IN THE COURT OF APPEALS OF IOWA

No. 3-013 / 11-1588
Filed April 24, 2013

IVON TOE, Individually and as Next Friend of YANFOR WRIGHT, NYANSA WRIGHT, RICHMOND WRIGHT, AND PAULEEN TOE, minors; ACHOL DENG MAWIEN; SEKOU JAI, Individually and as Next Friend of SUNDAY NAYOU, GEE NAYOU and ISAIH NAYOU, minors; EVELYN NAYOU; JOSEPH COLE, Individually and as Next Friend of HOMPHREY VANIE and VANESSA VANIE, minors; THE ESTATE OF ASSATA KARLAR by its Administrator GAYE KARLAR; GAYE KARLAR, Individually and as Father and Next Friend of TARLEY KARLAR, ESTER KARLAR, NIONBIAO KARLAR, KULEY KARLAR, and LOVETTA KARLAR, minor children of ASSATA KARLAR,
Plaintiffs/Appellees,

vs.

COOPER TIRE AND RUBBER COMPANY,
Defendant/Third-Party Plaintiff/Appellant.

STATE OF IOWA, ex rel. CIVIL REPARATIONS TRUST FUND,
Intervenor-Appellee,

ALFRED LANG,
Third-Party Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Carla T. Schemmel, Judge.

Cooper Tire and Rubber Co. appeals from the jury verdict entered for the plaintiffs injured in a rollover accident and their families. **AFFIRMED.**

Richard J. Sapp and Matthew R. Eslick of Nyemaster, Goode, West, Hansell & O'Brien, P.C., Des Moines, and Joe Thacker of Thacker Martinsek L.P.A., Perrysburg, Ohio, for appellant Cooper Tire and Rubber Company.

Kyle W. Farrar of Farrar & Ball, Houston, Texas, Frederick W. James of The James Law Firm, Des Moines, and John Gsanger of The Edwards Law Firm, Corpus Christi, Texas, for appellees.

Thomas J. Miller, Attorney General, Des Moines, and Richard E. Mull, Assistant Attorney General, Iowa Department of Transportation, Ames, for intervenor-appellee State of Iowa ex. Re. Civil Reparations Trust Fund.

Brett C. Redenbaugh of Lewis, Webster, Van Winkle & Knoshaug, L.L.P., Des Moines, for third-party defendant/appellee Alfred Lang.

Heard by Eisenhauer, C.J., and Potterfield and Tabor, JJ.

POTTERFIELD, J.

The case arises from a rollover accident involving a multi-passenger van. The driver of the van, third-party defendant Alfred Lang, lost control when the tread separated on one of the van's tires, manufactured by Cooper Tire and Rubber Company ("Cooper"). Cooper appeals from a jury's $32.8 million award to six plaintiffs and their family members based upon the jury's finding that Cooper was completely at fault. For the reasons that follow, we affirm.

I. Background Facts and Proceedings.

On September 17, 2007, Ivon Toe, Achol Mawien, Sekou Jai, Jalah Nayou, Josephine Cole, and Assata Karlar were passengers in a 1997 Plymouth Voyager van driven by Alfred Lang and traveling northeast on Highway 65 to the Swift packing plant in Marshalltown where they all worked. The van was owned by Mawien, who had purchased it less than three weeks before the accident. The van had multiple prior owners; over 145,000 miles on the odometer; and except for its initial use as a rental vehicle in Colorado, an unknown service and use history. The van's tires were all replacement tires. The left rear and right front tires were manufactured by Cooper.

Just before the accident, Lang was in the left lane, closest to the median. The tread of the left rear Cooper tire separated, which resulted in the vehicle pulling to the left. Lang steered sharply to the right and the van crossed the right lane and veered onto the right shoulder. The van rolled several times after leaving the pavement. Lang was uninjured, Karlar was killed, Toe was paralyzed from the neck down, and the others passengers sustained varying degrees of personal injuries.

The occupants of the vehicle and various family members sued Cooper on numerous theories, including that the Cooper tire was defectively designed, was sold in a defective condition, was manufactured defectively, Cooper failed to give adequate warnings of the tire's dangers, Cooper was negligent in various ways, and numerous express and implied warranties had been breached. On appeal, Cooper's major complaint is that the district court erred in allowing evidence of tread separations in Cooper tires other than a GTS 2846, which was the specific tire model involved here, to show knowledge of defective skim stock rubber.

Cooper presented evidence that a steel belted radial tire is composed of numerous components arranged in a number of different layers falling into six general groups: inner liner, body plies, steel belts, tread, beads, and sidewalls. As summarized by Cooper in its appellate brief:

> Beads are the foundation of a tire and provide an anchor for other components and make the tire's fit against the rim tight. The first layer, the inner liner, is a thin layer of specialized rubber designed to retain air pressure between the tire and the wheel. The next layers are "body plies." Body plies are made of polyester encased in rubber and are provide structure to the tire and assist in air retention. The third layer is another type of rubber product called the sidewall. Sidewall rubbers are different from those found in the inner liner. Sidewalls are flexible and are designed for certain ride and handling characteristics.
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> Above the sidewall are the steel belts. In passenger tires, there are two rubber-encased steel belts containing parallel steel wires, one belt above the other at opposing angles. The crisscrossing steel belts provide rigidity and support for the tire's tread. The steel belts are coated with a unique type of rubber known as "skim stock."
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> The top layer of the laminate structure of a radial tire is the tread. The tread is a combination of specialized type of rubbers, formulated specially for abrasion resistance and traction capabilities.

The tire involved in this case carries the brand name Cooper Lifeliner Classic II,[1] size P215/65R15, which is a medium duty radial passenger car tire manufactured at Cooper's Texarkana, Arkansas, plant during the week of March 26, 2000. It is also a Generation VII tire with a Green Tire Specification (GTS) 2846.[2] The GTS 2846 tire was certified for production in 1996 according to standards promulgated by the National Highway Transportation Safety Administration ("NHTSA"), the federal agency responsible for automotive and tire safety. Between 1996 and 2001, more than 660,000 GTS 2846 tires were sold.

The subject tire was described by Toe's expert as "fairly worn," and had been used for approximately 35,000 miles. The tire had a nail in it that had penetrated through the entire structure of the tire. Grooves on the sidewall of the tire were evidence that the tire had been run for an extended period of time underinflated, overloaded, or both.

It was Toe's theory that, by 1996, Cooper had become aware that tread separations in its tires were increasing dramatically. Cooper learned it could minimize tread separations by improving the antioxidant protections (AO protection) in its rubber used in skim stock (also referred to as belt compound or coat stock) to make its tires better able to resist the degradation from oxygen

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[1] Brand names include a number of sizes of tire and may have numerous differences in compilation. The Classic II line includes forty-four different tire models.

[2] In the manufacturing process, tires pass from a "green" state to a "cured" or "vulcanized" state. In the green state, the various uncured components of the tire are assembled into the laminate structure described above. The assembled components are then placed in a curing oven where they are vulcanized and molded into the form recognizable to consumers.

The Green Tire Specification is the tire design or blueprint to which a particular model tire is manufactured. "GTS" is the equivalent of "model." A GTS specifies the dimensions, weight, and physical attributes of the components in the tire, as well as the order in which the components are placed during manufacture.

over time. In support of this theory, Toe offered numerous exhibits purporting to show Cooper used the same skim stock in all its tires (the skim stock is referred to as 525C) and experienced a rise in tread separations after introducing the skim stock in 1995 until Cooper issued a product change notification in February 2000 that the skim stock would be changed across the board for passenger and light truck tires. The Texarkana plant, however, did not implement the change until it depleted its skim stock inventory after the manufacture of the tire involved here.

Cooper moved in limine and objected at trial to several exhibits on grounds that other tires mentioned in the exhibits were not proven to be substantially similar to the GTS 2846 tire at issue,[3] and thus the exhibits were irrelevant, or any relevance was substantially outweighed by undue prejudice.[4] Toe responded that the exhibits reflect Cooper's concerns about the increase in tread separations due to the faulty skim stock and showed Cooper's knowledge of the problems with the skim stock.

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[3] Cooper notes that the Federal Government defines "substantially similar tires" for purposes of reporting requirements under the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act as those made to "the same size, speed rating, load index, 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." 49 C.F.R. § 579.4(d)(3).

Anthony Brinkman's affidavit states, that "from an engineering and technical standpoint, 'similar' tires are those manufactured only to the same Green Tire Specification (GTS), or a related specification that differs only in terms of sidewall treatment." (Adding whitewall to a tire results in a different GTS).

[4] The exhibits allowed in but objected to by Cooper on these grounds are Exhibits 8, 10, 14, 18, 23, 25, 27, 32, 35, 36, 37, 38, 40, 55, 60, 75, 111, 246, 256, 301A, 483, 502, 514, and 598.

The district court ruled that documents indicating that Cooper "had problems with all their tires will come in, because that includes the spec in this case or the tire in this case." The court stated that it would, however,

> place on plaintiff a burden to show that it is all the tires or all the rubber or all the whatever, and if it's not, it won't come in, because I think Cooper's knowledge of facts that they had problems with all their tires, including this one, is relevant. If they had a problem with a totally different spec which may somehow be related, it's not going to come in.

The court later explained further:

> If the document says, "we have a big problem with our Classic II tires," it will come in. If it says, "We have a problem with a subpart of our Classic II tires," or it lists specific tires and this one is not included, it will not come in. If it's global, it comes in if it can relate down. If it does not, it will not.

Cooper was allowed a standing objection on grounds of relevance, hearsay, and lack of substantial similarity to the subject tire in both time and substance. Cooper did not request a limiting instruction on the purpose for the evidence, whether to show notice and knowledge or to show a dangerous defect in the tires.

Following a month-long trial, the jury came to a non-unanimous verdict that Cooper was at fault based on defects in the tire. The majority of jurors found Cooper 100% at fault for the accident and awarded damages in the amount of $32.8 million. The jury awarded Toe (used here in the singular) more than $28.4 million, some $24.5 million of which was for future medical expenses, and most of that value was for twenty-four-hour in-home nursing care for the rest of her life. Cooper argued that Toe's needs were adequately met at the Norwalk rehabilitation center at a cost of $5000 per month.

Cooper's post-trial motions were denied, including its request for a remittitur of future medical expenses or new trial.

On appeal Cooper contends: (1) the court erred in its evidentiary rulings: (a) permitting the plaintiffs to introduce documents regarding warranty and liability claims involving tires, failure modes, and causes of failure not proven to be substantially similar to those involved in this case; (b) admitting Exhibit 502, which involved warranty claims for light truck tires; (c) admitting Exhibit 36 (a memorandum discussing warranty claims for different model tires and including oral comments from Texas tire dealers) over Cooper's hearsay objection; (d) allowing the jury to view video excerpts of the depositions of Dwayne Beach and Larry Wilch, which depositions were taken for cases pending in California years before the accident in this case occurred; (e) refusing to permit Cooper to submit further testimony from two witnesses, Sergeant Randy Wacha, a State Patrol accident reconstruction expert, and former Cooper engineer Lyle Campbell; and (f) permitting Toe's expert Troy Cottles to testify about "awling," a procedure discontinued by Cooper years before the subject tire was manufactured.

Cooper further argues (2) the district court erred in using Jury Instruction No. 32, which told the jury that Cooper would be liable for defects caused by the nail in the tire so long as it was "foreseeable" that the subject tire might pick up a nail in its lifetime; Cooper also asserts (3) there was insufficient evidence to submit the issue of punitive damages to the jury, and (4) the future medical expenses award to Toe is "flagrantly excessive because it conflicts with the

requirement under Iowa law that a plaintiff be awarded only 'reasonable and necessary' medical expenses."

II. Scope and Standard of Review.

1. *Evidentiary rulings*. We review a district court's evidentiary rulings for an abuse of discretion. *See McClure v*. *Walgreen Co*., 613 N.W.2d 225, 235 (Iowa 2000). An abuse of discretion occurs when "'the court exercised [its] discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" *Waits v*. *United Fire & Cas*. *Co*., 572 N.W.2d 565, 569 (Iowa 1997) (quoting *State v*. *Maghee*, 573 N.W.2d 1, 5 (Iowa 1997)). A ground or reason is untenable when it is not supported by substantial evidence or when it is based on an erroneous application of the law. *See id.* Not every erroneous admission of evidence requires reversal. *McClure*, 613 N.W.2d at 235. Reversal is only warranted when "a substantial right of the party is affected." *Id.* (quoting Iowa R. Evid. 103(a)). "Although a presumption of prejudice arises when the district court has received irrelevant evidence over a proper objection, the presumption is not sufficient to require reversal if the record shows a lack of prejudice." *Id.*

2. *Jury Instructions*. "We review alleged errors in jury instructions for correction of errors at law." *Boyle v*. *Alum–Line*, *Inc*., 710 N.W.2d 741, 748 (Iowa 2006). "It is error for a court to refuse to give a requested instruction where it 'correctly states the law, has application to the case, and is not stated elsewhere in the instructions.'" *Deboom v*. *Raining Rose*, *Inc*., 772 N.W.2d 1, 5 (Iowa 2009) (quoting *Vaughan v*. *Must*, *Inc*., 542 N.W.2d 533, 539 (Iowa 1996)). If an error in instructions results in prejudice, a reversal is warranted. *See id.* Jury

instructions should be considered together and in their entirety. *Anderson v. Webster City Cmty. Sch. Dist.*, 620 N.W.2d 263, 265 (Iowa 2000). Reversal is warranted if the instructions have misled the jury. *Id.* Prejudicial error occurs when the district court "materially misstates the law." *Id.*

3. Sufficiency of evidence to submit punitive damages. If a claim is supported by substantial evidence, the issue must be submitted to the jury—this includes the issue of punitive damages. *See Mercer v. Pittway Corp.*, 616 N.W.2d 602, 617 (Iowa 2002) (noting the evidence to support an award of punitive damages must be "clear, convincing, and satisfactory"). Punitive damages are appropriate only when actual or legal malice is shown. *Schultz v. Sec. Nat'l Bank*, 583 N.W.2d 886, 888 (Iowa 1998). Mere negligent conduct is therefore not sufficient to support a claim for punitive damages. *Beeman v. Manville Corp. Asbestos Disease Compensation Fund*, 496 N.W.2d 247, 256 (Iowa 1993).

4. Damages. "'We review the district court's denial of a motion for a new trial based on the claim a jury awarded excessive damages for an abuse of discretion.'" *WSH Props., L.L.C. v. Daniels*, 761 N.W.2d 45, 49 (Iowa 2008) (quoting *Estate of Pearson ex rel. Latta v. Interstate Power & Light Co.*, 700 N.W.2d 333, 345 (Iowa 2005)).

III. Discussion.

1. Evidentiary rulings. Cooper raises numerous complaints about the district court's evidentiary rulings.

a. "Substantially similar incidents." Relying upon *Mercer*, 616 N.W.2d 602, Cooper argues that the district court erroneously permitted the

plaintiffs to introduce documents regarding warranty and liability[5] claims involving tires, failure modes, and causes of failure not proven to be substantially similar to those involved in this case. In *Mercer*, our supreme court remanded for a new trial in a case in which the plaintiffs asserted a smoke detector had failed to alarm, resulting in injury to one child and the death of another. *See* 616 N.W.2d at 629. On appeal, the manufacturer of the smoke detector contended the trial court had erroneously admitted evidence of consumer complaints involving the alleged failure of the same model of smoke alarm at issue because the incidents were not proved to be substantially similar to the circumstances of the Mercer fire. *See id.* at 612.

The supreme court stated:

> The rule is well established that evidence of *prior* accidents or incidents may be admissible to show the existence of a *dangerous condition*. *Lovick v*. *Wil–Rich*, 588 N.W.2d 688, 697 (Iowa 1999). A preliminary requirement to the admission of evidence of prior incidents, however, is a foundational showing that the prior accidents or incidents occurred under substantially the same circumstances as the incident in the present case. *McClure*, 613 N.W.2d at 234 (holding that evidence of thirty-four incident reports, involving claimed "error" in filling of prescriptions at defendant's pharmacy within a three-year period preceding the prescription error in plaintiff's case, were substantially similar to misfilling incident giving rise to plaintiff's claim and were properly admissible under similar incidents rule); *see also Lovick*, 588 N.W.2d at 697, *and cases cited therein*. In cases where the evidence of prior accidents or incidents is offered to show a dangerous condition, the probative value of previous accidents rests in the likelihood that the same dangerous conditions caused the accident that is the source of the present litigation. *Cook v*. *State*, 431 N.W.2d 800, 803 (Iowa 1988).

Id. at 612-13.

[5] Cooper defined a "liability" claim where the claim exceeded the cost of the tire.

The *Mercer* court found that the trial court had admitted 363 customer complaints, only 116 of which had occurred prior to the Mercer fire. *See id.* at 615. The *Mercer* court then stated:

> The 116 consumer complaints received prior to the Mercer fire all involved the same product—the BRK model 83R ionization detector—and also involved the same general allegation—that the model 83R failed to alarm to smoke.
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> At first glance, it may seem that the 116 consumer complaints were properly admitted. However, the consumer complaints show that there are a number of variables that affect the performance of a smoke detector. *Thus*, *the specific reason why the model 83R failed to alarm to the presence of smoke in the Mercer fire therefore became an issue in the case*. *Plaintiffs had the burden of showing that the facts and circumstances of each consumer complaint were substantially similar to the Mercer fire to be admissible into evidence*. Accordingly, this means that plaintiffs had to do more than just show that each consumer complaint involved a model 83R that did not alarm to smoke. Rather, *plaintiffs had to show that there was a sufficient similarity between the reason why the particular consumer's detector failed to alarm and why the Mercers' detector failed to alarm*; it was not BRK's burden to disprove any common factors between the Mercer fire and the incidents reported in the consumer complaints. Thus, the fact that BRK categorized the complaints as [No Response to Smoke] NRS or that BRK sent out the same form letter to the consumer does not prove that the reason the particular consumer's detector allegedly failed to alarm is sufficiently similar to the reason the Mercers' detector allegedly did not alarm.

Id. at 616 (emphasis added).

It is Cooper's contention that it produces hundreds of models of tires, each of which is a unique compilation of the various components. Cooper asserts any alleged failure in a different model tire is irrelevant to the tire involved here.

The plaintiffs argue, however, that the boxes of consumer complaints in *Mercer*, admitted without analysis of the mechanisms for the failures of the smoke detectors (the company's testing showed no defects in the products), is qualitatively different than Cooper's internal analysis of the problems with the

skim stock component, which was the content of the exhibits admitted here. They contend that the exhibits Cooper challenges are documents prepared by Cooper employees that reflect that the same skim stock was used in all Cooper's tires, and Cooper had concerns about that skim stock based on an increase in tread separations across models of tires after the skim stock was incorporated. They assert that the exhibits were properly admitted to show that Cooper had knowledge of the defective skim stock and chose not to correct it for several years as part of their claim for punitive damages. *See McClure*, 613 N.W.2d at 234 (noting plaintiff "was clearly trying to establish a pattern of conduct that showed that Walgreen knew of problems in getting prescriptions properly filled at the pharmacy on Ingersoll, yet did nothing to solve the problem" and noting that the "challenged evidence was obviously relevant to the punitive-damage issue of willful and wanton conduct on the part of Walgreen").

In its post-trial ruling, the trial court explained its evidentiary ruling:

> Defendant argues that Iowa product liability law requires a showing of "substantial similarity" of products before evidence concerning other products or claims is admitted. The court agrees. The court, however, held that the ongoing defect in the skim stock used by Cooper was the substantial similarity which united all of the evidence and allowed introduction of skim stock failure on other tires at trial. To the court it was similar to having a ladder manufacturing company using defective wood which easily split in many different ladder models. The evidence of the failure in all the ladder models based upon the specific defects in the wood was relevant the failure of any of its ladders which contained the defective wood. In other words, the substantial similarity was the defective wood which caused many types of ladders to fail.
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> . . . .
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> The court in this case let in evidence concerning Cooper Tire models different than the tire in this case when those tires contained the same defective skim stock which was contained in the Toe tire and the documents admitted and discussed related to that skim stock defect. Thus the link and similarity between this

> evidence and the present tire was the skin stock defect. The evidence of defect in the skim stock used in Cooper Tires, Cooper's knowledge of the defect, coupled with expert testimony tying the defect to the tire in this case made the evidence concerning the skim stock sufficiently similar to allow its introduction, and its probative value far outweighed its prejudicial effect at trial.

Cooper states one problem with the district court's ruling is that "it is based on the premise that a particular component—skim stock rubber manufactured using a particular formula—performs in the same way in different model tires." Cooper contends the evidence shows that tires are complex products with many different components that vary from model to model. Different models have different constructions that vary in the amount of materials used. And as to skim stock itself, it is a rubber that coats wire filaments in the steel belts, and the number of wires varies from model to model. Cooper argues, "It is precisely these types of differences in components and interaction of components that support NHTSA's definition of "substantially similar." *See* 49 C.F.R. § 579.4(d)(3) (defining "substantially similar" tires as those made to the "same size, speed rating, load index, load range, number of plies and belts, and similar ply and belt construction and materials, placement of components, and component materials").

"The substantial similarity rule does not require identical products; nor does it require us to compare the products in their entireties. The rule requires substantial similarity among the variables *relevant to the plaintiff's theory of defect*." *Smith v*. *Ingersoll-Rand Co*., 214 F.3d 1235, 1248 (10th Cir. 2000) (emphasis added). Here, it was the plaintiff's theory that the skim stock used in all Cooper's tires was defective and Cooper was aware of that defect. *See Four*

Corners Helicopters, *Inc*. *v*. *Turbomeca*, *S.A*., 979 F.2d 1434, 1440 (10th Cir. 1992) (noting that the requirement of substantial similarity is relaxed when the evidence of other incidents is used to demonstrate notice or awareness of a potential defect); *cf*. *In re Cooper Tire & Rubber*, 568 F.3d 1180, 1191 (10th Cir. 2009) (finding that because the plaintiffs' theory of the case included the argument that Cooper was on notice of a tire tread separation problem, the district court was not clearly in error in concluding that information on tires manufactured to specifications of another tire not involved in the case could tend to lead to discoverable evidence).

The documents were relevant to the issue of Cooper's knowledge of a defect in its skim stock, as well as the plaintiffs' claim for punitive damages. Cooper had "ample opportunity to show differences by cross-examination or by its own witnesses," which differences go to the weight rather than the admissibility of the evidence. *Lovick*, 588 N.W.2d at 697. The court balanced the probative value and prejudicial effect, finding that the evidence was relevant to these issues and not unfairly prejudicial. We agree. The court considered the arguments and weight of the evidence in the context of the month-long trial, and our review of the record indicates the evidence included information about Cooper's knowledge of skim stock apart from these documents to which Cooper objected. In light of the discretion given to the trial court in ruling on the admissibility of evidence, we find no abuse of discretion. We affirm on this issue.

b. *Exhibit 502*. The district court initially refused to admit Exhibit 502, which is a sealed exhibit. However, the plaintiffs sought to admit the exhibit after witness Dick Stephens was asked, "[I]n all your years of experience in

evaluating whether to make design changes in radial passenger tires, did Cooper ever compare the cost of the change to the cost of claims for consumers if Cooper did not make the change?" and answered, "Not to my knowledge." Exhibit 502 is an email addressed to several Cooper employees, which begins with the statement, "The attached document shows a potential method to assign costs to our adjustment returns."[6] The document ends with the statement, "I know this calculation is not perfect and does not include liability costs, lawsuits, or lost customers, but it is a piece of information to help select and justify specs for cost increases." Cooper argued that the document did not relate to Stephens' testimony. The court allowed the document, finding that "there's an argument as to whether it does or does not relate."

On appeal, Cooper asserts the document was not relevant, any probative value was far outweighed by unfair prejudice, and its admission was an abuse of discretion. The plaintiffs assert that Exhibit 502 was admitted after Cooper opened the door and provides an example of a cost calculation. They also argue that there was similar evidence already admitted that Cooper considered costs as a factor in determining whether to adopt a different tire design.

We note that Exhibit 502 was admitted after Stephens' testimony was completed. No other witness testified as to its content, though the attorneys argued its purported relevance or irrelevance in closing statements. Under the circumstances presented here, we find no abuse of discretion in allowing the exhibit. It was but one of hundreds of documents, and its argued relevance—that Cooper considered costs in making changes to its products—was already in the

[6] An adjustment is a term of art within the tire industry for "warranty claim."

record. When substantially the same evidence is in the record, erroneously entered evidence is not considered prejudicial. *Estate of Long v*. *Broadlawns Med*. *Ctr*., 656 N.W.2d 71, 88-89 (Iowa 2002) (abrogated on other grounds by *Thompson v*. *Kaczinski*, 774 N.W.2d 829, 836-37 (Iowa 2009)); *State v*. *Sowder*, 394 N.W.2d 368, 372 (Iowa 1986). If the erroneously admitted evidence is merely cumulative of other evidence in the record, it is not considered prejudicial. *Vasconez v*. *Mills*, 651 N.W.2d 48, 57 (Iowa 2002). Even if we assume without deciding that Exhibit 502 was erroneously admitted over Cooper's objections, any resulting error was harmless.

c. *Exhibit 36*. Cooper objected to the admissibility of Exhibit 36, which is a January 12, 2000 memorandum prepared by Mark Panning, who at the time of writing the memo was the manager of passenger tire engineering for Cooper. The memo was addressed to Dwayne ("Dewey") Beach, Panning's supervisor at the time, and was the result of a trip to the "southwest region" "to talk to dealers about what they like and don't like relative to our passenger tire product line-up." Cooper objected to the exhibit based on the trial court's in limine ruling: while the memo mentioned the Classic II line of tires, it identified specific models, none of which were the GTS 2846. Plaintiffs, in response, argued that the memo notes that dealers are "[s]eeing a higher incident of tread separations on Classic II's than we used to" and notes "key sizes." Toe argued that the conclusion, i.e. Panning's "overall impression," related to all Classic II tires and thus fell under the court's ruling of admissibility. The trial court agreed.

At trial, Cooper again objected specifically on grounds the document contained hearsay. The court ruled the exhibit admissible as a business record.

On appeal, Cooper contends Exhibit 36 contains hearsay, and thus was not admissible. "[A] ruling on hearsay, despite being an admissibility-of-evidence issue, is reviewed for errors at law." *GE Money Bank v*. *Morales*, 773 N.W.2d 533, 536 (Iowa 2009). Cooper is correct in noting that even if the Panning memorandum qualified as non-hearsay because it was a business record, *see* Iowa R. Evid. 5.803(6), the statements of the Texas dealers contained within that document may be objectionable as hearsay. *See State v*. *Reynolds*, 746 N.W.2d 837, 841 (Iowa 2008) (stating "a party must establish the applicability of an exception to the hearsay rule authorizing the admission of third-party hearsay statements contained in a business record").

The plaintiffs do not specifically address this issue, but note that the exhibit was relevant to its punitive damages claim and presents evidence of Cooper's knowledge that it "had a problem" with tread separation. They note that there is substantial evidence elsewhere in the record of Cooper's knowledge of tread separation.

The trial court wrote in post-trial ruling:

> The Panning memorandum discussed Cooper's experience with tread separations in its Classic II tire line, which included the tire at issue in this case. The document was a business record prepared by a Cooper employee prior to the time the tire in this case was manufactured, and the information it contained was relevant to Cooper's knowledge concerning tread separations. It was properly admitted on this basis and it admission does not justify the granting of a new trial.

Hearsay, that is, "statement[s], other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Iowa R. Evid. 5.801(c). Hearsay is not admissible unless it

falls within one of several enumerated exceptions. Iowa Rs. Evid. 5.802–03. Hearsay is presumed to be prejudicial "unless the contrary is affirmatively established." *Gacke v*. *Pork Xtra*, *L*.*L*.*C*., 684 N.W.2d 168, 183 (Iowa 2004).

Iowa Code section 622.28 (2007) states:

> Any writing or record, whether in the form of an entry in a book, or otherwise, including electronic means and interpretations thereof, offered as memoranda or records of acts, conditions or events to prove the facts stated therein, shall be admissible as evidence if the judge finds that they were made in the regular course of a business at or about the time of the act, condition or event recorded, and that the sources of information from which made and the method and circumstances of their preparation were such as to indicate their trustworthiness, and if the judge finds that they are not excludable as evidence because of any rule of admissibility of evidence other than the hearsay rule.

This statute is to be construed liberally. *Graen's Mens Wear Inc*. *v*. *Stille–Pierce Agency*, 329 N.W.2d 295, 298 (Iowa 1983).

Iowa Rule of Evidence 5.803(6) further governs the admission of business records under the hearsay exception.

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and the regular practice of that business activity was to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this subrule includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Iowa R. Evid. 5.803(6).

The statements of the Texas dealers contained in Exhibit 36 are statements made by people with knowledge at or near the relevant time as

required by the business records rule. Panning testified it was his purpose in talking to the dealers to determine "what they like and don't like relative to our passenger tire product line-up." The testimony presented by Panning indicates the memo was trustworthy and was made in the ordinary course of business. We conclude there was no error in admitting the exhibit. *See GE Money Bank*, 773 N.W.2d at 536.

And as we have already noted, "where substantially the same evidence is in the record, erroneously admitted evidence will not be considered prejudicial." *Estate of Long*, 656 N.W.2d at 88-89.

d. *Video depositions of Beach and Wilch*. Cooper contends the trial court erred in allowing the jury to view video excerpts of depositions of Dwayne Beach and Larry Wilch, which were taken in 2004 as part of discovery in consolidated actions pending against Cooper in California. Iowa Rule of Evidence 5.804(b)(1) states that the following is not excluded by the hearsay rule if the declarant is unavailable as a witness,

> testimony given as a witness at another trial or hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Cooper argues the California cases involved different model tires and included discussion of a different claimed defect in the liner gauge, and consequently, the plaintiffs have not shown Cooper had a similar motive to develop the testimony.

We have carefully considered the testimony presented by Beach and Wilch and reject Cooper's contention. As found by the trial court in its post-trial motion ruling,

> The depositions which the court allowed to be introduced were admissions made by employees or agents of Cooper Tire, who were located out of state, concerning their knowledge about issues related to the manufacture of Cooper Tires, Cooper's knowledge of the defects in its tires, and Cooper's lack of action to correct the defects in tires like the one at issue in this case.
>
> The depositions were taken in tire litigation where defects with Cooper's tires were at issue and Cooper was defending the safety of those tires. Prior to their being presented to the jury, the court read each of these depositions, along with the designations and objections of all parties, and ruled on each objection. This was done to ensure that only relevant and admissible portions of the depositions were presented to the jury. The court does not believe that the introduction of any or all of these depositions were unduly prejudicial to the Defendant, and their admission does not justify a new trial in this case.

We find no error. We find Cooper's claim of lack of motive to be without merit, especially in light of the full development of Cooper's defenses at trial.

e. *Testimony of Wacha and Campbell*. Cooper next complains that the trial court abused its discretion in not allowing testimony by (1) Sergeant Randy Wacha, a State Patrol accident reconstruction expert, that in tire disablements he had personally investigated, tread separations rarely resulted in a loss of control, and (2) former Cooper engineer, Lyle Campbell, to relay his personal knowledge regarding the significance of Cooper's compliance with federal testing requirements with respect to model 2846 tires, as well as the significance of the low return rates experienced by model 2846 tires.

Sergeant Wacha. The court sustained an objection, ruling Sergeant Randy Wacha could not testify concerning how many accidents

involving a tire disablement or tire separation he investigated had resulted in a serious accident.[7] The court found no evidence that any of the incidents Wacha investigated were in any way similar to the Toe situation. The trial court noted that Cooper had successfully challenged another investigating officer's testimony on precisely the same ground immediately prior to Sergeant Wacha's testimony.

On appeal, Cooper urges that Sergeant Wacha's testimony was admissible as curative of the trial court's error in allowing plaintiff's expert, Micky Gilbert, an accident reconstructionist who does vehicle dynamic testing[8] ("analyze[s] vehicle motion during an accident"), to present a video showing a staged test designed to demonstrate an SUV rollover following a tread separation. This contention was not raised in the trial court and we do not address it. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

Campbell. Lyle Campbell's testimony was introduced by video deposition. Campbell is retired from Cooper but still provides consulting in technical and forensic areas. He testified as to the components and specifications of tires, as well as federal regulations applicable to passenger tires. He was not allowed to additionally testify as to Cooper's internal testing standards compared to a high-speed test mandated by the federal government,

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[7] Sergeant Wacha did testify that the cause of the roll-over was driver error.

[8] Here Gilbert was "asked to analyze the effect of the tread separation on the vehicle handling in the subject accident." He concluded:

> Basically, that the tread separation is what initiated this sequence. The driver responded in a completely foreseeable manner, not just foreseeable but expected manner. That is what drivers do in these emergencies. And that a vehicle, when it's equipped with this type of occurrence, is not controllable by an average driver under that situation.

or the significance of Cooper's allegedly more rigorous internal testing standards, or give an explanation of the significance of the adjustment rates of the GTS 2846.

The trial court ruled Campbell had not been designated as an expert by Cooper and the opinions Cooper sought were "based upon work that has been done since he actually worked in the plant and that they were created for purposes of his testimony in this case."

Our supreme court has held that Iowa Rule of Civil Procedure 1.508 expert disclosure procedures do not apply to experts whose knowledge is not acquired or developed in anticipation of litigation or for trial. For example, a treating physician is generally not considered an expert for such purposes. *Day v. McIlrath*, 469 N.W.2d 676, 677 (Iowa 1991). Medical technologists, employed by the hospital who were "called to testify to the procedures employed by the hospital generally in the testing of blood, and to the specific testing," are not subject the rule. *Duncan v. City of Cedar Rapids*, 560 N.W.2d 320, 323 (Iowa 1997). Additionally, the testimony of a city engineer who was not designated as an expert has been allowed. *Graber v. City of Ankeny*, 616 N.W.2d 633, 647 (Iowa 2000).

Cooper argues on appeal that the trial court misinterpreted *Graber* where our supreme court stated:

> The city engineer's testimony in the present case is analogous to the testimony of a treating physician. The city engineer, even if giving "opinion evidence that could not be the subject of lay testimony," was testifying as to facts obtained prior to the litigation and mental impressions and opinions formed upon the basis of such knowledge. Therefore, his testimony fell within rule [1.508] and was properly allowed by the trial court.

Id.

Cooper contends Campbell acquired extensive knowledge of Cooper's testing programs the performance of the GTS 2846 tire throughout his experience as an employee of Cooper and knew the importance of low adjustment rates before beginning work on this case. The plaintiffs contend that Campbell was properly not allowed to testify as to facts obtained for this litigation, and in any event, substantially the same information was addressed elsewhere in the record. In reply, Cooper disagrees that the exclusion of Campbell's testimony was harmless error. Cooper argues that some of the exhibits Campbell was asked to address were included in the record, but their significance was not adequately explained.

Where opinion testimony is developed in anticipation of litigation or for trial, the designation and disclosure requirements apply. *See Duncan*, 560 N.W.2d at 323; *see also Cox v. Jones*, 470 N.W.2d 23, 25 (Iowa 1991) (treating physician who will give testimony on standards of care and causation is an expert subject to disclosure under rule [1.508]). We find no abuse of discretion in the limits placed on Campbell's testimony here.

f. Awling testimony. Cooper successfully moved in limine to exclude evidence of "awling," a procedure involving a sharp tool to pierce through the outer layers of a partially manufactured tire to allow air trapped in the tire's inner components to escape. The procedure was discontinued by Cooper years before the subject tire was manufactured.

However, during trial, Toe's expert witness, Troy Cottles, was allowed to testify about awling when the court found that Cooper had opened the door by

questioning Cottles whether the nail in the subject tire could have caused the degradation attributed to the defects in the skim stock. The jury was informed that awling was discontinued and that Cooper did not awl the tire at issue. Cottles explained that "the difference between an awl hole and a nail hole is negligible." While Cooper takes issue with this statement, it was adequately allowed to cross-examine Cottles. Cooper was able to elicit Cottles's agreement that "if awling pierced the inner liner, that would ruin the tire." We find no prejudicial error.

2. *Jury Instruction*. Cooper argues the court erred in instructing the jury that Cooper would be liable for defects caused by the nail in the tire so long as it was "foreseeable" that the subject tire might pick up a nail in its lifetime.

Jury Instruction No. 32 reads:

> The requirement that a product be free from defects at the time it left the defendant's control includes the requirement that there be precautions to keep the product free from defects for a normal length of time when handled in a normal manner.
>
> However, the defendant is not responsible if the product is delivered free from defects, and later mishandling changes or other causes beyond their control make the product defective, unless mishandling, changes or other causes beyond defendant's control were reasonably foreseeable by the defendant.

This is consistent with the principles and jury instruction discussed by our supreme court in *Leaf v*. *Goodyear Tire & Rubber Co*., 590 N.W.2d 525, 530 (Iowa 1999):

> *Alleged abuse of tire by prior owner*. Goodyear claims the tire showed signs of having been run flat or underinflated, and this constitutes misuse. Leaf says the issue is not whether there was misuse by running it flat or underinflated but whether such misuse was reasonably foreseeable to Goodyear. This foreseeability inquiry should rarely be determined as a matter of law. *Smith*, 519 N.W.2d at 831.

> The court's instruction stated:
>
> > The requirement that the tire be free from defects at the time it left Goodyear's control includes the requirement that necessary precautions be taken to keep the tire free from defects for a normal length of time when handled or used in a normal manner. However, Goodyear is not responsible if the tire was delivered free from defects and later mishandling, changes or other causes beyond its control make the product defective, unless that mishandling, change or other cause beyond Goodyear's control was reasonably foreseeable by it.
>
> *This is a correct instruction on the law*, and substantial evidence supports the jury's verdict. Goodyear's own expert testified it is foreseeable that this type of tire would be used when it is underinflated or flat, especially when run as an inside dual.

(Emphasis added.) The instruction given is the same given in *Leaf*.

Cooper would have this court overrule *Leaf*. That is not the prerogative of this court. *See State v*. *Eichler*, 83 N.W.2d 576, 578 (Iowa 1957) ("If our previous holdings are to be overruled, we should ordinarily prefer to do it ourselves."); *State v*. *Hastings*, 466 N.W.2d 697, 700 (Iowa Ct. App.1990) ("We are not at liberty to overturn Iowa Supreme Court precedent.").

Cooper argues on appeal that Instruction 32 was erroneously given "in a non-misuse case." Instruction 33, to which Cooper offered no objection, reads in part:

> As one of its defenses, Defendant Cooper Tire claims that even if the use of the tire in the condition it was in on the day of the accident was a foreseeable use, that such use was nevertheless *a misuse* of the product by driver Lang and the vehicle owner Mawien.

(Emphasis added.) Cooper's claim on appeal is misleading at best.

3. *Punitive damages*. Cooper contends there was insufficient evidence to submit the issue of punitive damages to the jury because there is no evidence of

willful and wanton disregard for the rights or safety of another. *See* Iowa Code § 668A.1(1)(a).

In *McClure*, 613 N.W.2d at 230-31, the court explained:

> We have defined "willful and wanton" in the context of this statute to mean that "[t]he actor has intentionally done an act of unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences."
>
> Punitive damages serve "as a form of punishment and to deter others from conduct which is sufficiently egregious to call for the remedy." Mere negligent conduct is not sufficient to support a claim for punitive damages. Such damages are appropriate only when actual or legal malice is shown.
>
> Actual malice is characterized by such factors as personal spite, hatred, or ill will. Legal malice is shown by wrongful conduct committed or continued with a willful or reckless disregard for another's rights.

(Citations omitted.)

The trial court found that the matter was properly submitted upon the plaintiffs' presentation of evidence of design defect, which included a sidewall failure in the tire, and manufacturing defect in the skim stock; Cooper's knowledge of the defects in their skim stock and their continued use of the defective skim stock in their tires, including the tire which failed on the vehicle in which plaintiffs were injured; Cooper's knowledge the defect could cause tire failures. The trial court wrote,

> The Court believes that there was sufficient evidence presented, particularly in light of the likelihood of significant injury to an automobile or its occupants in the event of a tire failure in a vehicle being operated on a highway at the speed limit, for the jury to conclude that Cooper had the requisite knowledge to sustain punitive damages.

We agree that there was sufficient evidence to create a jury question.

4. *Excessive damages*. Cooper finally argues that the award for future medical expenses to Toe was "flagrantly excessive because it conflicts with the requirement under Iowa law that a plaintiff be awarded only 'reasonable and necessary' medical expenses." Toe responds that Cooper asked the jury to award only that amount that would pay for Toe to be warehoused in a nursing home when the facility's own witnesses testified that she would do better under the in-home care plan offered by the plaintiff's witness, Dr. Lichtblau.

As our supreme court has advised in *WSH Props*., *L*.*L*.*C*. *v*. *Daniels*, 761 N.W.2d 45, 50 (Iowa 2008):

> We begin our analysis with the proposition that a flagrantly excessive verdict raises a presumption that it is the product of passion or prejudice. *See Allen v*. *Lindeman*, 259 Iowa 1384, 1398, 148 N.W.2d 610, 619 (1967) ("'A verdict should not be disturbed unless it is so flagrantly excessive as to raise a presumption that it was the result of passion, prejudice, or undue influence.'") (quoting *Glatstein v*. *Grund*, 243 Iowa 541, 557, 51 N.W.2d 162, 172 (1952)); *accord Schmitt v*. *Jenkins Truck Lines*, *Inc*., 170 N.W.2d 632, 659 (Iowa 1969) (stating new trial may be granted when verdict "raises a presumption that it is the result of passion, prejudice or other ulterior motive"). On the other hand, not every excessive verdict results from passion or prejudice. *See Miller v*. *Town of Ankeny*, 253 Iowa 1055, 1063, 114 N.W.2d 910, 915 (1962); *Curnett v*. *Wolf*, 244 Iowa 683, 689, 57 N.W.2d 915, 919 (1953); *accord* 58 Am.Jur.2d *New Trial* § 313, at 313 (2002) ("[T]he fact that a damage award is large does not in itself . . . indicate that the jury was motivated by improper considerations in arriving at the award.").

Like the finding in *WSH Properties*, 761 N.W.2d at 51,

> We think the evidentiary basis for the jury's assessment of damages dispels any presumption that the excessiveness of the verdict was motivated by passion. Once the presumption of passion that might arise from a flagrantly excessive verdict is dispelled, we must look for some other indication in the proceedings that would support a finding the jury was angry with the defendants and motivated to punish them.

The jury's damages award here is in line with the evidence presented and reveals no indication of improper passion or prejudice. The jury tailored its verdict to the evidence, and we will not disturb it simply because it is larger than Cooper would like.

IV. Conclusion.

For all of the foregoing reasons, we affirm the trial court's evidentiary rulings as within the range of discretion, the trial court's jury instruction as a correct statement of the law, and affirm the damage awards as based on the evidence.

AFFIRMED.