

TEMPORARY RELIEF REQUESTED

No. 08-1076

**IN THE
SUPREME COURT
OF TEXAS**

***In re* DEERE & COMPANY D/B/A JOHN DEERE COMPANY AND
JOHN DEERE CONSTRUCTION & FORESTRY COMPANY**

Relators.

**Original Mandamus Proceeding
From the 18th Judicial District Court of Johnson County, Texas
Honorable John Neill, Presiding Judge**

PETITION FOR WRIT OF MANDAMUS

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STATEMENT OF THE CASE

Nature of the Case: This is a products liability action. Plaintiff sued the Deere Defendants, and several others, for injuries Arturo Martinez suffered in an accident that took place involving a John Deere 410D backhoe loader.

Trial Court: Honorable John Neill, 18th Judicial District Court of Johnson County, Texas.

Trial Court's Disposition: Granted the Plaintiff's motion to compel production. (App. 1)

Court of Appeals: Tenth Court of Appeals in Waco, Texas. Per curiam Memorandum opinion by Justices Vance and Reyna, with Chief Justice Gray dissenting. *In re Deere & Company, et al.*, No. 10-08-00436-CV (Tex. App.–Waco Dec. 22, 2008, orig. proceeding) (not designated for publication). (App. 3)

Disposition on Appeal: Denied the petition for writ of mandamus (which was filed on December 18, 2008). The majority issued no opinion; the dissent stated: “A separate opinion will not issue. He notes, however, that he would request a response for review and determination of whether, as it appears from the petition, that the request for production is overbroad and the order requiring production is even more overbroad than the request.”

STATEMENT OF JURISDICTION

This Court has jurisdiction to issue writs of mandamus under TEX. GOV'T CODE § 22.002(a) and Rule 52 of the Texas Rules of Appellate Procedure.

ISSUES PRESENTED

1. Did the trial court abuse its discretion in ordering Relators to produce documents relating to 78 different models of equipment, which entails reviewing Relators' files for documents dating back close to 40 years, when most of the models and related incidents bear no relation, in direct conflict with this Court's prior holdings in the product liability context, to the model and incident at issue in this case?

2. Do Relators have an adequate remedy by appeal or, as stated in *Walker v. Packer*, 827 S.W.2d, 833, 843 (Tex. 1992), does the trial court's discovery order compelling production of patently irrelevant documents constitute an error that cannot be cured on appeal because it imposes a burden on Relators that clearly constitutes harassment and far exceeds any benefit Plaintiff may receive, and because the error creates the likelihood that Relators' ability to present a viable defense at trial will be severely compromised?

STATEMENT OF FACTS

Plaintiff filed this suit against the Deere Defendants, along with several other parties, alleging strict product liability and negligence, among other causes of action.¹ These causes of action center around an accident that took place on April 1, 2004. On that day, Arturo Martinez was standing on the step of a John Deere 410D Backhoe Loader when the step allegedly broke, causing Mr. Martinez to fall under the Loader and be run over by the moving equipment.² Just days before the statute of limitations expired, Plaintiff filed suit March 21, 2006.³ On June 2, 2006, Plaintiff served 47 Requests for Production on Deere, including in No. 18 seeking “all [non-governmental] documents of customer complaints received by Defendant relative to the sidestep on any model backhoe.”⁴ Deere timely responded, objecting to the overbreadth of the request to the extent it went beyond the product model of the pending litigation, and stated that subject to that limitation it had no responsive documents.⁵

Almost two years later, on March 25, 2008, Plaintiff’s counsel informed Deere’s counsel that Plaintiff planned to file a Motion to Compel (the “Motion”) if Deere did not amend its responses, but did not articulate any perceived deficiencies in Deere’s responses.⁶ Three days later, Plaintiff filed the Motion, stating Deere had “wholly failed

¹ See Relators’ Record (“RR”) filed in Support of Relators’ Petition for Writ of Mandamus at Tab 12, Plaintiff’s Fourth Amended Petition at ¶¶ 5.1-5.10.

² *Id.* at ¶¶ 4.1.

³ RR Tab 13, Plaintiff’s Original Petition.

⁴ RR Tab 10, Plaintiff Arturo Martinez’ First Requests for Production to Defendant Deere & Company d/b/a John Deere Company (“First Request for Production”), p. 9 at No. 18.

⁵ RR Tab 11, Defendants Deere & Company’s Responses to Plaintiff’s First Request for Production, p. 7 at No. 18.

⁶ RR Tab 4, Deere Defendants’ Response to Plaintiffs’ to Motion to Compel (“Motion to Compel”), at p. 2.

to respond” to 35 of Plaintiff’s 47 Requests, including No. 18.⁷ Similar to Plaintiff’s bald allegation of deficiencies during the attempted “meet and confer”, the Motion also did not provide any explanation as to why Deere’s discovery responses were inadequate.⁸

On May 8, 2008, the trial court heard Plaintiff’s Motion. With regard to the scope of No. 18, the Court ruled as follows:

I would like to avoid problems in the future as far as Plaintiff defining same or similar in one way and Defendant defining it in another way. I think the way we could avoid that is if you can give me some model numbers. And if it’s just a specific number, if it’s three or four, I don’t mind ordering that. If we’re talking about – again, if we’re talking about dozens of different models, then we may run into another issue.⁹

The court further expounded upon this issue: “If it’s a handful, then I’m going to grant it. If we get into dozens of, you know, 20 – 20, 25, dozens more than that, then I think we run into a problem there and we may need another hearing.”¹⁰ Plaintiff subsequently filed a Proposed Order listing 35 product lines, which encompasses a total of 78 models (e.g., the 410 backhoe series has eight models and the 310 series has 12).¹¹ Notably, while Plaintiff’s original Request No. 18 focused only on “the sidestep on any model backhoe”, Plaintiff’s Proposed Order expanded the Request beyond backhoes to include tractors and four-wheel drive loaders, including one product – the 1140 4WD – that has never existed.¹² Indeed, 80% of the 35 product series listed fall outside the scope of the

⁷ RR Tab 3, Plaintiffs’ Motion to Compel Discovery to Defendant Deere & Company d/b/a John Deere Company (“Motion to Compel”), at 1.

⁸ *Id.*

⁹ RR Tab 5, May 5, 2008 Hearing Transcript, at 16:8-16.

¹⁰ *Id.* at 17:15-18.

¹¹ RR Tab 6, Proposed Order Granting Plaintiffs’ Motion to Compel); Appendix (“App.”), attached hereto in Appendix (“App.”) at Tab 2, Affidavit of F. Daniel Griswold in Support of Petition for Writ of Mandamus (“Griswold Affidavit”), at ¶¶ 7, 9.

¹² App. at Tab 2, Griswold Affidavit, at ¶ 8.

original Request. Similarly, the Proposed Order also sought to extend the scope of the original Request beyond the “sidestep” to include any “handle that supports human weight.” No explanation for either expansion, however, was provided.

Presumably because Plaintiff sought dozens of models rather than just a few, the Court conducted another hearing on the Motion on September 4, 2008. At this hearing, Plaintiff represented that the proposed list of models was based on Plaintiff’s expert’s research of various Deere equipment that purportedly (although in reality, not necessarily) had bolt-on steps.¹³ Though the Proposed Order actually included a number of different types of step assemblies, Plaintiff’s counsel acknowledged at the hearing that this case deals with a step assembly with “four holes in and bolted”; in other words, the four-bolt assembly.¹⁴ Yet, no further argument or effort was made to demonstrate how the step assemblies of the proposed 35 product lines were similar to that existing on the subject backhoe loader. As noted by Deere’s counsel, the Court had asked Plaintiff to provide a list of three or four models and the evidence that made those models relevant, and “from May 8th to now, Plaintiff has given you no evidence to say this is why this product is similar enough to the 410D product so as it should be included in the order. And that is the Plaintiff’s burden to demonstrate for you.”¹⁵ Indeed, Plaintiff made no offering to establish the reasonable similarity of the evidence sought; and as a result, failed to meet the requisite burden of proof necessary to justify compelling its production.

¹³ RR Tab 10, September 4, 2008 Hearing Transcript, at 5:9-17.

¹⁴ *Id.* at 9:11-15.

¹⁵ *Id.* at 13:16-25.

Following the September 4 hearing, the trial court asked the parties to file a letter brief advising of how the Waco Court of Appeals' 1989 *Deere v. May* decision, which, as will be discussed in depth below, held that reasonably similar circumstances are required for production of related models, affected their respective positions in this dispute. Deere's September 11, 2008 letter advised the court of the holding in *May*, analyzed its applicability to this matter, and argued that only five backhoe loader models were reasonably similarly with regard to the at-issue step.¹⁶ More specifically, due to a 1996 model modification, the John Deere 410D Loader in this case switched from a two-bolt to a four-bolt step assembly.¹⁷ Four other backhoe loader models incurred the same modification.

As a result, Deere argued in its September 11 letter that those four models, in addition to the 410D, were the only reasonably similar designs requiring production based on the precedent established by *May*.¹⁸ As previously mentioned, the majority of the other models requested were tractors and four-wheel drive loaders manufactured over a span of 40 years, and the remaining backhoe loaders Plaintiff requested had a variety of sidesteps, ranging from two-bolt assemblies located in different parts of the machine to welded assembly in which there are no attaching bolts.¹⁹ Given the vastly different designs of the requested models, Deere contended that they did not rise to the level of "reasonably similar" required by the *May* decision.

¹⁶ RR Tab 8, September 11, 2008 Letter to The Honorable Judge John Neill from Mark D. Strachan ("Deere Letter").

¹⁷ App. at Tab 2, Griswold Affidavit, at ¶ 11.

¹⁸ RR Tab 8, Deere Letter.

¹⁹ App. at Tab 2, Griswold Affidavit, at ¶ 9-10.

In her letter, Plaintiff presented her interpretation of the standard, and argued that “[i]n this case, all the model numbers outlined in the attached proposed Order Granting Plaintiffs’ Motion to Compel had similar step and/or handle components to the backhoe involved in this incident.”²⁰ Once again, despite the fact that she had the burden to establish similarities justifying production of the evidence, Plaintiff failed to provide any explanation as to the alleged similarities of the requested models. Approximately three months later, on December 5, 2008, the trial court signed Plaintiff’s Proposed Order, giving Deere 21 days to produce thousands of purportedly responsive documents.²¹ In ordering production of these documents, however, the Court provided no analysis of the facts or law underlying its decision.

Deere filed a Petition for Writ of Mandamus with the Waco Court of Appeals on December 18, 2008. The Petition was denied in a 2-1 decision on December 22, 2008.²² While the two-Justice majority did not provide any analysis, Chief Justice Gray, in dissent stated: “A separate opinion will not issue. He notes, however, that he would request a response for review and determination of whether, as it appears from the petition, that the request for production is overbroad and the order requiring production is even more overbroad than the request.”²³

²⁰ RR Tab 9, September 11, 2008 Letter to The Honorable Judge John Neill from Stephen L. Daniel (“Plaintiff’s Letter”).

²¹ App. at Tab 1, Order Granting Plaintiff’s Motion to Compel. The trial court since granted an extension to January 16, 2009.

²² App. at Tab 3, Memorandum Opinion Denying Relators’ Petition for Writ of Mandamus.

²³ *Id.*

ARGUMENT

I. The Applicable Legal Standard on a Petition for Writ of Mandamus.

To obtain a writ of mandamus, Deere must show that the trial court clearly abused its discretion and that Defendants have no adequate remedy by appeal.²⁴ This Court holds that “mandamus is available to correct a clear abuse of discretion in a discovery matter”²⁵, and has granted mandamus in a number of “product-liability cases when a discovery order covered products the plaintiff never used.”²⁶

II. The Trial Court Abused Its Discretion in Issuing an Overbroad and Improper Discovery Order in the Products Liability Context.

A. Mandamus is an appropriate remedy for an abuse of discretion related to overly broad motions to compel production.

While the scope of discovery generally is within a trial court’s discretion, “the trial court must make an effort to impose reasonable discovery limits.”²⁷ A court “order that compels overly broad discovery well outside the bounds of proper discovery is an abuse of discretion for which mandamus is the proper remedy.”²⁸ While a reviewing court ordinarily cannot disturb a trial court’s factual findings unless shown to be “arbitrary and unreasonable”, the trial court has no discretion to determine what the law is or to apply it to the facts, and “a clear failure by the trial court to analyze or apply the law correctly

²⁴ *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135-36 (Tex. 2004); *In re Allstate*, 85 S.W.3d 193, 195-96 (Tex. 2002).

²⁵ *General Motors Corp. v. Lawrence*, 651 S.W.2d 732, 733 (Tex. 1983).

²⁶ *In re Graco Children’s Products, Inc.*, 210 S.W.3d 598, 600 (Tex. 2006) (referring to three prior decisions and granting mandamus in this instance where there was “no apparent connection between the alleged defect and the discovery ordered”).

²⁷ *In re CSX Corp.*, 124 S.W.3d 149, 152 (Tex. 2003).

²⁸ *Dillard Dep’t Stores, Inc. v. Hall*, 909 S.W.2d 491, 492 (Tex. 1995) (internal citation omitted).

will constitute an abuse of discretion.”²⁹ In *Walker*, for instance, this Court ruled that the trial court abused its discretion when it erroneously ruled on a discovery request based on its analysis of a single case.³⁰ Indeed, that reliance was “a legal conclusion to be reviewed with limited deference” to the lower court.³¹ Moreover, trial courts do not have discretion to make erroneous legal conclusions even when the area of law is unsettled.³²

B. This Court has repeatedly vacated orders which failed to place proper limitations on discovery that sought production of material unrelated to the alleged defect or product.

A number of decisions offer guidance when considering the abuse of discretion standard of review in the product liability context. All share the same common theme that “discovery may not be used as a fishing expedition” and that “requests must be reasonably tailored to include only matters relevant to the case.”³³ Mandamus proceedings have been routinely used, including in our context, to address orders that compel the production of documents extending well beyond any reasonable scope based on the actual incident and product at issue.

In *General Motors v. Lawrence*, for instance, General Motors brought a mandamus proceeding after the trial court had granted a motion to compel that would have required the manufacturer to produce information related to all of its vehicles, without time limitation, even though the allegedly defective design in that case involved one particular truck model’s fuel filler neck that was not even in some of the requested

²⁹ *Walker v. Packer*, 827 S.W.2d 833, 839-40 (Tex. 1992).

³⁰ *Id.* at 840.

³¹ *Id.*

³² *In re Stroud Oil Properties, Inc.*, 110 S.W.3d 18, 23 (Tex. App.–Waco 2002, no writ).

³³ *In re American Optical Corp.*, 988 S.W.2d 711, 713 (Tex. 1998) (internal citations omitted).

vehicle models.³⁴ This Court held that the trial court had abused its discretion in entering an overly broad discovery order that compelled production of documents related to vehicles that simply could not have been relevant to the underlying dispute. Consequently, the Court further held that the requests should be limited to trucks manufactured during a specific range of years, and which had a particular type of in-cab fuel tank located in the passenger cab with a protruding pipe.³⁵ By tailoring the requests' breadth in this way, this Court ordered only reasonably similar models to be produced so as to better focus the production on relevant materials only.

Similarly, in *In re American Optical Corp.*, this Court stated that a request for production as to defective respiratory protection products should be limited to "particular products the plaintiffs claim to have used" during "time periods such use may have occurred."³⁶ The trial court in that case committed an abuse of discretion by ordering the production of all products produced over a fifty-year period.³⁷

More recently, in a 2006 case involving an allegedly defective harness clip in a baby's car seat, this Court directed the trial court to vacate its order compelling discovery of more than a dozen products, none of which had five-point harnesses or defective harness buckles like the seat at issue.³⁸ Mandamus was conditionally granted because the plaintiff's requests were impermissibly overbroad by not being "reasonably tailored to

³⁴ *General Motors Corp.*, 651 S.W.2d at 734.

³⁵ *Id.* at 733-34.

³⁶ *In re American Optical Corp.*, 988 S.W.2d at 713.

³⁷ *Id.*

³⁸ *In re Graco Children's Products, Inc.*, 210 S.W.3d at 600.

the relevant product defect.”³⁹ Though the plaintiff tried to argue that other products helped to show the corporate defendant’s state of mind, this Court responded that while statements as to the particular product are discoverable, the inquiry cannot be broadly extended.⁴⁰

These decisions related to defective products are quite consistent with other grants of mandamus in other contexts also based on overbroad discovery orders. *See, e.g., K Mart Corp. v. Sanderson*, 937 S.W.2d 429, 431 (Tex. 1996) (ruling in a case involving an abduction at the parking lot of a defendant store that criminal conduct on parking lots of other stores dating back 10 years would likely not “have even a miniscule bearing” on the case, and “far too small to justify discovery”); *Dillard Dep’t Stores, Inc. v. Hall*, 909 S.W.2d 491 (Tex. 1995) (granting mandamus relief where trial court, in a lawsuit involving false arrest, had ordered defendant to produce every claims file and incident report over a six-year span “in every lawsuit or claim that involved allegations of false arrest, civil rights violations, and excessive use of force” for each of its 227 stores); *Texaco, Inc. v. Sanderson*, 898 S.W.2d 813, 814-15 (Tex. 1995) (requiring requests to be more narrowly tailored in case involving alleged exposure to toxic chemicals, where plaintiff requested all documents written by defendant’s safety director as to a broad array of subjects). As this Court has shown, while mandamus is not a remedy to be granted with regularity, it is nevertheless to be employed where necessary to restrain egregious discovery orders.

³⁹ *Id.* at 601.

⁴⁰ *Id.*

C. Only incidents occurring under “reasonably similar circumstances” are admissible.

In addition to product liability cases in the mandamus context, a number of courts have considered the scope of relevant evidence involving other products, a scope which as discussed above the trial court previously asked both Plaintiff and Deere to analyze. In 1989, the Waco Court of Appeals examined a case in which a Deere 450C bulldozer backed over, and killed, an individual (May).⁴¹ There was no direct evidence as to how the incident occurred, though the plaintiffs alleged it took place when May stopped the dozer, left it in neutral, and then while kneeling down behind the dozer to check a leak, was run over when the transmission gear shifted by itself from neutral into reverse.⁴² In that case, just 15 months prior to the accident, Deere had initiated a safety modification program on the 450C and three other models, with a redesigned spool valve and neutral gear on the dozers’ second transmission.⁴³ The at-issue bulldozer, however, had not been modified prior to the accident, and both the modifications and warnings contained within could have prevented May’s death.⁴⁴

In that case, the parties argued over the admissibility of evidence from 34 incidents involving dozers that had moved after being left in neutral with the engine running. The court held that other incidents that “occurred under reasonably similar circumstances” were admissible.⁴⁵ More specifically, they were admissible “if they

⁴¹ *John Deere Company v. May*, 773 S.W.2d 369, 371 (Tex. App.-Waco 1989, writ denied).

⁴² *Id.*

⁴³ *Id.* at 372.

⁴⁴ *Id.* at 376.

⁴⁵ *Id.* at 372. In our situation, of course, the question is whether the information is discoverable, and not just admissible. While both issues will have to be determined at some point, given the trial court’s reliance on *May* it is applicable to this analysis even though ultimately the mandamus decisions are the most relevant here.

involved *the same type of occurrence*, i.e., the circumstances would be reasonably similar if the dozers moved after being left in neutral with the engine running.”⁴⁶ In applying a reasonably similar standard to the facts, the court limited the scope of the request to bulldozer models that had undergone the same safety modification program.⁴⁷

This decision followed closely other decisions making clear that fishing expeditions in this context are not allowed and the requests must be reasonably narrow. *See, e.g., Rush v. Bucyrus-Erie Co.*, 646 S.W.2d 298, 301 (Tex. App.-Tyler 1983, writ ref’d n.r.e.) (evidence pertaining to two other accidents was admissible because the two had also occurred “while dismantling similar booms manufactured by Bucyrus with headed boom splice pins”); *McInnes v. Yamaha Motor Corp., U.S.A.*, 659 S.W.2d 704, 710 (Tex. App.-Corpus Christi 1983), *aff’d on other grounds*, 673 S.W.2d 185 (Tex. 1984) (holding that evidence of accidents “involving the same product” is relevant and admissible); *Air Shields, Inc. v. Spears*, 590 S.W.2d 574, 579 (Tex. Civ. App.-Waco 1979, writ ref’d n.r.e.) (evidence limited to whether infants had developed retrolental fibroplasia on identical Air Shields incubators); *Magic Chef, Inc. v. Sibley*, 546 S.W.2d 851, 855 (Tex. Civ. App.-San Antonio 1977, writ ref’d n.r.e.) (evidence limited to the same model gas range). In *Yamaha*, for instance, the court stated that in a products liability case, “evidence of other accidents involving the *same product* is admissible to

⁴⁶ *Id.* at 372-73.

⁴⁷ Moreover, the importance of the evidence in *May*, unlike here, is *no one* in that case saw the incident happen, thus the plaintiffs were forced to rely on circumstantial evidence to show the dozers “had a propensity” to shift from neutral to reverse, a propensity that caused May’s death. *Id.* at 373. The evidence was thus “vital” and relevant because the more incidents the plaintiffs could show had happened, the greater the probability that May died as alleged. *Id.* at 373-74. In our case, there were witnesses to the accident so direct evidence is available.

show its dangerous or hazardous nature if the accident occurred under the same or substantially similar conditions as that involving the plaintiff.” (emphasis added).⁴⁸

D. Plaintiff’s initial discovery request was impermissibly overbroad, and was subsequently expanded well beyond any proper constraints.

A review of the chronology of this case demonstrates that, respectfully, the trial court made findings of fact that were arbitrary and unreasonable, and legal conclusions that were contrary to the holdings discussed above. The underlying dispute arose out of a request for “all [non-governmental] documents of customer complaints received by Defendant relative to the sidestep on any model backhoe.”⁴⁹ As noted in Deere’s original objection, the initial request was overly broad and it ignored the crucial fact that this incident involved a bolt-on step apparatus that had only two of the required and designed four bolts in place at the time of the accident. Historically, Deere’s backhoes have used a number of different methods for attaching a step to the machine, ranging from two-bolt assemblies to four-bolt assemblies to a welded assembly.⁵⁰ In addition, the step is situated in different locations on different machines, leading to different possible factors that may contribute to failure. Accordingly, even within the line of Deere backhoes, significant dissimilarities exist between the models, thereby limiting or eliminating the potential relevance of some of the evidence sought.

Moreover, the 410 model alone has a number of sub-models, ranging from the 410A manufactured in 1979 to the 410TJ built in 2007, some of which used two-bolt step assemblies, some had four-bolt step assemblies, and some used no bolts at all in the step

⁴⁸ *McInnes*, 659 S.W.2d at 704.

⁴⁹ RR Tab 10, First Request for Production, p. 9 at No. 18.

⁵⁰ App. at Tab 2, Griswold Affidavit, at ¶ 10.

assemblies.⁵¹ For instance, information related to the 410TJ model, which has a welded step, would provide nothing relevant to this case involving allegations of a defective four-bolt step assembly design. Asking Deere to produce complaints relative to the sidestep on *any* model backhoe is akin to asking for the baby seats in *Graco* that did not use the defective harness buckles or for trucks in *General Motors* that did not have a fuel filler neck that was part of an in-cab fuel tank with a protruding pipe. Rather, as was done in the *Graco* and *General Motors* cases, the requested discovery needs to be tailored to the allegedly defective product. In *Graco*, the alleged defect was a five-point harness so only models employing a similar five-point harness design were considered reasonably similar. In *General Motors*, only trucks with a fuel filler neck that was part of an in-cab fuel tank with a protruding pipe could be considered reasonably similar. Here, the discovery should similarly be limited to only those model backhoes utilizing a four-bolt step assembly as that is the only design in question.

In fact, Plaintiff's counsel admitted at the Motion to Compel hearing that he was not interested in a welded step design that did not use bolts.⁵² He also represented that Plaintiff was only interested in going back 15 years.⁵³ Yet, in the Proposed Order submitted after the hearing, Plaintiff requested 35 product lines (encompassing 78 models of varying equipment) that are not restricted in time, requiring Deere to produce documents dating back to 1971.⁵⁴ Additionally, while the initial discovery request asked for information related only to backhoes, Plaintiff proposed an Order seeking 7 backhoe

⁵¹ *Id.* at ¶ 9.

⁵² RR Tab 5, May 8, 2008 Hearing Transcript, at 7:6-12.

⁵³ *Id.* at 9:21-23.

⁵⁴ App. at Tab 2, Griswold Affidavit, at ¶ 9.

product lines, 5 four-wheel drive loaders, and 23 tractors. Of note, this list includes the supposed 1140 4WD loader, a non-existent model.⁵⁵ In short, the scope of the proposed Order, which was entered by the court, went well beyond the scope of the initial request as well as the bounds of permissible discovery.

Moreover, the original Request for Production also only sought documents “relative to the sidestep.” Yet, under the proposed and accepted Order, Plaintiff impermissibly expanded the scope of the request even further to include any “handle that supports human weight”, even though there are no allegations that a handle was in any way involved in the Martinez accident, much less allegations that one was defective. Presumably, Plaintiff might contend that some handles, like some of the sidesteps, are affixed with bolts. That argument would be paramount to the *General Motors* plaintiff claiming that not only did the manufacturer need to produce evidence relating to the in-cab fuel filler neck, but also an in-cab radiator hose, because both are similarly affixed. That is not what the proper standard allows. The proper standard requires similar circumstances, and handles and steps are not similar devices.⁵⁶

The trial court’s acceptance of Plaintiff’s last minute attempt to expand further the scope of the request beyond the allegedly-defective sidestep was an abuse of discretion and contrary to the law. In *May*, for instance, the court limited the scope of the proper production to the allegedly defective part – the redesigned spool valve and neutral gear on the transmission. Plaintiff may say that a step is a step, no matter on which machine it

⁵⁵ *Id.* at ¶ 8.

⁵⁶ For example, handles are not necessarily meant to support the entire weight of a person, but often are included to provide a stabilizing point.

is located, but this Court in *Graco* did not say that a harness is a harness – it required reasonably similar circumstances. It is a clear abuse of discretion to allow Plaintiff to procure information beyond instances that are similar to the incident in question.

A reasonable request is one that relates to the circumstances involved in the allegation made by the requesting party and that is *reasonably* limited as to time, place and subject matter.⁵⁷ Plaintiff’s request was not tailored to elicit useful information, but rather meant as a harassing fishing expedition aimed solely at allowing Plaintiff an opportunity to discover evidence entirely unrelated to the subject matter at issue – the Deere 410D Loader four-bolt step. Applying the decision in *May* as expansively as possible to our facts, Plaintiff’s request should be limited to, at most, those models that were modified with a four-bolt apparatus by Deere’s 1996 Product Improvement Program. This includes the 300D, 310D, 315D, 410D, and 510D backhoe loaders.⁵⁸ On no other models were step assemblies modified in the same manner as the 410D, thus reading the precedent from *May* as broadly as possible, these five models would be the only potential “reasonably similar” products in which any incidents might be relevant to the dispute at hand.

Unlike in *May*, in our case the modification actually was performed on the subject backhoe loader, thus the relevant time period occurs after the post-1996 modification and production should be similarly limited to this relevant time period. Any incidents prior would have occurred on dissimilar step assemblies. This Court in *In re American Optical*

⁵⁷ See *Texaco, Inc.*, 898 S.W.2d at 815.

⁵⁸ RR Tab 8, Deere Letter.

Corp., limited the inquiry to the specific products the plaintiffs had used, and the time periods that use may have occurred.⁵⁹ Here, the use occurred in 2004, however Deere has been willing to search for records dating back to 1996 to encompass the *entire* time period the specific product was used by *anyone*.

Such an Order would provide Plaintiff with over 12 years of evidence of “any lawsuits, problems or complaints” on *all* Deere backhoe models that employed a similar four-bolt step design. Though Deere ultimately feels that only incidents related to the 410D model subsequent to the 1996 modification are relevant and admissible, Deere provided the trial court with a proposed order that would have required production for these five four-bolt models. Plaintiff, by contrast, has provided *no* evidence as to why the 78 models it seeks are reasonably similar to the Deere 410D backhoe loader and its step assembly, and why the handle is reasonably similar to the sidestep. Instead, Plaintiff’s counsel merely suggested that her expert feels that all of the models are related.⁶⁰ Counsel’s statements are not evidence. Rather, if Plaintiff’s expert truly believes that all of the requested models are related or similar, then in order to rise to the level of proof necessary to meet Plaintiff’s burden, that expert(s) should have provided an affidavit or testimony establishing how and why they reached that conclusion.

The mandate created by the court’s recent order compelling production forces Deere to search for, and potentially produce, documents related to 78 models based on a naked and unsubstantiated conclusion of Plaintiff’s counsel that goes well beyond the

⁵⁹ 988 S.W.2d at 713.

⁶⁰ RR Tab 7, September 4, 2008 Hearing Transcript, at 9:11-17.

scope of proper discovery. The trial court abused its discretion by ignoring the prior holdings of this Court and arbitrarily and unreasonably expanding the initial discovery request such that Deere should now be faced with an Order to produce documents that could never have an evidentiary impact on the defect alleged in this case. Chief Justice Gray from the Waco Court of Appeals agreed last week that the initial discovery request was overbroad, and the Order entered several weeks ago even broader.

III. The Improper Scope of the Order Leaves Defendants With No Adequate Remedy on Appeal.

In addition to demonstrating the trial court's abuse of discretion, Deere also bears the burden of showing it has no adequate remedy on appeal. This Court established at least three situations in which a party will not have an adequate remedy by appeal if a trial court's discovery error is not cured.⁶¹ Among those situations are: (1) "a discovery order compels the production of patently irrelevant or duplicative documents, such that it clearly constitutes harassment or imposes a burden on the producing party far out of proportion to any benefit that may obtain to the requesting party"; and (2) the party's ability to present a "viable" defense at trial will be eliminated or "severely compromised by" the trial court error.⁶²

The irrelevance of the discovery order, namely its seeking of non-backhoe models and inapposite step designs, as well as weight-bearing handles, was previously discussed in depth. Meanwhile, the burden versus benefit sliding scale is entirely one-sided. The burden on Deere to comply with the Order would be extensive, while the benefit to

⁶¹ See *Walker v. Packer*, 827 S.W.2d 833, 843-844 (Tex. 1992).

⁶² *Walker*, 827 S.W.2d at 843.

Plaintiff – outside of the five reasonably similar models – would be virtually non-existent. Deere already has spent over 30 hours merely to make a preliminary investigation into the range of documents potentially responsive, and expects a full production to take hundreds of hours and costs many thousands of dollars in manpower and duplication of documents.⁶³ Two examples demonstrate the immense burden, and minimal benefit:

(1) Between 1976 and 1980, Deere manufactured a 444 Four Wheel Drive Loader. Several decades ago, an individual was injured when he slipped while stepping off this loader model. The step in that case did not break, and used a welded assembly without *any* attaching bolts, yet any and all documents pertaining to the individual’s injury would be responsive under the trial court’s overbroad discovery order.⁶⁴

(2) Deere was involved in a lawsuit several years ago in which an individual was injured when he fell from the step of a 310E backhoe loader. Unlike our case, there was no failure of the mounting bolts, or part failure of any kind. Thus, no insight from this incident would be gained in the subject litigation. Nonetheless, because the discovery order requires Deere “to produce any and all documents pertaining to or relating to any lawsuits”, Deere would be forced to review and potentially produce thousands of pages simply because the lawsuit involved a step. Every pleading, letter, email, and note related to an irrelevant lawsuit would be responsive, or at a minimum, require a review that would consume days of time and thousands of dollars to duplicate.⁶⁵

⁶³ App. at Tab 2, Griswold Affidavit, at ¶ 4.

⁶⁴ *Id.* at ¶ 5.

⁶⁵ *Id.* at ¶ 6.

These are only two examples of many highlighting how the burden imposed upon Deere by the Order could not be remedied on appeal. By the time Deere appealed the scope of the order, it already would have had to spend potentially hundreds of hours and thousands of dollars to uncover, review, and produce “any and all” documents pertaining to slip-and-falls involving vastly different pieces of Deere equipment that, as to the bolt-on step, were significantly different in design. Additionally, as discussed, the corresponding benefit to Plaintiff is non-existent, with the exception of providing counsel with an impermissible fishing expedition.

Additionally, should evidence of these irrelevant accidents on irrelevant equipment occurring under irrelevant circumstances find their way to a trial and presentation before a jury, Deere’s ability to present its defense would be severely compromised. The cumulative effect of slip-and-falls on tractors could be used by Plaintiff to distract a jury’s attention from the substantive reality of this matter, a reality that the actual backhoe at issue had no defective design and simply was not properly maintained eight years after the bolt-on apparatus was modified. If this Court denies Deere’s Petition, Deere would of course seek to limine out from trial any and all irrelevant evidence, but given the trial court’s decision with regard to its discoverability, Deere’s attempt could again be unsuccessful, and by that point, Plaintiff will have conducted months of discovery based on the overbroad order.

As aptly stated in *Graco*, “[e]vidence about different products and dissimilar accidents has long been inadmissible, as it generally proves nothing while distracting

attention from the accident at hand.”⁶⁶ In that case, the plaintiff delayed the trial by more than a year by “direct[ing] her attention to products she never used and defects she never alleged.”⁶⁷ Here, in a case that is approaching the three-year anniversary of its filing, Plaintiff’s attempt to focus attention on tractors, four-wheel drive loaders, and weight-bearing handles would do the same. If such evidence was allowed and the jury successfully distracted, the error would undoubtedly lead to an appeal, reversal, and remand of the case, wasting the precious resources of the parties, the judiciary, and the jurors. Deere is ready and willing to quickly produce any and all documents related to reasonably similar accidents occurring under reasonably similar circumstances. The trial court has respectfully abused its discretion in ordering much, much more.

PRAYER

For the reasons set forth above, Relators, the Deere Defendants, respectfully pray that this Court grant mandamus relief and reverse the ruling of the trial court by limiting the scope of Plaintiff’s discovery requests only to those five models identified as being reasonably similar, and therefore, potentially relevant to this matter. Relators further pray for such other relief to which they may be entitled.

Respectfully submitted,

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⁶⁶ *In re Graco*, 210 S.W.3d at 601.

⁶⁷ *Id.*

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CERTIFICATE OF SERVICE

The undersigned certifies that on this _____ day of December, 2008, a true and correct copy of the foregoing instrument was served in accordance with the Texas Rules of Civil Procedure and the parties' pre-trial agreement via hand delivery, certified mail, return receipt requested, email, or facsimile on the following counsel of record:

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A true and correct copy of the foregoing instrument was served via hand delivery on:

The Honorable John Neill
18th Judicial District Court
Guinn Justice Center
204 S. Buffalo Ave., Room 304
Cleburne, Texas 76033

Joel L. Israel

VERIFICATION OF PETITION, APPENDIX, AND RECORD

STATE OF TEXAS §
 §
COUNTY OF DALLAS §

Before me, the undersigned authority, on this day personally appeared Joel Israel, known to me to be the person whose name is subscribed below and who, upon his oath and based upon personal knowledge, stated that (1) he is one of the attorneys of record for Relators in this original proceeding; that (2) he has reviewed the petition and concluded that every factual statement in the petition is supported by competent evidence included in the Appendix or Record; and that (3) the items contained in the Appendix and Record are true and correct copies.

Joel L. Israel

Given under my hand and office seal of office this _____ day of December 2008.

Notary Public, State of Texas

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