

**FILE COPY**

CAUSE NO. C-1872-10-J

JESUS GONZALEZ MARTINEZ,  
INDIVIDUALLY; VERONICA GONZALEZ  
ZARATE, INDIVIDUALLY, AND AS  
REPRESENTATIVE OF AND GUARDIAN  
OF JESUS GONZALEZ MARTINEZ;  
ADRIANA ALONSO SARABIA,  
INDIVIDUALLY; AND MARIA F.  
GALLEGOS, INDIVIDUALLY, AND AS  
REPRESENTATIVE OF THE ESTATE  
OF ABRAHAM SALAZAR, DECEASED

Plaintiffs

v.

COOPER TIRE AND RUBBER CO., AND  
FUTURA IN ITS ASSUMED OR COMMON  
NAME;

VILLA'S TIRE SERVICE, AND VILLA'S  
TIRE SERVICE IN ITS ASSUMED OR  
COMMON NAME;

RAUL CAVAZOS d/b/a RAUL'S TIRE  
SERVICE, AND RAUL'S TIRE SERVICE  
IN ITS ASSUMED OR COMMON NAME;

Defendants

IN THE DISTRICT COURT

430<sup>TH</sup> JUDICIAL DISTRICT

HIDALGO COUNTY, TEXAS

**ORDER GRANTING IN PART AND DENYING IN PART**  
**COOPER TIRE AND RUBBER COMPANY'S MOTION TO**  
**COMPEL PRODUCTION OF THE SUBJECT TIRE FOR NON**  
**DESTRUCTIVE CUSTODIAL INSPECTION**

Before the Court is Defendant Cooper Tire & Rubber Company's  
(hereinafter "Defendant Cooper Tire") Motion to Compel Production of the

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Subject Tire for Nondestructive Custodial Inspection (hereinafter sometimes referred to as "Cooper Tire's Motion")<sup>1</sup> and Plaintiffs' (hereinafter sometimes referred to as the "Martinez family") Response to Cooper Tire's Motion.<sup>2</sup> Defendant Cooper Tire also filed a reply to the Martinez family's response.<sup>3</sup> The Court called the case for hearing on December 16, 2010. The Martinez family appeared by and through attorney at law John Blaise Gsanger. The Defendant Cooper Tire appeared by and through attorney at law, Rafael C. Taylor. Both sides announced ready. For reasons enumerated hereinafter, the Court grants in part and denies in part, Cooper Tire's motion.

I.

**BACKGROUND**

The Martinez family filed a civil lawsuit against Defendant Cooper Tire and other Defendants on June 23, 2010, alleging that on November 7, 2008, while Abraham Salazar was driving a Ford Explorer in Mexico, the tread separated from the right rear tire causing Salazar to lose control of

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<sup>1</sup>Cooper Tire's Motion was filed on December 1, 2010.

<sup>2</sup>The Martinez family's response was filed on December 3, 2010.

<sup>3</sup>Defendant Cooper Tire filed a reply to the Martinez family's response on December 15, 2010.

the vehicle and crash. The Martinez family further alleges that the tire failed because it was defective resulting in injuries and damages to the Martinez family.<sup>4</sup> Defendant Cooper Tire filed Special Exceptions and its Original Answer<sup>5</sup> urging special exceptions, a general denial, a verified denial and other defenses, reserving its right to further amend its answer in accordance with the Texas Rules of Civil Procedure.

II.

**DEFENDANT COOPER'S POSITION**

Cooper Tire's Motion states that the Martinez family has been unwilling to produce the alleged subject tire for nondestructive custodial inspection by its consultants despite multiple requests, thereby necessitating its Motion to Compel. Cooper Tire's Motion requests that the Court enter an Order compelling the Martinez family to produce the alleged subject tire for a period of up to sixty days for nondestructive, custodial inspection by Defendant Cooper and its consultants at a location, such as a laboratory or office of the consultant, where appropriate tools and equipment can be utilized for the examination.

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<sup>4</sup>See, Plaintiffs' Original Petition and Request for Disclosure, Paragraph V, Pages 5-8.

<sup>5</sup>Defendant Cooper filed its Original Answer on August 13, 2010.

At the pre-trial hearing, Defendant Cooper Tire also explained that sixty days was necessary because of the distance from the Cooper Tire headquarters in Ohio to the location of its experts and due to the experts' schedules. Moreover, Defendant Cooper argued<sup>6</sup> that the Court should not require video taping or the presence of Plaintiff's representatives at the inspection. Counsel for Defendant Cooper submitted proposed orders for the Court's consideration.<sup>7</sup>

### **III. THE MARTINEZ FAMILY'S POSITION**

Counsel for the Martinez family does not dispute that Defendant Cooper Tire is entitled to the inspection and even several inspections. However, they cite Rule 196.3 of the Texas Rules of Civil Procedure in support of their request to retain the tire in their possession while the requesting party (Cooper) performs the inspection. Further, they propose three different orders<sup>8</sup> – one that allows the inspection at its present location (Martinez family representatives' care, custody, and control) with

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<sup>6</sup>Defendant Cooper also cited and presented case law where Courts ordered that plaintiffs' representative could not video tape or view the Defendants' inspection because it violated the consulting expert privilege.

<sup>7</sup>A copy of the Defendant Cooper Tire's proposed orders are filed among the papers in this case.

<sup>8</sup>A copy of the Plaintiffs' proposed orders are also filed among the papers in this case.

Plaintiffs' representative present; a second order allowing the Defendant Cooper to remove the tire from its present location but with a requirement that Defendant Cooper pay the transportation costs for Plaintiffs' representatives to bring the tire and witness the inspection and finally a third order where no representative is present but with a requirement that Defendant Cooper video tape the inspection.<sup>9</sup> To avoid Cooper Tire's concerns about the consulting expert privilege, counsel suggested the video not provide the faces or identity of the individuals conducting the inspection.<sup>10</sup>

The Martinez family expresses concern about relinquishing custody of the tire for Cooper Tire's inspection. They argue that they are unable to pursue spoliation remedies if a third party, other than Cooper Tire, loses, damages, or destroys the tire.<sup>11</sup>

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<sup>9</sup>Counsel for the Martinez family state that Cooper Tire agreed to such an Order in a case with Federal Judge Janis Graham Jack in the federal district court in the Southern District of Texas – Corpus Christi Division.

<sup>10</sup>This offer was made in open court on the record on December 16, 2010.

<sup>11</sup>The Martinez family mention four cases where tire evidence was allegedly mishandled; although none involved Cooper Tire, the Court understands Plaintiffs' concerns.



## IV.

**DEFENDANT COOPER TIRE'S REPLY**

In its reply, Defendant Cooper Tire argues that Plaintiffs' proposals are fundamentally unfair, are unworkable, and violate the attorney work-product and consulting expert privileges. Cooper Tire explains that having plaintiffs' representatives "hover over Cooper's shoulder during the testing is entirely contrary and inconsistent with the well-established principle that discovery is to ensure a fair and level playing field between the parties."<sup>12</sup> (citations omitted).

Defendant Cooper Tire also objects to the videotaping of the inspection of the subject tire as unworkable because "[t]he logistics of the video proposal would demand that the inspection be conducted in a single location over the length of a single video recording." Further, Cooper Tire complains that Cooper or its experts could not stop the video to move the tire to another location for more testing without fearing an allegation by Plaintiffs that Cooper tampered with the evidence while the video camera was off, while videotapes were changed or if any mechanical difficulty

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<sup>12</sup>Defendant Cooper's Reply to Plaintiffs' Response to Cooper's Motion to Compel Production of the Subject Tire for Nondestructive Custodial Inspection, Paragraph I, page 2-3.

occurred.<sup>13</sup>

Finally, Defendant Cooper Tire argues that presently Cooper's retained experts and their work-product are privileged and information concerning consulting experts is not discoverable.<sup>14</sup> The latter privilege "grants the party and its attorney a sphere of protection and privacy in which to develop their case."<sup>15</sup> In the Gayne case, the Supreme Court held that allowing Plaintiffs to be present during tests conducted by General Motors' consulting experts violated the consulting expert privilege.

However, as stated in Cooper Tire's reply, in at least one case cited by Plaintiffs alleging possible damage, a video tape supported Defendant's position "that the damage to the tire did not occur during the forensic examination of the tire conducted by defendants."<sup>16</sup> In that case, the video actually assisted the Defendants against claims of misuse by its experts or agents.

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<sup>13</sup>Id. at page 4.

<sup>14</sup>See, Tex. R. Civ. P. 195, cmt 1.

<sup>15</sup>Defendant Cooper Tire cited General Motors Corp. vs. Gayne, 951 S.W. 2d 469, 474 (Tex. 1997), in support of its position.

<sup>16</sup>See, Cooper Tire's Reply, Paragraph III, pages 7-8, involving the Martha Rodriguez, et al v. Firestone Tire & Service Centers, et al, case

V.

**TIRE INSPECTION ORDER**

After carefully reading and considering Cooper Tire & Rubber Company's Motion to Compel Production of the Subject Tire for Nondestructive Custodial Inspection, the Martinez Family Response, Cooper Tire's Reply, the case law submitted, the arguments of counsel and other in and out of state orders, and after balancing the hardships and potential adverse results to the parties, the Court ORDERS that Defendant's Motion to Compel be and it is hereby GRANTED IN PART, and DENIED in part as follows:

A. The Motion is granted in part, subject to the following terms and conditions:

1. Prior to any delivery or shipping of the subject tire from Plaintiffs' counsel to Defendant's counsel, Plaintiffs, at their expense, shall videotape the subject tire, the sealed containers and their contents and provide Defendant's counsel a copy of this video. The video shall not identify any party who performed the video taping.
2. Plaintiffs' counsel shall deliver to counsel for Cooper (unless otherwise agreed to, at Johnson, Trent, West & Taylor, L.L.P., 919 Milam St., Suite 1700, Houston, Texas 77002) the tire evidence within fifteen (15) days of the date of receipt of this Order.
3. Cooper shall be responsible for the safe keeping and



maintenance of the tire evidence after it has received the tire evidence and until such time as the tire evidence is returned to Plaintiffs' counsel.

4. Any examination by Cooper shall be non-destructive and consist of visual, tactile, photographic, video and x-ray examinations only.
5. No solvents or lubricants shall be applied to the tire evidence.
6. No punctures, cuts, permanent marks, or scratches are to be made on the tire evidence while performing the inspections.
7. No samples of any kind may be removed from the tire evidence.
8. Cooper will demount the subject tire from its rim in order to fully inspect it, if necessary.
9. Cooper Tire will videotape, at their expense, the subject tire after receipt of the same from Plaintiffs' counsel to catalogue the items received. Cooper Tire will also videotape the entire examination without interruption from the time the containers are open until the tire is returned into the containers and the containers are resealed.
10. Cooper Tire shall provide a copy of the videotape to Plaintiffs' counsel at the time they return the tire.
11. The videotape will be stopped for breaks and the video will resume after the breaks until the conclusion of the examination.
12. Defendant's counsel shall inform the person responsible for the inspection and the person responsible for the videotaping of the terms of this order and assure

compliance with the same.

13. The video shall not identify any faces or identities of any of the individuals performing the inspection to assure compliance with the attorney work product and the consulting expert privileges.
14. The tire evidence will be returned to Plaintiffs' counsel within sixty (60) days of receipt of the tire evidence by Cooper.
15. Neither Plaintiffs nor their counsel or representatives shall be allowed to be present during the inspection, photographing and videotaping of the subject tire.

B. The Motion is DENIED in part as follows:

The Defendants request that the inspection of the tire not be videotaped is denied.

The Court further ORDERS that:

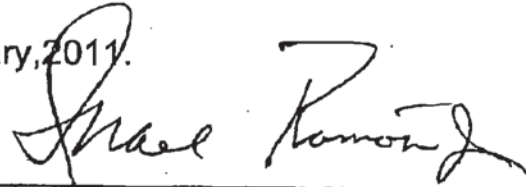
1. It is the mutual obligation of the parties to preserve the Subject Tire and Wheel.
2. A photocopy of the shipping label shall be firmly secured to each item in the package to prevent loss during transport. In the envelope affixed outside of each package, the following shall be included:
  - a. The names of the Plaintiffs; and
  - b. A complete and detailed list of each item contained in the package. If the Subject Tire and Wheel has more than one part (i.e., tread, sidewalls, etc. are completely detached from the Subject Tire body), this must be reflected. Also, whether the Subject Tire is mounted or demounted to the wheel shall be

noted.

3. This Order does not affect any parties' right to assert a spoliation claim in the event sufficient grounds support such an allegation.
4. The parties may, by agreement, modify any provision in this Order that is necessary to effectuate the Court's Order; and
5. The Court will entertain a motion to modify any provision in the Order if the parties find it unworkable and they cannot agree to modify or change it.

The Hidalgo County District Clerk shall forward forthwith a copy of this Order to all counsel of record by fax.

SIGNED this 13<sup>th</sup> day of January, 2011.



ISRAEL RAMON, JR., Judge  
430<sup>TH</sup> Judicial District

cc: Mr. T. Christopher Trent, Mr. Raphael C. Taylor, Mr. Michael A. Pita -  
Fax No. 713/222-2226

Mr. John Blaise Gsanger - Fax No. 361/698-7614

*Prepared by 430<sup>th</sup> District Court (mcs)*