UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MARCOS MICHAEL,

Plaintiff,

-against-

15 Civ. 3659 (CM)

GENERAL MOTORS COMPANY,

Defendant.

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DECISION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

McMahon, C.J.:

Marcos Michael ("Plaintiff") was severely injured after his 2005 Chevrolet Avalanche collided with a concrete Jersey barrier. Plaintiff sued General Motors LLC ("Defendant"), alleging that the vehicle's airbag failed to deploy and that the seatbelts failed to restrain him. Plaintiff alleges that his injuries would have been far less severe had this safety equipment not been defective.

After discovery, Defendant moved for summary judgment on all counts. For the reasons set forth below, Defendant's motion for summary judgment is granted.

I. Factual Background

The facts below are taken from (i) Defendant's very brief 56.1 statement, (Dkt. No. 134), with which Plaintiff agrees except for certain details regarding the cause of the accident (Dkt. No. 141); (ii) evidence submitted by both parties as part of summary judgment briefing (Dkt. Nos.

132, 139); and, where necessary, (iii) Plaintiff's complaint (Dkt. No. 132-1). Certain facts are also taken from this Court's opinion of June 14, 2016. (Dkt. No. 52.)

On May 1, 2005, Plaintiff's father, Mr. Georgios Michael, purchased a 2005 Chevrolet Avalanche from Croton Auto Mall, a Chevrolet dealer in Croton-on-Hudson, New York, for his son. (Dkt. Nos. 134 ¶ 1; 132-12 at 18.) Five years later, Plaintiff allegedly took the vehicle for servicing at a New Rochelle, New York Chevrolet dealership, because the airbag indicator light was flashing. (Dkt. No. 132-1 ¶ 5.) The mechanics checked the car and found no issues. (*Id.*) The vehicle passed a subsequent inspection on October 30, 2011. (*Id.*)

On March 17, 2012, Plaintiff was driving home, westbound on the Southern State Parkway, at approximately 12:40 a.m. (Dkt. No. 139 ¶ 2.) As he prepared to exit at the Cross Island Parkway to head to his home in the Bronx, another vehicle struck the right, rear corner of his car. (Dkt. No. 141 ¶ 14.) Plaintiff's vehicle crossed several lanes of traffic and collided with the concrete Jersey barrier. (Dkt. No. 139 ¶ 4; Dkt. No. 141 ¶ 14.)

Plaintiff alleges that he was wearing his lap belt and harness but that they failed to restrain him, and that the vehicle's airbags failed to deploy. (Dkt. Nos. 132-1 ¶ 5–6; Dkt. No. 141 ¶¶ 5–6.) As a result of the impact, Plaintiff's head was propelled through the driver's side window and struck the Jersey barrier. (Dkt. No. 132-1 ¶ 6.) Plaintiff suffered severe injuries as a result of the accident and, in fact, he was placed in a medically-induced in a coma for several weeks immediately after the accident. (Dkt. No. 134 ¶ 3; Dkt. No. 141 ¶¶ 8–9.)

Shortly after the accident, Plaintiff's worried father contacted the insurance company, Esurance, to tell them about the accident, and Plaintiff's brother took photographs of the car. (Dkt. No. 52 at 1–2.)

About a week later, while Plaintiff was still in a coma, the insurance company contacted Plaintiff's father to say that they had seen the car and concluded that it was totaled. (*Id.* at 2.) In late March, apparently at the behest of Esurance, the car was towed from the Speedway Auto Center in Queens where it had been taken immediately after the accident, to Copart, a car auction facility located on Long Island. (*Id.*)

On April 2, 2012, Plaintiff's father signed over title to the car to Esurance. (*Id.*) Plaintiff's father testified that he signed the paperwork after Esurance asked him to do so during a phone conversation that occurred in late March. (*Id.*) Plaintiff's father, who had no understanding of what signing away title might mean for his son going forward, and who proceeded without any legal advice, apparently believed he would receive a check from Esurance in exchange. (*Id.*) Subsequently, the car went through an auction process: Copart, acting on behalf of Esurance, sold the car to Latinos Racing, a salvage dealer in Texas, which then sold the car to Inversiones P y C, S.A. de C.V., a salvage buyer located in El Salvador. (*Id.*) The car was shipped to El Salvador, where it was apparently destroyed. (*Id.*)

While all of these transactions were taking place, Plaintiff remained in a medically-induced coma. (*Id.*)

Plaintiff continues to suffer debilitating medical effects from the accident, including traumatic brain injury, memory issues, partial hearing loss, and pain. (Dkt. No. 141 ¶¶ 12–13.)

II. Procedural History

A. Complaint and Removal

Plaintiff originally filed this case *pro se* in the Bronx County Supreme Court. (Dkt. No. 1, at 2.) Defendant removed the case on May 12, 2015, pursuant to 28 U.S.C. § 1332, (*id.*), and filed its answer on June 8, 2015. (Dkt. No. 8.)

On June 5, 2015, Plaintiff moved to remand the case to the Supreme Court of the State of New York, Bronx County. (Dkt. No. 5 at 2.) On July 10, 2015, this Court denied Plaintiff's motion to remand. (Dkt. No. 15 at 4.)

B. First Summary Judgment Motion - Spoliation

At the initial pretrial conference, the parties notified the Court that the vehicle was not available for inspection because Plaintiff's father had signed over title to the car (or what was left of it) while Plaintiff was comatose in the hospital. (Dkt. No. 21 at 4.) Defendant put Plaintiff on notice that it would move for dismissal on the basis that critical evidence had been spoliated. (*Id.* at 15:20–16:8.)

The Court granted limited discovery as to the spoliation question only, (*id.* at 14), and, on November 24, 2015, Defendant moved for summary judgment (Dkt. No. 44). On June 14, 2016, this Court denied the motion, there being no evidence that either Plaintiff or his father had acted in bad faith in signing over title. (Dkt. No. 52 at 6.) The Court noted that Defendant might be burdened by proceeding without the vehicle, but observed: "Plaintiff in this case will labor under an equivalent burden, since he must prove that a defect in the car . . . caused the accident. That burden may well be insuperable without the ability to inspect . . . the car[;] and other evidence . . . may or may not be sufficient to establish that the car was defective." (*Id.* at 6–7.) The absence of

the car no doubt explains why Plaintiff could not find a lawyer to bring this case, despite the severity of his injuries.

C. Fact and Expert Discovery

Both parties then proceeded to general discovery, with Plaintiff continuing to represent himself. (*See, e.g.*, Dkt. No. 76.) The parties appeared before the Magistrate Judge a total of four times. At the initial pretrial conference, Plaintiff mentioned that, during the earlier period of discovery limited to spoliation, he had sought production of documents relating to "airbag issues, ignition switch issues, and recall issues" of similar General Motors vehicles from the years 2003 to 2007. (Dkt. No. 119 at 11; *id.* at 16; *see also* Dkt. No. 19 at 2.) Plaintiff indicated he would renew these requests. For its part, Defendant offered to produce a list of all crash tests and safety tests—its "compliance package"—to Plaintiff as part of its initial disclosures, and offered to make available specific reports to Plaintiff upon Plaintiff's request, contingent on the parties' agreeing to a protective order. (Dkt. No. 119 at 11–15.) The protective order was ultimately entered on January 26, 2017. (Dkt. No. 66.)

At the same, initial conference, Plaintiff explained that he might consider amending the complaint to add Chevrolet of New Rochelle, the service company, as a party. (Dkt. No. 119. at 27.) The judge discussed potential statute of limitations issues with Plaintiff and set a deadline for joinder. (*Id.* at 27–30.)

During this conference, Plaintiff was also informed of his right to serve interrogatories on and to take depositions of Defendant, including a 30(b)(6) deposition. (*Id.* at 31–32.) Plaintiff also mentioned at the conference that he planned to use one expert witness, his treating neurologist, (*id.* at 30), and he was advised of the proper procedures for expert discovery (*id.* at 33–34).

At the second status conference held two months later, the Magistrate Judge outlined settlement and mediation procedures for Plaintiff's benefit. (Dkt. No. 121 at 16–23.) Plaintiff again mentioned he planned to call his treating neurologist as an expert witness. (*Id.* at 23.) Plaintiff also briefly mentioned, but later announced he had decided against, utilizing an expert who would "[t]estify[] just that by looking at the pictures post-accident, that the vehicle airbags should have deployed and the seatbelts should have restrained [him] in the seat" and that he "should not have ejected from the vehicle. (*Id.* at 30.) The Magistrate Judge again outlined the process of expert discovery for Plaintiff's benefit. (*Id.* at 24–25.)

The Magistrate Judge ultimately opted not to stagger expert discovery in her scheduling order, based on the parties' representations that the subjects on which their experts would testify were different. (*Id.* 31–34.) This meant that, to the extent Defendant planned to use rebuttal experts, Defendant would be allowed to submit these rebuttal experts' reports without waiting for Plaintiff. (*Id.*)

During discovery, Plaintiff served document requests and interrogatories on Defendant. (*See* Dkt. No. 75.) In response, Defendant produced over 30,000 documents, including technical documents and customer contacts concerning reports of frontal airbag non-deployment. (*Id.*; *see also* Dkt. No. 82 at 1.) Defendant also produced crash test videos. (Dkt. No. 147 at 8.)

At the third status conference, Plaintiff complained that the crash test videos were not of the 2005 Chevy Avalanche but instead of another vehicle, a two-door pickup truck. (*Id.* at 6–7.) Defendant responded that General Motors does not "test every single vehicle we sell. What we do is compliance testing for model scope vehicles[.]" (*Id.* at 8.) Defendant explained that the company's process was to define "substantially similar" airbag and seatbelt systems used in other

vehicles and to produce the safety testing for those. (*Id.* at 9.) The Magistrate Judge found that the discovery dispute was not ripe for review. (*Id.* at 12.) Plaintiff never raised this issue again.

The Magistrate Judge also reminded both parties of the upcoming deadlines for expert discovery. (*Id.* at 12.) At this time, Plaintiff indicated to the court that he did not plan to call any experts. (*Id.*)

As expected, during the period designated for expert discovery, Plaintiff did not serve any expert disclosure. (*See* Dkt. No. 85 at 1.) Nor did he notice the deposition of any of Defendant's experts. (*Id.*)

At the fourth and final status conference before the Magistrate Judge, Plaintiff stated that he had not noticed any experts because Defendant "ha[s] the burden of proof as a defense because my evidence is the pictures, the factual information in the police report, and stuff like that." (Dkt. No. 145 at 5.) The Magistrate Judge clarified and explained that plaintiff indeed had the burden of proof on his claim. (*Id.* at 6.) After Defendant summarized its own expert reports, the Magistrate Judge gave Plaintiff additional time to put in expert reports, even though the deadline had passed. (*Id.* at 19–20.)

Plaintiff did not notice any experts during the extension.

D. June 26 Letter and Rebuttal

Instead, on June 26, 2017, before expert discovery had closed, Plaintiff submitted a letter to the Court stating that he "should be the only one that should be able to file a motion for summary judgment on Res Ipsa Loquitur [*sic*]." (Dkt. No. 84 at 1.) To this letter, Plaintiff attached a copy of the police report from the incident, photos of the crash and of his head injuries, as well as what he described as "documentation given to me by general motors [*sic*] that the seatbelts functional test was cancelled." (*Id.*) Plaintiff attached only the first page of what appeared to be four-page

document. (*Id.* at 5.) This document, produced pursuant to the protective order, shows that on May 18, 2005, Defendant cancelled a test having to do with the presence of the seat belt's anchor bolt and secure attachment. (*Id.*) It is not clear from the face of the partial document to what vehicle or test series this document corresponds.

Along with this letter, Plaintiff also submitted a "rebuttal" of Defendant's experts. (Dkt. No. 84 at 10–11.) The rebuttal did not take the form of an expert report, but instead of a letter or brief addressed to the Magistrate Judge, outlining paragraph by paragraph Plaintiff's reasons for disagreeing with Defendant's experts' conclusions. In the rebuttal, Plaintiff again alluded to the cancelled seatbelt test, writing, "The problem is that the restraint systems original testing was cancelled and we don't know if [defense expert Steven Corrion's] factual numbers are accurate." (*Id.* at 10.)

After the rebuttal, none of Plaintiff's subsequent court filings attached or referenced the seatbelt test document.

E. Second Summary Judgment Motion

Discovery concluded on June 29, 2017, (Dkt. No. 86), and the parties then cross-moved for summary judgment, with Plaintiff moving the day before Defendant. (Dkt. Nos. 92, 94.) In his motion, Plaintiff argued that summary judgment was appropriate under a theory of *res ipsa loquitur* and appended, in support, the police report and photographs of his injuries and the vehicle. (Dkt. No. 92 at 2.)

On November 1, 2017, this Court denied both motions without prejudice and entered a sixty-five day stay of proceedings to enable Plaintiff to consult with the lawyers at the new Legal Clinic for *Pro Se* Litigants. (Dkt. No. 118 at 1–2.) Because Plaintiff was referred to the clinic

after the close of discovery, the clinic was unfortunately unable to assist Plaintiff with either fact discovery or expert discovery.

At the same time, the Court also inquired whether Plaintiff's claim might be comprehended in *In re General Motors LLC Ignition Switch Litigation*, No. 14-md-2543, presently pending in this district before Judge Furman. (Dkt. No. 118 at 5–6.) It appears not, as Plaintiff had entered into an earlier stipulation—again, without the benefit of counsel[1]—that withdrew "with prejudice, any claim, argument and/or legal theory that the March 17, 2012 accident was caused by an ignition switch-related failure, malfunction and/or defect," among other things. (*See* Dkt. No. 123; *see also* Dkt. No 58.)

F. Mediation

On January 5, 2018, this Court extended the sixty-five day stay while both parties pursued mediation. (Dkt. No. 125 at 1.) The Legal Clinic for *Pro Se* Litigants assisted Plaintiff in mediation.

The clinic also attempted to secure *pro bono* representation for Plaintiff but was not successful, as many attorneys were conflicted out of *pro bono* representation by the presence of Defendant in the lawsuit.

On March 15, 2018, the parties notified the Court that mediation had been unsuccessful and requested a briefing schedule for summary judgment (Dkt. No. 128), which was entered on March 19, 2018 (Dkt. No. 129).

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[1] Releasing his claim for an ignition switch defect had, however, been the subject of discussion at a status conference held before Magistrate Judge Freeman. (Dkt. No. 119 at 16–24.) Plaintiff entered into the stipulation of release with Defendant roughly three weeks later. (Dkt. No. 58.)

G. Third Summary Judgment Motion

Defendant moved for summary judgment on the basis that Plaintiff had failed to prove his case via competent and admissible evidence. (Dkt. No. 131 at 2.) This is the instant motion. Defendant's motion is supported by the affidavits of four experts in automotive safety devices, excerpts of deposition transcripts, and records from companies involved in the post-accident auction of the Chevy Avalanche. (Dkt. No. 132.)

The Legal Clinic for *Pro Se* Litigants provided limited assistance to Plaintiff in preparing his opposition to Defendant's motion for summary judgment. (Dkt. No. 140 at 6.) Plaintiff's opposition, (Dkt. No. 140), was supported by his own declaration, a copy of the police report from the scene of the accident, and post-collision photographs of the vehicle only. (Dkt. No. 139.) Plaintiff did not include any expert testimony in support.

III. Legal Standard

Under Federal Rule of Civil Procedure 56(c), the court will grant summary judgment if the evidence offered shows that there is no genuine issue as to any material fact and that the movants are entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Furthermore, where a plaintiff cannot establish an essential element of his claim, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Id.* at 322–33.

On a motion for summary judgment, the court views the record in the light most favorable to the non-movant and resolves all ambiguities and draws all reasonable inferences against the movant. *See United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Donahue v. Windsor Locks Bd. of Fire Comm'rs*, 834 F.2d 54, 57 (2d Cir. 1987). However, a nonmoving party must produce

evidence into the record and "may not rely simply on conclusory statements or on contentions that the affidavits supporting the motion are not credible." *Gan v. City of N.Y.*, 996 F.2d 522, 532 (2d Cir. 1993).

"[A] party's *pro se* status does not alter the obligation placed upon the party opposing summary judgment to come forward with evidence demonstrating that there is a genuine dispute regarding material fact." *Vallen v. Carrol*, No. 02-cv-5666, 2005 WL 2296620, at *3 (S.D.N.Y. 2005). At the same time, "special solicitude should be afforded *pro se* litigants generally, when confronted with motions for summary judgment." *Graham v. Lewinski*, 848 F.2d 342, 344 (2d Cir. 1988). Accordingly, the Court "liberally construe[s] pleadings and briefs submitted by [the] *pro se* [plaintiff], reading such submissions 'to raise the strongest arguments they suggest.'" *See Bertin v. United States*, 478 F.3d 489, 491 (2d Cir. 2007) (quoting *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994)) (internal citation omitted).

Pursuant to Local Civil Rule 56.2, a *pro se* litigant also must be given notice of the consequences of failing to respond appropriately to a motion for summary judgment. *See* S.D.N.Y. & E.D.N.Y. Local R. 56.2; *McPherson v. Coombe*, 174 F.3d 276, 280–81 (2d Cir. 1999). Here, Defendants complied with Local Rule 56.2 by providing Plaintiff with a "Notice to *Pro Se* Litigant Who Opposes A Motion For Summary Judgment." (Dkt. No. 135.)

IV. Discussion

When a consumer is injured by a product, New York State recognizes a cause of action for negligence, as well as a cause of action for strict products liability under three theories: manufacturing defect, design defect, and failure to warn. *Caprara v. Chrysler Corp.*, 417 N.E.2d 545, 549–52 (N.Y. 1981). Both causes of action have their respective advantages. In a strict liability case, "the scienter that is so vital to the negligence suit need not be shown." *Id.* at 549.

In other words, "in strict products liability, it is no longer any answer that the defendant injured the plaintiff carefully. Those who market products must stand behind them." *Id.* at 550.

Unlike in strict liability cases, however, a plaintiff alleging negligence may rely on the doctrine of *res ipsa loquitur*, which enables the factfinder to infer that the defendant possessed the requisite scienter and breached his duty of care to create and market a safe product.[2] The plaintiff must clear certain hurdles first. "The conditions usually required before the rule [of *res ipsa loquitur*] may be applied are stated to be (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not be due to any voluntary action or contribution on the part of the plaintiff[,] and (4) evidence as to the true explanation of the event must be more readily accessible to the defendant than the plaintiff." *Searle v. Suburban Propane Div. of Quantum Chem. Corp.*, 700 N.Y.S.2d 588, 592 (App. Div. 2000). To illustrate, New York courts have permitted plaintiffs to proceed a theory of *res ipsa loquitur* in the following instances: against a hospital, where a large laparotomy pad was discovered inside a patient's abdomen following surgery, *Kambat v. St. Francis Hosp.*, 678 N.E.2d 456, 459 (N.Y. 1997); against an airline, where a pilot contracted to fly a surveillance helicopter crashed it, *Abbott v. Page Airways, Inc.*, 245 N.E.2d 388, 392 (N.Y. 1969); and against an elevator repair company, where the automatic door failed to retract and the repair company had contracted for its exclusive maintenance, *Rogers v. Dorchester Assocs.*, 300 N.E.2d 403, 407 (N.Y. 1973).

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[2] New York courts do not allow plaintiffs to proceed on a theory of *res ipsa loquitur* in an action for breach of implied warranty, *Muniz v. Am. Red Cross*, 529 N.Y.S.2d 486, 488–89 (App. Div. 1988), which for many purposes is indistinguishable from a strict products liability claim, *Searle v. Suburban Propane Div. of Quantum Chem. Corp.*, 700 N.Y.S.2d 588, 591 (App. Div. 2000). *See also Micallef v. Miehle Co., Div. of Miehle-Goss Dexter, Inc.*, 348 N.E.2d 571, 578–79 (N.Y. 1976) (action for breach of implied warranty, when "based on tortious behavior, is more correctly treated under the theory of strict products liability").

When a consumer's injury occurs during a vehicle collision, the case belong to a sub-species of products liability claims known as "crashworthiness" claims. *Garcia v. Rivera*, 553 N.Y.S.2d 378, 380 (App. Div. 1990). "Crashworthiness" claims are also called "second collision" claims, because the plaintiffs in these cases do not allege that a negligently or defectively designed, manufactured, or labeled product *caused* the injury in the first place. *Id.* Rather, they allege enhanced injuries due to a "second collision"—typically between the occupant and some interior part of the vehicle, such as the window or steering column, or between the occupant and another object, such as a telephone pole or median, after the occupant is ejected. For this reason, these claims are also called "enhanced injury" claims. *See Lawless v. O'Brien*, 636 N.Y.S.2d 92, 93 (App. Div. 1995).

A plaintiff's burden of proof in an enhanced injury case is demanding. *Bolm v. Triumph Corp.*, 341 N.Y.S.2d 846, 854 (App. Div. 1973), *certified question answered, order aff'd*, 305 N.E.2d 769 (N.Y. 1973). "Manufacturers in the automotive, trucking, or aircraft industries when faced with a 'crashworthiness case' enjoy a distinct legal advantage over the plaintiff." Nixon Peabody, *Putting the Plaintiff to the Test: The Crashworthiness Doctrine in Recent Decisions* (Dec. 16, 2005), https://www.nixonpeabody.com/en/ideas/articles/2005/12/16/putting-the-plaintiff-to-the-test-the-crashworthiness-doctrine-in-recent-decisions. The plaintiff must prevail not only on the underlying theory of product liability (negligence, manufacturing defect, design defect, or failure to warn, each of which carries its own high burden of proof) but also "the extent of enhanced injuries attributable to the defect." *Tiner v. Gen. Motors Corp.*, 909 F. Supp. 112, 116 (N.D.N.Y. 1995). For example, the Plaintiff may not merely allege that he was injured because his airbag failed to deploy; he must "subtract" those injuries caused by the primary collision and offer proof that the delta corresponds to the airbag's failure. Essentially, this requirement is

causation by another name. In almost every case, proving this second prong requires expert testimony. *Tiner*, 909 F. Supp. at 116.

Plaintiff's claims regarding the two safety devices at issue, the airbag and seat belt, are examined in turn.

A. Airbag Claim

1. Strict Liability

Turning first to strict liability, Plaintiff, not being a lawyer, does not expressly state the theory of product liability he is pursuing. Instead, he has repeatedly alleged some version of the following: "Despite a near-frontal collision with the immovable concrete barrier, the Avalanche's airbags failed to deploy." (Dkt. No. 139 ¶ 6; *see also* Dkt. No. 132-1 ¶ 6.)

Because Plaintiff's complaint does not allege any facts with respect to the labeling or safety instructions of the airbag, it seems safe to conclude that Plaintiff does not pursue his case under a failure to warn theory. By process of elimination, then, Plaintiff states a claim for either manufacturing or design defect. "Although sometimes difficult to delineate," there is a "real distinction" between the two theories. *Caprara*, 417 N.E.2d at 552. "[A] defectively manufactured product is flawed because it is misconstructed [*sic*] without regard to whether the intended design of the manufacturer was safe or not." *Id.* "In contrast . . . design defects involve products which are made in precise conformity with the manufacturer's design but nevertheless result in injury to the user because the design itself was improper." *Id.* at 553. It seems a fair reading of Plaintiff's complaint that "failed to deploy," here, states a claim for manufacturing defect. This is supported by other allegations in Plaintiff's complaint, including that he had taken the Avalanche for servicing after noticing that the airbag indicator light was flashing. (Dkt. No. 132-1 ¶ 5.) A manufacturing defect theory is also supported by language in Plaintiff's opposition

to summary judgment, which argues that "[i]if the airbags had worked as intended, Marcos Michaels' [*sic*] injuries would have been far less severe (Dkt. No. 140 at 1). If, by contrast, Plaintiff were proceeding under a theory of design defect, he would have acknowledged that the airbag did not deploy by design and would have faulted this design for his injuries.

Plaintiff cannot point to direct evidence of a manufacturing defect in the automobile or airbag, because—through no fault of his—no one was able to inspect the vehicle after the crash. However, a plaintiff can sometimes prove a manufacturing defect using circumstantial evidence. *See Allstate Ins. Co. v. Hamilton Beach/Proctor Silex, Inc.*, 473 F.3d 450, 452 (2d Cir. 2007) (discussing *Restatement (Third) of Torts: Product Liab.* § 3 (1998)). Indeed, "New York has long recognized the viability of this circumstantial approach in products liability cases." *Speller ex rel. Miller v. Sears, Roebuck & Co.*, 790 N.E.2d 252, 254 (N.Y. 2003). "In a products liability case it is now established that, if plaintiff has proven that the product has not performed as intended . . . , the fact finder may, even if the particular defect has not been proven, infer that the accident could only have occurred due to some defect in the product or its packaging." *Halloran v. Virginia Chems.*, 41 N.Y.2d 386, 388 (N.Y. 1977).

The Court therefore finds that Plaintiff is proceeding under a theory of circumstantial evidence supporting an inference of a manufacturing defect—sometimes termed a "malfunction" theory—with respect to the airbag. It examines his claim accordingly.

To survive summary judgment on a malfunction theory, a plaintiff must prove that the product did not perform as intended and must exclude "all causes of the accident not attributable to [the defendant's] conduct." *Gargano v. Rosenthal*, 473 N.Y.S.2d 225, 227 (App. Div. 1984) (citing *Halloran*, 41 N.Y.2d at 388). Defendant argues that Plaintiff has failed to submit any

evidence that would create a triable issue of material fact with respect to the first prong. The Court agrees.

Although expert testimony is not always fatal to a manufacturing defect claim, its absence is excusable only when the technical issues involved are within the ken of the average juror. "[N]o doubt utilization of expert testimony is the rule rather than the exception." *Jackson v. Melvey*, 392 N.Y.S.2d 312, 314 (App. Div. 1977); *see also Guarascio v. Drake Assocs. Inc.*, 582 F. Supp. 2d 459, 463 (S.D.N.Y. 2008) ("New York courts uniformly rule that competent, non-conclusory expert testimony is needed in cases involving more complex design issues."). Airbag cases, unsurprisingly, warrant expert testimony. "While the opinion of an expert may not always be necessary in establishing a products liability case, the complex issues involved in the design and operation of an air bag make expert proof imperative, especially, where [a defendant's] motion is supported by the opinion of an expert." *Fitzpatrick v. Currie*, 861 N.Y.S.2d 431, 434 (App. Div. 2008).

Here, Plaintiff has not submitted his own expert testimony, and his efforts to leverage the Defendant's experts' testimony to his advantage do not succeed. Plaintiff argues that since the collision was "near frontal," the airbag should have deployed, per Defendant's own experts. (Dkt. No. 140 at 3.) This argument hinges on Plaintiff's quoting the expert reports selectively and inexactly. For example, the full excerpt from expert Leo Knowlden's report states that frontal airbags are "intended, by design, to only deploy in the event of a frontal, or near frontal, impact, *with a severity that has been demonstrated in testing to exceed the ability of the seatbelt to restrain the occupant's upper head and torso.*" (Dkt. No. 132-5 ¶ 18 (emphasis added).) The report goes on to say that impact forces must meet the designated deployment threshold. (*Id.*) The report concludes that "[b]ased on the available photographs, the accident report and the injuries suffered

by the driver, the frontal component of the impact did not meet the criteria for deployment of the frontal airbags." (*Id.* ¶ 30.) Other experts, including Dr. Elizabeth Raphael, reached the same conclusion, finding that the longitudinal delta-V of the initial left frontal impact, as calculated by another of Defendant's experts Steven Bailo, was "below the deployment threshold for frontal airbags." (Dkt. No. 132-4 ¶ 18.) In other words, while airbags are generally designed to deploy in cases of frontal collision, scientific parameters govern when a collision is sufficiently "frontal" to trigger deployment. Thus, it is not enough for Plaintiff to oppose summary judgment on the grounds that "both of Defendant's crash experts [were] using the term 'front' to describe the [Avalanche's] impact." (Dkt. 140 at 3.)

Plaintiff's attempt to introduce other, non-expert evidence to show that the collision was "frontal"—and therefore that the airbag did not perform as intended—also fails because it depends on a similar misreading of the expert reports. (Dkt. No. 139, Exs. B–E.) Certainly, the evidence corroborates that the accident affected the front of the vehicle: photographs show the vehicle's front, left bumper almost completely detached; severe scraping of the paint on the front, left bumper; and buckling of the hood. (*Id.*) The police report codes the "Point of Impact" as corresponding to the front, left portion of the vehicle on the accident report diagram. (Dkt. 139, Ex. A.) Although this is precisely the kind of evidence that a court may consider on a motion for summary judgment, the evidence is uncontroverted: Defendant's experts claimed reliance on the photographs and police report in reconstructing the accident. (*See, e.g.*, Dkt. No. 132-3 ¶ 22.) This evidence might create a triable issue of material fact if Defendant's experts had affirmed that *any* "frontal" or "near frontal" collision, *without more*, triggers airbag deployment. Again, however, they did not.

To the extent Plaintiff alleges a claim for strict liability based on the airbag, therefore, the Court grants summary judgment to the Defendant.

2. Negligence (*Res Ipsa Loquitur*)

As discussed, although Plaintiff's present motion does not expressly argue for liability in negligence on a theory of *res ipsa loquitur*, this Court understands it to do so implicitly. First, Plaintiff's complaint states that a contract was signed for "the purchase of a safe and well-designed SUV," (Dkt. No. 132-1 at 1), and he argues in the instant motion that he "was in a near frontal collision in a vehicle manufactured by General Motors and the airbags failed to deploy" (Dkt. No. 140 at 6). Second, Plaintiff has also said as much in his previous court filings: "[M]y case is a clear cut a Res Ipsa Loquitur case as possible [*sic*]. [. . .] The products defects are obvious to any human on the face of his earth by just looking at the pictures[.]" (Dkt. No. 84 at 1; *see also* Dkt. No. 92 at 2 ("Under Res Ipsa Loquitur, the victims its telling us that the product defect is so clearly obvious, having to prove its existence is not legally required [*sic*].").)

Defendant did not brief the issue of *res ipsa loquitur* in either of its cross-motions for summary judgment. However, the Court finds that, as a matter of law, the "theory of *res ipsa loquitur* is inapplicable" to the airbag claim. *Mejia v. Delgado*, 75 N.Y.S.3d 14, 15 (App. Div. 2018).

In order for his claim to survive summary judgment, Plaintiff must create a triable issue of fact with respect to whether the airbag's non-deployment was an event "which ordinarily does not occur in the absence of someone's negligence." *Dermatossian v. N.Y. City Transit Auth.*, 492 N.E.2d 1200, 1204 (N.Y. 1986). As with Plaintiff's strict liability claim, the *res ipsa* inference could apply to a theory of (1) negligent construction or assembly or (2) negligent design.

Negligent construction or assembly would, by definition, appear to require that the airbag malfunctioned (*i.e.* did not deploy when it should). As discussed above, Defendant's experts have

submitted proof that the airbag did not, in fact, malfunction because the collision would not have triggered the standard deployment threshold. Defendant's experts have explained that an airbag's non deployment in certain collisions is not only not the product of someone's negligence but is consistent with what the vehicle's engineers intended. (Dkt. No. 132-5 ¶ 30; Dkt. No. 132-4 ¶ 18.) Deployment is not always beneficial because it generates forces that can injure an occupant, which means that engineers engage in a risk analysis to determine the appropriate thresholds for deployment. (Dkt. No. 132-5 ¶ 20–21.)

Plaintiff responds that "[a]irbags are intended to keep passengers safe," (Dkt. No. 140 at 6), and that "[a]ny human being on the street with no knowledge of mechanical engineering, or any auto mechanic experience, just by looking at these photos can and will say that the airbags should have deployed," (Dkt. No. 132-2 at 1). However, the Court finds that these arguments, combined with Plaintiff's own description of the crash, has not created a triable issue of fact with respect to negligent construction or assembly in light of Defendant's expert evidence. Had this accident been part of a limited subset of cases in which an airbag malfunction would be self-evident, *i.e.*, a head-on collision, the Court could perhaps have concluded that this presents a genuine factual issue for a jury. Again, however, the realities of airbag engineering are more complicated.

Plaintiff has also failed to satisfy other preconditions that would be required to proceed on a theory of *res ipsa loquitur* for negligent construction or assembly, including that any alleged failure of the airbag was "caused by an agency or instrumentality within the exclusive control" of Defendant and was "not . . . due to any voluntary action or contribution on the part of the plaintiff." *Searle*, 700 N.Y.S.2d at 592. Indeed, Defendant has introduced several facts that shift the locus of control away from it and toward Plaintiff or third parties. Plaintiff's father had owned, and Plaintiff had been using, the vehicle for approximately seven years at the time of the accident. In

the interim, the vehicle appears to have been involved in another accident, on April 16, 2008. (*See* Dkt. No. 132-17 at 15.) The vehicle was also serviced several times by parties other than Defendant. (*See id.* at 13–17.)

Turning next to negligent design, as a preliminary matter, it is unclear if Plaintiff can actually take advantage of the doctrine of *res ipsa loquitur* on a theory of design defect. The Court is not aware of any case in New York in which a plaintiff attempted to gain an inference of negligent design on a theory of *res ipsa loquitur*. The closest analogy this Court can think of is a case in which a product is designed and marketed without an optional safety feature. *See, e.g.*, *Scarangella v. Thomas Built Buses, Inc.*, 717 N.E.2d 679, 683 (N.Y. 1999). Even in these cases, however, the Court does not understand any plaintiff to have relied on *res ipsa loquitur*. *See, e.g.*, *Lindquist v. County of Schoharie*, 4 N.Y.S.3d 708, 711 (App. Div. 2015) (highway segment should have had guide rails and additional speed limit signs); *Melendez v. Abel Womack, Inc.*, 959 N.Y.S.2d 252, 254 (App. Div. 2013) (forklift should have included operator guard door); *Cunningham v. Vincent*, 650 N.Y.S.2d 850, 853 (App. Div. 1996) (wheelchair lift should have come with seat belt); *David v. Makita U.S.A., Inc.*, 649 N.Y.S.2d 149, 151 (App. Div. 1996) (table saw should have been designed with permanent blade guard or brake); *Micallef v. Miehle Co., Div. of Miehle-Goss Dexter, Inc..*, 348 N.E.2d 571, 574 (N.Y. 1976) (printing press should have included roller guards). Moreover, in each of these cases, plaintiffs proposed a feasible alternative design. Here, Plaintiff does not propose an alternative airbag design that would have prevented or mitigated his injuries, and an alternative design is not readily apparent to this Court.

Regardless, the Court finds that Plaintiff has not met the first requirement to gain the inference of *res ipsa loquitur*, *i.e.*, that the airbag's non-deployment in a collision of this nature was an event that ordinarily does not occur in the absence of negligence by the vehicle's designers.

Defendants have submitted evidence demonstrating that a non-deployment under these circumstances would be, far from the product of negligent design, a desired outcome. This is because, first, "the trajectory of [Plaintiff] was primarily lateral and deployment of the frontal airbags would not have provided additional restraint," (Dkt. No. 132-5 ¶ 31), and second, "the process of deploying, [*sic*] frontal airbags generate high, potentially injurious forces that are capable of causing significant induced injury to occupants," (*id.* ¶ 21). Plaintiff has not proffered any evidence to the contrary.

The Court therefore **GRANTS** Defendant's motion for summary judgment on the airbag claim.

B. Seatbelt Claim

1. Strict Liability

Again, Plaintiff has not expressly indicated whether his claim for the defective seatbelt is based on a theory of defective design or defective manufacturing. Defendants, facing this ambiguity, elected to brief both theories. (Dkt. No. 133 at 11.) The Court agrees with Defendants that, in contrast to the airbag claim, Plaintiff's claim that the "seatbelts failed to restrain" may reasonably be interpreted to allege either theory. (Dkt. No. 132-1 ¶ 6.) In other words, Plaintiff could be understood to state a claim on the basis that either: (i) the seatbelts were supposed to lock during the collision but did not; or, in the alternative, (ii) they locked during the collision but nonetheless had not been designed to provide adequate protection.

2. Manufacturing Defect/Malfunction Theory

Again, because the unavailability of the vehicle makes direct proof impossible, the Court assumes that Plaintiff pursues his seatbelt claim on a "malfunction theory" of product liability. In order to survive summary judgment on a malfunction theory, Plaintiff must first create a

genuine issue of material fact that the seatbelt did not perform as intended. *Gargano*, 473 N.Y.S.2d at 22. The Court concludes that he has not.

Defendant's experts introduced evidence that Plaintiff's injuries were not inconsistent with proper functioning of the seatbelt. Specifically, expert Steven Corrion stated in his affidavit: "Even if Mr. Michael was wearing his seat belt as he reported, he still would have moved in the direction of impact in reaction to the crash forces acting on the vehicle. . . . with the close proximity of Mr. Michael's head to the side glass, in a properly seated position, his head could have reached the driver's side window due to the vehicle dynamics (which includes both planar forces, and rolling of the vehicle) even though the seat belt is locked." (Dkt. No. 132-3 ¶¶ 27–28.) In response, Plaintiff offered absolutely no evidence that could create a triable issue of material fact with respect to whether the seatbelt worked as designed. Instead, Plaintiff focuses his brief on the issue of whether he was, in fact, wearing his seatbelt—a fact that Defendant is willing to accept as undisputed. (Dkt. No. 140 at 2.)

Because Plaintiff fails to raise a genuine issue of fact for trial on whether the seat belt functioned as intended, he cannot prevail on a manufacturing defect theory.

3. Design Defect

Plaintiff's seatbelt clam may also be interpreted as an argument that the seatbelt should have been designed in a way that would have prevented, and not exacerbated, his injuries. In a design defect cases, the plaintiff must "present evidence that the product, as designed, was not reasonably safe because there was a substantial likelihood of harm and it was feasible to design the product in a safer manner." *See Voss v. Black & Decker Mfg. Co.*, 450 N.E.2d 204, 208 (N.Y. 1983). This second step, sometimes called the "reasonable alternative design" test, requires the plaintiff to "present some admissible evidence that there exists a technologically feasible and commercially practicable alternative design that would have reduced or prevented

the harm sustained by the plaintiff." *Soliman v. Daimler AG*, No. 10-cv-408, 2011 WL 6945707, at *5 (E.D.N.Y. Aug. 8, 2011), *report and recommendation adopted*, 2011 WL 4594313 (E.D.N.Y. Sept. 30, 2011). New York courts require the plaintiff to support the second prong with expert testimony unless a reasonable alternative design would be obvious to a layperson, a narrow exception. *Id.* (citing *Maxwell v. Howmedica Osteonics Corp.*, 713 F. Supp. 2d 84, 91 (N.D.N.Y. 2010)). Therefore, Plaintiff must offer evidence into the record that the seatbelt was unsafe as designed and that a reasonable, alternative design for the seatbelt existed.

As to the first prong, Plaintiff has proffered no evidence that the seat belt, as designed, was unsafe. Ironically, however, Defendant's expert testimony raises a genuine issue of fact that the seatbelt was not reasonably safe—because a driver's head can still reach the driver's side window, even when the seatbelt is functioning properly. (Dkt. No. 132-3 ¶ 28; *see also* Dkt. No. 132-4 ¶ 20 ("[H]ad Mr. Michael been properly wearing his seatbelt and had it locked in a timely manner, his head still would have been able to move out of the window opening and make contact with the concrete barrier.").) Defendant's experts have raised a genuine issue of material fact as to whether a seat belt should be designed in such a way as to prevent the driver's head from hitting the car window, especially in situations in which the airbag is designed not to deploy.

Unfortunately, Plaintiff's claim must nonetheless be dismissed because New York's is a two-prong test, and he fails to raise a genuine issue of material fact on the second prong—specifically, that there was a technically feasible way to design a seat belt that would prevent the driver's head from hitting the side window in the event that the airbags do not deploy. Defendant's experts have stated, "There is no production seatbelt that could have prevented this interaction [between the driver's head and the concrete barrier]." (Dkt. No. 132-4 ¶ 20.)

Plaintiff has failed to address the second prong, because he offers no competent evidence of a reasonable alternative design. In fact, he does not even address this issue. When a reasonable alternative design would not be obvious to a lay person (and in this case it would not), and where the plaintiff fails to provide any proof, summary judgment is appropriate. *Guarascio*, 582 F. Supp. 2d at 464.

4. Negligence (Res Ipsa Loquitur)

For the same reasons discussed in the earlier portion of the opinion relating to the airbag, the theory of *res ipsa loquitur* is inapplicable to Plaintiff's seatbelt claim. Again, Plaintiff has not created a genuine issue of fact with respect to whether his being partially ejected from the vehicle, despite wearing his seatbelt, is an event "which ordinarily does not occur in the absence of someone's negligence."

To the extent Plaintiff's claim would be premised on negligent construction or assembly, Plaintiff has not been able to raise a genuine issue of material fact that the seatbelt malfunctioned. As noted above, the car has also been outside the exclusive control of Defendant for several years, meaning the jury could not appropriately draw an inference that any malfunction would have been caused by Defendant (rather than, for example, by the previous car accident or by Plaintiff's vehicle servicer).

To the extent Plaintiff's claim would be premised on negligent design, this Court is again unsure that New York State law permits a plaintiff to allege a theory of negligent design on a theory of *res ipsa loquitur*. In any event, it is not immediately clear that, when an automobile collides with a fixed object at a high rate of speed, a driver's head would not ordinarily exit the window in the absence of negligence on the part of the seatbelt's designers. *Cf. Kambat*, 678 N.E.2d at 459. As Defendant's experts have noted, "[N]o seat belt system can prevent all injuries in all crashes." (Dkt. No. 132-3 ¶ 18.) Expert Steven Corrion stated that even if Plaintiff

had been wearing the lap belt and harness as reported, inertial forces still acting on his body would have caused Plaintiff's "head and appendages [to be] further extended in the direction of impact as his torso was stopped." (Dkt. No. 132-3 at ¶ 27.) Dr. Elizabeth Raphael also noted that the Avalanche "was at a significant roll angle" of 41.4 degrees, which would have created additional forces that caused Plaintiff's head to—in her words—"interact[] with the median barrier." (Dkt. No. 132-4 at ¶ 11.)

The Court therefore **GRANTS** Defendant's motion for summary judgment on the seatbelt claim.

C. Timeliness

Plaintiff argues that Defendant's motion for summary judgment was untimely and asks the Court to deny Defendant's motion on this basis. (Dkt. No. 140 at 2.) The Court declines Plaintiff's invitation.

On April 30, 2018, Defendant timely filed a notice of motion for summary judgment, a Rule 56.1 statement, a memorandum of law, and exhibits in support of its motion. (Dkt. Nos. 131–34.) The same day, Defendant also filed to the docket the required "Notice To *Pro Se* Litigant Who Opposes A Motion for Summary Judgment," which included a statement that Plaintiff could direct any questions regarding the summary judgment motion to the *Pro Se* Office. (Dkt. No. 135.) The following day, which was one day after the motion was due, Defendant filed an amended notice of motion, which added new language regarding the Local Rule 56.2 notice and availability of services at the *Pro Se* Office. (Dkt. No. 137.) All changes were contained to the notice of motion; Defendant did not amend its memorandum of law, 56.1 statement, or exhibits.

Plaintiff apparently takes issue with Defendant's late filing of the amended notice of motion. This argument is plainly meritless, given that both the notice and the motion itself were timely filed. Moreover, "[t]he linchpin of Rule 56.2 is whether a *pro se* plaintiff . . . ultimately is aware of the basic requirements and ramifications of the adjudication of the summary judgment motion against him." *Forsyth v. Fed'n Emp't & Guidance Serv.*, 409 F.3d 565, 572 (2d Cir. 2005), *abrogated on other grounds by Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007). Plaintiff, who submitted his opposition in a timely manner, cannot realistically claim that he was in any way prejudiced.

D. Objection to Experts

Finally, the court addresses Plaintiff's objections to Defendant's expert witnesses. (Dkt. No. 140 at 5.)

Plaintiff challenges Defendants' use of expert witness affidavits in his memorandum of law, writing: "Notably, three of these experts work directly for General Motors while the fourth is employed by the law firm representing them in this action. They are untroubled if their experts misstate a key factor that their expert conclusions cannot be reckoned with other parts of their statements." (Dkt. 140 at 5.) These contentions are insufficient to overcome the expert affidavits, since, as the Court has already stated, "a nonmoving party 'may not rely simply on . . . contentions that the affidavits supporting the motion are not credible.'" *Gan*, 996 F.2d at 532.

In order to ensure it has comprehensively addressed Plaintiff's objections, this Court also reviews an earlier attempt by Plaintiff to disqualify Defendant's experts through his self-styled "rebuttal" submitted during discovery. (Dkt. No. 84.) As a reminder, Plaintiff filed this document on June 27, 2017, following expert disclosure. (*Id.*) At that time, Defendant proposed to the Magistrate Judge that, to the extent this rebuttal was an attempt to challenge the admission of its

experts' testimony, *i.e.*, an FRE 702 challenge, the motion should be denied without prejudice and could be disposed of by the trial court. (Dkt. No. 85 at 2.)

Defendant has attached the rebuttal to its current motion for summary judgment. (Dkt. No. 132-2.) Plaintiff has not. (*See* Dkt. No. 139.) Moreover, the document is neither a declaration nor an affidavit. Therefore, the Court cannot treat it as evidence in support of Plaintiff's opposition motion.

The Court has its doubts that Plaintiff has an interest in moving to disqualify Defendants' experts, given his seeming reliance on certain conclusions in their reports, as well as his statement that "[if] it is [Defendant's] strategy to deny the airbag defect by way of expert testimony, then they may do so at trial by argument in front of a jury." (Dkt. No. 140 at 6.) Nonetheless, given the mandate to construe *pro se* filings liberally, the Court treats this as if it were a *Daubert* motion and explains why Plaintiff's attempt to disqualify also fails under that standard.

Under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), "a trial court faced with a proffer of expert scientific testimony must determine . . . whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails 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." *Derienzo v. Trek Bicycle Corp.*, 376 F. Supp. 2d 537, 552 (S.D.N.Y. 2005) (citing *Daubert*, 509 U.S. at 592–93) (internal quotations omitted). When ruling on a *Daubert* motion, "a district court should consider indicia of reliability, including, but not limited to, (1) whether the testimony is grounded on sufficient facts, (2) whether the underlying methodology is reliable, and (3) whether the witness has applied the method reliably

to the facts." *Wantanabe Realty Corp. v. City of N.Y.*, No. 01-cv-10137, 2004 WL 188088, at *2 (S.D.N.Y. 2004).

Plaintiff has not raised any challenge to Defendant's experts' qualifications, their methodology, or their scientific reasoning. Instead, Plaintiff disagrees with their conclusions. Rebutting expert Steven Bailo, for example, Plaintiff states: "Based o [*sic*] facts provided by this expert there is no reason why the airbags should have not deployed and also no reasons why the seatbelt failed to restrain." (Dkt. 90 at 2.) He argues that their conclusions are plainly or obviously wrong to "anyone with eyes," "every child," and "any human being on the street with no knowledge of mechanical engineering, or any auto mechanic experience, just by looking at" photos of the accident. (*Id.*) Plaintiff also levies *ad hominem* attacks, calling the experts' reports "absurd," "not only biased but unjust," and "absurd and comical." (*Id.*) None of these is a cognizable basis for challenging an expert report, let alone eliminating an expert's affidavit on a motion for summary judgment. Therefore, to the extent Plaintiff's rebuttal is an attempt to disqualify Defendant's experts, it fails.

Conclusion

For the reasons stated above, Defendant's motion for summary judgment is **GRANTED**. The Clerk of Court is respectfully requested to remove the motions at Docket Nos. 131 and 137 from the Court's list of open motions, and to close this case.

Dated: November 13, 2018

Chief Judge

BY ECF TO ALL PARTIES
BY MAIL TO PLAINTIFF