Product Liability

Discovery in the produc

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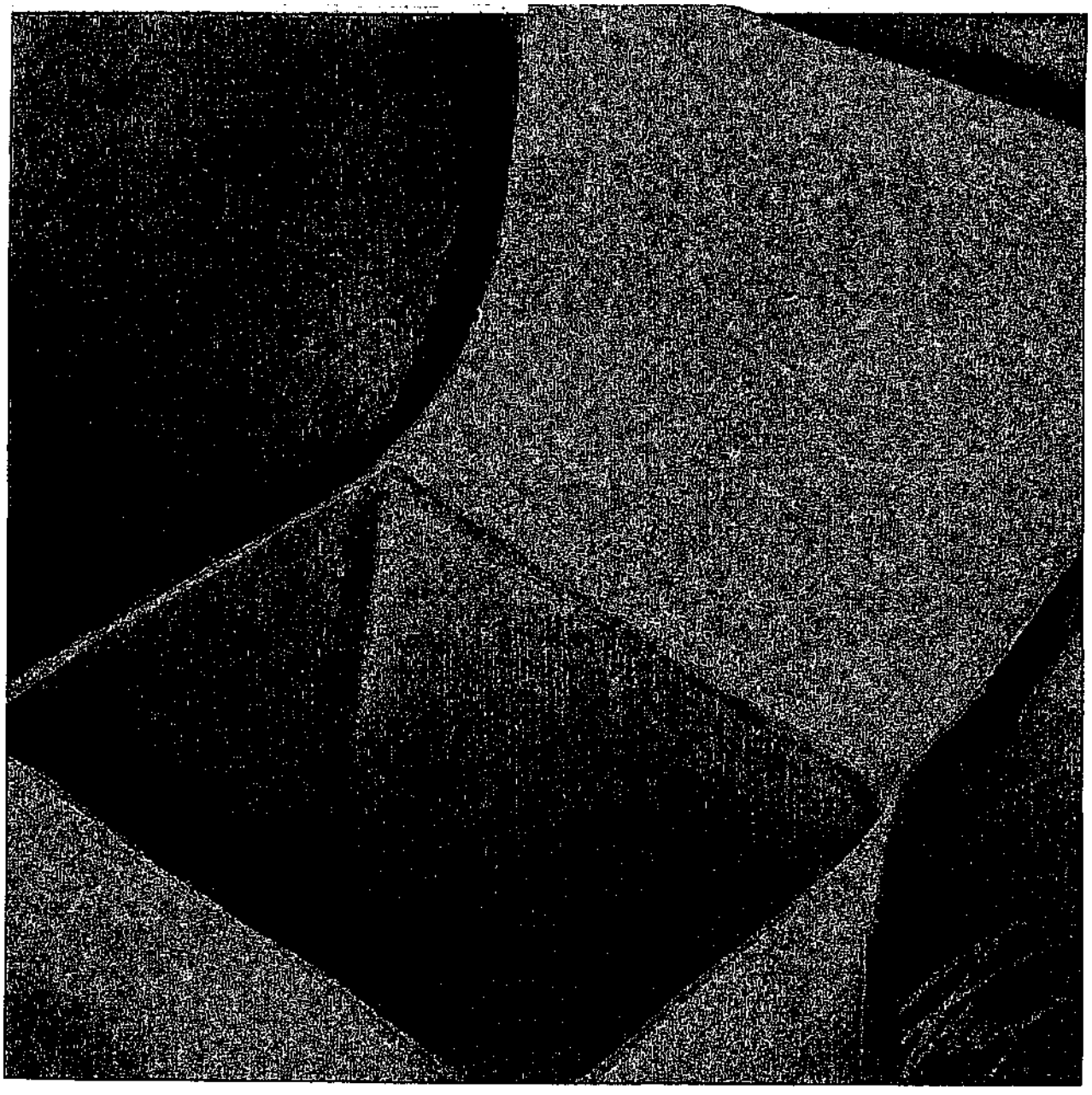

liability case

As in other areas of litigation, to be successful in a product liability case, it is imperative that you think about your case and know where you have to go. You must know the elements of your cause of action. Then you must think about what evidence you need to prove each of those elements and how best to secure it. You must continually ask yourself "What is this case about?" and "What must I prove?" Don't let the case become a runaway freight train. You must try to keep the case focused and as simple as possible. Theodore Koskoff, an accomplished trial lawyer, wrote in his *Essays on Advocacy* to "cerebrate" about your case. This is especially true in the product liability case.

An in-depth discussion of product liability law is beyond the scope of this article. Case law is discussed only where necessary to put in context the discovery issues discussed. I recommend *Virginia Law of Products Liability* by Gary Spahn and Robert Drain as a good source for the discussion of the law.

Under either negligence or warranty theory[1] plaintiff must prove: (1) product was unreasonably dangerous either for its intended or reasonably foreseeable uses, and (2) the unreasonably dangerous condition existed when the product left the defendant's hands.[2] As in other areas of litigation, your discovery must be designed to flush out information necessary to prove these elements.

Discovery is guided by Rule 4:1 of the Virginia Rules of Supreme Court and Rule 26 of the Federal Rules of Civil Procedure. Those rules allow for the discovery of information relevant to a claim or defense, and for the discovery of the existence of documents or tangible items and persons with knowledge relevant to a claim or defense. The scope of discovery is limited by the requirement that the requested information be reasonably designed to lead to the discovery of admissible evidence.

Presuit investigation

Presuit investigation in a product case is extremely important. You should immediately obtain the product and preserve it in the state in which it was when the injury occurred. While lack of the product is not an automatic bar to recovery,[3] not having the product may result in practical proof problems which will be difficult, if not impossible, to overcome.[4]

You should then determine the existence of other incidents or cases involving the same or similar product. An invaluable source of information is to contact other lawyers who have handled these cases, review their discovery requests and responses.

Your own expert should be located and consulted prior to conducting discovery. I emphasize the word "consult" because such experts are generally non-discoverable.[5] Do not allow the expert to do any destructive testing on the product because you may open the door to a challenge by the defendant that the product has been changed from the time of the alleged injury. If such testing is necessary before suit is filed, photograph the product to portray its condition. Note also that any testing done by an expert, either before suit is filed or afterwards, should be done under circumstances substantially similar to those existing at the time of the incident. If not, the test and results will not be admissible.[6]

Caution should be used in selecting an expert. Forensic testimony has become big business and most experts command a high price for their services. Don't allow the expert to snowball you. You must critically evaluate any intended expert, and apply your common sense to their purported opinions.

Remember, if their opinions do not seem sound to you, they probably aren't. The second caveat in dealing with an expert is to not let the expert take control of the case. Remember-you are the lawyer and you are the one who knows what must be proved to prevail.

Which leads me to the next point on presuit investigation. That is you must educate yourself on the product through books, magazines, trade journals, and any other source which may contain helpful information. There are innumerable sources of information available concerning just about every product imaginable. All it takes on your part is a little ingenuity and imagination. Without doing such background work, you will not be able to critically evaluate your case, your expert, or your opponent's positions.

Another important step in the presuit phase is to determine whether the product has been subject to any product recalls, government investigations (i.e. NHTSA, CPSC), "news" show investigations or any other such inquiry. If so, request and review all such information.

Formal discovery

Interrogatories. Discovery in products cases tend to be an evolving and time-consuming process, so be thoughtful in the interrogatories served. It is best to save some for later stages of the case as the issues become more focused. I generally serve an initial set of discovery with the complaint to flush out the issues and parties as early as possible. Another word of caution, it is best to serve your suit with plenty of time left on the statute. You want to leave ample time to add any unknown defendants as well as to correct any misnaming of the parties. You are playing with fire if you wait to the last few days to file suit!

There are some discovery requests which I believe are absolutely essential in the products case:

(1) Other claims and incidents, including date of alleged incident, the date notice of the claim was received by the defendant, facts relating to the occurrence, and if the case has been filed, the date of filing and style, and name and address of the attorney handling the case. This information is extremely important for several reasons. First, prior incidents may be evidence of the defective nature of the product. Second, this is a tremendous source of additional information through contact with other attorneys handling similar cases. Third, this information is relevant on the issue of the defendant's knowledge of the defect, and also goes to punitive damages. Fourth, it is a means by which to ascertain that a defendant is consistent in its responses. That is, by networking with other attorneys handling similar cases, you can determine whether the responses are consistent with those given in other cases. Fifth, such evidence is useful from a psychological standpoint. A defendant does not want evidence of numerous other cases coming into evidence. Conversely, a plaintiff may reevaluate his case if there are no other similar incidents reported.

As a precaution, make the request for this information as narrow as reasonably possible to increase your chance of winning a motion to compel, as well as to eliminate production of unrelated material. Remember the information produced is useless unless you review it. This is a very time-consuming process, and you do not want to waste time reviewing unnecessary information.

The likely arguments to counter in a motion to compel are that the request is overly broad and beyond the scope of permissible discovery. Your response to these objections are (if you followed the advice above) that the request is narrowly drafted, and that the information is relevant for the reasons stated above. There are a couple of great cases which you must add to your arsenal to obtain this information. They are *Kozlowski, PPA* v. *Sears, Roebuck & Co.* 73 F.R.D. 73 (1976) and *Clark v. General Motors Corp.,* 20 Fed. R. Serv. 2d 679 (1975). The court in *Kozlowski* held that a defendant who creates a complex and burdensome record keeping system regarding prior incidents cannot then use the burdensomeness of the system to avoid its discovery obligations. *Kozlowski* at 76.1 have used the *Kozlowski* case to have a Circuit Court judge order the production of all bathroom slip and fall incidents involving a national hotel chain. Also be aware of the line of cases holding that a party (including a product liability defendant) must provide good faith answers to discovery.[7]

(2) Serve interrogatories confirming that defendant manufactured, assembled or sold the product. If you are dealing with a component part, you must also serve discovery to determine who manufactured the component part, as well as identifying all those in the chain of distribution. Discovery must be tailored to the particular defendant. If the defendant is a retail seller, fashion discovery to confirm that it sold the product. Also determine from whom it purchased the product. If alleging a design defect, determine who was chiefly responsible for the design of the product.

(3) Ask defendant to identify its expert. Oftentimes the defendant will respond that no such determination has been made. Note that under Va. Sup. Ct. R. 4:1(e)(1) and Fed. R. Civ. P. 26(e)(1), a party is obligated to "seasonably" supplement a response regarding identity of testifying experts. After the defendant's expert is identified, gather as much information on the expert as possible, i.e. whether he has testified before, whether he testified for this defendant before, and whether he testified on this alleged defect. Determine whether he has written on the subject, and if so, obtain all such writings. Determine whether the expert is a member of any professional associations, and determine the expert's relationship to the defendant. For example, often an expert will work for a company that does work for a trade association to which the defendant belongs.

Importandy, much of this information can be obtained through networking with other lawyers who

have handled these cases. Experience has shown that in the more common product cases, you often see the same experts. By obtaining such expert's depositions from other lawyers, you can gather a tremendous amount of information concerning the expert's education, professional associations, and writings, all without and before taking their deposition. Also check with ATLA's expert database and deposition bank. Finally, speak with your expert. Often your expert will know or have had cases against the defendant's expert.

(4) You should discover whether the defendant contends that the plaintiff was contributorily negligent, assumed the risk, or misused the product, and if so, to state all facts supporting these defenses and to identify all persons having knowledge of all such facts. Do note that contributory negligence is a defense to a negligence-based product action,[8] is not a defense to a warranty based action,[9] that assumption of risk is a defense to a negligence action,[10] but the assumption must be both voluntary and knowing,[11] and that a foreseeable misuse of the product is not a defense.[12]

(5) Post incident remedial measures-serve an interrogatory asking for information on any post incident changes related to the alleged defect. Such information is discoverable under the rules of discovery, i.e. may lead to information on knowledge of defect. Note that such information is also admissible in evidence for limited purposes, i.e. proof of ownership or feasibility of a corrective measure, if controverted.[13]

(6) Discovery regarding most knowledgeable person-serve interrogatory determining who on defendant's staff is chiefly responsible or most knowledgeable regarding your alleged defect. Again it pays to draw a narrow allegation of defect and thereby have a narrow focus here, otherwise, you will probably encounter a response to this inquiry that hundreds or thousands of people were involved with the assembly or design of the product and no one or two individuals can be named. Once you have this person identified, you can then search the relevant literature for any writings he authored to be used in subsequent discovery or at trial. Additionally, obtain deposition transcripts from other lawyers who have deposed these individuals on similar cases. Such deposition testimony is admissible for impeachment and may be admissible substantively.[14]

Requests for Production. Requests for production are extremely valuable tools in the product liability case. Again, the requests should be narrowly drawn. There are some basic things that you must ask for.

(1) From the seller, request all documents it provided to the buyer when the product was sold. This request should generate owners' manuals (which include operating instructions, maintenance information, warnings, and warranty information), and sales receipts (which may also contain warranty information). Also request sales and promotional material used in advertising the product. This information relates to the foreseeable uses that the product may be put by a consumer, may create warranties, and may be used to combat a defense of product misuse.[15] Also request from the retail seller all documents it received from whomever it purchased the product. This information may be relevant to a warranty claim, may contain warnings given by the manufacturer, and may contain information on the proper assembly or adjustment of the product prior to delivery to the consumer.

(2) All design diagrams, specifications, and blueprints should be requested in a design case. In an assembly defect case, you should request documents relating to the assembly process. The design diagrams would also have to be requested in such a case to be able to compare the product as assembled with how it was designed to be assembled.

(3) Request copies of all documents relating to all prior similar claims. Relevant for reasons discussed above.

(4) Request all documents relating to tests or inspections of the product. This information is relevant to proving a defect, as well as proving knowledge of defect, and may relate to punitive damages.

As a practical matter, you must have a way to organize and recall the information contained in production of thousands of pages of documents. This is another reason to contact other attorneys handling your type of case. The number of hours involved in organizing the material is staggering, and often this has been done by other lawyers. There are services available to do this but they are expensive. Also there are software programs available to help in document control.

Depositions. (1) Experts-Under the state court rules, deposition of an expert is not a matter of right.[16] However, common practice is that each side depose the other's expert. Which leads to the question 'To depose or not to depose". Serious thought must be given to whether to depose the defendant's expert. Consider whether you really need to do so, in light of the deposition transcripts which you have previously obtained. If you decide to depose the defendant's expert, you must educate yourself beforehand on the technical issues involved, as well as on the expert's background. Recognize that many experts have testified numerous times on the very issues you are asking about, so if you are not fully prepared, it will be a waste of your time and your client's money. Additionally, if you are not fully prepared to take the deposition, you will give the expert and your opponent the psychological edge.

(2) Corporate representatives-You may also want to depose the persons involved in the design of the product, or a corporate representative knowledgeable concerning the product's design or assembly. If you do not know that person's identity, use Va. Sup. Ct. R. 4:5(b)(6) or Fed. R. Civ. P. 30(b)(6) which allows you to describe the area of inquiry and requires the defendant to designate and produce a person knowl-

edgeable in those areas. However, if such a deposition is to be taken, you must prepare for it. Again, many of these designated persons will have testified before, and you should obtain those depositions, as well as speaking with attorneys who have taken their depositions.

Request for Admissions. Requests for Admissions are extremely useful in the products case. Think about the elements of your case, and how you can use a request to simplify and satisfy your proof. For example, requests can be used to prove that the defendant manufactured and or sold the product. Requests can also be used to prove that the defendant knew the product was defective. For example, you can make reference to any tests conducted by the defendant (which you have previously discovered through interrogatories) and the results of those tests. Similarly, requests can be fashioned using the information you have previously discovered concerning other claims to establish the defendant's knowledge of other claims before the date of your client's injury. All requests should be simply and narrowly drawn to avoid objection.

Protective Orders. Many times a manufacturer will request that a protective order be entered in exchange for producing the information requested. Serious thought should be given to whether to voluntarily agree to the protective order. You should consider that the burden is on the moving party to prove, by good cause, that the requested information is "a trade secret or other confidential research, development, or commercial information."[17] The protective order must, at a minimum, include language from the statute allowing you to share the information with other lawyers handling similar cases.[18] The inclusion of such language is the only way to ensure that the defendant has produced the same documents to you that they have produced to other plaintiffs with similar cases. Another practice tip here is not to agree to return the documents at the close of the case. Such a requirement is very time-consuming, requiring you to review all documents to delete notes. Additionally, it raises the risk of sanctions for an unintentional failure to return all the documents.

Inspection of Product by defendant or its Expert. A defendant will be able to examine the product either by agreement or through a request for production. You should lay the ground rules regarding any such inspection. First, require that the defendant disclose beforehand who will be doing the inspection. Second, if the condition of the product is important to your case, do not allow the defendant to manipulate it or do any destructive testing of the product. Third, you should attend the inspection, and photograph it.

Do be aware that the recent revisions to the Federal Rules of Civil Procedure include changes to the discovery rules. Federal Rule of Civil Procedure 26 now requires a party to disclose, without a request, the name and address of persons having knowledge of discoverable information, to produce or describe relevant documents, to provide a computation of damages, to produce insurance agreements, and to identify expected testifying experts and produce their reports.

Dealing with discovery abuse

Motions to compel are, unfortunately, common in the product liability case. Some steps should be taken to increase your chance of success in arguing the motion. First, the request should be narrowly drawn to begin with. Second, reasonable efforts should be made to resolve the dispute and all efforts of such should be memorialized by a letter. If the dispute cannot be resolved, then a discovery conference with the court can be requested under Va. Sup. Ct. R. 4:13. A motion to compel can be filed under Va. Sup. Ct. R. 4:12(a)(1), and attorney fees can be awarded under Va. Sup. Ct. R. 4:12(a)(4). The rules provide for other sanctions if discovery abuse occurs. Those sanctions are set out at Va. Sup. Ct. R. 4:12(b). They are as follows: ordering that the issue being inquired into is established in accordance with the claim of the person obtaining the order; ordering that the disobedient party not be allowed to support designated claims or defenses, or prohibiting it from introducing designated matters in evidence; or striking the pleadings or parts thereof, or staying matters until discovery orders are obeyed, or dismissing the action or entering a default against the disobedient party. Rule 37 of the Federal Rules of Civil Procedure contains provisions similar to those contained in Rule 4:12.

Discovery abuse takes myriad forms in the products area, rearing its ugly head in the following forms: boilerplate objections, use of semantics, delay, obstruction at a deposition, evasive or misleading responses, destruction, loss or suppression of evidence, massive production of documents, better known as "truck load discovery". Alas, do not be forlorn, there is good case law developing to combat such abuses. For example, in *Dollar v. Long Mfg. NC, Inc.*,[19] the court stated broad objections based on generalizations are insufficient and may result in a waiver to object on any grounds. In *Sellon* v. *Smith*,[20] the court imposed sanctions for an unreasonably narrow interpretation of straightforward requests. In *Royalty Petroleum Co. v. Arkla, Inc.*,[2i] a party and counsel were sanctioned for filing supplemental responses concerning issues central to the case on the day before trial. In *Ralston Purina Co. v. McFarland*,[22] the court held counsel's instructions to his client not to answer questions during a deposition were indefensible and contrary to the discovery rules. In *Votour* v. *American Honda Motor Co.*,[22] the court upheld a default judgment against defendant for "deceptive and deliberately evasive responses... designed to obfuscate the discovery rules."

Several remedies have evolved regarding the loss or destruction of evidence. One such remedy is the "adverse inference rule." That is, the unexplained loss or destruction of evidence creates an inference that

the evidence would have been favorable to the other side.[24] The second remedy is sanctions.[25] A third remedy is an independent cause of action for destruction of evidence.[26]

To deal with truckload discovery, demand that the producing party provide an index to the documents.[27] Seek attorneys' fees for reviewing materials that were produced but are outside the scope of the request. A third option is to seek sanctions for abusive overproduction.[28]

In dealing with discovery abuse, you must be persistent and you must build a good record.

Conclusion

In closing, let me reemphasize what was said at the beginning: to successfully use the discovery rules in the product liability case, you must know the elements of your case and you must think about how best to secure it. Be imaginative and persistent and you will get what you need.

Endnotes

1. Virginia has not recognized strict liability created under the Restatement (Second) of Torts §402A (1966), *Sensenbrenner v. Rust, Orling & Neale Architects, Inc.,* 236 Va. 419, 374 S.E.2d 55 (1988); *St. Jarre v. Heidelberger DruckmaschinenAG.,* 816 F.Supp. 424 (E.D. Va. 1993).
2. *Logan* v. *Montgomery Ward & Co., Inc.,* 216 Va. 425, 219 S.E.2d 685 (1975).
3. *See Southern States Coop. Inc. v. Doggert,* 223 Va. 650, 659,292 S.E.2d 331, 336-337 (1992).
4. *See Stokes v. L. Geismar, SA.* ,815 F.Supp. 904 (E.D. Va. 1993), granting summary judgment in favor of defendant because: 1. plaintiff failed to produce the saw which allegedly caused him injury, and 2. there were no eyewitnesses to the accident; therefore plaintiff failed to meet burden of proof under Virginia product liability law, *affd,* 16F.3d411 (4th Or. 1994).
5. *See* Va. Sup. Ct. R. 4:1 (b)(4)(B), Fed. R. Civ. P. 26(b)(4)(B).
6. *See Swiney v. Overby,* 237 Va. 231, 232-233, 377 S.E.2d 372, 374 (1989); *Chase* v. *General Motors Corp.,* 856 F.2d 17, 20 (4th Cir. 1988).
7. Am. Law Prod. Liab. 3d §53:60 and *Washington State Physicians Ins. Exch. and Assoc, v. Fisons Corp.,* 122 Wash.2d 299 (1993) (entering default against defendant for failing to answer discovery). In *Rogers v. Tri-State Materials Corp.,* 51 F.R.D. 234, 245 (N.D. W.Va. 1970) the court stated that interrogatories, if relevant, are not objectionable simply on the grounds they may cause the answering party work, research or expense.
8. *See Ford Motor Co. v. Bartholomew,* 224 Va. 421,431, 297 S.E.2d 675,680-681 (1982).
9. *Brockett v. Harrell Bros.,* 206 Va. 457, 463,143 S.E.2d 897,902 (1965) and *Jones v. Meat Packers Equip. Co.,* 723 F.2d 370,373 (4th Cir. 1983).
10. *See White Consolidated Indus. Inc. v. Swiney,* 237 Va. 23,376 S.E.2d 283 (1989).
11. *Virginia Elec. & Power Co. v. Winesett,* 225 Va. 459,470, 303 S.E. 2d 868, 875 (1983).
12. *Featherall v. Firestone Tire & Rubber Co.,* 219 Va. 949, 252 S.E.2d 358 (1979); *Besser Co. v. Hansen,* 243 Va. 267,415 S.E.2d 138 (1992); *Euler v. American Isuzu Motors,* 807 F. Supp. 1232 (W.D.Va. 1992).
13. *See* Va. Code Ann. §8.01-418.1 (1950, as amended).
14. *See Grayv. Graham,* 231 Va. 1,5, 341 S.E.2d 153 (1986) and Federal Rule of Evidence 804(b)(1).
15. *See Leichtamer* v. *American Motors Corporations,* 67 Ohio St. 2d 456,424 N.E.2d 568 (1981), the Jeep CJ-7 case in which Court affirmed admission of TV advertising on grounds relevant to consumer expectations and foreseeable misuse of product.
16. $_1$S<?eVa.Sup.Ct.R.4:I(B).
17. Va. Sup. Ct.R. 4:1(c)(7).
18. *See* Va. Code Ann. §8.01-420.01 (1950, as amended).
19. *Dollar* v. *Long Mfg. NC, Inc.,* 561 F.2d 613, 617 (5th Cir. 1977), *cert, denied,* 435 U.S. 996 (1978).
20. *Sellon* v. *Smith,* 112 F.R.D. 9,12-14 (D.Del. 1986).
21. *Royalty Petroleum Co. v. Arkla, Inc.,* 129 F.R.D. 674 (W.D. Okla. 1990).
22. *Ralston Purina Co. v. McFarland,* 550 F.2d 967 (4th Cir. 1977).
23. *Votour v. American Honda Motor Co.,* 435 So.2d 368 (Fla. Dist. Ct. App. 1984).
24. *Vick v. Texas Employment Comm* 'n, 514 F.2d 734,737 (5th Cir. 1975).
25. *See Southern Pac. Transp. Co. v. Evans,* 590 S.W.2d 515 (Tex. App. 1979), *cert, denied,* 449 U.S. 994 (1980), wherein a default judgment was affirmed following defendant's dismantling of the automobile the plaintiff claimed was defective.
26. *See Bondu v. Gurvich,* 473 So. 2d 1307 (Fla. Dist. Ct. App. 1984), wherein a hospital lost records indispensable to plaintiffs medical malpractice action.
27. *See Sabel v. Mead Johnson & Co.,* 112 F.R.D. 211 (D. Mass. 1986).
28. *See Consolidated Equip. Corp. v. Associates Commercial Corp.,* 104 F.R.D. 101 (D. Mass. 1985), wherein the complaint was dismissed when plaintiff responded to discovery by offering to permit defendant to inspect 47 feet of business files undifferentiated with respect to the claims.

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