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VOLUME 29, ISSUE 25 / JUNE 8, 2010

WHAT'S INSIDE

MOTORCYCLE

- 6 Sportster 'jiffy stand' was damaged before collapse, Harley-Davidson says
Battiato v. Harley-Davidson Motor Co. (M.D. Pa.)

MUFFLER REPAIR KIT

- 7 Muffler patch kit death suit revived by Michigan appeals court
White v. Victor Auto. Prods. (Mich. Ct. App.)

RECALLED PRODUCTS

- 8 Half the country has had a recalled product, legal research website says

SEAT BELTS

- 8 Ind. federal judge bars tests by plaintiff's counsel in seat belt case
Green v. Ford Motor Co. (S.D. Ind.)

TIRES (WRONGFUL DEATH/ FORUM)

- 9 Dispute over Firestone tires can proceed in Mexico, Indiana federal judge says
Gonzalez v. Ford Motor Co. (S.D. Ind.)

TIRES (WRONGFUL DEATH)

- 10 Plaintiff: Viable case against tire installer should keep suit in state court
McCabe v. Ford Motor Co. (E.D. Tex.)

UTILITY VEHICLE

- 11 Court finds no evidence that utility vehicle owner spoiled evidence
Knight v. Deere & Co. (E.D. Cal.)

COMMENTARY

Toyota crisis creates new opportunities for the company

Business performance experts David Drew and Michael Saletta examine the concept of leadership and how Toyota, facing a major crisis, has a chance to define itself, through its actions, as a truly great company.

SEE PAGE 3

UNINTENDED ACCELERATION

Toyota must produce documents on acceleration incidents

The federal judge overseeing the multidistrict litigation on claims of runaway acceleration in Toyota vehicles has ordered the automaker to give plaintiff attorneys thousands of documents on previous investigations of such complaints.



REUTERS/Valentin Flauraud

CONTINUED ON PAGE 5

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TABLE OF CONTENTS

Commentary: By David Drew and Michael Saletta Toyota crisis creates new opportunities for the company.....	3
Unintended Acceleration: <i>In re Toyota Motor Corp. Unintended Acceleration Prods. Liab. Litig.</i> Toyota must produce documents on acceleration incidents (C.D. Cal.).....	1
Motorcycle: <i>Battiato v. Harley-Davidson Motor Co.</i> Sportster 'jiffy stand' was damaged before collapse, Harley-Davidson says (M.D. Pa.).....	6
Muffler Repair Kit: <i>White v. Victor Auto. Prods.</i> Muffler patch kit death suit revived by Mich. appeals court (Mich. Ct. App.).....	7
Recalled Products Half the country has had a recalled product, legal research website says	8
Seat Belts: <i>Green v. Ford Motor Co.</i> Ind. federal judge bars tests by plaintiff's counsel in seat belt case (S.D. Ind.)	8
Tires (Wrongful Death/Forum): <i>Gonzalez v. Ford Motor Co.</i> Dispute over Firestone tires can proceed in Mexico, Indiana federal judge says (S.D. Ind.).....	9
Tires (Wrongful Death): <i>McCabe v. Ford Motor Co.</i> Plaintiff: Viable case against tire installer should keep suit in state court (E.D. Tex.)	10
Utility Vehicle: <i>Knight v. Deere & Co.</i> Court finds no evidence that utility vehicle owner spoiled evidence (E.D. Cal.).....	11
News in Brief	12
NHTSA Engineering Analysis (EA) – (April) 2010	13
Case and Document Index	14

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Toyota crisis creates new opportunities for the company

By David Drew and Michael Saletta

What should a company like Toyota do?

The engineering, quality and subsequent public relations challenges experienced by Toyota in the early part of 2010 are similar to those experienced by many organizations with high-profile brands and associated high levels of customer expectation. When something goes publicly wrong, the high expectations we hold for the marquee brand in question represent a branding form of potential energy. This potential energy very quickly becomes kinetic energy when coupled with the catalysts of media scrutiny, consumer disappointment, and the absence of the simple explanation and fix consumers require in 2010.

Once something has gone badly wrong, of course, there is no turning back the clock. In the more recent case of BP (whose own troubles have eclipsed those of Toyota earlier in the year), CEO Tony Hayward has candidly and repeatedly declared, "We will be judged on our response."

Hayward's statement grimly and accurately recognizes there is little to be *materially* gained at this stage from finger-pointing or publicly agonizing over the factors that led to catastrophe (be it deaths, injuries and fear caused by unintended vehicle acceleration or a tragic oil platform accident and subsequent environmental disaster), but rather all energy should be directed toward fixing the concerns and effects at hand.

This, of course, may require the analysis, identification and elimination of cause, but there will be time later for the discussion and allocation of corporate and human responsibility.

However, the causes and effects of engineering problems quickly breed a second-tier issue, namely the increasingly quick (thanks to ever-shortening news cycles and the blanket nature of media coverage) and lasting damage to brand and reputation. It is in this context that an ability to quickly identify the cause (or at the very least describe clearly what you are *doing* to identify and eliminate the cause) takes on an importance all its own.

One word that has consistently appeared during the very public discussion of Toyota's perceived organizational failures during the last few months has been "leadership." Commentators have happily bandied this word around as though it were the single silver bullet that would fix and would have prevented anything going wrong in the first place. Consumers even got a chance to see leadership in action through the spectacle of the human embodiment of Toyota's leadership (in the form of Akio Toyoda, Toyota's president, going before the U.S. Congress to represent his company).

Leadership, then, is clearly something considered to be a critical element in a company's successful and profitable conversion of resources to goods that consumers will value and trust (there is a reason they are called "goods" and not "bads").

Go out today and ask 10 people what leadership means to them, and you will probably get 10 different answers.

The problem with leadership as a "thing" is that it is pretty abstract. It's one of those highly personal words that mean something different to everyone, like "happiness" or "success." Don't just take our word for it. Go out today and ask 10 people what leadership means to them, and you will probably get 10 different answers. "Leadership — well, we know we've got to have more of it, but we can't actually tell you what it is." It's a *sine qua non* that also has a certain *je ne sais quoi*.

So, what does leadership mean in the context of the challenges faced by companies like Toyota? What leadership buttons should be pushed, what levers should be pulled in the wake of a crisis like the one Toyota is navigating? As any senior executive knows, the bigger an organization is, the harder it is to change.

The dirty little secret in the senior management community is that executives

don't have quite the level of freedom to make sweeping changes that the world seems to think they do. They know it is impossible for the skipper to rebuild the boat while he or she is actually sailing it, even if the weather conditions are calm, let alone if they are sailing through a storm.

For the most part, the options are limited to trimming sail, redistributing weight, evaluating the chosen route, making course corrections, and *managing the crew in the most effective way possible*.

The level of public, press and government attention focused on a besieged company like Toyota, however, has one key saving grace — it affords the company not just an opportunity, not just permission, but actually provides a mandate for the company to make significant changes to the way it is configured and behaves.

Every great company will have the opportunity to encounter a major crisis — a chance to prove what it is made of, a defining moment that determines whether it is truly great. To paraphrase Tony Hayward again, companies will rightly be judged by their response to catastrophe.

Human experience tells us things will go terribly wrong every once in a while, no matter how carefully we try to prevent it. Toyota is no exception, and its time is now. So, what should investment in "leadership" mean for a company like Toyota?

REACTIVATE THE COMPANY'S PURPOSE WITH PASSION

After a big "moment of truth," there is a need, and probably a latent desire on the part of the organization, to emotionally get back to the core purpose of the business, reaffirming the values and unified sense of purpose of

the business that got it where it was in the first place.

Companies can easily “remind themselves” what their customers want and expect. Previous brand audits are probably still right there sitting on the shelf, and what customers said they loved about the company two, three or five years ago is probably still valid. Why not dust them off and take a look and use them at the heart of a company-wide initiative to reinvigorate the organization with a passion for doing what the most important constituents of the business — the customers — need it to do?

A company facing a crisis has a conscious choice to make, namely that of a fight for or a flight from what makes it the company it is. Once this choice has been made, the company has an opportunity to communicate a new breakthrough strategy and vision, perhaps that of being the best and highest quality, as opposed to being the biggest.

BUILD ‘HIGHLY AWARE’ LEADERSHIP TEAMS AT EVERY LEVEL

This just in: “leadership” is not a function of what it says on your business card, the dollar figure on your pay stub or where your name sits on a PowerPoint organization chart.

A junior executive or team member who will one day be CEO probably does not sit back and think, “Well, I can’t do anything about that, it’s a leadership/management issue.” He or she more likely thinks, “What can I do about this,” and more importantly, “How can I help others to do something about it?”

At a cultural level, “leadership” is a specific set of behaviors that individuals can learn, practice *and* role model for others. It is a responsibility that everyone in an organization has to everyone else. Recognizing this and reinforcing these ideas with a system of clearly understood positive and negative consequences for desired and undesired behaviors can help create a company-wide leadership culture where regular feedback and accountability are the norm. It also can create a whole new level of organizational self-awareness.

Only by doing this can a company create (at individual, team and organization levels) this self-awareness as to its strengths and opportunities for growth, so everyone can “show up” at a different level with new behaviors.

Every great company will have the opportunity to encounter a major crisis; a chance to prove what it is made of, a defining moment that determines whether or not it is truly great.

DRIVE INTERNAL AND EXTERNAL PERFORMANCE

Internally, a crisis concerning quality calls for a dramatic rethink of the way issues are handled, problems analyzed, decisions made and risks managed — in short, how troubleshooting is undertaken at every level of a company. Without a single, clear language and framework for handling troubleshooting across an entire organization, confusion will naturally abound in any effort to coordinate any kind of troubleshooting.

The organization that embeds critical-thinking skills into all internal performance behaviors at all levels of the organization will have a significant advantage over competitors that have not done this. If every engineer, technician, manager — *everyone* in the business — approaches issues with the same, consistent methodology for gathering, analyzing and sharing data on issues, the likelihood of early issue resolution is exponentially increased and the cycle time to resolve those issues is dramatically decreased. Multiply this across a company with the size and complexity of Toyota, and the positive effect can be staggering: The costs to resolve issues as well as the number of issues eliminated in the early stages can both be slashed.

Once individuals and teams have been equipped with a consistent approach to troubleshooting, there are ways to “engineer their performance systems” to encourage quality-driving behaviors with positive and negative consequences for desired and undesired behaviors.

Consider a hypothetical example of two engineers addressing two similar quality problems they identify. Engineer one, who consistently gathers data and develops a very detailed and precise description of a technical problem, ultimately serves the interests of the customer (and by extension, the company) better than Engineer two, who tries a number of different fixes to see if one will “stick.”

Engineer one has systematically served the objective of identifying, and therefore permanently eliminating, the true cause. Engineer two has introduced more changes, dramatically eliminating the chance that true cause can ever be identified. Although Engineer two “looked busier” and seemed to be trying to fix the problem right away, which of the two should really be rewarded for his or her behavior, and which should get some timely, constructive feedback on his or her approach?

Of course, in this scenario both engineers were at least acting to tackle a problem, regardless of the approaches they took. At least they were taking an approach. Too often, however, performers in companies (be they individuals, leaders or whole teams) will quickly classify an issue as “someone else’s problem.”

Engineering the overall performance system to embed quality-driving behaviors and to encourage accountability/responsibility, rather than avoidance, is critical. In short, establishing the company-wide attitude “we are all accountable and responsible both to the customer and to each other” is critical.

These internal changes also have external utility. By making the troubleshooting process apparent to shareholders, partners, vendors, regulators and customers, companies can re-energize their external relationships *and* mitigate the public relations aspects of quality issues by *inviting* external audit and scrutiny.

EMPOWER THE NEW CULTURE

Behavior changes can be anchored at all levels of an organization by designing the appropriate consequences for desired behaviors. At a grassroots level, it is essential to look for little wins every day and to herald small successes with much fanfare, coupling a sense of accountability with the likelihood of recognition and reward. The happy accidents, or “happidents” (instances of individuals or teams taking appropriate action to improve operations both within and

outside their immediate sphere of influence) need to be recognized and applauded. Only by recognizing and reinforcing the budding green shoots of change can new behaviors be truly anchored and become the new standard operating procedure.

Simultaneously, attention needs to be paid to eliminating and preventing re-growth of the weeds of “how we used to do it.” Entrenched habits/norms will quickly reappear and overwhelm the desired new behaviors. Performers at all levels need to be trained to pay attention to the green sprouts of change and make sure the weeds don’t overrun them.

Finally, if there is one priority internal community of people that a company needs to pay truly close attention to, it is actually middle managers and supervisors. They are the critical link between strategy redevelopment and strategy execution — the difference between behavioral change and behavioral stagnation. If they can be helped (through performance system engineering) to view themselves as leaders and indeed owners in the broadest and most meaningful sense, they as a group are the people who translate strategic organizational requirements into daily organizational behavior. **WJ**



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Toyota

CONTINUED FROM PAGE 1

In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices and Products Liability Litigation, MDL No. 2151, 2010 WL 2194802 (C.D. Cal. May 28, 2010).

U.S. District Judge James V. Selna of the Central District of California issued the order from the bench after a hearing.

He gave Toyota 30 days to turn over any English-language documents that do not involve the company’s communications with its own attorneys and 60 days to produce papers written in Japanese.

The judge said he would issue a protective order by the end of June covering documents

with trade secrets or other data that could compromise Toyota’s competitive position.

Toyota had argued in a brief that the plaintiffs’ discovery requests were premature.

“The Federal Rules of Civil Procedure are not suspended or ignored because of the magnitude of this litigation or the publicity surrounding it,” the automaker said.

“Until plaintiffs file their consolidated complaints, Toyota is left without any clarity as to what causes of action plaintiffs are asserting, let alone any of the safeguards afforded by the federal rules, such as the ability to object and the requirement that discovery be limited to non-privileged matter that is relevant to any party’s claim or defense,” Toyota said.

The fact that many of the documents have already been given to Congress and to the National Highway Traffic Safety Administration does not change this fact, the automaker added.

The plaintiffs countered that disclosure of the documents would enable them to prepare a clear, comprehensive complaint on all claims, including diminished resale value, stemming from the acceleration problems and related recalls. **WJ**

Related Court Document:
Order: 2010 WL 2194802



REUTERS/Ints Kalnins

MOTORCYCLE

Sportster 'jiffy stand' was damaged before collapse, Harley-Davidson says

Arguing for summary judgment in a personal injury case, Harley-Davidson Motor Co. says the "jiffy stand" (the spring-loaded side kickstand) on a 1992 Sportster motorcycle already was damaged when it collapsed and caused the plaintiff's injury.

Battiato v. Harley-Davidson Motor Co., No. 1:08 CV 1786, brief in support of summary judgment filed (M.D. Pa. Mar. 24, 2010).

"This accident happened with a broken product," Harley insists.

According to the company, Russell Battiato was loading the Sportster onto a trailer when the stand collapsed and caused the bike to fall onto him, breaking his leg.

Battiato sued the company in the U.S. District Court for the Middle District of Pennsylvania.

In support of its summary judgment motion, Harley says the jiffy stand had a damaged and deformed part where the spring attaches to the frame and Battiato was fully aware of this problem prior to the accident.

In a deposition, the plaintiff described the stand's operation as a "hair trigger," Harley contends.

Therefore, the company says, his liability claim is barred because he assumed the risk. The motorcycle was misused, was not in the same condition it was when it left the factory, and was not unreasonably dangerous, it adds.

"Empty words do not defeat summary judgment," the defendant says. "To make Harley-Davidson liable for this accident that resulted from the use of a 12-year-old used motorcycle in a broken and improperly operating condition, which plaintiff planned to get fixed, constitutes absolute liability and insurance, which is contrary to the law." **WJ**

Attorneys:

Defendant: Mark E. Gebauer, Eckert Seamans Cherin & Mellott, Harrisburg, Pa.

Related Court Document:

Brief in support of summary judgment: 2010 WL 1723426

If a product is used in a manner unintended by the manufacturer (whether foreseeable or not), the claim is barred, Harley-Davidson says.

Muffler patch kit death suit revived by Michigan appeals court

The Michigan Court of Appeals has restored a failure-to-warn suit by a woman who says her husband died of carbon monoxide poisoning because a muffler patch kit he used lacked warnings about the danger of running a vehicle indoors without ventilation.

White v. Victor Automotive Products Inc. et al., No. 286181, 2010 WL 1979249 (Mich. Ct. App. May 18, 2010).

Ruling 2-1, the panel said the trial court erred in holding that the dangers of carbon monoxide poisoning should have been “obvious” to any reasonably prudent person.

danger even though it is odorless, colorless and can be inhaled without discomfort.

Remanding the case, the appeals court said the trial court apparently based its decision on the obviousness of carbon monoxide’s dangers “on its own personal understanding of the risk of such action, rather than upon

“The obvious inference is that decedent had knowledge . . . of the dangers of carbon monoxide associated with his work,” the dissenting justice said.

The ruling came in a suit against Victor Automotive Products by Kim White, who says her husband, Craig, died of carbon monoxide poisoning in their garage while applying a Victor muffler and exhaust pipe patch kit to their Buick.

The kit’s instructions told the user to clean the muffler with a wire brush before attaching a metal patch and special bonding tape, the suit says.

White says it did not warn users to perform the tasks with proper ventilation in line with the final instruction to idle the vehicle for 10 minutes so the bonding tape could “cure” in response to the exhaust heat.

After the Livingston County Circuit Court granted Victor’s summary judgment motion, White appealed to the Court of Appeals, which overturned the ruling in an unpublished opinion.

The panel said the lower court wrongly held that Craig White “had so many other options . . . like just opening the garage door,” and never addressed whether carbon monoxide, present in exhaust fumes, is an obvious

review of the evidence of what is generally known by reasonable people.”

The panel said, “The issue of what a reasonable person knows is not one to be determined by a trial court’s personal view, even if it is a reasonable one adopted in good faith. Rather, only a finder of fact may make that determination, unless evidence shows that reasonable minds could not differ.”

Dissenting, Justice Kirsten F. Kelly said Victor “did not have a duty to include carbon monoxide warnings on the muffler wrap package.”

She said the dismissal should also stand based on Craig White’s professional engine repair experience.

“The obvious and natural inference is that decedent had knowledge, or should have had knowledge, of the dangers of carbon monoxide associated with his work,” she wrote. “Any other inference would be nonsensical; a reasonable juror could reach no other conclusion.” **WJ**

Related Court Document:
Opinion: 2010 WL 1979249



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RECALLED PRODUCTS

Half the country has had a recalled product, legal research website says

Almost half of all Americans have owned at least one recalled consumer product, according to a report just released by a popular legal research website.

According to a national telephone survey by Findlaw.com, of the people who said they previously or currently owned a recalled product, 33 percent said it was a motor vehicle, while 16 percent said it was a toy or infant product.

Of the 1,000 people who participated in the survey, 76 percent of those who reported

knowing that a product they owned was recalled said they responded by returning the product or having it repaired, the survey said.

Among the other reported categories of most frequently recalled products are: household appliances, 12 percent; drugs, 7 percent; and medical devices, 3 percent.

The survey said 465 consumer products were voluntarily recalled in 2009, according to statistics from the Consumer Product Safety Commission. More than 8,000 deaths and 14 million injuries annually stem from recalled and unrecalled consumer products, the survey said. **WJ**

SEAT BELTS

Ind. federal judge bars tests by plaintiff's counsel in seat belt case

A federal judge in Indianapolis has barred the plaintiff in a rollover case against Ford Motor Co. from using his lawyer's own seat belt test results as evidence.



REUTERS /Eric Thayer

Green v. Ford Motor Co., No. 1:08-cv-0163-LJM-TAB, 2010 WL 1726620 (S.D. Ind., Indianapolis Div. Apr. 29, 2010).

Judge Larry J. McKinney of the U.S. District Court for the Southern District of Indiana said the tests did not sufficiently replicate the conditions of the accident in which plaintiff Nicholas Green was injured.

The tests were "so far removed from the events that actually occurred" that their "slight probative value is substantially outweighed by the potential for juror confusion," the judge said.

According to the opinion, Green lost control of his 1999 Ford Explorer Sport, struck a guardrail and rolled over. He suffered paralyzing injuries in the 2006 crash.

Green sued Ford, alleging the Explorer was defective and unreasonably dangerous because the seat belts failed to protect him.

The automaker moved to bar evidence of the plaintiff counsel's testing of alternative restraint system designs, which he performed on several exemplar vehicles.

In the tests, the judge said, the attorney used a Bobcat loader and a forklift to tip over two 1999 Explorers and down a hill.

Green claimed the tests showed the alternative seat belt design was safe and available to Ford at the time the 1999 Explorer was manufactured.

Judge McKinney said the tests did not replicate the actual accident to the extent required under the law.

While "tests used to demonstrate scientific principles upon which an expert will rely do not require strict adherence to the facts," the judge said, these tests were simply too far removed from the actual events.

For example, he noted they did not approach the speed at which Green's Explorer was traveling when the accident happened.

MOTIONS ON EXPERT TESTIMONY

Meanwhile, the judge granted Green's motion to bar Ford from using the testimony of expert Jeffrey Pearson, who tested a 2003 Ford Ranger.

"Throughout this litigation, Ford successfully opposed discovery into Ford Rangers on the basis that those vehicles were dissimilar to the 1999 Explorer," Judge McKinney said.

He noted the automaker's admission that it could have performed similar tests without using a Ranger vehicle.

Finally, the judge ruled Green could present restraint system testimony from expert Gary Whitman and biomechanical analysis testimony from expert Dennis Shanahan.

Ford argued that Whitman was not qualified and that Shanahan could not identify the point when Green was injured during the accident sequence.

Whitman's education, experience and training satisfied Federal Rule of Evidence 702, and he based his opinions on sound methodology, the judge said.

"Moreover, his testimony about the 1999 Explorer's restraint system, Ford's failure to adequately test that system and potential alternative designs will assist [the] jury in its determination on the ultimate issue," Judge McKinney held.

As to Shanahan, the judge said a qualified expert witness can offer a hypothetical explanation of injury causation, and the jury can decide the weight of that opinion after direct and cross-examination. [WJ](#)

Attorneys:

Plaintiff: David V. Scott Sr., Scott, Forrest & Bourne, New Albany, Ind.; James O. McDonald, Everett Everett & McDonald, Terre Haute, Ind.

Defendant: Jared A. Harts, Kevin C. Schiferl and Randall R. Riggs, Frost Brown Todd LLC, Indianapolis

Related Court Document:

Opinion: 2010 WL 1726620

TIRES (WRONGFUL DEATH/FORUM)

Dispute over Firestone tires can proceed in Mexico, Indiana federal judge says

Mexico is an available and appropriate forum to handle a suit over tread belt separation on a Bridgestone/Firestone tire that allegedly caused a fatal crash there, an Indiana federal judge has ruled.

Gonzalez et al. v. Ford Motor Co. et al., Nos. MDL 1373 and IP07-5837-C-B/S, 2010 WL 1576831 (S.D. Ind. Apr. 19, 2010).

U.S. District Judge Sarah Evans Barker of the Southern District of Indiana, who oversees the multidistrict litigation over the Bridgestone/Firestone tires, dismissed the lawsuit brought by Monica Gonzalez, citing *forum non conveniens*.

Gonzalez sued Ford Motor Co. after her husband was killed while operating his 1999 Explorer in the Mexican state of Guanajuato.

She claimed the tread on the vehicle's tires separated, causing him to lose control of the car.

Gonzalez, a Mexico resident, sued Ford in the United States. The automaker sought dismissal on *forum non conveniens* grounds when the Judicial Panel on Multidistrict Litigation transferred and consolidated suits over Bridgestone/Firestone tires to the District Court.

The defendants then resubmitted the dismissal request to the Indiana court.

Judge Barker, granting the motion, said the defendants met their burden of establishing that Mexico is an adequate forum for the litigation and that the country provides "some potential avenue for redress."

Gonzalez provided no evidence to dispute the affidavit of a Guanajuato-based law professor that the courts would have "territorial competence over this case ... because the accident took place in Guanajuato."

The judge also found that private and public interest factors weigh in favor of litigating the case in Mexico.

Specifically, Judge Barker noted that discovery related to the issue of core liability already had been completed and that the defendants would make it available in Mexico.



REUTERS/Henry Romero

She pointed out that, unlike a U.S. court, a Mexican court would be able to view the accident scene if needed.

Finally, the judge noted the "strong interest of a defendant's home forum is tempered where the plaintiff is a foreign citizen and the defendant is an American corporation with extensive foreign business dealings." [WJ](#)

Attorneys:

Plaintiffs: David McKnead, Houston; Laurie McFarlane Bauer, Mobridge, S.D.

Defendants: Jennifer K. Huelskoetter, Bowman & Brooke, Minneapolis; Mark F. Marshall, Davenport Evans Hurwitz & Smith, Sioux Falls, S.D.; Randall R. Riggs, Frost Brown Todd, Indianapolis; Rory King, Aberdeen, S.D.; Mark J.R. Merkle, Krieg Devault, Indianapolis

Related Court Document:

Order: 2010 WL 1576831

See Document Section A (P. 15) for the order.

Plaintiff: Viable case against tire installer should keep suit in state court

The plaintiff in a Texas wrongful-death case says his viable claim against an in-state tire repair shop defeats Cooper Tire & Rubber Co.'s motion to dismiss the action for improper joinder.

McCabe v. Ford Motor Co. et al., No. 1:10-cv-00098, response to dismissal motion filed (E.D. Tex., Beaumont Div. May 11, 2010).

Cooper, which removed plaintiff Lonnie McCabe's state court suit to the U.S. District Court for the Eastern District of Texas, is asking the federal court both to dismiss the suit and to deny the plaintiff's consequent motion to remand. Cooper's headquarters are in Ohio.

In opposing remand, Cooper says McCabe improperly added Texas state resident Superior Tire & Service to the suit merely to defeat federal diversity jurisdiction, which preempts state court jurisdiction "only if none of the parties in interest properly joined and served as defendants is a citizen of the state in which such action is brought."

Cooper further argues that joinder of Superior Tire was improper because McCabe did not state a claim for product liability against the repair shop in its original complaint, but added it for the first time in its remand motion.

Failure to allege a manufacturing defect claim at the complaint stage is fatal to McCabe's case under Tex Civ. Prac. & Rem. Code § 82.003(a), which absolves non-manufacturers of liability in products liability cases, Cooper adds.

"Because Section 82.003(a) bars plaintiffs' claims against Superior Tire, [it] is improperly joined and should be dismissed from this suit," Cooper says.

According to court filings, the plaintiff's wife, Linda, was driving a Ford Explorer Aug. 14, 2007, in Beaumont, Texas, when she struck an 8-foot piece of lumber lying in the highway. The accident caused a blowout and a rollover, and she suffered severe chest injuries that led to her death.

In June 2009 Lonnie McCabe sued Cooper, Ford Motor Co. and Superior Tire in Jefferson County's 172nd Judicial District Court.



REUTERS/John Hillery

Improper joinder involves "actual fraud in the pleading of jurisdictional facts, or inability of the plaintiff to establish a cause of action against the non-diverse party in state court," under *Travis v. Irby*, 326 F.3d 644, 647 (5th Cir. 2003).

Cooper removed the action to the federal court and moved for dismissal in April.

Cooper argues that because McCabe's original complaint failed to state a claim against Superior Tire, the District Court should ignore as self-serving his "new allegations" that Superior negligently installed or repaired the tire that blew out.

In response McCabe says he notified Cooper during discovery of his negligence claim, which "alone makes dismissal unfathomable."

The plaintiff cites an October 2009 letter from Cooper's counsel acknowledging the claim alleged a "bad patch" job by Superior

Tire, and he says he has evidence establishing Superior's negligence.

"Most certainly, at this juncture, it cannot be said that there is no reasonable basis for the District Court to predict that the plaintiff might be able to recover against the in-state defendant," McCabe says. [WJ](#)

Attorneys:

Plaintiff: Paul F. Ferguson Jr., Provost Umphrey LLP, Beaumont

Defendant: T. Christopher Trent, Raphael C. Taylor and John S. Edwards Jr., Johnson, Trent, West & Taylor, Houston; J. Thad Heartfield and M. Dru Montgomery, Heartfield Law Firm, Beaumont

Related Court Document:

Response brief: 2010 WL 1935821

Court finds no evidence that utility vehicle owner spoiled evidence

A California federal judge has refused to preclude testimony about the condition of the brakes on a John Deere utility vehicle, finding no proof that the plaintiff owner spoiled any evidence.

Knight v. Deere & Co., No. 2:08-cv-01903-GEB-EFB, 2010 WL 1948311 (E.D. Cal. May 11, 2010).

U.S. District Judge Garland E. Burrell Jr. of the Eastern District of California also denied defendant Deere & Co.'s motion to exclude plaintiff Shirley Knight's proposed expert witness.

The litigation stems from a fatal accident involving a 1991 John Deere model AMT 622 utility vehicle owned by Homer and Marlene Fagan.

In September 2006 the Fagans were using the vehicle to lead a pony from their resident to the nearby home of Julie Stevens. Marlene was driving the vehicle, and Homer sat in the tailgate, leading the pony.

According to court records, the Fagans encountered Julie and her daughter on the road. Stevens climbed into the passenger seat of the vehicle, and her daughter sat on the tailgate with Homer.

While traveling down a private gravel road, the vehicle's brakes allegedly failed. It flipped, throwing three of the passengers from the vehicle and fatally injuring Stevens.

Three days after the accident, court records say, the California Highway Patrol inspected the vehicle and concluded the brakes were not properly maintained.

Knight, the guardian of Stevens' daughter, and the Fagans sued Deere & Co. over the allegedly faulty brakes.

Homer Fagan testified in deposition that he had replaced the braking mechanisms on the utility vehicle after the Highway Patrol's

The judge said a fact dispute exists as to whether the plaintiff removed, replaced and lost the right- or left-side brake pads.

inspection. However, several weeks after the repairs, he could not locate the discs and pads that he allegedly removed.

The defendant asserted the Fagans' failure to preserve the brake pads constituted spoliation of evidence and the court should preclude any evidence about the condition of the brakes at the time of the accident.

The company also sought to bar the testimony of plaintiffs' engineering expert Russell Darnell on the grounds that he was unqualified and his opinions were based on speculation and conjecture.

Darnell opined that hydraulic fluid had caused the right brake to fail, the inclusion of a front brake on the vehicle could have prevented the accident and the vehicle was defective because it lacked a second front wheel.

Judge Burrell rejected both of the defendant's requests.

He noted the parties disputed which brake pads remained on the utility vehicle and which ones Fagan had removed and lost.

Fagan testified he removed the pads from the left side of the vehicle, but the defendant's spoliation claim centered on the right-side pads and discs, the judge said.

Finally, the judge concluded Darnell's knowledge, skill, education, training and experience sufficiently qualified him to offer his opinion on vehicle design defects. [WJ](#)

Related Court Document:
Order: 2010 WL 1948311

See Document Section B (P. 23) for the order.

NEWS IN BRIEF

MERCEDES-BENZ WINS VERDICT ON STABILITY CONTROL

A California state court jury has returned a unanimous verdict for Mercedes-Benz, finding no defect in the electronic stability control in a 2006 model S430. Plaintiff Baljinder Grewal claimed the vehicle spun out of control and struck a guardrail. He lost both legs below the knees in the 2008 accident and suffered internal injuries, his complaint said. MB argued the stability system functioned as designed and Grewal's negligence in driving at a high speed in heavy rain with worn tires led to the accident. Defense attorneys were Justs Karlsons and David Killoran of Carroll, Burdick & McDonough in San Francisco and Clayton Robertson of Carroll, Burdick & McDonough in Los Angeles.

Grewal v. Mercedes-Benz USA LLC et al., No. 56-2008-00334158-CU-MC-VTA, verdict returned (Cal. Super. Ct., Ventura County May 18, 2010).

COOPER TIRE: POLICE TESTIMONY BELONGS IN DEATH CASE

Cooper Tire & Rubber Co. argues in a Texas federal court brief that the opinions and observations of Mexican police regarding a fatal accident should be allowed in the case. However, the plaintiffs say the officers should be qualified as experts before their testimony is allowed. Cooper counters the police will offer "factual observations of individuals trained in recounting details" and that such information "passes easily over the 'lay opinion' hurdle to admissibility." The accident at issue happened in 2007, when the tread came off a Cooper Sears Guardsman Trailhandler AP tire on a 1991 Chevrolet van in San Luis Potosi, Mexico. Martin and Jose Trenado were killed, and three other family members injured, the suit says.

Trenado et al. v. Cooper Tire & Rubber Co. et al., No. 4:08-249, response to plaintiffs' motion filed (S.D. Tex., Houston Div. Mar. 31, 2010).

Related Court Document:
Response brief: 2010 WL 2001422

FORD DEFENDS ROOF, RESTRAINT SYSTEM DESIGN

Ford Motor Co. contends in a pretrial statement in Pennsylvania federal court that a 1994 Explorer involved in a rollover was not defective. The automaker says the restraint system and roof performed as designed during an accident in which Christine Elick was injured. Ford claims the vehicle was in poor condition because the entire suspension system and undercarriage were coated in rust. "The design, manufacture and assembly of the roof assembly and three-point seat restraint system are safe, nondefective, proper and adequate and in compliance with [Federal Motor Vehicle Safety Standard] 216 and FMVSS 208, 209 and 210, respectively," the defendant says. Ford adds that the physical evidence suggest Elick was not "properly utilizing" the seat belt and that her injuries stemmed from compression on her spine during the rollover.

Elick v. Ford Motor Co., No. 4:08-249, defendant's pretrial statement filed (W.D. Pa. Mar. 30, 2010).

Related Court Document:
Ford's pretrial statement: 2010 WL 1994475

WESTLAW JOURNAL INSURANCE COVERAGE



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NHTSA Engineering Analysis (EA) – April 2010

<i>Action No.</i>	<i>Make & Model Year</i>	<i>Subject</i>	<i>Date Opened</i>	<i>Date Closed</i>
PE09-044	2007-2008 CHEVROLET TAHOE/GMC YUKON INTERIOR	DOOR HANDLE LACERATION HAZARD	14-SEP-2009	
PE09-045	MODEL YEAR 2004 - 2006 MAZDA RX8 W/MANUAL TRANSMISSIONS	CLUTCH PEDAL BRACKET FAILURE	23-SEP-2009	
PE09-054	MY 2006 TOYOTA COROLLA AND MATRIX WITH 1ZZ-FE ENGINE	ENGINE STALLING - ECM FAILURE	30-NOV-2009	
PE09-055	1997-2008 E350/450 FORD CAB/ CHASSIS	HVAC SWITCH FAILURES	07-DEC-2009	21-APR-2010
PE10-001	2005-2011 D SERIES MCI MOTORCOACHES	WHEEL CHAIR LIFT SEPARATES FROM BUS	14-JAN-2010	
PE10-003	2008-2011 C2 THOMAS BUILT SCHOOL BUSES	INOPERATIVE 8-WAY WARNING LAMPS	20-JAN-2010	05-APR-2010
PE10-004	2008-10 BUELL 1125C & CR	SUDDEN FUEL EXPULSION	25-JAN-2010	
PE10-005	MY 2005-2009 CHEVROLET COBALT	ELECTRIC POWER STEERING FAILURE	27-JAN-2010	
PE10-006	MY 2010 TOYOTA PRIUS	BRAKING PERFORMANCE	03-FEB-2010	
PE10-007	2009-2011 C2 THOMAS BUILT SCHOOL BUSES	STOP LAMPS INTERMITTENT	03-FEB-2010	
PE10-008	MY 2009-10 TOYOTA COROLLA, COROLLA MATRIX	STEERING WANDER OR DRIFT	18-FEB-2010	
PE10-009	2008 SAFETY 1ST VANTAGE	HARNES SLIPPAGE	05-MAR-2010	
PE10-010	MY1999-2003 GM C/ K PICKUPS and SUVs	BRAKE LINE FAILURE DUE TO CORROSION	30-MAR-2010	
PE10-011	2008 THOMAS SCHOOL BUS	REAR ENGINE (RE) DASH FIRE	21-APR-2010	
PE10-012	2007 DODGE CALIBER	STICKING ACCELERATOR PEDAL	29-APR-2010	

A preliminary evaluation is the initial phase of a NHTSA investigation, prompted after a review of consumer complaints and/or manufacturer service bulletins suggest a safety defect may exist. The results of a PE determine whether the investigation will be upgraded to an engineering analysis or closed. Most PEs are resolved within four months.

CASE AND DOCUMENT INDEX

<i>Battiato v. Harley-Davidson Motor Co.</i> , No. 1:08 CV 1786, <i>brief in support of summary judgment filed</i> (M.D. Pa. Mar. 24, 2010)	6
<i>Elick v. Ford Motor Co.</i> , No. 4:08-249, <i>defendant's pretrial statement filed</i> (W.D. Pa. Mar. 30, 2010)	12
<i>Gonzalez et al. v. Ford Motor Co. et al.</i> , Nos. MDL 1373 and IP07-5837-C-B/S, 2010 WL 1576831 (S.D. Ind. Apr. 19, 2010)	9
Document Section A	15
<i>Green v. Ford Motor Co.</i> , No. 1:08-cv-0163-LJM-TAB, 2010 WL 1726620 (S.D. Ind., Indianapolis Div. Apr. 29, 2010)	8
<i>Grewal v. Mercedes-Benz USA LLC et al.</i> , No. 56-2008-00334158-CU-MC-VTA, <i>verdict returned</i> (Cal. Super. Ct., Ventura County May 18, 2010)	12
<i>In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices and Products Liability Litigation</i> , MDL No. 2151, 2010 WL 2194802 (C.D. Cal. May 28, 2010)	1
<i>Knight v. Deere & Co.</i> , No. 2:08-cv-01903-GEB-EFB, 2010 WL 1948311 (E.D. Cal. May 11, 2010)	11
Document Section B	23
<i>McCabe v. Ford Motor Co. et al.</i> , No. 1:10-cv-00098, 2010 WL 1935821 <i>response to dismissal motion filed</i> (E.D. Tex., Beaumont Div. May 11, 2010)	10
<i>Trenado et al. v. Cooper Tire & Rubber Co. et al.</i> , No. 4:08-249, <i>response to plaintiffs' motion filed</i> (S.D. Tex., Houston Div. Mar. 31, 2010)	12
<i>White v. Victor Automotive Products Inc. et al.</i> , No. 286181, 2010 WL 1979249 (Mich. Ct. App. May 18, 2010)	7