

PROPERLY DEFINING THE SCOPE OF DISCOVERY:
UNDERSTANDING THE IMPORTANCE OF “SUBSTANTIALLY SIMILAR”
DESIGNS IN PRODUCT LIABILITY CASES

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“Civility in the law went the way of the dodo bird with the expansion of product liability law.” -- Dwight W. James, Des Moines, Iowa, Fellow of the American College of Trial Lawyers.

On March 19, 2010, a Polk County, Iowa jury in *Toe v. Cooper Tire and Rubber Co., et al.* ordered Cooper Tire to compensate seven individuals in the amount of \$32.8 million, including \$1.5 million in punitive damages. The panel found that 10 years earlier Cooper Tire defectively designed and manufactured the tire at issue. Lasting more than six weeks, the trial included testimony from over twenty-five witnesses and more than one hundred exhibits. The evidence presented at trial detailed a complex story of a company that placed profits over safety. Although there can be little doubt about the importance of the countless decisions made during trial, the most crucial victory, which ultimately set the stage for the verdict, came more than ten months before the first juror ever took a seat when Plaintiffs won the critical discovery battle.

In the two years leading to trial, the case proved to be no different from every other tire and/or product liability case: a bitter and lengthy discovery battle over essential information. Every product liability case is proven by two pieces of evidence: (1) the product itself and (2) the underlying design and manufacture documents. Both pieces of evidence are essential because each can, and often do, tell a completely different story. It is nearly impossible to maintain a cause of action against a product manufacture without having possession of the failed product. Hence, the failed product is of the utmost importance. However, the cause of the product’s failure is often subject to “interpretation” by a defendant’s experts. Excuses for a product’s failure are as plentiful as the experts lining up to accept a defendant’s retainer check. Without written evidence supporting the theory of the defect and cause of failure, experts are permitted to “opine” that the failure was caused by anything from misuse by a plaintiff to the rotation of the earth on the day of the accident. It is for this very reason the design and manufacture documents are equally important.

With few exceptions, every company will document the events leading to the design and manufacture of any product it intends to sell. Tire companies are no different in this respect. Because as many as 10 engineers design an individual tire line, documentation of key design decisions is critical. Fortunately for Plaintiffs, Cooper Tire was quite good at documenting its ineptitude. Plaintiffs were able to show internal knowledge of the problems surrounding the tire at issue, which proved to be of dire importance at trial.

Because catastrophic tire failures are relatively rare and because every member of the jury drives to and from the courthouse on a set of four tires, an inherent skepticism of tire defect exists in

the mind of many jurors. To neutralize this inherent skepticism, it is critical to establish the alleged design and/or manufacturing defect with documents authored by the defendant.

It comes as no real surprise to anyone who has ever been involved in a product liability case that defendants go to extraordinary lengths to thwart the discovery process. This article is intended to provide an overview of one common discovery tactic used by defendants and how to overcome it.

"We have given the plaintiff in this case 10,000 pages of documents. The plaintiff's attorney is on a witch hunt. This has to stop at some point."

-- Every product liability defense attorney who has attended a motion to compel hearing.

Tire companies will often voluntarily produce, before discovery requests are even served, a number of documents 99% of which are not worth the paper on which they were printed. This initial, gratuitous production most always begins with the boilerplate language *"in an effort to avoid discovery related issues and to focus on the merits of this case defendant hereby offers to produce a wide range of information concerning the tire at issue. These documents include design, manufacture, and marketing information for the subject tire."* This boilerplate language adequately foreshadows defendant's response to a plaintiff's first, second, third, and subsequent motions to compel, because product liability defendants continually attempt to unilaterally set the scope of discovery and to define the key battle ground of discovery regarding "substantially similar" products.

In almost every state, discovery in a product liability case is permitted not only of the specific product at issue, but also of "substantially similar" products and incidents. Indeed, the Iowa Supreme Court has repeatedly held that information related to other products and accidents in "substantially similar" circumstances is not only discoverable, it is admissible. *See, e.g., Lovick v. Wil-Rich*, 588 N.W.2d 688, 697 (Iowa 1999)(reviewing numerous cases analyzing the "substantial similarity" requirement). Importantly, "[i]dential circumstances are not required to prove substantial similarity," especially "where [the] defendant has ample opportunity to show differences by cross-examination or by its own witnesses" *Id.*

Tire cases provide an excellent example of this battle ground over discovery regarding "substantially similar" products and incidents. For example, tire companies often produce different brands of tires from a single tire design. In litigation, tire defendants will almost always offer to produce information related to the design and manufacture of the subject tire and what is referred to as the "green tire spec" ("GTS"). The GTS encompasses each of the differently branded tires utilizing the same design. Because the GTS will often include up to twenty different brand names of tires, limiting the discovery to the applicable GTS often becomes a sexy argument in response to a plaintiffs' motion to compel. However, all tires within a single GTS are of the *exact* same design. The only difference between the tires is the brand name of the tire molded into the tire sidewall. To understand how limited a in scope a GTS is consider this: if two tires of the exact brand and size are manufactured at the exact same plant on the exact same day each will be classified under a different GTS, for the purpose of discovery, if the color of the sidewall lettering is different between the two tires. Therefore, limiting

discovery to a single GTS provides absolutely no information whatsoever concerning “substantially similar” designs and is, instead, limiting discovery to the *identical* tire design.

If a defendant were successful in limiting discovery to a single GTS, the tire company would be permitted to withhold 90% of the documents leading up to and following the design and production of the subject tire. Therefore, it is imperative that plaintiff’s counsel be cognizant of the evidence that falls outside of this unilaterally imposed scope. As with any business in which products are mass produced, the design and manufacture process is standardized across many tire designs in an effort to avoid duplicative expenses. Therefore, most companies track the performance of tire lines and families, i.e. all passenger tires, all tires within one brand name, etc. Because of this business practice seldom will a product manufacture narrowly tailor product investigations concerning failures or potentially poor designs to one single product.

Take for instance the recent sudden acceleration problems with Toyota vehicles. The evidence has shown Toyota to have a company-wide problem with unintended acceleration. The problem is not, nor has it ever been, limited to one certain vehicle design. However, before this problem received national attention through recent Congressional hearings, Toyota attempted to limit discovery responses in sudden acceleration cases to the specific model vehicle involved in the underlying accident. If successful in doing so, Toyota was under no obligation to produce an overwhelming majority of documents that collectively prove the defect, because each of those documents did not specifically discuss a problem with the exact model vehicle at issue in the lawsuit.

The same tactic holds true for tire companies. If limited to a single GTS, discovery in a tire case will result in virtually no information detailing the massive problems that extend company-wide unless the requested document specifically references the *exact* model tire at issue in the case. As with Toyota, a tire defendant’s ability to thwart discovery from the inception of the case must be monitored and vigorously fought. A responsive letter detailing a defendant’s gamesmanship and the grossly misleading nature of defendant’s often disingenuous discovery offer is extremely important. Should defendant later chose to use its own self-serving letter in response to Plaintiffs’ motion to compel, this response letter can hopefully be used to educate your judge about the gamesmanship and discovery tactics being utilized by the defendant. Otherwise, the plaintiff’s ability to discover information relevant to the case defect theory is almost fatally compromised.

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