

DAILY REPORT

A SMART READ FOR SMART READERS

An ALM Publication

Michelin settles tire case after big sanction

JUDGE BLASTED tire maker and Atlanta counsel for 'subterfuge'; company says sanction unrelated to deal

R. ROBIN MCDONALD
rmcdonald@alm.com

TWO MONTHS AFTER a federal judge in Atlanta sanctioned Michelin North America with a finding that one of its tires was defective and unreasonably dangerous, the company has settled with an Alabama man left paralyzed after a 2008 auto accident he claimed was caused by a defective tire.

The dollar amount of the deal was confidential at Michelin's request, said lawyers at Butler, Wooten & Fryhofer, which represented accident victim Johnny Bates and his wife Patricia.

It ends three years of litigation during which Michelin "obfuscated and abused the discovery process" by withholding evidence in a fashion that Bates attorney George Fryhofer called "pervasive" and "unrelenting."

"We have encountered other product manufacturers who abused discovery," Fryhofer said, "but Michelin's conduct in this case was particularly egregious."

Michelin attorney Robert Monyak at Peters & Monyak in Atlanta referred the *Daily Report* to Michelin spokesman Tony Fouladpour, who said the settlement "was in no way a result of the sanction order and was being discussed well before the judge's decision."

"Michelin is open to discussing the resolution of litigation before trial, and in this case both parties were able to reach an agreement," he said. "It's a reasonable agreement, and we believe it's in the best interest of both parties."

The settlement was hatched after U.S. District Court Judge Amy Totenberg blasted Michelin's national discovery counsel, Kate Helm of Nelson Mullins Riley & Scarborough in Atlanta, for engaging "in a pattern of subterfuge" by withholding relevant documents.

Totenberg's 61-page order also said that Michelin had made multiple "inaccurate or false representations" to plaintiffs lawyers and the court and "acted willfully" in repeatedly violating court orders. The relevant documents regarding the safety of the Michelin tires that formed the basis of the litigation "would likely never have emerged but for plaintiffs' persistence in seeking the court's intervention," Totenberg wrote.

Helm did not reply to a request for comment. Her partner, Richard K. Hines of Nelson Mullins, said the two lawyers were referring all queries to Michelin per the company's instructions.

Wreck followed by discovery fight

At the heart of the case is a Michelin-manufactured Uniroyal Laredo tire on the Bateses' sports utility vehicle. The tire came apart while they were driving through Atlanta to visit family on Christmas Day 2008, causing their SUV to go out of control and overturn.

Bates, a truck driver who was then 63, was left a quadriplegic by the accident. Butler Wooten lawyers said his medical bills totaled more than \$870,000 and estimated that his future medical expenses, coupled with wage losses caused by his injuries, totaled more than \$3.6 million.



ALISON CHURCH

Plaintiffs' lawyer George Fryhofer said defense conduct was "egregious."

Bates' lawyers alleged that the accident was caused by the catastrophic disintegration of the tire, which was caused by design and manufacturing defects. But from the time the case was filed in 2009, Michelin lawyers balked at turning over company documents that the Bates lawyers believed would help prove their case. By the time a discovery hearing was held in December 2010, "Michelin had not even produced a full banker's box of documents," Totenberg's order noted.



Judge Amy Totenberg: Michelin received “more than adequate” warning.

In January 2011, U.S. District Judge Richard W. Story, who was presiding over the case at the time, ordered Michelin to produce nearly all of the documents that the Bates attorneys had sought for nearly two years. Among them were a list of numerical codes that Michelin had assigned to tires that had been returned to the company as faulty, according to court records.

Totenberg took over the case after she became a judge last year, and in June 2011, she fined Michelin \$17,000 for not turning over the information.

On Jan. 13 of this year, following a September sanctions hearing after which Michelin surrendered much of the data it had previously withheld, Totenberg issued a second sanctions order. That order included a preclusion determination that the Uniroyal tire at issue in the litigation was defective and unreasonably dangerous; the order barred Michelin from contesting the issue at trial.

In her order, Totenberg said the harsh sanction was warranted, because “Michelin received more than adequate notice from the court’s multiple warnings that it would not tolerate further hampering of the discovery process or violations of its orders; plaintiffs’ multiple sanctions requests; and its own flagrant disregard of the federal discovery rules and the court’s discovery orders.” She also noted that the previous monetary sanction “did not serve to remedy Michelin’s cavalier attitude toward its obligations.”

Totenberg left open the question of whether the Bateses’ tire failed as a result of its defective and unreasonably dangerous condition, saying that such a determination would be “the death knell to any Michelin defense to liability.” She said she did so because Michelin finally began producing the sought-after documents in compliance with previous court orders.

Totenberg’s order also detailed the discovery battle that prompted the sanctions. By June of last year, despite court orders compelling Michelin to do so, the company’s lawyers had failed to turn over numerical codes and other data critical to analyzing customer returns of faulty tires. Totenberg admonished Michelin attorneys with a \$17,000 sanction while warning company lawyers that “any further delays, manipulation of discovery ... or basically failure to function in good faith” would result in further sanction.

Less than a month later, Butler Wooten lawyers sought sanctions again after learning during the depositions of two Michelin employees that Michelin had withheld additional documents that the company previously had been ordered to surrender. But at a July 7 conference, “Michelin vehemently denied that it had not produced all the adjustment codes,” Totenberg’s order noted.

“However, on July 14, 2011, Michelin produced another 144 pages of adjustment conditions with codes, pictures and descriptions,” that included 113 new conditions that had previously been withheld, the order said.

At a daylong sanctions hearing last September, Helm testified as the sole witness in Michelin’s defense and took responsibility for the missing data.

“Ms. Helm was evasive in response to plaintiffs’ questioning of who redacted the list, stating repeatedly she did not recall,” before finally taking personal responsibility for what she said were human errors after attempting to assert attorney-client privilege, Totenberg wrote.

“Michelin contended that the additional 144 pages were produced on its own initiative and not because plaintiffs had caught Michelin red-handed,” Totenberg wrote. “However, Michelin’s alleged ‘self-reporting’ did not occur until after plaintiffs pointed out there were missing codes and sought sanctions for Michelin’s withholding of the documents. Michelin did not simply discover the error on its own and voluntarily come forward with the documents as it would have the court believe.”

As a result, Totenberg wrote, “The veracity of Michelin’s contentions regarding its conduct in the discovery process for a variety of reasons has proven unreliable. It appears plaintiffs are correct in their assertion that every one of Michelin’s counsel’s representations to the court regarding the production of the adjustment codes and adjustment data has proven to be inaccurate.”

Totenberg also wrote that while she “originally believed Ms. Helm’s affidavit testimony that the failure to produce the missing adjustment codes was an innocent oversight, and while this may very well be true, the credibility of her statements over time has been eroded by the actual course of discovery events.

“In light of Ms. Helm’s evasive and inconsistent testimony at the Sept. 19 hearing and defendant Michelin’s shifting representations made to the court since June 3, 2011, the court cannot simply rely on Michelin’s avowals of good faith regarding any of these discovery issues.”

Totenberg also chastised Helm for misleading the court by saying in December 2010 that certain documents sought by the plaintiffs had been given to them, even though they had not. Helm’s “subsequent failure to correct the mistake once she realized the court relied on her statements to conclude that the documents had been produced ... is plainly unacceptable,” she wrote.

“Michelin effectively kept the plaintiffs and the court in the dark by allowing them to rely on inaccurate information, which Michelin knew to be false.”

Totenberg also noted that “an essential purpose” of her orders directing Michelin to turn over specific data to the Bates lawyers “was to ensure that plaintiffs were provided the information necessary to analyze and evaluate the adjustment data to determine how many tires were being returned for the conditions at issue in this case.”

But, she continued, “Not only did Michelin produce the adjustment data in a format that was indecipherable to plaintiffs, not even a Michelin employee who was experienced in analyzing adjustment data could understand the information provided in the chart. ... Michelin’s production of the adjustment data in this completely unusable format was patently unacceptable... .”

The case is *Bates v. Michelin North America*, 1:09-cv-03280 (N.D. Ga.).