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Fourth DCA Endorses "Fishing Expeditions" Against Manufacturers in Product Liability Cases

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In December 2010, the Florida Fourth District Court of Appeal (Broward, Palm Beach, Indian River, Martin, Okeechobee and St. Lucie counties) issued an implausible new discovery ruling encouraging the use of the discovery process as a "fishing expedition" against product manufacturers. Other Florida courts have previously denounced such discovery tactics as the tool of claimants hoping to stumble upon some cause of action or to force capitulation with the threat of unbridled and expensive discovery.[1]

Alvarez v. Cooper Tire & Rubber Co., 2010 WL 4861514 *4, 35 Fla. L. Weekly D2630 (Fla. 4th DCA 2010) was a wrongful death products liability case involving the tread separation of a Cooper tire installed on a light pickup truck. The plaintiff in Alvarez alleged that a defect caused the tread to separate during ordinary operation resulting in a fatal rollover accident. Id. at *3.

In his remarkable opinion, former Fourth DCA Judge Gary M. Farmer, Sr., jettisoned the common law development of the Florida Substantial Similarity Doctrine as a check on gratuitous plaintiff discovery (colloquially termed, "fishing expeditions") into products other than the one at issue in the lawsuit. In the discovery context, the Substantial Similarity Doctrine predates Alvarez by some fifteen years. In Caterpillar Indus., Inc. v. Keskes, 639 So.2d 1129, 1130 (Fla. 5th DCA 1994) the Florida Fifth District Court of Appeal held that "Florida has established a rule that before similar accidents or incidents are either discoverable or admissible the plaintiff must establish that the incidents are '*substantially similar*.'" [emphasis added]. The doctrine originated in Perret v. Seaboard Coast Line R.R., 299 So.2d 590 (Fla. 1974). There the Florida Supreme Court quoted the essential rule:

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[1] *See for example,* Toyota Motor Corp. v. Greene 483 So. 2d 130, 131 (Fla. 1st DCA 1986) (Interrogatories cannot be used as a fishing expedition undertaken in hope that some cause of action might be discovered); State Farm Fire & Casualty Co. v. Black & Decker, Inc., 2003 U.S. Dist. LEXIS *12 (E.D. La. 2003) (where the complaint does not allege any particular product defect, a court is justified in denying discovery regarding other product recalls because plaintiff has failed to indicate that the circumstances surrounding the other accidents are substantially similar to those in the case at bar.).

> 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.

Id. at 592. Though other bases were mentioned by Judge Farmer for abrogating the rule in the Alvarez case, the opinion was primarily based upon his unprecedented announcement that the doctrine was never meant to apply during the discovery phase of a lawsuit.

Judge Farmer recounted that the Florida Supreme Court's 1974 creation of the Substantial Similarity Doctrine in Perret occurred in a case involving the *admissibility* of other incident evidence *at trial*. Id at *6. He then noted that in this context, the Supreme Court did not use the word "substantial" as a defining qualifier of what was similar enough to be relevant. Since the Supreme Court did not expressly use the "substantial" adjective for identifying "other product" evidence that would be *admissible*, Judge Farmer felt it should not be applied to require "an intensified standard of evidentiary weight" before *discovery* would be allowed as to such matters. On this subject, he wrote:

> 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.
>
> 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 [discovery rules] to enlarge relevancy to the entire subject matter rather than to contract it to trial evidence.

Id. at *6-7 [italics in original].[2] The Fourth DCA thus concluded that "the discovery standard of *substantial similarity* for other products [....] is not a correct interpretation of Florida discovery

[2] The Alvarez court even dismissed as "*orbiter dicta*," the Fourth DCA's own prior acknowledgment of the Substantial Similarity Doctrine in the discovery context as stated in Nissan Motors Corp. v. Espinosa, 716 So.2d 279, 280 (Fla. 4th DCA 1998) ("[W]here the discovery requested information on makes and models different than the one involved in the injury, it was the plaintiff's burden to establish a substantial similarity before such discovery was permissible.").

law." Id. at *7 [italics in original].[3] Instead, the plaintiff must only show the other makes and models on which discovery is sought are "*comparable in substance*." Id. at *5-6.

Most stunning was Judge Farmer's rebuff of *stare decisis*[4] despite acknowledging that the Substantial Similarity Doctrine developed in the discovery context to limit flagrant "fishing expeditions" by plaintiffs. Id. at *7 [citations omitted]. In a manifestly plaintiff-oriented passage, Judge Farmer actually encourages "fishing expeditions" in products cases involving other makes and models discovery, stating:

> [An] enlarged scope of relevancy for [other products] discovery [....] embrace[s] 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 [manufacturer ….], 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.

Id. at *7. This philosophical disposition by the Alvarez Court completely ignores the real life and all too common scenario whereby sophisticated and connected plaintiffs lawyers coordinate boundless other incident/accident and makes & models discovery in hopes of finding something to suggest a defect theory for lawsuits, or to multiply the burdens on the

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[3] This would be news to multiple other Florida District Courts of Appeal including: the 5th DCA - See Caterpillar Industrial Inc. v. Keskes, 639 So.2d 1129 (Fla. 5th DCA 1994)(Substantial similarity must be established before information regarding other makes and models is discoverable); the 2d DCA - See American Medical Sys. v. Osborne, 651 So. 2d 209, 211 (Fla. 2d DCA 1995) (Plaintiff must establish substantial similarity before similar accidents or incidents are discoverable); the 1st DCA - See Goodyear Tire & Rubber Co. v. Cooey, 359 So. 2d 1200 (Fla. 1st DCA 1978) (Discovery order allowing plaintiff's expert to inspect equipment in tire manufacturing plant was quashed for among other reasons, a lack of predicate that such equipment was used in producing the subject tire "or tires substantially identical or similar in construction to the tire involved in this case"); the 3d DCA – See Ashby Division of Consolidated Aluminum v. Dobkin, 458 So. 2d 335 (Fla. 3d DCA 1984) ("Other accidents" are those with substantially similar conditions, causes, and circumstances).

[4] See Gessler v. Department of Business and Professional Regulation , 627 So. 2d 501, 504 (Fla. 4th DCA 1993) ("The concept of *stare decisis*, by treating like cases alike and following decisions rendered previously involving similar circumstances, is a core principle of our system of justice").

defense long before the case is even considered for a trial setting. According to Judge Farmer, so long as a plaintiff proffers "plausible" information that the other makes and models are similar, discovery should be allowed "as a matter of course." Id. at *7.

As a post-script, Judge Farmer retired from the Fourth DCA just weeks after writing the Alvarez opinion. Soon after, he joined his son at a South Florida plaintiffs' law firm which litigates against product manufacturers. The former judge's bio page for his new firm also states that he is now an "Eagle Member of the Florida Justice Association"(FJA),[5] and boasts that the Alvarez decision stands in part for the proposition that, "the scope of discovery allows fishing for information relevant to subject matter of dispute."

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[5] <http://www.pathtojustice.com/attorneys/Gary/Farmer,+Sr./> The FJA is formerly known as "the Academy of Florida Trial Lawyers." It is an association of claimant-attorneys "dedicated to [….] protecting the rights of Florida's citizens and consumers [who are] made safer when large corporations and industries [….] accept fair responsibility for their actions." http://www.floridajusticeassociation.org/index.cfm?pg=WhoWeAre FJA Eagle members:

> [W]ant to help people receive the justice they deserve. They decide to represent The People over the interests of big corporations and pledge to protect society and serve the public good by joining in our culture of commitment.