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PRODUCT LIABILITY

Secret things

Latest ruling in Miami Goodyear case illustrates continuing battle over disseminating design information

by Laurie Cunningham

The 3rd District Court of Appeal has dealt a blow to the Goodyear Tire and Rubber Co. by ruling that Goodyear design secrets uncovered in a product liability lawsuit can be disseminated to the public to protect consumer safety.

But the Akron-based tire company continues to fight to keep that information confidential. Its lawyer, Frederick Fein of Miami, has warned the plaintiff lawyer in the case not to release the information, despite the Nov. 12 appellate ruling. Fein has hinted in a letter that he will seek contempt sanctions and Florida Bar disciplinary action if the material is disclosed.

But the plaintiff attorney, Bruce Kaster, who is nationally known for his work in tire defect cases, says he plans to ignore the warning. "Fred Fein doesn't tell me what to do," said Kaster, a solo Ocala practitioner. "I take instruction from the courts. A letter like this shows that Goodyear is scared to death someone's going to tell the truth about them."

The case illustrates the continuing battle between corporate defendants and plaintiff lawyers over dissemination of potentially damaging design and manufacturing information in product liability lawsuits. Companies fear that dissemination of such information on national electronic databases compiled by plaintiff attorneys, such as the Attorneys Information Exchange Group, will hurt them in future lawsuits.

At the same time, the case shows how judges continue to struggle with



Plaintiff attorney Bruce Kaster plans to share internal Goodyear documents about the design and testing of steel-belted truck tires with anyone who wants it.

the issue of whether to grant confidentiality orders to shield trade secrets of the corporate defendants when disclosure of such information could protect consumers.

On Nov. 12, in *Jones v. Goodyear*, a three-judge panel of the 3rd DCA unanimously reinstated a \$1.8 million jury verdict against Goodyear that was set aside by the trial judge, Miami-Dade

Circuit Judge Eleanor Schockett. The case involved a tire mechanic for the Miami-Dade County Public Schools who was severely injured by a school bus tire that exploded when he was filling it with air in October 1994.

Judge Schockett had set aside the October 2001 jury verdict on the grounds of insufficient evidence and that she shouldn't have allowed the plaintiff's expert to testify.

The 3rd DCA also vacated a confidentiality order that Judge Schockett had imposed on the parties prior to trial.

Schockett's order barred the plaintiff, Ronnie Jones, and his attorneys from sharing internal documents they had received from Goodyear during discovery about the company's design and testing of its steel-belted medium and heavy truck tires.

"Since the jury clearly found that Jones was injured by the tire in question, the tire is deemed a 'public hazard,'" Judge Melvia Green wrote for the 3rd DCA panel. Therefore, the information about design and testing of the tire must be disclosed under Florida's 1990 Sunshine in Litigation Act, she wrote. The panel included Chief Judge Alan Schwartz and Judge Linda Ann Wells.

Florida's Sunshine Laws are among the nation's strongest in prohibiting judges from issuing confidentiality orders that conceal a "public hazard."

'Secrets are gone'

In *Jones*, Goodyear's fear of having its internal documents circulated to

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plaintiff lawyers throughout the country are well-founded.

Bruce Kaster said he plans to broadly disseminate the information from the boxes of internal documents he received from Goodyear during the trial. Kaster said the documents show that Goodyear's own tests on its steel-belted medium truck tires reveal that the company knew they were defective.

"As soon as the appellate court issues its mandate, these secrets are gone," Kaster said. "I'm making it available to any member of the press, public or lawyer who wants it."

But immediately following the 3rd DCA ruling, Fein sent a letter to Kaster advising him that Goodyear would be filing a motion for rehearing. If the 3rd DCA refuses the motion for rehearing, Fein said, Goodyear would be seeking review by the Florida Supreme Court. In the meantime, Fein wrote, Goodyear expected Kaster to keep the discovery information confidential.

"DO NOT [his emphasis] disclose any of Goodyear's confidential, proprietary and/or trade secret documents which were obtained during discovery," Fein wrote in his Nov. 13 letter. "Any breach of the protective order of confidentiality entered in this matter will be construed as an obvious violation of a court order, as well as a violation of the Rules Regulating the Florida Bar."

Fein ended the letter with a bolded, underlined statement in capitals: "PLEASE GOVERN YOURSELVES ACCORDINGLY."

An appellate ruling is considered final once the court issues a mandate to the trial judge to carry out its ruling. The mandate is issued 15 days after the appellate opinion is handed down, giving the losing party time to file a motion for rehearing.

Kaster described the letter as "obnoxious and condescending." Although he knows he has to keep the documents confidential until the 3rd DCA's ruling is final, Kaster said he has no further obligation to maintain the secrecy unless Goodyear gets a court order to stay any disclosure.

In an interview, Fein said his letter to Kaster wasn't intended to be threatening. "It was written for the sole purpose

of protecting Goodyear's proprietary information while the issue is still in the courts," said Fein, a partner at Thornton Davis & Fein in Miami. "I didn't want the plaintiffs to take the appellate opinion and disseminate Goodyear's trade secrets."

Goodyear plans to file a motion with the 3rd DCA for rehearing, as well as rehearing en banc, Fein said.

If the 3rd DCA denies rehearing, which it typically does, it will most likely issue the mandate right away, say legal experts not involved in the case. Then, to keep the documents confidential, Goodyear would have to win a stay of the mandate from the 3rd DCA, the Florida Supreme Court or the trial judge, which would be an uphill legal fight.

'Zipper failure'

According to the original 1997 lawsuit, the plaintiff, Ronnie Jones, then 35, was putting air into a tire on a school bus in October 1994 when the tire exploded. Jones was hurled against a gate and knocked unconscious. As a result of the accident, Jones suffered permanent brain damage, severe back problems, and depression.

At trial, Bruce Kaster presented testimony by his expert, Richard Baumgardner, a tire engineer with more than 40 years of experience. Baumgardner testified that the tire explosion was caused by "zipper failure."

The problem, he said, was a design flaw that resulted in too great a difference between the thickness of the rubber in the center portion of the sidewall of the tire and the areas above and below it. The rubber at the "flex point" of the tire was too thick, causing the tire to split under pressure, Baumgardner said.

But Goodyear's expert, Charles Gold, testified that Jones had caused the accident himself by using unsafe procedures to reinflate the damaged bus tire.

The jury, however, found Goodyear 80 percent liable for negligent design and failure to warn, and awarded \$1.8 million in damages. The jury assigned the other 20 percent liability to the school district. It also granted

\$210,000 to Jones' wife, Sylvia, for loss of consortium.

But, shortly after the verdict was delivered, Schockett ruled that there was not enough evidence to support the jury decision. "The verdict was against the manifest weight of the evidence and was motivated more by the jurors' sympathies than by the testimony and the evidence presented at trial," she wrote.

Goodyear also argued that Baumgardner's testimony should be excluded because it didn't pass the Frye test. Under the Frye test, any party seeking to introduce a new scientific principle or theory in court must first prove that other experts in the field generally accept the theory.

Judge Schockett agreed with Goodyear that Baumgardner's testimony included "new and novel scientific evidence" subject to the Frye test, and that she should have excluded it.

But the 3rd DCA overruled Schockett on this point, finding that Baumgardner's testimony consisted of opinion based on years of experience as a tire engineer, and therefore was not subject to the Frye test. "Baumgardner's testimony does not involve a novel scientific principle or discovery," Judge Green wrote.

Fein now argues that the 3rd DCA was wrong on both the Frye and confidentiality issues.

On the confidentiality issue, he said that under a 1995 ruling by the 2nd DCA in *Dupont v. Lambert*, courts must grant defendants an evidentiary hearing before setting aside a confidentiality order. Failure to do so is a violation of due process, Fein said.

Fein said that the jury in the Jones case was not in the best position to determine whether the Goodyear tire was hazardous, thereby making the tire design information publicly accessible.

Such decisions are better made by the National Highway Traffic Safety Administration, which is responsible for investigating driver deaths and issuing product recalls, he said.

But Kaster said that federal agency is a toothless organization that is slow to act on complaints about product defects. ■