

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

BRUCE THORNDIKE and)
LETITIA N. JORDAN, as next friends of)
CHRISTOPHER THORNDIKE,)
a minor,)

Plaintiffs)

v.)

Civil No. 00-198-B

DAIMLERCHRYSLER)
CORPORATION et al.,)

Defendants)

**RECOMMENDED DECISION ON DEFENDANT INGERSOLL FASTENERS'S
MOTIONS FOR SUMMARY JUDGMENT**

AND

**MEMORANDUM OF DECISION ON INGERSOLL FASTENERS'S MOTION TO
STRIKE PORTIONS OF DENNIS A. GUENTHER'S SUR-REBUTTAL DEPOSITION
TESTIMONY FROM THE SUMMARY JUDGMENT RECORD**

Plaintiffs Bruce Thorndike and Letitia Jordan, as parents and next friends of Christopher Thorndike, their minor son (jointly referred to hereinafter as “the Thorndikes”), commenced a civil action against DaimlerChrysler Corporation (“DaimlerChrysler”) on September 26, 2000, alleging that Christopher Thorndike was rendered a paraplegic and suffered severe abdominal and spinal injuries during an automobile accident in which the spare tire retention system in the 1994 Dodge Ram 350 passenger van in which Christopher was riding failed, enabling the van’s floor-mounted spare tire to fly forward and into the back of Christopher’s bench seat. Following a period of discovery, the Thorndikes amended their Complaint to add Ingersoll Fasteners¹

¹ A division of Ifastgroupe and Company, Limited Partnership and Ifastgroupe, Inc., its General Partner.

(“Ingersoll”), the manufacturer of the retention bolt, a key component of the spare tire retention system, based on the allegation that Ingersoll defectively manufactured the bolt installed in the subject van. Subsequently, Ingersoll and DaimlerChrysler asserted cross-claims against one another for contribution and indemnification. Ingersoll now moves for summary judgment against the Thorndikes’s claims and in favor of its cross-claims against DaimlerChrysler.² I now **RECOMMEND** that the Court **DENY** Ingersoll’s summary judgment motion in all respects.

Summary Judgment Material Facts

Summary judgment is warranted only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c); United States Steel v. M. DeMatteo Constr. Co., 315 F.3d 43, 48 (1st Cir. 2002). The facts recounted in this decision are drawn from the parties’ Local Rule 56 statements of material facts. When construed in the light most favorable to the non-movants, those statements would support the following findings.

DaimlerChrysler designed the spare tire retention system in the van and designed and specified the grade 1, 3/8-inch bolt for use as a retention bolt in this system. (St. of Mat. Facts in Sup. of Ingersoll’s M.S.J., Docket No. 93, ¶ 9; Def. DaimlerChrysler Corp.’s Resp. to Ingersoll Fasteners’ St. of Mat. Facts and St. of Add’l Mat. Facts, Docket No. 99, ¶ 9.) DaimlerChrysler’s purchase orders identify Ingersoll’s grade 1, 3/8-inch diameter bolts as “bolt spare tire hold down[s].” (Docket No. 93, ¶¶ 1, 2.) Although the fact finder could infer from this fact that Ingersoll knew its grade 1, 3/8-inch bolts were being used for retaining spare tires, there is no

² See Docket No 58 (containing Ingersoll’s Cross-Claim against DaimlerChrysler, filed Mar. 15, 2002). For an unknown reason, Ingersoll did not move for summary judgment against DaimlerChrysler’s cross-claims.

evidence to support an inference that Ingersoll knew the bolts were being used in the subject spare tire retention system, which places the spare tire on the floor of the van, without encapsulating it within a spare tire compartment or wheel well.

Ingersoll agreed to manufacture bolts for DaimlerChrysler in compliance with DaimlerChrysler's specifications, particularly materials standard MS-3517, which requires, among other things, that bolts supplied by Ingersoll be "homogenous and free of injurious imperfections," and materials standard PF-5379, which requires that "the juncture of the head and neck be free of laps and/or cracks." (Docket No. 93, ¶¶ 3, 4, 5; Docket No. 99, ¶¶ 2, 5; Pl.'s Resp. to Ingersoll's St. of Mat. Facts and Pl.'s Further St. of Mat. Facts, Docket No. 103, ¶¶ 2, 5; Exhs. to Ingersoll's M.S.J., hereinafter "Ingersoll Exhibits," Tab 16, § 2.4.4 & Tab 18, § 3.) The subject bolt had a forming defect, known as a "fold" or "lap" on the underside of the bolt head, at the midpoint between the bolt head's juncture with the spine of the bolt and the outer diameter of the bolt head, but not in or on the juncture between the head and spine. (Def. Ingersoll's Resp. to Pl.'s Further St. of Mat. Facts, Docket No. 117, ¶ 12.) Thus, the key issue for purposes of this motion concerns the question of whether the subject bolt was defective or failed to comply with materials standard PF-3517 by virtue of being other than "homogenous and free of injurious imperfections." There are four expert witnesses whose discovery testimony relates to the issue of whether the subject bolt was defective or failed to comply with DaimlerChrysler's specifications :

- (1) Ingersoll's metallurgist, Patrick Kelley, B.Sc.³;
- (2) DaimlerChrysler's metallurgist, Gary Fowler, Ph.D. ;
- (3) DaimlerChrysler's mechanical engineering and accident reconstructionist, Dennis Guenther, Ph.D., P.E.; and

³ Mr. Kelley's expert report is co-signed by Richard Ziernicki, Ph.D., P.E., who appears to have worked in tandem with Mr. Kelley. (Ingersoll Exhibits, Tab 23.)

(4) The Thorndikes's metallurgist, Richard McSwain, Ph.D., P.E.

Drs. Kelley and Fowler

According to Ingersoll's expert, Dr. Kelley, the subject bolt "met all applicable standards for chemical composition, material properties, and performance and was, therefore, not defective." (Docket No. 93, ¶ 28.) DaimlerChrysler's expert, Dr. Fowler, agrees with Dr.

Kelley:

The fracture grew on a traverse plane, and eventually encountered a lap near the area of final separation. The lap was not at the fracture origin. The strength of the bolt as determined by hardness testing and metallography indicates compliance with Chrysler and Ingersoll strength requirements. Comparison of the subject bolt to exemplar bolts that were tested further confirms that the subject bolt's strength requirements were satisfied. Material standard MS-3517 states that 'finished parts shall be homogeneous and free from injurious imperfections.' The lap observed on the subject bolt was not at the fracture origin. Therefore the subject bolt would not contain an 'injurious' imperfection.

(Ingersoll Exhibits, Tab 5, p. 9.) Although Dr. Fowler would likely characterize the lap or fold on the bolt head as an "imperfection," his opinion is that the fold was nevertheless not "injurious." (Docket No. 93, ¶¶ 34-37.)⁴

Dr. Guenther

In light of issues raised by Ingersoll in the present motion for summary judgment, DaimlerChrysler now attempts to undercut Dr. Fowler's testimony with that of Dr. Guenther, its mechanical engineering and accident reconstruction expert. In the context of a "sur-rebuttal" deposition, Dr. Guenther opined that the subject bolt contained an "injurious imperfection" based

⁴ DaimlerChrysler contends that Fowler's opinion is limited to metallurgical issues and does not extend to the issue of whether the bolt contained an "injurious imperfection" or manufacturing defect. (Docket No. 99, ¶ 35.) Of course, the scope of Dr. Fowler's opinion must be established by reference to his expert designation. DaimlerChrysler designated Dr. Fowler to testify about, among other things, "the fracture mode, metallurgical properties and cause for the fracture of the bolt," (Docket No. 93, ¶¶ 33, 34; Docket No. 99, ¶ 33; DaimlerChrysler's Feb. 2002 Expert Designation at 9) (emphasis added), which clearly implicates whether a defect or injurious imperfection existed in the subject bolt.

on his assessment that the fold on the underside of the bolt's head diminished its capacity to absorb energy during the collision and that, but for the fold, "it would have absorbed more energy and failed later in the crash sequence, resulting in the tire skidding along the floor of the van." (Docket No. 99, Add'l Facts, ¶ 30; see also Exhibits to DaimlerChrysler Corp.'s Resp. to Ingersoll's St. of Mat. Facts, hereinafter "DaimlerChrysler Exhibits," Tab B, pp. 91-92, 120-21.) This opinion was first revealed during Dr. Guenther's January 17, 2003 deposition, after Ingersoll filed the instant motion for summary judgment. In tension with this opinion is a prior statement made by Dr. Guenther in his March 6, 2002 deposition, during which he indicated, "I don't know what a fold means." (Ingersoll Exhibits, Tab 8, p. 172.) Now Dr. Guenther not only knows what a fold is, but also is of the opinion that but for the presence of a fold in the subject bolt, the spare tire would likely have harmlessly skidded across the floor of the van.

In a separate motion, Ingersoll moves the Court to strike from the summary judgment record Dr. Guenther's latest testimony on the existence of an "injurious imperfection." Ingersoll asserts that DaimlerChrysler violated Rule 26(a)(2)(B) by failing to timely disclose Dr. Guenther's "fold opinion" in its expert designations and argues for the exclusionary remedy afforded by Rule 37(c)(1). (Docket No. 120 at 3-4, ¶ 5.) In addition, Ingersoll challenges Dr. Guenther's testimony under the evidentiary standards applicable to expert testimony, see Daubert v. Merrill Dow Pharms., 509 U.S. 579 (1993), contending that Dr. Guenther is not qualified to offer this opinion and that he employed an unreliable methodology to arrive at it. (Docket No. 120 at 4, ¶ 6.) Finally, Ingersoll complains that the testimony violates a standing order issued by the Court on March 7, 2002, which can be found at Docket No. 57. Both DaimlerChrysler and the Thorndikes oppose the motion to strike.

DaimlerChrysler argues that it was appropriate for it to elicit supplemental expert testimony from Dr. Guenther during his sur-rebuttal deposition because Ingersoll's assertion of the component parts doctrine in its motion for summary judgment amounted to unfair surprise. (Docket No. 125 at 3.) Furthermore, DaimlerChrysler maintains that Dr. Guenther's latest opinion "merely explain[s] or supplement[s] those opinions that Dr. Guenther had previously expressed in his initial expert report, his first deposition and his sur-rebuttal report." (Id. at 4.) I find DaimlerChrysler's arguments to be unpersuasive. Among the issues DaimlerChrysler designated Dr. Guenther to address are "the pre and post-impact speeds of the subject Dodge van [and] the change in velocity and G-forces experienced by the van" as well as "the movement of the spare tire and spare tire retention bolt through the course of the accident." (Ingersoll Exhibits, Tab 5, p.3.) Although the movement of the bolt through the course of the accident would be based on the nature of the force applied to the subject bolt, it does not amount to a designation concerning DaimlerChrysler's manufacturing specifications or whether the subject bolt satisfied those specifications. On that issue, it is apparent that DaimlerChrysler designated Dr. Fowler and not Dr. Guenther. Dr. Fowler's designation specifies that "Dr. Fowler will . . . testify that the subject bolt conformed to material specifications stated in the Chrysler and Ingersoll engineering drawing and standards." This is a sufficiently clear designation on the issue. Indeed, if Dr. Fowler's testimony was not intended to address whether an "injurious imperfection" or other defect existed in the subject bolt, it is difficult to understand what issue he was designated for. And perhaps more importantly, it is difficult to understand how Dr. Guenther's new-found fold opinion amounts to an "explanation" or "supplementation" of his prior opinion, as DaimlerChrysler suggests, when his March 6, 2002 statement was that he did not know what a fold was. Finally, I fail to see how Ingersoll's assertion of a legal doctrine in its

motion for summary judgment amounted to unfair surprise. Because I conclude that Dr. Guenther's opinion concerning the existence of an "injurious imperfection" exceeds his designation and was neither timely nor properly disclosed, I **GRANT** Ingersoll's motion to strike Dr. Guenther's "injurious imperfection" or "fold opinion" testimony from the summary judgment record.⁵

Dr. McSwain

The sole remaining expert to address the issue of the subject bolt's defects or injurious imperfections is the Thorndikes's own expert, Dr. McSwain. On this issue, Dr. McSwain's report indicates the following:

The subject 1994 Dodge B350 Wagon Van spare tire hold-down bolt had a forming defect present on the underside surface of the bolt head. . . .

The forming defect in the subject . . . bolt led to cracking of the head of the bolt during the accident event which altered the uniform lateral support for the bolt and significantly contributed to the fracture of the bolt. . . .

The subject . . . [bolt] was defective in manufacture due to the presence of a visibly detectable forming defect and a weakened grain structure, both of which significantly contributed to the failure of the [bolt] in the accident event.

(Docket No. 93, ¶ 50; Docket No. 99, ¶ 50; Docket No. 103, ¶ 50; see also Ingersoll Exhibits, Tab 25, p. 11-12, §§ 6, 7, 11.) The bases for his conclusions are explained in Dr. McSwain's Materials Engineering Investigation Affidavit ("McSwain's MEIA"), submitted with the Thorndikes's opposing statement of fact, Docket Number 103. In this affidavit Dr. McSwain explains that DaimlerChrysler's "injurious imperfection" standard is a heightened standard that

⁵ The Thorndikes's opposition to the Motion to Strike DaimlerChrysler's expert does not really advance the issue. They argue that Dr. Guenther's testimony should not be stricken because it constitutes an admission by DaimlerChrysler that DaimlerChrysler manufactured the subject van's spare tire retention system with a defective component. I agree that Dr. Guenther's testimony on this issue constitutes an "admission on file" that could normally be considered in the context of a summary judgment motion, but the pending motion is brought by Ingersoll and the opinions of DaimlerChrysler's experts do not amount to admissions by Ingersoll, a distinct legal entity. Furthermore, the Thorndikes have not demonstrated that the Federal Rules of Civil Procedure would permit them to read this deposition testimony into the record as part of their case in chief. See Fed. R. Civ. P. 32(a) & (b).

would prevent bolts from having defects capable of degrading the bolt's strength or serviceability.⁶ (McSwain's MEIA, ¶¶ 10, 12.) According to Dr. McSwain, the subject bolt had two imperfections affecting serviceability: a stacked grain structure at the head-to-shank radius and a lap at the head-to-shank radius. (Id., ¶ 12.) Dr. McSwain asserts that these are both well-recognized forming defects that affect strength, that these defects "weakened the bolt from restraining the spare tire as it was loaded in the subject accident," and that "by way of their location and orientation in the subject bolt . . . directly contributed to the bolt failure process." (Id., ¶¶ 12, 13.) Finally, Dr. McSwain describes testing performed at his laboratory in which exemplar Ingersoll bolts of the same vintage were test loaded in a manner similar to the loads applied in the accident. (Id., ¶ 15.) These tests reflected a wide variation in the failure point of Ingersoll's bolts, ranging from the equivalent of 40.4 G to 70.2 G, which variation depended, again according to Dr. McSwain, on the degree of severity of the individual forming defects in each bolt. (Id., ¶ 17.)⁷ The Thorndikes properly assert these various opinions and conclusions in their statement of material facts. (Docket No. 103, Add'l Facts, ¶¶ 31-33, 37-40.)

⁶ According to Dr. McSwain, the "requirements that the bolt be 'homogenous and free from injurious imperfections' were definitive in ascertaining the defectiveness of the subject accident bolt." (McSwain's MEIA, ¶ 14.) There is currently pending a Daubert motion filed by Ingersoll to exclude from introduction at trial, inter alia, Dr. McSwain's opinion that the subject bolt contained an injurious imperfection. However, that motion was never incorporated into Ingersoll's summary judgment papers. Ingersoll filed its motions for summary judgment early, on January 2, 2003, well ahead of the extended, February 7 motions deadline. (Docket No. 91.) On the motion deadline date, February 7, 2003, Ingersoll moved to exclude certain of Dr. McSwain's and Dr. Guenther's opinions on Daubert grounds, without making any reference to the pending summary judgment papers. (Docket No. 115.) Three days later, in tandem with its summary judgment reply statement of facts, Ingersoll moved to strike portions of Dr. Guenther's testimony from the summary judgment record, but not Dr. McSwain's. (Docket No. 120, granted herein.) The motion to exclude, Docket Number 115, has been referred to me and will be addressed in a forthcoming memorandum of decision. Suffice it to say, for present purposes, that the McSwain opinions recounted herein do not appear susceptible to exclusion under Daubert, based on a review of the motion to exclude and the response and reply connected therewith.

⁷ One aspect of the Thorndikes's factual presentation that I have not included herein involves Ingersoll's alleged failure to adhere to certain quality control/inspection standards. (Docket No. 103, ¶¶ 15-30.) In my view, even if the Thorndikes could establish that Ingersoll departed from a contractual or objective standard of care in this regard, liability on the part of Ingersoll would still depend on a showing that the subject bolt was defective. If the Thorndikes cannot prove that the bolt was defective, then they could not show that Ingersoll breached any duty to prevent a defective bolt from reaching the market.

Summary Judgment Discussion

The Thorndikes assert the following counts against Ingersoll: (I) negligent manufacture; (II) breach of express and implied warranties of fitness; and (III) strict product liability. (Third Am. Compl., Docket No. 43, ¶¶ 38, 62, 68.) As alleged, each of these claims depends on the Thorndikes's ability to prove that Ingersoll's manufacturing process rendered the subject bolt or retention system defective. Cf. Stanley v. Schiavi Mobile Homes, Inc., 462 A.2d 1144, 1148 (Me. 1983) (requiring proof of defect for both negligence and strict products liability claims in a design context); Lorfano v. Dura Stone Steps, Inc., 569 A.2d 195, 197 (Me. 1990) (requiring proof of defect for warranty of merchantability claim). Counts I and III against Ingersoll also require proof that a manufacturing defect in the bolt proximately caused, *i.e.*, was a substantial factor in causing, injury to Christopher. Cf. Ames v. Dipietro-Kay Corp., 617 A.2d 559, 561 (Me. 1992) ("In order to recover under either a product liability or a negligence theory, it is essential that the plaintiff prove that a product's defective design or the defendant's negligent conduct proximately caused the plaintiff's injuries."); Grover v. Boise Cascade Corp., 2003 ME 45, ¶ 11, 819 A.2d 322, ___ (2003) (concerning "substantial factor" standard). Ingersoll asserts that these claims are not actionable because, even if the subject spare tire retention system was rendered defective by DaimlerChrysler's use of the grade 1, 3/8-inch bolt, there is no evidence that the bolt was "itself defective" or that a defect in the bolt proximately caused the spare tire retention system to fail where it otherwise would not have failed. (Ingersoll's Consol. Mem., Docket No. 95, at 25.)

In the law of products liability, Ingersoll is what is commonly referred to as a component parts manufacturer. It qualifies as such because it neither participated in designing or assembling the finished, composite product at issue (the spare tire retention system). Rather, Ingersoll

simply supplied one component part of the system, the grade 1, 3/8-inch retention bolt. Because component parts manufacturers are neither designers nor manufacturers of the finished, composite product, they are to be held liable for defects in the composite product only if their component part was itself defective. See, e.g., Davis v. Komatsu Am. Indus. Corp., 42 S.W.3d 34, 38-39 (Tenn. 2001) (collecting cases) (“[T]he component parts doctrine provides that a manufacturer who supplies a non-defective and safe component part generally will not be held liable for a defective or unreasonably dangerous final product.”); Koonce v. Quaker Safety Prods. & Mfg., 798 F.2d 700, 715 (5th Cir. 1986) (collecting cases and holding that “if the component part manufacturer does not take part in the design or assembly of the final system or product, he is not liable for defects in the final product if the component part itself is not defective”); see also Restatement (Third) Products Liability § 5 (1998). This rule flows from a recognition that a mere component parts manufacturer assumes no duty to the public with respect to the quality or safety of the composite product’s design or manufacture and that products liability has been extended only to those parties who have designed, manufactured or sold the defective product. Thus, although there is no case in Maine that addresses the duty or scope of liability of a component part manufacturer, I consider it likely that the Law Court would recognize that a component part manufacturer is not responsible for an unreasonably dangerous condition in a finished, composite product unless it participates in the design, manufacture or assembly of the composite product or unless its component part directly contributes to the finished product’s dangerous condition by virtue of either a defect in the component part or a failure by the component part manufacturer to manufacture the component part in compliance with specifications set by the designer of the composite product.⁸ Duffee v. Murray Ohio Mfg.

⁸ I differentiate between a component part that is “itself unreasonably dangerous” and one that fails to comply with design specifications because the cases indicate that a component may become unreasonably dangerous

Co., 896 F. Supp. 1071, 1077 (D. Kan. 1995) (“[T]he overwhelming rule from other jurisdictions is that a person who supplies a component subsequently integrated into a finished product by a sophisticated manufacturer is not liable for a failure of that product, so long as the component complies with specifications set by the manufacturer”) (quoting Gardner v. Chrysler Corp., 1995 U.S. Dist. LEXIS 5877, *5-6 (D. Kan. Apr. 5, 1995) (collecting cases)). Thus, analytically, Ingersoll may be liable to the Thorndikes if the Thorndikes can demonstrate that Ingersoll failed to manufacture the subject bolt in accordance with DaimlerChrysler’s specifications and that such failure was a substantial factor in causing injury to Christopher Thorndike.

In my view, Dr. McSwain’s affidavit testimony provides a sufficient evidentiary basis for the fact finder to conclude that Ingersoll failed to comply fully with DaimlerChrysler’s specifications and that such failure was at least a substantial factor in causing Christopher injury. On the first issue, Dr. McSwain’s testimony is direct evidence capable of supporting the conclusion that the subject bolt failed to comply with DaimlerChrysler’s manufacturing specifications due to the presence of latent and patent imperfections that directly impacted the bolt’s strength. Although other experts disagree, certainly the fact finder might credit Dr. McSwain’s testimony on the existence of an injurious imperfection.⁹ On the second issue, that of causation, Dr. McSwain’s testimony constitutes strong circumstantial evidence that the forming defects in the subject bolt were a substantial factor in causing Christopher injury. Given

solely by virtue of its non-compliance with design specifications. In other words, heightened design specifications can place a component part manufacturer on notice that ordinary quality will not suffice. Thus, Ingersoll’s argument that Dr. McSwain considers the subject bolt to be defective only in the context of DaimlerChrysler’s design decision should not be taken as dispositive of the claims against it. That the specified bolt was under-designed does not necessarily mean that it was not simultaneously under-manufactured. This is not to say that Ingersoll must independently scrutinize DaimlerChrysler’s design decisions (it need not), but that Ingersoll must manufacture its component parts in compliance with design specifications. Whether it did so in this instance is, in my view, one of the genuine issues generated by Dr. McSwain’s testimony.

⁹ That the term itself (“injurious imperfection”) is ambiguous may be recognized by the Court as a matter of law. Resolution of that ambiguity is properly submitted to the fact finder. Schindler v. Nilsen, 2001 ME 58, ¶ 15, 770 A.2d 638, 643 (2001).

the wide range in strength among the Ingersoll bolts tested by Dr. McSwain, a fact finder might reasonably infer that whether the spare tire released in the collision event and the degree of force it was able to impart to Christopher, if any, was directly tied to the amount of force the subject bolt was capable of absorbing.¹⁰ Thus, had the subject bolt been a perfect rather than imperfect bolt, Dr. McSwain's testing reflects that it would have been capable of withstanding up to 70 G of force and that the spare tire would not have released in the collision.¹¹ For these reasons, I conclude that the Thorndikes's showing is sufficient to overcome summary judgment.¹²

¹⁰ Ingersoll's accident reconstruction expert, Dr. Ziernicki, testified that even a 10-15% increase in the bolt's strength would have precluded the bolt from failing. (Docket No. 103, Add'l Facts, ¶ 34.)

¹¹ The highest estimation of the G force generated in the collision event is on the order of 58 G. (Docket No. 103, Additional Facts, ¶ 36.) The lowest range estimation is between 45 and 50 G. (Id., ¶ 35.)

¹² Ingersoll's bid for summary judgment relies almost entirely on a portion of Dr. McSwain's deposition testimony in which he stated (1) that grade 1, 3/8-inch bolts should only be used for unimportant or non-load carrying connections, such as in a spare tire retention system situated in a wheel well in a car's trunk, (Docket No. 93, ¶¶ 52, 55, 57), and (2) that even a grade 1, 3/8-inch bolt "that meets all the specifications imposed by Chrysler or the SAE," would "likely" have failed in the subject accident. (Docket No. 93, ¶ 56; McSwain Depo., p. 51, lines 9-18; see also, generally, McSwain Depo., pp. 44-51, 93-94.) Although I can certainly appreciate that the fact finder might infer from this testimony that DaimlerChrysler's design was the sole or primary cause of the spare tire retention system's failure, I do not consider it proper in the context of summary judgment for the Court to conclude that this testimony requires the fact finder to conclude that a design defect alone proximately caused Christopher Thorndike's injuries. Based on my reading of the deposition testimony, it appears that Dr. McSwain was addressing the issue of whether DaimlerChrysler defectively designed the system, not simply whether Ingersoll defectively manufactured the bolt. This was clarified, to a degree, in an exchange related to questioning by the Thorndikes's counsel:

- Q. You can't tell me today that a grade 1, 3/8-inch bolt would always fail in circumstances where it was subject to greater than 40 Gs?
- A. Sure, because you quantified 40 Gs. . . . So, my opinion is that they're likely to fail. You may find one or two that won't, but they're likely to because of the variability.
- Q. And you're talking specifically in this instance of the M bolts?
- A. Right.

(McSwain Depo., p. 93, line 15 – p. 94, line 13.) Ultimately, the pertinent question is not whether any bolt would likely have failed, but whether a bolt having no "injurious imperfection" would have been sufficiently strong to prevent the tire from releasing and striking the second row bench seat back with sufficient force to cause injury to Christopher Thorndike, assuming that this is what happened during the collision event. Dr. McSwain's testimony permits an inference that such a bolt would likely not have failed in the collision because it would have been capable of enduring as high as 70 G of force. Finally, it seems to me that the question of the subject bolt's defectiveness is tied up in the question of the spare tire retention system's defectiveness because it is conceivable that the jury might conclude that the relative utility in the retention system's design outweighs the relative danger when a "perfect"

The remaining aspect of Ingersoll's motions for summary judgment concerns its cross-claims against DaimlerChrysler. I **RECOMMEND** that this motion be **DENIED**. As noted by DaimlerChrysler in its memorandum of law (Docket No. 98 at 3), Ingersoll's cross-claims are dependent on a verdict being returned in favor of the Thorndikes on their claims against Ingersoll. (See Docket No. 58, Cross-Claim ¶ 2.) That eventuality has not come to pass and the pending motion does nothing to make that outcome certain. As the case is postured, it is conceivable that the fact finder might assign primary liability to Ingersoll rather than DaimlerChrysler or no liability to either defendant. The ultimate outcome will turn on the facts and not on any legal doctrine raised in Ingersoll's summary judgment motion.

Conclusion

For the reasons stated herein, I **GRANT** Ingersoll's Motion to Strike Portions of Dennis A. Guenther's Sur-Rebuttal Deposition Testimony from the Summary Judgment Record (Docket No. 120); **RECOMMEND** that the Court **DENY** Ingersoll's Motion for Summary Judgment on Plaintiffs' Claims for Negligence, Strict Liability, and Breach of Warranty (Docket No. 91); and **RECOMMEND** that the Court **DENY** Ingersoll's Motion for Summary Judgment on Cross-Claim Against Defendant DaimlerChrysler Corporation (Docket No. 92).

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection. Failure to file a timely objection shall

grade 1, 3/8-inch bolt is incorporated in the system, but that the relative danger of that system came to exceed the relative utility when the subject, imperfect bolt came to be incorporated in the subject van's tire retention system.

constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

May 21, 2003

Margaret J. Kravchuk

STANDARD

United States Magistrate Judge

**U.S. District Court
District of Maine (Bangor)
CIVIL DOCKET FOR CASE #: 1:00-cv-00198-DBH
Internal Use Only**

THORNDIKE, et al v. DAIMLER CHRYSLER, et al

Assigned to: JUDGE D. BROCK HORNBY

Referred to:

Demand: \$0

Lead Docket: None

Related Cases: None

Case in other court: None

Cause: 28:1332 Diversity-Product Liability

Date Filed: 09/26/00

Jury Demand: Both

Nature of Suit: 355 Motor Vehicle

Prod. Liability

Jurisdiction: Diversity

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ThirdParty Plaintiff

**DAIMLER CHRYSLER
CORPORATION**

represented by **PETER M. DURNEY**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

THOMAS A. NORTON
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

DAVID W. MCGOUGH
(See above for address)

V.

Defendant

INGERSOLL FASTENERS

represented by **THOMAS C. NEWMAN**
MURRAY, PLUMB & MURRAY
PO BOX 9785
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LEAD ATTORNEY
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TIMOTHY H. BOULETTE
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IFASTGROUPE INC

represented by **THOMAS C. NEWMAN**
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TIMOTHY H. BOULETTE
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Cross Claimant

INGERSOLL FASTENERS

represented by **THOMAS C. NEWMAN**
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Cross Defendant

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