

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

MARTIN SOSTENES AND MARIA ANTONIA)
LIMA ESTEBAN, INDIVIDUALLY AND AS)
NEXT FRIENDS OF ELEHU SOSTENES,)
MINOR CHILD,)

Plaintiffs,)

vs.)

Cause No. 2008L007574

BRIDGESTONE CORPORATION;)
BRIDGESTONE/FIRESTONE AMERICAS)
HOLDING, INC; f/k/a BRIDGESTONE/)
FIRESTONE, INC.; BRIDGESTONE/)
FIRESTONE NORTH AMERICAN TIRE, LLC;)
ISUZU MOTORS OF AMERICA, INC; and)
GARCIA'S CAR REPAIR, INC.;)

Defendants.)

**PLAINTIFFS' RESPONSE TO BRIDGESTONE AMERICA'S MOTION TO COMPEL
PRODUCTION OF THE SUBJECT TIRE FROM PLAINTIFFS**

Plaintiffs (referred to collectively as the "Sostenes family"), by and through their attorneys, file Plaintiffs' Response to Bridgestone America's Motion to Compel Production of the Subject Tire from Plaintiffs, and would respectfully show the Court as follows:

1. This is a product liability and negligence case involving a defective Firestone Firehawk SS10 tire. The defective tire is the key piece of evidence in this case, and it is in the possession and custody of the Sostenes family. Firestone has asked to inspect the tire, and the Sostenes family has offered the tire for inspection, but the parties have been unable to agree upon the terms of an inspection. Specifically, Firestone will not agree to allow a representative of the Sostenes family to be present during the inspection and testing of the tire in the family's possession and – in the alternative – will not agree to videotape the inspection in lieu of having a

representative of the Sostenes family present. Moreover, Firestone will not agree to be responsible for loss or damage to the tire if it is allowed out of the Sostenes family's possession.

A Party's Right to Be Present During the Inspection of Evidence in its Possession

1. The law clearly establishes the party who has possession of evidence has a right to be present when an opposing party inspects that evidence:

We believe the plaintiff should be allowed to have a representative present during testing in these circumstances where the object tested is the basis of the claim, and it was an abuse of discretion for the trial court to have denied this right. The object to be tested is the plaintiff's evidence, and he has the right and duty to his client to control it so it will not be damaged or tampered with in any way.

Klick v. R. D. Werner Co., 38 Ill. App. 3d 575, 578, 348 N.E.2d 314, 317 (1st Dist. 1976)). In the *Illinois Practice Series: Civil Procedure Before Trial*, law professors Richard Michael and Michael Kaufman confirm this legal requirement:

Where a party's physical evidence is inspected or tested, that party has the right to be present. When testing involving the actual evidence is to be conducted, an order should be obtained authorizing the testing and specifying what tests may be performed, their time and place, the party who is to perform the test or experiment, and any limitations imposed on the testing procedures.

4 Ill. Prac. Civ. Procedure Before Trial § 33.5, Richard Michael, J.D., Michael Kaufman, J.D., (2nd ed., updated 2009) (citing *Klick*).

The Need for Guidelines Limiting Inspections of Evidence in One Party's Possession

2. Beyond the requirement that a party is entitled to be present during the inspection of evidence in its possession, the law regarding the need for specific guidelines covering opposing party inspections of evidence in the other party's custody is equally well established. *Nichols Illinois Civil Practice* summarizes the law requiring "guidelines for the control of the evidence" specifying "what tests or inspection may be conducted, when, where, and by who" and "who

may be present, including representatives of all parties to the cause, how far the tests or inspection can go, and what authority each of the parties shall have in that regard”:

If a party desires to test or inspect the evidence, the court should dictate the guidelines for the control of the evidence. The guidelines should set forth what tests or inspection may be conducted, when, where, and by whom. The guidelines should also set forth who may be present, including representatives of all parties to the cause, how far the tests or inspection can go, and what authority each of the parties shall have in that regard.

3 Nichols Ill. Civ. Prac. § 44:45, Diane Koning, J.D., Michael Kaufman, J.D. (Updated May 2009) (citing *Klick*). Similarly, *Illinois Law and Practice: Discovery* also confirms the need for a “protective order that dictates guidelines for control of plaintiff’s evidence which defendant desires to test or inspect.” 16 Ill. Law and Prac. Discovery § 6, Eric Mayer, J.D (Updated 2010). The *American Law of Products Liability 3d Treatise* confirms that Illinois law imposing restrictions on the inspection of evidence in the other party’s possession (including the restriction that the party in possession of the evidence must be allowed to attend the inspection) is a mainstream proposition of law:

In permitting the nondestructive inspection and testing of products, the courts have typically imposed a number of conditions on the inspection and testing, normally to protect the rights of the party who will be required to produce the product for discovery. Accordingly, one of the most common conditions imposed is that the party with custody and control of the product be given the opportunity to be present during the inspection or testing of the product by the opposing party or to have his or her expert, attorney, or representative present during the inspection or testing. The examining party may also be required, as a condition of any testing, to give reasonable notice of the time and place of the testing to the opposing party and to deliver to the opposing party, upon its request, copies of the reports of all tests and analyses of the product made by or on behalf of the examining party.

In other products liability actions, the courts, in permitting the inspection or testing of a product, have required, among other things, that--

- the examination or testing not adversely affect the product.
- the expert and representative of the party required to produce the product have the right to photograph the product before and after each stage of any test conducted.

- the inspection and testing be completed within a specified time.
- the defendant assume the plaintiff's reasonable expenses of having a qualified representative present at the defendant's inspection of the product at the defendant's facility and that the expenses be considered a taxable disbursement by the defendant if it ultimately succeeded in the action.

Am. L. Prod. Liab. 3d § 53:107 (Updated 2010) (citing *Stearn v. Ford Motor Co.*, 123 A.D.2d 856, 507 N.Y.S.2d 470 (2d Dep't 1986); *DiGiovanni v. Pepsico, Inc.*, 120 A.D.2d 413, 502 N.Y.S.2d 23 (1st Dep't 1986); *Fullone v. Goodyear Tire and Rubber Co.*, 107 F.R.D. 1, 1 Fed. R. Serv. 3d 338 (W.D.N.Y. 1985); *Klick v. R. D. Werner Co.*, 38 Ill. App. 3d 575, 348 N.E.2d 314 (1st Dist. 1976); *Canter v. American Cyanamid Co.*, 6 A.D.2d 847, 174 N.Y.S.2d 983 (1958); *Merriam Display Supply Studio v. Harlambides*, 196 Misc. 352, 91 N.Y.S.2d 901 (Mun. Ct. 1949)).

Compromise Inspection Protocols the Sostenes Family Has Proposed

3. Despite the clear authority giving the Sostense family the right to have a representative present at any inspection of the evidence in their possession, Firestone will not agree to allow them to be present at the proposed inspection of the defective Firestone Firehawk SS10 tire. In response, the Sostense family has offered a compromise that has been agreed by other tire manufacturers – although the family would prefer to enforce their right to be present at any inspection, they have offered to allow Firestone to inspect the tire without the Sostenes family being present if Firestone will (1) disclose only a videotape of the inspection showing only the hands and tools on the tire and not the faces or voices of the persons conducting the inspection, (2) assume full responsibility for the consequences if the tire is lost, altered, or destroyed while it is out of the plaintiffs' possession at the defendant's request, and (4) adhere to the agreed non-destructive guidelines. *See Exhibit 1, Exhibit 2.* Despite the fact that the Sostense family has the right to have a representative present at any inspection of tire, Firestone would neither agree that

they can be present at the inspection nor agree to videotape the inspection. As yet another effort at compromise, the Sostense family proposed replacing the requirement that they be present – or in the alternative, that Firestone videotape the inspection – with an agreement that both parties would share the results of any testing and that both parties would accede to the imposition of sanctions if the evidence is lost, altered, or destroyed (with the sanction against the Sostenes family if the tire is altered while it is in their possession and the sanction against Firestone if the tire is altered when it is out of the family’s possession at Firestone’s request). *See Exhibit 3*. This offer of compromise was also rejected.

4. Counsel for the Sostenes family is motivated to seek these protections because of counsels’ past experiences in other tire cases where inspections of the tire caused damage to the tire that had a significant impact on the case. In *Martha Rodriguez, et al. v. Firestone Tire & Service Centers et al.*, No. C-115,396 (244th Dist. Ct. Ector County Tex.), a defense expert damaged the bead of the tire dismounting it after the crash, and while the plaintiffs understood this damage to have been the result of the defense inspection, the defendants claimed it was pre-crash damage that contributed to the tire failure. This dispute became an overwhelming distraction at trial. In *Kimberly Dee Hargrove et al. v. Hankook Tire America Corp. et al.*, No. 42940 (118th Dist. Ct. Howard County Tex.), the plaintiffs’ retained expert found no tear in the tire carcass which penetrated the tire’s innerliner, and the defense’s retained expert found no tear in the tire carcass which penetrated the tire’s innerliner, but the third and final inspection by defendant’s in-house forensic analyst found that a tear in the carcass which penetrated the innerliner. The in-house analyst claimed to have “found” this innerliner puncture – which experts for both sides did not detect in their earlier inspections – by using a sharp instrument to “probe” a tear in the carcass to “see” if that tear penetrated through the innerliner. The question

whether this in-house analyst found the innerliner puncture with his sharp probe or created the puncture with that probe became the issue that dominated the case from that point forward. In *Sara Cruz et al. v. Michelin North America et al.*, No. 2007-CV-0141-A (197th Dist. Ct. Willacy County Tex.), the defense expert identified red paint marks on the detached tire tread as a paint mark transferred from the vehicle to the tire during the crash sequence, and the defense expert then used this transfer mark as evidence to support the defense of the case. Analysis of the photographs taken before the detached tread was shipped to the defendant confirmed that the red paint mark was not on the tread at that time, and analysis of the red paint on the tire as compared with the paint on the red truck confirmed that the two paints were chromatically similar but chemically different. This issue became a significant and time consuming distraction at trial. In *Bertha Orozco et al. v. Michelin North America et al.*, No. 06-02-0007-CYL (81st Dist. Ct. La Salle County Tex.), a tire was lost in shipping on its return to the plaintiffs' counsel's office. These are just a few examples of the difficulties that can arise from a defense inspection of a tire that is conducted without proper safeguards of the evidence, and counsel for the Sostenes family has personal experience with each of these cases as plaintiffs' counsel. In light of these experiences, the Sostenes family must insist on enforcing their right to protect the tire at issue by the full measure of safeguards allowed under Illinois law or by some alternative agreement as they have proposed.

Conclusion

5. The Sostenes family asks this Court to order Firestone to comport with *Klick v. R. D. Werner Co.* in its inspection of the tire at issue; specifically, the family asks (1) to have a representative present during Firestone's inspection of the tire at issue, (2) to require Firestone to specify in advance exactly what inspection, examination, or testing it will perform as well as the

exact methodology for such tasks, including specifying the time (to be mutually agreed), place (to be mutually agreed), and the person who is to perform each task (to be designated at Firestone's election), and (3) to limit the inspection to non-destructive means (to be mutually agrees that the means are, in fact, non-destructive). In the alternative, the Sostenes family asks that the Court order Firestone to conduct its inspection of the tire according to any of the three alternative protocols proposed by the Sostenes family and attached as Exhibit 1 – 3.

Prayer for Relief

For the reasons set forth above, Plaintiffs pray that this Court order that Firestone conduct the inspection of the tire under the conditions specified in *Klick v. R. D. Werner Co.*

Date: February 22, 2010.

Respectfully submitted,

MARTIN SOTENES and MARIA ANTONIA
LIMA ESTEBAN, individually and as Next
Friends of ELEHU SOSTENS, a Minor Child,
Plaintiffs,

By: 

George S. Bellas

Co-Counsel for Plaintiffs:

George S. Bellas
Cook County Atty. No. 22565
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15 N. Northwest Highway
Park Ridge, IL 60068
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SUITE 1400 78470
FAX: (361) 698-7614

May 14, 2004

Mr. Richard K. Hines, V
Nelson Mullins Riley & Scarborough, LLP
999 Peachtree Street, N.E., Ste. 1400
Atlanta, Georgia 30309
Via Facsimile: 404/817-6030

Re: Cause No. C-737-01-B; Margarita Barrios Toscano, et al. v. Toyota
Motor Sales, U.S.A., Inc., et al.; In the 93rd Judicial District Court, Hidalgo
County, Texas.

Dear Richard

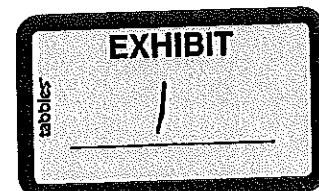
As we discussed, I will send you the tire and tire pieces, bearing our document
numbers 8500-K000019/0020 and 8500-K000027/0028, for your client's inspection upon
the following conditions:

1. There will be no destructive testing of the tire or tire pieces;
2. The tire and tire pieces will be shipped in sealed containers to the following
address:

Jonathan Wade
Michelin North America, Inc.
1785 New Cut Road
Spartanburg, SC 29303

3. The sealed containers and their contents will be videotaped as the containers
are opened, and the videotape will record the tire and tire pieces during the
entire time without interruption from the time the containers are opened until
the tire and tire pieces are returned into the containers and the containers are
resealed;
4. You will make the person responsible for the inspection and the person
responsible for the videotaping aware of the terms of this agreement;

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May 14, 2004
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5. The tire and tire pieces will be returned to me in sealed containers along with the videotapes mentioned above for receipt at my office immediately after Joe Grant's deposition.
6. Michelin North America, Inc. will bear full responsibility for the tire and tire pieces from the time it leaves my office until it is received by my office upon its return from Michelin North America, Inc.

If this letter reflects our agreement, please sign this letter and return the executed copy to me by facs mile.

Best regards,

THE EDWARDS LAW FIRM, L.L.P.


John Blake Gsanger

JBS/vs


Richard K. Frances, V

8-13-99; 3:07PM; FULBRIGHT & JAWORSKI

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EDWARDS, PERRY & HAAS, L.L.P.

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Direct Dial: (361) 691-7660
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August 13, 1999

Mr. John W. Weber, Jr.
Fulbright & Jaworski, L.L.P.
300 Convent Street, Suite 2200
San Antonio, Texas 78205-3792

FACSIMILE: (210) 270-7205

Re: Cause No. C-6376-98-R; *Esteban Martinez et al. vs. Ford Motor Company, et al.*; In the 332nd Judicial District, Hidalgo County, Texas.

Dear John:

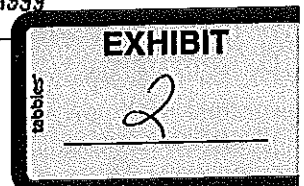
This letter will confirm our agreement regarding production of the accident tire for inspection/non-destructive testing by Continental General Tire, Inc. and its experts. It is my understanding that I will ship the accident tire in a sealed box to an address which you will provide to me. We agree that the tire will be videotaped during the entire time that the box is open. The faces of individuals performing the inspection/non-destructive testing need not be shown on the videotape, but the videotape will generally show everything that is being done to the tire. I will be provided a copy of the videotape.

You will return the accident tire to me in the sealed box immediately after the inspection/non-destructive testing has been completed. You further represent to me that no destructive testing will be performed on the accident tire, nor will the accident tire be altered. However, if the tire is placed on a wheel to determine whether the tire will retain air, the beads of the tire may be lubricated using standard lubrication solution. This will not be considered an alteration of the tire.

802 N. CARANCAHUA, SUITE 1400 • CORPUS CHRISTI, TEXAS 78408-0700 • P. O. BOX 460 • CORPUS CHRISTI, TEXAS 78402-0460
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EDWARDS, PERRY & HAAS, L.L.P. IS AN EQUAL OPPORTUNITY FIRM. WE DO NOT DISCRIMINATE ON THE BASIS OF RACE, GENDER, RELIGION, NATIONAL ORIGIN, ANCESTRY, COLOR, SEX, OR AGE.

AUG 13 1999



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Mr. Steven D. Jansma
August 13, 1999
Page 2

If this letter accurately reflects our agreement, please execute the signature line below and return same to me by facsimile for filing with the Court as a Rule 11 Agreement. I will not ship the tire until you ask so that you can coordinate its delivery with the availability of persons to inspect it.

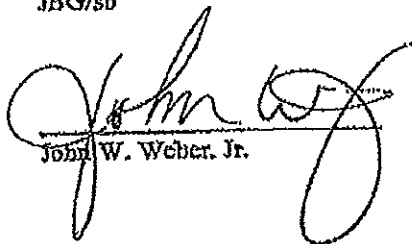
I look forward to your response.

Best regards,

EDWARDS, PERRY & HAAS, L. L. P.


John Blaise Gsanger

JBG/sb


John W. Weber, Jr.

THE EDWARDS LAW FIRM

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October 23, 2009

Robert Tomm
Troy D. Hoyt
HOLLAND & KNIGHT LLP
131 S. Dearborn St., 30th Floor
Chicago, IL 60603

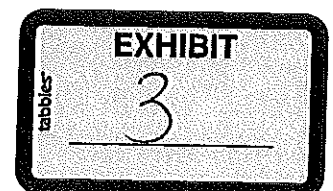
Via Facsimile to: (312) 578-6666

Re: Cause No. 2008L007574; *Martin Sostenes, et al. v. Bridgestone, et al.* In the Circuit
Court of Cook County, Illinois, County Department, Law Division

Dear Counsel:

The subject tire (and this term shall include any tire pieces and the rim) is available for inspection under the following conditions:

- (1) The condition of the tire and rim shall be documented by videography upon its receipt and immediately prior to the packaging of the tire and rim for shipment.
- (2) The tire and rim may be examined under high intensity lighting.
- (3) The tire has been de-mounted from the wheel, and no re-mounting or re-dismounting will be allowed without further express agreement in writing or court order.
- (4) The hardness of the rubber in the tire may be measured at various points by a durometer so long as it does not puncture or affect the physical integrity of the tire and leaves no visible mark.
- (5) The tire may be examined by an x-ray machine and the parties agree that they will share any such x-rays within 90 days of this agreement.
- (6) The tire, including any bead wire endings, may be examined under microscope, but such microscopy shall not entail sampling of the tire (i.e., any microscopy shall be conducted on the tire itself without the removal of anything from the tire).
- (7) All relevant observations of the condition of the tire may be recorded.
- (8) No destructive testing of the tire will occur, and for purposes of this agreement, this shall prohibit any sampling of the tire, any re-mounting of the tire, any washing of the tire, any probing of the tire with sharp or pointed implements (not to disclude use of a durometer), any re-inflation or application of suction or air pressure on the tire, and from this day forward, no party or agent of any party shall perform any examination other than visual, tactile, possible durometer reading, and possibly x-ray without further express agreement in writing or court order.



Robert Tonn
Troy D. Hoyt
Page 2

(9) The tire and rim will be shipped from Plaintiffs' counsel's office and to Plaintiffs' counsel's office via FedEx at Defendant's expense, and will be insured at Defendant's expense during transport up to the maximum amount that FedEx will allow, and will be returned within 60 days. The parties hereby agree that the tire and tire pieces are the single most critical pieces of evidence in this case and loss, destruction, or alteration of this critical evidence should be met with the most severe sanction to be imposed against Plaintiffs if such loss, destruction, or alteration of the evidence occurs while the evidence is in their possession or to be imposed against Defendants if this evidence is lost, destroyed, or altered while it is out of the possession of Plaintiffs or their agents.

Please confirm that this is our mutual agreement, and then contact my office to coordinate shipment of the tire.

Best regards,

THE EDWARDS LAW FIRM

John Blaise Gsanger

AGREED TO:

Robert Tonn, or
Troy D. Hoyt
Attorneys for Bridgestone Defendants