IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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

VERSUS — NO. 2009-TS-01815

FORD MOTOR COMPANY — APPELLEE

BRIEF OF THE APPELLANT

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Certificate of Interested Persons

The undersigned counsel of record certified 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 judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Kelly Grant, Appellant
   3647 County Road 150
   Quitman, MS 39355

2. Stacey Lea Sims, Esq.
   Morris, Sakalarios & Blackwell, PLLC
   Post Office Drawer 1858
   Hattiesburg, MS 39403-1858
   Telephone: (601) 544-3343
   Telefax: (601) 544-0631

3. Ford Motor Company, Appellee
   Post Office Box 6248
   Dearborn, MI 48126

4. Everett E. White, Esq.
   Baker Donelson Bearman Caldwell & Berkowitz
   4268 1-55 N
   Post Office Box 14167
   Jackson, MS 39236-4167

5. Michael B. Wallace, Esq.
Wise Carter Child & Caraway, P.A.
Post Office Box 651
Jackson, MS 39205-0651

This the 2nd day of March, 2011.

RESPECTFULLY SUBMITTED:

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

BY: _____
STACEY LEA SIMS, MSB [redacted]
ATTORNEY FOR APPELLANT

Stacey Lea Sims, MSB [redacted]
Morris, Sakalarios & Blackwell, PLLC
Post Office Drawer 1858
Hattiesburg, MS 39403-1858
Telephone: (601) 544-3343
Telefax: (601) 544-0631

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

MS RULES

STATEMENT OF ISSUES

Issue No. 1: Did the Court Err in Failing to Compel the Defendant, Ford Motor Company, to produce the Design Drawings of the 1996 Ford Probe?

Issue No. 2: Did the Court Err in Excluding the Affidavit of Dr. Charles W. Benedict?

Issue No. 3: Did the Court Err in granting Ford Motor Company's Motion to Exclude Dr. Benedict's Seatbelt, Structural Integrity and Biomechanic Opinions?

Issue No. 4: Did the Court Err in denying Plaintiff's Motion to Compel the 30(b)(6) Deposition of Ford Motor Company?

Issue No. 5: Did the Court Err in denying Plaintiff's Motion to Allow Additional Discovery?

Issue No. 6: Did the Court Err in denying Plaintiff's Motion to Amend the Scheduling Order?

Issue No. 7: Did the Court Err in granting Summary Judgment in favor of Ford Motor Company?

STATEMENT OF THE CASE

Kelly Grant (hereinafter "Grant") and her two small children, Memory and Makayla Maggard were traveling along Highway 45 in Clarke County, Mississippi on September 28, 2002 in Grant's 1996 Ford Probe. Grant, the driver, was seated in the driver's seat, while her young daughter MaKayla Maggard was seated directly behind her in the driver's side rear seat. Makayla was properly restrained in her infant seat. Memory Maggard was seated in the rear passenger's side seat.

As Grant approached an intersection, Riley ran a stop sign on the east side of Highway 45, crossed both lanes of traffic, and crashed her 1998 Toyota into the driver's side of Grant's 1996 Ford Probe.

As a result of the collision, Grant, Memory and Makayla suffered injury. Makayla suffered severe head trauma and succumbed to her injuries. It is undisputed that Riley's actions caused the accident, and plaintiffs have settled with Riley regarding her culpability.

Grant, on behalf of herself, her minor child, Memory, and the Wrongful Death Beneficiaries of Makayla filed a Complaint against Ford Motor Company (hereinafter "Ford") on December 31, 2002. Grant alleged that her 1996 Ford Probe's design and manufacturing defects caused and contributed to the injuries of Grant and her young children. Specifically, Grant alleged defects in the seat belts, framework (welds), and hinges caused and contributed to their injuries. Ford denies same.

SUMMARY OF THE ARGUMENT

Grant submits the Court erred by failing to compel the production of certain design drawings. Miss. R. Civ. P. 34 requires parties to produce all documents in their "possession, custody, and control." In denying Grant's Motion to Compel, the Court found only that said documents were not in Ford's possession. However, Grant submits the Court failed to apply the correct legal standard.

The Court failed to consider Ford's ability to control said documents. Ford and Mazda Motor Corporation entered into a contract to jointly manufacture the Ford Probe. Under the terms of the Contract, Ford had the absolute contractual right to obtain said documents. Further, Ford exercised control over Mazda in that Ford has a thirty three percent (33%) ownership interest. For all these reasons, Grant submits that Ford had a practicable ability to produce said documents and should have been compelled to produce said design drawings.

Notwithstanding Ford's failure to produce said documents, Grant properly designated Dr. Charles W. Benedict as an expert witness anticipated to testify at trial regarding seat belts, door hinges/welds and biomechanics. Grant produced a written report of Dr. Benedict in accordance with the various Scheduling Orders. Further, Grant produced Dr. Benedict for deposition. At all times, Benedict opined that the Grant Ford Probe was defective. Dr. Benedict opined that the seatbelt was designed in such a manner that when certain forces were applied, the seat belt would unlatch thus allowing the passenger to move about the vehicle. Further, Dr. Benedict opined that the welds along the b-pillar of the Grant Probe were inappropriate and not sufficient to prevent the anticipated shearing. Further, Benedict

opined that the head of the minor child struck the B-Pillar thus causing the head trauma documented in the child's medical records.

Ford filed a *Daubert* Motion to Exclude Grant's expert. In response, Grant responded and attached three separate affidavits of Benedict setting forth Benedict's bases for his opinions. Ford filed a Motion to Strike said Affidavits just two days prior to the hearing on Ford's Motion. Over the notice objection of counsel for Grant, the Court heard argument regarding said Motion to Strike, and entered its Order Striking the Affidavits of Dr. Benedict. Grant argues the Court erred.

This Court has stated that when an expert's opinion is challenged, the party sponsoring said witness shall be allowed an opportunity to respond to the challenge. Further, this Court has held that a discovery deadline shall not preclude seasonable supplementation. In fact, the Rules of Civil Procedure require same. Nothing in Dr. Benedict's Affidavits was outside the scope of Grant's designation. Further, the Affidavits were provided ninety-four (94) days prior to the scheduled trial date, Ford neither argued nor showed bad faith and/or surprise, and in fact, Dr. Benedict, in his deposition stated said additional testing would be conducted after the close of the deposition. For these reasons, Grant submits the Court erred in excluding the Affidavits of Benedict.

Further, Grant submits the exclusion of her expert's testimony was without merit. The testimony of Benedict was (1) based upon sufficient facts and data and (2) was a product of reliable principles and methods (3) applied to facts of this case. For these reasons the exclusion of Dr. Benedict as an expert was incorrect.

Also cited as error was the Court's failure to compel the continuation of the 30(b)(6)

Deposition of Ford. Grant noticed the 30(b)(6) Deposition of Ford in accordance with the Scheduling Order. Ford produced Howard Slater as their only 30(b)(6) designee. During said deposition, Slater identified three individuals who were better capable of providing information regarding the one topic of inquiry. Many areas of inquiry contained within the notice were never addressed, and Slater identified a series of responsive documents not produced by Ford. Additionally, when Grant's counsel advised that the completion of said deposition was not possible, Ford refused to allow Grant to continue the deposition further. Grant filed a Motion to Compel the deposition. The Court denied same. Again, Grant submits that the Court erred. Ford had a duty to produce those individuals most knowledgeable about the topics of inquiry. Clearly, Ford did not. Further, approximately four hours to depose an evasive corporate representative is hardly adequate (after all Ford deposed Plaintiff's expert for eleven hours).

Additionally, as a result of the information discovered during the deposition of Slater, Grant sought an Order compelling the production of the documents identified for the first time. Further, Grant sought an opportunity to depose those witnesses identified in the deposition. Again, the Court denied Grant's requests.

Finally, Grant sought an Order Amending the Scheduling Order to allow plaintiffs to supplement their designation of experts and conduct additional discovery. Again, the Court denied Grant's requests and granted Summary Judgment in favor of Ford. This Court has been consistent that when limitations on discovery are improvidently ordered and important information is denied a litigant a reversal will result. Therefore, Grant urges this Court to enter its Order reversing the decisions of the lower court.

ARGUMENT

Issue No. 1:

Did the Court Err in Failing to Compel the Defendant, Ford Motor Company, to produce the Design Drawings of the 1996 Ford Probe?

Ford Motor Company, Mazda Motor Corporation, and Auto Alliance International, Inc. entered into a Product Development Agreement to design, manufacture and produce a vehicle and market said vehicle under the name "Ford Probe" on March 19, 1993. (R. E. 1). Said vehicles were assembled in facilities owned and operated by Auto Alliance International in accordance with the design specifications and distributed to Ford Motor Company. Grant alleges her 1996 Ford Probe was designed, manufactured and produced in accordance with the terms and specifications of said agreement.

Grant propounded Requests for Production of Documents to Ford Motor Company. Contained within said Requests for Production of Documents was a request for all Design Drawings relating to the 1996 Ford Probe. Ford Motor Company answered and alleged said documents were not in their possession and referred Grant to Mazda. (R. E. 3, p. 3) Ford has never stated that said documents are not within their custody and/or control.

Grant filed a Motion to Compel the production of the Design Drawings alleging that although Ford Motor Company may not be in actual possession of the design drawings, Ford controlled and/or had custody of said design drawings; therefore, Ford should be compelled. Notwithstanding argument the Court entered its Order denying said request.[1]

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[1] The Lower Court record is void of a written Order denying Plaintiffs' Motion to Compel; however, it is undisputed that the Motion was made, argument was had, and the Court denied same. In fact, the Court references its denial of said Motion in its Memorandum Opinion dated September 28, 2009 on p. 2 of said opinion.

However, Grant submits that the Court erred in its ruling.

Miss R.C iv. P. 34 provides:

> Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents ... which are in the possession, custody or control of the party upon whom the request is served.

It is undisputed that ST44 Product Development Agreement ¶ 5.1 D. Specifications and Drawings. provided as follows:

> ...When Ford specifies a need for specifications and drawings, Mazda and AAI shall provide to Ford, normally within fourteen (14) days after Ford's request ...copies of specifications, drawings, blueprints, instructions and other supporting documentation prepared or owned by them as well as shoninzu of its vendors ... relevant to the Ford vehicle. (R. E. 1)

Accordingly, it is clear that Ford, at all times, during the discovery period, had a legal right to obtain the design drawings from Mazda. Courts have consistently held a party has control if said party has a legal right to obtain the documents on demand. Resolution Trust Corp. v. Deloitte & Touche, 145 F.R.D. 108, 110 (D. Colo. 1992); Weck v. Cross, 88 F.R.D. 325, 327 (N.D. Ill. 1980); Searock v. Stripling, 736 F. 2d 650, 653 (11th Cir. 1984); The legal right to obtain documents or information from another may arise by contract. *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 928-29 (1st Cir. 1988).

The word 'control' is to be broadly construed. A party controls documents that it has the right, authority, or ability to obtain upon demand. Scott v. Arex, Inc., 124 F.R.D. 39 (D.Conn. 1989); Haseotes v. Abacab Internat'l Computers, Inc., 120 F. R. D. 12 (D. Mass

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(R. E. 2) However, it should be noted that the Court continually states that it is satisfied that Ford is not in possession of the design drawings. Possession is not the appropriate test.

1988); Buckley v. Vidal, 50 F. R. D. 271.

Additionally, under some circumstances courts interpret the concept to go beyond whether the litigant has a legal right to obtain materials and focuses on their practical ability to obtain them. In Re NASDAQ Market-Makers Antitrust Litig., 169 F.R.D. 493, 530 (S.D.N.Y. 1996). Therefore, Rule 34 enables a party seeking discovery to require production of documents beyond Ford's actual possession if Ford has retained any right or ability to influence the person in whose possession the documents lie. Rule 34 creates access to documentation in an economical and expeditious fashion by requiring Ford to produce relevant records not in its physical possession when the records can be obtained easily from Mazda by simple request. Prokosch v. Catalina Lighting, Inc., 193 F.R.D. 633, 636 (D.Minn. 2000).

Further, Ford Motor Company has a thirty three percent ownership in Mazda Motor Company. Therefore, notwithstanding Ford Motor Company's contractual right to obtain the design drawing, Ford also possessed a degree of ownership and thus can exercise control over Mazda Motor Company. Courts have been clear that defendants cannot be allowed to shield crucial documents from discovery merely by storing them with its affiliate abroad. If Defendants could so easily evade discovery, every company would invest in a foreign affiliate for the sole purpose of storing sensitive documents. Cooper Indus. v. British Aerospace, Inc., 102 F.R.D. 918, 920 (S.D.N.Y. 1984).

For the aforegoing reasons, Grant submits that the Court erred when it failed to compel the production of the design drawings relating to the 1996 Ford Probe automobile.

Issue No. 2

Did the Court Err in Excluding the Affidavit of Dr. Charles W. Benedict?

On or about May 4, 2009, Ford Motor Company filed its Motion to Exclude Dr. Charles Benedict's opinions regarding (1) Biomechanics, (2) Structure, and (3) Seatbelts and noticed same for hearing on May 26, 2009.

In response to said challenges and at the request of Grant's counsel, Dr. Benedict prepared and submitted affidavits relating to his education, experience, research, investigation, and opinions relating to (1) Biomechanics (R.E. 7), (2) Structure (R.E. 6), and (3) Seatbelts (R.E. 8). Said Affidavits were attached to Grant's Response to Ford Motor Company's Motions to Exclude Dr. Charles Benedict's Opinions which was filed with the Court on May 21, 2009.

After receiving Grant's Response, Ford Motor Company requested a continuance of the May 26, 2009 scheduled hearing on their Motions to Exclude in order to prepare a reply to Grant's Response. Said continuance was granted by the Court. Thereafter, Ford re-noticed its Motions to Exclude Dr. Charles Benedict's Opinions for June 11, 2009. Said Notice was dated May 28, 2009 (R. E. 9). Some eleven days later, Ford Motor Company filed their Motion to Strike the Affidavit of Dr. Charles Benedict on June 8, 2009, and noticed same to be heard at the hearing on June 11, 2009.

Notice

Counsel for Grant objected to said Motion being heard at the June 11, 2009, hearing, as untimely. Miss R. Civ. P. 6 (d) provides that "A written motion, other than one which may be heard ex parte, and notice of the hearing thereof, shall be served not later than five

days before the time fixed for the hearing."

Notwithstanding the plain language of Miss R. Civ. P. 6(d) said objection was overruled by the Court and Grant was forced to proceed with the hearing regarding the Affidavit without sufficient time to prepare a response.

Grant submits that the Court committed error by not providing Grant sufficient time to prepare a response to Ford's Motion to Strike and forcing Grant to defend a Motion without being provided sufficient notice under the Mississippi Rules of Civil Procedure.

Motion

Further, it is Grant's position that Ford's Motion was without merit and should have been denied. Miss. R. Civ. P. 26(4)(A)(i) provides:

> A party may through interrogatories require any other party to identify each person whom the other party expect to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

In accordance with said requirement, Appellants' counsel filed their Designation of Expert on April 17, 2007 (R.E. 2). Grant also provided Ford a Preliminary Report of Dr. Charles W. Benedict on August 9, 2007 (R.E. 4). By agreement of the parties, Dr. Charles W. Benedict, Appellants' expert, was deposed pursuant to Notice on June 25, 2008 and June 26, 2008. At the beginning of said Deposition, counsel for Grant made it clear that Grant's expert opinions were incomplete and/or void of certain specifics due to Ford's failure to produce the aforementioned design drawings. Gant specifically reserved Grant's right to supplement, modify, enhance, and/or change said opinions as discovery continued and/or additional information was received and/or discovered. See Deposition Transcript of

Charles Benedict, Vol. I, Page 6, L. 9-16, R.E. 5).

In accordance with the Designation filed in 2007 by Grant, Dr. Charles W. Benedict stated he was "asked to document the vehicle, reconstruct the accident, and look at the vehicle from the standpoint of any defects within the vehicle that would have led to the injuries to the occupants." *See* R. E. 5, Vol. I, Page 7, L. 23 through Page 8, Line 2. Upon examination, Dr. Benedict identified two major defects with the subject Ford Probe. First, he identified a defect in the structural integrity of the left side of the vehicle, including the door and b-pillar and the hinges at the door. Second, he identified, the restraints. *See* R. E. 5, Vol. I, P. 8, L. 14-19. After identifying generally his opinions, Dr. Benedict continued to respond to all specific questions posed by counsel for Ford for some eleven and one-half hours at all times making it clear that his opinions were subject to additional discovery, review of the design drawings and any subsequent testing.

Notwithstanding the repeated and exhaustive efforts of Grant's counsel to obtain the design drawings, the design drawings were never discovered and/or produced by Ford and/or Mazda. Therefore, Dr. Benedict was never afforded the opportunity to review said design drawings and/or specifications. Notwithstanding this fact, Dr. Benedict, in accordance with his deposition testimony, continued his original investigation, research, and testing in preparation for the scheduled trial.

In Young v. Meacham., 999 So. 2d 368 (Miss. 2008), the Mississippi Supreme Court made it clear that a Scheduling Order does not preclude supplementation. In fact, Miss R. Civ. P. 26(f)(1) demands that a party seasonably supplement. Further, the Court held that "there is no hardline rule as to what constitutes seasonableness, the focus is to avoid unfair

surprise and allow the other side enough time to prepare for trial." *Id. at* 372. "The Supreme Court has defined "seasonable supplementation" to mean soon after new information is known and far enough in advance of trial for the other side to prepare." Thompson v. Patino, M.D., 784 So. 2d 220, 223 (Miss. 2001).

The Mississippi Supreme Court addressed this issue directly in Kilhullen v. Kansas City So. Railway, 8 So. 3d 168 (Miss. 2009). In Kilhullen, Plaintiff's experts submitted affidavits after the end of Discovery in the Court's Scheduling Order, in response to Defendant's Motion for Summary Judgment, and the trial court struck the affidavits. The Supreme Court reversed, noting:

> "Additionally, this Court has stated that "[w]e . . . require that, when an expert's opinion is challenged, the party sponsoring the expert's challenged opinion be given a fair opportunity to respond to the challenge. The provision of a fair opportunity to respond is part of the trial court's gate keeping responsibility . . . ." Smith v. Clement, 983 So. 2d 285, 2008 Miss. LEXIS 172 at 11 (Miss. 2008)."

The court reached a similar result in Young v. Meachum. Plaintiff sought to admit a second affidavit and a supplemental expert designation after the end of Discovery as scheduled in the Court's Scheduling Order. The trial court struck the affidavit and supplemental designation, and granted summary judgment. The Mississippi Supreme Court reversed. The opinion notes:

> "...the trial court erroneously equated a discovery deadline with a deadline for supplementation of an expert opinion. P16. To the contrary, Mississippi Rule of Civil Procedure 26(f)(1) requires that a party "seasonably supplement a prior response with any question addressed to . . . (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the testimony." While there is no hardline rule as to what constitutes seasonableness, the focus is to avoid unfair surprise and allow the other side enough time to prepare for trial. (Citations omitted.)
>
> In the present case, no trial date had been set, and Dr. Hansen's supplemental

> affidavit did nothing to change his original opinions. As noted above, the only difference between the supplemental affidavit and the original affidavit was his opinion that the EKG was wrongly interpreted."

In Bowersfield v. Suzuki, 151 F. Supp. 2d 625 (2001), the court again reached the same conclusion with a situation in which the facts are nearly identical to the present case. In Bowersfield, Defendant tried to disqualify Plaintiff's designated expert, an Engineer with experience in occupant kinematics who was to testify about design defects in a Suzuki automobile. At the *Daubert* hearing, Defendants objected to the admission of any analysis, facts or conclusions that were not mentioned in the expert's initial report. The Court, finding for Plaintiff on the issue, stated:

> While the conclusions presented by Mr. Cantor at the Daubert hearing were consistent with his expert report, much of the methodology and basis for the conclusions to which he testified were not contained in his expert report. For example, his report did not contain any of the photographs, technical drawings or calculations of the proposed vehicle modifications for seats with three-point seatbelts, the barrier or the proper placement of a warning label. Consequently, the first question presented by defendants' motion is the extent to which the Court, in addressing the Daubert issues, should consider Mr. Cantor's hearing testimony that is beyond the scope of his report. . .
>
> "Testimony of an expert on matters within the expert's expertise but outside of the expert's report is not only permissible at trial, but the exclusion of such testimony may be reversible error . . . . An expert may testify beyond the scope of his report absent surprise or bad faith." Fritz v. Consolidated Rail Corp., 1992 U.S. Dist. LEXIS 5807, 1992 WL 96285, 3 (E.D. Pa. Apr. 23, 1992) (Hutton, J.) (Citing [*632] DeMarines v. KLM Royal Dutch Airlines, 580 F.2d 1193 (3d Cir. 1978). Courts within this district have also noted that there is no local custom, practice or rule which would limit an expert's testimony to the strict confines of his report. See id. at 3 (citing Kelly v. GAF Corp., 115 F.R.D. 257 (E.D. Pa. 1987) [15] (Ditter, J.))

In the instant case, the Affidavit was provided on May 20, 2009, some ninety-four (94) days before the Scheduled trial of this matter. Further, it is undisputed that Dr. Benedict testified in his deposition that he intended to conduct additional testing between his

deposition and the trial of this matter. Further, it is undisputed that the opinions of Dr. Benedict did not change. Therefore, the Defendant, Ford has not been surprised in any way by the Affidavit of Dr. Benedict. Further, no evidence was presented to the tribunal that the Appellants failed to fairly and diligently comply with the Orders of the Court, and their duty to seasonably supplement discovery.

Therefore, Grant submits error occurred when the lower Court entered its June 26, 2009, Order Striking the Affidavit of Dr. Charles W. Benedict (R. E. 11).

Issue No. 3:

Did the Court Err in granting Ford Motor Company's Motion to Exclude Dr. Benedict's Seatbelt, Structural Integrity and Biomechanic Opinions?

This Court should apply an abuse of discretion standard. Webb v. Braswell, 930 So.2d 387, 396-97 (Miss. 2006). Furthermore, a trial court's decision to allow expert testimony should be reversed only upon a showing of prejudice. Jones v. State, 918 So.2d 1220, 1223 (Miss. 2005).

This Court has adopted the expert admissibility standard introduced in *Daubert* and now codified in the 2003 Amendment to Rule 702. The amended Rule 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert ... may testify thereto in the form of an opinion or otherwise if (1) the testimony is based upon sufficient facts or data, (2) the testimony is a product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Miss. R. Evid. 702. The trial court is "to act as a gatekeeper, insuring that expert testimony is both relevant and reliable. *Bullock v. Lott*, 964 So. 2d 1119, 1128 (Miss. 2007). It is not the trial court's duty to determine if the expert in question is correct. This decision falls

squarely within the province of the jury.

Seatbelt

In the lower Court Opinion, the Court found that the "rebound theory" opined by Dr. Benedict was unreliable because it was untested. This is inaccurate. Dr. Benedict testified in his deposition that he had tested the very seat belt at issue in this case as follows:

> **A. I pushed the latch plate down as far as it would go. The button went down with it. I held the button in that position, snatched on the latch plate and it came out. . . .**
>
> **Q. So you held the release button down and then pulled it out.**
>
> **A. I held it down in the position it went when I pushed the latch plate down.**
>
> **Q. Did you measure how far the button went down when you pushed the latch plate down? Would that be the three-sixteenths measurement?**
>
> **A. Yes, it is a little over three-sixteenths.**

(R. E. 5, Page 291, Line 24). Said Testimony clearly indicates that Dr. Benedict tested his theory on the very seat belt at issue in this case prior to the Deposition.

Also, subsequent to the Deposition, Dr. Benedict performed a series of tests which clearly demonstrate the reality of the rebound inertial release and documented the forces required to cause such an unlatch. Dr. Benedict's tests revealed that a minimum of 15 G's is required for the latch plate to rebound and generate the force required to unlatch. 15 G's is below the foreseeable forces in real world collisions, such as the one involved in this case. See R.E. 8 p. 32b.

Further Grant's Designation of Expert indicates that Dr. Benedict will rely upon his experience. Dr. Benedict has personally investigated and analyzed more than 200 accidents involving seat belt usage and/or failure of seat belt systems. (R.E. 8p. 21). Ford and

General Motors have conducted tests which support the theory opined by Dr. Benedict. (R. E. 8. p. 22). Dr. Benedict has tested 20 or more different types of buckles, all of which inertially unlatch. (R.E. 8 p. 28). Dr. Benedict has been granted patents on five designs and has one patent pending for non-inertial release buckle designs. (R.E. 8). Several Articles were submitted which support the inertial unlatch theory.

Finally, Dr. Benedict pointed to the facts to reinforce his opinions. There is evidence of stress on the webbing of the left rear seat restraint. Kelly Grant testified that she strapped the seat into the vehicle properly. The officer testified that the webbing was found within the baby seat in the proper location. The Automatic Locking Retrator (ALR) was locked. Loading marks and evidence of back feeding through the latch plate slot were found on the left rear seatbelt webbing. The belt was found unlatched immediately following the accident.

Dr. Benedict does not attempt to utilize his "snatching demonstration" as evidence to support his opinion. It is simply a visual aid to show how the inertial unlatch occurs.

The lower Court found that Dr. Benedict's theories were conclusory because he did not consider alternative explanations for the seat belt unlatching. Again, this is incorrect. As set forth in Dr. Benedict's Affidavit at P. 32c. (R. E. 8), Dr. Benedict considered four ways the latch plate could become unattached from the buckle and was able to discount all of them except his current theory. (See R.E. 5 p. 54 l. 20-25; p. 55 l 1-10, p. 283 l. 25, and p. 319, l. 11-14.)

Finally, the lower Court concluded that alternative designs proposed by Dr. Benedict cannot be considered because none were in use when the vehicle was manufactured in 1996. As pointed out in Benedict's Affidavit at P. 33 (R. E. 8), the all-belts-to-seats (ABTS)

design was in use at the time of the manufacture of the 1996 Ford Probe. In fact, Ford, in 1990, some six years prior to the manufacture of the car at issue in this case, commissioned a study to determine the costs associated with installing the ABTS design in all their vehicles and determined that it would add only $3.32 to each seat. (See Ex. 17 to the Aff. of Benedict. R.E. 8) Further, Dr. Benedict testified in his deposition regarding alternative designs and pretensioners being available prior to 1996. (See R. E. 5 pp. 95 l.102; p. 108 l. 23-25; and p. 109)

Accordingly, Grant submits that the lower court erred when it excluded Dr. Benedict's testimony regarding seat belts.

Structural Integrity

Dr. Benedict's opinions on structural integrity involve both design defects and manufacturing defects.

The design defect to which Benedict proposed to testify related to the strength of the welds/door hinges of the vehicle. Benedict opined that the hinges on the 1996 Ford Probe were not heavy enough to withstand foreseeable forces. In forming his opinion, Dr. Benedict examined the Grant vehicle and compared the hinges to hinges found on other automobiles.

Of particular issue is the fact that Benedict was unable to review the design drawing of the 1996 Ford Probe. Notwithstanding, Benedict did make accurate calculations relevant to the strength of the door, based upon the minimum amount of force necessary to shear them and the strength of the driver's seat webbing. By doing so, Benedict established a range of possible values instead of a single definitive value.

Dr. Benedict's range, although not limited to a single digit or measure, is scientifically valid.

Dr. Benedict utilized his calculated force range for the calculation as to the maximum loads for the hinge and the seat belt webbing. Although there may be a range of possibilities, there are definite limits. Dr. Benedict opined that given assumptions most favorable to Ford, said hinges and welds were not sufficiently designed to withstand the anticipated force.

Although the Court suggested Benedict did not offer an alternative design, Benedict did propose strengthening the hinge(s) in question by making it larger thus stronger. Although, this alternative may seem simple it is quite effective.

Benedict's testimony regarding manufacturing defects was based on his experience as an engineering consultant. Hinges are simple devices. Benedict's opinion regarding the manufacturing defect, specifically the faulty welds, was based on his experience and observation. Benedict compared the welds in the Grant vehicle, the exemplar vehicle and other vehicles. Observation is a valid method of scientific inquiry, and comparing and contrasting the work in question with work from a control group is also a valid scientific method. In Kilhullen v. Kan City S. Ry, the Mississippi Supreme Court overturned the exclusion of an expert engineer at an accident site, who had only taken measurements at the scene of an accident, personally observed the site, and used common engineering formulas to analize that data. Kilhullen, 8 So. 3d 186 (Miss. 2009). No testing or exemplars were necessary for simple calculations which is analogous in this case to the calculations of the difference between the maximum specified load of safety belt webbing and the maximum strength of the hinge.

The Mississippi Supreme Court found that car manufacturers have a duty to make cars crashworthy, meaning to make them as safe as reasonably possible for their occupants. Such a theory requires neither that the defect cause the accident, nor the injuries, but only that it contribute to making the injuries worse. Estate of Hunter vs. GMC, 729 So. 2d 1264 (Miss. 1999).

Accordingly, Grant submits that the lower court erred when it excluded Dr. Benedict's testimony regarding seat belts.

Biomechanics

In the Lower Court Opinion, the Court found that Benedict did not have adequate training and experience to offer opinions in Biomechanics. Dr. Benedict's Affidavit provides that Dr. Benedict has three degrees (BS, MSE, and PhD) in mechanical engineering. As part of obtaining said degrees, Benedict studied extensively kinematics and dynamics of both constrained and non- constrained mechanical systems (the human body is a constrained, biomechanical system). Benedict attended several courses in occupant kinematics. See CV of Dr. Benedict attached as Exhibit 5 to the Affidavit (R. E. 7). As a graduate student, Dr. Benedict studied kinematics and dynamics of mechanical systems. (See R. E. 7 p. 18). Also, Dr. Benedict has been an Accident Reconstructionist for 37 years, and in doing such, has attended numerous seminars which incorporated kinematics. Finally, Benedict does not opine to offer a medical opinion. He simply offers an opinion on how Makayla Maggard moved about the Ford Probe and what forces she may have struck as she moved about the subject vehicle.

Dr. Benedict conducted an analysis of the particular Ford Probe which is the subject

of this suit. He placed the infant seat that Ford Probe. He viewed the infants hair in the B-Pillar of that Ford Probe. Based upon his experience, education and analysis, he was able to determine that the child came into contact with the B-Pillar.

The child's medical records will support the cause of death was head trauma. Dr. Benedict has relied upon a review of the medical records to support this cause of death, and then opined, based upon this cause of the death, that the head trauma was caused from impact with the B-Pillar which is obvious since the child's hair was in the B-Pillar.

For these reasons, Grant submits that the Court erred in excluding the testimony of Benedict relating to Biomechanics.

Issue No. 4:

Did the Court Err in denying Plaintiff's Motion to Compel the 30(b)(6) Deposition of Ford Motor Company?

Grant had delayed the 30(b)(6) Deposition of Ford in anticipation of the receipt of the aforementioned design drawings. At all times, and during all amendments to the Scheduling Orders of the Court, Grant had reserved her right under Miss R. Civ. P. Rule 30(b)(6) to take the deposition of Ford. (R. E. 14) After the lower Court denied Grant's request to compel the production of the design drawings and Grant had been unable to ascertain the design drawing from any third parties, Grant properly noticed the 30(b)(6) Deposition of Ford and included in said notice specific requests aimed at determining the location of the design drawings and to ascertain specific details about Ford's attempt to properly produce said design drawings. Additionally, Grant sought discovery regarding the identity of additional witnesses who could provide information regarding those individuals

who may have knowledge regarding the design drawings and Ford's control of said documents.

After filing an Objection to said Notice, Ford designated Howard Slater as their only corporate representative regarding the topics of inquiry, and Slater appeared on August 13, 2009, at the office of Ford's counsel for said deposition.

The Deposition began at approximately 9:30 A.M. on August 13, 2009. The designee of Ford had a back injury; therefore, multiple breaks were requested, including a two hour lunch break. As the day approached its end, plaintiffs' counsel advised counsel for Ford that she was skeptical that the deposition could be concluded that day and inquired whether Ford would like to reconvene the following morning or reschedule a new date for the witness and other representatives. At said time, Ford's counsel refused to allow the continuation of the deposition forcing plaintiff to ask the Court to compel the continuation of the deposition. (R.E. 13)

Additionally during said Deposition, Slater testified that he was not responsible for design drawings. Slater testified that the investigation into the design drawings was performed by the support group at Ford, a division to which he is not a member. Slater had no knowledge regarding what action had been taken, what requests were made, and what avenues had been explored to locate the design drawings. In fact, Slater testified that his only knowledge regarding any formal request by Ford to obtain said documents from Mazda was based upon verbal representations of Ford's counsel. (See R. E. 13, Page 71, Line 14 though 23). Clearly, Ford failed to produce the person most knowledgeable regarding the design drawings and/or Ford's attempt to locate said drawings. In fact, during said

Deposition, counsel for Ford agreed to produce the person who would be able to identify where design drawings were housed in Ford's facility. (See R. E. 13, Page 104, Line 15). However, Ford failed to do so and the lower Court denied Grant's Motion to Compel Ford to produce said witness.

Further, the Notice required Ford to produce the person most knowledgeable about the Metaphase, a design depository at Ford. Slater testified that he had not investigated and did not know whether or not the Metaphase system was utilized with the 1996 Ford Probe. Slater was unable to answer any questions regarding said system. Clearly, Slater was not the person most knowledgeable regarding this specific topic of inquiry.

Finally, numerous times throughout the partial deposition of Ford, Slater acknowledged that he was not the person most knowledgeable about the topics of inquiry. In fact, Slater provided the names of three additional individuals he believed may have been more knowledgeable about the topics of inquiry, namely: Jim Kiselis, a Ford employee, who supervises the "Support Group" which is responsible for the search and inquiry relating to design documents in this case; Ed Cadigan, a Ford employee, who worked with Mazda Motor Corporation (Ford's partner on the Ford Probe) regarding the carry-over of the Ford Probe; and Jeff Ziegler, a former Ford employee, who participated in the design, development and program management of the Ford Probe.

Ford "'must make a conscientious good-faith endeavor to designate persons having knowledge of the matters sought by [the party noticing the deposition] and to *prepare* those persons in order that they can answer fully, completely, unevasively, the questions posed . . . as to the relevant subject matters.'" Resolution Trust Corp. v. Southern Union Co., 985

F.2d 196, 197 (5th Cir. 1993). Ford failed to do so.

Further, under Rule 56(f) of the Mississippi Rules of Civil Procedure, the completion of discovery is desirable before the Court determines if there is a genuine issue of material fact. Marx v. Truck Renting & Leasing Ass'n, Inc., 520 So. 2d 1333, 1343 (Miss. 1987) (citing Smith v. H.C. Bailey Cos., 477 So. 2d 224, 232 (Miss. 1985)). Justice is served when a fair opportunity is afforded the plaintiff. Cunningham v. Lanier, 555 So. 2d 685, 686 (Miss. 1989); In this case, the Scheduling Order provided that Grant would be allowed to take the 30(b)(6) Deposition of Ford. The Court erroneously stated that the Discovery Deadline had since passed. Discovery was ongoing relating to the 30(b)(6) of the Defendant, Ford.

For the aforegoing reasons, the Court erred when it failed to Compel Ford to continue the 30(b)(6) Deposition and produce those individuals most knowledgeable about the topics of inquiry.

Issue No. 5:

Did the Court Err in denying Plaintiff's Motion to Allow Additional Discovery?

In regard to matters relating to discovery, the trial court has considerable discretion. The discovery orders of the trial court will not be disturbed unless there has been an abuse of discretion. Clark v. Mississippi Power Co., 372 So. 2d 1077, 1080 (Miss. 1979); Palmer v. Biloxi Regional Medical Center, Inc., 564 So. 2d 1346, 1368 (Miss. 1990). Where, however, limitations on discovery are improvidently ordered or allowed and important information is denied a litigant reversal will obtain. See, e. g. Goosman v. A. Duie Pyle, Inc., 336 F. 2d 151 (4th Cir. 1964); Goldman v. Checker Taxi Co., 325 F. 2d 853, 856 (7th Cir.

1963).

A trial court's discretion in the discovery area is generally guided by the principles that (a) the court follow the general policy that discovery be encouraged, (b) limitations on discovery should be respected but not extended, (c) while the exercise of discretion depends on the parties' factual showings disputed facts should be construed in favor or discovery, and (d) while the importance of the information must be weighed against the hardships and cost of production and its availability through other means, it is preferable for the court to impose partial limitations on discovery rather than an outright denial. Any record which indicates a failure to give adequate consideration to these concepts is subject to the attack of abuse of discretion, regardless of the fact that the order shows no such abuse on its face. Greyhound Corp. v. Superior Court, Merced County, 56 Cal.2d 355, 364 P. 2d 266, 279-280, 15 Cal.Rptr. 90 (Cal. 1961).

In the case at bar, the Lower Court simply denied Grant the opportunity to seek additional discovery; notwithstanding Ford's failure to produce witnesses, identify witnesses in response to Interrogatories, and Defendant's failure to produce documents in response to Requests for Production. Further, the Court applied the wrong standard of "possession only" to its rulings and never considered Ford's custody and/or control over the requested information. Grant submits that this action was in error.

Erroneous denial of discovery is ordinarily prejudicial in the absence of circumstances showing it is harmless. Weahkee v. Norton, 621 F. 2d 1080, 1083 (10th Cir. 1980). Here, we cannot determine whether the requested documents might have changed the result in this case, therefore, we cannot say the error was harmless. Therefore, the matter

should be reversed for further discovery.

Issue No. 6:

Did the Court Err in denying Plaintiff's Motion to Amend the Scheduling Order?

Trial judges are afforded considerable discretion in managing the pre-trial discovery process in the Courts, including the entry of scheduling orders. Robert v. Colsan, 729 So. 2d 1243, 1245 (Miss. 1999). When reviewing a decision that is in the discretion of the trial court, it must first determine if the court applied the correct legal standard. Scoggins v. Ellzey Beverages, Inc., 743 So. 2d 990, 996 (Miss. 1999). Miss R. Civ. P. 37(b)(2)(c) provides if a persona designated under Rule 30 (b)(6) to testify fails to provide or permit discovery, the Court in which the action is pending may make such orders in regard to the failure as are just.

In the case at bar, the Ford Motor Company has repeatedly failed to provide documents identifying witnesses, or allow Grant access to 30(b)(6) deponents most knowledgeable about the discoverable matters. For these reasons, Grant submits that the Court erred in failing to Amend the Scheduling Order, allowing additional discovery, and compelling Ford to produce documents and witnesses in accordance with the prior request of Grant.

Issue No. 7:

Did the Court Err in granting Summary Judgment in favor of Ford Motor Company?

The Circuit Court's grant of a Motion for Summary Judgment is reviewed by this Court de novo. See Wilner v. White, 929 So. 2d 315, 318 (Miss. 2006). *Mississippi Rule of Civil Procedure 56(c)* provides summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is not genuine issues as to any material fact and that the moving party is entitled to a judgment as a matter of law." Miss. R. Civ. P. 56(c). The Comment to Rule 56 adds that "summary judgment is not a substitute for the trial of disputed fact issues." The Court cannot deprive a litigant of a full trial of genuine fact issues. Miss. R. Civ. P. 56 cmt. When reviewing the matter, all evidence shall be viewed in the light most favorable to the party against whom the motion is made. Daniels v. GNB, Inc., 629 So. 2d 595, 599 (Miss. 1993).

In this case, the opinion of the circuit court regarding Summary Judgment is predicated upon the exclusion of Grant's expert opinions and Ford's failure to produce the design drawings of the 1996 Ford Probe vehicle. Further, should the Court have allowed Grant to continue discovery, amend the scheduling order, and conduct additional discovery, said deficiencies could have been cured. Grant alleges the Court erred in the excluding of said expert opinions, failing to compel Ford to produce said design drawings, and disallowing subsequent discovery, including, but not limited to, the continuation of the 30(b)(6) Deposition of Ford. It is clear from the Lower Court's prior rulings denying Summary Judgment based upon said expert opinions, that had said expert opinions not been

excluded, then Summary Judgment would have been denied. Therefore, for the reasons heretofore mentioned, Grant submits that Summary Judgment was improper.

CONCLUSION

For the aforegoing reasons, Grants requests this Honorable Court to enter its Order finding that the Court erred in the following ways:

(1) Failing to Compel the production of certain design drawings in the possession, custody, and/or control of Ford;

(2) Excluding the Affidavit of Dr. Charles W. Benedict;

(3) Granting Ford Motor Company's Motion to Exclude Dr. Benedict's Seatbelt, Structural Integrity and Biomechanics Opinions;

(4) Denying Plaintiff's Motion to Compel the 30(b)(6) Deposition of Ford Motor Company;

(5) Denying Plaintiff's Motion to Allow Additional Discovery;

(6) Denying Plaintiff's Motion to Amend the Scheduling Order; and

(7) Granting Summary Judgment in favor Ford.

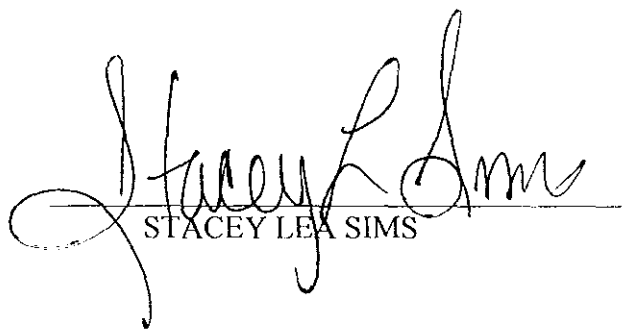
CERTIFICATE OF SERVICE

I, Stacey Lea Sims, attorney for the appellant certify that I have this day filed this Brief of the Appellant, and have served a copy of this Brief by United States Mail with postage prepaid on the following persons at these addresses:

Everett E. White, Esq.
Baker Donelson Bearman Caldwell & Berkowitz
4268 1-55 N
Post Office Box 14167
Jackson, MS 39236-4167

Michael B. Wallace, Esq.
Wise Carter Child & Caraway, P.A.
Post Office Box 651
Jackson, MS 39205-0651

This the 2nd day of March, 2011.



STACEY LEA SIMS