IN THE STATE COURT OF GWINNETT COUNTY
STATE OF GEORGIA

MORGAN LAYNE DIZE, an incapacitated minor, by and through her next friends and natural parents, SABRINA LYNN DIZE and ANDREW DIZE, and SABRINA LYNN DIZE and ANDREW DIZE, jointly as natural parents of their minor daughter, MORGAN LAYNE DIZE,	)	CIVIL ACTION FILE
	)	NO. 00-C-4666-5
Plaintiffs,	)	
vs.	)	
DAIMLERCHRYSLER CORPORATION and CATHY LYNN HOWELL,	)	
Defendants.	)	

ORDER

This is a products liability and negligence action brought by Andrew and Sabrina Dize on behalf of their minor child, Morgan Dize. The plaintiffs allege a crashworthiness defect (and failure) in the driver's seat in the Dize minivan. Plaintiffs allege this defect caused a catastrophic brain injury to Morgan when the Dize minivan was hit in a low-speed, rear impact collision and Mrs. Dize's front driver's seatback collapsed on four-year-old Morgan, who was seated in the back seat behind Mrs. Dize. The defendants are DaimlerChrysler ("DC"), the manufacturer of the Dize minivan, and Cathy Howell, the driver of the vehicle that collided with the rear of the minivan.

The following facts are undisputed: Mrs. Dize and Morgan were traveling on Pleasant Hill Road in their DaimlerChrysler minivan. Mrs. Dize was seated in the driver's seat and wearing her lap and shoulder belt. Morgan was seated in the back seat directly behind Mrs. Dize

and was also wearing her lap and shoulder belt. As traffic slowed on Pleasant Hill Road (and as the Dize minivan slowed with it), the Dize minivan was hit from behind by defendant Howell's vehicle.

During that impact, the driver's seat back on the Dize minivan, plaintiffs contend, failed and collapsed rearward onto Morgan, thus allowing Mrs. Dize's head to collide with Morgan's head. While DC disputes that the rearward movement of the driver's seat was a "failure" or a "collapse," DC does admit that the seat did "move rearward" or "yield" in the impact, allowing Mrs. Dize's head to collide with Morgan's. As a result of that blow, Morgan suffered a hemorrhage into the brain, spent several months at Scottish Rite Hospital, and is now permanently and catastrophically brain damaged.

Plaintiffs brought claims against Ms. Howell and against DC. The claims against Mrs. Howell allege negligence in striking the Dize vehicle.

The claims against DC allege: (1) strict liability for the alleged defective design and absence of warnings with respect to the allegedly weak, collapsing front driver's seat; (2) negligence in the design of the front driver's seat and the absence of warnings; (3) wrongful refusal to recall and fraudulent concealment of the defects; and (4) *punitive damages*. Plaintiffs allege DC failed to design a seat strong enough to withstand a survivable, low-speed, rear-impact collision without collapsing and subjecting to serious injury passengers either in the collapsing seat itself or behind it.[1] Furthermore, plaintiffs contend DC failed to warn consumers about the

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[1] The plaintiffs contend that this incident should not have resulted in significant injury to anyone absent the product failure. Plaintiffs argue that none of the other occupants of either vehicle (Mrs. Dize, Ms. Howell, or Ms. Howell's young child) suffered any significant injury in the incident. The plaintiffs' accident reconstructionist estimates the change in velocity experienced by the Dize minivan in the impact at 11-13 mph. Wayne McCracken deposition at 23-24. DC's accident reconstructionist estimates that at somewhat higher—14-18 mph. Greg Stephens

dangers associated with its defective seat design even though it was aware from its own testing and from real world events that its minivan seats were prone to collapse and injure occupants.

DC denies these allegations of defect and contends that it designs seats to "yield rearward" or "recline" during a rear impact collision. DC also contends that such yielding seats are a positive safety feature and are designed to reduce injuries to the occupants of DC vehicles.

This matter is before the Court on Plaintiffs' First Motion for Sanctions and Plaintiffs' Renewed Emergency Motion for Sanctions and various supplements thereto. Plaintiffs contend that DC has willfully withheld (and is willfully withholding) critical evidence in violation of DC's discovery obligations under the Georgia Civil Practice Act and multiple orders of this Court. Plaintiffs contend that this concealment of evidence and willful disobedience to the multiple orders of this Court has prejudiced plaintiffs in the proof of their case and in their ability to rebut DC's defenses at the trial that was specially set for November 26, 2001.

After a lengthy hearing on these motions on November 8, 2001 (which followed earlier, multiple, lengthy hearings on these issues resulting in the issuance of previous orders on these same subjects) and after considering the briefs, arguments, and evidence submitted by the parties both during and before the hearing on this matter, the Court agrees with plaintiffs and finds that plaintiffs' motions should be granted.

As discussed more fully below, the repeated, deliberate, willful disobedience to this Court's multiple orders, the magnitude of and nature of the evidence concealed, and the obvious prejudice to plaintiffs on the eve of this specially set trial dictate but one appropriate sanction: striking of DC's answer and entry of default against DC.

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deposition at 39-41.

The Court held a lengthy hearing on plaintiffs' *first* motion for sanctions on September 10, 2001. That motion was necessitated because plaintiffs discovered DC was withholding complaints and claims of other minivan seat back failures *from its own files*[2] that were responsive to plaintiffs' discovery requests. Though DC had originally objected to answering the requests seeking this evidence, the parties had engaged in a meet and confer taken down by a court reporter under Uniform Superior Court Rule 6.4 in order to reach agreements to obviate plaintiffs' filing a motion to compel to require the production of such evidence. One of the agreements reached during the meet and confer was that DC would withdraw its objections to plaintiffs' discovery requesting this evidence and produce all of the responsive evidence called for by those requests. DC even admitted at the September 10 hearing it agreed to provide full and complete responses to that discovery request.

Following the meet and confer, DC filed supplemental responses withdrawing its objections to those requests. Following DC's supplemental responses, however, plaintiffs, through their own investigation, discovered that DC had withheld numerous claims, complaints,

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[2] Under Georgia law, other similar incidents relating to product defects are admissible to prove notice of the defect or danger, magnitude of the danger, lack of safety for intended uses, standard of care, causation and failure to warn. See, e.g., General Motors Corp. v. Moseley, 213 Ga. App. 875, 447 S.E.2d 302, 306 (1994) ("evidence of other incidents involving the product is admissible, and relevant to the issues of notice of a defect and punitive damages"); see also Monk v. Dial, 212 Ga. App. 362, 441 S.E.2d 857, 859 (1994) (evidence of prior similar incident admissible to show condition or knowledge of condition); Mack Trucks, Inc. v. Conkle, 263 Ga. 539, 436 S.E.2d 635, 639-40 (1993) (evidence of defendant's reception of "numerous complaints" about defect similar to that at issue relevant to notice and punitive damages); Ford Motor Co. v. Stubblefield, 171 Ga. App. 331, 319 S.E.2d 470, 479 (1984) (evidence of similar incidents involving prior vehicle model admissible on notice and punitive damages, including issue of defendant's "continuing negligence in regard to its knowledge of the safety hazard, its failure to warn the public of the danger and its continued marketing of the dangerous product"); Skil Corp. v. Lugsdin, 168 Ga. App. 754, 309 S.E.2d 921 (1983) (evidence of prior similar incidents relevant to show both fact and notice of defect).

and lawsuits from its own files of minivan seat back failures in real world incidents, many resulting in claims of serious injury to either the occupants of the allegedly collapsing seat itself or to those located behind the allegedly failing seat (some of whom were small children).

As a result of the hearing on September 10, the Court held in its order of September 20 the following:

> The evidence adduced at the hearing and the briefing and arguments of counsel have convinced the Court that DC did not comply in a timely manner with its discovery obligations, including specifically a finding by the Court that DC *willfully withheld* documents in its possession relating to numerous OSIs [i.e., other similar incidents] and willfully failed to identify numerous OSIs until after plaintiffs had already moved for sanctions and, even then, did so only immediately preceding the hearing on the motion for sanctions. The Court finds the withheld documents were clearly requested by plaintiffs' first request for production No. 17 and that the identification of the incidents was clearly requested by plaintiffs' first interrogatory 35. While DC initially objected to this discovery, the Court also finds that in the transcribed meet and confer of June 26, 2001, DC agreed to withdraw its objections to request for production No. 17 and respond fully to it. Further, in DC's supplemental response of July 13, DC withdrew its objections to request for production No. 17 and agreed to respond to it. DC also withdrew its objections to interrogatory No. 35 in its supplemental response. At the hearing, DC counsel acknowledged that, although DC initially objected to these requests, DC agreed in the meet and confer and in the supplemental responses to provide the requested information and documents.
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> Notwithstanding that agreement, the Court finds that DC did not provide the requested information and documents until after plaintiff discovered voluminous OSIs that were not disclosed by DC and plaintiff had moved for sanctions.
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> In light of this record, the Court is disturbed by, and does not agree with, DC's suggestion at the hearing and in its supplemental brief that the Court lacks the power to sanction DC for withholding evidence that was called for by plaintiffs' discovery, that DC agreed to produce in the meet and confer, and that DC agreed to produce in its supplemental responses, where it also eliminated its objections. Uniform Superior Court Rule 6.4 requires parties to confer in an attempt to reach agreements to avoid the Court's having to rule on a motion to compel. Such agreements were made in the meet and confer and further confirmed in the supplemental responses, all as acknowledged by DC counsel at the hearing. In the Court's view, a party's withholding of evidence in violation of agreements and supplemental responses, made pursuant to the directives of a Uniform Superior Court Rule to meet and reach agreements, stands on no lesser footing than ignoring the obligation to respond to the same discovery when

> ordered by the Court when the parties do not agree. Had the parties not agreed, the Court could; and would, have ordered DC to respond fully. The plaintiffs should not be penalized, and a recalcitrant party rewarded, by having the range of sanctions circumscribed because the parties reached agreements as Rule 6.4 encourages, rather than forcing the court to decide every discovery dispute. DC's suggestion to that effect would turn the rule on its head; it would encourage propounders of discovery never to make agreements pursuant to Rule 6.4 since violations of such agreements would not be punishable with the range of sanctions under Rule 37. Likewise, adopting DC's suggestion would encourage responding parties to reach agreements they never intended to keep and to conceal responsive evidence with impunity since such concealment without a court order, under DC's argument, would not be punishable under Rule 37.
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> As explained above, an Order of this Court is not required before the Court can sanction a party that willfully withholds evidence in violation of agreements reached in, and supplemental responses issued pursuant to, a meet and confer under Uniform Superior Court Rule 6.4. The Court views DC's agreements and supplemental responses to have imposed an obligation on DC equivalent to that imposed by an Order of this Court. Notwithstanding that, to the extent DC has not already done so, DC is hereby ORDERED within 10 days to provide a full and complete response to any interrogatory and all responsive documents to any request for production that DC agreed to supplement in the meet and confer, that DC supplemented in its supplemental response after the meet and confer, or that DC removed objections to in any such supplemental response. These include the following plaintiffs' requests for production (13-14, 17, 19, 21, 28, 35-36, 47-51, 53, 57-58, 70) and the following plaintiffs' interrogatories (35).

(emphasis added).

The Court deferred the precise sanction to impose until the hearing on other pretrial matters set for November 8, 2001. The final two sentences quoted above, ordering "full and complete responses" and "all responsive documents" to the aforementioned requests and interrogatory, are important to the instant motions, as the evidence has demonstrated that DC has withheld and continues to withhold evidence ordered produced by this portion of the order of September 20.

At the same time the Court entered the above order of September 20, the Court also entered a September 20 order granting plaintiffs' motion to authorize a database search of certain

of DC's computer databases. Plaintiffs alleged that previously unproduced documents or data within the scope of discovery were located or identified in such databases. The database search pursuant to the Court's order began on October 11, 2001, and continued at periodic intervals thereafter. Pursuant to the order, at all times, DC, its counsel, and the computer operator (a DC employee) maintained control of the search. The plaintiffs gave search terms to the operator to run. Then, the screen the plaintiffs were able to view was turned off while DC and its operator reviewed the search results on a private screen. Only once DC counsel had determined that the screen contained no privileged information did DC then turn on plaintiffs' monitor so plaintiffs could see the results of the search. The same procedure was adhered to when plaintiffs requested a computerized "document" be "opened" so it could be viewed on the screen.

At times during the search, pursuant to the order, plaintiffs requested DC make certain "screen saves" of the information the parties together viewed on the screen. When that occurred, the DC operator would save the screens to the hard drive of the operator's computer. During the search, however, DC took the position that it would not contemporaneously print copies of the requested screen saves for plaintiffs (which DC and plaintiffs had reviewed together on the screen and which were saved on the operator's hard drive) and that DC would not produce copies of underlying documents referred to in the databases and requested by plaintiffs until 30 days following the conclusion of the database search. Given the specially set trial date of November 26 and the number of responsive databases DC offered within the scope of discovery, DC's position put plaintiffs in the untenable posture of having to choose whether to terminate the search before it was complete in order to get *any* evidence from the search prior to trial or to continue the search but risk never getting prior to trial any of the requested evidence from the search.

To address that problem, plaintiffs moved to shorten the time for production of requested screen saves and underlying documents. At the same time, DC moved for a protective order seeking to limit the database search the Court had earlier ordered. DC made two basic arguments in its motion for protective order: (1) that certain databases that were "linked" from the databases DC tendered to plaintiffs either were not "databases" or were outside of the scope of the Court's order allowing the database search; and (2) an alleged successor vehicle to the current minivan that was undergoing seat development and testing (i.e., the "CS")[3] was "outside the scope" of the Court's order because it was allegedly a "future vehicle" even though it appeared to reflect an alternative design. During the search, DC had barred plaintiffs from searching these "linked" databases and from searching any information relating to the CS vehicle. At plaintiffs' insistence, DC submitted to the Court *in camera* screen shots containing "links" to the "linked" databases and information relating to the CS. The Court reviewed those *in camera* submissions. The Court held a lengthy hearing on these two motions on October 23, 2001.

Because the parties were continuing the database search on October 24 (the day after the October 23 hearing), both parties requested the Court move swiftly to issue its orders. So, on October 24 the Court issued two orders, which are important to the instant motions because the evidence has shown that DC has willfully disobeyed these orders as well. The first order of October 24 denied DC's motion for protective order, thus (1) rejecting DC's argument that the "linked databases" either were not databases or were outside of the scope of the Court's

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[3] The "CS" was discovered by plaintiffs during the search on the "web page of the minivan platform," and plaintiffs presented evidence at the hearing that the CS was a project proposed by the "minivan platform" group.

September 20 order; and (2) rejecting DC's argument that the alternatively designed CS vehicle was outside the scope of discovery and the scope of the database search. The Court in its order of October 24 also made clear that the Court would not restrict the "discoverability" of such alternative designs but that the Court would address "admissibility" at a later date.

The second order issued October 24 shortened the time to produce "any" requested screen save: "any images" previously requested were to be produced within 24 hours; future images "as requested by plaintiffs" were to be produced within 24 hours of request. As to other underlying requested documents that were identified or referred to in the search, "any document...previously requested" was to be produced within 10 days of the entry of the order, and on a going forward basis, "any...document requested by plaintiff" from the database search was to be produced within 10 days of request. DC has not argued that this time frame was burdensome. Nor could DC make that argument. The "screen saves" were being contemporaneously saved on the hard drive of the DC operator's computer and could be printed for plaintiffs or copied to disk for plaintiffs within seconds. The underlying documents were also being requested with specificity. In fact, at the hearing of October 23, DC stated that it had no opposition to the entry of the plaintiffs' proposed order shortening the time for production of screen saves and underlying documents.

The parties received by fax on October 24 the Court's orders of the same date while the parties were engaged in a continuation of the database search in Michigan. Following receipt of the Court's orders, DC allowed plaintiffs to search (and DC made screen saves at plaintiffs' request from) the "linked databases" and the databases containing information relating to the CS vehicle (DC had previously barred plaintiffs from both areas).

The first deadline for production of requested screen saves under those orders was Thursday morning, October 25, 2001, when the first 24 hours would have expired after receiving the Court's orders of October 24 that required production of requested screen saves within 24 hours. No screen saves were produced. At the end of the day on October 25, however, DC produced to plaintiffs a compact disc and indicated that the responsive material was contained therein.

On the morning of October 26, however, after plaintiffs had returned from the database search to Georgia, plaintiffs received a letter from DC stating that DC had *not produced* screen shots relating to "future vehicles" (i.e., the CS). In addition, DC stated that it was also *not producing* screen shots plaintiffs had requested during the search that DC "feel[s] are clearly outside the scope of the order." Thus, DC produced *some* of the screen saves ordered produced but not others. As a result of DC's conduct, on Friday, October 26, plaintiffs filed their Renewed Emergency Motion for Sanctions and argued that DC's action constituted a deliberate defiance of the Court's orders of October 24 denying DC's motion for protective order and shortening the time for production so as to require "any" requested screen save be produced within 24 hours.

On Friday afternoon, October 26, DC continued the same pattern of conduct in its production of "screen saves" seen and requested during the search on October 25. DC withheld on October 26 screen saves due from the October 25 search that DC allegedly contended either were not databases, were outside of the Court's September 20 database search order, or were related to future designs (i.e., CS) (which contentions the Court had already rejected in its prior orders). Plaintiffs supplemented their Renewed Emergency Motion for Sanctions with this evidence on Monday, October 29.

The Court agrees with plaintiffs' contentions. DC's course of conduct on October 25 and 26 was a deliberate, premeditated violation of the Court's database search order of September 20 and of the Court's October 24 orders denying DC's motion for protective order and requiring production of "any" requested screen saves within 24 hours. The Court further finds DC's conduct was willful and in bad faith. DC withheld evidence the Court ordered produced based on an "interpretation" of the database search order that DC had urged and that the Court had already rejected in its orders of October 24. After rejecting those urged interpretations by denying the motion for protective order, the Court had ordered "any" requested screen saves be produced within 24 hours, absent an assertion of privilege (which has not been made).[4]

As part of its response to the Renewed Emergency Motion, DC submitted *some* of the withheld screen saves to the Court *in camera* (while withholding others even from the Court). Having reviewed those submitted screen saves, the Court finds that each such screen save was within the scope of discovery and within the scope of the Court's orders of September 20 and October 24. Each such document should have been produced to plaintiffs on October 25 or 26 as the Court ordered.

Then, on November 2, the Court entered an interim order on the Renewed Emergency Motion, which the Court faxed to the parties on that date. The Court confirmed in the order of November 2 that the screen shots DC was withholding were "within the scope of material discoverable by plaintiffs" and were "part of the database search authorized by the Court on September 20, 2001." The Court continued:

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[4] DC's own conduct confirmed its understanding that the Court had previously rejected its arguments when DC made the very same arguments in its brief in opposition to plaintiffs' Renewed Emergency Motion for Sanctions as it had made in support of its earlier motion for protective order.

> The "screen shots" represent parts of the various databases which the Court authorized to be searched, and the production of the "screen shots" is reasonably calculated to lead to the discovery of admissible evidence. Even if an individual "screen shot" might not be relevant at trial, its production is required here.

The Court also ordered the withheld "screen shots" and documents *past due* under the Court's prior orders be produced "*instanter*" or "immediately." The language of this order becomes important because the evidence similarly shows that DC has violated, and continues to violate, this directive of the Court as well.

In addition to the material withheld in violation of Court order discussed above, plaintiffs also contend that, during the database search, plaintiffs uncovered other evidence that was (and is) being withheld in violation of DC's discovery obligations under the Georgia Civil Practice Act and the Court's order of September 20 compelling full and complete responses and all responsive documents to certain discovery requests.

Plaintiffs also contend that some of the underlying documents produced by DC on November 5, 2001, in response to renewed requests during the database search, were clearly responsive to (and should have been produced earlier in response to) discovery requests served over a year ago and ordered compelled in the Court's order of September 20. At the hearing on November 8, plaintiffs submitted exhibits detailing this evidence to establish with specificity what plaintiffs contend had been (and, in some instances, was still being) concealed in violation of Court order.

The Court agrees with plaintiffs and finds that the following evidence was concealed in violation of DC's discovery obligations and the Court's order of September 20 compelling the production of all responsive documents to certain requests:

-impact simulator test videos evaluating the seatback performance on successor vehicles to the Dize minivan (an impact simulator test is where a dummy is placed in a seat on a sled and the seat and dummy are subjected to accelerations designed to simulate a rear impact in order to evaluate the seat performance). These videos, previously withheld in violation of Court order but produced on November 5, include videos of 8 impact simulator tests of successor vehicles, test numbers IS 20181, IS 20182, IS 20183, IS 20184, IS 20193, IS 20194, IS 20195, IS 20196.

-full scale rear crash test videos of successor vehicles to the Dize minivan or of vehicles with seats that have been admitted by DC in its interrogatory answers to be similar to the Dize minivan seats (dummies are in the front seats during the test, which allows seatback performance to be evaluated). These videos, previously withheld in violation of court order but produced on November 5, include test numbers VC 7580, VC 7680, VC 7682, VC 7839, VC 8370, VC 8456, VC 8725.

-full scale rear crash test videos of the alternatively designed and the allegedly far stronger and non-collapsing integrated belt-to-seat type seat used by DC on its Sebring convertible vehicle and utilized by plaintiffs as a safer, alternative design in the testimony of its expert and in plaintiffs' own litigation crash testing for this case. These videos, previously withheld in violation of court order but produced on November 5, include test numbers VC 8280 and VC 8805. (The plaintiffs note, however, that the quality of the copies of the tapes provided to plaintiffs is so poor that it is very difficult to even see the dummy or the seat in the vehicle, much less be capable of evaluating the performance of it.)

-full scale rear crash test videos of the alternatively designed and the allegedly far stronger and non-collapsing integrated belt-to-seat type seat used by Chrysler on its Dodge Ram extended cab pickup (designated as the BE vehicle) and utilized by plaintiffs as a safer,

alternative design in this case. These videos, previously and currently withheld in violation of court order, include test numbers VC 06594, VC 05827, VC 05954, VC 06107, VC 06114, VC 06163, VC 06257, VC 06291, VC 06396, VC 06397, VC 06413, VC 06449, VC 06589, VC 07464, VC 06611, VC 07168, VC 06456.

-impact simulator test videos of the alternatively designed and the allegedly far stronger and non-collapsing Dodge Ram extended cab integrated belt-to-seat type seat. These videos, previously and currently withheld in violation of court order, include test numbers IS 145121, IS 14522, IS 15866, IS 15867, IS 15868, IS 15869, IS 15870, IS 15871, IS 15872, IS 15873, IS 15874, IS 15875, IS 15876, IS 15877.

-impact simulator test videos of the alternatively designed and the allegedly far stronger and non-collapsing Sebring integrated belt-to-seat type seat. These videos, previously and currently withheld in violation of court order, include test number IS 13190.

-impact simulator test video and reports evaluating the seatback performance on the CS successor vehicle to the Dize minivan. These tests, previously and currently withheld in violation of Court order, include videos and reports relating to the tests conducted pursuant to IS Request 1019 and IS Request 0031 (all DC produced on November 5 were test *requests*, not the reports or videos).

-full scale vehicle rear crash test videos and reports evaluating the seatback performance on the CS successor vehicle to the Dize minivan. These tests, previously and currently withheld in violation of Court order, include videos and reports relating to the tests conducted pursuant to Requests for VC 8657 and VC 9283 (all DC produced on November 5 were test *requests*, not the reports or videos).

-an approximately 4-inch stack of additional reports, complaints and claims (produced on November 6 and 7 and tendered at the hearing), labeled CAIR reports, from DC minivan customers reporting incidents of front seatback failure in DC minivans in rearward loading, resulting in the front seats collapsing, bending, or failing and moving rearward into the back seat, with many resulting in allegations of injury to the occupants of those seats or to occupants seated behind those seats. What is particularly disturbing about DC's withholding of this evidence is that this is same kind of evidence (i.e., reports to DC of minivan seatback failures) that was the subject of the Court's strong order of September 20 finding that DC had "willfully withheld" this category of evidence in violation of its discovery obligations. In that same order, the Court even ordered DC to provide any such evidence *it had not yet provided* within 10 days. As it turns out, the concealment of other incidents of minivan seatback failure addressed at the September 10 hearing and in the September 20 order was apparently just the tip of the iceberg. And the 4-inch stack of withheld notices of other incidents produced on November 6 and 7 is apparently not even the full universe of such minivan seatback failures available to DC. The plaintiffs' search of the CAIR database, which produced the stack of CAIRs tendered to the Court, is not yet even concluded. Other years of minivan seat complaints remain to be searched.

The *above evidence* was withheld in violation of the Court's order of September 20, which required "full and complete responses" and "all responsive documents" for the *below listed discovery requests*:

-Request for Production No. 13: "any and all rear crash tests...[of]... any predecessor or successor vehicle of the 1996 Dodge Caravan" [or] "any vehicle with the same or similar seat."

-Request for Production No. 14: "any and all tests other than crash tests (such as …impact loading…performed upon the front seats or seat backs of any DC vehicle equipped with the same or similar seat."

-Request for Production No. 57: "documents of any kind relating to, discussing, referencing, or otherwise dealing with the subject of integrated belting seats or integrated belting systems."

-Request No. 17: "lawsuits and claims…involving personal injury or death…where a front seat or seat back in any way collapsed, gave way, bent backwards, failed or allegedly collapsed, gave way, bent backwards, or failed."

-Request No. 28: "documents which …describe…or…concern 'controlled deflection' or 'controlled yielding' as these terms relate to the yielding or giving way of the seat and seat back in DC vehicles in rear-end crashes."

-Request No. 36: "documents…which discuss, address, mention, evaluate, consider, or otherwise comment upon the risk or potential that a seat and seatback … might, was alleged to have, or did fail, break backward, collapse, or otherwise moved rearward after a rear impact."

-Request No. 50: "documents in which DC…reported on the consequences to human beings…when seatbacks broke, collapsed, bent backwards or moved rearward in rear-end collisions."

-Request No. 51: "documents in which DC…reported on the injury risks that could occur when seats or seat backs broke, collapsed, bent backwards, or moved rearward in rear-end collisions."

In addition to documents plaintiffs have discovered that DC withheld in violation of the Court's orders discussed above, plaintiffs also contend and presented compelling evidence at the

hearing that DC is *continuing to withhold*, as of the date of the hearing, underlying documents requested during the database search. Such underlying documents were required to be produced within 10 days of request under the Court's order of October 24. Further, any requested documents that were past due were also ordered to be produced "immediately" or "instanter" in the Court's order of November 2. (Many of those documents are also being withheld in violation of the Court's order of September 20 since many of those documents were also directly responsive to the requests that the Court compelled in the September 20 order.)

The evidence that is *still being withheld*, as of the date of the hearing,[5] in violation of Court order is identified in various exhibits plaintiffs tendered at the hearing listing documents that were requested but not produced. That withheld evidence includes the following:

-Impact simulator test videos and reports evaluating the seatback performance in the CS vehicle. These requested tests, previously and currently withheld in violation of the September 20, October 24, and November 2 database related orders, include videos and reports relating to impact simulator test numbers IS 21112, IS 21113, IS 21114, IS 21115, IS 21116, IS 21117, IS 21118, IS 21119, IS 21120, IS 21121, IS 21122, IS 21123, IS 21124, IS 21125.

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[5] The hearing date of November 8, 2001, is the operative date on which to evaluate the nature of DC's "current" compliance or noncompliance with this Court's orders. That is the date on which the Court was required to evaluate that conduct, to evaluate the prejudice to the plaintiffs in light of the imminent trial date and the trial cross-examination depositions set for 1 business day later, and to evaluate the damage done to the prospect of a fair trial by DC. The Court announced its ruling on that date. The specially set trial and noticed depositions were also cancelled on that date as a result of the Court's intended ruling. While any attempt by DC to belatedly comply with the Court's earlier orders *after* that date and after the Court announced its intention to default DC may prevent the imposition of *future* sanctions for *continued* disobedience to the orders of this Court, such belated compliance has no bearing on the appropriateness of the sanctions issued based on the record as of November 8. Further, it is also clearly established that "'[o]nce a **motion** for **sanctions** has been *filed*, their imposition cannot be precluded by a belated response by the opposite party.'" Rogers v. Sharpe, 206 Ga. App. 353, 425 S.E.2d 391, 392 (1992) (emphasis in original).

-Crash test videos and reports on full scale crash tests on the CS vehicle. These videos and reports, previously and currently withheld in violation of the September 20, October 24, and November 2 database related orders, include videos and reports relating to crash test numbers VC 8179, VC 8230, VC 8357, VC 8365, VC 8442, VC 8559, VC 8578, VC 8582, VC 8636, VC 8657, VC 8762, VC 8827, VC 8866, VC 8884, VC 8949, VC 8974, VC 9032, VC 9079, VC 9148, VC 9170, VC 9190, VC 9283, VC 9284, VC 9316, VC 9329.

-Full scale rear crash test videos of the alternatively designed and the allegedly far stronger and non-collapsing integrated belt-to-seat type seat used by Chrysler on its Dodge Ram extended cab pickup. These videos, previously and currently withheld in violation of court order, include test numbers VC 06594, VC 05827, VC 05954, VC 06107, VC 06114, VC 06163, VC 06257, VC 06291, VC 06396, VC 06397, VC 06413, VC 06449, VC 06589, VC 07464, VC 06611, VC 07168, VC 06456.

-Impact simulator test videos of the alternatively designed and the allegedly far stronger and non-collapsing Dodge Ram extended cab integrated belt-to-seat type seat. These videos, previously and currently withheld in violation of court order, include test numbers IS 145121, IS 14522, IS 15866, IS 15867, IS 15868, IS 15869, IS 15870, IS 15871, IS 15872, IS 15873, IS 15874, IS 15875, IS 15876, IS 15877.

-Impact simulator test videos of the alternatively designed and the allegedly far stronger and non-collapsing Sebring integrated belt-to-seat type seat. These videos, previously and currently withheld in violation of court order, include test number IS 13190.

DC has offered a number of arguments to oppose the issuance of sanctions. The Court finds none to be persuasive.

First, as to plaintiffs' first motion for sanctions, at the hearing on November 8, DC argued that in the meet and confer DC did not agree to provide *full and complete responses* to the requests enumerated above. Rather, DC now contends that it agreed to provide only such information as it enumerated in its *own* supplemental responses. That is, DC now argues that, even though it withdrew its objections to the enumerated requests as a result of the meet and confer, DC was still entitled to conceal any evidence that its supplemental response did not specifically mention would be provided.

The Court rejects that suggestion for several reasons. To start with, as to the incidents of other seatback failure, the Court has already found in the order of September 20 that, at the September 10 hearing, DC counsel conceded the opposite of what they now argue: "At the hearing, DC counsel acknowledged that, although DC initially objected to these requests, DC agreed in the meet and confer and in the supplemental responses to provide the requested information and documents." 9/20/01 Order at 2.

Further, even if, prior to the entry of the order of September 20, DC's obligation had been limited by the language of DC's own supplemental response (which the Court doubts), the September 20 order compelling production in response to the various enumerated requests changed that. In that order, the Court clearly and unambiguously ordered DC "to provide . . . all responsive documents" to the certain enumerated requests. Id. at 3.

DC also argues that it misunderstood the scope of the Court's rulings on October 24, rejecting DC's arguments attempting to keep plaintiffs away from databases relating to the CS vehicle and from other databases that DC contended were outside the scope of the database search. DC offers that suggestion as an attempted explanation why on October 25 and 26 it engaged in conduct that to any reasonable observer appeared to be in direct defiance of the

Court's orders of October 24 (i.e., withholding screen saves relating to the linked databases and the CS vehicle).

The Court rejects that argument as well. DC's own conduct at the database search, once it received the Court's orders of October 24, proves the contrary. Upon receipt of those orders, DC allowed plaintiffs access to the "linked" databases and to the CS vehicle information (from which it had previously barred plaintiffs). That conduct reflects that DC knew the Court rejected both arguments. Moreover, even though the Court on November 2 again rejected these same arguments, DC is *continuing* to withhold much of the same evidence. The combination of those factors show DC fully understood (and understands) the Court's rulings: DC simply chose (and chooses) not to comply.

DC also tries to excuse its failure to provide the CS vehicle information in response to the orders of October 24 on the grounds that an additional, "special" protective order had not yet been entered. The Court rejects that argument too. After receiving the Court's orders on October 24, so as not to delay production, DC counsel and plaintiffs' counsel agreed on the record during the database search that plaintiffs would maintain the CS information as "nonsharing" until DC could propose and the Court could enter a new, "special," non-sharing protective order. The fact that DC did not move for a "special protective order" until October 29 and that the Court did not enter it until November 2 does not justify DC's withholding the CS information. In addition, even after the Court entered DC's "special protective order" on November 2 and required production of the withheld information "instanter," DC has continued to withhold the CS material discussed above. DC had all the protection it needed: it simply chose (and continues to choose) not to comply.

At one point during the hearing, DC argued that it had produced the videos of the impact simulator and crash testing on the integrated belt-to-seat seat design for the Dodge Ram extended cab pickup and for the Sebring in a prior litigation with plaintiffs' counsel, Butler v. Chrysler. Plaintiffs' counsel and DC had agreed DC could simply specifically refer plaintiffs by Bates number to responsive documents produced in Butler that were also responsive to the requests in this case.

The plaintiffs strongly dispute the contention that these videos were produced to plaintiffs in Butler. The Court considered DC's own exhibit it tendered at the hearing purporting to describe what was produced in Butler in terms of crash tests and impact simulator tests. DC's own exhibit shows no videos were produced there. The Court thus finds, based on DC's own evidence and the record before it, that the videos relating to testing of integrated, stronger seats in the Dodge Ram extended cab and Sebring were not produced to plaintiffs in the Butler case.

DC also points to the volume of material it produced in the Butler case and to a much lesser extent in this case (most of which in both cases plaintiffs contend was largely useless) to excuse DC's deliberate decision not to produce other evidence that plaintiffs need, that their document requests and requests during the searches asked for, and that the Court ordered produced. The Court categorically rejects DC's argument and concludes the two comparisons have nothing to do with one another. It is obvious that one of the most effective ways to conceal damaging evidence is to bury such evidence in the midst of a huge, largely useless production. Rather than excuse DC's misconduct here, a large production of useless material may, in a proper case, be evidence of additional discovery abuse.

To excuse the continued concealment of virtually all of the CS, alternative design evidence discussed above, DC argued at the hearing, and provided in a letter to plaintiffs'

counsel (which plaintiffs tendered as an exhibit at the hearing) the following: "certain VC and IS tests are so new that some of the documents related to these tests are either not yet complete or they have not yet made it into the proving grounds test jacket from various parts of the corporation." The Court rejects that excuse as false and disproven by the evidence tendered at the hearing. The exhibits plaintiffs tendered identify the test dates for all the currently withheld testing. Many of the tests DC has continued to withhold in violation of order go back to the mid-1990s (i.e., the Dodge Ram extended cab and Sebring integrated belt-to-seat tests). The earliest CS tests go back to February 2000 (over a year and a half ago) and continue in almost every month up to the most recent in September 2001, which is over 2 months ago.

Having found a pattern of willful, bad faith concealment and withholding of evidence in violation of repeated orders of this Court, the Court now turns to the issue of the appropriate sanction for that stream of misconduct.[6] O.C.G.A. § 9-11-37 provides for sanctions when a party fails to comply with discovery rules and orders of the Court. "A very broad discretion is granted

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[6] This is not the first time DC committed discovery abuse. DC has been sanctioned multiple times for its failure to comply with discovery orders. See Marquis v. Chrysler Corp., 577 F.2d 624 (9th Cir. 1978) (upholding sanctions against Chrysler for failing to produce discovery documents); Mulvey v. Chrysler Corp., 106 F.R.D. 364 (D.R.I. 1985) (awarding sanctions against Chrysler for the willful failure of its corporate representative to attend a deposition); Chrysler Corp. v. Blackmon, 841 S.W.2d 844 (Tex. 1992) (reviewing a default judgment entered against Chrysler for discovery abuses); Pena v. Chrysler Corp., Inc., Case No. 1-94-305 (Rockwell Co. Tex. Dist. Ct. June 2, 1996) (awarding sanctions and attorneys fees for failure to produce documents); Beckman v. Chrysler Corp., Inc., Case No. CIV – 93 – 489 (III) (Sebastian Co. Ark. Dist. Ct. July 22, 1996) (imposing sanctions on DC for failure to follow a judicial order pertaining to discovery); Scripa v. Chrysler Corp., Inc., Case No. 95 – 2 – 29223 – 2SEA (King Co. Wash. Sup. Ct. Oct. 21, 1996) (awarding attorney's fees); Gibson v. Chrysler Corp., Inc., No. 99-1049 MHP (N.D. Cal. May 28, 1999) (imposing sanctions to compensate the court for time spent addressing frivolous arguments); Roth v. Chrysler Corp., Inc., No. 94-0605C (Mass. Dist. Ct. Apr. 5, 2000) (awarding sanctions for DC's unsatisfactory discharge of its discovery obligations). These orders were attached as Exhibit 2 to Plaintiffs' Motion to Compel and First Motion for Sanctions.

judges in applying sanctions against disobedient parties in order to assure compliance with the orders of the courts." Sellers v. Nodvin, 207 Ga. App. 742, 745-46, 429 S.E.2d 138, 140 (1993).

"When a party willfully fails to comply with a court order compelling discovery, the Court can impose the 'drastic sanctions of dismissal and default' under O.C.G.A. § 9-11-37." General Motors Corp. v. Conkle, 226 Ga. App. 34, 486 S.E.2d 180, 185 (1997). "It is a consequence of disobedience and is authorized 'where the failure is willful, in bad faith or in conscious disregard of an order.'... This is 'distinguished from an accidental or involuntary non-compliance. A conscious or intentional failure to act is in fact willful.'" Id. (citations omitted).

"A trial court's finding that a party has willfully failed to comply with its discovery obligations will not be reversed if there is any evidence to support it. A harsh sanction such as dismissal for failure to participate in discovery requires a conscious or intentional failure to act, as distinguished from an accidental or involuntary non-compliance. Significantly, we have held that there is no requirement that the trial court find actual "willfulness," because a conscious or intentional failure to act is in fact wilful." (internal quotations and citations omitted). Deep South Construction, Inc. v. Slack, 248 Ga. App. 183, 187, 546 S.E.2d 302, 305-06 (2001).

"Trial judges have broad discretion in controlling discovery, including imposition of sanctions, and appellate courts will not reverse a trial court's decision on such matters unless there has been a clear abuse of discretion." West v. Equifax Credit Info. Svcs., 230 Ga. App. 41, 42-43, 495 S.E.2d 300, 303 (1997) (internal citations omitted).

In General Motors Corp. v. Conkle, 486 S.E.2d at 188, though eschewing any rigid test, the Court set forth a list of factors that a trial court could consider in determining whether to issue a default for discovery abuse. Those are as follows:

"(1) the size, volume, and amount of discovery requested." In Conkle, 486 S.E.2d at 190, the Court stated that a finding of willfulness was difficult because GM's conduct involved "incomplete or inadequate responses over a range of requests."[7] The Court further noted that sanctions are appropriate when the abuse concerns "a more focused issue." Id. In this case, unlike in Conkle, the repeatedly requested and repeatedly court-ordered discovery was very focused. The disobedience was focused and deliberate. Both dealt with specific, defined pieces and types of evidence (that appeared to be helpful to the plaintiffs and harmful to DC), many of which were specifically requested during the database search by document name. That factor dictates in favor of default.

"(2) The amount of time allowed for production." The discovery was originally requested in October 2000. DC has had over a year to comply. The first motion for sanctions was filed in July 2001. Four months have elapsed since then. The Court's order compelling various enumerated requests was on September 20, almost two months ago. DC itself consented to the time frames in plaintiffs' proposed order shortening the time for production of screen saves and requested documents. Unlike in Conkle, DC has never argued that it was given insufficient time to comply with any request of plaintiffs or order of this Court. The Court finds that DC had more than adequate time to comply with the various requests and orders and willfully failed to do so. That factor dictates in favor of default.

"(3) the amount of delay between request and production." In Conkle, the Court found a slow production following order but one that was ongoing. Id. As reflected above, this

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[7] The Court frankly does not understand how wide-ranging discovery abuse over a multitude of responses would inure to the discovery abuser's benefit on the question of the ultimate sanction. It would seem to the Court that both wide-ranging abuse and focused noncompliance are equally worthy of punishment.

case involves no adequacy of time issues for production, no "slowness" of production. Much of the court ordered evidence was still being withheld at the time of the hearing. The first motion for sanctions was filed because plaintiffs discovered that DC had concealed evidence it had agreed to produce. The Court finds that DC did not produce the evidence because DC did not want to comply, not for any reason relating to the adequacy of time to comply. The only suggestion DC has ever made on the sufficiency of time to comply dealt with the requested CS testing that DC was still withholding in violation of court order at the time of the hearing. As discussed above, DC tried to excuse its noncompliance by claiming the testing was so new it could not be found. As discussed above, the Court finds that representation to be false (even ludicrous) as the requested testing goes back in time over a year and the "newest" testing is over two months old. That factor dictates in favor of default.

"(4) amount of delay between the court's order and production." As discussed above, this is not a "slowness" case. The Court finds DC withheld evidence not because it lacked sufficient time to produce it but because it did not want plaintiffs to have it. Much of the requested and court-ordered evidence was still being withheld as of the date of the hearing. That factor dictates in favor of default.

"(5) the degree of reasonableness of the excuse of noncompliance." Unlike in Conkle, this Court finds no convincing excuses have been offered. In fact, the Court waited throughout the various hearings in this matter to hear *some* reasonable explanation of what appeared to the Court to be a pattern of deliberate defiance to the Court's orders. No such explanation ever came, and many of the excuses, such as the "age of the tests," were proven to be false. That factor dictates in favor of default.

"(6) the prejudice to movant's case." As discussed more fully below, the prejudice to plaintiffs on the eve of trial is substantial. In Conkle, the Court found no impact on the ability of the plaintiffs to prove their case. Id. Here, DC's conduct has made a fair trial impossible. This factor dictates in favor of default.

"(7) the degree of departure from our constitutional and statutory mandate for the just, speedy, efficient, and inexpensive resolution of disputes." DC's misconduct has delayed this case and the plaintiffs' ultimate day in court substantially. The Court committed substantial resources to schedule this case for a specially set trial months ago. The Court had to significantly rearrange the Court's calendar to do so, to the inconvenience of the Court and other litigants. Because DC's conduct has made that fair trial impossible, the Court has had to reschedule the trial indefinitely so as to give DC an opportunity to seek interlocutory review of this order. DC's discovery abuse has resulted in a colossal waste of the Court's time and resources and significant delay to plaintiffs. That factor dictates in favor of default.

"(8) The relative amount of compliance or noncompliance with the Court's order." In Conkle, the Court found GM had "largely complied." The opposite is shown here. DC has largely *not* complied with the repeated orders of this Court. This factor dictates in favor of default.

"(9) the efforts made to comply or move for an extension." The Court finds that DC made no significant effort to comply with the Court's orders and made no request for an extension of time. This factor dictates in favor of default.

"(10) the imposition placed on court resources by the failure to comply." This is substantial, as reflected in (7) above. This factor dictates in favor of default.

"(11) whether prior warning was given to the offending party of the effect of noncompliance." In Conkle, the Court found there was none. Here, DC was clearly put on notice by the Court's first order on plaintiffs' first motion for sanctions. That order reflected the Court's strong approbation for the misconduct and should have put any reasonable litigant on notice that the Court would deal sternly with future similar misconduct. Then, while the ultimate sanction for that first misconduct was left undecided until the pretrial conference, DC continued to commit the same pattern of misconduct. Finally, the mere existence of a *series* of discovery orders against DC should have gotten DC's attention and caused it to change its behavior. Notwithstanding that course of orders, DC's misconduct has not only continued but also gotten worse. This factor dictates in favor of default.

"(12) the efficacy of alternative sanctions against the party or counsel." As discussed above and below, the Court has carefully considered this factor and concluded that nothing short of default will be effective. This factor dictates in favor of default.

Additionally, in Banks v. ICI Americas, Inc., 264 Ga. 732, 450 S.E.2d 671, 675 (1994), the Supreme Court set forth the risk-benefit analysis for determining at trial whether a product is defective. This Court has also analyzed those factors in this case and finds that the range and magnitude of the evidence withheld in violation of court order touches almost every listed factor that must be addressed by the plaintiffs' proof or defendants' defenses: "the usefulness of the product," "the gravity and severity of the danger posed by the design," "the likelihood of that danger," "the avoidability of that danger," "common knowledge and expectation of danger," "the user's ability to avoid danger," "the state of the art at the time the product is manufactured," "the ability to eliminate the danger without impairing the usefulness of the product," "the feasibility of an alternative design," "the availability of an effective substitute for the product which meets the same need but is

safer," "the financial cost of the improved design," and "the adverse effects from the alternative." Id. at 675 n.6.

Similarly, the evidence willfully withheld in violation of order affects the plaintiffs' ability to disprove the defendants' defenses that collapsing or "yielding" seats do not cause injuries, that such seats are safer in the real world than rigid seats such as the Sebring or Dodge Ram (or perhaps CS) that do not collapse, that DC had no notice of a defect in the performance of its minivan seatbacks, and that DC had no obligation to warn or any liability for punitive damages.

As the Court explained at the hearing, the Court has an obligation to ensure the trial is fair. DC's pervasive discovery abuse has made that impossible. The plaintiffs have convinced the Court that they have suffered substantial prejudice as a result. On Thursday, November 8, when the Court announced its intended ruling to the parties during the hearing, the specially set trial was approximately two weeks away. For the plaintiffs, however, the trial was even closer. The plaintiffs had noticed a series of videotape trial cross examination depositions to begin in Detroit on Monday, November 12, of five DC executives and engineers.[8] Plaintiffs stated their intention to begin their proof at trial with those cross examination depositions. For plaintiffs, the trial thus would effectively start on November 12 (one business day after the November 8 hearing). Without the hidden evidence, plaintiffs faced the very real prejudice of not having the documents it needed to cross examine these executives and engineers or to rebut with effective cross-examination the likely direct DC would attempt with these witnesses to support its defenses. Further, discovery has closed, plaintiffs' experts have been deposed and their theories established, the defense experts deposed, the

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[8] Plaintiffs had asked for DC's cooperation making such witness available earlier. When DC refused to do so, plaintiffs were left with no choice but to notice the depositions in order to get the evidence for trial.

pretrial order even submitted, and plaintiffs' final trial preparation was being done all without the withheld evidence. The preparation of plaintiffs' case had already been prejudiced by DC's misconduct.

The Court carefully considered whether to impose lesser sanctions. The Court has concluded, however, that nothing short of default would address (1) the magnitude and pattern of the defiance by DC to the Court's orders, (2) the number of orders DC violated, (3) the volume of the evidence withheld, (4) the importance of that evidence to the proof of plaintiffs' claims and to rebutting DC's defenses, (5) the affront to the power of the Court reflected in DC's misconduct, (6) the fact that DC was still withholding much of the evidence at issue at the time of the hearing, and (7) finally and most importantly, the palpable unfairness that such misconduct has already visited on the imminent trial of this case.

It appears to this Court that DC's discovery misconduct and violation of this Court's Orders has been very calculated. Knowing full well that it ran the risk of severe sanctions, DC apparently elected not to comply with its discovery obligations and not to comply with this Court's Orders. The reasons for that election are not hard to imagine: compliance would mean plaintiffs would become possessed of evidence which was potentially harmful to DC and which could make it difficult for DC to use defenses upon which it intended to rely. In addition, when during trial, evidence obtained by plaintiffs pursuant to actual compliance by DC was used, that evidence could then be available to other litigants, the press, and the public, with potential adverse consequences to DC that transcend this one lawsuit. DC appears to have made an economic decision: DC concluded its own interests were best served by violating its discovery obligations and this Court's Orders. The consequences of such a decision are not merely harmful to the plaintiffs in this one lawsuit. That sort of decision effectively destroys the truth-seeking function of litigation and compromises

the obligation of this Court, or of any court, to seek the truth. The probable reasons for DC's misconduct are more pernicious than the misconduct itself.

Accordingly, for all of the foregoing reasons, the Court hereby strikes DC's answer and declares DC in default.

IT IS SO ORDERED this 3rd day of ~~November~~ December, 2001.

Pamela D. South, Judge
State Court of Gwinnett County