

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHNNY BATES and PATRICIA
MIDDLETON BATES,

CIVIL ACTION NO.
1:09-CV-3280-RWS

Plaintiffs,

v.

MICHELIN NORTH AMERICA, INC., and
MICHELIN CORPORATION,

Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO COMPEL PRODUCTION OF
TIRES AND RIMS FOR INSPECTION AND TESTING**

Defendant Michelin North America, Inc. files this Memorandum of Law in Support of its Motion to Compel Production of Tires and Rims for Inspection and Non-Destructive Testing, filed contemporaneously herewith, and shows the Court as follows:

I. Introduction

This is a products liability case in which plaintiffs Johnny Bates and Patricia Middleton Bates (“Plaintiffs”) allege that a tire (the “subject tire”) manufactured by MNA was defective, that the subject tire became disabled on the road, and that this caused an accident in which Plaintiffs were injured. Plaintiffs make numerous general allegations of defectiveness, and specifically allege that the subject tire was

defectively designed and manufactured. Obviously, even the most basic defense of this case requires that MNA conduct a thorough scientific inspection of the central evidence in the case: the subject tire, the other tires mounted on, or found in, the subject vehicle, and the rims on which those tires were mounted. Plaintiffs, however, refuse to produce the tires and rims at issue in the case for inspection, except under unwarranted and unreasonable conditions that are contrary to the law and infringe upon MNA's right to equal access to the evidence. MNA therefore respectfully requests that this Court compel Plaintiffs to produce the tires and rims for inspection and non-destructive testing for a period of 60-90 days at MNA's facility in Spartanburg, South Carolina.

II. Factual Background

On February 23, 2010, MNA served its First Request for Production of Documents and Things to Plaintiffs. (Exh. A). Therein, pursuant to Request to Produce Nos. 7 and 13, MNA requested that Plaintiffs produce the subject tire, as well as the other tires on or in the subject vehicle and the rims on which those tires were mounted, for inspection. (Id.). That same day, counsel for MNA sent Plaintiffs' counsel a letter to formally request that MNA be permitted to take possession of the tires and rims for 60-90 days at its inspection facilities in South Carolina, and to outline the conditions under which MNA's tire inspection would occur. (Exh. B). MNA's counsel assured Plaintiffs that MNA would not harm or

alter the tires and rims in any way, and that the evidence would be returned to plaintiffs in the same condition in which it was received. (Id.) MNA also offered to absorb the cost of shipping the tires and rims to and from MNA's Spartanburg, SC plant for inspection and testing. (Id.)

Plaintiffs responded to the Requests for Production and stated that the subject tire was in Plaintiffs' counsel's possession, and was "available for inspection." (Exh. C, Plaintiffs' Response to Requests to Produce nos. 7 and 13). By letter, however, Plaintiffs' counsel stated that, although plaintiffs would produce the tires for inspection by MNA in South Carolina, any such inspection must take place under plaintiffs' "supervision," with a representative of the plaintiffs present with the tires "at all times." (Exh. D, February 25, 2010 Letter from Plaintiffs' counsel).

In an effort to resolve the matter, MNA pointed out the inequity inherent in plaintiffs' suggestion that they be permitted to "supervise" inspection of critical evidence by MNA's technical personnel, consulting experts, and counsel, while allowing no such restriction upon plaintiffs' own possession of the evidence. (Exh. E, May 14, 2010 correspondence from counsel for MNA). Counsel for MNA again assured plaintiffs that MNA's inspection and testing would not harm the evidence, and noted that the condition of the tires and rims could be thoroughly documented by plaintiffs before production, and upon receipt by MNA. Id.

In response, Plaintiffs again refused to relinquish possession of the tires and rims, insisting that a representative of the plaintiffs be present during any inspection by MNA. (Exh. F, May 19, 2010 correspondence from Plaintiffs' counsel). Plaintiffs suggested that MNA's work product could be protected by their representative "stand[ing] at an appropriate distance" so that MNA's examinations and discussions of the evidence could be viewed but not heard. *Id.* As discussed below, this offer does not begin to address MNA's concerns, and remains an unwarranted and inequitable handicap upon MNA's right to a thorough investigation of plaintiffs' allegations, and the thoughtful and informed preparation of its defense. The conditions placed on MNA's requested inspection constitute an abridgement of MNA's right to equal access to the evidence, and would result in a violation of the protections afforded MNA under the work-product doctrine.

III. Argument

A. Plaintiffs are obligated to produce the tires and rims to MNA for inspection and non-destructive testing.

The Federal Rules of Civil Procedure specifically provide for the production of relevant tangible things for inspection, testing, and sampling, upon request by an opposing party. *See* Fed.R.Civ.P. 34(a)(1). Defendants in this case are entitled to thoroughly inspect and test the tires and rims at issue, since those products are the central evidence in this case. *See Sipe v. Ford Motor Co.*, 837 F. Supp. 660, 661

(M.D. Pa. 1993) (“A products liability case focuses on the product itself. ... There is ample support for a public policy rule that a plaintiff in a products liability action must produce the product for the defendant’s inspection.”). It is an unfair burden to require a defendant to defend against an allegation that its product was defective without knowing anything at all about that specific product and having no way to identify what defect is alleged to have caused its product to have failed. See Powe v. Wagoner Electric Sales Corp., 589 F. Supp 657, 661 (S.D. Miss. 1984). This is especially true here, where the product itself has been preserved and is available for inspection.

Plaintiffs have had sole possession of the tires and rims since the accident at issue, and have had the subject tire inspected by their expert during that time. (See Exh. C at 14, Plaintiffs’ response to Interrogatory no. 8). MNA has served a request for production on Plaintiffs, pursuant to Rule 34, so that it too can have the same opportunity Plaintiffs have had for thorough and considered evaluation of the evidence. Plaintiffs agreed to an inspection in principle, but imposed unreasonable limitations on MNA’s access to the evidence. Plaintiffs’ counsel asserts that, “We must insist to have a plaintiffs’ representative present at all times with the tires while they are being inspected by Michelin and its experts.” (Exh. F).

Plaintiffs’ demands are absurd, and constitute unreasonable and unjustified limitations on MNA’s access to critical evidence. MNA is entitled to a private and

independent examination of the tires and rims with equipment that will allow it to analyze them thoroughly without causing any damage, and with experts whose identities and opinions are protected by Fed.R.Civ.P. 26(b)(4)(B).

Plaintiffs have had unrestricted access to the evidence for their own private, independent examinations, and have not offered to allow MNA's representative to be present and "supervise" those inspections. Not surprisingly, plaintiffs have specifically objected to the disclosure of information regarding their own inspection and testing of the subject tire on the ground that such request "is, on its face, beyond the scope of discovery under federal law as it seeks the identity and opinions of non-testifying consulting experts." (See Exh. C, plaintiffs' response to Interrogatories 3 and 14). Plaintiffs would invoke the right to unfettered, unsupervised access to the central evidence in this case, yet they would deny this same opportunity to MNA. This is fundamentally unfair. MNA has acknowledged its responsibility for the evidence while the tires and rims are in its possession, and has represented that it will use reasonable care and non-destructive methods in its inspection, will document the condition of the evidence upon receipt, will videotape the de-mounting of the tires from the rims, if such is necessary, and will return the evidence to plaintiffs' counsel in the same condition in which it was received. With those assurances, MNA is entitled to conduct the thorough

examination of the evidence necessary to prepare its defense, without the invasive and distracting presence of a representative of the plaintiffs.

B. Plaintiffs' Request to Supervise MNA's Inspections Infringes MNA's Rights Under the Work Product Doctrine and is Impractical.

Those participating in the inspection and analysis of the tires and rims on behalf of MNA will include MNA's employees (including attorneys and technical advisors) and counsel. Federal law protects against the disclosure to other parties of these individuals' "mental impressions, conclusions, opinions, or legal theories . . . concerning the litigation." Fed.R.Civ.P. 26(b)(3)(B); see Upjohn v. United States, 449 U.S. 383, 398, 101 S. Ct. 677, 66 L.Ed.2d 584 (1981)(noting that the "strong public policy' underlying the work-product doctrine ... has been substantially incorporated in Federal Rule of Civil Procedure 26(b)(3)."). Likewise, while in possession of the tires and rims, MNA will have consulting experts examine these materials to assist its representatives and counsel in understanding the evidence and help them develop the legal and technical theories of their defense. The identities and opinions of consulting experts are also protected by federal law. See Rule 26(b)(4)(B).

Plaintiffs seek to "supervise" MNA's inspection and testing. It is difficult to conceive of a scenario in which MNA could inspect the evidence under such "supervision" without revealing work product. At a minimum, each of MNA's

representatives would be required to examine the tire individually; take no notes; never reveal (by touch or visual focus) any particular aspect of the evidence that he or she found particularly interesting; and maintain a neutral facial expression throughout his or her analysis. Consulting experts could not point out tire features to counsel or MNA employees, and could not discuss their opinions in the presence of the tire. To term such an exercise an “examination” is a farce.

For MNA’s inspection of the evidence to be helpful to the defense of the lawsuit (the purpose of this discovery), it will be necessary for those examining the tires and rims to communicate about their findings and impressions. Discussions about the significance of certain elements of the tires and rims inevitably will take place, with participants pointing out different aspects of the evidence; raising, discussing, adopting, and discarding different theories and explanations; and taking notes. Features of the evidence of particular significance to the defense likely will draw special attention; they may be marked with chalk or removable stickers, viewed under special lighting or magnification, documented using microphotography or other specialized equipment, tested in non-destructive ways, or minutely measured. Any such focus would be obvious to an observer.

Other courts have recognized the inevitability of the disclosure of work product during the examination of evidence and have prohibited a plaintiff’s attendance at defendants’ inspection of physical evidence in product liability cases

for this very reason. See, e.g., Shoemaker v. General Motors Corp., 154 F.R.D. 235, 236 (W.D. Mo. 1994). Because inspection of the tires and rims in the presence of a representative of Plaintiffs would not allow MNA the privacy to which it is entitled, MNA asks this Court to compel plaintiff to produce this evidence for unsupervised inspection at MNA's own facilities. See Fullone v. Goodyear Tire & Rubber Co., 107 F.R.D. 1, 2 (W.D.N.Y. 1985) (finding that plaintiff allowing defendant to examine allegedly defective truck rim at plaintiff's counsel's office was insufficient; defendant was entitled to additional, "**private** non-destructive examination and testing of the rim" (emphasis added)).

A thorough tire inspection is a time-consuming process, taking a minimum of several hours. This process will be repeated by MNA's in-house technical advisors and retained consulting experts, and will take place over a number of days with various members of MNA's defense team participating in the inspections and discussions of the evidence at various times, as their schedules permit. In addition to the fundamental unfairness of allowing plaintiffs' representative to "supervise" these quintessential work product activities, such a proposition is simply impractical.

C. MNA Is Entitled To Additional Private Inspections of the Tires and Rims In The Future.

Discovery is an ongoing process, requiring parties to evaluate and reassess evidence as new evidence is presented. Therefore, all parties are entitled to inspect the evidence throughout the discovery process. See Fullone, 107 F.R.D. at 1-2 (rejecting the plaintiff's argument that the defendant was not entitled to examine evidence a second time).

Allowing MNA only one window of opportunity to obtain all of the information it can, while permitting plaintiff to retain the evidence for the rest of the discovery period would not constitute fair and equal access. MNA should be allowed additional access to the tires and rims if necessary, and asks that this Court say so in its Order.

IV. CONCLUSION

For the foregoing reasons, MNA respectfully requests that the Court grant its Motion to Compel Production of Tires and Rims for Inspection and Testing and order Plaintiffs to produce the subject tire, other tires and rims for inspection at MNA's Spartanburg, SC testing facility.

Respectfully submitted this 21st day of May 2010.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on May 21, 2010, I electronically filed the within and foregoing **Motion to Compel Production of Tires and Rims For Inspection and Testing** via the CM/ECF system, which will automatically provide service by email or mail on the following:

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