

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

-----  
ANDREW MOMMSEN,  
HUGH MOMMSEN and KAREN  
MOMMSEN,

Plaintiffs

v.

TOYOTA MOTOR CORPORATION,

Defendant.

-----

ORDER

07-cv-455-bbc

A final pretrial conference was held in this case on October 23, 2008, before United States District Judge Barbara B. Crabb. Plaintiffs appeared by Todd Tracy and Cathy Cetrangolo. Defendant Toyota Motor Corporation appeared by David Graves and Bard Borkon.

Counsel predicted that the case would take 10 days to try. They understand that trial days will begin at 9:00 and will run until 5:30, with at least an hour for lunch, a short break in the morning and another in the afternoon. Jury selection will go forward before the magistrate judge on Monday, November 3, 2008; trial will begin on Wednesday, November 5, 2008. (If it appears by the end of the day, Monday, November 3, that the Superl trial will

finish by noon on Tuesday, counsel will be notified and trial will begin at 1:45 on Tuesday.)

Counsel agreed that with the exception of experts, all witnesses would be sequestered. Counsel are either familiar with the court's visual presentation system or will make arrangements with the clerk for instruction on the system.

No later than noon on the Friday before trial, plaintiff's counsel will advise defendant's counsel of the witnesses plaintiff will be calling on Wednesday and the order in which they will be called. Counsel should give similar advice at the end of each trial day; defendant's counsel shall have the same responsibility in advance of defendant's case. Also, no later than noon on the Friday before trial, counsel shall meet to agree on any exhibits that either side wishes to use in opening statements. Any disputes over the use of exhibits are to be raised with the court before the start of opening statements.

Counsel should use the microphones at all times and address the bench with all objections. If counsel need to consult with one another, they should ask for permission to do so. Only the lawyer questioning a particular witness may raise objections to questions put to the witness by the opposing party and argue the objection at any bench conference.

Counsel are to provide the court with copies of documentary evidence before the start of the first day of trial.

Counsel agreed to the voir dire questions in the form distributed to them at the conference, but reserved the right to propose some additional questions in writing no later

than Friday, October 31. As noted, the magistrate judge will preside over jury selection (unless Superl settles) and will give the jury the introductory instructions. The jury will consist of eight jurors to be selected from a qualified panel of fourteen. Each side will exercise three peremptory challenges against the panel.

Counsel discussed the form of the verdict and the instructions on liability. Final decisions on the instructions and form of verdict will be made at the instruction conference once all the evidence on liability is in. Counsel are free to submit briefs on comparative negligence and the form of the verdict prior to trial.

Defendant's motion for permission to use a vehicle "buck" to illustrate how a seat-belted occupant would move around the cab of a truck in a rollover accident is GRANTED.

The following rulings were made on the parties' motions in limine.

Plaintiffs' Motions

\_\_\_\_\_ 1. Exclude any suggestion that Andrew Mommsen or his companions had consumed alcohol the night before - GRANTED as unopposed.

2. Exclude any reference to any Federal Motor Vehicle Safety Standard provisions not related to vehicle's passive restraint system - GRANTED with the condition that defendant will be allowed to introduce other federal standards if plaintiffs raise issue about general crash worthiness of vehicle.

3. Exclude any suggestion that defendant is sorry about accident - DENIED but any

such statements are to be brief.

4. Exclude evidence that Dr. Marc Krouse had his license suspended for three days more than 10 years ago - GRANTED as unopposed.

5. Exclude any evidence that any other court may have excluded any expert for either side - GRANTED.

6. Exclude specific portions of testimony by defendant's experts Dennis Schneider and Greg Smith - DENIED. Information about glass scratches in supplementation is within scope of Schneider's initial report. Smith may discuss ea/em loop-deployment sufficiently related to initial expert report. Schneider may discuss second inversion testing (Plaintiffs chose not to depose Schneider and defendant disclosed his supplemental report before the discovery deadline.) Also, he may testify about "all belts to seat" testing and bilateral lung contusions.

7. Exclude evidence that vehicle was overloaded or loaded improperly - GRANTED. Nymo's negligence in loading is irrelevant to question whether seatbelt was defective.

8. Exclude reference to possible alternative designs - DENIED.

9. Exclude any reference to number of lawsuits filed against defendant concerning 1989-1994 truck - GRANTED

10. Exclude any evidence suggesting that subject webbing has been altered or modified since accident - DENIED.

11. Exclude any reference to any offer of settlement from John Nymo - GRANTED.

12. Exclude any evidence about any collateral benefits plaintiff may receive or has received - GRANTED.

13. Exclude any reference by any paramedic or other medical personnel about the number of rolls the vehicle experienced, its speed, the dynamics of the accident or the kinematics of the occupants and any speculation about negligence - GRANTED, with the exception that any EMT and medical personnel can testify about facts they perceived.

14. Prohibit John Nymo and Leif Videen from testifying about the number of times the vehicle rolled - DENIED. As eyewitnesses to the accident, these witnesses may testify about what they perceived.

15. Exclude any reference to any police report and any testimony by an officer about the cause of the accident or Nymo's negligence - GRANTED.

16. Exclude opinions by defendant's expert, Dennis Schneider - DENIED. Schneider's background in biomechanics qualifies him as an expert and his testimony does not duplicate that of William Van Arsdell.

17. Exclude the seatbelt opinions of defendant's expert, William Van Arsdell - DENIED. Van Arsdell is a professional engineer who has performed hundreds of tests on seatbelts.

18. Exclude evidence of "spit or inversion testing" - DENIED. The proposed testing

information is relevant to the issues in the case and will not confuse the jury.

19. Exclude any reference to National Accident Sampling system/Crashworthiness Data System statistical data about rollover accidents by defendant's expert, Greg Smith - DENIED. The statistical data is of the type reasonably relied upon by experts such as Smith.

20. Exclude the testimony of Greg Smith - DENIED. Defendant has shown that Smith used scientific and peer-reviewed techniques that are acceptable within the field of accident reconstruction.

#### Defendant's Motions

1. Exclude evidence of discovery disputes - GRANTED.
2. Exclude evidence of other accidents - GRANTED, except that plaintiffs can produce such evidence *if* they can lay a foundation of substantial similarity.
3. Exclude evidence of other retractor testing - DENIED. The other retractor tests appear to be substantially similar and will illustrate general spool-out principles.
4. Exclude post-manufacture evidence about vehicle or component designs developed after 1994, when Toyota truck was manufactured - GRANTED.
5. Exclude testimony by plaintiffs' experts, Stephen Syson and Marc Krouse- DENIED.

### Depositions

Defendant designated certain portions of definitions to be read at trial; plaintiffs took the position that defendant could not sue the deposition testimony because the deponents live within the district, although more than 100 miles from the courthouse. When I ruled that the deponents were not required to appear because of their distance from the courthouse, plaintiffs asked for additional time to make their counter-designations. That request was granted. Plaintiffs may have until Wednesday, October 29, 2008, in which to submit their deposition counter-designations.

Entered this 27th day of October, 2008.

BY THE COURT:  
/s/  
BARBARA B. CRABB  
District Judge