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S.C. SUPREME COURT

The State of South Carolina
In the Supreme Court

ON CERTIFICATION FROM AN APPEAL IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Appellate Case No. 2016-002398

THEODORE G. HARTSOCK, JR., as Personal Representative of the Estate of Sarah Mills Hartsock (Estate of Sarah Mills Hartsock),

Plaintiff – Respondent,

v.

GOODYEAR DUNLOP TIRES NORTH AMERICA LTD, a foreign corporation; and THE GOODYEAR TIRE & RUBBER COMPANY, a foreign corporation,

Defendants – Appellants.

FINAL REPLY BRIEF OF APPELLANTS GOODYEAR DUNLOP TIRES NORTH AMERICA LTD. AND THE GOODYEAR TIRE & RUBBER COMPANY

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ARGUMENT IN REPLY

The Final Brief of Respondent (the "FBR") is long on assertion, but short on demonstration; a trait that becomes evident beginning with the statement that "there is no authority in South Carolina or elsewhere that supports Appellants' circuitous logic that, if a party is permitted to withhold certain information, then the party has automatically been granted a 'privilege'". (FBR at 4.)[1] This statement misconstrues Appellants' position and ignores the substantial authority from South Carolina and elsewhere cited between pages 5 and 10 of the Final Brief of Appellants ("FBA"),[2] including the definition of "privilege" in Black's Law Dictionary, *Privilege*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Privilege" is generally defined as "[a]n evidentiary rule that gives a witness the option to not disclose the fact asked for, even though it might be relevant; the right to prevent disclosure of certain information in court ... ."), the commentary of prominent evidence scholars, Edward J. Imwinkelried, THE NEW WIGMORE: EVIDENTIARY PRIVILEGES § 1.1 at 2-3 (2d ed. 2009) ("As delimited, privileges are the evidentiary rules that allow a person who communicated in confidence or who possesses confidential information to shield the communication or information from compelled disclosure during litigation."); *id.* § 9.2 at 1456 ("[T]oday the existence of the privilege [for trade secrets] is a given."); *id.* App'x D, Topical Secrets at 1807, 1848

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[1] Respondent's Statement of the Case contains an erroneous recitation of the underlying case, but is in any event irrelevant to the certified question of law.

[2] Abbreviations and terms used herein shall bear the same meaning as in the FBA unless otherwise stated.

(listing S.C. Code Ann. § 39-8-60 as a privilege), and the decisions of this Court and others, *S.C. State Hwy. Dep't v. Booker*, 260 S.C. 245, 254–55, 259, 195 S.E.2d 615, 619–20, 622 (1973) ("[P]rivileged matter in South Carolina is matter that is not intended to be introduced into evidence and/or testified to in Court" or discovered pretrial even though "relevant."); *S.C. State Bd. of Med'l Examiners v. Hedgepath*, 325 S.C. 166, 169, 480 S.E.2d 724, 726 (1997) ("The terms 'privilege' and 'confidences' are not synonymous, and a professional's duty to maintain his client's confidences is independent of the issue whether he can be legally compelled to reveal some or all of those confidences, that is, whether such communications are privileged." (footnote omitted)); *accord McCormick v. England*, 328 S.C. 627, 633–34, 494 S.E.2d 431, 433 (Ct. App. 1997) (privilege is right "to refuse to disclose in court," or otherwise, confidential information); *Snavely v. AMISUB of S.C., Inc.*, 379 S.C. 386, 393 n.5, 665 S.E.2d 222, 225 n.5 (Ct. App. 2008) ("privilege" refers to right "to refuse to disclose in court" confidential information); *cf. State v. Gonzalez*, 234 P.3d 1, 10 (Kan. 2010)) ("A privilege is a rule of evidence that allows a person 'to shield [a] confidential communication or information from compelled disclosure during litigation.'" (quoting Imwinkelried, THE NEW WIGMORE: EVIDENTIARY PRIVILEGES § 1.1, at 2 (2d ed. 2009))); *Ex Parte Mendel*, 942 So. 2d 829, 836 (Ala. 2006) (term "privilege" is "used to describe written or oral communications, which, because of the nature of the relationship or transaction, are confidential and protected from disclosure," including qualified privileges).

According to Hartsock, "South Carolina does recognize a statutory trade secret, but not a trade secret privilege." (FBR at 5.) In his unsuccessful effort to establish that distinction, Hartsock asserts that

> preservation of secrecy during litigation does not equate to establishment of an evidentiary privilege against disclosure for trade secrets. Rather, S.C. Code Ann. § 39-8-60 provides for the confidentiality of trade secrets during the litigation process but nothing more.

(FBR at 7–8.) The concession that South Carolina has a statutory trade secret law which protects trade secrets during litigation is a fatal one because the quintessential character of an evidentiary privilege under the authorities discussed above is the right to preserve confidentiality *during litigation.* The right to hold trade secrets in confidence *outside litigation* is a property right that has nothing to do with privilege. *Cf.* S.C. Code Ann. § 39-8-30.[3]

Nowhere does Hartsock venture a clear definition of privilege. However he does argue that "[h]ad South Carolina's Legislature intended to create a trade secret privilege, it could have, using clear and explicit language, when it first adopted a form of the Uniform Trade Secrets Act in 1992 or when it replaced the 1992 statute with the SCTSA in 1997." (FBR at 11.) The implication is that a statute must employ the word "privilege" to give rise to an evidentiary privilege under South Carolina law.

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[3] Of course, the SCTSA also ensures, in the event that disclosure is ordered, that the trade secrets are protected from further dissemination during and following the litigation. *See, e.g.*, S.C. Code Ann. § 39-8-60(E), (F), (H), (I); *id.*, § 39-8-90, -100.

The same notion underlies the statement that "[t]he South Carolina Legislature has intentionally and unequivocally created statutory privileges of varying degrees and, when it has done so, it has done so explicitly." (FBR at 11–12.) This line of analysis rapidly becomes self-contradictory because Hartsock admits that S.C. Code Ann. §§ 19-11-30 and 19-11-95 create qualified privileges, (FBR at 12 & n.4), but upon examination it is found that neither statute uses the word "privilege." Moreover, this proposed rule is contrary to numerous decisions of this Court, the Court of Appeals and the District of South Carolina that recognize statutory protections from compelled disclosure as a "privilege," although the statute did not use the term, *see, e.g.*, (FBA at 13–14 & n.12) (collecting cases and statutes); *see also* (FBA at 11–12 & n.10) (collecting statutes creating privileges without using the express term).

Respondent also attempts to support the alleged distinction between S.C. Code Ann. § 39-8-60(B)'s protections from compelled disclosure and a "privilege" by noting that the term "privilege" is not used in that subsection, but is used in S.C. Code Ann. § 39-8-60(C), where it refers neither to Subsection (B) or any other specific type of privilege. (FBR at 5–6.) This legislative fact is supposed to support the conclusion that no privilege was intended to be created by Subsection (B), a variation on the theory that the General Assembly must call something a privilege for it to be one.

In short, Respondent's argument premised upon Subsection (C)'s reference to "any privilege" begs the question of what "any privilege" means. And were it

adopted, it would nullify Subsection (B)'s protections in certain circumstances, contrary to the text of Subsection (B) and the legislative purpose of protecting trade secrets. Subsection (C) subjects discovery requests that require "[d]irect access to computer databases containing trade secret information, so-called 'real time' discovery" to a unique rule: no access unless the Court finds "that the proponent of the discovery cannot obtain this information by any other means and provided that the information sought is not subject *to any privilege*." S.C. Code Ann. § 39-8-60(C) (emphasis added). In doing so, Subsection (C) offers no commentary upon the protections afforded by Subsection (B), but merely addresses particular circumstances where trade secrets may be exposed, and imposes heightened discovery requirements to prevent their exposure.

Nothing in the text of Subsection (C) supports the conclusion that "any privilege" does not include those protections recognized in Subsection (B) for trade secrets, and there is good reason to reject that interpretation. If "any privilege" does not include the protections recognized in Subsection (B), then a court could "order[] discovery" of a trade secret without "first determin[ing] whether there is a substantial need by the party seeking discovery for the information," contrary to the express terms of Subsection (B). This would occur whenever the trade secret is sought from a computer database and cannot be obtained "by any other means." The duty to harmonize the provisions of Code § 39-8-60 requires the Court to reject Respondent's interpretation of "any privilege." *Cf. Hill v. York Cty. Nat. Gas Auth.*, 384 S.C. 483, 490, 682 S.E.2d 809, 813 (2009) (noting that the "interpretation [of the

term 'other sources'] advanced by the Landowners would create an irreconcilable conflict in the Act" at issue and electing to "construe the term 'other sources' in a manner that reconciles and harmonizes the language with other provisions of the Act.").

When Hartsock asserts that "Appellants' argument interchangeably uses 'privilege'; 'a legal right to withhold information' and 'confidential' as if they are synonymous, based on the assertion that they convey the identical legal meaning," he sets up a strawman; a circumstance we are led to expect by the absence of any supporting citation to the Final Brief of Appellants. (FBR at 16.) Where Appellants discuss South Carolina cases, between pages seven and eight of their opening brief, they accurately maintain the distinction between the duties to maintain certain information in confidence and the right to refuse disclosure of privileged material during litigation.[4] Because the SCTSA clearly confers the latter, it creates a privilege.

Hartsock argues that *Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 674 S.E.2d 154 (2009), "was decided based on the express language of the SCTSA and Rule 26(c), rather than Rule 501, SCRE." (FBR at 17.) From this Hartsock takes the unfounded position that "[t]his Court's choice to analyze S.C. Code Ann. § 39-8-60 under the South Carolina Rules of Procedure, rather than the protection provided

[4] Respondent asserts an ability to detect a "distin[ction] between confidential information protected by the balancing tests employed by the rules of civil procedure and information entitled to a special evidentiary privilege" citing *McCormick* and *Hedgepath*. This is an odd claim inasmuch as neither case refers to any rule of civil procedure.

by Rule 501, SCRE, to privileges provides a definitive answer. There is no statutorily-created trade secret privilege in South Carolina." (FBR at 18.) Hartsock adds to this an interpretation of footnote 11 in *Laffitte* to suggest that this Court was contrasting South Carolina with "other 'jurisdictions where trade secrets are protected by a codified evidentiary privilege,' including Texas and California." (FBR at 17–18.) Several mutually reinforcing observations establish that Hartsock's analysis rests upon various misreadings of *Laffitte*.

First, Hartsock's Rule 501 analysis is circular. That Rule provides: "Except as required by the Constitution of South Carolina, by the Constitution of the United States or by South Carolina statute, the privilege of a witness, person or government shall be governed by the principles of the common law as they may be interpreted in light of reason and experience." S.C. Code Ann. § 39-8-60 is a South Carolina statute and this Court gave it effect. Bringing in a discussion of Rule 501 would have been surplusage.[5]

Second, this Court in *Laffitte* made it clear that the SCTSA and Rule 26(c), SCRCP operated together to provide the rule of decision giving rise to the *Laffitte* balancing test. Rule 501, SCRE by itself does not advance that analysis.

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[5] This may explain why, had *Laffitte* cited Rule 501, SCRE, it would have been the first reported South Carolina case to do so. That Rule 501's editor's note does not include reference to a trade secret privilege "among" its listing of privileges tells us nothing regarding the status of S.C. Code Ann. § 39-8-60(B)'s protections, contrary to Respondent's insinuation. *See* (FBR at 16). By its terms, the listing is illustrative, not exhaustive, and was adopted in 1995, before the SCTSA.

Third, the *Laffitte* Court did not intend to draw a contrast between states with codified trade secret privileges and those operating under state versions of Rule 26(c). To the contrary, *Laffitte's* use of precedent was intended to emphasize that Indiana, which had no codified privilege, and Texas and California which do, all use the same balancing test. In *Bridgestone Ams. Holding, Inc. v. Mayberry*, 878 N.E.2d 189 (Ind. 2007), the Supreme Court of Indiana stated that "[t]he application of Rule 26 to trade secrets should be informed by Indiana's enactment of the Uniform Trade Secrets Act, which provides states with a common legal framework for protecting trade secrets from misappropriation" and "evinces our legislature's intent to apply trade secret law uniformly with other jurisdictions." *Id* at 194. It also said

> Even jurisdictions that recognize a privilege for trade secrets have applied a similar balancing test. See, e.g., *In re Cont'l Gen. Tire, Inc.*, 979 S.W.2d 609 (Tex. 1998); *Bridgestone/Firestone, Inc. v. Superior Court*, 7 Cal. App. 4th 1384, 9 Cal. Rptr. 2d 709 (Ct. App. 1992). This seems like a suitable bases for analyzing such matters.

Mayberry, 878 N.E.2d at 192. Then the Indiana Supreme Court adopted a strict necessity test in reliance, inter alia, on *In re Bridgestone/Firestone, Inc.*, 106 S.W.3d 730, 733 (Tex. 2003). *Mayberry*, 878 N.E.2d at 196.

The *Laffitte* Court followed a similar analytical path, citing many of the same cases. The Court began its discussion of the standard for discovery of trade secrets by finding "that the plain language of § 39-8-60(B) clearly indicates that trade secrets may be protected during discovery not only in misappropriation cases, but in 'any civil action' where trade secrets are sought during discovery." *Laffitte*, 381 S.C.

at 473–74, 674 S.E.2d at 161–62. It continued: "this is not to say, however, that the 'substantial need' language of the Trade Secrets Act is the sole relevant inquiry in determining the standard governing trade secret information." *Id.* at 474, 674 S.E.2d at 162. The Court then quoted Rule 26(c)(7), SCRCP, and noted that "[i]n determining whether trade secret information is subject to a protective order under Rule 26(c)(7), federal and state courts typically apply a balancing test that incorporates a 'relevant and necessary' standard for the party seeking to discovery the trade secret information." *Id.*

The Court "disagree[d] with Respondent's argument that our determination that the Trade Secrets Act applies to any civil action impermissibly supplants a rule of civil procedure" because "§ 39-8-60 does not improperly limit the operation of Rule 26 in that both provide for reasonable restrictions on the discovery of trade secrets." *Id.* at 475, 674 S.E.2d at 162. Thus, "[t]he Trade Secrets Act does not supplant, but rather complements, Rule 26(c), SCRCP. Cf. *Mayberry*, 878 N.E.2d at 194 (finding that the application of Rule 26 to trade secrets' should be informed by Indiana's enactment of the Uniform Trade Secrets Act)." *Id.*

In context, the statement in footnote 11 merely stands for the proposition that it is legitimate to mate the balancing test often used under Rule 26(c) with a statutory evidentiary privilege for trade secrets. Hence, it is legitimate to mate the balancing test under Rule 26(c), SCRCP, with the substantial need requirements of

Code § 39-8-60(B). *Laffitte* not only fails to say that the South Carolina statute does not create an evidentiary privilege, its use of analogy suggests the opposite.[6]

Finally, when this Court defined the necessity prong of the balancing test, it did so in reliance on cases from Texas and California, states that Hartsock admits have trade secrets privileges. (FBR at 8–10, 18.) The *Laffitte* Court defined the necessity prong using this language:

> For the trade secret information to be deemed "necessary," we hold that the party seeking the information "cannot merely assert unfairness but must demonstrate with specificity exactly how the lack of the information will impair the presentation of the case on the merits to the point that an unjust result is a real, rather than a merely possible, threat." *In re Bridgestone/Firestone, Inc.*, 106 S.W.3d 730, 733 (Tex. 2003); *accord Bridgestone/Firestone, Inc. v. Superior Court*, 7 Cal. App. 4th 1384, 9 Cal. Rptr. 2d 709, 713 (1992) (holding that a party seeking discovery must make a "particularized showing" that "the information sought is essential to a fair resolution of the lawsuit"). "Implicit in this is the notion that suitable substitutes must be completely lacking." *Mayberry*, 878 N.E.2d at 196. In other words, the trial court must evaluate whether there are reasonable alternatives available to the party seeking the discovery of the information, and ultimately, the trial court must require the discovery of a trade secret only

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[6] Respondent's claim that *Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co.*, 107 F.R.D. 288 (D. Del. 1985), "is analogous to" this Court's test in *Laffitte*, (FBR at 19–21), cuts against Respondent on the certified question. *Coca-Cola Bottling* clearly recognized that the protections it was construing and applying were a trade secret privilege. *See* 107 F.R.D. at 292 ("It is well established that trade secrets are not absolutely privileged from discovery in litigation," but only qualifiedly privileged. (citing, inter alia, *Fed. Open Mkt. Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 362 (1979))); *id.* at 298 (addressing why "defendant's assertion of trade secret privilege" must yield). In doing so, *Coca-Cola Bottling* merely followed the Supreme Court's lead in *Merrill*, 443 U.S. at 354–62 (repeatedly referring to trade secret protections in Rule 26(c)(7) as a "privilege"), which *Coca-Cola Bottling* cited four times. 107 F.R.D. at 292, 293, 300.

> when "the issues cannot be fairly adjudicated unless the information is available." Wright & Miller, § 2043.

Laffitte, 381 S.C. at 476, 684 S.E.2d at 162.

Hartsock concludes his brief with the argument that Appellants have conceded that South Carolina has no common law evidentiary privilege for trade secrets. (FBR at 21–22.) Because Rule 501 clearly subordinates common law development of evidentiary privileges to statutory law, and S.C. Code Ann. § 39-8-60 is clearly a statute creating a qualified evidentiary privilege for trade secrets, Hartsock's argument does not advance his position.

CONCLUSION

This Court should answer the certified question in the affirmative, holding that S.C. Code Ann. § 39-8-60 creates an evidentiary privilege for trade secrets.

Respectfully submitted,

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PROOF OF SERVICE

I certify that on the 15th day of May, 2017, I served one (1) copy of the Final Reply Brief of Appellants Goodyear Dunlop Tires North America Ltd. and The Goodyear Tire & Rubber Company upon each counsel of record for all parties in this appeal via first-class United States mail and addressed as follows:

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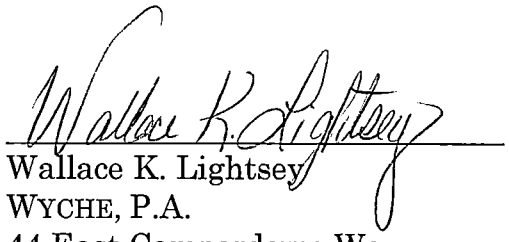

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