DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2010

MARIO A. ALVAREZ,
Appellant,

v.

COOPER TIRE & RUBBER COMPANY,
Appellee.

No. 4D08-3498

[December 1, 2010]

FARMER, J.

Relevant evidence in civil cases — that is, the acceptable knowledge base of facts for the jury — is found in an aggregate of historical facts, data, information, objects and opinions that the law allows the parties to place before the finder-of-fact to decide the case. To assist the parties in assembling all the knowledge fairly needed to prove a cause of action or defense, the rules establish a pretrial process called *discovery*, which (as its name implies) is also meant to afford a means of apprehending that which they do not know. Hence, the process begins with a wide sweep, gathering many kinds of knowledge only possibly germane (if at all), yet capable of leading to admissible trial evidence. At discovery's end, the accumulated knowledge is distilled into the evidence the parties can lay before the jury.

When this discovery is not allowed to have its intended scope — for example, when one party is blocked from ascertaining and acquiring from the other party unprotected, relevant information and data that is admissible at trial — the sum of knowledge placed before the jury will be unfairly deficient, hence misleading. The whole structure of the trial will be faulty. The jury's basis for resolving the facts will be tilted against the party denied that access. Trial then will be an expedition on an errant course. Because the possible factual base for the jury has been unreasonably curtailed peremptorily, a jury's resolution of the facts will be unreliable, and its verdict untrustworthy.

It is said in this case that a trial judge unreasonably curtailed one

party's pretrial discovery of directly relevant, valid and reliable information reasonably calculated to lead to admissible evidence. The argument is that the critical information about the subject matter was lodged solely with the adverse party, but the court's errant discovery restrictions resulted in one-sided evidence before the jury. Hence, there was a verdict based on faulty, defective information. It is contended that the resulting judgment must be reversed and the case returned to the trial court to allow the full measure of discovery in accord with the principles and purposes of the rules governing that process. When reasonable discovery has been completed, the party asserts, the case must then be retried with — as will then be determined by the trial court — all the relevant admissible evidence.

The subject of the action was a fatal accident in a light pick-up truck. The tire tread unexpectedly separated on a rear wheel while the vehicle was traveling within the speed limit near the Sawgrass Expressway's great curve. Three men occupied its front seat. None fastened a seatbelt. When the tread separated, the driver lost control. The vehicle lurched from the roadway into the median and rolled over. The passenger in the right window seat, whose estate brought this lawsuit, was crushed and killed, along with the man in the middle. Only the owner-driver survived.

The tires were standard passenger-light truck tires, but not original equipment. Although purchased as new, they were unmatched, aftermarket, replacement tires, each of a different make and in use just under three years.[1] The right rear tire suffering the tread separation was made by Cooper Tire.

The complaint alleged that the tread separation resulted from defects in the design or manufacture of the tire.[2] Plaintiff alleged that even

[1] There is some indication that one tire was of slightly dissimilar size. Whether that contributed to the tread separation was an issue to be determined by the finder of fact.

[2] Causes of action for both strict liability and negligence were alleged. The strict liability claim said the tire "was defective … in that it lacked proper adhesion of the steel belts surrounding material resulting in tread belt separation … [and] failed to incorporate belt edge wedges, gum edge strips, nylon overlays, nylon belt edge layers, or nylon safety belts to reduce the hazard of tread belt separation… ." The count for defective design alleged that the tire "failed to incorporate belt edge wedges and failed to utilize nylon overlays or nylon belt edge layers in the subject tire to reduce or eliminate belt edge separation and tread belt separation." The complaint further alleged "improper quality control measures, improper plant practices and procedures, and

though it was used in the manner intended, unexposed defects in the tire caused its tread to separate in normal operation, thereby making it unreasonably dangerous and causing the death of plaintiff's decedent.

Cooper Tire manufactured the tire at a plant in Mississippi. It denied plaintiff's claims and alleged 12 affirmative defenses, including the failure to use seat belts, misuse and abuse of the tire, as well as failure to maintain the tire.[3] Notably, Cooper Tire specifically alleged as an affirmative defense that the tire was made according to "state-of-the-art" standards of design, engineering and manufacturing.[4]

To gauge what permissible discovery might allow, we must necessarily assay the nature and elements of the claims and defenses alleged. Plaintiff's primary claim alleged strict liability. In *West v. Caterpillar Tractor Company*, 336 So.2d 80, 92 (Fla. 1976), the Florida Supreme Court adopted the RESTATEMENT (SECOND) OF TORTS, § 402A, holding:

> "[A] manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."

336 So.2d at 92. *West* further held:

> "In order to hold a manufacturer liable on the theory of strict liability in tort, the user must establish [1] the manufacturer's relationship to the product in question, [2] *the defect and unreasonably dangerous condition of the product*, and [3] the existence of the proximate causal connection between such condition and the user's injuries or damages." [e.s.]

336 So.2d at 87.

Later, in *Ford Motor Company v. Hill*, 404 So.2d 1049, 1051-52 (Fla.

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improper adhesion between components."

[3] The parties took conflicting positions about whether the tire had been misused, abused or improperly maintained.

[4] *See* § 768.1257, Fla. Stat. (2009) ("In an action based upon defective design, brought against the manufacturer of a product, the finder of fact shall consider the state of the art of scientific and technical knowledge and other circumstances that existed at the time of manufacture, not at the time of loss or injury").

1981), the supreme court considered a contention that Florida should apply negligence law for products liability design defects, thus confining strict liability claims to manufacturing defects only. *Hill* rejected that argument. It held that under § 402A the doctrine of strict liability expressly applies to design defect claims, quoting with obvious approval the following:

> "It would be a strange result if we said that a manufacturer who carefully designs a product and thereafter negligently produces it should be held liable, but a manufacturer who negligently designs the product and thereafter carefully produces it pursuant to the negligent design should be relieved of liability."

404 So.2d at 1052 (quoting *Hancock v. Paccar, Inc.,* 283 N.W.2d 25, 33 (Neb. 1979)). The court also agreed that:

> "[t]he policy reasons for adopting strict tort liability do not change merely because of the type of defect alleged. If a product, due to its design, is dangerous at the time of an accident, that should be sufficient to impose strict tort liability."

404 So.2d at 1052. Ultimately, the *Hill* court concluded:

> "the *better rule is to apply the strict liability test to all manufactured products without distinction as to whether the defect was caused by the design or the manufacturing.* If so choosing, however, a plaintiff may also proceed in negligence." [e.s.]

404 So.2d at 1052. The explication of § 402A in *West* and *Hill* constitutes the prevailing law in this State on strict liability as settled by our supreme court.[5]

Under *West* and *Hill*, the strict liability claim here required plaintiff to

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[5] Plaintiff alleged both strict liability and negligence. The negligence claim could possibly be moot because, as the court held in *Hill*, § 402A strict liability applies to both design and manufacturing claims. *See* 404 So.2d at 1052; *but see Agrofollajes S.A. v. E.I. DuPont De Nemours & Co. Inc.*, --- So.3d ---, 34 Fla. L. Weekly D2578, 2009 WL 4828975, at *1-4, 21 (Fla. 3d DCA Dec. 16, 2009) (risk utility/benefit test in RESTATEMENT (*THIRD*) OF TORTS § 2, controlled issue whether systemic fungicide used in Costa Rica was defective).

plead and prove only these elements:

> (1) the manufacturer's relationship to the product;
>
> (2) a defect causing the tire to be unreasonably dangerous when used as intended; and
>
> (3) a proximate causal relationship between the defective condition and the resulting injury.

West, 336 So.2d at 87; *Hill*, 404 So.2d at 1051. Here plaintiff pleaded that:

> (1) decedent was a passenger in a vehicle, hence in the position of a consumer-user relying without inspection for defects on the safety of the tire manufactured by Cooper Tire;
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> (2) a defect caused the tread on a rear wheel to separate during ordinary operation, making the tire unreasonably dangerous when used as intended; and
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> (3) the tread separation caused the vehicle to lurch from the roadway and roll over, killing decedent.

Obviously the principal issue for discovery centered on issue (2): whether the tire was defective and unreasonably dangerous in ordinary operation. Equally critical to discovery's scope is Cooper Tire's "state-of-the-art" affirmative defense.

It is evident that the parties occupied significantly different positions of access to relevant scientific-technical information and data as to issue (2) and Cooper Tire's "state-of-the-art" defense concerning design and production of the tire. Plaintiff was a consumer-user, probably having little (if any) knowledge of passenger car-light truck tire production. On the other hand, Cooper Tire is one of the leading manufacturers of such tires in the United States and should be presumed to be well-informed about all aspects of their design, production and use. Consequently, on the critical discovery issues, access to information was essentially a one-way street with most, if not all, information and data critical to plaintiff in the hands of defendant, Cooper Tire.

The discovery rule lays down this basic principle: the scope of

discovery extends to anything not privileged, possibly relevant to the "subject matter" of the claim or defense as being reasonably calculated to lead to admissible evidence.[6] This scope — relevancy to the *subject matter* of the claims and defenses (instead of the narrower scope for relevancy of trial evidence) — undeniably articulates a purpose to enlarge discovery beyond only such evidence as may ultimately be admissible at trial.[7]

Within this scope, even trade secrets are discoverable.[8] The fact that information or data sought by a party may constitute trade secrets is not by itself a basis to bar disclosure to the adverse party in discovery. On the other hand, an interest in confidentiality for legitimately protected trade secrets may require suitable safeguards as to disclosure and use of the information or data — both within and outside the litigation. But any need for such protection is not a valid basis to bar discovery outright to keep such information hidden.

Obviously the *subject matter* for discovery in this case was passenger-light truck tire production and tread separation. It is, therefore, relevant to know whether passenger-light truck tire design and production differs from model to model, or maker to maker. Does the incidence and cause of tread separation change with each model of such tires and diverse producer? Are there standardized factors and remedies running throughout the industry for such factors? In short, does the model alone determine the scope of discovery related to tread separation?

Plaintiff's expert witness testified that Federal Regulations specifically recognize that:

> "*A tire* sold or in use outside the United States *is* ***substantially similar*** to a tire sold or offered for sale in the United States *if it has the same size, speed rating, load index,*

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[6] *See* Fla. R. Civ. P. 1.280(b)(1).

[7] *See Amente v. Newman*, 653 So.2d 1030, 1032 (Fla. 1995) (concept of relevancy is broader in discovery context than in trial context, and party may be permitted to discover relevant evidence that would be inadmissible at trial if it may lead to discovery of relevant evidence); *Allstate Ins. Co. v. Langston*, 655 So.2d 91, 94 (Fla. 1995) (same); *McAlevy v. State*, 947 So.2d 525, 530 (Fla. 4th DCA 2006) (same); *Superior Imports of Tampa Inc. v. Stacy David Inc.*, 617 So.2d 795, 797 (Fla. 1st DCA 1993) (party is permitted to discover those matters relevant to the subject matter of the litigation even though such evidence may be inadmissible at trial).

[8] *See* Fla. R. Civ. P. 1.280(c)(7).

> *load range, number of plies and belts, and similar ply and belt construction and materials, placement of components, and component materials,* ***irrespective of plant of manufacture or tire line***."[9] [e.s.]

Under this federal Department of Transportation regulation, all domestic passenger-light truck tires currently produced are deemed *substantially similar* to each other. At the same time, the federal Environmental Protection Agency also recognizes that domestic manufacturing and production of rubber tires is standardized:

> "Most tire production in the United States is now of radial-ply construction: virtually all car tires (with the exception of the temporary spare) and more than 80 percent of truck and bus tires are of radial-ply construction. ...
> ...
> Nearly all passenger car tires and more than 80 percent of highway truck tires are radials. ... *For tires within the same category that have similar ratings, there is little product differentiation between tire producers*; thus, price is the main distinguishing characteristic for consumers of tires within the same category of tires."[10] [e.s.]

The Record on Appeal discloses no plausible reason why, if passenger-light truck tires are *substantially similar* for purposes of federal regulation of interstate commerce, they are not also *substantially similar* for the subject matter of discovery in this lawsuit.

The failed tire was a Trendsetter model, steel-belted radial tire (Cooper Trendsetter SE, P205/70R14), produced at Cooper Tire's Tupelo plant in 1998, bearing green tire specification 3011. In addition to discovery[11] from Cooper Tire as to that model tire, plaintiff further requested discovery as to several other Cooper Tire passenger-light truck models suffering tread separation — all steelbelted radial tires. Additionally, plaintiff specifically requested the same discovery that Cooper Tire had previously been required to produce in other passenger-light truck tire

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9 49 C.F.R. § 579.4(d)(3).

10 U.S. Environmental Protection Agency, *Economic Analysis of the Rubber Tire Manufacturing MACT, Final Report*, August 2000, at 2-10, 2-12.

11 The term *discovery* refers to all pertinent forms allowed by the rules of procedure: i.e., production of documents, interrogatories, examinations upon oral deposition. *See* Fla. R. Civ. P. 1.280(a). The particular form of discovery is not dispositive of any issue we decide.

tread separation cases in Florida courts and elsewhere.

Concerning discovery from these other cases, plaintiff's most important initial requests were numbers 19 and 20 in the original request for production. Plaintiff furnished an affidavit of an expert having extensive knowledge and experience in the design and manufacturing of Cooper Tire's passenger tires and tread separation. During the discovery proceedings, he testified by affidavit that the inner liner on every steel-belted, radial passenger tire is identical and that the components relevant to tread separation for steel-belted radial passenger tires made by Cooper Tire are identical in all critical aspects. He stressed that all the documents being sought dealt with the "Trendsetter" line of Cooper Tire and that they were both critical and significant to proving defects in the subject tire. Finally the expert testified that none of the details being sought constituted trade secrets because all were already made known to competitors.[12]

Cooper Tire objected to all these requests on the grounds that they were irrelevant, overbroad, unduly burdensome and constituted trade secrets. The positions of the parties as to the propriety of these requests yielded multiple motions to compel discovery and opposing motions for protective orders barring such discovery. These motions resulted in at least one evidentiary hearing lasting three days, as well as many other protracted hearings over the span of 4 years.[13]

Plaintiff argued that the discovery allowed in other cases was directly relevant to the subject matter, was crucial to the issues in this case and — because it had previously been produced elsewhere — was of no burden to Cooper Tire. He further emphasized that because it had already been produced in these other cases, Cooper Tire's claim of trade secrets could not be taken seriously as a bar to disclosure.

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[12] His affidavit swore: "[T]he majority of Cooper Tire's designation of protected trade secret for documents and testimony is inappropriate as it does not protect any information that is a bona fide trade secret that would benefit their competitors in the manufacture of tires, but is rather information that reflects the poor quality of design and manufacture of Cooper tires.... The information Cooper Tire has designated as trade secret in the past is information that is generally known to its competitors or readily ascertainable by their competitors"). This testimony was sufficient to support an order compelling production of the documents requested.

[13] Plaintiff argues on appeal that "Cooper's modus operandi was to instigate a discovery war, designed to stall the discovery process and make the litigation as expensive and as drawn out as possible." The Record on Appeal is not without some evidence supporting this contention.

Ultimately the judge initially presiding over discovery agreed with the position of Cooper Tire, restricting plaintiff's discovery "to the subject tire and *substantially similar* tires, which [the trial court] define[d] as tires designed and manufactured according to Green Tire Specification 3011 and its Related Specification 3163."[14] [e.s.] The judge's basis for denying plaintiff's requested discovery was solely Cooper Tire's claim that the information was trade secrets.

As the case progressed, the initial discovery order in this case was later accepted and followed without change by a successor judge in spite of renewed attempts by plaintiff to allow discovery of these other Cooper Tire models with tread separation. That restriction was then continued at trial and applied by the successor judge to the evidence permitted to be seen and heard by the jury. All testimony, tangible and documentary evidence allowed before the jury was similarly limited to the specific models specified in the pretrial orders.[15]

Plaintiff argues that these orders effectively limited the resulting evidence at trial to just the model tire involved in the accident. Plaintiff contends that this restriction was unreasonable and contrary to the allowed scope of discovery under the rule, depriving him of highly relevant discovery and trial evidence within the sole control of Cooper Tire, but critical to proving his claims. That is the principal issue on this appeal.

Much of the briefing and oral argument on appeal repeats the arguments in the trial court over the meaning of the term *substantially similar* applied by the trial judge in this case restricting discovery essentially to only the model tire involved in the accident. But as a prescriptive device to determine like products, this term is not especially useful.

Substantially is one of those English words with multiple meanings pointing in quite different directions. First, it may mean "having substance and not illusory" or "relating to the main or most important

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[14] The parties agree that "green tire" designation is a standard device used throughout the industry for the final stage of production for every model passenger-light truck tire.

[15] The trial judge explained: "I know that that's been a big issue from the very beginning. But the way this case has sort of been line drawn, so that … it was limited to these particular green tire model numbers. … But I'm going to sustain the objection for the reasons stated."

things being considered."[16] On the other hand it also can have an entirely different sense meaning "considerable in amount or degree."[17] The courts using the phrase *substantially similar* do not explain which possible meaning was intended. The first could be understood as connoting only that the other product must be *comparable in substance* to the one involved in the case. That meaning would be consistent with rule 1.280(b)(1).

If the second meaning (that the similarity must be "considerable in amount or degree," i.e., having a similarity that is strong or compelling) is the one intended, then the modifier *substantially* appears to require an intensified evidentiary weight for the similarity. But, evidentiary weight is a matter almost always reserved for the trier-of-fact and not as a factor in discovery. Thus, of the possibilities, the first meaning, *comparable in substance*, comes closest to the text and purpose of rule 1.280(b)(1) with its focus on the broader *subject matter* of the claims and defenses. A better measure for discovery regarding other products would thus be *comparable in substance* rather than *substantially similar.*[18]

To be sure, in *obiter dicta,* this court once referred to the *substantially similar* test. *See Nissan Motors Corp. v. Espinosa*, 716 So.2d 279 (Fla. 4th DCA 1998). There, however, it is clear that the term's meaning had no actual effect on our decision. Instead we denied relief because the party had simply failed to make any showing by affidavit or otherwise that the proposed discovery was relevant to the subject matter.

As used in discovery, *substantially similar* appears to have originated in *Caterpillar Industrial Inc. v. Keskes*, 639 So.2d 1129 (Fla. 5th DCA 1994). There the Fifth District recognized *Perret v. Seaboard Coast Line Railroad*, 299 So.2d 590 (Fla. 1974), as the leading case on permitting similar accidents to be used to prove liability for negligence *at trial*. *Keskes*, 639 So.2d at 1130

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[16] *See* CAMBRIDGE INTERNATIONAL DICTIONARY OF ENGLISH (electronic ed.), *available at* http://dictionary.cambridge.org. [search term: *substantial*].

[17] *See* Merriam-Webster's Online Dictionary (11th ed.) ("considerable in quantity : significantly great, <earned a substantial wage>") (available at http://www.merriam-webster.com/dictionary/substantially).

[18] We have already seen that federal regulations deem all passenger-light truck tires in the United States to be substantially similar to one another. We again note that the Record on Appeal in this case fails to show why this federal regulatory recognition should not itself satisfy any Florida requirement of substantial similarity. But, even if it had, the qualifying term *substantial similarity* does not appear anywhere in rule 1.280(b)(1).

In *Perret*, the Florida Supreme Court explained the general rule for *trial* admissibility, thus:

> "Subject to the general requirement of similarity of conditions, reasonable proximity in time, and avoidance of confusion of issues, the courts have generally recognized that ... evidence of prior similar injuries resulting from the same appliance as the injury in suit, is admissible for the purpose of showing the existence of dangerous or defective premises or appliances."

299 So.2d at 592. The modifying term *substantially* was not used in *Perret*. The *Perret* holding is actually that the evidence of a *similar* accident in another case *was* admissible at trial. The modifying term *substantially* was not applied to further constrict the operative term *similar*. In substance, therefore, the supreme court in *Perret* required only a *similarity* of conditions to satisfy relevancy for admission of evidence at trial.

If evidence is relevant for admission at trial, surely it must be discoverable. *Perret* is therefore direct authority for allowing discovery of evidence from other cases involving merely a *similar* product to prove that the product on trial was dangerously defective.

We note that the rationale in *Keskes* for restricting discovery with the *substantial similarity* requirement was that the request was a "fishing expedition," and therefore somehow improper. *See* 639 So.2d at 1130. In *American Medical Systems Inc. v. Osborne*, 651 So.2d 209, 211 (Fla. 2d DCA 1995), the Second District adopted the same reasoning to bar discovery. The opinions in *Keskes* and *Osborne* offer no explanation for their hostility to fishing expeditions in discovery *related to the subject matter*.

Indeed, it does not seem to us that discovery fishing in the waters of the subject matter is foreclosed by rule 1.280(b)(1). An enlarged scope of relevancy for discovery purposes seems to embrace a strong policy to allow parties to do some *fishing* to learn what possible trial evidence may actually be out there. As in this case, where all the relevant information lies in the hands of the opposing party who claims trade secrets as a bar, it could be necessary to do some casting about of lines and nets to learn precisely what the opposition knows that it does not want its adversary to know. After all, lawyers and litigants do not always recognize exactly

what they are missing but should know. Anyway, there is a trial judge standing watch over the lakes and ponds of discovery who, if the time comes, can act to stop overfishing and pull in the lines and nets.

Here the subject matter in question is undeniably the Cooper Tire design and manufacturing process for all passenger-light truck tires suffering tread separation. Applying *Perret* and its holding about trial evidence to the scope of discovery for this case, it seems manifest that evidence from other cases about other model passenger-light truck tires need bear only a *similarity in substance* with the subject matter of the claim. In this discovery context, *Perret*'s specification of unadorned *similarity* is more coherent with the essential purpose of rule 1.280(b)(1) to enlarge relevancy to the entire subject matter rather than to contract it to trial evidence.

Especially in discovery, when the conflicting contentions of the parties as to similarity seem to have some plausibility, it is not the role of the judge in discovery to settle the issue of relevancy for admissibility at trial as a precondition to allowing the discovery. If information about other products is plausibly capable of being seen both ways, similar and dissimilar, discovery should be allowed as a matter of course — unless there are other good reasons to bar it. Admissibility of trial evidence should be finally decided only when and if the evidence is actually proposed at trial.

Plaintiff here argues that the unreasonable limitation on discovery and its resulting exclusion of trial evidence profoundly and unreasonably limited his access to evidence in this case. He argues that:

> "The trial court sustained Cooper's objections over and over again, based on its pre-trial ruling limiting the evidence in this case to the specific green tire specifications of the tire in this case. Plaintiff was prejudiced because this ruling significantly limited the evidence Plaintiff could adduce to prove his case. Plaintiff's expert testified that the critical components of tread belt separations are identical in all Cooper steel belted radial tires, including the inner liner, the antioxidants, the belt edge design, the lack of appropriate wedge or gum strip at the belt edge and lack of nylon overlay. This evidence was 'critical' and 'significant' to prove the specific design defects, and Cooper's notice of these defects.
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> "The jury was denied the opportunity to accurately

> evaluate the design and manufacturing defects in this tire. The trial court abused its discretion when it limited the evidence in this case to the very narrow classification of the identical green tire specification."

To decide whether discretion has been abused, one must first know the nature and extent of the discretion allowed by law. Correctly interpreted, rule 1.280(b)(1) reduces the range of discretion by allowing discovery so long as the information sought is relevant to the subject matter of the pending action and is reasonably calculated to lead to admissible evidence. *See* Fla. R. Civ. P. 1.280(b)(1).

On this issue, we follow the decision of the Third District in *Cooper Tire and Rubber Company v. Rodriguez*, 2 So.3d 1027, 1029-31 (Fla. 3d DCA 2009), involving this identical issue, the same defendant, and even many of the same documents. In that case the tread separated on a different model passenger-light truck tire, also resulting in rollover and serious injuries. 2 So.3d at 1029. There too, Cooper Tire argued that discovery should be confined to the model on the vehicle and those made to the same green tire specifications. 2 So.3d at 1029-30. The trial court overruled its objections and ordered production. On certiorari review, the Third District held:

> "[I]t is clear that the production compelled by the trial court's May 22nd order is not so broad as to amount to a departure from the essential requirements of law. *The manufacturing techniques and procedures employed to construct the Cobra model radial tires involved in the plaintiff's accident are not unique to the tires manufactured to the same* [Green Tire Specification (GTS)]. Therefore, although the May 22nd order compels the discovery of documents related to Cooper tires other than those manufactured to the same GTS, we cannot say that the order is so broad that it compels the production of materials that cannot possibly lead to the discovery of admissible evidence.

2 So.3d at 1031.

We conclude that the discovery standard of *substantial similarity* for other products with similar defects is not a correct interpretation of Florida's scope of discovery rule.[19] Even if it had some utility in

[19] Courts outside Florida have allowed the same discovery from Cooper Tire in comparable cases. *See Ex parte Cooper Tire & Rubber Co.*, 987 So.2d 1090,

describing the purpose and meaning of rule 1.280(b)(1)'s "subject matter" standard, it was construed far too narrowly in the discovery orders issued in this case. Rather than construing the rule's scope to be larger than the admissibility of trial evidence, the court unreasonably constricted it to the single model tire involved in this case, which is even narrower than *Perret*'s standard for evidence at trial. As all the above courts have concluded, the general nature of passenger-light truck tire production is standard for all models. Records of tread separation in any of them may lead to admissible evidence at trial in this case. For the same reasons, it is obvious that the discovery sought is especially relevant to Cooper Tire's "state-of-the-art" defense.

We next consider whether this unreasonable restriction on discovery should be treated as harmless error.[20] Generally, in civil appeals, the

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1103 (Ala. 2007) (stating that "the manufacture of the tires was to a large extent standardized and that the particular design and manufacturing process was substantially the same, regardless of a particular model. Thus, the discovery in this case is directed toward detailing the instances in which Cooper's design and manufacturing process has resulted in tires that failed as a result of tread separation, regardless of the particular size or tread pattern of the tire"); *Mann ex. rel. Akst v. Cooper Tire Co.*, 33 A.D. 3d 24, 35 (N.Y. App. Div. 2006) (where Cooper Tire argued discovery be limited to same green tire specification, New York court stated: "[T]here is simply no evidence in the record, nor any rationale, that suggests that tread separation is limited to either one or a range of green tire specifications. [T]hus the scope of discovery in this case should include documents relating generally to the tread separation defect or problem. To rule otherwise would mean, as the plaintiffs assert, that Cooper Tire would not produce documents in which tread separation and foreign object contamination is discussed generally. . . . [W]e agree, that such information is of 'vital importance irrespective of the make of tire involved [since] it contains evidence of what Cooper Tire knew of belt and tread separations.' . . . [T]o limit disclosure to 'same green tire specifications' rather than to tires with the same defect of tread separation is an 'absurdity since Cooper Tire will be able to conceal documents probative on the issues of notice, defectiveness and dangerousness. For the same reasons, it would be absurd to limit disclosure to the same plant as the one where the subject tire was manufactured"); *Peterson v. DaimlerChrysler Corp.*, No. 1:06-cv-00108-TC-PMW, 2007 WL 2391151, at *3 (D. Utah 2007) (holding that "limiting discovery in the fashion Cooper proposes . . . could potentially deprive Plaintiffs of discovery supporting [plaintiff's] theory [of his case].

[20] *See* § 59.041, Fla. Stat. (2009) ("No judgment shall be set aside or reversed, or new trial granted by any court of the state in any cause, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the

burden is on the appellant to show that an error probably affected the outcome.[21] In civil appeals, the basic test for prejudicial error in procedure is whether it results in a miscarriage of justice to the affected party.[22]

There are two ways appellate courts consider prejudice. *See Wilson v. State*, 764 So.2d 813 (Fla. 4th DCA 2000) (trial errors, occurring during the presentation of evidence to the jury, are subject to harmless error analysis; structural errors "in the constitution of the trial mechanism defy analysis by 'harmless error' standards"). In *Wilson*, we showed that some trial errors can fairly be assessed as harmless because they may "be quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial]." 764 So.2d at 817 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 629 (1993)). But we made clear that some structural errors "defy harmless error standards" and are reversible per se "because they infect the entire trial process." 764 So.2d at 817-18 (quoting *Brecht*, 507 U.S. at 630).

Although the decisions involving "structural error" are nearly all criminal trials with their dominant constitutional requirements, the concept of structural error is not alien to civil litigation. For example, in *Lakeside Regent Inc. v. FDIC*, 660 So.2d 368, 370 (Fla. 4th DCA 1995), we reversed a deficiency judgment because the trial court had denied the party bringing the appeal discovery of "necessary, properly discoverable material." We concluded that:

> "[e]ven under a strict relevancy standard, the information sought by the plaintiffs in this case was discoverable. ... Those were matters directly relevant to the issues before the court and, therefore, clearly within the proper scope of

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entire case it shall appear that the error complained of has resulted in a miscarriage of justice. This section shall be liberally construed.").

[21] *White v. Crandall*, 143 So. 871, 874 (Fla. 1932) (error must be material and harmful, otherwise judgment will stand); *but see Baker v. Chatfield*, 2 So. 822, 823-25 (Fla. 1887) (error in instruction ground for reversal unless it affirmatively appears that it was not prejudicial).

[22] *Barcus v. Wood*, 134 So. 39, 40 (Fla. 1931) (judgment should not be reversed for errors in procedure unless resulting in miscarriage of justice); *Centex-Rooney Const. Co. v. Martin County*, 706 So.2d 20, 26 (Fla. 4th DCA 1997) ("The trial court's judgment should be reversed only where it appears that such error 'injuriously affect[ed] the substantial rights of the complaining party[.]'..."); *see also* § 59.041, Fla. Stat. (judgment should not be reversed unless, after examination of entire case, it appears that error complained of resulted in miscarriage of justice).

discovery."

660 So.2d at 370. We did not weigh the exclusion of the evidence against other evidence on the critical issue, instead pointing out that:

> "denying appellants access to necessary, properly discoverable material, has created the situation whereby we are now duty bound to conclude that the appellants have raised sufficient material issues of fact to preclude summary judgment..."

660 So.2d at 370. If the right to discovery is indispensable to show a triable issue, it is equally so as to admissible evidence at trial itself.

Other decisions have also treated some errors in civil litigation as enough, in and of themselves, to require a reversal. In *Lottimer v. North Broward Hosp. Dist.*, 889 So.2d 165, 167 (Fla. 4th DCA 2004), we held that the failure to permit the exercise of a peremptory challenge before the jury is sworn constitutes an error as a matter of law, requiring reversal of the final judgment. In *Martinez v. Vega*, 751 So.2d 1268, 1270 (Fla. 3d DCA 2000), the court concluded without weighing the error against the other evidence in the case that the erroneous exclusion of a statement at the scene of an accident — to the effect that a truck driver had run through a red light — was reversible error,. The court pointed out that the issue of which driver had the green light was the central issue in the case, i.e., "hotly disputed". In *Peacher v. Cohn*, 786 So.2d 1282, 1283 (Fla. 5th DCA 2001), the court held the error in refusing to allow a final peremptory challenge before swearing the jury was reversible error per se. In *Van Sickle v. Zimmer*, 807 So.2d 182, 184 (Fla. 2d DCA 2002), the trial court's refusal to permit a party to exercise its peremptory challenges is not harmless error when the jury returns a verdict against that party. In *State Farm Fire and Casualty Co. v. Pettigrew*, 884 So.2d 191, 193, 198 (Fla. 2d DCA 2004), the exclusion of certain evidence of an automobile passenger's prior workers compensation claims was not harmless because it "thwarted" efforts to attack the credibility of a critical witness.

We conclude that the error here is prejudicial and requires reversal, whether the test is deemed trial error or structural. The critical information as to the existence of a defect in the failed tire, as well as Cooper Tire's "state-of-the-art" avoidance of design defect liability, was barred in discovery, and, therefore, the plaintiff was denied the opportunity to introduce the evidence at trial. This forbidden discovery

was directly relevant to both claims and defenses and utterly essential to plaintiff's case. From the perspective of authentication, it could be obtained only from Cooper Tire.

From the standpoint of trial error, it is difficult to comprehend any valid basis for concluding that it could not possibly have affected the jury's consideration of the claims and defenses. This was evidence from Cooper Tire's own design and manufacturing processes of all its models of passenger-light truck tires. What might be thought by reasonable jurors as merely an anomaly if found in only a single model tire quite reasonably could be seen as strong evidence of design defects if found in tires across the spectrum of the kind of product at issue. Denying plaintiff the discovery of this evidence from Cooper Tire itself is the equivalent of denying Cooper Tire discovery from plaintiff as to the use of seatbelts and maintenance of the tires, as well as of the financial and emotional effects of the death of the decedent on the members of his family.

As we saw in the beginning, the apparatus of civil litigation has incorporated into its structure the right of all parties to discovery of facts, information and data involving the subject matter of the dispute. Denying one of the parties that discovery — especially as to essential evidence critical to proving a claim or defeating a defense — is a manifest injustice. Within the meaning of the harmless error law, the denial here was considerably prejudicial and perpetrated a substantial injustice on the plaintiff in this litigation.

Upon remand, discovery will have to resume, governed by the holdings of this opinion. Proper and full discovery will then require a new trial, at which both sides will have the right to lay all their relevant, admissible evidence before the jury.[23]

Reversed with instructions.

HAZOURI and DAMOORGIAN, JJ., concur.

* * *

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Catherine Brunson (discovery) and Edward H. Fine (trial), Judges; L.T. No. CA02-12880 AH.

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[23] Because it is a crucial element in any wrongful death claim, discretion should be exercised to allow decedent's parents to testify at trial.

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Not final until disposition of timely filed motion for rehearing.