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CRASHWORTHINESS

GM must defend itself under California law in crashworthiness case

A California federal judge has denied General Motors LLC's bid to avoid applying California law in a crashworthiness case brought by an Iowa woman over a collision that occurred in the Golden State.

Mendoza v. General Motors LLC et al., No. 16-cv-967, 2018 WL 1960563 (E.D. Cal. Apr. 26, 2018).

U.S. District Judge Lawrence J. O'Neill of the Eastern District of California disagreed with Michigan-based GM that Michigan law should apply on the issue of liability, or that the law of Iowa, where plaintiff Miriam Mendoza resides, should apply on damages.

He also denied GM's motion to bar the testimony of the plaintiff's expert witness on life-care needs and costs.

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REUTERS/Edgard Garrido

CRASHWORTHINESS (INSURANCE)

\$21 million bad-faith award tossed in decades-old auto repair dispute

A Pennsylvania appeals court has tossed a \$21 million bad-faith award against Nationwide Mutual Insurance Co. in a more than 20-year-old dispute over repairs to a vehicle badly damaged in a 1996 crash.

Berg v. Nationwide Mutual Insurance Co., No. 713 MDA 2015, 2018 WL 1705274 (Pa. Super. Ct. Apr. 9, 2018).

In a 2-1 ruling, the Pennsylvania Superior Court found that the policyholder failed to prove Nationwide acted in bad faith by repairing the vehicle instead of declaring it a total loss.

In addition, the majority said there is insufficient evidence to establish that the insurer knew or should have known there were problems with the repair work.

The appellate panel noted the parties have been in litigation for more than 16 years and Nationwide has paid more than 100 times the original vehicle replacement cost in legal defense costs alone.

REPAIR INSTEAD OF REPLACE

The dispute dates back to September 1996 when Sheryl Berg was involved in a car accident while driving her 1996 Jeep Grand Cherokee.

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Some claims on ‘pungent’ Mercedes odors go forward

Mercedes-Benz USA must face a proposed class action alleging the heating, ventilation and air conditioning systems in certain vehicles emit a noxious odor caused by mold, a Georgia federal judge has ruled.

Amin et al. v. Mercedes-Benz USA LLC et al., No. 17-cv-1701, 2018 WL 1474619 (N.D. Ga. Mar. 13, 2018).

U.S. District Judge Amy Totenberg of the Northern District of Georgia refused to dismiss claims against MBUSA for breach of implied warranty and violations of Georgia’s fair business law. However, the judge did grant the automaker’s motion to dismiss claims for breach of express warranty and violations of state law on deceptive trade practices.

Lead plaintiffs Sunil Amin and Trushar Patel sued MBUSA in May 2017, saying the HVAC systems in affected Mercedes-Benz vehicles have a defect that prevents moisture from properly evaporating.

This “provides a haven for the growth of mold and mildew as spores enter the system through outside vents,” the plaintiffs claim.

The allegedly defective vehicles are the 2004-2012 Mercedes A-Class, 2001-2017 Mercedes C-Class, 2000-2014 Mercedes CL-Class, 2013-2017 Mercedes CLA-Class, 2003-2009 Mercedes CLK-Class, 2004-2017 Mercedes CLS-Class, 2003-2016 Mercedes E-Class, 2007-2017 Mercedes GL-Class, 2010-2016 Mercedes GLK-Class, 2006-2016 Mercedes M-Class, 2017 Mercedes GLE-Class, 2006-2015 Mercedes R-Class, 1999-2017 Mercedes S-Class, 2003-2012 Mercedes SL-Class, 2004-2016 Mercedes SLK-Class, and 2002-2013 Maybach 57 and 62.

Amin says that within 18 months of buying his car, the HVAC system in his vehicle began emitting a foul smell. Patel says his new car produced a “noxious, pungent, sour, musty odor” within four months of purchase.

MBUSA moved to dismiss the complaint.

Judge Totenberg first ruled that the express warranty does not cover design defects, and she granted the automaker’s motion to dismiss those claims.

But on the issue of implied warranty, she said the plaintiffs “plausibly alleged facts that, if proven, would show that the defect at issue affects the drivability, safety and usefulness of their cars.”

Resolving this question depends on facts revealed through discovery, so it is not appropriate for a motion to dismiss, the judge ruled.

Next, Judge Totenberg said Amin and Patel have valid claims under the Georgia Fair Business Practices Act, alleging that MBUSA knew of but failed to disclose the defect.

The plaintiff says that within 18 months of buying his car, the HVAC system began emitting a foul smell.

She said that, according to the complaint, Amin and Patel “repeatedly confront[ed]” the defendant with the “apparent falsity of its representations,” only to be met with denials.

“Therefore, plaintiffs have plausibly alleged justifiable reliance,” the judge ruled.

Judge Totenberg also found that MBUSA was entitled to the dismissal of claims brought under the state’s Uniform Deceptive Trade Practices Act, Ga. Code Ann. § 10–1–370, because the statute enjoins conduct that could cause future harm.



REUTERS/Maxim Shemetov

The suit claims the HVAC systems in several Mercedes-Benz vehicles have a defect that prevents moisture from properly evaporating.

The plaintiffs claim they have been damaged by the automaker’s past conduct but are not “likely to be damaged again by Mercedes advertising and marketing,” the judge noted.

A similar suit against Mercedes-Benz USA is underway in the Central District of California. *Bhatt v. Mercedes-Benz USA*, No. 16-cv-3171, complaint filed (C.D. Cal. May 9, 2016). [WJ](#)

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Plaintiffs: Adam Reinke, Madison H. Kitchens and Stephen B. Devereaux, King & Spalding, Atlanta, GA

Related Filings:

Opinion: 2018 WL 1474619

See Document Section B (P. 21) for the opinion.



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AIR BAGS

Injured driver wants judge to strike Ford dismissal motion in air bag case

A Washington man who says he was injured by a defective air bag has asked a Seattle federal judge to strike Ford Motor Co.'s motion to dismiss his case, calling the automaker's replacement of a previously withdrawn dismissal motion a "dirty trick."

Christopher v. Ford Motor Co., No. 17-cv-738, defendant's opposition to motion to strike filed (W.D. Wash. Apr. 23, 2018).

In a response memo filed April 23 in the U.S. District Court for the Western District of Washington, Ford says its actions were appropriate because one of its original arguments for dismissal — plaintiff Carrea Christopher's improper service of process — is no longer relevant.

After Christopher corrected service, the automaker filed a revised motion as "a voluntary act of professional courtesy intended solely to benefit the plaintiff by giving him additional time to respond," according to automaker's memo.

UNDERLYING CASE

Christopher, who is representing himself, sued the automaker in February, alleging the air bag in his 2006 Ford Ranger activated when another vehicle backed into him as he was stopped at an intersection in San Diego.

The air bag "exploded with such force" that it knocked him unconscious and caused chest and back injuries, the plaintiff says.

In its revised dismissal motion, Ford says the Washington federal court lacks general or specific personal jurisdiction.

Specific personal jurisdiction exists when the defendant has purposefully directed activities at the forum state, and the injury arises from those activities. General personal jurisdiction exists when a defendant's affiliations with the forum state are sufficiently "continuous and systematic."

In *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), the U.S. Supreme Court said a defendant is subject to general personal jurisdiction

when its contacts are "so constant and pervasive as to render it essentially at home" in the forum.

Ford says it is "at home" only in Delaware, where it is incorporated, and in Michigan, its principal place of business.

While Christopher asserts that Ford is registered in Washington, has sufficient minimum contacts and avails itself of markets in the state, the automaker counters that these claims are vague, conclusory and not entitled to a presumption of truth for jurisdictional purposes.

Ford further contends the plaintiff has failed to establish the requisite exceptional grounds for the court to find that the automaker is "essentially at home" in Washington.

Additionally, no evidence supports specific jurisdiction, the defendant's memo says. Although Christopher alleges that Ford advertises and sells vehicles in Washington, the automaker also sells cars in "every state in the country," the memo notes.

The plaintiff wants the court to strike Ford's motion.

He argues in a two-page application that Ford's withdrawal of its original motion indicates the defendant is "comfortable and snugg [sic] with cheating" and "there's no telling what's the next dirty trick" the automaker is planning.

Responding to Christopher's motion, Ford says it acted appropriately and fairly. **WJ**

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Related Filings:

March 2018 dismissal motion: 2018 WL 1630057
First amended complaint: 2018 WL 1630058

Dealer's parts replacement does not imply defect, Maryland panel says

A trial judge correctly declined to infer a product defect when a dealership made “goodwill” repairs to a problematic fuel injection system in a 2010 BMW 750xi sedan, a Maryland appellate panel has ruled.

Dedjoe v. BMW of North America, No. 33, 2018 WL 1905958 (Md. Ct. Spec. App. Apr. 23, 2018).

The Court of Special Appeals said in an April 23 opinion that plaintiff Benjamin Dedjoe did not refute the possibility that the system needed replacement because he failed to properly maintain the car.

When Dedjoe bought the previously owned vehicle in March 2012, it was covered under a limited warranty that expired in November 2013, according to the opinion.

After engine problems developed during the warranty period, Dedjoe brought the car to a New York BMW dealership, which replaced the fuel injection system at no cost.

In November 2014, after the warranty expired, a Baltimore dealership replaced all eight fuel injectors even though only one was faulty, the panel said.

Three months later the same dealership replaced one fuel injector at no charge.

In May 2015 Dedjoe sued BMW of North America in the Baltimore County Circuit Court for breach of express and implied

warranty, claiming the system was defective when he bought the vehicle.

The trial judge granted BMW's summary judgment motion, saying Dedjoe could not prove the vehicle had a manufacturing defect without expert testimony.

The mere fact that fuel injectors in the plaintiff's vehicle were replaced three times did not evidence a defect, the panel said.

On appeal, Dedjoe said the repeated fuel injector replacements and BMW's conduct indicated the presence of a defect, making expert testimony unnecessary.

Affirming the lower court's opinion, the Court of Special Appeals said that under the Maryland Consumer Protection Act/Automotive Enforcement Act and the federal Magnuson-Moss Warranty Act, 15 U.S.C.A. § 2301, a plaintiff must show, by inference or expert testimony, a defect in materials or workmanship.

The panel said the mere fact the injectors were replaced three times did not give rise to such an inference.

The appeals court rejected Dedjoe's claim that a reasonable manufacturer would not have replaced the parts at no cost if there was no legitimate defect. The panel found these “goodwill repairs” raised no such inference.

The panel also disagreed with Dedjoe's argument that the problems were attributable to a faulty system, citing evidence that the plaintiff might not have maintained and serviced the car as recommended.

Because there were other potential causes of the fuel system issues, no inferences could be drawn and expert testimony was needed to eliminate those causes, the panel concluded. [WJ](#)

Related Filings:

Opinion: 2018 WL 1905958

See Document Section C (P. 34) for the opinion.

Judge orders GM to expand discovery data in heated-seats case

General Motors must produce additional burn-injury data on certain models of vehicles with heated seats, a federal magistrate judge has ruled in the case of a paraplegic Illinois man who says a 2011 GMC Sierra's seat warmer severely burned him.

Whitley v. General Motors LLC, No. 17-cv-900, 2018 WL 1932968 (S.D. Ill. Apr. 24, 2018).

U.S. District Magistrate Judge Reona J. Daly of the Southern District of Illinois said that while plaintiff James Whitley is not entitled to material on vehicles dating back to 2001, General Motors LLC did not sufficiently explain why it had limited its discovery responses to post-2008 models.

Whitley sued the automaker last year, claiming he was unaware the seat warmers in the Sierra were activated when they burned him as he drove July 22, 2015, because he cannot sense heat or cold in his lower extremities.

The seat warmers can turn on "without any action by the user," generate dangerously high temperatures and do not shut off even when those temperatures are reached, according to the suit.

Whitley claims his injuries required multiple surgeries and more than 100 days of hospitalization.

GM knew or should have known that people with sensory deficits could be driving with an increased risk of serious burns, the complaint says.

Whitley requested documents from GM on vehicles "similar" to the 2011 Sierra, from the 2001 model year onward, the judge's order said.

The automaker responded by agreeing to produce data on what it termed "scope vehicles" that used the same GMT-900 seat heating system: the 2007-2014 Chevrolet Suburban and Tahoe, GMC Yukon and Yukon XL, and the Cadillac Escalade and Escalade ESV, the order said.

Four days later, GM changed the list to exclude 2007 models and redefined scope vehicles as the 2008-2013 Chevrolet Silverado, Avalanche and GMC Sierra, and the 2008-2014 Chevrolet Tahoe and Suburban, GMC Yukon and Yukon XL, and Cadillac Escalade and Escalade ESV, according to the opinion.

Whitley moved to compel production of the data GM had refused to turn over, claiming GM's response was narrow and restrictive.

The automaker countered that vehicles outside the scope had dissimilar heating systems and the GMT-900 system differed from the one used before 2007.

Judge Daly ruled that producing data on all post-2001 vehicles would be burdensome and disproportional to the needs of the case.

GM had shown that seat heater components in scope vehicles are incompatible with those used in prior model pickups, SUVs and cars, and Whitley's requests were limited to the 2011 Sierra or "similar or like products," the magistrate said. "Defendant simply responded to the questions that were asked."

While declining to completely broaden the list of scope vehicles, Judge Daly did note that GM must include the 2007 vehicle data it originally submitted.

"It is not apparent why these vehicles were excluded, except that the resistive front heating system was 'significantly changed' at the end of the 2008 model year," she said. "It is not clear why this change occurred or if it significantly altered the component parts or specifications." **WJ**

Related Filings:

Order: 2018 WL 1932968

See Document Section D (P. 39) for the order.

No proof that alternate brake design was safer, Virginia high court rules

The design of a lift truck brake is not objectively unreasonable absent a showing that a proposed alternative is safer than the manufacturer's original, the Virginia Supreme Court has ruled.

Evans v. NACCO Materials Handling Group Inc., No. 161788, 810 S.E.2d 462 (Va. Mar. 22, 2018).

The state high court said operators could face a greater risk of injury with a redesign's mechanic-adjusted parking brake rather than with the original's operator-adjusted brake.

The case arose in January 2010 when Jerry Evans, an inexperienced operator, used a Hyster S120XMS clamp lift truck to unload paper from a trailer at a Lynchburg, Virginia, plant.

The Virginia Supreme Court said a design is not safer if the proposed modification could create a greater risk of injury.

A lift truck resembles a forklift but has a clamp attachment that weighs about 2,800 pounds, according to the opinion.

When the truck got stuck in a gap on a loading ramp, Evans used a co-worker's truck to tow it, according to the opinion. He was killed when his lift truck rolled backward and crushed him between the two trucks.

The opinion said Evans had applied the parking brake on the lift truck, but an inspection revealed the operator-adjustable brake was out of adjustment.

Evans' widow, Ronda, sued the manufacturer of the Hyster truck, NACCO Materials Handling Group Inc.

At trial in the Roanoke Circuit Court, her expert witness, Frederick Mallett, said the brake was defectively designed because it was operator-adjustable, rather than mechanic-adjustable, but he admitted it complied with industry standards.

The jury returned a verdict for the plaintiff and awarded her \$4.2 million in damages, but the trial judge set aside the verdict and dismissed the case, finding Evans was contributorily negligent.

Both sides appealed to the Virginia Supreme Court.

Evans challenged the ruling on contributory negligence, and NACCO challenged the jury's finding of negligent design.

The state high court affirmed on the ground that the original design's operator-adjustable parking brake was not unreasonably dangerous.

The plaintiff's expert did not assert that the design violated industry norms, consumer

expectations or government regulations, the justices noted, and NACCO presented evidence that the design was used throughout the industry.

Even if reasonable consumers expected a design that allowed only mechanics to adjust the parking brake, there was no evidence that such a design was safer, the court said.

The justices also said a design is not safer if the proposed modification could create a greater risk of injury.

"An inescapable consequence of a design that limits brake adjustment to a mechanic, or that makes it more difficult to adjust the brake by requiring the use of tools, is that some operators and their employers will continue to use trucks with weakened brakes," the state high court said.

Having affirmed on these grounds, the justices did not rule on the contributory negligence issue. [WJ](#)

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Related Filings:

Opinion: 810 S.E.2d 462

Inadequate expert testimony dooms F-250 seat belt case against Ford

By Shari Pirone

An injured man who sued Ford Motor Co. over his F-250 pickup's allegedly defective seat belt failed to provide reliable and admissible expert testimony to make his case, an Alabama federal judge has ruled.

Easterling v. Ford Motor Co., No. 14-cv-2353, 2018 WL 1535290 (N.D. Ala. Mar. 29, 2018).

Jerry Easterling's expert witness declared Ford's seat belt buckle defective and dangerous but did not offer supporting data or testing, U.S. Magistrate Judge John E. Ott of the Northern District of Alabama said in dismissing the suit.

Easterling claimed he was driving his 2003 F-250 in December 2012 when he hit a patch of ice in Bessemer, Alabama, and lost control.

The truck veered off the road, spun and flipped over, according to his complaint.

Easterling said his seat belt unlatched due to defective design and manufacture.

He claimed his injuries would not have been as serious if the buckle, part of a three-point restraint system manufactured by TRW Vehicle Safety Systems Inc., had remained latched throughout the crash.

Easterling asserted claims under the Alabama Extended Manufacturer's Liability Doctrine. He also alleged negligent or wanton design, manufacture, testing, warning, inspection, distribution and sale, as well as breach of implied warranty.

EXPERT TESTIMONY

Easterling offered testimony from mechanical engineering expert Donald R. Phillips, who said the seat belt unlatched because there

were fractured plastic springs behind the buckle release button.

The cracked springs prevented the button from returning to a full "up" position, resulting in less than full engagement of the lock bar, Phillips said.

Steel coil springs used in other seat belt systems would have been stronger than plastic, he said, and Ford put Easterling in danger by failing to use the metal components.

Phillips said Ford should have warned of the danger and recalled any trucks with plastic springs.

Ford moved to exclude Phillip's opinions and for summary judgment.

Judge Ott granted both motions, saying expert testimony was required to establish a

defect but Phillips' testimony was unreliable and inadmissible.

Phillips did not analyze the springs' properties or durability, conduct testing to determine why they failed 10 years after the vehicle was manufactured, or compare the strength and performance of metal and plastic springs, the judge noted.

Phillips also failed to identify a reasonably safe alternative design using metal return springs, Judge Ott said.

Without admissible expert testimony, Easterling could not meet his burden of proving the seat belt was unreasonably dangerous and defective when it left Ford's possession, the judge concluded. [WJ](#)

Related Filings:

Opinion: 2018 WL 1535290



REUTERS/Shannon Stapleton

S.C. high court recognizes trade-secret privilege in Goodyear case

Answering a question from a federal appeals court in a defective-tire case against Goodyear, the South Carolina Supreme Court has held that state law recognizes a qualified evidentiary privilege for trade secrets.

***Hartsock v. Goodyear Dunlop Tires North America Ltd. et al.*, No. 27793, 2018 WL 1938540 (S.C. Apr. 25, 2018).**

The high court ruled 4-1 that a party seeking discovery of a trade secret must show a “substantial need” under the state’s Trade Secrets Act, S.C. Code Ann. § 39-8-10, and pass a three-part balancing test to overcome the privilege.

A dissenting opinion said the state does not recognize a privilege for trade secrets, but the statute provides rules for discovery in state-law-based cases.

DISCOVERY DISPUTE

The question of whether South Carolina law recognizes a trade secret privilege stems from a long-standing discovery dispute in a wrongful-death case Theodore Hartsock Jr. brought against Goodyear Dunlop Tires North America Ltd. *Hartsock v. Goodyear Dunlop Tires N. Am.*, 672 F. App’x 223 (4th Cir. 2016).

According to Hartsock’s complaint, his wife, Sarah, was killed in Calhoun County, South Carolina, in 2010 when a motor home crossed a median and hit her vehicle head-on.

The 2013 complaint says a Goodyear Dunlop G670 RV tire on the motor home failed and caused the collision. The suit asserts claims for negligence, strict liability and breach of warranty.

Hartsock claims the inner liner of the tire was too thin and a feasible alternative design existed when the tire was manufactured.

In discovery, he sought production of the portion of Goodyear’s Global Design Manual covering the inner liner design specifications and the failed tire’s butyl content.

The tiremaker objected, saying the information constituted trade secrets.

In 2015, U.S. District Judge Patrick M. Duffy of the District of South Carolina applied federal discovery standards and ordered Goodyear to produce the information on the tire’s butyl content and the relevant part of the Global Design Manual subject to a confidentiality order. *Hartsock v. Goodyear Dunlop Tires N. Am.*, No. 13-cv-419, 2015 WL 9873811 (D.S.C. Nov. 30, 2015).

The District Court denied Goodyear’s motion for reconsideration but allowed the company to appeal the order.

4TH CIRCUIT SEEKS HELP

Appealing to the 4th Circuit, Goodyear argued that Federal Rule of Evidence 501 requires the application of the South Carolina Trade Secrets Act, which it said recognizes an evidentiary privilege for trade secrets and is more stringent than the federal standard.

Hartsock countered that the District Court correctly ruled on the issue and the matter is governed by the Federal Rules of Civil Procedure and federal common law, not state law.

Finding no directly controlling South Carolina authority, the 4th Circuit asked South Carolina’s high court to decide whether the state recognizes an evidentiary privilege for trade secrets.

The appeals court said the SCTSA and *Laffitte v. Bridgestone Corp.*, 674 S.E.2d 154 (S.C. 2009), afford trade secrets substantial protection, but “whether that protection amounts to an evidentiary privilege is not clear from either the [statute] or *Laffitte*.”

STATE HIGH COURT’S RESPONSE

The majority of South Carolina’s justices said the SCTSA’s protections — that a trade secret holder may refuse to disclose them — “are the quintessence of a privilege” and show a clear legislative intent to shield trade secrets “where public policy demands it.”

In an opinion written by Justice John W. Kittredge, the high court said a party seeking such material must prove a substantial need for it. This requires pleading with particularity the factual basis for or against liability, relevance to the litigation, substantial prejudice if the data is not released, and a good-faith belief that the material will be admissible, the majority said.

Laffitte spelled out a three-part balancing test that must also be applied, including the requirement of specific relevance to the issues in the case and a comparison of the relative harms of disclosure or nondisclosure to the parties, the majority said.

“Thus, if a substantial need is shown and the balancing test weighs in favor of the one requesting disclosure, the qualified privilege is overcome,” the state Supreme Court concluded.

In dissent, Justice John C. Few said he agreed with the majority’s statements about South Carolina law on the discovery of trade secrets except for the “privilege” label.

A true privilege allows a party to withhold information “in the face of all lawful authority,” but the SCTSA authorizes a refusal to disclose in a single context: discovery in a civil case, he said.

It is therefore a discovery rule, he said, adding that federal courts apply their own federal discovery rules. **WJ**

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Defendant: Wallace K. Lightsey, Wyche PA, Greenville, SC; M. Gary Toole, McDonald, Toole & Wiggins, Orlando, FL

Related Filings:

Opinion: 2018 WL 1938540
Goodyear’s 4th Circuit brief: 2016 WL 1253521
Hartsock’s 4th Circuit brief: 2016 WL 2586403

U.S. safety agency reviewing fatal Tesla crash in Florida

(Reuters) – The U.S. National Highway Traffic Safety Administration said May 10 it was reviewing a Florida crash of a Tesla Inc. vehicle May 8 that killed two teenagers.

NHTSA said in a statement it was “gathering information on the tragic crash in Fort Lauderdale, Florida, to understand all of the facts. The agency will take appropriate action based on its review.”

The National Transportation Safety Board said May 9 it was opening a probe into the crash and sending four investigators.

Earlier, Tesla said its autopilot system was unlikely to have been a factor in the crash. Autopilot, a form of advanced cruise control that has come under scrutiny after two crashes this year, was not engaged when the Model S car drove off the road and hit a concrete wall, catching fire, the company said, adding it had not yet seen logs from the crash.

“We have not yet been able to retrieve the logs from the vehicle, but everything we have seen thus far indicates a very high-speed collision and that autopilot was not engaged,” a Tesla spokesperson said.

The NTSB has four active investigations into crashes of the company’s electric vehicles.

While admitting that serious high-speed collisions could result in a fire, the Tesla spokesperson defended the car’s safety record, saying a gas car in the United States is five times more likely to catch fire than a Tesla vehicle.

In the event of an accident, eight air bags protect front and rear occupants, and the battery system automatically disconnects from the main power source, Tesla has said previously in promotional materials for the car.

“Should the worst happen, there is no safer car to be in than Model S,” according to a company brochure for the 2014 Model S.

NHTSA previously has said it is investigating two other Tesla crashes earlier this year, including a fatal March crash involving Autopilot in California. [WJ](#)

(Reporting by Sanjana Shivdas in Bengaluru and David Shepardson in Washington; editing by Patrick Graham and Bernadette Baum)

Uber sets safety review; media report says software cited in fatal crash

(Reuters) – Uber Technologies Inc. on May 7 said it has retained a former top U.S. transportation official to advise it on safety after a fatal self-driving crash in March, but it declined to comment on a technology website’s report that a software flaw was responsible for the accident.

The Information reported May 7 that Uber has determined the likely cause of the collision in March that killed a pedestrian was a problem with the software that decides how a self-driving car should react to objects it detects. The outlet said the car’s sensors detected a pedestrian but the software decided the car did not need to react right away.

“We can’t comment on the specifics of the incident,” Uber said regarding the report, citing an ongoing investigation by the National Transportation Safety Board.

In the March 18 accident an Uber self-driving vehicle struck and killed a 49-year-old woman who was walking across a street in the Phoenix suburb of Tempe.

Uber, which suspended testing of autonomous vehicles after the accident, on May 7 said it was looking at its self-driving program and said it retained Christopher Hart, a former chairman of the NTSB, to advise it on safety.



REUTERS/Mark Beach

Uber said the likely cause of the fatal collision in Tempe, Arizona, involving one of its self-driven vehicles was software-related. This photo taken after the March 24 accident shows the self-driven vehicle flipped on its side.

"We have initiated a top-to-bottom safety review of our self-driving vehicles program, and we have brought on former NTSB Chair Christopher Hart to advise us on our overall safety culture," Uber said. "Our review is looking at everything from the safety of our system to our training processes for vehicle operators, and we hope to have more to say soon."

Hart, who was named chairman of the Washington-area Metrorail safety commission in March, did not immediately respond to a request for comment.

In a video of the crash released by police, the Uber vehicle appeared not to brake before it struck the woman. There was a human driver sitting behind the wheel, who in the video appeared to be looking down and not at the road. Just before the video stopped, the driver looked upward toward the road and suddenly looked shocked.

The NTSB is expected to issue a preliminary report on the Arizona Uber crash in the coming weeks, a spokesman said.

The National Highway Traffic Safety Administration is also investigating the incident and declined to comment.

Bryant Walker Smith, a self-driving car expert and law professor at the University of South Carolina, said in an email that the report by The Information raised the question of whether Uber's "software might have detected something but misclassified as something other than a human (which could include determining that the probability of that something being a human was low)."

False positives and negatives have long been a challenge for self-driving and semiautonomous driving systems, he said, but said that detecting a pedestrian crossing a street "doesn't seem like an edge case" that would have been difficult for a self-driving car to handle.

Uber's chief executive officer, Dara Khosrowshahi, said in April that Uber still believed in prospects for autonomous transport, saying that "autonomous (vehicles) at maturity will be safer."

Hart, who was chairman of the NTSB when it opened a probe into a fatal Tesla crash involving a driver using the vehicle's Autopilot system, in 2016 said that self-driving cars will not be perfect.

"There will be fatal crashes, that's for sure," Hart said, but he said that would not derail the move toward driverless cars. **WJ**

(Reporting by David Shepardson; editing by David Gregorio and Leslie Adler)

At meeting with automakers, Trump launches new attack on NAFTA

(Reuters) – Ten American and foreign automakers went to the White House on May 11 to push for a weakening of U.S. fuel efficiency standards through 2025, while President Donald Trump used the occasion to launch a fresh attack on the North American Free Trade Agreement that has benefited the companies.

A draft proposal circulated by the U.S. Transportation Department would freeze fuel efficiency requirements at 2020 levels through 2026, rather than allowing them to increase as previously planned. Trump's administration is expected to formally unveil the proposal later this month or in June.

"We're working on CAFE standards, environmental controls," Trump told reporters at the top of the meeting, referring to the Corporate Average Fuel Economy standards for cars and light trucks in the United States.

Trump said he wants automakers to build more vehicles in the United States and export more vehicles.

But much of the hour-long meeting focused on NAFTA. Trump blasted the pact involving the United States, Canada and Mexico as "terrible" and noted that negotiations to make changes sought by his administration were ongoing.

"NAFTA has been a horrible, horrible disaster for this country and we'll see if we can make it reasonable," Trump said.

Automakers have called NAFTA a success, allowing them to integrate production throughout North America and make production competitive with Asia and Europe, and have noted the increase in auto production over the past two decades with the deal in place. They have warned that changing NAFTA too much could prompt some companies to move production out of the United States.

The chief executives of General Motors Co., Ford Motor Co., Fiat Chrysler, along with senior U.S. executives from Toyota Motor Corp., Volkswagen AG, Hyundai Motor Co., Nissan Motor Co., Honda Motor Co., BMW AG and Daimler AG met with Trump, as did the chief executives of two auto trade groups.

Major automakers reiterated they do not support freezing fuel efficiency requirements but said they want new flexibility and rule changes to address lower gasoline prices and the shift in U.S. consumer preferences to bigger, less fuel-efficient vehicles.

Fiat Chrysler chief executive Sergio Marchionne told Reuters before the meeting his company is "fully supportive" of Trump's efforts to revise the rules and hoped for "an agreed way forward."

Automakers also want the White House and California to reach agreement on maintaining national standards, fearing a prolonged

legal battle could leave the companies facing two different sets of rules — and the state level and nationally — and extended uncertainty.

Hinrich Woebcken, chief executive of the North American region for VW, told Reuters the meeting was a “great opportunity” to have an exchange of ideas about the future of emissions rules.

California and 16 other states covering about 40 percent of the U.S. population filed suit May 1 to block the Trump administration’s efforts to weaken the fuel efficiency requirements. *California et al. v. U.S. Env’tl. Prot. Agency et al.*, No. 18-114, *petition for review filed* (D.C. Cir. May 1, 2018).

Marchionne said he still hopes the administration could reach a deal with California to maintain nationwide emissions standards.

‘MARKETPLACE REALITIES’

U.S. Trade Representative Robert Lighthizer, Transportation Secretary Elaine Chao, White House economic adviser Larry Kudlow, Environmental Protection Agency chief Scott Pruitt and White House aide Chris Liddell are among the administration officials who attended the meeting.

Mitch Bainwol, who heads the Alliance of Automobile Manufacturers, told a congressional committee May 8 the industry supports “standards that increase year over year that also are consistent with marketplace realities.”

Bainwol said the industry remains hopeful that there will be a “negotiation” between the White House, California and the auto industry.

The industry also notes it faces rising fuel efficiency standards around the globe and is spending billions of dollars to introduce new battery electric vehicles in the coming years.

Democrats and environmental advocates plan to aggressively challenge the Trump administration’s plans to weaken the vehicle rules touted by Democratic former President Barack Obama’s administration as one of its biggest actions to combat climate change by reducing planet-warming emissions.

The Trump administration plans to argue the weaker rules will lead to cheaper vehicles, boost sales and employment, and improve safety by prodding faster turnover of older vehicles.

The Obama-era rules adopted in 2012 sought to double average fleet-wide vehicle fuel efficiency to about 50 miles per gallon by 2025, but included an evaluation due by April 2018 to determine if the rules were appropriate. **WJ**

(Reporting by David Shepardson in Washington; additional reporting by James Oliphant; editing by Paul Tait)

Crashworthiness

CONTINUED FROM PAGE 1

In July 2014, Mendoza, then 16, was a third-row passenger in her family’s 2002 Chevrolet Astro van when it was rear-ended near Bakersfield, California, according to the judge’s order.

She is permanently paralyzed from the neck down due to spinal injuries, the order said.

Mendoza filed a product liability lawsuit against GM in California in 2016. She alleges the Astro’s rear structure was defective and allowed the trailer hitch to interact with the floor pan near the third-row seat.

CHOICE-OF-LAW ISSUES

GM moved in March for a ruling that Michigan law applies to the product liability claims and that Iowa law applies to the measure of damages.

Mendoza countered that California law should apply to both.

Judge O’Neill noted that California’s choice-of-law rules presume the state’s law should apply unless the party arguing to apply a different state’s law can show otherwise.

The rules involve analyzing the relative governmental interests: Whether the differing states’ substantive laws differ, each state’s interest in having its own law applied and which state’s interest would be more harmed if its law were not applied, the judge said.

California allows claims for strict liability in product-defect suits, while Michigan does not, the judge said, noting a material difference.

To prevail under Michigan law, Mendoza would have the more difficult burden of showing a reasonable alternative design for the Astro that could have reduced her foreseeable risk of harm, Judge O’Neill explained.

GM said the allegedly tortious conduct of designing, engineering and testing the van happened in Michigan and that state has an interest in protecting its businesses from financial liability and promoting a favorable legal climate.

California was merely the “fortuitous” location of the accident, the automaker added.

Judge O’Neill disagreed, saying the injury occurred in California, which has an interest

in securing the safety of its residents and guests and in keeping defective products out of the state.

He concluded each state’s interests would be impaired if the other state’s law were applied but that GM failed to show Michigan has the prevailing interest.

“Michigan’s interest in protecting resident defendants cannot extend beyond its borders to torts committed in other states against non-Michigan plaintiffs,” the judge said. “Michigan courts have generally refused to apply Michigan law to products liability cases where Michigan’s only connection to the lawsuit is that it is the location of the defendant manufacturer.”

On the damages issue, GM said Iowa law should apply because Mendoza lives there.

Judge O’Neill noted that in California, a defendant even 1 percent at fault is jointly and severally liable for all economic damages, while in Iowa, defendants are similarly liable only if they are more than 50 percent at fault.

For that reason, the judge said, applying California law would not impair Iowa’s interest in ensuring its citizens are compensated for

tort injuries because Mendoza would not be paid less under California law and might even be paid more than under Iowa law.

"Furthermore, Iowa has no interest in ensuring the defendant, who is not an Iowa resident, is not held joint and severally liable," he said, concluding California law should apply.

EXPERT TESTIMONY PARTLY EXCLUDED

GM asked Judge O'Neill to exclude as unreliable or speculative the testimony of Mendoza's expert witness Kent Jayne, a certified rehabilitation counselor and life-care planner. The automaker said he is not qualified to opine on traumatic brain injuries.

He said Jayne can testify on Mendoza's life-care needs and costs, vocational prospects, and earning capacity, given his specialized knowledge in those areas. He also can testify

on a cognitive test he administered as a rehabilitation specialist.

The judge agreed with GM, however, that Jayne cannot testify on whether Mendoza suffered a traumatic brain injury because he is not qualified to give a medical opinion. **WJ**

Related Filings:

Memorandum decision and order:
2018 WL 1960563

See Document Section A (P. 15) for the decision and order.

Repair dispute

CONTINUED FROM PAGE 1

Nationwide insured her under a policy that required it to pay for the loss of the vehicle or repair or replace the damaged parts, according to the appeals court's opinion.

Initially, Nationwide opted to repair the Jeep instead of paying \$25,000 to replace it, the ruling said. The repairs cost \$12,500 and took almost four months to complete, the opinion said.

Berg alleged that when the Jeep was returned to her, the repairs were defective and the vehicle was not crashworthy.

After Berg completed her lease agreement more than two years after the accident, Nationwide totaled the Jeep and paid the bank that held the vehicle's title \$18,000 to settle the claim and obtain ownership, the opinion said.

In 1998, Berg sued Nationwide and the car dealership that made the repairs after the accident, asserting breach of contract, bad faith, fraud, negligence, conspiracy and violation of Pennsylvania's Unfair Trade Practices and Consumer Protection Law.

JUDGE AWARDS \$21 MILLION

A jury in the Berks County Court of Common Pleas in 2004 awarded Berg over \$2,000 for the defendants' violation of the state consumer protection law, according to the appellate opinion. In a second phase of the trial in 2007, a judge entered a directed verdict in favor of Nationwide on the issue of bad faith, the ruling said.

Following an appeal by Berg, the case made its way back to the trial court. In 2014 Judge Jeffrey K. Sprecher ruled in favor of



REUTERS/Tiksa Negeri

The Pennsylvania Superior Court said the plaintiff failed to prove her insurer acted in bad faith by having her vehicle repaired instead of declaring it a total loss. Here, a mechanic works on a vehicle engine.

Berg on her bad-faith claim and awarded her \$18 million in punitive damages and \$3 million in attorney fees. *Berg v. Nationwide Mut. Ins. Co.*, No. 98-813, 2014 WL 2969526 (Pa. Ct. Com. Pl. June 12, 2014).

Nationwide appealed.

PANEL: EVIDENCE DOESN'T SHOW BAD FAITH

The Superior Court panel vacated the \$21 million award and remanded the case, ruling that the trial court's findings of fact are not supported by the evidence.

"The trial court engaged in a limited and highly selective analysis of the facts and drew the most malignant possible inferences from the facts it chose to consider," Judge Victor P. Stabile wrote for the majority.

For example, the majority said, there was insufficient evidence to conclude the Jeep was

damaged beyond repair or that Nationwide had actual knowledge of the Jeep's defective condition after it was repaired and returned to Berg.

Insurers do not have a good-faith duty to inspect repair work before returning a vehicle to a policyholder, the majority added.

In a dissenting opinion, Judge Correale F. Stevens said the trial court's verdict and damages award was supported by "ample evidence."

There is sufficient evidence to support the trial court's determination that Nationwide was motivated by financial gain in repairing the Jeep and "acted with reckless disregard in not thoroughly inspecting the ongoing repairs," Judge Stevens said. **WJ**

Related Filings:

Opinion: 2018 WL 1705274

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