STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM R. MONTNEY and
JUDY MONTNEY,

Plaintiffs–Appellants,

v

GENERAL MOTORS CORPORATION and
ALLIEDSIGNAL CANADA, INC.,

Defendants–Appellees.

UNPUBLISHED
September 6, 1996

No. 187351
LC No. 93-101922

Before: Michael J. Kelly, P.J., and Hoekstra and E.A. Quinnell,* JJ.

PER CURIAM.

Plaintiffs appeal by right an order granting summary disposition in favor of defendants, General Motors Corporation ("GM") and AlliedSignal Canada, Inc. ("AlliedSignal"), in this product liability/design defect case. We affirm.

This design defect case arises from an accident in which plaintiff William Montney was injured when a blade from the flexible engine cooling fan ("flex fan") in his 1977 Chevrolet pickup truck broke off from the fan's assembly and severed the ulnar nerve in his left arm, leaving him permanently disabled and disfigured. Plaintiffs argued that the flex fan was subject to fretting fatigue and should not have been installed in the truck. Defendants moved for summary disposition on the grounds that plaintiffs had failed to present any evidence of the magnitude of the risk involved and failed to present any evidence of an alternative design. The lower court granted the motion, finding that plaintiffs failed to present a prima facie case of design defect. We agree with the trial court.

Although manufacturers are not required to insure against all injuries which arise from the use of their products, manufacturers may be held liable for any injuries which result when their products are not designed in such a way as to eliminate "unreasonable risk of foreseeable injury." *Prentis v Yale Mfg*

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* Circuit judge, sitting on the Court of Appeals by assignment.

Co, 421 Mich 670, 682-683; 365 NW2d 176 (1985); *Owens v Allis-Chalmers Corp*, 414 Mich 413, 416; 326 NW2d 372 (1982); *Adams v Perry Furniture Co (On Remand)*, 198 Mich App 1, 14; 497 NW2d 514 (1993). In order to establish a prima facie case for design defect, a plaintiff must show, through direct or circumstantial evidence, that there is a reasonable probability that the defect is attributable to the manufacturer or seller. Furthermore, the plaintiff must also present evidence concerning both the magnitude of the risk involved and the reasonableness of the alternative design. *Prentis*, *supra* at 686-691; *Owens*, *supra* at 429-432; *Haberkorn v Chrysler Corp*, 210 Mich App 354, 364; 533 NW2d 373 (1995); *Kinzie v AMF Lawn & Garden*, 167 Mich App 528, 535-536; 423 NW2d 253 (1988). This pure negligence risk-utility test is to be applied to all cases in which defective design is alleged. *Prentis*, *supra* at 686-691. See also SJI2d 25.31. Absent evidence of these factors, the plaintiff has failed to present a prima facie case for design defect and the defendant manufacturer/seller is entitled to judgment as a matter of law. *Fisher v Kawasaki Heavy Industries, Ltd*, 854 F Supp 467, 469 (ED Mich, 1994).

We conclude that, when looking at the evidence proffered, specifically Dr. Trojan's deposition testimony, plaintiffs failed to present a prima facie case for design defect. Dr. Trojan admitted that he had no evidence concerning the magnitude of the risk of a flex fan causing injuries of the kind plaintiff suffered, and more importantly, Dr. Trojan had no alternative design to the flex fan, as well as no evidence on the reasonableness of an alternative design. Plaintiffs' allegations that defendants' design was defective due to inadequate testing are not sufficient to support a claim for defective design. *Fisher*, *supra* at 469; *Prentis*, *supra at* 686-691; *Haberkorn*, *supra* at 364. Plaintiffs' attempt to avoid summary disposition by filing an affidavit containing Dr. Trojan's recommendations was improper because a plaintiff cannot avoid a motion for summary disposition by asserting statements in an affidavit which are contrary to damaging testimony given during a deposition, and the affidavit was properly not considered by the lower court. *Aetna Casualty & Surety Ins Co v Ralph Wilson Plastics*, 202 Mich App 540, 548; 509 NW2d 520 (1993); *Downer v Detroit Receiving Hospital*, 191 Mich App 232, 234; 477 NW2d 146 (1991).

Finally, we have reviewed and find without merit plaintiffs' claim that the deposition testimony of defendants' experts created a genuine issue of material fact. The testimony relied on by plaintiffs is insufficient to establish a triable fact issue.

Affirmed.

/s/ Michael J. Kelly
/s/ Joel P. Hoekstra
/s/ Edward A. Quinnell