” 7:990, R.E.5 at 178. *See also* 7:1001, R.E.5 at 221 (Benedict refers to welds as “cheesy”).

Benedict agreed that there are some forces that would rip through any weld, but felt these welds should have held up to the “minor” forces at issue in this accident.<sup>15</sup> 7:989, R.E.5 at 175. He had no opinion as to how many welds would prevent the portion of the vehicle from being torn loose in this accident because he had not “done the calculations” and, in fact, could not do the calculations because he did not “have the program to do that.” 7:995, R.E.5 at 199.

Benedict had no idea what type of metal was used in the vehicle, although he opined that “it looks like recycled stuff,” 7:996, R.E.5 at 201, nor could he say what type of metal should be

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<sup>15</sup> Of course, as discussed, Benedict had not actually calculated the forces in this accident. Notably, both vehicles suffered significant damage. 7:938, 12:1721, F.R.E.3.

used as he had done no calculations as to the forces at play in an accident such as this, nor did he think he needed to. 7:996, R.E.5 at 203-04. As for what types of welds he thought should have been used, he stated that he would have used seam welding, although he had done no testing or analysis to determine the amount of strength this would have added. 7:998, R.E.5 at 210.

**B. Exclusion of certain of Benedict's opinions**

Several months later, after the close of discovery and with a trial date approaching, Ford moved under M.R.E. 702 and *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), to exclude Benedict's testimony as to biomechanics, the seatbelt, and structural integrity. 8:1160-9:1206, 13:1931-17:2419. A hearing was set for the Tuesday after Memorial Day. 18:51. On the preceding Wednesday, Grant submitted responses to each of the three motions which included affidavits from Benedict with over 500 pages of attachments in addition to electronic data containing videos and other materials.<sup>16</sup> 9:1214-10:1388, R.E.6-8, 10:1469, 18:51.

Ford immediately objected to these materials in a letter to the Court, copied to Grant's counsel, because much of the information contained in Benedict's affidavits was "neither provided nor identified through Dr. Benedict's expert designation and report and were not disclosed or referenced during the course of Dr. Benedict's two day deposition," and this constituted "improper and untimely submission of supposed expert testimony."<sup>17</sup> 10:1469-70. The Court agreed to cancel the hearing to give itself more time to review these new materials, 18:51-52, and the hearing was re-noticed for June 11, 2009. R.E.9.

On June 8, 2009, Ford submitted its motion to strike Benedict's affidavits. 10:1410-11,

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<sup>16</sup> Much of the over 500 pages of attachments was not included in the e-mail received by Ford's counsel containing the affidavits but were on the disk which was not received until days later. 10:1466, 10:1469, 18:51.

<sup>17</sup> Ford's counsel also told Grant's attorney on that same day that Ford intended to move to strike the affidavits. 10:1465-66.

10:1414-20.<sup>18</sup> At the hearing on June 11, 2009, Grant's counsel objected to arguing the motion to strike due to having not had five days' notice. 18:50-51. The Circuit Court, however, stated that "there has been plenty of notice" and that "any kind of surprise or technical complaint about it being heard today is overruled." According to the Circuit Court, "everybody was on board with what was going to be done here today as of June 1,<sup>19</sup> which was 11 days ago." 18:52.

The Circuit Court ultimately struck only those portions of the affidavit that addressed data or information accumulated after Benedict's deposition. 12:1678-79, R.E.11; 18:67. These stricken portions did not include any of Benedict's opinions on biomechanics.

As for Ford's *Daubert* motions, the Circuit Court determined (i) that Benedict's "Biomechanics opinions are not reliable under Rule 702 and *Daubert* because he is not fully qualified in the field of Biomechanics and ... [he] failed to conduct the proper testing and calculations to substantiate his theories," 12:1696, R.E.12 at 17; (ii) that Benedict's opinions regarding the hinges and welds should be excluded due to the lack of testing to substantiate his theories, 12:1692, R.E.12 at 13, and (iii) that Benedict's opinions as to the seatbelt were "wholly unreliable" as they were "not supported by substantial testing and methodology," 12:1689, R.E.12 at 10.

Grant moved to reconsider both the Circuit Court's decision to strike the affidavits as well as the decision to strike Benedict's opinions as to biomechanics, structural integrity, and seatbelts. 10:1430-59. *See also* 10:1464-75. Following a hearing on the matter, 19:103-28,

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<sup>18</sup> Although the motion was not filed with the Clerk's office until June 10, 10:1410, plaintiff's counsel always notes receipt of the document on June 8, the day it was submitted. 10:1432, 18:51, Gr.Br. at 9. As noted above, the parties had a practice of e-mailing certain documents to each other as a courtesy.

<sup>19</sup> The Circuit Court was likely referring to the original hearing date of May 26, 2009, because he refers to June 1 as the date that Grant's counsel showed up for the cancelled hearing because he had not received the Circuit Court's message. 18:52.

F.R.E.4, those motions were denied. 19:111, 19:128, F.R.E.4.

Ford then moved for summary judgment as to Grant's claims due to her lack of evidence as to a defect, causation, or a feasible design alternative. 10:1421-26. Grant never filed a response to this motion, but instead sought a stay of any ruling until after the completion of discovery, which the Circuit Court granted. 10:1461-63, F.R.E.1. As noted in the Circuit Court's order, however, the discovery deadline had passed, and the only remaining item of discovery was Ford's deposition under M.R.C.P. 30(b)(6), which had been postponed by agreement of the parties. 10:1462, F.R.E.1. The deposition of Ford's corporate representative, Howard Slater, did not lead to any additional evidence to support Grant's claims, and the Circuit Court ultimately granted summary judgment in Ford's favor. 11:1631-35, R.E.15. Final judgment was entered on September 30, 2009, 11:1636, R.E.16, and Grant appealed that judgment to this Court. 11:1637.

**C. Mazda design documents**

In 2007, in response to Grant's first discovery directed at Ford, Ford alerted Grant to the fact that Mazda Motor Corporation in Japan "was the lead vehicle engineering activity for the 1996 Ford Probe ...." 3:431, R.E.3 at 1. Ford thus referred Grant to Mazda "for additional materials regarding the design, testing, and/or assembly of the subject 1996 Ford Probe." 3:432, R.E.3 at 2. In response to an interrogatory as to persons involved in the design of the vehicle, Ford again noted that "Mazda was responsible for any design decisions, including design specifications, to these assemblies" and that Ford was therefore "without sufficient information and/or documents to respond to Plaintiff's Request and refers Plaintiff to Mazda for additional information responsive to this Request." 3:434, R.E.3 at 4. *See also* 3:435-37, 3:440-42, 3:447,

3:449, 4:455-56, 4:458-60, 4:466, R.E.3 at 5-7, 10-12, 17, 19, 25-26, 28-30, 36.<sup>20</sup>

In responding to plaintiff's supplemental requests for production, Ford again reiterated Mazda's design of the subject vehicle and also provided contact information for Mazda in Japan "[t]o the extent that Mazda may have information or documents not in the possession, custody or control of Ford." 4:515-16.

During the first part of 2008, Grant attempted to get the documents through letters rogatory to Mazda Motor of America in California, 4:519-21, 4:528-35, and other entities, 4:522-24.<sup>21</sup> Having not succeeded in those efforts, Grant filed a motion, shortly after Benedict's deposition, seeking to compel Ford to produce "design documents," among other things. 4:551-61. Grant found it "curious" how design documents would not be in Ford's possession, 4:553, but nevertheless asserted her belief that, "[w]hether these documents are in the physical possession of Ford Motor Company, or not, Ford most certainly has control over these documents." 4:556.

Ford noted in response that it had produced "all responsive documents in its possession or control." 4:593. It also noted that Mazda and Ford were separate corporate entities, and that Grant was incorrect in her assumption that Ford's ownership of 33% of Mazda stock gave Ford any sort of authority over Mazda's operations. *Id.* "Consequently, Ford does not have any right or control over the design documents that may be in Mazda's possession ...." 4:593-94.

At a hearing in early August of 2008 on Grant's motion, the Circuit Court ordered the plaintiff to specify more clearly the documents she sought and told Ford to ask Mazda for these

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<sup>20</sup> Ford did agree to produce the "Ford and Mazda Probe ST-44 Engineering and Component Supply Agreement," 3:431-32, R.E.3 at 1-2, as well as documents to which Mazda may have referred in designing the Probe, 3:436, R.E.3 at 6, and various Mazda documents that Ford actually had in its possession, 3:436-37, 3:440, R.E.3 at 6-7, 10.

<sup>21</sup> Auto Alliance International in Michigan was the company that assembled the 1996 Probe. 3:432, R.E.3 at 2.

documents once they were sufficiently identified. 11:1620, F.R.E.2. As set forth in correspondence to the Circuit Court, Grant specified the design drawings she wanted and Ford requested those documents from Mazda, but “Mazda denied Ford’s request on grounds that Mazda is not a party to the lawsuit and does not believe that it has a legal obligation to produce the documents to Ford.” *Id.*

Grant filed a supplemental motion to compel Ford to produce “documents the plaintiff believes are under the control of Ford ...”<sup>22</sup> 6:757. In its supplemental response, Ford noted that the Product Development Agreement ended in 1997, and that “Ford has no control over the requested design drawings” and thus Grant’s motion to compel should be denied. 6:773-79. As summarized by Ford, it “cannot be compelled to produce documents that it does not have and cannot obtain.” *Id.*

Ford further stated that Grant does not dispute that “Ford has produced every document in its possession responsive to Plaintiff’s Supplemental Discovery Requests,” but that Grant’s sole argument was based on her belief that Ford had a right to obtain the design drawings from Mazda and thus had “control” over the documents under M.R.C.P. 34(a). 6:775. Ford submitted, however, that it “has no right to obtain any documents from Mazda,” and thus “has no ‘control’ over any documents that might be in Mazda’s possession.” 6:777. *See also* 11:1622, F.R.E.2 (Ford notes that it has “already attempted to exercise its alleged control over the documents,” but had been unsuccessful).<sup>23</sup>

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<sup>22</sup> Grant argued that provisions of the Vehicle Supply Agreement placed a duty upon Mazda to produce the requested documents to Ford. Grant has abandoned any reliance on this document in her appellate brief. Ford argued that no provision in that agreement provided Ford with a legal right to obtain the design drawings, nor does Ford own the design drawings, so the provision cited by Grant regarding inventions and discoveries was inapplicable. 11:1621.

<sup>23</sup> As evidenced in the preceding paragraphs, the assertion that “Ford has never stated that said documents are not within their custody and/or control,” Grant Brief at 6 (hereinafter cited as “Gr.Br.”), is simply not true. Ford clearly did dispute whether it had custody or control over these documents; in fact,

After Mazda refused to provide the documents to Ford, the Circuit Court denied Grant's motion to compel but allowed a continuance for Grant to try to get the documents. 11:1617, F.R.E.2, 18:3-4. At the next hearing the Circuit Court inquired as to the status of the design documents, and Grant's counsel stated that they had been working with a third party to subpoena the documents, but, because Japan is not a member of the Hague Convention, their courts have ruled that entities there cannot be compelled to produce evidence in suits in other countries. 18:4. As of that time, January 2009, Grant had "not yet ... issued a subpoena requesting the documents from Mazda specifically." *Id.* However, Grant's counsel stated that if they did not get the documents, they nevertheless "definitely" wanted to go forward with the trial. 18:5. *See also* 18:61-62 (Grant's counsel indicates willingness to go to trial without design documents).

In a letter to the Court in April 2009, counsel for Ford stated that Grant had recently "indicated ... she had ended her pursuit of the Mazda documents." 9:1208.

The Circuit Court on multiple occasions specified that Ford had complied with its discovery obligations with regard to these design documents. *See* 19:134 ("no finding from this Court that the Defendant was unreasonable or violated orders of the Court with reference to assisting in getting these documents"); 11:1629, R.E.14 at 2 ("as repeatedly stated, the Court is satisfied the Defendant is not in possession of design documents for the 1996 Ford Probe").

#### **D. Ford's Rule 30(b)(6) deposition**

As Grant admits in her brief, Gr.Br. at 20, she had delayed taking Ford's Rule 30(b)(6) deposition in hopes of having the Mazda documents for use at the deposition. The parties had

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that was the focus of the motion to compel. *See also* 4:594 ("[b]ecause Ford does not have possession or control over any documents responsive to these Supplemental Requests, it once again directed Plaintiff to Mazda") (emphasis added); 4:600 ("Plaintiff is seeking to have Ford collect documents that, as discussed above, are not in its possession or control") (emphasis added); 6:773 ("Plaintiff's Motion to Compel is based on the mistaken belief that Ford has control over certain design drawings"; "Ford does not have any right to obtain documents from Mazda"); 11:1620, F.R.E.2 ("Plaintiff's Supplemental Motion fails to show that Ford has control over the requested documents"); 11:1621, F.R.E.2 (Ford explained that its minority interest did not give it any control over the day-to-day operations of Mazda, and did not give it authority to demand documents).

thus agreed to have Ford's deposition taken after the discovery deadline had passed. 10:1462, F.R.E.1.

When Ford moved for summary judgment after the Circuit Court had excluded portions of Benedict's testimony, Grant asked the Court to stay consideration of the motion and allow her to proceed with Ford's Rule 30(b)(6) deposition. The Circuit Court granted this request "to give the Plaintiffs the opportunity [to] complete their thorough search for the design documents." *Id.*

Grant's counsel deposed Ford's Rule 30(b)(6) corporate witness, Howard Slater. At the deposition, Grant's counsel spent a large portion of the time focusing on matters beyond the scope of the deposition. For example, a significant amount of time was spent asking Slater questions about an unverified article, not shown to Ford's counsel or the deponent, that counsel had found on the internet that evidently suggested that the Probe was somehow related to the Mustang or Mercury Cougar, although Slater testified that it was not. 11:1583, 11:1610-13, R.E.13 at 50-51, 161-70.

Slater testified that Ford had searched for, but does not have, the requested Mazda design drawings, 11:1586-87, R.E.13 at 65-67, and that Ford likely never had possession of those drawings, 11:1591, R.E.13 at 83-84. Grant's counsel, however, refused to believe this testimony.<sup>24</sup> Ford's counsel finally ended the deposition after 5 p.m. as the questioning had degenerated into "nothing more but harassing the witness." 11:1614, R.E.13 at 176-77.

Grant proceeded to file motions for the completion of the Rule 30(b)(6) deposition, 11:1534-35, to compel the production of shop manuals, owner's guides, and product source books related to the Probe, 11:1536-38, and to amend the scheduling order to allow her to conduct additional discovery, 11:1539-41.

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<sup>24</sup> See, e.g., 11:1613, R.E.13 at 172 ("That's the problem, and we have been going at this for years where we have requested and you have said you don't have it and quite frankly I don't believe that.").

Ford opposed all these motions, noting that “Plaintiff’s counsel’s speculative belief that Ford really has the Mazda design drawings does not entitle her to additional discovery,” and further, that “additional discovery cannot possibly change the outcome of this case.” 11:1563. Ford noted that, even if Grant were to somehow obtain the Mazda documents, and even if Benedict were allowed to rework his opinions, nothing in the Mazda documents would affect the Court’s earlier decision striking Benedict’s biomechanics opinion, and without such testimony, Grant had no evidence of causation.<sup>25</sup> *Id.*

In its order denying Grant’s motion, 11:1628-30, R.E.14, the Circuit Court noted that it had reviewed the deposition transcript which had prompted these various motions and had determined that the additional discovery sought by Grant “would be a waste of time and money.” 11:1629, R.E.14 at 2. The Circuit Court noted that Ford’s deponent had been subjected to “some very contentious lines of questioning that dealt with issues outside of the scope of the deposition,” and that to continue the deposition “would only yield more irrelevant testimony and such testimony would not assist the Circuit Court’s ruling on the Defendant’s Summary Judgment motion.” *Id.*

### **III. Statement of facts**

The facts “relevant to the issues presented for review,” M.R.A.P. 28(a)(4), are set forth in the preceding sections addressing the nature of the case and the course of the proceedings.

### **SUMMARY OF THE ARGUMENT**

The dispositive issue in this appeal is the Circuit Court’s proper exclusion of Grant’s proffered expert testimony on biomechanics and her failure to demonstrate that any further

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<sup>25</sup> As for the specific documents demanded by Grant, Ford noted that the owner’s manual had been produced two years earlier, and that Grant had not identified any document request to which the shop manual or source book was responsive. 11:1556.

opportunity for discovery would have repaired this fatal defect in her case. None of the issues she raises has any merit.

The Probe automobile was designed by Mazda. Because the Circuit Court's finding that Ford did not have possession, custody, or control of Mazda's design documents is not clearly erroneous, it properly denied Grant's motion to compel. Although Ford requested Mazda to furnish the documents, Mazda refused. Neither Ford's contract with Mazda nor its position as a minority stockholder in Mazda gave it a legal right to obtain the documents.

After the close of discovery, and shortly before the scheduled trial date, the Circuit Court properly struck those portions of Benedict's new expert affidavits which had not been provided by his report or his deposition testimony during the discovery period. Ford promptly objected to Benedict's supplemental opinions, and the Circuit Court correctly ruled that Grant had sufficient notice of Ford's motion to strike; in any event, the Court later gave her a full chance to address these issues on her motion for reconsideration. While Mississippi permits a litigant seasonably to supplement her expert's opinions, Grant never explained why Benedict needed to wait almost a year after his deposition to offer new opinions barely three months before trial. While some cases have permitted supplementation even after the close of discovery, no case has permitted supplementation so close to a scheduled trial date where the expert can offer no good reason for the delay.

In reviewing Benedict's original opinions, the Circuit Court properly excluded them for lack of reliability. With regard to the seatbelt, Benedict offered a variation of the inertial release theory that has been rejected by other courts. He did no testing to determine whether his theory could have fit the circumstances of this actual crash, nor did he offer a feasible alternative design in use when the Probe was manufactured in 1996. Likewise, he did no testing to support his opinion that the Probe's door hinges were structurally deficient because they did not appear as

strong as those on his Mercedes. Nor could Benedict identify any defects in the spot welds on the B-pillar. Although he had access to the vehicle, he had done no testing to determine the type of metal used or the forces necessary to dislodge the B-pillar. Finally, the Circuit Court refused to recognize Benedict as an expert in biomechanics because of his lack of training and qualifications. His opinions themselves were excluded for the additional reason that he had performed no testing to substantiate his theories concerning the decedent's movements during the crash.

Having properly stricken Benedict's opinions, the Circuit Court properly rejected Grant's efforts to postpone the inevitable. The Circuit Court granted summary judgment because of the absence of any evidence to support essential elements of Grant's claim. Because Grant could not explain how further discovery would cure the defects in her proof, the Circuit Court rejected her efforts to amend to the scheduling order and to permit a further deposition of Ford. Almost seven years after the suit was filed, the Circuit Court did not err in dismissing her claim.

#### **ARGUMENT**

The primary dispute in this case concerns the proximate cause of Makayla Maggard's head injury. Grant must prove, not only an alleged defect in the Probe, but also that such a defect caused a fatal head injury that she would not otherwise have received from the severe collision forces involved in the crash. Resolution of that issue turns on exactly how Makayla was injured and at what point in the accident sequence it occurred—the "injury mechanisms" as Benedict said, or biomechanics.

As to that issue, nothing in the Mazda documents has any bearing on Benedict's opinions. Moreover, the affidavit Benedict submitted in response to Ford's *Daubert* motion contained no new testing or grounds for his opinion in that area, so his biomechanics opinion was not within

the parameters of the Court's order striking such information. Nor does Grant suggest that any further discovery could have produced a different biomechanics opinion.

Accordingly, if the Circuit Court properly excluded Benedict's biomechanics opinion, as Ford demonstrates in Part III.C of the Argument, then nothing else Grant complains of in her brief provides a basis for overturning the summary judgment in Ford's favor. Without proof that Makayla's injuries were caused by a defect in the vehicle, Grant cannot prove a necessary element of her claim. For the Court's convenience, Ford addresses Grant's arguments in the sequence presented by her brief, but none of those issues need be addressed unless the Court reverses the exclusion of Benedict's biomechanics opinion.

**I. THE CIRCUIT COURT PROPERLY DENIED GRANT'S MOTION TO COMPEL FORD TO PRODUCE DOCUMENTS THAT WERE NOT IN ITS POSSESSION, CUSTODY, OR CONTROL.**

Grant's first issue addresses her failure to obtain Mazda's design documents. Although Grant never followed through on procedures to obtain these documents from Mazda,<sup>26</sup> she faults the Circuit Court for denying her motion to compel Ford to get the documents from Mazda. Importantly, as the Circuit Court held, even had Grant obtained the documents, Benedict's

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<sup>26</sup> Where a party has control of documents in the possession of a third party, such as one's bank statements, he or she may not rely on the fact that the opposing party could subpoena the documents and thereby refuse to comply with an order to produce the documents. *Smith v. Tougaloo College*, 805 So.2d 633, 639-40 (Miss. App. 2002). However, a party's continued insistence on having an opponent produce documents it has been shown cannot be obtained by that party, while not taking advantage of avenues by which he or she might could get the documents, is another matter. See *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1426 (7th Cir. 1993) (Posner, C.J.) (after finding that items were not in plaintiffs' control under Rule 34, court notes that plaintiffs had told the defendants what entities had the items "and if the defendant had wanted pertinent documents in the custody or control of any of those entities it had only to issue a subpoena duces tecum"); *M'Baye v. New Jersey Sports Prod., Inc.*, 2008 WL 1849777, \*4 (S.D.N.Y. Apr. 21, 2008) (party had made reasonable efforts to get documents from his former promoter and manager who refused to cooperate; "if defendants really believe these documents are so important, they may themselves seek to compel [the promoter and manager] to produce them"); *American Maplan Corp. v. Heilmayr*, 203 F.R.D. 499, 502 (D. Kan. 2001) (after finding that officer and minority shareholder of corporation did not have control of corporation's documents, Court notes that "Rule 45 is the proper vehicle through which AMC may obtain the VET documents"). Here, the true importance of the documents is questionable, as plaintiffs expressed their desire to go to trial whether they obtained these documents or not. 18:5, 18:61-62.

biomechanics testimony would have still been excluded, and summary judgment would have been entered due to Grant's inability to prove causation. 11:1630, R.E.14. So this issue provides no basis for overturning the judgment entered in Ford's favor.

Regardless, the Circuit Court properly denied Grant's motion. In one of the cases cited by Grant, the Circuit Court notes that "Rule 34 performs the salutary function of creating access to documentation in an economical and expeditious fashion by requiring a party to produce relevant records not in its physical possession *when the records can be obtained easily from a third-party source.*" *Resolution Trust Corp. v. DeLoitte & Touche*, 145 F.R.D. 108, 111 (D. Colo. 1992) (emphasis added). The record in this case reveals just the opposite—the Mazda design documents could not be easily obtained by Ford. Ford thus was under no duty to produce them, and the Circuit Court acted well within its discretion in denying Grant's motion to compel. *Herndon v. Mississippi Forestry Comm'n*, 2010 WL 4942649, \*5 (Miss. App. Dec. 7, 2010) ("court's 'denial of a motion to compel is subject to an abuse of discretion standard of review on appeal'") (quoting *Edmonds v. Williamson*, 13 So.3d 1283, 1292 (Miss. 2009)). See also *Allen v. National R. Passenger Corp.*, 934 So.2d 1006, 1013 (Miss. 2006) (finding no abuse of discretion in trial court's finding as to whether failure to produce documents was due to willfulness or an inability to comply).<sup>27</sup>

**A. The record establishes that Ford does not have the "practical ability" to get the documents from Mazda.**

After requiring Ford to request the design documents from Mazda, 11:1620, F.R.E.2, a

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<sup>27</sup> Grant cites a California case, *Greyhound Corp. v. Superior Court*, 364 P.2d 266, 279-80 (Cal. 1961), for the proposition that "while the exercise of discretion depends on the parties' factual showings disputed facts should be construed in favor of discovery." Gr.Br. at 24. If Grant means to suggest that, in discovery disputes, all doubtful factual issues should be resolved in favor of more discovery, no opinion of this Court suggests any such thing. To the contrary, the Supreme Court of the United States has affirmed discovery orders where the trial court's factual findings "are fully supported by the record." *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976), *reh'g denied*, 429 U.S. 874 (1976). As demonstrated hereafter, the Circuit Court's finding that Ford lacked possession, custody, or control of the disputed design documents is "fully supported by the record."

process that proved unfruitful when Mazda refused to produce the documents, *id.*, the Circuit Court properly denied Grant's motion. Despite Grant's assertions to the contrary, it was made evident that Ford did not have the "practical ability" to obtain the documents from Mazda and that the documents could not "be obtained easily from Mazda by simple request." Gr.Br. at 8. Accordingly, even if "practical ability" were the proper standard,<sup>28</sup> Ford did not have "control" of the documents so as to require Ford to produce them under M.R.C.P. 34.<sup>29</sup>

Indeed, in one of the cases cited by Grant, *Searock v. Stripling*, 736 F.2d 650, 653-54 (11th Cir. 1984), the court held that a party did not have "control" of documents when it had made good faith efforts to obtain them from third parties, but those entities had not provided them.<sup>30</sup>

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<sup>28</sup> The "practical ability" standard noted in *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 530 (S.D.N.Y. 1996), cited at Gr.Br. 8, is a broader application of control than that applied by other courts. In *Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.*, 233 F.R.D. 143, 146 (D. Del. 2005), the Court, addressing control in the related context of subpoenae under Rule 45, noted that the Second Circuit's "practical ability" test was more "expansive" a definition of "control" than the traditional meaning of the legal right to obtain the documents. See also 8B Charles A. Wright, *et al.*, FEDERAL PRACTICE & PROCEDURE § 2210 (noting that "practical ability" goes beyond the concept of whether a litigant has a legal right to obtain documents, and stating that "[c]aution must be exercised when the notion of control is extended in this manner ... because sometimes the party's actual ability to obtain compliance from nonparties may prove more modest than anticipated").

<sup>29</sup> Grant argues that the Court applied the wrong standard because, in a footnote in a subsequent order, 11:1632, R.E.15 at 2 n.1, the Court noted that it had previously "ruled that the Defendant is not required to provide the designs because the drawings are not in the Defendant's possession." But as discussed above, the entire focus of the motion to compel and Ford's response was whether or not Ford had control of the documents by being able to get them from Mazda. In fact, in one of Ford's responses, Ford noted that it was not disputed that Ford did not possess the documents. In denying Grant's motion, then, the Court clearly rejected her arguments regarding control.

<sup>30</sup> See also *Chaveriat*, 11 F.3d at 1426 (items requested to be produced were not in party's custody or control because party could not order third party in possession of items to turn them over; "fact that a party could obtain a document if it tried hard enough and maybe if it didn't try hard at all does not mean that the document is in its possession, custody, or control; in fact, it means the opposite"); *M'Baye*, 2008 WL 1849777 at \*4 (M'Baye did not have possession, custody, or control of documents; many of M'Baye's financial documents were in possession of his former promoter and business manager who refused to produce the documents when M'Baye requested them); *800537 Ontario Inc. v. Auto Enterprises, Inc.*, 205 F.R.D. 195, 198 (E.D. Mich. 2000) (magistrate was in error in finding that materials were in control of plaintiffs; documents were in possession of plaintiffs' criminal attorney in Canada who had refused to produce them based on ethical responsibilities; "[p]lain and simple, Plaintiffs

**B. Ford has no legal right to require Mazda to turn over the documents.**

Grant, however, claims that Ford had the “legal right to obtain the design drawings from Mazda.” Gr.Br. at 7. She bases this belief on (i) a 1993 Product Development Agreement and (ii) Ford’s position as a minority stockholder in Mazda. Neither position withstands scrutiny.

First, the Production Agreement relied on by Grant governed the relationship of the parties only for the production cycle of the Probe, from 1992 through 1997.<sup>31</sup> Ford demonstrated to the Circuit Court that the parties’ obligations under the contract thus ended in 1997. The “Purpose” section of the Agreement, 6:784, R.E.1 at 2514, specifically states that “[t]he purpose of this Agreement is to define the development responsibilities and obligations of Mazda as the LVEA [Lead Vehicle Engineering Activity] for the Second Cycle Ford Vehicle [Probe] that will be assembled by AAI ....” The Second Cycle “began on April 16, 1992 and is planned to end [and in fact did] on September 30, 1997 ....” 6:788, R.E.1 at 2518.

In addition, the “Term and Termination” provision of the Agreement, 6:809, R.E.1 at 2539, provides that “Mazda has commenced development work on the [Probe] ... and this Agreement covers that work and shall extend until the completion of the Second Cycle ....” See also 6:815, R.E.1 at 2545 (“Cancellation Costs” provision referring to obligations if agreement is “prematurely terminated, prior to September 30, 1997”); 6:817, R.E.1 at 2547 (also referring to termination of agreement at end of product cycle and requiring parties to reach additional agreements on certain items if terminated before then).

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are unable to comply with Defendants’ request for production of these documents and therefore, ... Order compelling the production of these documents is clearly erroneous”); *Martin v. B. F. Goodrich Co.*, 602 N.W.2d 343, 346-47 (Iowa 1999) (documents in possession of another company were beyond scope of discovery; party had requested the documents but had been denied access).

<sup>31</sup> In contrast, the contract between the parties in the case cited by Grant, *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 929 (1st Cir. 1988), expressly included a continuing obligation for one of the contracting parties to make records available for the defense of pollution litigation by the other party. Although Grant argued below that another contract, the Vehicle Supply Agreement, contained a provision regarding Ford’s defense of product liability claims, 6:758, that agreement did not contain any provision requiring Mazda to continue to make documents available like the provision in *Anderson*.

Nor does Ford's ownership of some Mazda stock establish that it has the legal right to demand documents from Mazda and thereby obtain them. Grant cites as support for this proposition the decision in *Cooper Industries, Inc. v. British Aerospace, Inc.*, 102 F.R.D. 918 (S.D.N.Y. 1984), in which a wholly-owned subsidiary was held to be in control of documents in the possession of its parent corporation after repeatedly defying court orders to either produce the requested documents or set forth in an affidavit what efforts had been made to obtain the documents. That is not the situation here.

The fact that Ford owns a minority portion of Mazda stock simply does not give it the right to order Mazda to produce documents. See *American Maplan Corp.*, 203 F.R.D. at 501-02 (president and minority shareholder of corporation not required to produce documents in possession of corporation; corporation was not "a sole proprietorship" and the plaintiff had not even alleged that defendant shareholder and officer was the corporation's alter ego; court notes also that shareholders do not have "an unfettered legal right" to corporate records).<sup>32</sup> Ford is a distinct corporate entity from Mazda, the company that possesses the design documents. As the Third Circuit has held, "[i]n the absence of control by a litigating corporation over documents in the physical possession of another corporation, the litigating corporation has no duty to produce." *Gehring Int'l Ins. Co. v. Comm'r of Internal Revenue*, 839 F.2d 131, 140 (3d Cir. 1988).

There is no basis for requiring Ford to produce documents that it did not have and could not obtain. The Circuit Court's denial of Grant's motion to compel should be affirmed.

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<sup>32</sup> See also *Kestrel Coal Pty. Ltd. v. Joy Global Inc.*, 362 F.3d 401, 405 (7th Cir. 2004) (addressing production of documents for suit in Australia under 28 U.S.C. § 1782, court disapproves trial court's requiring corporation to produce documents in possession of subsidiaries and notes "[l]egal distinctions between corporations and their investors").

## II. THE CIRCUIT COURT DID NOT ERR IN STRIKING PORTIONS OF BENEDICT'S AFFIDAVITS.

Grant is asking this Court to allow parties to present an expert report that contains no significant information as to the basis for those opinions, allow that expert to testify at his deposition that he has done little to no testing to support his opinions and has very thin grounds upon which to base his opinions other than his own experience and knowledge, wait for the discovery deadline to pass, and then, as the trial date approaches and only when the other side challenges that expert's opinions under *Daubert*, suddenly decide to provide additional grounds and testing to support the expert's opinions.<sup>33</sup> Such a procedure would eviscerate the discovery process, particularly in a products liability case, which presents the classic "battle of the experts."

In this case, the scheduling orders entered by the Circuit Court contained deadlines for the taking of depositions of plaintiff's experts and then defendant's experts. *See, e.g.*, 1:100, 3:429, 4:507, 4:525. The Circuit Court clearly intended for the parties to come to trial fully prepared to address the testimony of each other's experts based on the prior depositions. At the time Ford's motions to strike were heard, trial was scheduled for August 24, 2009. 10:1412.

At that hearing, the Circuit Court stated, "there is just not any way that a Defendant can properly respond to a changing playing field as far as what an expert is going to testify to and what the basis of his opinions are." 18:67.<sup>34</sup> Later, at the hearing on Grant's motions to

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<sup>33</sup> Notably, this appears to be Benedict's modus operandi. In a trial court decision handed down in Florida after this case was appealed, the Court notes, in striking Benedict's door latch and seatbelt defect opinions, that Benedict had testified at his deposition that he had not done any testing to determine what particular defect he believed caused the door to open in the accident, but stated, "I know it just came open, and it shouldn't have." *Minnis v. Ford Motor Co.*, Case No. 06-452-CA, slip. op. at 4-5 (Cir.Ct., 19th Judicial Cir., Martin Cty., Fla. Mar. 24, 2010). *See* Appendix. At the hearing on Ford's motion to exclude Benedict's testimony, plaintiff's counsel "handed the Court a 21 page affidavit executed by Dr. Benedict" with "a disc containing an appendix of material" attached. *Id.* at 4. Although the Court did consider the affidavit—there is no indication that Ford moved to strike the affidavit under Florida's procedures—it nevertheless struck Benedict's opinions due to his lack of testing to support his opinions.

reconsider, the Circuit Court again noted that there was insufficient time “to be accountable to cross-examination about the methodology of all those things [the new material] ....” 19:105. The Circuit Court also noted that Grant’s suggestions to give Ford more time to allow their experts to rebut Benedict’s new information or to depose Benedict again would mean that the August 24 trial date could not be maintained. 19:106-07.

In refusing to allow Grant’s expert to “supplement” his opinions with information that should have been provided at the time of his deposition, the Circuit Court was well within its discretion. *Blanton v. Board of Supervisors*, 720 So.2d 190, 196 (Miss. 1998) (applying abuse of discretion standard when addressing court’s exclusion of expert report as untimely); *Sanders v. Wiseman*, 29 So.3d 138, 140 (Miss. App. 2010) (“trial court’s decision to grant or deny a motion to strike an affidavit will not be reversed unless there has been an abuse of discretion”).

**A. The Circuit Court did not err in finding that Grant had sufficient notice.**

Grant first argues that the Circuit Court should be reversed because Ford’s motion to strike Benedict’s affidavits was served only three days before the hearing, in violation of M.R.C.P. 6(d). However, as noted above, Grant was clearly put on notice that Ford objected to the affidavits as being untimely on the very day that they were filed with the court—some 22 days before the hearing and 19 days before Ford filed its motion. The Circuit Court, fully aware of the circumstances, found that “there has been plenty of notice” and noted that everyone had known what was going to take place at the hearing several days earlier. 18:52. It was thus the Circuit Court’s finding that Grant actually had notice, and for much longer than the rule’s five

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<sup>34</sup> See also 18:60 (Court: “You know, what were you anticipating that they do? I mean, once you submit that affidavit, if you want it considered or the information considered, surely you would think that the Defendant will want to cross-examine him on the methodology, the results, and those conclusions. And there is no way they could do that and keep the trial date that is set.”); 18:66 (Court: “Now, we’ve got a trial scheduled in August, approximately two months away, and there is supplementation of all kinds of other testing and data that was accumulated after the deposition that would bolster his opinions, if not change his ultimate opinions.”).

days.

In *Hughs v. Hughs*, 809 So.2d 742, 744 (Miss. App. 2002), a party argued that she had insufficient notice that a particular issue was going to be addressed at a hearing, but the court found that the issue was included in a broader motion. Here, Grant was well aware, and had been for two to three weeks, that Ford objected to the affidavits and would be objecting to them at the hearing to exclude Benedict's opinions. Indeed, it was the service of the affidavits that resulted in the hearing being moved to June 11 in the first place—with Grant's consent. 10:1470.

Moreover, Grant was able to raise all of these issues with the Court again when she moved for reconsideration, and the Circuit Court again held a hearing to address her concerns. 19:104-11. See *Barnes v. Confidential Party*, 628 So.2d 283, 291 (Miss. 1993) (although order granting protective order and fees and expenses was entered without any hearing as required by M.R.C.P. 37, "this omission was cured by the hearing held on Emmett's Motion for Reconsideration").

The Circuit Court properly found that lack of notice was not an issue.

**B. The new information in Benedict's affidavits was properly excluded.**

The Circuit Court relied on a decision from a federal court in Texas which presented a scenario much like this case. In *Avance v. Kerr-McGee Chem. LLC*, 2006 WL 3484246 (E.D. Tex. Nov. 30, 2006), the plaintiff filed various affidavits for purposes of addressing the defendant's *Daubert* challenges. The court in *Avance* noted that one of the expert's affidavits included "a new method for statistical analysis, new sources, and new studies." *Id.* at \*3. Another expert also "provide[d] new sources and justifications for his opinions," *id.*; another "cite[d] a myriad of sources for which he relies on for the first time, or for which he expressly

disavowed any reliance on in his deposition,”<sup>35</sup> *id.* at \*4; and still another “cite[d] never before disclosed sources and purport[ed] to rely on those sources to support his opinions,” *id.* at \*5.

The *Avance* Court stated that “[e]ven though the Federal Rules of Civil Procedure provide for supplementation, parties do not have infinite time to supplement their expert opinions with new information to respond to challenges to their experts’ original evidence.” *Id.* at \*7. The plaintiff had provided no reason why the new information in the affidavits was filed “after the expert report deadline, after the expert discovery deadline, after *Daubert* and summary judgment motions were filed, and less than a week from the *Daubert* hearing.” *Id.* The Court found that “allowing the introduction of *new* information at this time for use in the Court’s consideration of the parties’ *Daubert* motions would be unfair and prejudicial to Defendant because Defendant would not have an opportunity for cross-examination on those new issues.” *Id.* The defendant had also noted that “responding to the new contentions of Plaintiffs’ experts both in this motion and (if allowed) in future proceedings and filings, disrupts Defendant’s preparation for the *Daubert* hearings, the trial of this case, and increases its costs of litigation.” *Id.* at \*1.

Grant argues, however, that Mississippi law allows for, and in fact requires, “seasonal supplementation,” and that she can continue to provide new grounds and tests from her expert up until close enough to trial that it would be deemed unseasonable.

Grant first notes that she had reserved the right at Benedict’s deposition “to supplement, modify, enhance, and/or change said opinions as discovery continued and/or additional

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<sup>35</sup> Likewise, at his deposition, Benedict indicated that he did not rely on a report by Richard Clarke and Kendall Few for anything other than to identify the buckle and its features. 7:968-69, R.E.5 at 91-94. He specifically stated that he did not rely on their study for his opinions because they were addressing “a different problem” and were “doing drop testing or inertial, vertical inertial testing from the bottom up.” 7:968, R.E.3 at 92. Yet in his affidavit, he justifies his opinions and his “snatching” demonstration by discussing “[d]ynamic drop tests” causing unlatch “during an upward, vertical acceleration,” 9:1231, R.E.8 at ¶ 14, and quotes from the Clarke study, 9:1235, R.E.8 at ¶ 19.

information was received and/or discovered.” Gr.Br. at 10 (citing R.E.5 at 6). But the reservation she refers to dealt only with the Mazda documents.

MR. CADE [Grant’s counsel]: We want to let it be known that this deposition is being taken without documents that we’ve requested from Ford that they stated were in possession of Mazda, including but not limited to design drawings, other documents regarding design. And we reserve our right to have [sic] this may affect opinion once we receive those documents.

7:947, R.E.5 at 6. Of course, Grant never obtained the Mazda documents so none of the new information in Benedict’s affidavits related in any way to this reservation.

Unlike the expert in *Young v. Meacham*, 999 So.2d 368 (Miss. 2008), relied on by Grant, Benedict was not, in his affidavits, responding to a document presented to him for the first time at his deposition where he was asked to give his opinions based on certain assumptions about the document.<sup>36</sup> While the court in *Young* did state that the trial court, “[b]y holding that the plaintiffs’ supplemental expert designation violated the scheduling order,” had “erroneously equated a discovery deadline with a deadline for supplementation of an expert opinion,” *id.* at 372, it does not stand for the proposition that an expert can wait until long after discovery deadlines to provide testing and other bases for his opinions which should have been conducted before the opinions were formulated. As the Fifth Circuit has stated, “The purpose of rebuttal and supplementary disclosures is just that—to rebut and to supplement. These disclosures are not intended to provide an extension of the deadline by which a party must deliver the lion’s

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<sup>36</sup> Grant also quotes from *Thompson v. Patino*, 784 So.2d 220, 223 (Miss. 2001), in which the Court notes seasonable supplementation means “soon after new information is known and far enough in advance of trial for the other side to prepare.” (Emphasis added.) Benedict was not presented with any new information which would have altered his opinions in any way. The only “new” information in his affidavits was what he had generated himself. See *Cooper Tire & Rubber Co. v. Farese*, 2008 WL 5104745, \*4 (N.D. Miss. Nov. 26, 2008) (“courts have routinely rejected untimely ‘supplemental’ expert testimony where the opinions are based upon information available prior to the deadline for expert disclosures”).

Further, while it is not clear from the appeal record exactly when Benedict conducted additional tests, in *Buchanan v. Ameristar Casino Vicksburg, Inc.*, the Court noted that “seasonably does not mean several months later. It means immediately.” 957 So.2d 969, 973 (Miss. 2007) (quoting *West v. Sanders Clinic for Women, P.A.*, 661 So.2d 714, 721 (Miss. 1995)). It seems unlikely that Ford would have received the information before trial had it not filed a *Daubert* motion.

share of its expert information.” *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 571 (5th Cir. 1996), *cert. denied*, 519 U.S. 811 (1996).

Further, unlike in this case, no trial date had been set in *Young*. The *Young* court noted that the focus in deciding “what constitutes seasonableness” was “to avoid unfair surprise and allow the other side enough time to prepare for trial.” *Young*, 999 So.2d at 372. Here, the Circuit Court found that to allow Benedict to rely on testing and studies he had not previously disclosed would not provide adequate time to prepare for the upcoming trial.

Grant also relies on *Kilhullen v. Kansas City S. Ry.*, 8 So.3d 168 (Miss. 2009). In that case, the court found that the trial court had “erroneously applied the rules of discovery ... when the rule regarding affidavits filed in opposition to a motion for summary judgment was applicable.” *Id.* at 174. The *Kilhullen* court also discusses giving a party a “fair opportunity to respond” to a challenge as to its experts. While the affidavit in that case was from an accident reconstructionist stating that he agreed with another expert’s findings and methodology, the case does not indicate that a wealth of new information, testing, and methodology was allowed to be brought in as part of any “fair opportunity to respond.” Here, the Circuit Court only struck those portions of Benedict’s affidavit that addressed testing done after his depositions or bases for his opinions which had not been previously provided in his deposition when specifically requested. Grant was otherwise allowed to respond to Ford’s challenge to her expert’s opinions.

Finally, Grant too relies on a federal court decision, *Bowersfield v. Suzuki Motor Corp.*, 151 F.Supp.2d 625 (E.D. Pa. 2001). In that case, the defendants objected to an expert’s testimony at a *Daubert* hearing as being beyond the scope of his report. The court refused to limit the testimony to the ten conclusions set out in the report, but allowed the expert to expand “on the details of his methodology and the bases for his opinions.” *Id.* at 632. Importantly, the court in that case stated that “[w]hat defendants should have done upon receipt of Mr. Cantor’s

conclusory report was to take his deposition, but they did not do so.” *Id.* In this, case, of course, Ford did take the deposition of Benedict over the course of two days in order to determine all the grounds and bases for his opinions. The Circuit Court properly limited his discussion to the information disclosed at that time.

The use of experts in litigation is an expensive endeavor for all sides, and the time for a party to disclose all the grounds and bases for its expert’s opinions is during the discovery process,<sup>37</sup> not after its opponent has gone through the time and expense of preparing a *Daubert* motion after the discovery deadline has passed, and where the trial court will have to reopen discovery to allow the other side a fair chance to explore this new information. Once a trial court puts a scheduling order in place, the parties should be expected to abide by it. *Bowie v. Montfort Jones Mem’l Hosp.*, 861 So.2d 1037, 1042 (Miss. 2003).

Although this Court has in prior opinions allowed parties to submit expert reports or affidavits after the close of discovery in certain circumstances, the situation presented here provides no basis for such supplementation. The Circuit Court, knowledgeable of the complexity of the products liability claims at issue in this case, and of the time and expense that would be required to address additional information in time for an upcoming trial, properly concluded that the new information in Benedict’s affidavits should be excluded. This Court should affirm.

### **III. BENEDICT’S OPINIONS DID NOT MEET THE REQUIRED STANDARDS OF RELIABILITY UNDER M.R.E. 702 AND WERE PROPERLY EXCLUDED.**

As Grant correctly notes, this Court reviews the Circuit Court’s decision to exclude expert testimony for abuse of discretion. *Webb v. Braswell*, 930 So.2d 387, 396-97 (Miss. 2006).

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<sup>37</sup> In *Nichols v. Tubb*, 609 So.2d 377, 384 (Miss. 1992), *cert denied*, 510 U.S. 814 (1993) this Court discussed the importance of the discovery process in providing the needed information with regard to expert testimony. In so doing, the Court stated that, “[i]f truth is to be attained in the trial process, it is imperative that the attorneys and experts testifying will be fully knowledgeable as to the other party’s contentions and claims well in advance of trial.”

Here, the Circuit Court correctly exercised its gatekeeping role and excluded Benedict's testimony as being unreliable and inadmissible under M.R.E. 702. The Court's decision as to each of Benedict's opinions should be affirmed.

The admissibility of expert testimony in Mississippi is governed by M.R.E. 702, which follows the guidelines set forth by the United States Supreme Court in *Daubert*, 509 U.S. at 593-94. See *Hill v. Mills*, 26 So.3d 322, 324 n.1 (Miss. 2010). The trial judge serves as a gatekeeper "to ensure the reliability and relevancy of expert testimony." *Id.* at 330. "It goes without saying that an unqualified expert's opinions are per se unreliable." *Id.* Expert testimony is considered reliable "if it is 'derived by the scientific method' and is not merely 'subjective belief or unsupported speculation.'" *University Med. Ctr. v. Martin*, 994 So.2d 740, 745 (Miss. 2008) (quoting *Daubert*, 509 U.S. at 590). See also *Hill*, 26 So.3d at 329 ("expert must have knowledge that is more than subjective or unsupported speculation").

Here, the Circuit Court determined (i) that Benedict's seatbelt opinions were "not supported by substantial testing and methodology and are wholly unreliable," 12:1689, R.E.12 at 10; (ii) that Benedict's opinions as to the structural integrity of the vehicle were not based on proper testing and were unreliable, 12:1692, R.E.12 at 13; and (iii) that Benedict's opinions on biomechanics were not reliable as "Dr. Benedict did not perform the necessary testing to substantiate his theories" and the opinions were no more than "conclusory statement[s]" and, further, that Benedict was not qualified to testify in that field, 12:1694-96, R.E.12 at 15-17. All of these decisions are supported by the record in this case.

**A. Benedict's seatbelt opinions were properly excluded.**

Grant states in her brief that Benedict testified at his deposition that he had tested the seat belt at issue in this case and proceeds to quote his testimony about snatching the latch plate out while holding down the release button. Gr.Br. at 15. On the very next page, she claims that

Benedict was not using the snatching demonstration “as evidence to support his opinion,” but that this was simply “a visual aid.” Gr.Br. at 16.

The Circuit Court recognized the snatching demonstration for what it is—not a true test but a “parlor trick”<sup>38</sup> which provides no accurate data related to a real world accident. 12:1686, R.E.12 at 7 (citing *Dale v. General Motors Corp.*, 109 F.Supp.2d 1376, 1380 (N.D. Ga. 1999)). As the Court held, “Dr. Benedict’s snatching demonstration does not prove that the rebound theory is applicable to real-world automotive accidents.” 12:1686, R.E.12 at 7. The Court noted that “Dr. Benedict is unable to show what, if any, force is required to partially press a seatbelt button to allow such a release *or what force was exerted on the buckle during the accident.*” *Id.* (emphasis added).

In her brief, Grant points to Benedict’s affidavit in which he discusses tests conducted after his deposition in which he determined what forces were needed to cause such an unlatch. Gr.Br. at 15. Of course, as discussed above, these belated tests were properly excluded by the Court. Nevertheless, the tests themselves are not described in the affidavit, and, although Benedict states that the 15 g’s “is below the foreseeable forces in real world collisions such as the subject accident,” he provides no basis for this statement. 9:1242, R.E.8 at ¶ 32.b. Moreover, nothing in his affidavit shows that he ever calculated the actual forces in this accident which he had admittedly not done prior to his deposition.

Benedict testified that his theory as to why the seatbelt unlatched was an “inertial

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<sup>38</sup> In *General Motors Corp. v. Porritt*, 891 So.2d 1056, 1058 (Fla. App. 2004), the Florida appellate court, in reversing the trial court’s decision to show a videotape of Benedict’s tests on a seatbelt in which he pressed the seatbelt button down with a metal clamp and then with a toothpick, and struck the buckle causing it to release, noted that “General Motors’ experts testified, and Dr. Benedict admitted, that the National Highway Traffic Safety Administration describes these types of tests as ‘parlor tricks’ because they do not simulate real world conditions.” After noting that “where testing is offered as evidence, the conditions in an experiment must be substantially similar to those at the time of the occurrence for evidence of the experiment to be admitted,” *id.*, the court determined that “Dr. Benedict’s tests were misleading and prejudicial as to the causation element of Porritt’s claims.” *Id.* at 1059.

unlatch” theory, but that it differed in that this case involved downward forces instead of upward forces. The inertial unlatch theory “has been generally rejected as a real world occurrence,” and “the concept of inertial release as a real world proposition has been rejected by the scientific community at large.” *Dale*, 109 F.Supp.2d at 1379, 1381.

As the Circuit Court correctly noted, this new derivative of the inertial unlatch theory was even less reliable than the rejected inertial unlatch theory and it apparently “has never been used by a qualified expert or accepted by any court in the area of Automotive Products Liability.” 12:1685, R.E.12 at 6. The Court also noted that this particular theory “has never been tested.” 12:1686, R.E.12 at 7. Benedict testified at his deposition that he had not tested the theory, and nothing in his affidavit indicates what manner of testing he may have done after his deposition to be able to determine whether the tests duplicated the subject accident conditions.

In addition, the Circuit Court found that “Dr. Benedict’s lack of exploration into alternative causes does not create a substantial basis for his opinions regarding seatbelts in this case.” 12:1687, R.E.12 at 8. One of the factors to be considered in determining whether an expert’s opinion is reliable is whether the expert “adequately consider[ed] alternative explanations.” *Shelter Ins. Co. v. Ford*, 2006 WL 318821, \*3 (N.D. Miss. Feb. 9, 2006), *aff’d*, 2006 WL 3780474 (5th Cir. Dec. 18, 2006). Although Grant again goes to Benedict’s affidavit where he purports to have considered three alternatives to his theory, his deposition testimony reveals that the other alternatives were rejected, not because testing or scientific data did not support them, but because Benedict just did not believe that these things occurred.<sup>39</sup>

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<sup>39</sup> The record citations Grant provides which supposedly support Benedict’s affidavit, Gr.Br. at 16, do not address the same alternatives discussed in the affidavit. In his affidavit, Benedict lists four theories, including his own rebound theory, as to why the buckle may have been unlatched. 9:1242-43, R.E. 8 at ¶ 32.c. The first two deposition citations refer to someone else simply checking the retractor system. 7:959, R.E.5 at 54-55. The third citation to page 283, 7:1018, R.E.5, is referring to spooling which is not referring to the unlatching of the buckle, but whether the webbing itself would have spooled out allowing the infant seat to change positions. The final citation to page 319 of the deposition, 7:1027,

Q. Have you considered the possibility that the tongue was thread through the back of the child seat, but not inserted into the buckle or not adequately engaged into the buckle?

A. No. Because Ms. Grant specifically said how she put it in. If she is pulling it tight – if she is pulling it tight like she said she was, and I believe her, then it is not buckled, it is going to come sliding back. It can't hang up enough that it will do that.

Q. Other than Ms. Grant's testimony and her conversations with you, do you have any other evidence to support your opinion that could not have happened in this accident?

A. No, nobody does. I mean some people can hypothesize that's what it is, and that's why all this went on, and blah, blah, blah. But they don't have any proof that it did either.

7:1029, R.E.5 at 327-28.

Q. Have you calculated or made any effort to determine the sequence of events in this particular crash to demonstrate that the parameters that I'm trying to ask about have been met to obtain an unlatch, as far as the direction of the force, the amount of force, the duration of force, and the tension that the buckle is experiencing at the time of the collision?

A. I told you the direction of the force, but I haven't done any of the other stuff.

Q. Are those necessary components in order to render reliable expert opinions as to whether this buckle experienced an unlatch in this accident?

A. No, I know that it experienced an unlatch, because it is the only way the baby seat could be hanging out the way it is, because it has the ALR on it.

7:1018, R.E.5 at 282-83.

In *Townsend v. Doosan Infracore American Corp.*, 3 So.3d 150 (Miss. App. 2009), the Court rejected this same sort of “results-oriented” approach to expert testimony. In that case, the expert “concluded that the only way the accident could have occurred was that Townsend must have bumped the gear lever into the ‘forward’ position upon exiting the forklift,” and thus he limited his testing to that theory. *Id.* at 155-56. The Court concluded the expert's findings were “speculative and that his methodology failed to meet either the relevancy or reliability standards outlined in *Daubert.*” *Id.* at 156.

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R.E.5, is actually a fairly good picture of Benedict's rejection of alternative reasons the buckle may have unlatched: “The only other thing that could have happened, if it is inadvertent, is for something from Memory's area to have hit the button. *But I don't think that happened.*” (Emphasis added.)

Finally, the Circuit Court noted that Benedict offered “no feasible alternative design that was in use when the vehicle was manufactured in 1996.” 12:1688, R.E.12 at 9. At his deposition, Benedict asserted that Ford should have used a pretensioner in the retractor and an all-belts-to-seat design. 7:1022, R.E.5 at 299. He had done no testing to show that such a design would have prevented Makayla’s death in this accident, because he claimed “[y]ou don’t have to. It is a fact.” 7:1007, R.E.5 at 248.

In *Lott v. Rental Serv. Corp.*, 2006 WL 839558 (S.D. Miss. Mar. 30, 2006), the Court addressed similar conclusory statements. There, the plaintiff’s expert had opined that the safety benefits associated with having fenders on a boom lift was, to him, “an open and obvious fact.” *Id.* at \*4. But the court found that “[w]hat the plaintiff’s expert describes as ‘open and obvious’ this court holds to be speculation and guesswork that certainly could not withstand the scrutiny of [plaintiff’s expert’s] professional peers.” *Id.* at \*5. Likewise, Benedict’s bald conclusion that “it is a fact” that his alternative design would have prevented Makayla’s death is pure conjecture.

Furthermore, at his deposition, Benedict could not identify a single production vehicle in 1996 that contained an all-belts-to-seat system. 7:1024, R.E.5 at 301. Grant, in her brief, again goes to Benedict’s affidavit, to argue that he did ultimately allege that the ABTS design was in use when the Probe was manufactured. Gr.Br. at 16-17. The exhibits referenced by Benedict are not in the appeal record. However, even if the Court were to have considered Benedict’s affidavit in this matter, there were plenty of reasons to exclude Benedict’s testimony. His belated attempt to argue that other cars had an ABTS system at the time is insufficient to salvage his testimony.

**B. Benedict's structural integrity opinions were properly excluded.**

As noted above, Benedict's structural integrity testimony focuses on both the hinges<sup>40</sup> as well as certain welds on the driver's side of the vehicle. The Circuit Court excluded these opinions after determining that, although Benedict did state that he could not substantiate his opinions without the Mazda design drawings, he nevertheless "seems to arrive at specific conclusions without testing or analyzation of relevant forces and component parts involved in the accident." 12:1690, R.E.12 at 11. As noted by the Circuit Court, "[w]ith evidence that the hinges were not able to withstand the force of the accident, Benedict opines that the hinges were defectively designed in that they were not able to withstand foreseeable forces." 12:1689, R.E.12 at 10. In other words, Benedict basically asserted that the hinges must have been defective or what happened in this accident would not have occurred.

Relying on the decision in *Glenn v. Overhead Door Corp.*, 935 So.2d 1074 (Miss. App. 2006), the Circuit Court found that Benedict's opinion that the hinges needed to be "beefed up," was "nothing but a bottom line [that] supplies nothing of value to the judicial process." 12:1690, R.E.12 at 11 (quoting *Glenn*, 935 So.2d at 1080). The Circuit Court found that Benedict had "not done any testing to substantiate his opinion" and "did not quantify the collision forces sustained during the accident." 12:1690, R.E.12 at 11. "The only calculations performed by Dr. Benedict involved imputing highly speculative data into an equation to determine the amount of force the hinges would withstand." *Id.* Nor did Benedict do any sort of testing to support his opinion that the hinges in his Mercedes could withstand more force than those in the Probe, but said, "All I need to do is look at it." *Id.* The Circuit Court found that "Dr. Benedict's use of a Mercedes hinge as an example of how a hinge should be designed is extremely superficial and,

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<sup>40</sup> Frankly, it is not at all clear how the fact that the door came off its hinges has anything to do with causation of Makayla's injuries. It would seem to be the issue of the welds that would allow the B-pillar to come loose, which is what Benedict claims was the source of the injury.

again, not supported by any scientific data.” *Id.*

Grant tries to justify Benedict’s speculative calculations by stating that he did provide a range of forces that were “scientifically valid.” Gr.Br. at 18. She fails to reveal, however, that even those calculations, as noted by the Circuit Court, were based on assumptions because Benedict testified that he did not know what material was used for the hinges (although he had hinges he could have tested to determine the material) and simply assumed that 50,000 PSI steel was used. 12:1690, R.E.12 at 11.

Grant offers little support for Benedict’s opinions regarding the “beefier” Mercedes hinges, stating only that although making hinges “larger thus stronger” “may seem simple it is quite effective.” Gr.Br. at 18. This vague sort of description is precisely why the Circuit Court excluded Benedict’s opinions as being “speculative and not based on substantial evidence.” 12:1691, R.E.12 at 12. As the Court of Appeals held in *Glenn*:

An expert’s opinion is admissible only if it is founded on data. “Talking ‘off the cuff’—deploying neither data nor analysis—is not an acceptable methodology.” *Lang v. Kohl’s Food Stores, Inc.*, 217 F.3d 919, 924 (7th Cir. 2000). Dr. Baden merely offered an opinion, with no explanation of any methodology he employed in arriving at that opinion. He did not form his opinion based on his own testing or on statistical data gathered by others. “An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process.” *Mid-Stone Fertilizer Co. v. Exchange Nat. Bank of Chicago*, 877 F.2d 1333, 1339 (7th Cir. 1989) The circuit court was within its discretion in refusing to consider Dr. Baden’s testimony. We find this assignment of error is without merit.

935 So.2d at 1079-80. This Circuit Court too was within its discretion in excluding Benedict’s opinions on hinges.

Nor do Benedict’s opinions as to the spot welds withstand *Daubert* scrutiny. He questioned both the number of welds and their placement, but, as the Circuit Court held, those opinions were not reliable “because there is no data or scientific testing to prove his theory.” 12:1691, R.E.12 at 12. As set forth above, Benedict agreed that there are some forces that would

rip through any weld, but felt these welds should have held up to the “minor” forces at issue in this accident, even though he had not calculated the exact forces of the accident.<sup>41</sup> 7:989, R.E.5 at 175. He had no opinion as to how many welds would be needed to prevent the portion of the vehicle from being torn loose in this accident, he had no idea what type of metal was used in the vehicle, nor could he say what type of metal should be used. Nor had he done any testing or analysis to determine the amount of strength his suggested seam welding would have added.

The Circuit Court relied on a decision by a Texas district court as “particular[ly] instructive.” 12:1691-92, R.E.12 at 12-13 (citing *Hafstienn v. BMW of North America, L.L.C.*, 2005 WL 5988651 (S.D. Tex. 2005), *aff’d*, 194 Fed.Appx. 209 (5th Cir. 2006)). There, the court excluded the testimony of a metallurgist as to spot welds. The expert had decided that some of the welds on the subject vehicle were faulty, and then opined that this was what caused the vehicle to split apart which had exposed a child’s head to the pavement and caused his death. However, the expert could not say “how many bad welds would make a difference”; he “agreed that the impact of a heavy object can cause welds to fail, causing a split in the metal, and that this does not mean the welds were substandard,” and he could not say whether, had all the spot welds “been done exactly to specifications, ... that the vehicle would not have separated as it did.” *Id.* at \*3.

Here, Benedict leaps from his observation of welds he deems faulty to the conclusion that this is what caused part of the vehicle to separate, but he did no testing as to the type of metal used or the amount of forces that would cause such an event, and he agreed that some forces

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<sup>41</sup> Again, although Benedict testified to a “range” of forces, that calculation was based on the forces needed to shear the hinges, and to determine that, Benedict assumed what type of steel was used in the hinges. As the Circuit Court noted, “Again, Dr. Benedict is faced with the reoccurring problem of having no idea of the force applied to the welds and other component parts during the accident.... Instead of conducting tests to help determine the possible amount of force required or the placement of the welds, Dr. Benedict claims that he cannot make the necessary calculations without the design drawings.... In regard to the structural integrity of the vehicle, it seems that Dr. Benedict is attempting to use the lack of design drawings as an excuse for his unsubstantiated theories.” 12:1691, R.E.12 at 12.

would cause any welds to rip. Nor had he tested whether his suggested alternative of seam welding would have made any difference whatsoever.

Grant tries to salvage Benedict's opinion by citing to *Kilhullen*, in which the court found an engineer's testimony to be sufficient with regard to line-of-sight data in a railroad accident. There, the engineer had collected data of the accident site "using appropriate engineering instruments and devices, and subsequently input that data into a recognized line-of-sight equation." 8 So.3d at 173. That is a far cry from what Benedict did here. Nor is calculating how far a person might be able to see down a railroad track the same thing as testifying as to whether or not spot welds in a vehicle were defective and a causative force in a passenger's injuries in an accident. Benedict's testimony that he observed some spot welds that he found to be substandard and that this led to Makayla's injuries is no more than the "*ipse dixit*"<sup>42</sup> testimony which is to be excluded under *Daubert* standards. *Dedaux Util. Co. v. City of Gulfport*, \_\_\_ So.3d \_\_\_, No. 2010-CA-00290-SCT, at ¶ 39 (Miss. Apr. 7, 2011), *reh'g motion pending* ("Stokes's valuation was merely his 'opinion,' with no supporting recognized methodology"; "[i]pse dixit opinions are inadmissible").<sup>43</sup> The Circuit Court's exclusion of Benedict's structural integrity opinions should be affirmed.

**C. Benedict's biomechanics opinions were properly excluded.**

The Circuit Court excluded Benedict's biomechanical opinions for two reasons: (1) it found that Benedict was not qualified to present testimony in this area, and (2) his testimony was

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<sup>42</sup> "He himself said it." Black's Law Dictionary at 743 (5th ed. 1979).

<sup>43</sup> See also *McKee v. Bowers Window & Door Co.*, \_\_\_ So.3d \_\_\_, 2011 WL 1498372, ¶¶ 24-26 (Miss. Apr. 21, 2011), *reh'g motion pending* (upholding exclusion of expert's testimony who had merely observed windows and offered testimony that was "nothing more than 'unsupported speculation or subjective belief,' lacking any semblance of an underlying 'reliable principl[e] or metho[d]'" (quoting *Hubbard v. McDonald's Corp.*, 41 So.3d 670, 675 (Miss. 2010)); *Denham v. Holmes*, \_\_\_ So.3d \_\_\_, 2011 WL 1314229, ¶ 54 (Miss. Apr. 7, 2011) (upholding exclusion of testimony that "contained an obvious 'analytical gap'"; expert "failed to connect the dots between the skid marks and the existing physical evidence" and "his conclusion regarding causation was unreliable").

unreliable as he “did not perform the necessary testing to substantiate his theories.” 12:1695, R.E.12 at 16.

In finding that Benedict was not qualified to testify as to the cause of Makayla’s head injury in this case, the Circuit Court found support in two prior decisions finding medical causation to be beyond Benedict’s expertise. *Hodge v. Soper*, 17 Fed.Appx. 196, 197 n.2, 198 (4th Cir. 2001) (upholding exclusion of “Dr. Benedict’s testimony as to the causation of physical injury” as being “unreliable and beyond his expertise”); *Hoover v. Bell Sports, Inc.*, No. 92-8721-CIV-MORENO, at 7 (S.D. Fla. Aug. 25, 1995) (finding that “Dr. Benedict is not qualified to testify as to the medical cause of Plaintiff’s injury”), 12:1705, Appendix.

In addition, the Circuit Court found the decision in *Hafstienn, supra*, to be persuasive. There, the court found that an expert with “extensive training and experience in mechanical engineering, biomedical engineering, and teaching biomechanics of bracing and gait as well as six years of experience with NASA ‘working on projects related to biomechanics of human activities’ and seven years as a full time faculty member at the University of Texas Medical Branch, ‘with specific responsibilities as Director of Orthopedic Spine Research and Director of the Biomechanics, Motion and Performance Lab,’” 2005 WL 5988651, at \*4, was nevertheless not qualified to testify as to whether the head injuries suffered by a child passenger were caused by defects in the vehicle. The court noted that the expert was neither a pathologist nor neurologist and that his having “a PhD in biomedical engineering and a doctorate in osteopathic medicine does not qualify him to give opinions on the mechanism of Taylor Hafstienn’s fatal injuries.” *Id.* at \*5. The Circuit Court here found that the expert in *Hafstienn* was even more qualified than Benedict, and rightfully so. As with that expert, Benedict “has no qualifications or experience in occupant kinematics, head injuries in general or children in particular....” *Id.* The decision should be affirmed.

Furthermore, Benedict's opinions in this area were woefully lacking. He did not review all of Makayla's medical records, took no measurements, did not determine the crash intrusion into the side of the vehicle, or know the forces required to cause an injury such as Makayla's or the forces involved in this accident. As the Circuit Court held, "Dr. Benedict cannot substantiate his opinions regarding the movement of component parts within the subject vehicle because he has done no measurement of the subject [P]robe." 12:1695, R.E.12 at 16.

Grant argues in her brief that Benedict's placement of the infant seat in the car and his observation of hairs on the B-pillar allow him to testify that Makayla's "head trauma was caused from impact with the B-Pillar which is obvious since the child's hair was in the B-Pillar." Gr.Br. at 20. But that only shows contact with the B-pillar at some point; it does not prove that the B-pillar was the cause of her fatal injuries. In fact, Ford's experts agreed that Makayla contacted the B-pillar, but they disagreed as to that being the cause of her death. 17:2418.

The Circuit Court did not abuse its discretion in finding that Benedict's conclusory statement that Makayla "got whacked in the head and she had a brain injury" was "not based on substantial facts and measurements that could have been conducted before the theories were made." *Id.* Since its adoption of the *Daubert* standard, the Mississippi Supreme Court has made clear that an expert's opinions must be based on "the methods and procedures of science, not merely [the expert's] subjective beliefs or unsupported speculation." *Mississippi Transp. Comm'n v. McLemore*, 863 So.2d 31, 36 (Miss. 2003). *See also Sanders*, 29 So.2d at 141 (expert opinions "consisting of nothing more than conclusory statements should be disregarded by the court"). Because Benedict's biomechanical opinions did not meet the required standard of reliability, this Court should affirm the Circuit Court's decision excluding this portion of his testimony.

**IV. THE CIRCUIT COURT DID NOT ERR BY REFUSING TO REOPEN DISCOVERY AND AMEND THE SCHEDULING ORDER AND INSTEAD ENTERING SUMMARY JUDGMENT IN FORD'S FAVOR.**

The remaining issues in Grant's brief all relate to her attempt, once Benedict's opinions were excluded, to avoid the inevitable—summary judgment in favor of Ford. When Ford moved for summary judgment due to Grant's inability to prove the required elements of her products liability claim, 10:1421-26, Grant did not respond, but instead moved the Court for a stay pending Ford's Rule 30(b)(6) deposition, 10:1461-63, F.R.E.1. Then, after the deposition was taken, she sought the Circuit Court's permission to make Ford appear at yet another deposition and to produce additional documents, 11:1534-38, and also asked the Circuit Court to amend the scheduling order to allow her to conduct even more discovery, 11:1539-41. Basically, almost seven years after suit was filed, and over a year after the close of discovery, Grant wanted a "mulligan." The Circuit Court, exercising its "considerable discretion in managing the pre-trial discovery process," *Bowie*, 861 So.2d at 1042, properly rejected these requests.

Nowhere in any of these motions did Grant suggest that any of her requests would serve to overcome the striking of her expert's testimony as to causation. 11:1534-43.<sup>44</sup> At the hearing on all of her motions, Grant's counsel offered no response to Ford's argument that "there is not a design drawing in the universe that is going to make Dr. Benedict qualified to offer biomechanic opinions, and there is not a design document in the universe that is going to salvage and enable

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<sup>44</sup> Earlier, in her motion for reconsideration of the order striking certain of Benedict's opinions, Grant had alternatively moved for an amendment of the scheduling order and a continuance to allow her to supplement her discovery responses with the new information in Benedict's affidavits and also to obtain new experts. 10:1456-58. At the hearing on this issue, however, 19:112-28, F.R.E.4, Grant did not advocate that section of the motion. Her counsel did, one time, in response to Ford's summary judgment motion argument, assert that discovery was not complete and that, should she obtain the Mazda documents based on information she hoped to discover during Ford's Rule 30(b)(6) deposition, then there should be a continuance to allow her "to supplement Dr. Benedict's prior designation for his additional testimony that would be necessary after that was done and additionally to potentially return additional experts."

Ford's counsel, however, pointed out that "even if you believe that somehow the defect theories might be related to these design drawings, they have no causation testimony." 19:136. The record reveals no subsequent request for the opportunity to find other experts.

Dr. Benedict to go back in time and take the measurements and do the things that he should have done to form a reliable biomechanic's and causation opinion." 19:149.

The Circuit Court agreed:

Lastly, even if this Court were to allow the completion of the 30(b)(6) deposition and grant the Plaintiff's other discovery requests, their initial claim is still flawed because they are unable to prove causation of the victims injury. In excluding the biomechanics testimony of Dr. Charles Benedict, the Court struck any proof the Plaintiff had regarding the causation issue. *Irrespective of the presence of design drawings, the Plaintiff will not be able to prove causation.* Therefore, any future discovery into the availability of the design documents is moot.

11:1630, R.E.14 at 3 (emphasis added).

Nowhere in the eight pages of her brief devoted to these additional discovery matters and the entry of summary judgment, Gr.Br. at 20-27, does Grant refute this holding. She does make the sweeping statement that "should the Court have allowed Grant to continue discovery, amend the scheduling order, and conduct additional discovery, said deficiencies could have been cured," Gr.Br. at 26, but that is simply not true. Nothing about Benedict's biomechanics opinions, or even his seatbelt opinions for that matter, hinged on the availability of the Mazda design documents.

Summary judgment was properly granted in this case because Grant had no evidence to support elements of her claim. As in *Williams v. Bennett*, 921 So.2d 1269, 1278 (Miss. 2006), "the claimant in this case has failed to meet the prerequisites necessary to create a successful cause of action and thus create a triable issue of fact." In that products liability suit, the Circuit Court, referring to the products liability statute, MISS. CODE ANN. § 11-1-63, as "an explicit blueprint for claimants to prove when advancing such a claim," upheld the dismissal of the action when plaintiff had no evidence to support required elements of her action:

When claimants do not fulfill their statutory obligation, they leave the courts no choice but to dismiss their claims because they fail to proffer a key element of proof requisite to the court's determination of whether the claimant has advanced

a valid claim under the statute. As the Supreme Court clearly said in *Celotex [Corp. v. Catrett]*, 477 U.S. [317,] at 323 [(1986)], ... where "the summary judgment evidence establishes that one of the essential elements of the plaintiff's cause of action does not exist as a matter of law, ... all other contested issues of fact are rendered immaterial."

921 So.2d at 1277.

The Circuit Court granted summary judgment here because, without expert testimony, Grant could not prove that the Ford Probe was defective. 11:1634-35, R.E.15 at 4-5. None of Grant's arguments as to the additional discovery she wanted show that what she sought would have overcome the deficiencies in Benedict's testimony. Her arguments provide no basis for overturning the summary judgment entered by the Circuit Court.

#### CONCLUSION

For the reasons stated herein, the Circuit Court's judgment dismissing Grant's complaint must be affirmed.

Respectfully submitted,

BY:



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ATTORNEYS FOR FORD MOTOR COMPANY

**CERTIFICATE OF SERVICE**

I, Michael B. Wallace, one of the attorneys for Appellee Ford Motor Company, do hereby certify that I have this date caused to be mailed, via U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing to the following:

Hon. Lester F. Williamson, Jr.  
CIRCUIT COURT JUDGE  
Post Office Box 86  
Meridian, Mississippi 39302

*Trial Court Judge*

Stacey Lea Sims  
MORRIS, SAKALARIOS & BLACKWELL, PLLC  
Post Office Drawer 1858  
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*Attorney for Appellant*

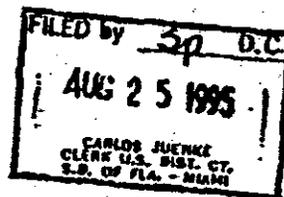
This, the 3<sup>rd</sup> day of June, 2011.

  
\_\_\_\_\_  
MICHAEL B. WALLACE

JOSEPH TUEYELL HOOVER and KAY F.  
HOOVER,  
Plaintiffs,

vs.

BELL SPORTS, INC., a foreign  
corporation a/k/a BELL HELMETS, INC.  
and ED TUCKER DISTRIBUTORS, INC., a  
foreign corporation,  
Defendants.



ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came before the Court upon Defendant's Motion for Summary Judgment (docket no. 70), filed on March 9, 1995.

THE COURT has considered the motion, responses and the pertinent portions of the record, including affidavits and transcripts of the depositions filed in the case, heard oral argument on the summary judgment motion on March 28, 1995, held a hearing on August 23, 1995 in order to determine the qualifications of Plaintiffs' experts on the causation issue, and being otherwise fully advised in the premises, it is

ADJUDGED that the motion for summary judgment is GRANTED.

LEGAL STANDARD

Summary judgment is authorized only when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The

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party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

If the record presents factual issues, the Court must not decide them. Instead, the Court must deny the motion and proceed to trial. *Environmental Defense Fund v. Marsh*, 651 F.2d 983, 991 (5th Cir. 1981). Summary judgment may be inappropriate even where the parties agree on the basic facts, but disagree about the inferences that should be drawn from these facts. *Lighting Fixture & Elec. Supply Co. v. Continental Ins. Co.*, 420 F.2d 1211, 1213 (5th Cir. 1969); *Impossible Electronics. Techniques, Inc. v. Wackenhut Protective Systems, Inc.*, 669 F.2d 1026, 1031 (5th Cir. 1982).

The party opposing a motion for summary judgment need not respond to it with any affidavits or other evidence unless and until the movant has properly supported the motion with sufficient evidence. Only when that burden has been met by the movant does the burden shift to the non-moving party to demonstrate that there is indeed a issue of fact that precludes summary judgment. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604 (11th Cir. 1991). The party opposing the motion may not simply rest upon mere allegations or denials of the pleadings; the non-moving party must establish the essential elements of its case on which it will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The nonmovant must present more than a scintilla of

evidence in support of the nonmovant's position. A jury must be able to reasonably find for the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986).

**STATEMENT OF FACTS**

Plaintiffs (Joseph Hoover and his wife, Kay) filed a products liability complaint against Defendants Bell Sports, Inc. ("Bell") and Ed Tucker Distributors, Inc. ("Tucker") in Florida Circuit Court. The case was removed to Federal Court based upon diversity jurisdiction. The complaint alleges causes of action under Florida law for negligence, strict liability, breach of warranty and loss of consortium.

Plaintiff Joseph Hoover suffered injuries on August 5, 1988, when he was attempting to ride a motorcycle under a low overpass. While under the overpass, Plaintiff prematurely raised up and struck his helmeted head on the concrete understructure of the overpass. As a result of the accident, Plaintiff suffered spinal cord injuries. The motorcycle helmet in question was designed by Defendant Bell and distributed by Defendant Tucker.

In support of their claim, Plaintiffs offer the testimony of Dr. Charles Benedict, a consulting engineer, on the issue of both design defect and medical causation. Dr. Benedict, in his deposition, states that Plaintiff's injuries were caused when the helmet "rotated about Mr. Hoover's head and 'karateed' him in the C-3, -4 area." (Benedict Dep. at 8.) Dr. Benedict further alleges that it was a design defect in the helmet that led to Plaintiff's

injuries.

Plaintiffs' expert, Dr. Benedict, is the sole owner of Benedict Engineering, which engages in accident reconstruction, product failure analysis and product design activity. Dr. Benedict is not a medical doctor, has no medical doctors or medically trained persons on his staff, and did not consult any medical doctors in reaching his opinions. (*Id.* at 3-8, 31-32.) To formulate his opinion, Dr. Benedict took photographs of the helmet, reviewed the complaint, and watched a videotape of Plaintiff rotating the helmet backwards on his head. (*Id.* at 4, 18, 28.) Dr. Benedict did not perform any calculations to determine the amount of force Plaintiff's neck sustained as a result of the alleged impact of the helmet with Plaintiff's neck. (*Id.* at 14, 15.) Furthermore, Dr. Benedict took no physical measurements of Plaintiff's head or the helmet. (*Id.* at 27, 28.)

Plaintiffs also offer the affidavit of Dr. Marc Levinson, a physiatrist, on the issue of medical causation. In his affidavit, Dr. Levinson states that Plaintiff's injuries are consistent with the helmet making contact with the cervical spine. (Levinson Aff. at 2.)

Defendants assert that for Plaintiffs to recover under any theory alleged, they must present competent and substantial evidence to prove that the alleged defect in the helmet was the cause-in-fact of Plaintiff's injuries. Defendants argue that Plaintiffs have failed to offer any competent medical testimony on the issue of causation.

### LEGAL ANALYSIS

In order for Plaintiffs to recover under any theory of liability alleged, they must prove that the alleged defect or negligence of Defendants was the factual cause of Plaintiff's injuries. See *City of Green Cove Springs v. Donaldson*, 348 F.2d 197, 200 (5th Cir. 1965); *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 90 (Fla. 1976); *Stahl v. Metropolitan Dade County*, 438 So. 2d 14, 17 (Fla. 3d DCA 1983). Florida courts apply a "but for" causation-in-fact test: that is, but for the defect or negligence of the defendant, plaintiff's injury would not have occurred. *Stahl*, 438 So. 2d at 17.

Citing *Prosser, Law of Torts* § 41 (4th Ed. 1971), the Florida Supreme Court has found the plaintiff's burden in negligence actions to be the following:

[Plaintiff] must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.

*Gooding v. University Hosp. Bldg., Inc.*, 445 So. 2d 1015, 1018 (Fla. 1984). Thus, Plaintiffs have the burden of showing that it was more probable than not that Plaintiff's injuries were medically caused by the alleged design defect of the helmet.

Generally, expert testimony is required to demonstrate legal causation where this issue is beyond the common knowledge of

laymen. W. Prosser, *The Law of Torts* § 241 (4th ed. 1971); *Greene v. Flewelling*, 366 So. 2d 777, 780 (Fla. 2d DCA 1979). The Court recognizes that in certain situations non-physicians are competent to testify as to the medical cause of an injury. Thus, for example, a toxicologist is competent to testify as to the cause and effect of chemicals in an environment. See *Hermes v. Pfizer, Inc.*, 848 F.2d 66, 69 n.15 (5th Cir. 1988). The toxicologist in such a situation has the requisite knowledge, skill, experience, training and education contemplated by Rule 702 of the Federal Rules of Evidence, which governs the use of expert testimony.

In the present case, Plaintiffs rely on Dr. Charles Benedict, a consulting engineer, to establish that the motorcycle helmet involved was defectively designed and that it was the medical cause of Plaintiff's injuries. Defendant has challenged Dr. Benedict's qualifications on the medical cause issue and the helmet design defect issue. The Court does not reach the issue of whether Dr. Benedict can testify, under the guidelines set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, \_\_\_ U.S. \_\_\_, 113 S.Ct. 2786 (1993), as to the possible design defects in the helmet. Because it is undisputed that Dr. Benedict has absolutely no knowledge, skill, experience, training or education in spinal cord or cervical injuries, the Court finds that Dr. Benedict is not qualified to testify as to the medical cause of Plaintiff's injury.

Although Plaintiffs contend that Dr. Benedict, through his deposition and affidavit, creates a genuine issue of material fact on the issue of causation, the Court disagrees. Dr. Benedict may

be an expert on helmet design, geometry and kinematics, but that is an insufficient basis to establish the medical cause of Plaintiff's injuries in this case. Plaintiffs note that Dr. Benedict has been previously retained as an expert regarding defective helmets and the injuries caused by them. However, Dr. Benedict himself barely remembers only two previous helmet cases that he has worked on. (Benedict Dep. at 18-20.) Moreover, the one case that Dr. Benedict does remember involved a case where the helmet came off and the Plaintiff suffered injuries when he fell on his head. (*Id.*) Thus, Dr. Benedict's testimony in the prior case had more to do with the defective design of the helmet rather than the medical cause of the Plaintiff's injuries. Here, because Plaintiff suffered his injuries while still wearing the helmet, more evidence is necessary to demonstrate the actual medical cause of Plaintiff's injury. The Court is compelled to find that Dr. Benedict is not qualified to testify as to the medical cause of Plaintiff's injury.

Plaintiffs cite to a variety of cases for the proposition that in certain situations non-physicians are competent to testify as to injury causation. *Habecker v. Copperloy Corp.*, 893 F.2d 49 (3rd Cir. 1990); *Hermes v. Pfizer, Inc.*, 848 F.2d 66 (5th Cir. 1988); *Backes v. Valspar Corp.*, 783 F.2d 77 (7th Cir. 1986); *Dorsett v. American Isuzu Motors*, 805 F. Supp. 1212 (E.D.Pa. 1992). Initially, it is noted that these cases are not binding upon this Court. Furthermore, each case cited to by Plaintiffs are all distinguishable from the instant case.

In *Habecker*, the plaintiff, a forklift operator, fell out of

the forklift when it tipped over because it had no seat belts. The plaintiff was killed when the forklift crushed him. Plaintiff's expert had a master's degree in safety education and a doctorate in human factors and product safety design. The trial court excluded the expert's testimony. The Circuit court reversed finding the expert qualified to testify as to the causal relationship between the lack of seat belts and the plaintiff's injury. Thus, the expert in *Habecker* did not testify as to the actual medical cause of the plaintiff's injury, merely that the lack of seat belts led to the plaintiff falling out of the forklift and thereby being crushed.

In *Hermes*, the Fifth Circuit held that a licensed pharmacist is competent to testify as to the medical effect of a prescribed antidepressant, Sinequan. The Court found that the expert's training, knowledge, skill and experience in the drug field made the expert's testimony relevant. However, in the instant case, Dr. Benedict lacks the knowledge, skill, training and education necessary to testify as to what was the cause of Plaintiff's cervical spine injuries.

In *Backes*, the Seventh Circuit held that a chemist who worked for the Environmental Protection Agency was competent to testify as to what may have caused a child's rheumatoid arthritis. The Court noted that the expert was not competent to diagnose a case of rheumatoid arthritis, only to testify as to the cause of the disease. In the present case, Dr. Benedict may be qualified to testify as to why the helmet may be defective; however, that does

not make him competent to testify as to whether the helmet actually caused Plaintiff's spinal cord injuries.

Finally, in *Dorsett*, an expert in engineering and occupant crash protection was allowed to testify that the Plaintiff's injuries were caused by her head coming into contact with the roof of the car which had rolled over. The Court noted that an "engineer could not testify as to whether a seatbelt system was safe without knowing what injuries would result if the seatbelt system were used." *Dorsett*, 805 F. Supp. at 1226. The Court went on to note that in order to establish a *prima facie* case, the plaintiff had the burden of showing what injuries she would have suffered had an alternative, safer seatbelt design been used. It is clear that in the instant case, Plaintiffs have offered absolutely no evidence as to what injuries Plaintiff would have suffered had a different helmet been used. Accordingly, Plaintiff has failed to establish a *prima facie* case.

In the present case, Plaintiff was wearing his helmet when he hit his head on the underpass. Plaintiffs offer Dr. Benedict's testimony for the proposition that the helmet itself caused Plaintiff's injury, not the striking of the underpass with Plaintiff's head. Thus, the issue presented is whether the helmet helped prevent further potential injuries or whether the helmet actually caused Plaintiff's injuries. To resolve this, Plaintiffs must provide the Court with expert testimony as to the actual cause of his injury. However, to support his contention that the helmet was the medical cause of Plaintiff's injuries, Dr. Benedict merely

looked at photographs of the helmet and a videotape of Plaintiff rotating the helmet on his head. If the Court were to accept Dr. Benedict's testimony, the Court would be finding that any accident involving the subject type helmet resulting in an injury to the C-3, C-4 area of the spine was the result of the alleged negligent design. In fact, Dr. Benedict's deposition and affidavit do not support this contention. The steps taken by Dr. Benedict in reaching his conclusion are inadequate to help the trier of fact determine whether the subject helmet helped prevent potential injuries or instead was the actual cause of those injuries. Thus, the Court finds that Dr. Benedict is not qualified to testify as to the medical cause of Plaintiff's injuries and excludes his testimony under Federal Rules of Evidence 702 and 403.

In addition to Dr. Benedict, Plaintiffs also offer the affidavit of Dr. Marc Levinson, a physiatrist, on the issue of medical causation. Dr. Levinson states that he has "reviewed Mr. Hoover's hospital chart and medical records along with the depositions of Charles E. Benedict, Ph.D, and Robert A. Mendelsohn, M.D." and that the injuries suffered by Plaintiff are "consistent with a hyperextension injury caused in whole or in part by the rotation of the helmet coming into contact with the cervical spine and injuring the spinal cord." (Levinson Aff. at 2.)

However, it is clear from the pleadings that Dr. Levinson, who is listed as a witness on the pretrial stipulation, is an afterthought on the issue of medical causation. Plaintiffs' pleadings in opposition to Defendant's Motion for Summary Judgment

focus almost exclusively on the testimony of Dr. Benedict, not Dr. Levinson. As to Dr. Levinson, Plaintiffs merely state that they intend to call him "to testify regarding the cause of Plaintiff's injuries." (Pls.' Mem. Resp. Summ. J. at 8.) This is wholly insufficient to create a genuine issue of material fact. Dr. Levinson is Plaintiff's physical therapist. His knowledge is rooted in physical therapy and rehabilitation. The Court does not dispute that Dr. Levinson is an expert on physiatry. However, Dr. Levinson's methodology in reaching his opinions as to the cause of Plaintiff's injury does not meet the requirements of Daubert.

Daubert requires "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts of this case." *Daubert*, 113 S.Ct. at 2796. It is undisputed that Dr. Levinson merely reviewed the depositions of Charles E. Benedict and Robert A. Mendelsohn along with Mr. Hoover's hospital chart and medical records. Dr. Levinson has never concluded that Plaintiff's injury were caused by the helmet in question. In fact, Dr. Levinson's strongest statement in that regard is merely that it was possible that the helmet caused Plaintiff's injury.

Most important, however, is the fact that Dr. Levinson never actually tried to determine the cause of Plaintiff's injury. As he testified at the hearing on August 23, 1995, Dr. Levinson merely stated that he was asked whether or not in his opinion it was possible that Plaintiff's injury was caused by the helmet. Dr.

Levinson replied that it was "possible." Yet, Dr. Levinson never even attempted to determine the actual cause of Plaintiff's injury. Accordingly, Dr. Levinson's methodology in determining the medical cause of Plaintiff's injury is entirely insufficient to meet the *Daubert* requirements and his testimony does not create a genuine issue of material fact that would support denying the motion for summary judgment.

The Court notes that not all doctors can testify as to medical causation. A doctor testifying as an expert still must be experienced, trained, educated and knowledgeable within the field on which he is testifying. *Christopersen v. Allied-Signal Corp.*, 939 F.2d 1106, 1112-13 (5th Cir. 1991) (en banc), cert. denied, 503 U.S. 912 (1992). Thus, for example, an orthopedic surgeon may not be qualified to testify on a neurological issue.

In the present case, Plaintiffs fail to set forth with sufficient detail how Dr. Levinson is qualified to testify as to the medical cause of Plaintiff's injury. Plaintiffs' summary one sentence statement that Dr. Levinson will testify as to the cause of Plaintiff's injury does not create a genuine issue of material fact. In addition, the affidavit of Dr. Levinson, which was filed at the last minute, also does not create a genuine issue of material fact. Dr. Levinson states only that Plaintiff's injuries are consistent with a hyperextension injury caused by the rotation of the helmet coming into contact with the cervical spine. Dr. Levinson's statement merely raises the possibility that Plaintiff's injury was caused by the helmet coming into contact with the

cervical spine. This possibility is insufficient to withstand a motion for summary judgment. See *Gooding*, 445 So. 2d at 1018. Plaintiff must show that the injury more likely than not was caused by the negligence of Defendants or the defect of the helmet. *Id.* at 1020. The affidavit of Dr. Levinson fails to do this.

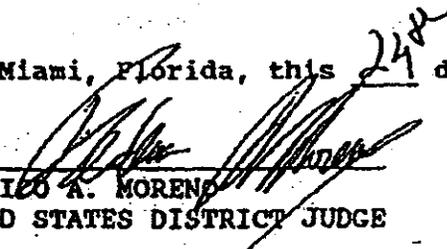
Moreover, Dr. Levinson's affidavit merely contains conclusory allegations without specific facts in support thereof. The Eleventh Circuit has held that "conclusory allegations without specific supporting facts have no probative value" and that "a party may not avoid summary judgment" by filing an affidavit containing such conclusory allegations. *Evers. V. General Motors Corp.*, 770 F.2d 984, 986 (11th Cir. 1985); see also *Avirgan v. Hull*, 932 F.2d 1572, 1577 (11th Cir. 1991), cert. denied, 502 U.S. 1048 (9192). In the instant case, the whole of Dr. Levinson's affidavit is conclusory and does not create a genuine issue of material fact.

#### CONCLUSION

Because Plaintiffs have failed to offer competent evidence as to the medical causation of Plaintiff's injury, and the effect of that under Florida law on the balance of Plaintiffs' claims, it is

ADJUDGED Defendants' Motion for Summary Judgment is GRANTED as to all counts.

DONE AND ORDERED in Chambers at Miami, Florida, this 24<sup>th</sup> day of August, 1995.

  
FEDERICO A. MORENO  
UNITED STATES DISTRICT JUDGE

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David E. French, Esq.  
R. Benjamin Reid, Esq.

copies provided:

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

Case No. 92-8721-CIV-MORENO

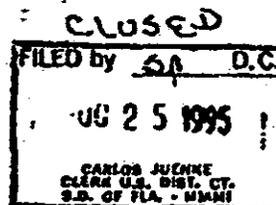
JOSEPH TUEYELL HOOVER and KAY F.  
HOOVER,

Plaintiffs,

vs.

BELL SPORTS, INC., a foreign  
corporation a/k/a BELL HELMETS, INC.  
and ED TUCKER DISTRIBUTORS, INC., a  
foreign corporation,

Defendants.



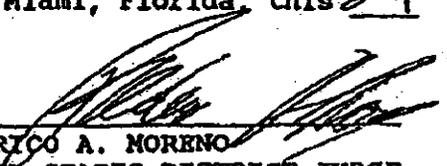
FINAL JUDGMENT

Pursuant to Fed. R. Civ. P. 58 and the Court's Order Granting Defendant's Motion for Summary Judgment, it is

ADJUDGED that judgment is entered in favor of Defendants, BELL SPORTS, INC., a foreign corporation a/k/a BELL HELMETS, INC. and ED TUCKER DISTRIBUTORS, INC., a foreign corporation and against Plaintiff, JOSEPH TUEYELL HOOVER and KAY F. HOOVER. The case, namely the entire complaint, is dismissed with prejudice. Further, it is

ADJUDGED that any pending motions are DENIED as moot.

DONE AND ORDERED in Chambers at Miami, Florida, this 24<sup>th</sup>  
day of August, 1995.

  
FEDERICO A. MORENO  
UNITED STATES DISTRICT JUDGE

copies provided:  
David E. French, Esq.  
R. Benjamine Reid, Esq.



**IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT  
IN AND FOR MARTIN COUNTY, FLORIDA**

JACQUELINE MINNIS,

Plaintiff,

CASE NO. 06-452-CA  
JUDGE METZGER

v.

FORD MOTOR COMPANY, a  
foreign corporation doing business  
in the State of Florida, and  
ADVANTAGE FORT OF STUART, INC., a  
Florida corporation,

Defendants.

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**ORDER ON DEFENDANTS' MOTION TO EXCLUDE CERTAIN  
TESTIMONY OF PLAINTIFF'S EXPERT, DR. CHARLES BENEDICT**

**THIS CAUSE** came on before the Court on the Defendants' Motion to Exclude Certain Testimony of Plaintiff's Expert, Dr. Charles Benedict (the "Motion"), and the Court having considered the Motion and record, having heard argument of counsel and being otherwise fully advised in the premises, finds and concludes as follows:

This action arises out of a motor vehicle accident which occurred on or about July 26, 2004 on Interstate 95 (the "Accident") wherein Plaintiff alleges a phantom vehicle cut her off, causing her to lose control of her 1999 Ford Explorer (the "Vehicle"). After losing control of the Vehicle, Plaintiff alleges that the Vehicle ultimately made contact with a "jersey barrier" resulting in that the

Vehicle rolling over. Plaintiff was ejected from the Vehicle during the course of the Accident and sustained injuries. Plaintiff alleges that she was wearing her seatbelt at the time of the Accident; Ford Motor Company and Advantage Ford of Stuart, Inc. ("Ford") disagrees. Furthermore, Plaintiff alleges that the driver's side door of the Vehicle became unlatched during the course of the Accident; Ford disagrees.

Plaintiff has alleged that the Vehicle had two design defects which caused injuries to Plaintiff during the course of the Accident. The first design defect alleged by Plaintiff is that the Vehicle's door was defective, as it opened during the Accident. Plaintiff also alleges that due to the Vehicle's defectively designed seatbelt, the seatbelt worn by Plaintiff during the Accident became inertially unlatched. To support the foregoing design defect allegations, Plaintiff has retained expert Dr. Charles Benedict. Ford challenges Dr. Benedict's expert opinions regarding the alleged design defects associated with the Vehicle on the basis of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) and/or 90.702-.705, Florida Statutes.

Florida courts adhere to the general acceptance standard set forth within *Frye* when evaluating opinions which a party asserts are based upon novel science. See *Castillo v. E.I. Du Pont De Nemours & Co.*, 854 So.2d 1264 (Fla. 2003); *Brim v. State*, 695 So.2d 268 (Fla. 1997). The *Frye* test ensures that "the jury will not be

misled by experimental scientific methods which may ultimately prove to be unsound.” *Flanagan v. State*, 625 So.2d 827 (Fla. 1993). General acceptance is an evaluation of the quality and quantity of the evidence supporting the technique. *Id.* At 272. “[T]he burden is on the proponent of the evidence to prove the general acceptance of both the underlying scientific principle and the testing procedures used to apply that principle to the facts of the case at hand.” *Ramirez v. State*, 651 So.2d 1164, 1168 (Fla. 1995). “A bald assertion by the expert that his deduction is premised upon well-recognized scientific principles is inadequate to establish its admissibility if the witness’ application of these principles is untested and lacks indicia of acceptability.” *Ramirez v. State*, 810 So.2d 836, 844 (Fla. 2001). General acceptance must be established by a preponderance of evidence. *See Ramirez*, 651 So.2d at 1168. To determine general acceptance, courts examine expert testimony, scientific and legal writings, judicial opinions, and consider whether the expert has published or submitted his/her studies for peer review and whether the opinions were formulated by the expert solely for the purpose of litigation. *See Hadden v. State*, 609 So.2d 573 (Fla. 1997).

Evidence not subject to a *Frye* analysis must still be deemed reliable. *See State v. Meador*, 674 So.2d 826, 835 (Fla. 4<sup>th</sup> DCA 1996). To be admissible, an expert’s opinion must be based upon valid underlying data which has a proper factual basis. *Carnival Corp. v. Stowers*, 834 So.2d 386 (Fla. 3d DCA 2003); *Brito*

*v. County of Palm Beach*, 753 So.2d 109 (Fla. 4<sup>th</sup> DCA 1998). An expert cannot just assume facts which form the basis of his opinion. *Id.* Furthermore, an expert's opinion must not be based upon speculation or conjecture. "[T]he judgment of an expert must be more than a guess." *Husky Indus., v. Black*, 434 So.2d 988 (Fla. 4<sup>th</sup> DCA 1983).

As to Plaintiff's expert's opinion that the Vehicle door was defective, resulting in it opening during the course of the Accident, when asked at deposition what particular defect in the door led to its failing in the Accident, Dr. Benedict responded, "I haven't been able to do any testing on the door handle relative to why it came open. I know it just came open, and it shouldn't have." (*See Dr. Benedict's deposition testimony pg. 12, lines 8-12.*) Dr. Benedict was also asked the question "[s]o you are not prepared to testify...that there is any particular defect in the door that caused it to come open; is that fair?" His response was "[n]ot at this point; but there had to be or it would not have come open." (*See Dr. Benedict's deposition testimony pg. 12, lines 14-18.*) At the hearing on the Motion, Plaintiff's counsel handed the Court a 21 page affidavit executed by Dr. Benedict dated March 10, 2010 (the "Affidavit"). Attached to the Affidavit was a disc containing an appendix of material. The Affidavit contains statements by Dr. Benedict which Plaintiff's counsel espouses meet the burden imposed upon his client regarding the foundation of Dr. Benedict's defect related opinions in this

matter. The Affidavit, however, does not address Dr. Benedict's very clear position at the time of his deposition that he had not been able to test the door handle in question "relative to why it came open" and as such, he was not able to state why the door came open. Dr. Benedict points out on page 7 of the Affidavit that he testified on page 25 of his deposition that "the component defect that allowed the left front door to open during the subject collision" was "the door handle return spring" which was "not strong enough to prevent the door from opening given the dynamics of this accident." However, when one looks to page 25 of Dr. Benedict's deposition testimony he again states "I haven't done any testing, so I'm not prepared to say exactly what it is." Dr. Benedict goes on to note on page 28 of his deposition "I need to do some testing on the door handle." Continuing on page 28 of Dr. Benedict's deposition, he was asked "[s]o your opinion regarding the door and its opening and any defect it may have is not finalized as we sit here today?" Dr. Benedict responds "[r]elative to what the defect is, that's correct; and the exact reason why it came open, other than the fact that I know it came open." For Dr. Benedict to come forward, via the Affidavit, and acknowledge that he still has not tested the subject door, but state in a conclusory fashion that he now has an opinion regarding a **specific defect** in the door of the Vehicle which caused such door to open during the Accident "based upon the physical evidence, the dynamics of the collision, my education and more

than 37 years of professional experience”, contradicts his deposition testimony that he indeed needed to perform testing and furthermore, does not establish that his opinion, regarding the Vehicle door design defect is based upon valid underlying data which has a proper factual basis. In light of the foregoing, Dr. Benedict’s opinion that the Vehicle had a design defect which caused the driver’s side door to open during the course of the Accident, is unreliable and not admissible under §§90.702-705, Florida Statutes.

Regarding Plaintiff’s expert opinion that the Vehicle’s defectively designed seatbelt became inertially unlatched during the course of the Accident, the Court first will address whether the theory of “inertial unlatching” has been generally accepted in the scientific community. Again when making a general acceptance determination, this Court may examine expert testimony, scientific and legal writings, judicial opinions and whether the expert has submitted his study for peer review or whether his opinions were formulated solely for litigation purposes. *Hadden v. State*, 609 So.2d 573 (Fla. 1997). Ford provided the Court with a National Highway Transportation Safety Administration (“NHTSA”) Notice of Denial of Petition, 57 FR 55298-01 (“Denial of Petition”). NHTSA is the agency charged with ensuring motor vehicle safety. 49 U.S.C.A. §105. Within the Denial of Petition, it is noted that the Institute for Injury Reduction (“IIR”), petitioned NHTSA to conduct a defect investigation of safety belts which can become

unlatched due to inertial unlatching. NHTSA notes that to address IRR's allegations contained within their petition, NHTSA obtained, analyzed and reviewed all available information and data regarding safety belt inertial unlatching. Lab tests were conducted to, among other things, determine if inertial unlatching would occur in the "real-world crash environment." The laboratory testing performed by NHTSA as a result of the IRR petition defined the engineering characteristics that could cause inertial unlatching. However, NHTSA found that the foregoing testing demonstrated that the engineering characteristics that may cause inertial unlatching in a lab are not present in "real-world crashes." NHTSA concluded that there was no evidence of a safety related defect trend associated with inertial unlatching of safety belts. In addition to the Denial Petition, Ford also directs the Court to the case of *General Motors Corp., v. Porritt*, 891 So.2d 1056 (Fla. 2d DCA 2004). The foregoing case concerns the same Dr. Benedict involved in this case. Dr. Benedict's opinion in the *General Motors* case was that the plaintiff was injured due to either a manufacturing or design defect in the seatbelt buckle situated in the 1995 Chevrolet S-10 pickup, which defect caused "inertial unlatching". In support of his inertial unlatching theory in the *General Motors* case, Dr Benedict relied upon tests that he himself performed. *Id.* During such tests, Dr. Benedict did not "measure the forces exerted on the buckle", "nor did he attach webbing to the seatbelt". *Id.* General

Motors argued that Dr. Benedict's tests "were not generally accepted in the scientific community under *Frye*" and "did not replicate real world conditions"; the court agreed. *Id.* In this case a similar scenario is presented; Dr. Benedict opines that a design defect in the Vehicle seatbelt buckle resulted in inertial unlatching, with such opinion being based, at least in part, upon tests that he performed for a different **litigated** case (versus for a study to be published in a peer reviewed publication), involving not an Explorer like the Vehicle, but an Expedition, with testing being done on a buckle without attached webbing and without utilizing the orientation associated with the Ford Explorer seatbelt assembly. Plaintiff, who bears the burden concerning this Motion, has failed to prove, by a preponderance of the evidence, that the scientific or engineering community has generally accepted the concept of inertial release of seatbelts **in real world accidents**. Furthermore, Plaintiff has failed to meet her burden under *Frye* that the testing utilized by Dr. Benedict to opine that inertial unlatching occurred (such testing is referred to as "Drop Testing"), is in fact testing that is generally accepted in the relevant scientific community to establish inertial unlatching of seatbelt buckles in actual automobile accidents. Setting aside the foregoing, it is also clear to this Court that the Drop Tests were not performed taking into account the actual conditions associated with the Accident. For example, the Drop Tests were conducted: (a) with a seatbelt buckle assembly used in a Ford Expedition and not

with the assembly type used in the Vehicle; (b) with a modification of the actual design of the seatbelt buckle mounting assembly contained within the Ford Expedition, which is not substantially similar to the mounting assembly in either the Ford Expedition or Explorer; (c) without webbing tension; and (d) without buckle assembly orientation similar to the Accident. The conditions utilized to conduct the Drop Tests were not "substantially similar" to the conditions involved in the Accident and therefore, should not be admitted or used to form the basis of Dr. Benedict's opinion that the seatbelt within the Vehicle inertially unlatched during the Accident. "In many instances, a slight change in the conditions under which the experiment is made will so distort the result as to wholly destroy its value as evidence, and make it harmful, rather than helpful." *Morton v. Hardwick Stove Co.*, 138 So.2d 807 (Fla. 2d DCA 1961) (quoting *Hisler v. State*, 52 Fla. 30, 42 So. 692, 695 (1906); see *Lytle v. Ford Motor Co.*, 696 N.E.2d 465 (Ind. Ct. App. 1998) (excluding similar tests seeking to demonstrate inertial unlatch because they ignored web tension). It is instructive to this Court that in the *Lytle* case, the court found that an inertial unlatch test that did not account for web tension was scientifically unreliable inasmuch as web tension "is the very factor that has been shown to prevent a seatbelt from inertially releasing during real world accidents." *Id.* The *Lytle* court further went on to note that it was undisputed that web tension

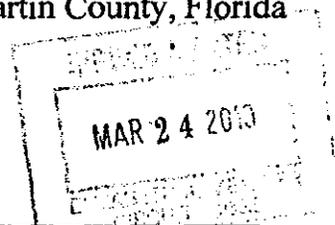
which exists in actual accidents significantly increases the amount of force that can be applied to a seatbelt before it can inertially unlatch. *Id.*

Despite the above findings, the Court wishes to also address the methodology used by Dr. Benedict to calculate the “acceleration forces” he believes were transmitted through the seatbelt buckle within the Vehicle during the course of the Accident. Specifically, Dr. Benedict assumed that the front of the Vehicle ramped up the 2.7 ft. high jersey barrier in 25 milliseconds. Using the foregoing figures, Dr. Benedict then calculated that the front of the Vehicle encountered 268g’s and inasmuch as the seatbelts were anchored to the floor pan in the middle of the Vehicle, he further assumed that the forces would have travelled half that distance in the same time. Using the foregoing methodology, Dr. Benedict calculated that the acceleration in the area of the at-issue buckle, during the Accident, amounted to 134g’s. Principles associated with vehicle dynamics are well documented in published technical literature. Ford presented this Court with published literature documenting testing that had been performed wherein vehicles were dropped from varying heights, to determine the acceleration forces experienced at different locations on a vehicle. These studies, which were performed on Ford Explorers, show that force accelerations experienced by a vehicle’s chassis and floor pan are significantly attenuated as they are transmitted through the vehicle. Dr. Benedict did not take into consideration the foregoing

published literature regarding the Ford Explorer reflecting significant attenuation of accelerations. Additionally, Dr. Benedict used an “amplification factor” to increase the 134g’s acceleration factor to 145g’s (it should be noted that Dr. Benedict testified that 145g’s would be needed, per his Drop Tests, to inertially unlatch the Vehicle’s seatbelt during the Accident). Dr. Benedict admits that he did not base his “amplification factor” opinion on testing of the buckle in question. Therefore, the Plaintiff failed to sustain her burden that that the methodology utilized by Dr. Benedict to calculate the “acceleration forces” transmitted to the seatbelt in question during the course of the Accident is a methodology generally accepted within the scientific community.

Based upon the foregoing findings and conclusions, it is hereby **ORDERED AND ADJUDGED** that the Defendants’ Motion to Exclude Certain Testimony of Plaintiff’s Expert, Dr. Charlie Benedict, be and the same is hereby **GRANTED**.

**DONE AND ORDERED** in Chambers, in Stuart, Martin County, Florida  
this 24<sup>th</sup> day of March, 2010.



ELIZABETH A. METZGER  
Circuit Judge

cc:

Paul D. Mark Lucas, Esq.  
Frank McDonald, Esq.  
Perry W. Miles, IV, Esq.  
John M. Abramsom, Esq.