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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.

BRIEF OF *AMICUS CURIAE* SOUTH CAROLINA ASSOCIATION FOR JUSTICE

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STATEMENT OF INTEREST

The South Carolina Association for Justice ("SCAJ") is a non-profit organization with a membership of more than 1,200 women and men of the trial bar of the State of South Carolina. SCAJ members represent tens of thousands of South Carolinians who have been injured or who face other life-changing events due to the actions of others and are in need of legal counsel. For almost sixty years, the SCAJ has promoted the rights of citizens by advocating the right to a trial by jury, full and just compensation for innocent victims, and the maintenance of a free and independent judiciary.

SCAJ members engage in litigation on behalf of injured parties, and discovery is an important part of all litigation, especially in a complex area such as products liability. SCAJ is especially knowledgeable on the burdens of pursuing litigation, particularly products liability litigation that involves extensive discovery and difficult questions of evidentiary law.

Through the Amicus Committee, the SCAJ works to protect, through advocacy, the rights of injured individuals faced with potentially daunting litigation, including complex discovery and evidentiary issues. The SCAJ submits *amicus curiae* briefs in cases involving important consumer issues

affecting its members and those persons whom its members are sworn to protect. This Court's determination of the question certified by the United States Court of Appeals for the Fourth Circuit will impact the ability of the SCAJ members to adequately represent innocent victim clients in both products liability and personal injury actions, thereby depriving consumers of their ability to have their claims fully explored by a jury in accord with the 7th Amendment of the United States Constitution.

STATEMENT OF ISSUE ON APPEAL

In an order dated March 3, 2017, this Court agreed to answer a question of law certified by a panel of the United States Court of Appeals for the Fourth Circuit. The specific questioned certified was: Does South Carolina recognize an evidentiary privilege for trade secrets?

Put differently: Do Defendants in South Carolina's courts have a legal right to withhold otherwise discoverable information from Plaintiffs, including innocent victims of defective products, on the basis that the information is an alleged trade secret?

STATEMENT OF THE CASE

The South Carolina Association for Justice adopts by reference the Statement of the Case of the Plaintiff Hartsock. *See* Rule 208(b)(6), SCACR.

SUMMARY OF ARGUMENT

This Court should hold that South Carolina does not recognize an evidentiary privilege for trade secrets. This is the only conclusion that can be squared with statutory and common law of South Carolina as well as protect the rights of innocent South Carolina victims who have been harmed by the acts of others.

I. AN EVIDENTIARY PRIVILEGE FOR TRADE SECRETS MAY NOT BE CREATED BY IMPLICATION

Goodyear's brief to this Court devotes a substantial amount of ink to the proposition that a trade secrets privilege is self-evident. It is not. Goodyear suggests that it is widely accepted that a trade secrets evidentiary privilege both does and should exist. It does not and it should not. To that end, Goodyear points this court to literature that treats the privilege as unquestionable. Appellant's Brief at 6 (citing Edward J. Imwinkelried, The

New Wigmore: Evidentiary Privileges § 1.1 at 203 (2d ed. 2009).[1] Nonetheless, an evidentiary trade secret privilege is not as axiomatic as Goodyear would have this Court believe.

In 1963, Chief Justice Warren announced the formation of an advisory committee tasked with drafting new rules of evidence. *See* Rules of Evidence: Hearings Before the Spec. Subcomm. on Reform of Fed. Crim. Laws of the Comm. on the Judiciary, 93d Cong. 74 (1973) [hereinafter Hearings]. The committee included judges, practitioners, and academics. The academics included Judge Jack Weinstein, who had long taught evidence at Columbia University, and Professor Thomas Green of the University of Georgia School of Law. *Id.* According to Judge Weinstein, the consensus of the committee was that privileges are "hindrances' which should be curtailed." 23 Charles A. Wright & Kenneth W. Graham, Jr., Fed.

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[1] Goodyear directs this Court to the updated treatise, The New Wigmore, in support of the proposition that the existence of the privilege for trade secrets "is a given". *Id.* at 1456. The current editor of The New Wigmore, Professor Edward Imwinkelreid, is a noted proponent of an evidentiary trade secret privilege. *See, e.g.,* Edward J. Imwinkelried, *Computer Source Code: A Source of Growing Controversy Over the Reliability of Automated Forensic Techniques*, 66 DePaul L. Rev. 97, 110 (incorrectly declaring that "[e]very American jurisdiction recognizes an evidentiary privilege protecting trade secrets"). Professor Imwinkelried's opinion is contradicted, however, by another noted respected treatise, Wright & Miller's Federal Practice and Procedure. *See, e.g.,* Kenneth W. Graham, Jr., *Statutory History*, Wright & Miller, 26 Fed. Prac. & Proc. Evid. § 5641 – 42, n. 25 (referring to an evidentiary trade secret privilege as "controversial" and advocating for an "equitable procedure to protect against disclosure.").

Prac. & Proc.: Evidence § 5422, at 685 (1980) (quoting 2 Jack Weinstein & Margaret Berger, Weinstein's Evidence, ¶ 501[01], at 501-12 (1975). Most committee members believed that any "privileges contained in the rules of evidence [ought to] be narrow." *Id.* In later testimony before the House Subcommittee, Professor Edward Cleary, the reporter for the committee cited Dean Wigmore's view that many statutory privileges are the product of effective lobbying by special interest groups, which simply want the prestige of privilege. *Hearings*, at 555-56. Professor Cleary noted privileges often operated as "blockades" to the quest for truth. *Id.* at 558.

In 1969, the Advisory Committee for the Rules of Evidence proposed Federal Rule 508, which established a trade secret privilege, *See* Prop. Fed. R. Evid. 508, *available at* 46 F.R.D. 161, 270 (1969). In 1973, the Supreme Court promulgated Rule 508 as drafted by the Advisory Committee. *See id., available at* 56 F.R.D. 183, 249 (1973). However, that same year, Congress expressly rejected Rule 508, due to external pressure from consumer groups, as well as internal concerns over the definition of "person" and the proper treatment and handling of computer trade secrets. *Id.; see also* 26 Charles Alan Wright & Kenneth W. Graham, Jr. Fed. Prac. & Proc. Evid. § 5641 (discussing proposed Rule 508). Congress then left it to the states to address trade secret privilege issues. *Id.*

After Congress' rejection of the Proposed Rule 508 in 1973, only Alaska, Hawaii, Nebraska, Nevada, New Mexico, Texas, and Wisconsin adopted Rule 508 *verbatim*. Many states refused to embrace Rule 508. *See* J. Watson, *Discovery of Trade Secret in State Court Action*, 75 A.L.R. 4th 1009 (1989) & Supp. (2000). In fact, the status of the trade secrets privilege is uncertain in a number of jurisdictions, including Arizona, Colorado, Idaho, Iowa, Michigan, Minnesota, Mississippi, Montana, North Carolina, Ohio, Oregon, Rhode Island, Tennessee, Vermont, Washington, West Virginia, Wyoming, and under Military Law. *See* Kenneth W. Graham, Jr. *Statutory History*, *in* Wright & Miller, 26 Fed. Prac. & Proc. Evid. § 5641, n. 25 (2017).

South Carolina did not adopt the proposed Rule 508. The parties to this action agree that "no statutory or common law evidentiary privilege for trade secrets existed in South Carolina" as of 1975. Appellants Brief at 16; Respondent's Brief at 21. The parties also appear to agree that South Carolina has not developed a common law evidentiary privilege for trade secrets. *Id.* The Appellant further concedes that "no specific privileges have been codified in the South Carolina Rules of Evidence". Appellant's Brief at 9. There is no constitutional provision that outlines an evidentiary privilege for trade secrets. Thus, the only question before this Court is

whether South Carolina has codified a substantive trade secret privilege. It is the SCAJ's position, based on this history and the plain language of the South Carolina Trade Secrets Act, that South Carolina has not codified such a privilege and that recognizing such a privilege would work to the detriment of the injured victims for whom SCAJ members tirelessly work.

The South Carolina Trade Secrets Act (SCTSA), S.C. Code Ann. §§39-8-10 to 130 (LexisNexis, LEXIS through Ch. 7, 8, and 9 of the 2017 session), does not create a trade secret privilege. The plain language of the statute is clear. The SCTSA's purpose is addressed to the creation of a civil action for misappropriation, wrongful disclosure, and wrongful use of a trade secret. *Id.* While the SCTSA does contain a provision for maintaining secrecy of trade secrets during litigation, S.C. Code Ann. §39-8-60, this section only addresses the manner in which the Court is to protect the confidentiality of trade secrets during litigation. Section 39-8-60 does not establish a substantive privilege against the disclosure of trade secrets. There is no mention of an evidentiary privilege. There is nothing in the statute that even suggests that the intent was to create a privilege.

Privileges operate as a "blockade" to the truth. As Judge Weinstein and his committee noted many years ago, privileges are "hindrances" which should be curtailed. As such, statutory privileges such as that sought by

Goodyear, should be narrow and should exist only by virtue of specific and unequivocal language enacted by the state legislature. To infer a substantive trade secret privilege, in the absence of a clear statement of legislative intent to afford an evidentiary privilege for trade secrets, is a stretch too far. *State v. Good*, 305 S.C. 313, 417 S.E.2d 643 (Ct. App. 1992) (there can be no creation of privilege by implication); 81 Am. Jur. 2d Witnesses § 141, at 182 (1976).

Without explicit language establishing an evidentiary privilege for trade secrets in the SCTSA, such a privilege does not exist. This Court may not create a privilege by implication or judicial fiat. The parties agree that no privilege is codified in the South Carolina Rules of Evidence and no such privilege exists in common law. As such, an evidentiary privilege for trade secrets does not exist by way of statute or the common law of South Carolina. This Court should answer the certified question in the negative: South Carolina does not recognize an evidentiary privilege for trade secrets.

II. INJURED CONSUMERS IN SOUTH CAROLINA SHOULD HAVE A FAIR AND REASONABLE OPPORTUNITY TO BE HEARD BY A JURY

Cases involving South Carolinians injured by the acts of others represent only a small fraction of South Carolina courts' total caseload. In 2015, South Carolina courts had a caseload of 275,393 incoming civil cases.

Of these 275,393 cases, only four percent (4%) or 11,025 cases sounded in tort. "Examining The Work Of State Courts: An Overview Of 2015 State Court Caseloads", Court Statistics Project, Nat'l Ctr. for State Courts, p. 8 (http://www.courtstatistics.org/~/media/Microsites/Files/CSP/EWSC%202015.ashx). Nonetheless, despite representing only a small percentage of all cases filed in South Carolina courts every year, cases involving injured innocent victims, including products liability actions such as this, are frequently the most complicated and the most likely to result in a lack of access to justice due to an imbalance of power.

In products liability lawsuits, there is an imbalance of power because the defendants often possess most of the information that is relevant and necessary that the plaintiff needs to prove his or her case – the plaintiff is at the mercy of the very entity that is allegedly responsible for the harm. *See, e.g.,* Dan H. Willoughby, et al., *Sanctions for E-Discovery Violations by the Numbers,* 60 Duke L.J. 789, 803 (2010) ("Defendants are sanctioned for e-discovery violations nearly three times more often than plaintiffs."); Michael V. Ciresi, et al., *Decades of Deceit: Document Discovery in the Minnesota Tobacco* Litigation, 25 William Mitchel L. Rev. 477 (1999); and David Halperin, *Discovery Abuse: How Defendants in Products Liability Lawsuits Hide and Destroy Evidence,* Congress Watch, July 1997 (discussing court

orders sanctioning defendants for discovery abuses). Thus, it is imperative that courts carefully consider any attempt to keep information that is relevant and necessary out of plaintiffs' hands.

Discovery has a noble goal: to expose all the facts so that case resolutions are based solely on the truth. The United States Supreme Court has held that exceptions to the duty to provide information are "distinctly exceptional, being so many derogations from a positive general rule." *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996) (citation omitted). The U.S. Supreme Court's cases "make clear that an asserted privilege must also 'serv[e] public ends." *Id.* at 11.

Inferring that South Carolina's Trade Secrets Act, S.C. Code Ann. §§ 39-8-10 *et seq.* provides "heightened" protection over the regularly applied standards set forth in Rule 26 of the South Carolina Rules of Civil Procedure or in *Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola, Co.*, 107 F.R.D. 288 (D.Del. 1985) would chill, if not preclude, a plaintiff's ability to learn whether a defendant has done the plaintiff wrong, and to establish that wrong in court. It would also unfairly and unnecessarily deny that plaintiff his day in court.

In 2015, there were an estimated 254,200 toy-related injuries treated in U.S. hospital emergency departments. "Toy-Related Deaths & Injuries

Calendar Year 2015", Consumer Prod. Safety Comm., Nov. 2016 (available at www.cpsc.gov/s3fs-public/Toy_Report_2015_0.pdf) It is not hard to imagine that at least one of these 254,200 injured children might be a resident of South Carolina. If that child is injured, or even killed, due to a defect in the toy with which he or she were playing, that child's family might bring a product liability lawsuit in order to be compensated for the child's injuries and, hopefully, to protect future children from suffering the same harm due to a defective toy.

Under South Carolina law, there are three defects a plaintiff in a products liability lawsuit can allege: (1) a manufacturing defect; (2) a warning defect; and (3) a design defect. *Watson v. Ford Motor Co.* 699 S.E.3d 169, 174 (S.C. 2010). By denying the plaintiff access to essential information, the court precludes the plaintiff from being able to prove his or her case. Thus, if the toy suffered from a manufacturing defect, the child's family would be unable to show that the particular toy was defectively manufactured under safety standards. The safety standards may be those generally accepted by a particular manufacturer. If the manufacturer is able to hide behind a claim of a trade secret protection against production, then the child's family's ability to prove a defective manufacturing process is significantly impaired, if not completely stymied.

Similarly, a plaintiff pursuing a product liability claim based on negligent design theory must establish, among other things, that the defendant failed to exercise due care in designing the product. *Branham v. Ford Motor Co.,* 701 S.E.2d 5, 9 (S.C. 2010). To successfully advance a design defect claim, the plaintiff must show that the design of the product caused it to be unreasonably dangerous." *Id.* at 13. As part of that burden of proof, the plaintiff must present evidence of the actual design and a reasonable alternative design. *Id.* at 16. Without the specific information as to the specifications to which a manufacturer intended to design a product, it is impossible to say whether that product was actually designed or manufactured properly. Similarly, without the specific information as to the specifications to which a manufacturer designed a product, it is impossible to say whether a failure was due to either a manufacturing or design defect. If a manufacturer can utilize a trade secret privilege to shield itself from producing such evidence, the plaintiff will be unable to present the evidence required to satisfy her burden of proof.

From 2009 to 2014, an estimated 1,459,201 injuries associated with playground equipment were treated nationally in emergency departments. "Injuries & Investigated Deaths Associated with Playground Equipment 2009-2014", Consumer Prod. Safety Comm., Aug. 2016 (available

at www.cpsc.gov/s3fspublic/Injuries%20and%20Investigated%20Deaths%20Associated%20with%20Playground%20Equipment%202009%20to%202014_1.pdf?29GwYlhQ6fUwXskAQxLoGaHaE8aHZSsY). Of course, a significant number of these injuries may have occurred on playgrounds in South Carolina and may involve harm to South Carolina children. If a child is injured on a South Carolina playground due to a defective design, such as inappropriate spacing of monkey bars, lack of proper safety features, or the choice of a material for a component, the child's family may bring a lawsuit in South Carolina against the manufacturer of that playground.

In order to prove that the playground design was defective, this South Carolina family must "point to a design flaw in the product and show how an alternative design would have prevented the product from being unreasonably dangerous. This presentation must include consideration of the costs, safety, and functionality associated with the alternative design." *Branham*, 701 S.E.2d at 16. If the injured child's family cannot make a showing sufficient to establish any of these essential elements, the manufacturer will be entitled to a judgment as a matter of law.

Imagine, however, that the Court permits the playground manufacturer whose product injured this South Carolina child to hide behind trade secret protection so as to hinder that consumer's ability to prove his

case. This injured South Carolinian effectively will be denied access to justice in contravention of South Carolina's constitutional guarantee of access to the courts. S.C. Const. art. I § 9. ("All courts shall be public, and every person shall have speedy remedy therein for wrongs sustained."). The injured child's access to the courts will be restricted solely on the basis of the child's inability to obtain evidence the Court has ruled to be essential to proving his or her claim.

This outcome runs counter to public policy and South Carolina's constitutional guarantee of access to the courts. If the Court permits a company whose product is alleged to have injured a South Carolina consumer to hide behind trade secret protection so as to hinder that consumer's ability to prove her case, the Court will essentially close the courthouse door to that consumer. Such a standard would subordinate the plaintiff's debilitating, or even fatal, physical injury, and the accompanying economic damage, to the company's claim of purely economic injury from disclosure. An injured plaintiff's need for information in a products liability case outweighs the harm that disclosure under a protective order would cause.

The only fair standard for the discovery of trade secrets is that already followed by South Carolina state courts and the District Court of South

Carolina under each jurisdiction's version of Rule 26 and interpretive case law adopted by each in applying Rule 26, which protects not only the ability of a manufacturer to protect its trade secrets, but also the right of an injured plaintiff to establish her case in court. Goodyear's invitation to this Court to infer a heightened standard under the SCTSA is detrimental to the constitutional rights of injured South Carolinians and should be declined.

CONCLUSION

South Carolina does not recognize a statutory, common law or constitutional evidentiary privilege for trade secrets. To infer the existence of one would fundamentally alter the balance of power between plaintiffs and defendants and unnecessarily deny injured South Carolinians their day in court. This Court should answer the Certified Question in the negative.

Respectfully submitted,

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