ORAL ARGUMENT — 3/25/97
97-0125
GENERAL MOTORS V. GAYLE

COLEMAN: I think the court is well acquainted with the issues before the court, and I would like to first address the crash test order. General Motors' crash testing is protected by the attorney work product and consulting expert privileges and a crash test order that respondent entered signed on January 22, 1996 violates those privileges. Because of that, General Motors is entitled to mandamus relief.

Litigation crash testing is fundamentally a very different thing from production crash testing. GM and other car manufacturers conduct exhaustive crash testing during the design and production stages of every vehicle that they manufacture. Those tests are ordinarily conducted by engineers in the ordinary course of the automobile manufacturer's business. Consequently, normally would not be considered protected by attorney work product. In fact in this case, plaintiffs requested and received much of that production testing that was conducted regarding seat belts and other aspects of the vehicle in question. And in fact, video tapes of some of that were made part of the record yesterday by the plaintiffs.

Litigation testing is different. The testing that is at issue in this case is testing that was initiated by GM's lawyers in connection with this case, or as the phrase goes, in anticipation of this litigation. The parameters of that testing are set by the attorney in consultation with the experts, whether they be testifying experts or consulting experts. Those parameters may include the nominal and relative speeds of the vehicles, the angles at which they collide, the elevation of the vehicles or the bumpers, the amount of swerve or evasive action, the positions of the test dummies in the vehicle, whether those dummies are wearing seat belts or not, and more generally, how that specific test will be instrumented, what kinds of information GM will want to take from that particular crash test: high speed cameras, neck sensors, things that will measure not only the impact of the vehicles and what happens to the vehicles, but also what happens to the death test dummies, the physical forces that are applied to those test dummies in an effort to determine whether that particular crash might create the kinds of injuries that are claimed by a plaintiff in a particular case.

Because of this, we believe that crash testing is protected by the attorney work product privilege and when conducted in consultation with a consulting expert, is also protected by the consulting expert privilege set out in the Texas Rules of Civil Procedure.

We don't believe that there is any published case that suggests that crash testing is not so protected. In fact, the cases which we cite in our brief the *Donahue v. Isuzu* case, the *Shoemaker v. GM* case and the *Hendrix v. Avis Rent-A-Car* case, which also involved GM crash testing all said that crash testing is attorney work product and should be protected. And each of those three cases, the court denied a motion similar to that which is before the court today. Denied the order which permitted plaintiffs to go and attend and to watch the crash testing.

SPECTOR: Has GM ever agreed to that procedure in another case?

COLEMAN: I think the court must be referring to the *Mesh* order, which is in the record here that states that it is an agreed order. But if you look at the order at the end the list of plaintiffs agreed as to form and entry requested by and then GM says: agreed as to form only. And there is an affidavit by the woman that could sign to that order stated it was not an agreed order. I think there is also in the record from several years ago an order that was requested by GM similar to this. So I believe the answer would have to be yes.

ENOCH: I am troubled by this. Suppose that the plaintiff cannot afford to do a crash test to replicate the event as they understand the facts to be. And the only post-crash testing that's been done has been done by the defendant and they are the only ones that have the information. Would the testing information not be subject to be made available to the plaintiff?

COLEMAN: I think the answer to your question is yes if it satisfies the rules of civil procedure. If that testing is reviewed, done by or reviewed by a testifying expert, then yes all of those materials would be subject to discovery.

ENOCH: But even if it's not reviewed by a testifying expert, just GM says I want to see what happens when we take the same facts that the plaintiff alleges and we just run this car into the wall and see what happens, and they've got that information from the testing, even if there is no other way that that material can be replicated by the plaintiff, they can't afford to go buy a car and run up against the wall and do the testing that GM can do under no circumstance would the facts of that test be discoverable?

COLEMAN: I think that's right. I think if GM does a consulting expert test, it goes and does it on its own and the rules allow for that, and the rules say the consulting expert materials whether it's crash testing by GM or somebody else is not discoverable unless it's reviewed by a testifying expert. If it's not reviewed, it's not going to be part of the trial except that the lawyer will have a better idea of what the case is about. But the testifying expert by definition is not going to know about that, is not going to have any idea, and so it won't be made part of the trial. I think what you're getting at really would require a wholesale switch in what our rules provide for that if GM was forced to provide that kind of information parties, not just automobile manufacturers, but all parties then ought to be subject to the same kinds of things, that if you do investigation that the other side really can't do for whatever reason, that there must be therefore an exception that all materials relevant to that even if they are not to be put on at trial or not to be presented to a testifying expert must be disclosed. And I think the rules of civil procedure don't provide for that, and as this court stated in the *Alvarado* case, it should be up to the committees to change the rules and not for the court to make as respondent said he was doing in this case a fairness exception to what the rules provide.

GONZALEZ: Can you address the adequate remedy by appeal? Apparently you were not able to convince the CA about that prong on this mandamus?

COLEMAN: One quick point on what the CA really did. It said, You may have an adequate remedy by appeal because you can go and do your testing, but don't tell the plaintiffs about it. In other words, the CA suggested, I think Justice Hudson in his dissent aptly noted that what the CA was inviting GM to do was violate the terms of the order subject itself to sanctions or contempt and then take it up on appeal that way. We don't think that the rules require that. That would really cut back on mandamus. All mandamuses would be just habeas corpus to this court from the contempt citation or being placed in jail. And so we think that really there is no way for us to get this stuff in front of the TC. We have two options: 1) to cave in, to do the testing but allow plaintiffs to attend, and that permits us then to get it in front of the court; and 2) to do consulting tests, because that's the only way we cannot have the plaintiffs there. And then paragraph 8 of the order says: "GM if you do consulting testing, you may not, you are prohibited from communicating any aspect of that testing whether it be the parameters, the results, anything directly or indirectly to your testifying experts. And so if GM did consulting on the testing would it be subject to discovery? We couldn't let our testifying experts review it under again of a threat of contempt or sanctions, so what are we to do when we come to trial? Your honor, we have this testing that we did, we didn't tell the plaintiffs about it, we haven't shown it to anybody who is going to testify at trial, but we would like you to admit it anyways even though there is no foundation for it in the record. We think if that happened, the TC would properly say, that's excluded.

GONZALEZ: They say you made a bunch of misstatements in the motions filed before us. Would you respond to their allegations of misstatement of facts?

COLEMAN: I don't believe that we have made any misstatements regarding the crash test order.

GONZALEZ: They argue the TC does not say that the plaintiffs can attend and video tape any consulting crash tests?

COLEMAN: Paragraph 7 purports to exclude what is called "consulting expert test." The way the respondent defines consulting expert testing is different from the way the rules define it. The rules define it as testing done by someone who has not been designated for trial. And the rules then provide that a consulting expert test may be reviewed by a testifying expert. This order defines a consulting expert test as one that is done by a consulting expert and will never be reviewed by a testifying expert. And so, the way that consulting expert is defined in the order is a little bit different from the way that it is defined in the rules of civil procedure. And we think that that may be what it's getting to. Their statement about our statement that the court says that this stuff is going to be inadmissible it is true that the order says: He reserves the right to keep it out. It was the statement in the hearing where he said: Definitely, I will keep this out if you do consulting expert testing and don't permit the other side to see it, I will keep it out. And so that was the hearing not the order.

SPECTOR: Can we turn to the jury issue?

COLEMAN: Yes. I would like to acknowledge first two primary facts. The first is, GM

didn't pay its jury fee until January 3, 1996. No doubt about it. Second, in the fall of 1995, GM received a notice from the TC stating, that if the case were retained on the docket, then under rule 245 it was set for trial on January 3.

OWEN: Would you address your adequate remedy by appeal? Why don't you have an adequate remedy by appeal with respect to the TC setting the case and moving forward with a nonjury trial?

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COLEMAN: The big thing to remember with respect to the way this trial came about is that discovery had been at a standstill for 2 years. Motions had been filed. Plaintiffs were asking GM to produce 200 million to 1 billion documents. It would have taken untold millions of dollars to review and produce. They weren't producing any experts for our depositions until those documents were produced. Discovery was at a standstill because those motions to compel and the motion to attend our crash testing had been set for hearing on 3 separate occasions in 1995: May 22, June 29 and October 30. On each occasion it was not the parties but the TC who said, "I'm passing on this hearing; I'm not going to do it yet." When he passed on the October hearing, he said, "I'm going to reset these things real soon. I will let you know." This thing had been set down in Brazoria county several times, and plaintiffs even in their arguments say that it had been set previously. It had never gone. The TC had repeatedly done this kind of thing, put it on the dismissal docket. When local counsel walked over, he thought he was going to get a hearing on these motions which plaintiffs themselves had said were crucial. There was no indication that this case was going to trial. There is no docket call. There is no pre trial conference. There were no exhibit lists, no witness lists, and there had been no ruling whatsoever on these crucial discovery motions.

CORNYN: There was a trial setting though?

COLEMAN: There was indeed. And that of course is something the court has to consider.

OWEN: But now we're in the middle of it.

COLEMAN: We are in the middle of it and we think that it was complete abuse of discretion when we moved for a continuance. Rule 252 says: If the TC, if you are convinced additional discovery needs to be made, you should grant a continuance. If you're not deny it and go to trial. What this court did and we have found no authority and really no precedent in this state or other states was: I'm denying your motion for a continuance but I recognize and everybody here recognizes there is a lot of discovery to be done yet. So, because I am going to do this bench trial, I'm denying the motion, but we're going to go and do discovery for a couple of more months while we go into this case. And that, I think, links up with the other factors which we discuss in our brief, those that are more _____ towards the jury trial itself, is that respondents set up this dual track of discovery and trial at the same time. And I believe that really is the focus of our inability to get adequate relief on appeal. Because when we go to examine or cross-examine the witnesses early in that trial that was to take place, we are not going to have information that's going to be discovered a couple of months later.

CORNYN: Are you asking for a complete prohibition against any discovery after opening statements?

COLEMAN: No, I don't think that we can ask for that. I think that on common and frequent occasions the courts of this state and other states have allowed a deposition here or there. If some expert changes the testimony a little bit, we do a deposition overnight. And I don't think we could ask for a complete prohibition.

What this procedure does, is it has substantial or significant discovery to be carried on months into the future. The court said, "I will wrap this trial up by the end of Spring." And we cannot adequately cross-examine or examine witnesses early in the that trial or the credibility of those witnesses is going to be in question because discovery hasn't taken place.

OWEN: What discoveries that you need that you haven't gotten to go to trial?

COLEMAN: We have not been able to do depositions of their experts. I think that's primarily our discovery. We believe that if we get relief on the crash test order, that we are entitled to go back to conduct our pretrial crash test investigation free of interference from the court, and that the discovery will necessarily follow from our crash testing and that full relief from the crash test order also requires that we put back into the pretrial setting that would allow us to do that. But there is a lot of other discovery primarily plaintiff's motion to compel...

OWEN: But again if the TC erred and the court would later say he shouldn't have done that, you get a new trial, how are you ultimately harmed? Why isn't that an adequate remedy?

COLEMAN: For instance, say we needed to cross-examine a witness early in this trial. We wanted to ask questions X, Y, Z. A CA would ordinarily say, Why didn't you ask them? Too bad, go away. But in our case we are going to be arguing, "Well we didn't discover that information until 2 months after that witness had been done." And because of the way discovery occurs bit by bit, it's not that you discover a piece of fact all at once, that if you have a hint, you look for it, you discover it, there is a continuum and we don't think that we'll be able to adequately show or that the CA will be able to adequately measure when precisely we discovered this information such that we should have been able to use it earlier in the trial. And that is the main reason we think there is no adequate remedy by appeal here.

CORNYN: Do you think it would have been better for the TC to put you to a jury trial, deny your motion for continuance and to proceed to try the case? Would you still be here seeking a writ of mandamus because the TC denied you a continuance to do discovery?

COLEMAN: We believe that still would have been error. The respondent clearly on the record said that he knew discovery needed to go forward. And it was really his doing that it hadn't been able to go forward because he had been passing on all of these hearings. We think that that still would have been error, but it would not have created this fundamental dosimetry that this creates that

is really unprecedented as far as I've been able to tell. At least then we would have said, "Ok, you shut down our discovery," that was error but the trial went forward based on the body of knowledge and discovery that had been accumulated at the time of trial. So we still think it would have been error, but it just would not have been that sort of fundamental ____metry.

CORNYN: Would it have been subject to mandamus or would you have an adequate remedy by appeal?

COLEMAN: We would have had a much more difficult case. We might have tried to go on the prong of *Walker* that says: If you deny a party discovery and it can't be made part of the record, the question then would be: Would the unfinished discovery be able to be made part of the record? But that would have been a different inquiry than this here.

PHILLIPS: There's been no stay by this court or this trial, but I gather that the trial judge is not doing anything on this matter at this time?

COLEMAN: Not at this time.

PHILLIPS: Let me try to understand what you're saying. Let's suppose you a hire a consulting expert and it takes 10 tries to set up this crash test _____ in a way that proves both helpful to your case and beneficial to the case. And you then hire a testifying expert. If you hired that consulting expert as a testifying expert there's no question that all 10 of those tests will be discoverable?

COLEMAN: Absolutely. That is correct.

PHILLIPS: If you hire a new expert then, to what extent can the new expert talk to the old expert, that a testifying expert talks to the consulting expert and shield those first 9 tests in your view?

COLEMAN: I think if we have the same consulting expert do all of the tests, and then chose the one and gave it to the testifying expert, the rules would seem to indicate that that consulting expert's opinions and mental impressions, materials relied on would be discoverable. And so it's not clear that we would be able to shield the other 9 simply because we liked the one. And that is an important point here.

PHILLIPS: Even if the consulting expert never talks to the testifying expert?

COLEMAN: Are you speaking about asking the testifying expert to do another test separate from...

PHILLIPS: Let's say no. Let's just say: Here's the test, testify about it. Then you think all 10 would probably be discoverable?

COLEMAN: If anything that GM shows that testifying expert reveals the mental impressions or opinions of the consulting experts, then I think the rules provide for a discovery. If they don't, then I don't believe the rules provide for it.

PHILLIPS: If the testifying expert recreates the favorite test can he talk to the consulting expert and still shield the less favorable test?

COLEMAN: I think if he talks to the consulting expert, that there would be a very strong argument that he had reviewed the opinions and mental impressions of the testifying expert. And ultimate I think this idea that GM is out to mock up a fake test, is really not true. We are simply trying to recreate the accident.

PHILLIPS: It's not our job to make that judgment.

COLEMAN: My point is, that if we did something that really wasn't above board as plaintiff's have suggested here, that would be subject to severe criticism by their experts. And in fact, that already happened with our first test where their expert came and said, "You've got the angles all wrong, this and that." They are well qualified to criticize our tests once we produce them in discovery and can criticize it, independently investigate them and do all. But they are adequately protected by the rules of discovery.

PHILLIPS: So as I understand it, based on your answers, it would always be your view if you were going to use a testifying expert to take what the consulting expert helped you do, and then recreate that with a new expert without any consultation between the two?

COLEMAN: Not necessarily. This testing is quite expensive and what you're suggesting is that GM would just redo testing it had already done.

PHILLIPS: If you're not going to redo it and it's all discoverable, I am beginning to lose sight of what the argument is about.

COLEMAN: It may be that we have had different experts do different tests. But ultimately if a consulting expert's stuff is discoverable what we argue is that it's discoverable in the ordinary course of discovery and not through a plaintiff's attendance requirement, which is the heart of this order here.

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RESPONDENT

LAWYER: What this case is about really is one legal principle and some very important factual matters that must be entertained by the court to determine whether mandamus will lie. And we submit that the legal principle is how far may the court go in issuing mandamus? Will this court rule that denial of the continuance is remediable by mandamus? And will this court rule that the

denial of the defendant's motion to proceed with this case on the nonjury docket is remediable by mandamus? And will this court decide that what has happened here in the discretion of a trial judge in terms of discovery is remediable by mandamus? Those questions must be answered we submit in favor of the plaintiffs, because under the facts of this case there can be no other disposition.

Unfortunately, I am going to have to delve a little bit more into the facts than I usually do, but that's important in this case. And the key and critical fact that this court must be aware of first of all is that the only testing that GM is doing in this case is with Failure Analysis Associates in Phoenix Arizona. Failure Analysis is GM's designated trial witness. There is no evidence of any other consulting expert who is being used as the rules says, solely for consulting purposes.

PHILLIPS: You wouldn't necessarily know about that?

LAWYER: No, we wouldn't but we would think that if GM had a consulting expert, they would have given some evidence of that to the court in camera. There would have been some showing of that.

HECHT: Why?

LAWYER: So that they could preserve their privilege and argue in this court that there is a privilege that would attach to that testing.

GONZALEZ: At what point do you want them to make that designation?

LAWYER: Certainly before the trial starts. In this case, the trial has started.

GONZALEZ: What I hear you say is that you want GM to make that designation before the tests are even conducted.

LAWYER: No, we are not asking for that at all. In fact, this order exempts consulting expert testing from our attendance. We cannot under this order go to those consulting experts' tests. And the trial judge under the rules has the ability to compel GM to make a determination: Is this person a consultant? Is this person a trial witness?

PHILLIPS: For all practical purposes that decision has to be made before the test is undertaken?

LAWYER: No it does not. The determination will be made by GM when it sees how the tests comes out. If it wants to use the test at trial, I assume that it would either recreate that test, or it would try to offer that test into evidence. At least then, we would know that that test had been denied.

PHILLIPS: They're taking a pretty big chance under this order to do a test with what would be called a consulting expert, that is you're not there, and they believe the results would be helpful, and they offer it at trial.

LAWYER: They are not running any risks. Because all they have to do is if they have made that a testifying test, this order says that we must either be given the opportunity to attend that test and all it would require is either that they recreate that test and realize of course that when he argues that it's going to be expensive or a waste of time there was no objection in the TC to burdensome this. There is no objection to our request for attendance on the basis of burdensomeness, costs or anything else.

OWEN: That's not the issue. The court said and the way the order read is if they do a consulting test and you're not there and they later try to recreate it, he will keep that later test out if it uses the same parameters. The order is pretty clear about that.

LAWYER: Actually the order says he reserves the right to do that. There has been no determination yet.

PHILLIPS: That's a pretty big risk. I mean they may lose their whole defense.

LAWYER: No. This court said in a couple of cases that if a test is done, an out of court experiment is done without the other side present, as long as it's substantially similar it may be admissible into evidence. Judge Gale's made no determination of that. He simply said, as a warning shot across their bowel: If you're going to do a consulting test, and I later determine that that test really formed the basis of a testifier's opinions, I may not let you admit that consulting test because you didn't let the plaintiffs come. Now if that's a risk, it's a permissible risk under the rules, because the trial judge has discretion under the rules to require GM to make the determination at a reasonable time before trial whether a witness is a consultant or a testifying expert.

HECHT: In any event they have to give the relators notice?

LAWYER: That's correct.

HECHT: Even a purely consulting expert test?

LAWYER: That's right.

HECHT: You have to record it and file it with the court?

LAWYER: That's right.

HECHT: What's the precedent for that?

LAWYER: I'm not sure I can cite you a case. But I think that the precedent is found in the rules. This court says in the rules that if a privilege is going to be asserted, the TC has discretion to require that privilege to be filed under seal with the court to determine later if in fact that privilege really is privileged. Let's say that GM goes out and does 10 consulting expert tests. They then decide that they like some of those tests and they want to show them to their testifying experts. If the testifying expert has reviewed those tests, as this court said in *Scott v. McElhenney*, if their work product has been reviewed or relied upon by testifying experts it's discoverable. Now how are we going to discover it if it's been done and it's not recorded? The trial judge has to make that decision.

HECHT: Should it be the rule then that all consulting experts's opinions and interviews and consults should be filed with the court? Should we make that a rule that each side give notice when they are consulting with an expert? Otherwise, how would you know?

LAWYER: Well you wouldn't know. But it's certainly within the TC's discretion to require that as this court's rules have said. The rule says the trial judge has discretion to require that to be filed with the court to preserve the privilege. And later on Judge Gayle will make the determination of whether that test really was reviewed or relied upon by a testifying expert. You have to realize that in crash testing what happens, and this court's free to look at the tapes, a consulting test may set the parameters for a testifier's testimony. If that happens, how can we ever determine how that process was engaged in? Did they tweak the angle from 32° to 31° to 30° and there's a natural progression. That's the kind of gamesmanship that this court has condemned in *Gandy* and in *Albower* and in other cases. As long as something is put in front of the jury, and it's submitted as the truth, the jury has the right to know the basis of that. And how else are we going to know unless that's filed with the court? It must be filed, the trial judge must be given discretion to determine those privileges and were this court to rule otherwise, I would be up here every other week on mandamus trying to urge this court that it's mandamusable because incidental trial rulings ought to be reviewed every time it happens. If the rule gives Judge Gayle discretion to do this, the court ought to leave it there and decide later on appeal if it was wrong.

HECHT: If this is your position why did you move the trial judge to modify or withdraw his order?

LAWYER: I thought that there may be some issues that could be cleaned up in terms of the record in this case. The facts are in dispute. The facts cannot be anymore in dispute about what happened. And I thought that Judge Gayle might clarify some of those facts for the court, might clean up some of the things that the CA said. Of course Judge Gayle has refused to do that.

HECHT: On what fact?

LAWYER: The fact of, is this a consulting or a testifying expert? The TC might have asked GM to put on some evidence of its consulting expert privilege, that he might have determined if the order as you're trying to talk about requires the kinds of actions by GM to run a risk. He might have clarified whether in fact his order meant that GM could never introduce a consulting expert test

at trial when the order just says he reserves the right to determine that later. There could have been a lot of things that could have been cleared up, and if this court thinks those kinds of factual decisions ought to be made, I think it would be unprecedented but perhaps the court could remand to Judge Gayle and order him to make those kinds of determinations.

PHILLIPS: Are you suggesting that we can't grant a mandamus until a trial judge has made a final order on some issue? So that if the trial judge says to you: You can make a trial notebook in preparation for this case, but I may order it disclosed to the other side immediately after opening statement. Would you just have to make that notebook and wonder and wait?

LAWYER: I would say that until the judge has made a determinative ruling and there is a clear entitlement to mandamus relief this court should defer to the TC.

PHILLIPS: So a judge can shall we say tweak the process by making some preliminary nonbinding rulings and they can never be reviewed?

LAWYER: No, they can be reviewed on appeal. And if there is harm shown from those rulings, if he later does what's anticipated by GM, that can be reviewed on appeal. There is an adequate remedy in this case and mandamus doesn't lie. There are several other important facts that need to be determined. Counsel is arguing that GM did not agree to the Meshy order in Judge Gayle's court. In February, 1995, GM's lawyer from Kirkland and Ellis signed an agreed order and proved that as to form. The form of the order was an agreed order. So 11 months before Judge Gayle signed this order in the *Delarosa* case, he had signed the very same kind of order agreed to by GM, that GM is now seeking mandamus in the SC. It simply should not be a trial judge's burden to have something agreed to by authority in another similar case on the very same type of crash testing, and then run the risk of being told that he must withdraw that order on mandamus from the SC. That's not fair to trial judges. GM has only one expert in this case and it's Failure Analysis. If the court takes the time and would like to, you can look at that test. It is run by Failure Analysis, GM's testifying expert. And it is not fair to trial judges when GM has designated a trial testifying expert for this court or for any court to say that that test may never be disclosed _____. The only anticipated retesting that GM has in this case is of that same Failure Analysis testing.

OWEN: Why the need for a consulting expert order at all if your version of the facts is correct?

LAWYER: It's more or less simply a protective kind of a prophylactic order. If GM does consulting expert testing, then that needs to be kept as consulting expert testing. Under the rules it can be preserved and the trial judge can force GM to make that determination. If GM does consulting expert testing, however, and it steps over the line and discloses that to a trial witness all those consulting tests become discoverable. There can be really no dispute about that.

OWEN: But isn't it GM's call whether and when it decides to cross the line from consulting to testifying under the rules?

LAWYER: Sure it is.

PHILLIPS: If you're reasonably sure GM doesn't have a consulting expert, why does it serve your client to delay this case by nearly 2 years to have the right to attend some nonexisting events?

LAWYER: We want to attend their testifying expert's test, because there is evidence in this case from Mr. Steven Sisson, the plaintiff's main expert who has been deposed. Counsel said that there was no depositions of the plaintiff's expert. Mr. Sisson has been deposed once. His testimony is, and it's in the record that I filed with the court yesterday, that there are problems with this test. GM when it does failure analysis testing takes the slack out of the belts through putting load cells on the belts. You can't tell that unless you are there. You can't tell if the belt buckle is a type 1 or a type 2 belt buckle unless you're there. As this court said in *GM v. Tanner*, a case brought by the relators, this court compelled the plaintiffs in that case to allow GM to go to a crash vehicle and do testing on the seat. And it said in that opinion: Viewing is not enough, (that's under Tab 3 in my arguments) sometimes you just have to be there. This is one of those kinds of cases. Unless Mr. Sisson our expert is there, he can't tell if GM's taking up the slack in the belts. He can't tell if it's the right kind of belt. He can't observe if there is anything else going on.

ENOCH: And your view is, that GM will be untruthful with the court when the expert is asked that question by you at the trial?

LAWYER: I certainly hope not. But I would think that GM would be a little bit more running of a risk if they tried to do that kind of activity. And we're not saying that that's going to happen.

PHILLIPS: Isn't this two different issues of a judge saying: Because of the unique nature of this test, I'm not going to let you offer it at trial unless the other side is there; and saying you can't experiment around and decide what you're going to do for trial without the other side being there?

LAWYER: Well that's right. And on the second point, if the judge had said: GM you can't do consulting expert testing, we would have a real problem. But the judge has not said that.

PHILLIPS: But if neither the attorney nor anybody else that's seen that consulting testing can use the mental knowledge gained in testifying experts testing then it's a nullity. It seems to me it's kind of happening as a windowless nomad out there the way this order is drawn up.

LAWYER: Well if there was any consulting expert testing that had been done, GM might have a point, but there is no consulting expert testing on this record. The only testing on this record is by Failure Analysis, it's testifying witness. And we are certainly within our rights to insist that we get to go to that kind of testing. Everything is discoverable.

I think what the spirit of that order indicates is that GM cannot do through the

backdoor what it can't do through the front door. And simply because information passes through the medium of an attorney does not relegate that information to a privileged stats.

ENOCH: Let me ask you what they can't do through the front door. Is it your view that the discovery rules permit a client to walk into court and say: If the defendant is going to run any tests in defense of this case, the rules permit me to be present at the test if they intend ultimately to produce the results of that test in trial? Forget about the consulting experts. Do the rules permit a judge to require a defendant to allow a plaintiff to attend all the tests?

LAWYER: No not all the test, and not any test in any case. But if you have, as we do in this case, evidence from an expert who has testified there is specific and articulable reasons why he needs to be present at the testing, then I think it's within the discretion of the trial judge.

ENOCH: Anytime a scientific test is conducted wouldn't it always be better for the opposing experts to attend the test?

LAWYER: It might be. But in cases like an economist and some kind of a reconstruction that relies on mathematical formulas, I don't think that's necessarily true, because those are readily verifiable. But let me say to the extent that I can speak for all plaintiffs, I don't have a problem if the defendant wants to come to My Day in the Life film. I don't have a problem if the defendant want's to come to my crash testing. I run a risk if I go to their crash testing. Let's suppose Failure Analysis does the test, and it turns out really good for GM. And my expert is there and he watched it, he's going to have to live with that in his deposition and at trial: Sir you were there, you saw it, it was run correctly, you saw the belts didn't come unbuckled in this case, you saw that your theory of the case is blown out of the water. What's he going to do? It's factually perhaps a risk that plaintiffs might not want to take. But when balanced against the chance that there will be gamesmanship in front of the jury, as this court's condemned in all those other line of cases, I think it's a risk that we are entitled to take, it is something that a trial judge is entitled in his discretion to order, it is something that has happened all over the country. In Michigan, Judge Hall, the federal judge in the Eastern district has ordered this kinds of thing. It's been done before. GM has asked for it before. GM has agreed to it before. And when it is done with the testifying experts, we submit to the court there is no abuse of discretion, and the trial judge permitting to happen because it's allowed by the rules.

GONZALEZ: So when you keep talking about this expert being a testifying expert when you don't make that designation.

LAWYER: That's right.

GONZALEZ: They make the designation. They've called a consulting only expert?

LAWYER: They have not. They have made a designation of Failure Analysis Associates as their testifying witness. And that's in my record excerpts at Tab 5. Mr. Thomas and Failure

Analysis Associates are GM's designated testifying witness.

GONZALEZ: In this case?

LAWYER: In this case, designated when Fulbright & Jaworski, the prior attorneys for GM, filed that designation. That is a matter of record. And this court has said in *Tom L. Scott v. McElhenney*, you can't just de-designate that and make them not a testifying expert. That's an opinion that you wrote, and I'm sure you are aware of that.

OWEN: But there may be consultants that they would like to hire tomorrow to run other tests, and they run the risk that if you do that they can't transmit what they learn from that test in their testifying expert.

LAWYER: I think that Judge Gayle would not so interpret the order. And if that's a problem in the order, then you can just simply order Judge Gayle: Take out that sentence. And there is nothing left that's wrong with the order. That's the narrow remedy that this court ought to use. Just use a parring knife and make that sentence of the order go away if it's not right.

CORNYN: What reason could Judge Gayle have had for denying the motion for continuance other than to deny a jury trial in the case?

LAWYER: He had many reasons. A trial judge has discretion, because putting people's feet to the fire might get the case settled, it might make parties more serious about discovery. He was clear on the record that the two reasons for which he set the case, started the case and then recessed it was because he wanted to allow GM to 1) do its testing; and 2) he wanted GM to be able to file in the CA a petition for writ of mandamus. Now I don't see how that can be anything but fair.

GONZALEZ: But isn't it odd to proceed on parallel tracks, trial, discovery at the same time?

LAWYER: It's not the ordinary and orthodox course. But let me tell you in this case, the record has been overstated by counsel for GM. There was not massive discovery request pending. As the record of the January 5 hearing says on page 3, Judge Gayle said, Plaintiffs announce ready for trial. GM was the one who was insisting on discovery. Later when plaintiffs discovery motion was taken up, it was limited by Mr. Hardy at that hearing to making sure that GM had produced all of its crash tests to us. In fact, Mr. Hardy agreed that if counsel for GM would simply write a letter and positively _____ that GM had produced all the crash tests, that was the extent of plaintiff's discovery that was outstanding. Now that's in the record. There wasn't anything else. We weren't sandbagging GM by having a massive discovery request withdrawing it, and then reasserting it. That's simply is not ____ out by the record. GM is not harmed by this kind of an order. It always films its crash tests. There is nothing burdensome about that.

PHILLIPS: Under our precedent, the trial judge would not have been in error in starting this case by a jury trial the very next day would he? Would you have had any complaint if the trial

judge had called a jury the day of this _____ dismiss hearing and would have started at the trial?

LAWYER: We would have had to know some things before we could make that determination. We would have had to know if a jury was available, if Judge Gayle's docket would have been disrupted otherwise by having the case tried to a jury. I think that Judge Gayle could have tried this case non-jury certainly in the time it's taken to get through the appellate courts. This case would be over now if GM hadn't sought mandamus twice. And a jury trial sometimes cannot be done as efficiently and as accommodatingly to GM's discovery requests as a trial judge could do that. So there were many reasons why a bench trial would have been a more efficient, a quicker process and for us something that we would like to still have.

HECHT: Why in that last mandamus proceeding did relators tell us that the case is not in trial? They just meant that day?

LAWYER: If you look on the page before in the brief that we filed, what we meant was the case was not in trial because Judge Gayle had deferred to this court to decide that issue. Now GM has agreed and the briefs filed on its renewed motion for mandamus that the case is in trial. In fact Judge Gayle set this case for trial on Feb. 14. He was going to recommence the trial testimony, but in fact this court decided that leave to file would be granted.

HECHT: But relator's position is, this case has been in trial since January of 1996?

LAWYER: That's what I heard Mr. Coleman just say.

HECHT: Is that the real parties position is what I'm asking?

LAWYER: Technically the case is in trial. What has happened is that because of the mandamus proceedings, the case has not been allowed to proceed during trial. Judge Gayle has either deferred to this court or the CA has issued a stay order. So either through the stayed process in the CA or through trying to defer to this court's ability to decide serious issues, Judge Gayle's decided not to call witnesses. Now we could be in trial today, I suppose, calling witnesses while this case is pending in front of the court, but to the extent this court changed the procedural dynamics of the case on mandamus, it might affect the trial, and we would rather wait to see what this court does in terms of these serious issues before we proceed with the trial.

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REBUTTAL

CORNYN: Mr. Coleman, one of the reasons that we stated we will not intervene by mandamus in incidental trial court rulings, is because it's a whole heck of a lot more efficient to see how the trial concludes and what kind of evidentiary record there might be. As I read this order, it could be interpreted as in essence a motion in limine where Judge Gayle could change his mind when evidence is actually offered at the trial and admit the evidence that the order would pertain to.

Why isn't that a problem here?

COLEMAN: You correctly interpret that particular sentence in paragraph 10, whether things would be admissible. But our complaints have not been focused solely on whether testing would be admissible or not. We think the attendance requirement clearly violates GM's privileges. We think the prohibition against inter expert communications clearly violates it. We think the film and file requirement of paragraph 10 violates it. And we also think that the notice requirements of paragraphs 3 and 9 violates it.

CORNYN: I think I understand your response, and that is, that Judge Gayle could change his mind and allow consulting only testing to be admitted into evidence. But you have other objections as well?

COLEMAN: It goes further back. For instance paragraph 8, which prohibits us from even communicating anything about our tests to anybody who will be testifying, there is no way for us to get a foundation. Even if he says on the day of trial, Do you have any consulting tests that you want to put in? He would have to rescind parts of his order to allow us to communicate aspects of the tests to a testifying expert.

CORNYN: Which a trial judge is entitled to change his or her mind, is he not?

COLEMAN: Every order that this court addresses on mandamus could be changed by the trial court. Every time somebody comes up on a privilege issue, the trial court in that case could, while the case is up, rescind that order and it would not be mandamusable. When that has not happened this court rules on mandamus. So I believe we are.

I have a couple of real important points. The first is, we did not designate Failure Analysis Associates as our testifying expert. The plaintiff's own record shows that we designated Mr. Terry Thomas who at that time was at Failure Analysis Associates as a designating expert. Where it says Failure Analysis Associates as part of the address it is the man, not the company, and he has since moved on a long time ago, before January, 1996, to another company and that is in the record at Tab 11, which was the ruling on the motion to inspect, page 14. He is no longer there. Our testifying expert has no connection. The other point was when plaintiffs say that Mr. Sisson had specific and articulable concerns about our testing, that just proves that under the regular regime of discovery, Mr. Sisson can tell the plaintiff's lawyer, Hey ask about the kind of webbing used in the test. Make them produce the webbing. Ask them if there was slack in the webbing. This man is sophisticated and testifies in these cases all the time. He knows exactly what happens. And so when GM produces a test for discovery by allowing its testifying experts to review it, they know precisely what questions need to be asked to test that testing. They don't need to actually be there to witness it.