CIRCUIT AND SUPERIOR COURTS
38TH JUDICIAL CIRCUIT
ALLEN COUNTY, INDIANA

DAVID HARTH and ROSETTA HARTH, Plaintiffs, vs. GOODYEAR DUNLOP TIRES NORTH AMERICA, LTD.; GOODYEAR-SUMITOMO RUBBER INDUSTRIES, LTD.; SUMITOMO RUBBER INDUSTRIES, LTD Defendants.	)	CAUSE NUMBER: **02D01-0208-CT-321** **ORDER OF THE COURT**

COMES NOW THE PLAINTIFFS, and file a Motion for Leave to Amend the Complaint and Motion to Compel Load Range E Documents. The Court, having heard argument from opposing counsel, having read supporting and opposing memoranda, and being duly advised in the premises, now finds and rules as follows.

In support of Plaintiffs' Motion to Amend, Plaintiffs argues that newly acquired evidence led to a change in their expert's opinion that Defendants acted with "reckless disregard." Plaintiffs argue that it was not until this evidence was tendered by Defendants for Mr. Carlson's May deposition that he was able to come to this opinion. Plaintiffs argue that the evidence mounted to show that "DTC acted recklessly in manufacturing and designing this tire."

In opposition to the Motion to Amend, Defendants argue that that three factors exist which should compel this Court to deny the motion: undue delay, undue prejudice and futility. These factors are included in several among which the appellate court will consider in review of this Court's discretion in ruling on a Motion to Amend. *See* Mapco Coal, Inc. v. Godwin, 786 N.E.2d 769 (Ind. Ct. App. 2003).

This Court agrees with Defendants. As we sit today, this case is a less than four (4) weeks away from a two week trial. This case has been pending since August of 2002. On the other hand, Plaintiffs argue that "Delay is an insufficient basis for denying a motion to amend unless the delay results in undue prejudice to the opposing party." Tragarz v. Keene Corp., 980 F.2d 411 (7th Cir. 1992). However, Plaintiffs ignore the fact that this motion changes the entire complexion of this case, and more specifically, with regard to the amount of damages which may be recoverable in this case. In fact, one week from today, this case is set for judicial settlement conference before The Honorable Nancy E. Boyer. It is no small point that the parties have already conducted two mediations without

this issue being presented as a contested issue. Adding punitive damages at this late date makes any settlement conference in this matter almost futile.

Perhaps most telling of the prejudice to Defendants was the reaction of counsel when this very matter of punitive damages was first addressed by this Court. During the May 24, 2005 hearing on Defendants' Motion for Interlocutory Appeal, this Court discussed the issue of bifurcation of this trial. In doing so, the Court asked Plaintiffs' counsel whether punitive damages were at issue in this case. While it was Plaintiffs' belief that punitive damages may be at issue, Defendants' counsel vehemently shook their heads in denial. It is no small coincidence that this Court received Plaintiffs' motion less than two weeks after the hearing, rather than immediately following the deposition in which Mr. Carlson supposedly first arrived at the opinion upon which Plaintiffs now rely.

While much of the prejudice to Defendants is certainly entwined with the delay in bringing this motion, this Court also finds Plaintiffs' conduct to be dilatory as well. Plaintiffs' counsel argued in open court that it was his strategy to not plead punitive damages because he would most certainly have to deal with a dispositive motion on the issue. Although the evidence of Defendants' reckless conduct "continued to mount," Plaintiffs chose not to seek leave to amend until a month before trial, and on the eve of the judicial settlement conference. Certainly at this point, Plaintiffs have avoided a dispositive motion on the issue of punitive damages. If this Court were to grant Plaintiffs' motion it would be improbable, if not impossible for the Defendants to file, the parties brief, and this Court entertain a dispositive motion on punitive damages at this late date. Certainly had the case against the Defendants continue to mount, as Plaintiffs would have this Court believe, Plaintiffs could have sought leave to amend its complaint in the two and a half years prior, allowing the merits of a dispositive motion to be considered.

Finally, at this late date, Defendant is confronted with new issues that it must be prepared to deal with at trial. These issues not only have implications during the trial for which they have already spent a significant amount of time preparing; but Defendants will also be presented with a significant task in having to parse through new issues of discovery regarding the worth of the companies, which was not at issue for almost three years in this case.

Therefore, for the aforementioned reasons, this Court **DENIES** Plaintiff's Motion for Leave to Amend the complaint.

Plaintiffs also seek production of certain "Load Range E" documents by Defendant Goodyear. In their opposition to Plaintiffs' motion and in the hearing, Defendants' arguments focused in large part on the relevancy and admissibility of the aforementioned documents, in addition to the Court's prior ruling of a protective order covering other documents sought by Plaintiff. However, this Court is more concerned with the applicable appropriate standard for discovery under T.R. 26, which states that it shall not be grounds for objection that information sought is inadmissible at trial "if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Furthermore, in reaching this standard, the movant must make an affirmative showing that the products are sufficiently similar to the subject product. *See* Christensen v. Sears, Roebuck and Co., 565 N.E.2d 1103 (Ind. Ct. App. 1991).

Plaintiffs have tendered the affidavit of their expert, Mr. Carlson, which clearly sets out the similarities between the subject tire and evidence sought. Defendants have tendered an affidavit of their own expert, Thomas Johnson, Jr., which contrasts that of Mr. Carlson. As this Court has seen many times, there is a battle of the experts. This Court is not about to evaluate/compare the merits of either expert, and begin an analysis of the weight to be given to either of the affidavits. The Defendants have not even moved to strike the affidavit of Mr. Carlson. Therefore, this Court **GRANTS** Plaintiff's Motion to Compel. To the extent, if any, that this order may overlap with this Court's prior ruling on the Protective order, said order is amended to reflect the Court's present ruling.

The discovery sought shall be subject to protective order entered by this Court, which form order shall be supplied by Defendants, **forthwith**. Defendants are hereby **ordered** to completely respond to Plaintiffs discovery requests related to this motion within 10 days of the date of the Court's protective order. To the extent that Plaintiffs' motion requests an award of costs and fees, said request is **DENIED**.

It is so **Ordered**.

DATED: June 24, 2005

The Honorable Stanley A. Levine
ALLEN SUPERIOR COURT

MANNER OF NOTICE:
(X) WITH COPY PURSUANT TO T.R. 72 TO BE SERVED BY:
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PROOF OF NOTICE UNDER TRIAL RULE 72(D)

A copy of the entry was served either by mail to the address of record, deposited in the Att distribution box, or personally distributed to the following persons:
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DATE OF NOTICE: June 24, 2005
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