

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

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CLAYTON W. CLARK,

*Plaintiff-Appellant,*

v.

TAKATA CORPORATION, AMERICAN HONDA MOTOR CO., INC.,  
HONDA MOTOR CO., LTD., HONDA OF AMERICA  
MANUFACTURING, INC., AND HONDA R&D CO. LTD.,

*Defendants-Appellees.*

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On Appeal from the United States District Court  
for the Southern District of Indiana

The Honorable John D. Tinder, Judge

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**BRIEF FOR APPELLEES  
TAKATA CORPORATION ET AL.**

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RANDALL R. RIGGS  
JEFFREY J. MORTIER  
*Locke Reynolds Boyd & Weisell  
1000 Capital Center South  
201 North Illinois Street  
Indianapolis, IN 46204  
(317) 237-3866*

KENNETH S. GELLER  
ALAN E. UNTEREINER  
MARK S. DAVIES  
*Mayer, Brown & Platt  
2000 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006  
(202) 463-2000*

*Counsel for Appellees*

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**CERTIFICATE OF INTEREST**

**[omitted]**

**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that Appellees' Brief contains 13,903 words,  
within the 14,000 permitted by Circuit Rule 32(d)(2).

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Mark S. Davies

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## **GLOSSARY**

AOB	Appellant's Opening Brief
EMT	Emergency Medical Technician
NR	District Court Clerk's Record (cited by docket entry & page)

## **JURISDICTION**

The district court had diversity jurisdiction under 28 U.S.C. § 1332. Plaintiff-appellant's jurisdictional statement is not correct. Plaintiff is a citizen and resident of Kentucky. Defendant-appellee American Honda Motor Co., Inc. is incorporated in and has its principal place of business in California; defendant-appellee Honda of America Manufacturing, Inc. is incorporated in and has its principal place of business in Ohio. The remaining defendants-appellees, Takata Corporation, Honda Motor Co., Ltd., and Honda R & D Co. Ltd., are incorporated in and have their principal place of business in Japan. Plaintiff's claim exceeds \$50,000. On March 5, 1998, judgment was entered against plaintiff. A notice of appeal was filed on March 25, 1998. Appellate jurisdiction is founded on 28 U.S.C. § 1291.

## **STATEMENT OF THE CASE**

This is a personal injury action arising out of a car accident. Plaintiff Clayton W. Clark alleged that the driver's seat belt in his Honda Accord was defective because it became unlatched during the rollover accident, causing him to suffer serious injury. In response to the testimony of the only eyewitness to the accident, who recalled seeing the belt in its proper location across Clark's lap, and to the unequivocal testimony of defendants' expert that Clark's presence and position in the driver's seat following the accident showed that the lap belt had *not* come unbuckled, plaintiff sought to create a genuine factual issue concerning whether the buckle had released by offering (1) the affidavit and deposition of an expert witness, and (2) the affidavit of a fact witness who had previously testified that she could not recall anything about the lap belt. The district court granted defendants' motions to strike this evidence, explaining that the expert's opinion was based on a wholly unreliable methodology and was otherwise inadmissible and that the fact witness's affidavit "clearly contradict[ed]" her prior sworn testimony. It then granted defendants' motion for summary judgment on the ground that Clark had

failed to present sufficient evidence to raise a genuine issue concerning whether the seat belt had become unbuckled during the accident. Clark appeals.

### **STATEMENT OF ISSUES**

- I. Did the district court abuse its discretion in granting the motion to strike certain untested opinions of an expert witness on the ground that the expert (a) based his testimony on his “experience” rather than on any scientifically valid or reliable methodology, and (b) had previously testified under oath that he “didn’t address” and “ha[d] no opinion on” the subject as to which he later offered the excluded opinions.
- II. Did the district court abuse its discretion in granting the motion to strike a fact witness’s affidavit that contradicted the witness’s prior deposition testimony.
- III. Was summary judgment properly granted because, in the absence of the stricken materials, plaintiff presented insufficient evidence to give rise to any genuine issue concerning whether the lap belt came unbuckled during the accident.

### **INTRODUCTION**

This is a case in which the litigation system worked as it should. Through no fault of defendants, plaintiff Clark was seriously injured in a terrible car accident when his car was struck from behind, causing it to leave the highway and tumble down an embankment. Unable to prove the elements of his negligence and strict liability claims against the defendants, Clark, in an effort to get before a sympathetic jury, resorted to unreliable expert testimony and the affidavit of a fact witness that conflicted with the witness’s prior sworn testimony. The district court saw through that tactic and, correctly applying the rules of civil procedure, terminated this meritless case before trial. Although plaintiff has suffered a life-altering injury, neither the legal system nor defendants are to blame. The district court’s evidentiary rulings were not an abuse of discretion. The summary judgment in defendants’ favor should be affirmed.

## STATEMENT OF FACTS

We state the facts in the light most favorable to plaintiff Clark, the non-moving party, relying as well on undisputed facts relevant to this appeal.

### A. The Underlying Accident

On Saturday, June 3, 1995, just before 2 a.m., Clayton Clark lost control of a 1991 Honda Accord he was driving on Interstate 65 in Simpson County, Kentucky. NR 1:2(¶7), NR 47:Tab 8 at 25. The car hit the guardrail and rolled over several times as it tumbled down an embankment (NR 47:Tab 5 at 13), ejecting both the front seat passenger, Derrick Borders, and the back seat passenger, Rod Brogdon. NR 47:Tab 3 at 5. Unlike Borders, who was protected only by the automatic shoulder belt (*id.* at 6), Clark was also wearing his manual lap belt, which Clark had engaged prior to the accident. NR 47:Tab 4 at 128.<sup>1/</sup> Clark could not remember whether his lap belt was in place after the accident (NR 46:3), but he was in a relatively normal driving position when the car came to rest. NR 47:Tab 5 at 17, Tab 8 at 25.

The accident was caused by Jessie Froggett, whose pickup truck hit the Honda from behind and knocked it off the highway. NR 1; NR 47:Tab 5 at 12. After ensuring that the police were notified and obtaining a flashlight from a passerby, Froggett climbed down the embankment to assist Clark. NR 47:Tab 5 at 15-17. Although he testified that “it was pitch black that night,” Froggett was able, with the flashlight, to make his way to the Honda, where he was the first to arrive. *Id.* at 16-17. Illuminating Clark with the

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<sup>1/</sup> For front seat occupants, the 1991 Honda Accord has a motorized shoulder belt and a manual lap belt.

flashlight, Froggett had a conversation with him during which Froggett saw in the beam of light trained on Clark that his shoulder belt and lap belt were both in place. *Id.* at 19.<sup>2/</sup>

Like Clark, the three emergency medical technicians (“EMTs”) who arrived at the accident scene after Froggett do not remember whether Clark’s lap belt was in place. David Duncan, whose duties included ensuring that no seat belt hindered the EMTs’ removal of Clark from the car, agreed that he “[c]ould have” unbuckled Clark’s seat belt, but stated that he “just can’t recall the incident.” NR 47:Tab 9 at 13 (“I can’t really recall any of the seat belts on any of the wrecks I’ve worked.”). Similarly, Robin Moseley had no recollection about Clark’s seat belts. NR 47:Tab 10 at 29.

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<sup>2/</sup> Froggett testified as follows:

Q. When you were talking to him, did you use the flashlight so you — put the flashlight on him so you could see him when you talked to him?

A. Yes.

\* \* \* \* \*

Q. When you looked in the car with the flashlight, could you see if he was wearing a seat belt?

A. Yes.

Q. And was he?

A. Yes.

Q. Now, a seat belt has two portions, it has a shoulder portion that goes across the chest and a lap portion, a lap belt. Were both of these belts in place?

A. They appeared to be.

Q. And you were able to observe that with a flashlight?

A. Yes.

Q. Did the lap belt appear to be properly latched into the buckle?

A. I don’t know.

Q. You didn’t try and reach in and grab it or anything?

A. No.

Q. But from what you could see, it looked like it was in the proper location across his lap?

A. It was across his lap, yes.

NR 47:Tab 5 at 19-20.

Melissa Hodson, the third EMT, could “only \* \* \* positively recall” that the shoulder belt was in place. NR 47:Tab 8 at 11. She could not “personally recall unlatching [Clark’s] lap belt.” *Id.* at 29. Likewise, when asked “[w]hat do you remember, if anything, about the lap belt” she answered: “*I don’t recall anything. I don’t recall actually cutting it or removing it.*” *Id.* at 11-12 (emphasis added). She also agreed, in response to a question, that she would have remembered unbuckling the lap belt had she done so. *Id.* at 12. She could not rule out that others, such as Duncan, might have released the belt. *Id.* at 29. Hodson also testified that when she arrived at the vehicle she was equipped only with a “little pen light \* \* \* and it was hard to actually see what was going on,” and that her “focus of attention” throughout the time she was assisting Clark was on his “possible neck injury.” *Id.* at 25, 29.

### **B. The Proceedings Below**

Clark filed this action under the Kentucky Products Liability Act, KRS § 411.300, *et seq.* and KRS § 411.182, against Takata Corporation, American Honda Motor Co., Inc., Honda Motor Co., Ltd., Honda of America Manufacturing, Inc., and Honda R & D Co. Ltd. (collectively “defendants”). NR 1; NR 87:23-24. He asserted tort claims of negligence and strict liability. NR 1.<sup>3/</sup> According to Clark’s complaint, the “seat belt latching mechanism \* \* \* failed and such failure caused plaintiff to become unrestrained and strike his head on the interior of the automobile \* \* \* .” NR 1 (¶ 10).

1. Because Clark had produced no evidence that the lap belt failed to restrain him during the collision, defendants moved for summary judgment. NR 44. There was no dispute that the *shoulder* belt was in place after the accident, or that Clark was wearing the lap belt at the time the accident occurred. And the only person who recalled

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<sup>3/</sup> Pursuant to the parties’ stipulation, the district court dismissed claims based on express or implied warranty. NR 87:1 n.1.

the position of the lap belt *after* the accident, Froggett, testified that the lap belt was still in place. See note 2, *supra*.

Defendants' expert, Harry Smith, who holds both a Ph.D. in engineering and an M.D., confirmed that the lap belt had remained buckled. NR 47:Tab 3 at 5-6. Smith explained that the accident, during which the vehicle rolled over "three or four" times, was of "sufficiently high energy" that "if Mr. Clark had not been properly restrained with both lap belt and shoulder harness he would have fared the same ejection outcome as his passengers who were not restrained (Brogdon) or only shoulder harness restrained (Borders)." *Id.* at 6. Smith also noted that if the lap belt had released, Clark would not have retained a relatively normal driving position after the car came to a stop. *Ibid.* (Clark's "final position at rest in the driver's seat is inconsistent with just shoulder belt usage"). Because Clark was not ejected from the car and retained a normal driving position, Smith concluded that the lap belt did not unbuckle.

Smith also opined that Clark's injuries were fully consistent with the lap belt remaining buckled throughout the accident. He explained:

Although restrained by both lap and shoulder belts throughout the accident sequence, Mr. Clark impacted the side roof rail with the top of his head above and lateral to his seated position most likely during the first roll of the accident sequence. In this position his body continued loading his neck and through the magnitude and direction of the forces at this moment in the accident, Mr. Clark incurred a C6-C7 fracture subluxation and subsequent spinal cord injury as a result.

NR 47:Tab 3 at 6. Smith based this conclusion, among other things, on three "[s]urrogate driver and exemplar vehicle" analyses he conducted in August, 1997, two involving a Honda Accord similar to the accident vehicle and one involving a Volvo 940 Turbo. *Ibid.* Two of these three tests were "spit analyses" in which the Honda and Volvo, after being drained of fluids, were mounted on a device resembling an enormous "roisserie spit" and then rotated to determine whether the fastened lap and shoulder belts would allow an individual who was seated in the driver's seat (of the same approximate

weight and height as Mr. Clark) to come into contact with the vehicle's roof. *Ibid*; NR 61:Tab 2 at 27, 29. Based on his review and analysis of the movements of the surrogate diver during those tests (as reflected in photographs and film), Smith concluded that "even when properly restrained \* \* \* the driver will come in contact with the roof rail as well as roof under static conditions with ample additional distance through which to flex the neck and produce the same or similar injury." NR 47:Tab 3 at 5, 7. Moreover, Smith explained that in "a dynamic situation" as was involved in the actual accident (where the vehicle traveling at a high speed actually rolls over and impacts the ground during the rollover), the movement of "the restrained driver" off the seat will be even greater. *Ibid*.

In response to this evidence, Clark offered the expert testimony of James Lafferty, Ph.D., an engineer. NR 54:Exhs. 1, 3. Lafferty's two-page expert report stated that "[i]f Mr. Clark's lap belt had functioned properly, he would have been restrained from impacting the roof of the Honda \* \* \* ." NR 54:Exh. 1A. Lafferty's report offered the following explanation for this opinion:

From measurements made of Mr. Clark, I understand that his seated height is approximately 32 inches. The distance from the bottom seat cushion of the driver's seat of the Honda to the top of the head rest (restraint) is 32 inches. Thus, he had about four inches of clearance between the top of his head and the crushed roof of the car. A lap belt, therefore, would have prevented his neck injury.

*Ibid*. When asked, however, at his deposition about "[w]hat evidence" he had to show "that the lap belt did, in fact, unlatch during the accident sequence," Lafferty first testified that he was *assuming* the lap belt had become unlatched and had no opinion on that subject. NR 47:Tab 11 at 80 ("I didn't address that question. I haven't considered it, so I have no opinion on that."). Later, in response to the request that he explain the "basis for saying that a properly functioning belt would [have kept Clark] from reaching

the roof rail,” Lafferty replied, “The lap belt would hold him down.” NR 61:Tab 1 at 123. When pressed, he offered the following testimony:

Q. And what testing or data base do you rely upon in offering that opinion?

A. *My experience.*

Q. Is that it?

A. *That’s it.*

*Ibid.* (emphasis added). When Lafferty was subsequently asked if he had conducted “any testing to document how far a person Mr. Clark’s size would move off of the seat in this accident if the lap belt remained latched,” he replied, “I’ve done no testing, no, sir.” *Id.* at 138.

In response to defendants’ motion for summary judgment, Clark submitted a one and one-half page affidavit of Lafferty’s that purported to “clarify” and “re-state” Lafferty’s professional opinion. NR 54:Exh. 1 at 1. In addition to reiterating his conclusory assertion that Clark’s lap belt “was not functioning during the accident and that it failed to restrain him,” Lafferty asserted in his affidavit that “the relative lack of blood on the lap belt in comparison to the blood on the shoulder harness and the seat is inconsistent with the lap belt being buckled during and after the accident.” *Id.* at 2. Compare NR 54:Exh. 3 (Lafferty stated in his deposition that “[t]here was *no* blood on that lap belt”) (emphasis added). Defendants moved to strike Lafferty’s affidavit as well as his other testimony concerning the purported unbuckling of the lap belt. NR 62.

Also in response to defendants’ motion for summary judgment, Clark submitted a supplemental affidavit of Ms. Hodson. NR 54:Exh. 2. In contrast to her sworn deposition testimony that she could “only \* \* \* positively recall” that Clark’s shoulder belt was in place (NR 47:Tab 8 at 11), could not “personally recall unlatching [Clark’s] lap belt” (*id.* at 29), and indeed “d[id]’t recall anything” about the lap belt (*id.* at 11-12), Hodson stated in her affidavit: “I did not cut or otherwise release the lap belt from Mr. Clark.” NR 54:Exh. 2 at 1. She also stated that it was her “belief based on my memory

as well as my practice, custom and procedure, that Mr. Clark’s lap belt was not attached around his waist \* \* \* when I first arrived on the scene \* \* \* .” *Id.* at 2. Defendants moved to strike Hodson’s affidavit as contrary to her deposition testimony. NR 64.

2. In a thoroughly reasoned, 25-page opinion, the district court granted defendants’ motions to strike as well as their motion for summary judgment. NR 87:1-2. In striking the affidavit of Melissa Hodson, the district court explained that “[a] party cannot claim a lack of general knowledge about a subject and later make a statement which requires detailed knowledge about the same subject.” NR 87:7 (quoting *Unterreiner v. Volkswagen of America, Inc.*, 8 F.3d 1206, 1210 (7th Cir. 1993)). After carefully reviewing Hodson’s deposition testimony — including her sworn statement that she “d[id]n’t recall actually cutting [Clark’s lap belt] or removing it” and “d[id]n’t recall *anything*” about the lap belt — the court concluded that the statements in her later affidavit that “Clark’s lap belt was *not* attached around his waist” and that “she did *not* cut or otherwise release the lap belt from Mr. Clark” were inadmissible because they “clearly contradict[]” the “prior sworn testimony.” NR 87:6-8 (emphasis added and omitted). The district court rejected Clark’s argument that Hodson’s affidavit merely “clarifies” her “ambiguous or confusing” deposition testimony. NR 87:5-8.

The district court also granted the motion to strike the testimony of James Lafferty. Initially, the court noted that there was no dispute about whether Lafferty was properly *qualified* in “the field of biomechanics.” NR 87:14 n.4. Whether an expert is qualified, however, is logically distinct from the question whether a particular opinion offered by the expert is based on a reliable methodology. NR 87:14-15 (“[A]cceptance of Dr. Lafferty as an expert qualified to give opinions in a particular field is not a sufficient basis for a determination that his testimony is based on scientifically valid reasoning or methodology.”). Next, the district court explained that under *Daubert v.*

*Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and Rule 702 of the Federal Rules of Evidence, it was required to engage in a “two-step analysis” by examining both “whether the reasoning or methodology underlying [Lafferty’s] testimony is scientifically valid and \* \* \* whether that reasoning or methodology properly can be applied to the facts in issue.” NR 87:13 (quoting *Daubert*, 509 U.S. at 592-593).

The district court rejected Clark’s argument that the *Daubert* framework is inapplicable to this case because Lafferty’s testimony was based not on any scientific methodology but on his “experience and training.” NR 87:11. “Under the law of the Seventh Circuit,” the district court explained, “all expert testimony proffered under Fed. R. Evid. 104(a) for admission under Rule 702[] must be tested to be sure the person possesses genuine expertise in a field and that [his] court testimony adheres to the same standards of intellectual rigor that are demanded in [his] professional work.” NR 87:12 (internal quotations omitted) (alterations in original). In addition, “the proffered testimony must be based upon the expert’s special skills in order to be both reliable and to assist the trier of fact.” NR 87:13 n.3.<sup>4/</sup>

Applying these settled principles of Seventh Circuit law, the district court concluded that Lafferty’s testimony was inadmissible for at least three independent reasons. *First*, “on the basis of the record before it” the court was unable to determine whether the “reasoning or methodology underlying Dr. Lafferty’s proffered testimony” was either “scientifically valid” or “properly \* \* \* applied to this case.” NR 87:16. “The record does not establish,” the court explained, that Lafferty’s “proffered expert testimony adheres to the same standards of intellectual rigor that are demanded in his

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<sup>4/</sup> The district court noted, however, that an expert’s “experience or training” is relevant to whether the expert “possesses expertise in a particular field,” *i.e.*, is qualified. NR 87:14; see also Fed. R. Evid. 702 (permitting a “witness qualified as an expert by knowledge, skill, experience, training, or education” to testify where testimony is based on “scientific, technical, or other specialized knowledge”).

professional work in the field of biomechanics and engineering.” *Ibid.* There was “no indication in the record that the bases for Dr. Lafferty’s opinions were subjected to any kind of peer review or publication,” no basis on which to “consider the error rate” of Lafferty’s technique, and no basis for determining whether Lafferty’s “methods are consistent with the generally accepted method for gathering and evaluating evidence in the field of biomechanics and mechanical engineering as applied to occupant dynamics and restraint system efficacy in motor vehicle accidents.” *Id.* at 15. Because the court was “unable to determine what methodology or reasoning, if any, serves as the basis for Dr. Lafferty’s opinions,” and because “Lafferty offers nothing more than subjective belief and unsupported speculation,” his testimony was inadmissible under Rule 702. *Id.* at 15, 16, 18.

*Second*, the district court ruled that Lafferty’s testimony that Clark’s lap belt failed was inadmissible because it was “not helpful to the trier of fact.” NR 87:16; see Fed. R. Evid. 702. The court described as “problematic” the fact that

Dr. Lafferty assumes the very fact that Mr. Clark attempts to prove through his expert testimony: that the lap belt failed during the accident sequence. At his deposition, Dr. Lafferty testified that he was assuming that Mr. Clark’s lap belt unlatched during the accident sequence. He specifically testified that he did not address the question whether the lap belt became unlatched during the accident sequence. Because Dr. Lafferty *assumes the very fact to be true that his expert testimony is offered to prove*, his testimony is *not helpful to the trier of fact* in determining the same fact in issue.

NR 87:16 (emphasis added).

*Third*, the district court ruled that Lafferty’s testimony “regarding the relative lack of blood on the lap belt,” which Clark had offered “[i]n an effort to recover from Dr. Lafferty’s damaging testimony that [Lafferty] ha[d] assumed the lap belt became unlatched,” was inadmissible because it is both “unscientific speculation and not based

on any special skills [Lafferty] has acquired through education or experience.” NR 87:16-17. The court explained:

Nothing in the record suggests that Dr. Lafferty has the education or experience in chemistry or other similar fields so as to enable him to provide expert testimony as to whether any blood was present on the lap belt. Nor is his testimony regarding blood on the lap belt based on any scientific methodology or testing. Yet, an opinion whether there was any blood on the lap belt would appear to lend itself to verification by scientific methods and testing. In fact, Defendants’ expert, Richard E. Bisbing, has conducted tests of the webbing and buckle of the lap belt, *which confirmed the presence of blood on the buckle and belt.*

NR 87:17-18 (emphasis added). Because Lafferty’s proposed testimony concerning the lack of blood on the lap belt “concerns a field of science that is outside his area of expertise,” it “would not assist the trier of fact” and thus “is not admissible under Rule 702.” *Id.* at 18. For all three of these reasons, the district court granted defendants’ motion to strike Lafferty’s testimony.

Finally, the district court granted defendants’ motion for summary judgment. The court explained that to prevail on his claims, Clark “must prove that his lap belt was defective.” NR 87:24. In this case, this means that Clark “must prove that his lap belt unlatched during the accident sequence” — a point that Clark “does not dispute.” NR 87:23. “This he cannot do,” the district court reasoned, because “the undisputed fact witness testimony is that Mr. Clark’s lap belt was in place in the proper location across his lap” and “the opinion of Defendants’ expert, Dr. Harry Smith, that Mr. Clark’s lap belt remained latched during the accident sequence is uncontroverted.” NR 87:24. “The only evidence” that the lap belt became unlatched are “the opinions of Dr. Lafferty and Ms. Hodson’s statements, which have been excluded from consideration.” NR 87:24-25. “Because the statements of Dr. Lafferty and Ms. Hodson have been excluded,” the court held, “there is no evidence of a defect in the lap belt, and Mr. Clark cannot prevail on his claims against Defendants. Defendants, therefore, are entitled to summary judgment.”

*Id.* at 25. The court added that “[e]ven if” it were to consider Lafferty’s testimony, that testimony would in no way “contradict[] Dr. Smith’s opinion that Clark’s post-accident position was inconsistent with” the unlatching of the belt during the accident. *Ibid.*

### **SUMMARY OF ARGUMENT**

This is a case in which the district court properly exercised its “gatekeeping” function to prevent a meritless lawsuit from reaching a jury. On the critical question of whether the lap belt remained in place throughout the accident, the only eyewitness who recalled seeing the lap belt after the accident stated unequivocally that the belt was in its proper position across Clark’s lap. This eyewitness, moreover, was the first to arrive at the vehicle after the accident. In addition, defendants’ expert testified that the lap belt had not come unbuckled, pointing to the fact that Clark remained sitting upright in the driver’s seat following the “high energy” rollover (in contrast to the other two passengers, one of whom was wearing only a shoulder belt, who were ejected from the vehicle). Defendants’ expert also conducted simulated rollover tests involving the same model of the Honda Accord and another vehicle, and concluded on the basis of those tests and other scientific studies that Clark’s injury’s could have occurred even if the belt had remained fastened. In other words, plaintiff’s injury is no evidence, in and of itself, that the lap belt became unlatched.

In response to this powerful evidence that the lap belt had *not* come unbuckled and thus was not defective, plaintiff proffered the testimony of his own expert, James Lafferty, and made-for-summary-judgment affidavits of both Lafferty and Melissa Hodson, a fact witness. In a careful and thorough opinion, the district court concluded that Lafferty’s opinions should be stricken because they were based on an unreliable methodology and otherwise inadmissible, and that Hodson’s affidavit should be stricken because it contradicted her prior testimony under oath. These evidentiary rulings, which

are the principal subject of this appeal, easily pass this Court's deferential review for abuse of discretion. And absent this testimony, plaintiff raised no genuine factual issue concerning whether the lap belt unbuckled.

1. Ms. Hodson stated at her deposition that she could not recall "anything" about the lap belt. In response to defendants' summary judgment motion, however, she submitted an affidavit claiming to recall that the lap belt was not in place. This Court is highly skeptical of conflicting affidavits that surface in response to summary judgment motions. The district court's decision to strike Ms. Hodson's affidavit was not an abuse of discretion.

2. The only basis plaintiff's expert gave for concluding that the lap belt unbuckled was his "experience \* \* \* [t]hat's it." Lafferty performed no lap belt tests and relied on no scientific data. Such an *ipse dixit* does not satisfy the minimum threshold of methodological reliability. Lafferty's alternative theory that the belt must have unbuckled because there was more blood on the shoulder belt than on the lap belt is similarly devoid of any scientific support, as well as beyond Lafferty's expertise. And both of Lafferty's efforts to demonstrate a basis for his conclusion were at odds with his sworn deposition testimony that he "ha[d] no opinion" on whether the lap belt unlatched during the rollover accident. The district court did not abuse its discretion in striking Lafferty's opinions.

3. Absent the excluded testimony, Clark offered no evidence that would raise a genuine factual issue concerning whether his lap belt failed during the accident. In view of the powerful evidence (both eyewitness and expert) that the lap belt did *not* unbuckle during the accident, the photograph of the driver's seat following the accident, standing alone, was insufficient to raise a genuine factual issue on this score. That is especially true since the inference Clark suggests could be drawn from the photograph is refuted by the uncontradicted testimony of defendants' expert. In any event, Clark never argued

below that summary judgment was improper because of the photograph. The argument has accordingly been waived. The district court's grant of summary judgment should be affirmed.

## **ARGUMENT**

### **I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN STRIKING THE TESTIMONY OF HODSON OR LAFFERTY**

#### **A. It Was Not An Abuse Of Discretion To Strike Hodson's Affidavit**

“The purpose of summary judgment motions — ‘to weed out unfounded claims, specious denials, and sham defenses,’ — is served by a rule that prevents a party from creating issues of credibility by allowing one of its witnesses to contradict his own prior testimony.” *Adelman-Tremblay v. Jewel Cos., Inc.*, 859 F.2d 517, 521 (7th Cir. 1988). Courts are “highly critical of efforts to patch up a party’s deposition with his own subsequent affidavit” (*Russell v. Acme-Evans Co.*, 51 F.3d 64, 67 (7th Cir. 1995) (Posner, C.J.)), especially where (as here) those efforts crop up in the context of opposing summary judgment, because “such an affidavit is not difficult to produce,” *Bank of Illinois v. Allied Signal Safety Restraint Systems*, 75 F.3d 1162, 1173 (7th Cir. 1996) (Cudahy, J., concurring). “Inherently depositions carry an increased level of reliability” (*Darnell v. Target Stores*, 16 F.3d 174, 176 (7th Cir. 1994)) compared to affidavits; “[d]epositions are adversarial in nature” (*ibid.*), whereas affidavits are “drafted by the lawyers.” *Russell*, 51 F.3d at 67. Accordingly, “when a witness has contradicted directly his or her own earlier statements without explaining adequately the contradiction or without attempting to resolve the disparity,” the affidavit is properly disregarded. *Bank of Illinois*, 75 F.3d at 1168.

Applying these well-settled principles, the district court granted defendants’ motion to strike the made-for-summary-judgment affidavit of Melissa Hodson. It did so because “Hodson’s affidavit clearly contradicts her prior sworn testimony given in her deposition.” NR 87:6. This Court reviews a district court’s ruling on a motion to strike “for

abuse of discretion, giving the trial judge much deference.” *Buckner v. Sam’s Club, Inc.*, 75 F.3d 290, 292 (7th Cir. 1996). Because there was no abuse of discretion here, the district court’s evidentiary ruling should be affirmed.<sup>5/</sup>

1. Prior to defendants’ summary judgment motion, Ms. Hodson testified unequivocally that she did not “recall anything” about the lap belt:

“Q. Okay. Do you remember whether either of his safety belts — his shoulder belt and a lap belt in the car I’ll submit — whether they were buckled or engaged?

A. *The only one I positively recall was his shoulder belt.*  
\* \* \*

Q. What do you remember, if anything, about the lap belt?

A. *I don’t recall anything. I don’t recall actually cutting it or removing it.*

Q. You do recall unbuckling or unlatching the shoulder belt?

A. Correct.

Q. Would you remember unbuckling the lap belt if you had done so?

A. Yes.

\* \* \*

Q. If I understand your testimony correctly about the lap belt in the car, all you can say is that from the time that you arrived, which was 20 minutes or more after you received the call, you do not personally recall unlatching that lap belt?

A. *Correct.*

Q. You cannot say what others might or might not have done; is that true?

A. Correct, correct.”

NR 47:Tab 8 at 11-12, 29 (emphasis added). No fewer than three times, Hodson clearly and emphatically disclaimed recollection concerning Clark’s lap belt. Of the shoulder and lap belt, she said she could “only \* \* \* recall” the shoulder belt; she did not recall either

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<sup>5/</sup> Although Clark acknowledges (as he must) the highly deferential standard of review applicable to the district court’s evidentiary ruling (AOB 13), he goes on to suggest that this Court must engage in a “two step analysis” resembling *de novo* review which consists of (1) a “determin[ation] whether there is a discrepancy, in fact, between the Affidavit and the prior deposition testimony,” and (2) if so, a determination “whether such discrepancy creates only a ‘sham issue of fact’.” AOB 14. That is incorrect. The proper approach is for this Court to determine whether the trial court *abused its discretion* in (a) concluding that Hobson’s affidavit conflicts with or contradicts her deposition testimony, and (b) declining to permit the affidavit to be introduced in order to “clarify ambiguous or confusing deposition testimony.” *Adelman-Tremblay*, 859 F.2d at 520. See also *Buckner*, 75 F.3d at 293 (affirming decision to strike affidavits where district court “could have rationally” concluded that affidavit was effort to “undo (contradict) the effects of the deposition testimony”).

“cutting” or otherwise “removing [the lap belt]”; she did not “personally recall unlatching” the lap belt; indeed, she “d[id]n’t recall anything” about the lap belt. *Ibid.* More emphatic testimony by a witness that she has no memory of a particular object is frankly difficult to imagine.

Once it became clear, however, after the filing of defendants’ summary judgment motion, that the position of the lap belt was critical to plaintiff’s case, Clark’s lawyers procured a supplemental affidavit from Hodson in which she stated, equally emphatically: “I *did not* cut or otherwise release the lap belt from Mr. Clark.” NR 54:Exh. 2 at 1 (emphasis added). She also declared:

Had Mr. Clark’s lap belt been buckled about his waist, it would have been my responsibility to cut it in order to release it and *I did not cut or release such lap belt*. It is my belief *based on my memory* as well as my practice, custom and procedure, that *Mr. Clark’s lap belt was not attached around his waist at any time* from when I first arrived on the scene to and including his extraction from the automobile.

*Id.* at 2 (emphasis added).

The contradiction between the affidavit and the sworn deposition testimony is obvious. There is simply no way to reconcile Hodson’s deposition testimony (“I don’t recall actually cutting \* \* \* or removing” the lap belt) with her contrary assertions in her affidavit (“I did not cut or otherwise release the lap belt from Mr. Clark. \* \* \* I did not cut or release such lap belt.”). Nor is it possible to square Hodson’s deposition testimony that she did not remember whether Clark’s lap belt was “buckled or engaged” (“The only one I positively recall was his shoulder belt.”) with her later assertion (allegedly based in part on her “memory”) that the lap belt was “not attached around his waist at any time.” And as if that were not enough, it is impossible to reconcile Hodson’s sworn testimony during her deposition that she “*d[id]’t recall anything*” about the lap belt with her various purported recollections concerning the lap belt that are set forth in her affidavit. As the district court correctly concluded, “Ms. Hodson’s statement in her affidavit that ‘she did not cut or otherwise release the lap belt’ contradicts, and, if not contradicting is

at the least inconsistent with, her prior sworn deposition testimony that she did not recall actually cutting, removing, or unlatching the lap belt and did not recall anything about the lap belt.” NR 87:7. Clark’s contention that Hodson’s affidavit “does not contradict her deposition” (AOB 17) thus borders on the fanciful. In any event, the district court obviously did not abuse its discretion in concluding that the Hodson’s affidavit and deposition testimony were contradictory. NR 87:6.

Moreover, the district court correctly concluded (NR 87:6-7) that this case is indistinguishable from *Unterreiner v. Volkswagen of America, Inc.*, 8 F.3d 1206 (7th Cir. 1993), a case that Clark conspicuously fails even to cite. In *Unterreiner*, a plaintiff alleging age discrimination argued that he was entitled to equitable tolling of his claims because the company had not posted a required notice. In his deposition, the plaintiff “exhibited an almost complete lack of recollection of what was posted on the bulletin board.” *Id.* at 1210. In a subsequent affidavit, however, he stated that there was definitely no posted notice. This Court concluded that “[i]f the statements are not contradictory, the later statement is at least highly unlikely considering the earlier revelations concerning a lack of recall.” *Ibid.* In words that apply with equal force here, this Court explained: “A party cannot claim a lack of general knowledge about a subject matter and later make a statement which requires detailed knowledge about the same subject.” *Ibid.* Like the affidavit in *Unterreiner*, Hodson’s affidavit is at best “highly unlikely” in light of her prior lack of recall.

2. The district court similarly did not abuse its discretion in rejecting Clark’s argument that Hodson’s affidavit should not be stricken because it “clarifies ambiguous or confusing deposition testimony.” NR 87:7. Clark renews that argument in this Court, focusing on Hodson’s affirmative answer to the brief question, “Would you remember unbuckling the lap belt if you had done so?” NR 69:2. According to Clark, “[t]he fact that Ms. Hodson does not remember releasing Clayton’s lap belt *raises the inference that*

*such belt did not require releasing because it was already released.*” AOB 19 (emphasis added).<sup>6/</sup>

This argument fails for at least three reasons. First, as the district court correctly held, Hodson’s deposition testimony simply “does not create the ‘window’ for clarification and expansion that Mr. Clark contends it does.” NR 87:7-8. Hodson’s statement at her deposition that she would have remembered “unbuckling” the lap belt says nothing about what the other two EMTs did or might have done. At most, this testimony supports the limited inference that *Hodson* did not unbuckle Clark’s lap belt. Clark has failed to show how such an inference, when considered together with Hodson’s other, explicit deposition testimony, creates any ambiguity or confusion. Nor could Clark make such a showing. The inference that Hodson must not have unbuckled Clark’s lap belt does not render ambiguous her unequivocal testimony, repeated at several points in her deposition, that she had no actual memory of Clark’s lap belt (including whether he was wearing it).<sup>7/</sup>

Second, Hodson’s deposition answer does not “raise[] the inference” that Clark’s lap belt was “already released” at the time Clark’s car came to a stop. AOB 19. As just explained, the only possible inference that could be drawn from Hodson’s deposition answer is that *she* did not unbuckle Clark’s lap belt following the accident. But Hodson conceded in her deposition that she could not “say what others might or might not have

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<sup>6/</sup> Clark also suggests that the district court, in concluding that Hodson’s affidavit contradicted her deposition testimony, overlooked this testimony. AOB 18 (stating that the district court cited only “*part of Ms. Hodson’s deposition*” and “did not include the fact that Ms. Hodson testified in their deposition that had she removed the lap belt she would have recalled doing so”). Clark is mistaken. The district court repeatedly cited (and indeed quoted in full) this portion of Hodson’s testimony in the portion of its opinion that discussed why Hodson’s affidavit was contrary to her deposition. NR 87:5-6, 7-8.

<sup>7/</sup> Although Clark criticizes the district court for relying on “nuances” and “minor discrep[an]c[ies]” in wording in Hodson’s testimony (AOB 18-19), that argument, if true, would merely demonstrate that the district court was well within its broad discretion in concluding that there was no ambiguity in need of clarification in Hodson’s deposition answer.

done” in regard to unbuckling the lap belt. Thus, Hodson’s deposition testimony leaves open the possibility that someone else unbuckled the lap belt. In fact, this is precisely what defendants believe occurred and what the evidence supports. The EMT who was in the best position to unlatch Clark’s belt (which was latched on Clark’s right side to a buckle attached to the center console) was David Duncan, who had entered the car through the front passenger door (and who, with the assistance of the other EMTs, removed Clark through that door). NR 47:Tab 9 at 13; NR 47:Tab 10 at 27-28. At his deposition, Duncan agreed that his responsibility in this situation would have included “ensur[ing] that the seat belts that the patient was wearing were released,” but he could not recall whether he unbuckled Clark’s lap belt. NR 47:Tab 9 at 13. Clark is thus wrong to suggest that Hodson’s deposition answer “raises the inference” that Clark’s lap belt “was already released.” AOB 19.

Third, Hodson’s affidavit goes well beyond any conceivable ambiguity in her deposition testimony. It is simply impossible to reconcile Hodson’s deposition testimony that she “d[id]’t recall anything” about the lap belt (NR 47:Tab 8 at 11-12) and could “only \* \* \* positively recall” that Clark’s shoulder belt was in place (*id.* at 11) with her subsequent statement in her affidavit that she believed, based on her “memory,” that Clark’s “lap belt was *not* attached around his waist \* \* \* when I first arrived on the scene \* \* \* .” NR 54:Exh. 2 at 2 (emphasis added). Not only does this contradiction show that the true purpose of Hodson’s affidavit was to alter rather than to clarify her prior sworn testimony, but it also confirms that the district court did not abuse its discretion in ruling that Hodson’s affidavit should be stricken.<sup>8/</sup>

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<sup>8/</sup> Even if the district court should have allowed Clark to submit the portion of Hodson’s affidavit that made explicit the supposed inference drawn by Clark from Hodson’s deposition answer (*i.e.*, that Hodson did not unbuckle Clark’s lap belt) — an argument Clark did not raise in this Court or below — it is difficult to see how the failure to do so could constitute an abuse of discretion, especially given (1) the inclusion of statements in Hodson’s affidavit that went far beyond any clarifying function, and (2) Clark’s complete

In *Bank of Illinois v. Allied Signal Safety Restraint Systems*, 75 F.3d 1162 (7th Cir. 1996), this Court rejected a similar ploy. There, parents testified that because their son “customarily wore his seat belt,” they “believed” that he was wearing the belt on the day of the accident, *id.* at 1165, just as Hodson believed based on her “custom” that Clark’s belt was still in place. NR 54:Exh. 2 at 2. This Court rejected the argument that the parents’ testimony merely clarified a prior statement that their son’s belt was not in place, finding the conflict with the former testimony to be manifest. *Bank of Illinois*, 75 F.3d at 1171-172. The same is true here.

3. In an effort to minimize the appearance that Hodson’s affidavit was “little more than a desperate attempt to resuscitate” Clark’s case (*Adelman-Tremblay*, 859 F.2d at 521), Clark suggests that submission of Hodson’s affidavit was necessitated by defendants’ failure to include “in their Evidentiary Appendix” to their summary judgment motion the portion of Hodson’s deposition where she testified that she would “remember unbuckling the lap belt if she had done so.” AOB 16-17; see *id.* at 17 (“The part omitted \* \* \* was that she would have remembered unbuckling the lap belt had she done so.”). This explanation, which Clark did not see fit to offer in the trial court, suffers from two flaws. First, it makes no sense. If defendants had omitted important deposition testimony, that problem could have been remedied by supplying the missing testimony. There was no need to provide a new affidavit to supply the court with the existing deposition testimony. Second, and more fundamentally, Clark’s explanation rests on a false premise. Contrary to Clark’s assertion, this portion of Hodson’s testimony *was*

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failure to demonstrate to the district court that Hodson’s deposition testimony was in any way ambiguous. NR 54; NR 87:8. In any event, if the district court had permitted this portion of Hodson’s affidavit, it would not have changed the outcome of defendants’ motion for summary judgment. The fact that Hodson did not unbuckle the lap belt does not raise a genuine issue of fact concerning whether the belt became unbuckled during the accident.

*included* in the Evidentiary Appendix submitted by defendants in support of their motion for summary judgment. NR 47:Tab 8 at 12. This explanation is thus no less a sham than was the Hodson affidavit.<sup>9/</sup>

**B. It Was Not An Abuse of Discretion To Strike Lafferty's Unreliable Opinions**

“Trial judges enjoy wide latitude and discretion when determining whether to admit expert testimony.” *Wintz v. Northrop Corp.*, 110 F.3d 508, 512 (7th Cir. 1997). “The primary locus of this obligation is Rule 702” of the Federal Rules of Evidence, *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993), which provides that “[i]f scientific \* \* \* knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” Fed. R. Evid. 702. Faced with a proffer of expert testimony, a district court, under Rule 104(a) of the Federal Rules of Evidence, is required, before allowing the testimony to be admitted, to make “a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.” *Daubert*, 509 U.S. at 592-93.<sup>10/</sup> Appellate review of a trial court’s decision to exclude expert testimony

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<sup>9/</sup> It is true that in response to defendants’ motion to strike Hodson’s testimony, which was filed on November 7, 1997, Clark filed a response accusing defendants of selectively omitting the relevant passage from Hodson’s deposition testimony. See NR 69 (Nov. 19, 1997). But that could hardly provide a reason for submitting the Hodson affidavit *two weeks earlier*, on October 24, 1997, in support of Clark’s opposition to the motion for summary judgment. See NR 54. Defendants’ Evidentiary Appendix in support of their motion for summary judgment, which included the relevant Hodson testimony, was filed on October 16, 1997. NR 47.

<sup>10/</sup> At several points in his brief, Clark suggests, incorrectly, that the word “preliminary” in the phrase “preliminary assessment” signifies a cursory (or less than exacting) inquiry into admissibility on the part of the district court. See AOB 25 (“All that *Daubert* demands is a ‘preliminary assessment’ of whether the testimony is scientific.”); *id.* at 29 (trial court need only make a “preliminary” assessment). The inquiry

is for “abuse of discretion,” the “hallmark” of which is “deference.” *General Elec. Co. v. Joiner*, 118 S. Ct. 512, 517 (1997) (citing *Koon v. United States*, 518 U.S. 81, 98 (1996)).<sup>11/</sup>

The Court in *Daubert* set forth a nonexhaustive list of four factors that are useful in gauging the reliability of expert testimony. First, “[o]rdinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested.” *Daubert*, 509 U.S. at 593. “Another pertinent consideration,” the Court explained, “is whether the theory or technique has been subjected to peer review and publication.” 509 U.S. at 593. A third factor is “the known or potential rate of error” and “the existence and maintenance of standards controlling the technique’s operation.” *Id.* at 594. And a fourth factor is the extent to which the methodology or technique employed by an expert is generally accepted in the relevant scientific community. *Ibid.* In evaluating the reliability of proposed expert testimony under Rule 702, district courts in this circuit

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required under Rule 104(a) is “preliminary” only in the sense that it must occur before the evidence is admitted. See Fed. R. Evid. 104(a) (governing “[p]reliminary questions concerning the qualification of a \* \* \* witness, the existence of a privilege, or the admissibility of evidence”). Nor does this Circuit regard the *Daubert* inquiry into admissibility as anything less than stringent, as the cases cited in Clark’s own brief amply demonstrate.

<sup>11/</sup> Although Clark acknowledges this deferential standard of review (AOB 24), he also states that this Court must “undertake[] a de novo review of whether the [district court] properly followed the *Daubert* framework.” *Ibid.* The Supreme Court in *Joiner*, however, squarely rejected the argument that an appellate court should apply *de novo* review to a district court’s application of the *Daubert* factors to the testimony of a particular expert. Cf. also *DePaepe v. General Motors Corp.*, 141 F.3d 715, 719 (7th Cir. 1998) (dicta). Although prior to *Joiner*, several circuits applied *de novo* review to the question whether *Daubert* is *completely inapplicable* to a particular category of expert testimony, Clark has not made such an argument in this Court, having abandoned the argument he pressed below that *Daubert* and its factors of reliability have no application where an expert eschews rigorous methodology altogether and purports to rely on “experience” or “training.” (In any event, the district court correctly rejected that argument (NR 87:11-16) as contrary to the law of the Seventh Circuit.)

ordinarily engage in a searching inquiry into whether the expert's methodology satisfies the *Daubert* factors of evidentiary reliability. This is no less true in product liability actions where the proposed expert is an engineer who offers to testify about an alleged defect in a product's design or manufacture. See, e.g., *Cummins v. Lyle Indus.*, 93 F.3d 362, 367-368 (7th Cir. 1996); *Deimer v. Cincinnati Sub-Zero Prods., Inc.*, 58 F.3d 341, 344-345 (7th Cir. 1995); see also *Tyus v. Urban Search Management*, 102 F.3d 256, 263 (7th Cir. 1996), cert. denied, 117 S. Ct. 2409 (1997).

The *Daubert* factors also apply with equal force in cases where an expert eschews reliance on any rigorous methodology and purports to base his opinion on "experience" or "training." See, e.g., *Cummins*, 93 F.3d at 368 n.2; note 4, *supra*.<sup>12/</sup> "[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert." *Joiner*, 118 S. Ct. at 519. Instead, a district court is required to rule out "'subjective belief or unsupported speculation'" by considering "whether the testimony has been subjected to the scientific method." *Wintz*, 110 F.3d at 512. Either "hands-on testing" or "review of experimental, statistical, or other scientific data generated by others in the field" may suffice. *Cummins*, 93 F.3d at 368.

Applying these settled principles of Seventh Circuit law, the district court granted defendants' motion to strike the opinions of James Lafferty concerning two subjects: (1) whether Clark's lap belt became unbuckled during the accident; and (2) whether the lap belt had blood on it (and, if not, the significance of the absence of blood). As we next

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<sup>12/</sup> Indeed, "it seems exactly backwards that experts who purport to rely on general engineering principles and practical experience might escape screening by the district court simply by stating that their conclusions were not reached by any particular method or technique. The moral of this approach would be, the less factual support for an expert's opinion, the better." *Watkins v. Telsmith, Inc.* 121 F.3d 984, 991 (5th Cir. 1997).

explain, the district court did not abuse its discretion in striking Lafferty's "expert" opinions on these subjects.<sup>13/</sup>

**1. Lafferty's Opinion That The Lap Belt Failed.** The two-page expert report of James Lafferty, Ph.D., stated that "[i]f Mr. Clark's lap belt had functioned properly, he would have been restrained from impacting the roof of the Honda \* \* \* ."

NR 54:Exh. 1. Lafferty's report gave the following explanation:

From measurements made of Mr. Clark, I understand that his seated height is approximately 32 inches. The distance from the bottom seat cushion of the driver's seat of the Honda to the top of the head rest (restraint) is 32 inches. Thus, he had about four inches of clearance between the top of his head and the crushed roof of the car. A lap belt, therefore, would have prevented his neck injury.

NR 54:Exh. 1A.

At his deposition, however, Lafferty was asked "[w]hat evidence" he had to show "that the lap belt did, in fact, unlatch during the accident sequence," and he testified that he was *assuming* the lap belt had become unlatched and had no opinion on that subject:

Q. In other words, you are assuming, based upon the facts that have been presented to you, that the lap belt unlatched and did not restrain him during the accident sequence; is that correct?

A. That's correct, sir.

Q. What evidence do you have available to you that the lap belt did, in fact, unlatch during the accident sequence?

A. I didn't address that question. I haven't considered it, so I have no opinion on that.

Q. You have been asked to assume that, then?

A. Yes, sir.

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<sup>13/</sup> The district court correctly focussed on Lafferty's opinions relevant to defendants' summary judgment motion. Lafferty did offer certain opinions, such as that Clark's injury was caused by his head hitting the roof of the car, that are within his expertise and that defendants do not dispute. "The problem is that the expert didn't stop there." *Navarro v. Fuji Heavy Indus., Ltd.*, 117 F.3d 1027, 1031 (7th Cir.) (affirming district court decision to exclude portion of affidavit critical to opposing summary judgment motion), cert. denied, 118 S. Ct. 600 (1997). Much of Clark's brief is devoted to showing that Lafferty was *qualified* to testify as an expert, an issue that is not in dispute and is not raised in this appeal. See AOB 19-20, 24, 26-27.

- Q. But you cannot independently verify that?  
A. Oh, I might, but I haven't tried to.

NR 61:Tab 1 at 80. Later in his deposition, in response to the request that he explain the “basis for saying that a properly functioning belt would [have kept Clark] from reaching the roof rail,” Lafferty summarily replied, “[t]he lap belt would hold him down.” *Id.* at 123. When pressed, Lafferty offered the following testimony:

- Q. And what testing or data base do you rely upon in offering that opinion.  
A. *My experience.*  
Q. Is that it?  
A. *That's it.*

*Ibid.* (emphasis added).

The district court gave two independent grounds for striking the foregoing testimony. *First*, it reasoned that Lafferty's opinion was inadmissible because it was “not helpful to the trier of fact.” NR 87:16; see Fed. R. Evid. 702. The court saw as “problematic” the fact that

Dr. Lafferty assumes the very fact that Mr. Clark attempts to prove through his expert testimony: that the lap belt failed during the accident sequence. At his deposition, Dr. Lafferty testified that he was assuming that Mr. Clark's lap belt unlatched during the accident sequence. He specifically testified that he did not address the question whether the lap belt became unlatched during the accident sequence. Because Dr. Lafferty assumes the very fact to be true that his expert testimony is offered to prove, his testimony is not helpful to the trier of fact in determining the same fact in issue.

NR 87:16. *Second*, the district court concluded that “on the basis of the record before it” it was unable to determine whether the “reasoning or methodology underlying Dr. Lafferty's proffered testimony” is either “scientifically valid” or “properly \* \* \* applied to this case.” NR 87:16. “The record does not establish,” the court explained, that Lafferty's “proffered expert testimony adheres to the same standards of intellectual rigor that are demanded in his professional work in the field of biomechanics and engineering.” *Ibid.* There was “no indication in the record that the bases for Dr. Lafferty's opinions were subjected to any kind of peer review or publication,” no basis on which to “consider

the error rate” of Lafferty’s technique, and no basis for determining whether Lafferty’s “methods are consistent with the generally accepted method for gathering and evaluating evidence in the field of biomechanics and mechanical engineering as applied to occupant dynamics and restraint system efficacy in motor vehicle accidents.” *Id.* at 15. Because the court was “unable to determine what methodology or reasoning, if any, serves as the basis for Dr. Lafferty’s opinions,” and because “Lafferty offers nothing more than subjective belief and unsupported speculation,” his testimony was “not based on a reliable methodology” and thus was inadmissible under Rule 702. *Id.* at 15, 16, 18.

Clark offers virtually no answer to the district court’s first rationale — that Lafferty’s opinion about whether Clark’s belt came unlatched was “not helpful to the trier of fact” (NR 87:16; see Fed. R. Evid. 702), because Lafferty had elsewhere admitted under oath that he “didn’t address that question,” “ha[d]n’t considered it,” and “ha[d] no opinion on that.” NR 47:Tab 11 at 80. Clark implies that the district court, in stating that Lafferty “was assuming” that Clark’s “unlatched during the accident sequence,” misunderstood Lafferty’s testimony. NR 87:16; AOB 22 (emphasis omitted). Thus, Clark repeatedly underscores the phrase “during the accident sequence” in an effort to suggest that Lafferty’s assumption was of limited scope (limited, that is, to whether the belt became unlatched during, rather than before or after, the accident). AOB 22, 28. This argument fails for several reasons. First, it is nonsensical. According to the undisputed testimony of Clark himself, he fastened his lap belt prior to the accident. And whether the belt unbuckled *after* the accident is plainly irrelevant to liability here. Thus, the only pertinent question is whether the lap belt failed *during the accident*. Lafferty’s emphatic testimony, however, was that he “ha[d] no opinion” on that question.

Second, Clark did not argue in the district court that Lafferty’s express disclaimer of any opinion concerning whether the belt became unbuckled was limited to unbuckling “during the accident sequence” (or that such a limitation was pertinent to the admissibility question). In requesting summary judgment, defendants contended that “Dr. James

Lafferty has simply been told to assume that the lap belt unbuckled during the accident” and has “no independent opinion that the lap belt did, in fact, unlatch during the accident sequence.” NR 45:9. In response, Clark merely pointed to other testimony of Lafferty that contradicted these sworn statements by offering an opinion that the lap belt did come unbuckled. See NR 54, 68. Clark did not suggest that there was no contradiction in Lafferty’s testimony, or that Lafferty’s statements were limited to unbuckling “during the accident sequence.” As this argument was never raised below, it has been waived. *Huntzinger v. Hastings Mut. Ins. Co.*, No. 96-4163, 1998 WL 205240, at \*4 (7th Cir. April 28, 1998) (explaining that it is “axiomatic that an issue not first presented to the district court may not be raised before the appellate court as a ground for reversal”), quoting *Christmas v. Sanders*, 759 F.2d 1284, 1291 (7th Cir. 1985).

Because Clark offers no plausible basis for upsetting the district court determination that Lafferty’s testimony was not sufficiently “helpful to the trier of fact” to be admissible (NR 87:16; see Fed. R. Evid. 702), there is no need to consider whether the district court’s second rationale would survive review for abuse of discretion. But, in any event, the second rationale is unassailable, as we next explain.

The district court did not abuse its discretion in concluding that Lafferty’s opinion concerning the lap belt should be stricken because it was not based on a reliable methodology under *Daubert*. Lafferty’s principal theory was that the seat belt must have unbuckled because it permitted at least four inches of movement. In his report, Lafferty opined that “if Mr. Clark’s lap belt had functioned properly, he would have been restrained from impacting the roof of the Honda and he would have had no serious injury in this accident.” NR 87:9. He explained:

From measurements made of Mr. Clark, I understand that his seated height is approximately 32 inches. The distance from the bottom seat cushion of the driver's seat of the Honda to the top of the head rest (restraint) is 32 inches. Thus, *he had about four inches of clearance between the top of his head and the crushed roof the car. A lap belt, therefore, would have prevented his neck injury.*

NR 54:Exh. 1A at 2 (emphasis added). Lafferty's critical point was that a well functioning lap belt would have allowed less than four inches of movement.

The district court rejected this "four inches of movement" rationale because "it does not appear that Dr. Lafferty's opinions have been subjected to the scientific method." NR 87:15. Lafferty conducted no tests to determine the forces acting on the lap belt in this accident. NR 61:Tab 1 at 133, 137, 138. He could not identify any literature which supported his belief that a lap belt would have stopped Clark from hitting the roof. *Id.* at 133, 134 ("I don't think that's ever been measured."). Instead, he based this critical opinion on his "experience":

- Q. What is your basis for saying that a properly functioning belt would keep him from reaching the roof rail?
- A. The lap belt would hold him down.
- Q. And what testing or data base do you rely upon in offering that opinion?
- A. My experience.
- Q. Is that it?
- A. That's it.

*Id.* at 123. Not surprisingly, the district court was "unable to determine what methodology or reasoning, if any, serves as the basis for Dr. Lafferty's opinions." NR 87:15.

With respect to whether Lafferty's opinion passed muster under the *Daubert* reliability factors, this case is not even close. Clark does not maintain that Lafferty's testimony satisfies even a single *Daubert* factor. Instead, he suggests that because Lafferty invoked his "experience," and because he examined the Honda, the buckle, and Clark's medical records, his opinion that the lap belt came unbuckled during the accident

was based on a reliable methodology. That argument simply cannot be squared with *Daubert* or with this Court's cases.<sup>14/</sup>

On appeal, Clark attempts to shore up Lafferty's methodology:

Based upon his measurements, Dr. Lafferty determined \* \* \* that Clayton Clark had 4 inches of clearance between the top of his head and the crushed roof of the car. In his deposition Dr. Lafferty stated that a lap belt *should allow a restrained driver to leave the seat by no more than 2 inches*. Thus, he concluded that, had Clayton been restrained by his lap belt, he would have had approximately two inches of clearance before his head would even begin to impact the roof of the Honda automobile.

AOB at 27 (emphasis added). This "2 inches of movement" rationale is nowhere in Lafferty's report, nowhere in his "clarifying affidavit," and nowhere in plaintiff's opposition to summary judgment. As plaintiff failed to make this argument below, he cannot press it here. *Huntzinger*, 1998 WL 205240, at \*4.

In any event, the "two inches" rationale is also unsupported by any scientific or reliable methodology. Lafferty did no testing to arrive at the two-inch figure. NR 61:Tab 1 at 133. He claimed that others had tested the amount of give in a lap belt, but then stated "I don't think that's ever been measured" and, predictably, could not identify any

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<sup>14/</sup> Indeed, Lafferty's methodology would not pass muster even in those circuits that do not apply any of the *Daubert* factors to engineering testimony. Although Clark suggests that Lafferty "relied upon" several "peer reviewed" articles cited in his two-page expert report (AOB 19-20, 29; see NR 54:Exh. 1A)) — a claim he did not make below (see NR 54; NR 68:2) — in fact there is no evidence that the articles cited in Lafferty's report were peer reviewed. More importantly, Lafferty himself testified that in formulating his opinion he did "nothing more than inspect the vehicle and make the measurements that I made and review documents, primarily the medical records." NR 61:Tab 1 at 53; NR 62:4-6. He later testified that he was relying solely on his "experience." NR 61:Tab 1 at 123. Thus, Lafferty expressly admitted that he did not rely on the articles. In fact, Lafferty did not even take the trouble to read any of the depositions in the case. *Id.* at 53. He had no idea even "in which direction" Mr. Clark "would \* \* \* move" as the car began to roll, explaining lamely, "I haven't looked at that." *Id.* at 123. And he had "no [opinion]" about the "forces that this lap belt and buckle experienced in this accident." *Id.* at 137-138. As this Court has recognized, "[a] conclusion without any support is not one based on expert knowledge and entitled to the dignity of evidence." *Navarro v. Fuji Heavy Indus., Ltd.*, 117 F.3d 1027, 1031 (7th Cir.), cert. denied, 118 S. Ct. 600 (1997). That principle required the exclusion of Lafferty's testimony.

studies. *Id.* at 133-34. Plaintiff's effort to recharacterize this expert opinion as one based "on the natural laws of physics and mathematics," indeed on principles so obvious that a judge could take judicial notice of them under Federal Rule of Evidence 201, AOB at 29, is ludicrous. Cf. *DePaepe*, 141 F.3d at 720 (rejecting argument based on "a lawyer's sense of how science should be done" because "[t]hat way quackery lies").

Clark asserts in his brief that Lafferty's slipshod and unscientific method "are of the type generally used and rendered by experts such as himself." AOB 28; see also *ibid.* (stating that Lafferty conducted "the same examinations and tests and inquiries any biomechanical engineer relies on daily in the normal practice in the field of biomechanical engineering"). These assertions are incorrect and, in any event, unsupported by this record. On the contrary, the record amply demonstrates the unscientific and dubious nature of Lafferty's methodology.

The methodology of defendants' expert, Harry Smith, illustrates how biomechanical experts do, and should, determine whether an occupant's head would have hit the roof with a properly functioning lap belt. Smith concluded that "[a]lthough restrained by both lap and shoulder belts throughout the accident sequence, Mr. Clark impacted the side roof rail area with the top of his head above and lateral to his seated position most likely during the first roll of the accident sequence." NR 47:Tab 3 at 6. To reach that conclusion, Smith conducted three "surrogate driver and exemplar vehicle" analyses, two involving a Honda Accord similar to the accident vehicle and one involving a Volvo 940 Turbo. *Ibid.* Two of these three tests were "spit analys[e]s" in which the Honda and Volvo, after being drained of fluids, were mounted on a device resembling an enormous "rotisserie spit" and then rotated in a test of how a driver (of the same approximate height and weight as Clark) would have moved during the rollover. *Ibid.*; NR 61:Tab 2 at 27, 29. Smith analyzed the movements of the surrogate driver secured in the driver's seat by both shoulder and lap belts (as reflected in photographs and films

taken of the test) and concluded that “even when properly restrained \* \* \* the driver will come in contact with the roof rail as well as roof under static conditions with ample additional distance through which to flex the neck and produce the same or similar injury.” NR 47:Tab 3 at 5, 7. Moreover, Smith explained that in “a dynamic situation” as was involved in the actual accident (where the vehicle at full speed actually impacts the ground during the rollover), the movement of “the restrained driver” off the seat will be even greater. *Ibid.* Smith also relied on a variety of other empirical data in reaching this conclusion.<sup>15/</sup> On this record, the district court’s decision to strike Lafferty’s lap belt testimony plainly was not an abuse of discretion.<sup>16/</sup>

**2. Lafferty’s Opinion Concerning The Absence Of Blood On The Lap Belt And Its Significance.** Lafferty’s affidavit, submitted in response to defendants’ summary judgment motion, offered an alternative but no more reliable basis for his conclusion that the belt must have unbuckled. At his deposition, Lafferty had stated:

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<sup>15/</sup> Smith explained that his conclusions about Clark’s likely impact with the side roof rail during the accident sequence found additional support in accident data collected through the National Accident Sampling System (NASS), in other “published data” found in Society of Automotive Engineer (SAE) monographs, and in the so-called “Malibu I and II” tests, which were “benchmark tests which show the gross kinematics of bodies when a vehicle undergoes basically barrel rollovers both in unrestrained as well as restrained configurations.” NR 61:Tab 2 at 22-25; NR 47:Tab 3 at 2, 5.

<sup>16/</sup> Smith also explained that the accident, which involved “three or four” rollovers of the vehicle as it tumbled down the embankment, was of “sufficiently high energy” that “if Mr. Clark had not been properly restrained with both lap belt and shoulder harness he would have fared the same ejection outcome as his passengers who were not restrained (Brogdon) or only shoulder harness restrained (Borders).” NR 47:Tab 3 at 6. Smith testified as well that if the lap belt had released, Clark would not have retained a relatively normal driving position after the car came to a stop. *Ibid.* (Clark’s “final position at rest in the driver’s seat is inconsistent with just shoulder belt usage”). Because Clark was not ejected from the car and had remained in a relatively normal driving position, Smith concluded that the lap belt did not unbuckle. This evidence was uncontradicted.

- A. *He was not restrained. There was no blood on that lap belt. And there certainly would have been if he had had it on. If the belt was still bucked at the time of the accident, there would have been strong evidence of it. That was not there.*
- Q. And what's your basis for saying that?
- A. I examined the belt. *There's no blood on it. \* \* \**

NR 54:Exh. 3 (emphasis added). Subsequently, defendants' expert, Richard E. Bisbing, inspected the belt with a stereomicroscope and conducted a battery of sophisticated chemical tests on it. NR 61:Tab 3; NR 60:14. He concluded:

Blood was confirmed by all tests on the inside of the driver's side lab belt buckle housing. Blood was also detected on the driver's side buckle mechanism frame, lock plate, sliding metal surface (interface) of the latch, on the plastic portion of the driver's side lap belt tongue latch plate, on the edge of webbing loop near driver's side lab belt tongue, and on the driver's side shoulder belt webbing.

NR 61:Tab 3 at 7. Faced with this evidence, Lafferty modified his testimony in an affidavit filed by Clark along with Clark's opposition to the motion for summary judgment. Lafferty's affidavit stated:

Also it is my opinion that the *relative* lack of blood on the lap belt in comparison to the blood on the shoulder harness and the seat is inconsistent with the lap belt being bucked during and after the accident.

NR 54:Exh. 1 at 2 (emphasis added). According to Lafferty, his visual assessment concerning the presence of blood on the seat belt could scientifically establish that the lap belt had not remained in place.<sup>17/</sup>

The district court ruled that Lafferty's testimony "regarding the relative lack of blood on the lap belt," which Clark had offered "[i]n an effort to recover from Dr. Lafferty's damaging testimony that he ha[d] assumed the lap belt became unlatched," was inadmissible because it is "unscientific speculation and not based on any special skills

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<sup>17/</sup> On appeal, Clark repeats Lafferty's initial error of stating unqualified opinions. According to Clark's brief, "[i]t is physically impossible for blood to cover the shoulder harness and seat to the extent depicted in the photograph and not also saturate the lap belt had Clayton been wearing it after the accident." AOB 31. As the expert testimony of defendants' expert Smith shows, this assertion is manifestly untrue. See page 36, *infra*.

[Lafferty] has acquired through education or experience.” NR 87:16-17. The district court explained:

Nothing in the record suggests that Dr. Lafferty has the education or experience in chemistry or other similar fields so as to enable him to provide expert testimony as to whether any blood was present on the lap belt. Nor is his testimony regarding blood on the lap belt based on any scientific methodology or testing. Yet, an opinion whether there was any blood on the lap belt would appear to lend itself to verification by scientific methods and testing. In fact, Defendants’ expert, Richard E. Bisbing, has conducted tests of the webbing and buckle of the lap belt, *which confirmed the presence of blood on the buckle and belt.*

NR 87:17-18 (emphasis added). Because Lafferty’s proposed testimony concerning the lack of blood on the lap belt “concerns a field of science that is outside his area of expertise,” it “would not assist the trier of fact” and thus “is not admissible under Rule 702.” NR 87:18. Accordingly, the district court ordered this testimony stricken as well.

The district court did not abuse its discretion in making this evidentiary ruling. Lafferty is not a chemist, and his qualifications as an engineer do not permit him to opine on the presence of blood on the lap belt and buckle. Indeed, Lafferty’s sworn testimony concerning the purported absence of blood turned out to be false (as demonstrated by the testimony of defendants’ qualified expert, Bisbing). Nor was Lafferty’s (revised) opinion in his made-for-summary-judgment affidavit — that the difference in blood on the lap belt and shoulder belt showed that the lap belt had become unlatched during the accident — based on any reliable scientific methodology. On the contrary, it rests on a number of unarticulated and unproven assumptions, such as the assumption that Clark’s lap belt was not covered or protected (for example, by a garment), and the assumption that blood from Clark’s head would have flowed over the shoulder belt and down to his lap rather than laterally along the shoulder belt.

Even if Lafferty’s expertise permitted him to present any opinion on this subject (it did not), his opinion was inadmissible under *Daubert*. Lafferty’s opinion that a lap belt would have a lot of blood in this type of accident lends itself to testing by the

scientific method (see *Cummins*, 96 F.3d at 368), yet Lafferty conducted no tests. Nor did he demonstrate reliability under any of the other *Daubert* factors. In stark contrast to Lafferty's untested assertions, defendants offered the expert testimony of Smith, who conducted a "simulation" (NR 61:Tab 2 at 61) in which he demonstrated that under the circumstances of the accident "blood emanating from [the] head will fall onto [Clark's] clothing, *will track via the shoulder harness towards the shoulder harness retractor* and even spill into the buckle of the lap belt *without blood reaching the lap belt itself.*" NR 47:Tab 3 at 7 (emphasis added). Thus, defendants' expert conducted scientific tests that *disproved* Lafferty's unfounded opinion. Because Lafferty's "testimony would not assist the trier of fact in understanding \* \* \* whether the lap belt came unlatched," the district court did not abuse its discretion in excluding it. NR 87:17-18.

The district court's decision to strike this opinion of Lafferty should also be upheld because of Lafferty's prior sworn statement that he was merely assuming that the lap belt became unlatched and had no opinion on this topic. Lafferty's attempt to proffer just such an opinion based on the disparity of blood on the lap and shoulder belts is flatly inconsistent with that sworn statement. For that reason as well, the district court's evidentiary ruling was not an abuse of discretion.

Finally, we note that Clark's primary case, *Pries v. Honda Motor Co.*, 31 F.3d 543 (7th Cir. 1994) (discussed at AOB 31-32), confirms the correctness of the district court's ruling. In *Pries*, as here, plaintiff's expert concluded that "the latch opened during the accident." 31 F.3d at 545. As here, the expert had conducted no tests and could not explain "what forces had brought this about." *Ibid.* This Court found that "[e]vidence of this kind is not scientific and does not satisfy Fed. R. Evid. 702." *Ibid.* (citing *Daubert*, 509 U.S. 579). So too, Lafferty's untested conclusion that the lap belt unbuckled is not science and was properly excluded.

## II. THE DISTRICT COURT CORRECTLY GRANTED DEFENDANTS' SUMMARY JUDGMENT MOTION

Once the testimony of Lafferty and Hodson is excluded, there is simply no genuine issue of material fact raised by this record concerning whether Clark's lap belt became unbuckled during the accident. As explained above (at page 3, *supra*), Clark himself testified that the lap belt was buckled before the accident. Jesse Froggett, the only eyewitness who recalled seeing Clark's lap belt following the accident, testified *unequivocally* that the lap belt remained in its proper position across Clark's waist.<sup>18/</sup> Froggett's testimony is all the more compelling because it was against his own interest (since it ruled out as a possible cause of Clark's injuries any defect in the lap belt, and thus left Froggett himself more vulnerable to a negligence claim). Moreover, defendants' expert, Harry Smith, offered uncontradicted testimony that Clark's position and placement in the driver's seat after the accident was proof that the lap belt had (as Froggett testified) remained in place throughout the accident. Smith explained, again without contradiction, that if Clark's lap belt had not been in place, he would have suffered the same outcome — ejection from the vehicle — as did his passengers who

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<sup>18/</sup> Clark suggests (AOB 6, 11) that Froggett's testimony was somehow qualified or ambiguous because he used the word "appeared" in the following exchange:

Q. Now, a seat belt has two portions, it has a shoulder portion that goes across the chest and a lap portion, a lap belt. Were both of these belts in place?

A. *They appeared to be.*

NR 47:Tab 5 at 19 (emphasis added). Far from signifying any doubt, the word "appeared" here is merely descriptive; it conveys Froggett's recollection that, *from all appearances*, the lap belt and shoulder belt were in their proper locations. In any event, the testimony of Froggett both before and after the snippet seized upon by Clark makes perfectly clear that that testimony is unambiguous. See note 2, *supra*; NR 47:Tab 5 at 19-20 ("Q. When you looked in the car with the flashlight, could you see if he was wearing a seat belt? A. *Yes.* \* \* \* Q. And was he? A. *Yes.* Q. And you were able to observe that with a flashlight? A. *Yes.* \* \* \* Q. But from what you could see, it looked like it was in the proper location across his lap? A. *It was across his lap, yes.*") (emphasis added).

were not wearing their lap belts. Smith also testified that Clark would not have remained squarely in the driver's seat following the four rollovers he endured if he had not been secured by his seat belt. And Smith determined, based on repeated simulations of the rollover, that Clark's injuries were entirely consistent with the lap belt remaining in place.

In the face of this overwhelming evidence that the lap belt remained buckled throughout the accident, Clark urges this Court to reverse the summary judgment in defendants' favor on the strength of a post-accident photograph of the Honda's driver's seat. Clark maintains that this photograph "submitted to the trial court" (AOB at 30) created a genuine dispute that the lap belt unbuckled. He states that the photograph "clearly and unmistakably shows that the lap belt has little if any blood on it while the shoulder restraint and seat itself are covered in blood." *Ibid.* According to Clark, "[i]t is physically impossible for blood to cover the shoulder harness and seat to the extent depicted in the photograph and not also saturate the lap belt had Clayton been wearing it after the accident." AOB 31. He argues that a "lay juror \* \* \* could observe that the relative lack of blood on the lap belt stands sharply in contrast to the saturation of the shoulder belt and seats" and "could draw the simple inference that the lap belt retracted and was not attached during the accident sequence." AOB at 32.

This argument fails for at least two reasons. First, Clark's pleadings never once drew the district court's attention to this supposedly critical photograph. Although Clark submitted the photograph as an exhibit to Lafferty's testimony, that testimony (and photograph) were offered only to support Lafferty's expert opinion. NR 68, 70. Clark never argued that the photograph had any relevance independent from Lafferty's testimony. See NR 54. As the district court correctly noted, the stricken testimony of Lafferty and Hodson was the "*only* evidence that Mr. Clark has presented to prove that his lap belt released during the accident sequence \* \* \* ." NR 87:24-25 (emphasis

added). Clark may not for the first time on appeal contend that the photograph, standing alone, should defeat summary judgment. Because it was never raised below, that argument has been waived. *Hunzinger*, 1998 WL 205240 at \*4.

Second, the photograph, standing alone, is insufficient to defeat summary judgment by raising a genuine issue of material fact concerning whether the lap belt became unbuckled. As just explained, the testimony — both eyewitness and expert — that Clark’s lap belt remained in place was overwhelming. Froggett testified that the lap belt was “across [Clark’s] lap” (NR 47:Tab 5 at 20), and he was the only eyewitness who recalled seeing the belt. Smith also testified that the lap belt did not come unbuckled. In addition, Smith and Bisbing testified that there *was* blood on the lap belt and that the larger amount on the shoulder belt was likely caused by the blood tracking along the shoulder belt rather than flowing over it and into Clark’s lap. This expert testimony was undisputed. Thus, the inference Clark suggests the jury could draw from the photograph alone (that the lap belt must have unbuckled) was refuted by uncontradicted expert and eyewitness testimony. Under these circumstances, the photograph alone could not forestall summary judgment in defendants’ favor.<sup>19/</sup>

Nor can Clark draw any support from *Pries v. Honda Motor Co.*, 31 F.3d 543 (7th Cir. 1994). There, plaintiff’s expert in industrial design testified that a seat belt bore signs of stress consistent with use during an accident. *Id.* at 544. This Court noted that accidents “leave telltale signs in physical objects, signs that can be read by people who know what to look for and have the right instruments.” *Ibid.* That testimony, based on admissible expert opinion, was sufficient to create a disputed issue as to the use of the belt. Here, unlike in *Pries*, the proffered expert opinion was *not* admissible (and was

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<sup>19/</sup> As for Clark’s retraction theory (AOB 7), that too is squarely at odds with Froggett’s uncontradicted testimony that the lap belt remained in place (*i.e.*, did not retract) after the accident.

properly excluded). As Smith's tests illustrates, a lay juror seeking to infer belt use from blood dispersal would not "know what to look for" and lacks the "right instruments." *Pries* cannot aid plaintiff.

The relevant case law squarely supports the trial court's grant of summary judgment. In *Whitted v. General Motors Corp.*, 58 F.3d 1200 (7th Cir. 1995), for example, the plaintiff alleged that a defective seat belt failed to restrain him. Opposing defendants' summary judgment motion, he argued that the mere "circumstances of the accident," including a low-speed collision, could allow a juror to infer that the seat belt was defective. *Id.* at 1207. Noting that the "seat belt appeared to be in good working condition prior to the collision [and] that the seat belt had never demonstrated problems before," the Court reasoned that plaintiff had not "nullif[ied] enough of the probable explanations" to warrant use of circumstantial evidence. *Id.* at 1208. The "circumstances of the accident" were consistent with a "seat belt [that] acted properly." *Id.* at 1207-09. Accordingly, the Court held that the circumstantial inference urged by plaintiff was "simply not enough to create a reasonable inference." *Id.* at 1208. The same is true here. Summary judgment was correctly entered in defendants' favor.

## CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

RANDALL R. RIGGS  
JEFFREY J. MORTIER  
*Locke Reynolds Boyd & Weisell  
1000 Capital Center South  
201 North Illinois Street  
Indianapolis, IN 46204*

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KENNETH S. GELLER  
ALAN E. UNTEREINER  
MARK S. DAVIES  
*Mayer, Brown & Platt  
2000 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006  
(202) 463-2000*

*Counsel for Appellees*

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