

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

Appeal from Charleston County
Court of Common Pleas

The Honorable J.C. Nicholson, Jr., Circuit Court Judge

Case No.: 2013-CP-10-02928
Appellate Tracking No.: 2016-002209

Steven Newbern and Claudia Newbern Appellants,

v.
Ford Motor Company Respondent.

**CONSENT MOTION TO SEAL LIMITED TRIAL RECORDS IN ORDER
TO PROTECT PROPRIETARY TRADE SECRET INFORMATION**

Pursuant to Rule 41.1 of the South Carolina Rules of Civil Procedure and Rule 240 of the South Carolina Appellate Court Rules, Respondent Ford Motor Company (“Ford”), by and with the consent of Appellants Steven Newbern and Claudia Newbern (“Appellants”), requests the Court seal limited portions of the trial record in order to protect proprietary and confidential trade secret information. In support of this consent motion, Ford would show to the Court as follows.

PROPRIETARY DOCUMENTS AT ISSUE

The underlying case involves allegations concerning performance of the restraint system installed in a 2009 Ford Focus. During trial counsel for the parties introduced a proprietary and confidential Ford document and elicited testimony from various witnesses relating to the proprietary and confidential document. Specifically, the Ford document marked as Defendant’s Exhibit No. 50 and identified as the Calibration Sign-off Report applicable to the front airbag

supplemental restraint system in the 2009 Ford Focus vehicle is a proprietary and commercially sensitive document providing details regarding calibration development and performance conducted by Ford's supplier, Bosch, to meet Ford's internal performance specifications. The report was produced by Ford subject to an agreed upon Protective Order and introduced at trial subject to the agreement of the parties and the trial court to seal the document.

Defendant's Exhibit 50 was moved into evidence, without objection, during cross-examination of Ford Design Analysis Engineer Ram Krishnaswami. (Tr. p. 483, line 13 – p. 484, line 11) During a break that followed shortly after admission of this evidence, Ford reiterated the need to treat the exhibit as a confidential document, and the trial court noted that “[o]nce the trial is over I’ll seal it. I have no problem doing that.” (Tr. p. 492, line 14 – p. 493, line 23) At the close of the trial, the trial court again noted that “by stipulation of the parties” it would mark the Stipulation on Confidential Documents Used at Trial as Court Exhibit 1 and seal Defendant's Exhibit 50. (Tr. p. 819, lines 21-25)

AUTHORITY TO SEAL RECORDS

This Court has the power to seal portions of the trial record, as the common law right of access to judicial records is not absolute. *See Nixon v. Warner Comm., Inc.*, 435 U.S. 589, 598 (1978); *United States v. Webber*, 791 F.2d 103, 106 (8th Cir. 1986); *In re Applications of Kansas City Star*, 666 F.2d 1168, 1176 (8th Cir. 1981). Whether court records should be sealed “requires a weighing of competing interests” exercised in light of the relevant facts and circumstances of the particular case and, therefore, is a decision that is committed to the sound discretion of the trial court. *Webster Groves Sch. Dist. v. Pulitzer Publ’g Co.*, 898 F.2d 1371, 1376 (8th Cir. 1990); *Independent Sch. Dist. No. 283, St. Louis Park, Minn. v. S. D.*, 948 F. Supp. 892, 898 (D. Minn. 1996). As the Supreme Court has explained, “[e]very court has

supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for an improper purpose.” *Nixon*, 435 U.S. at 598.

To the extent that confidential and/or proprietary information needs to be protected, this Court may seal portions of the record and exhibits admitted during trial. *See* Rule 41.1(a), SCRPC. As recognized by Rule 41.1, “as technology advances, court records will be more readily available and this Rule seeks to balance the right of public access to court records with the need for parties to protect truly private or proprietary information from public view.”

SOUTH CAROLINA HAS RECOGNIZED SEALING OF TRADE SECRETS

The South Carolina Supreme Court has recognized that the right to inspect and copy judicial records is not absolute, and public access to court records may be restricted in certain situations such as trade secrets. *See Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 630 S.E. 2d 464 (2006). Ford’s proprietary documents made the basis of this motion relate to trade secrets falling squarely within the traditional definition. Courts have made it clear that “trade secrets” and “confidential commercial information” are broad concepts that include any compilation of information which may give an advantage over a competitor. *Weinstein on Evidence*, Sec. 508 [03] 1984; *Doerfer*, The Limits of Trade Secret Law Imposed by Federal Patent and Antitrust Supremacy, 80 Harv. L. Rev. 1432 (1957); *Stedman*, Trade Secrets, 23 Ohio St. J. 1962.

South Carolina also has enacted the Trade Secrets Act, *S.C. Code Ann.* §§ 39-8-10, *et seq.*, which defines “trade secret” as “information...that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public or any other person who can obtain economic value from its disclosure or use...” *S.C. Code Ann.* § 39-8-20(b)(5). All parties agree that the exhibit made the basis of this consent motion meets and exceeds the standards of confidentiality and that the

information contained in the exhibit is sufficiently proprietary and confidential to justify sealing.

The Calibration Sign-off Report applicable to the front airbag supplemental restraint system in the 2009 Ford Focus vehicle at issue here embodies proprietary information, technological know-how, and confidential business records accumulated by Ford Motor Company at great effort and expense. The report also contains technical information, calculations and performance matrices, and an explanation of Ford's design and testing criteria. The dissemination of this material would provide competitors with information regarding design, development, manufacture, testing techniques, and test programs conducted by Ford to its great competitive disadvantage in the marketplace. Moreover, public dissemination of the Calibration Sign-off Report applicable to the front airbag supplemental restraint system in the 2009 Ford Focus vehicle would reveal confidential and proprietary information regarding the methodology Ford follows to identify and respond to product development and concerns. Protecting the confidentiality contemplated by the parties also will foster the full and candid pre-trial disclosure of information pursuant to our discovery rules.

The automotive manufacturing business is very competitive, and there is a very real and significant danger that other manufacturers could use the information contained in this Ford document to develop a competitive edge. Disclosure would therefore cause significant damage to Ford's market position; the harm caused by unfettered dissemination unquestionably warrants continued protection.

For all of these reasons, as well as those reasons presented to the trial court and incorporated herein by reference, Ford, with consent of Appellants herein, respectfully moves this Court for an order permitting it the filing of the Calibration Sign-off Report applicable to the front airbag supplemental restraint system in the 2009 Ford Focus vehicle under seal. Ford

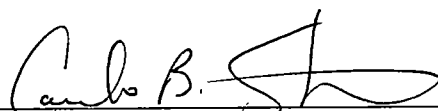
further requests that the deadlines for the Record on Appeal, as well as the final briefs of the parties, be held in abeyance until such time as the Court may issue a ruling on the instant consent motion.

CONCLUSION

In summary, Defendant's Exhibit No. 50 contains proprietary and trade secret information. For this reason, and based upon all of the facts and authorities set forth in Ford's Motion to Seal, Respondent, with the consent of Appellants, respectfully requests this Court grant Ford's consent motion to seal Defendant's Exhibit No. 50 as set forth herein.

WE SO MOVE.

April 25, 2017

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WE CONSENT.

April 25, 2017

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PROOF OF SERVICE

I certify this 25th day of April 2017 that I have served a copy of the CONSENT MOTION TO SEAL LIMITED TRIAL RECORDS IN ORDER TO PROTECT PROPRIETARY TRADE SECRET INFORMATION upon other counsel of record, by mailing same, postage prepaid in the United States mail, addressed to the following:

William E. Applegate IV, Esquire
Yarborough Applegate, LLC
291 East Bay Street, Second Floor
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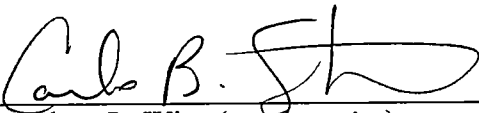
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SC Court of Appeals

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Steven Newbern and Claudia Newbern v. Ford Motor Company
Appellate Case No.: 2016-002209
File No.: 5100.360

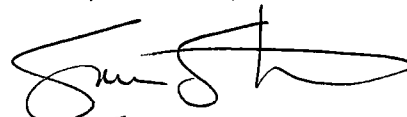
Dear Ms. Kitchings:

Enclosed please find the originals and one copy each of the Consent Motion To Seal Limited Trial Records In Order To Protect Proprietary Trade Secret Information and Proof Of Service regarding the above-referenced matter. Please file the original documents and return clocked copies to me via our office courier. Thank you for your assistance with this matter, and please contact me if you have any questions.

With kind regards, I am

Very truly yours,

TURNER, PADGET, GRAHAM & LANEY, P.A.



Carmelo B. Sammataro

CBS/tj

Enclosures

cc: William E. Applegate IV, Esquire
Kathleen C. Barnes, Esquire
Raymond O. Bodiford, Esquire (*Pro Hac Vice*)
Stephen E. Van Gaasbeck, Esquire (*Pro Hac Vice*)
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