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United States Court of Appeals for the Fourth Circuit

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

Plaintiff-Appellee

v.

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

Defendants-Appellants.

FILED
MAY - 9 2016
U.S. Court of Appeals
Fourth Circuit

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA AT CHARLESTON

**BRIEF OF AMICUS CURIAE
THE SAFETY INSTITUTE**

In Support of Plaintiff-Appellee's Request Seeking Affirmance

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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Signature: /s/ Courtney L. Davenport

Date: May 9, 2016

Counsel for: The Safety Institute

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I certify that on May 9, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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Cases

<i>Bahena v. Goodyear Tire & Rubber Co.</i> , 235 P.3d 592 (Nev. 2010).....	20
<i>Celaya v. Hankook Tire Am. Corp.</i> , CV-11-00429-TUC-RM, 2015 WL 1874101 (D. Ariz. Mar. 31, 2015)	27
<i>Fed. Open Mkt. Comm. of Fed. Reserve Sys. v. Merrill</i> , 443 U.S. 340 (1979)	17
<i>Fein v. Chenault</i> , 767 S.E.2d 766 (2014), <i>cert. denied</i> (Mar. 30, 2015).....	27
<i>Gyrc v. Dayton-Hudson Corp.</i> , 297 N.W.2d 727 (Minn. 1980)	14
<i>Haeger v. Goodyear Tire and Rubber Co.</i> , 906 F. Supp. 2d 938 (D. Ariz. Nov. 8, 2012), <i>aff'd</i> , No. 12-17718 (9th Cir. Feb. 16, 2016).....	19
<i>Hartman v. Remington Arms Co., Inc.</i> , 143 F.R.D. 673 (W.D. Mo. 1992).....	13
<i>Hickman v. Taylor</i> , 329 U.S. 495 (1947)	16
<i>Howard v. Ford Motor Co.</i> , No. 763785-2 (Cal., Alameda Co. Super. Oct 11, 2000).....	12
<i>Jaffee v. Redmond</i> , 518 U.S. 1 (1996)	16
<i>Kaynatma v. Sumitomo Rubber Industries, LTD</i> , No. 08-38042, Fla., Broward Co. 17th Jud. Cir. (affidavit signed Apr. 25, 2016)	26

<i>Laffitte v. Bridgestone Corp.</i> , 674 S.E.2d 154 (S.C. 2009)	17
<i>Lavelock v. Cooper Tire & Rubber Co.</i> , No. 00-CV-221072 (Mo., Jackson Co. Cir. Aug. 18, 2003)	27
<i>Mann v. Cooper Tire Co., slip op.</i> , 33 A.D.3d 24 (N.Y. App. 2006)	23
<i>MDK, Inc. v. Mike's Train House</i> , 27 F.3d 116 (4th Cir. 1994)	17
<i>Melton v. Gen'l Motors LLC, Ga.</i> , No. 14A 19974 (Cobb Co. St. compl. filed May 12, 2014).....	10
<i>Nat'l Acad. of Recreational Arts & Sci. v. On Point Events</i> , 256 F.R.D. 678 (C.D. Cal. 2009).....	17
<i>Pansy v. Borough of Stroudsburg</i> , 23 F.3d 772 (3d Cir. 1994)	17
<i>Patel v. Goodyear Tire & Rubber Co.</i> , 12-0336-NP, Mich. Berrien Co. Cir. (affidavit signed May 5, 2016).....	26
<i>Pimsner v. Nexen Tire Corp.</i> , No. 1:03-cv-01373 (N.D.N.Y. Nov. 29, 2004).....	27
<i>Plyler v. Bridgestone Corp.</i> , No. 05-CP-25-531 (S.C., Hampton Ct. Com. Pleas Aug. 20, 2007)	28
<i>Ruckelshaus v. Monsanto Co.</i> , 467 U.S. 986 (1984).....	21
<i>Trammel v. United States</i> , 445 U.S. 40 (1980).....	16

Vigil v. Bridgestone Americas Holding, Inc.,
No. D-0101-CV-2006-2463 (N.M., Santa Fe Co. Dist. Apr. 14, 2010) 28

Wyeth v. Levine,
129 S. Ct. 1187 (2009)..... 14

Additional Authorities

Restatement of Torts § 757, comment b..... 20, 21

American Jurisprudence 2d Products Liability § 1652 25

D.A. Paterson & K.M. Wolniak, *Tire Innerliner Technology – Unseen
Advances*, ITEC Paper (1994)..... 25

Dan H. Willoughby et al., *Sanctions for E-Discovery Violations by the
Numbers*, 60 Duke L. J. 789, 803 (2010) 18

David Halperin, *Discovery Abuse: How Defendants in Products
Liability Lawsuits Hide and Destroy Evidence*,
Congress Watch, July 1997..... 18

David S. Sanson, *The Pervasive Problem of Court-Sanctioned Secrecy
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Donald S. Tracey et al., *Innerliners and Tire Durability*,
ITEC (Sept. 2004) 25

Driven to Safety: How Litigation Spurred Auto Safety Innovations,
American Association for Justice (April 2010)..... 6

George Eads & Peter Reuter, *Designing Safer Products:
Corporate Responses to Product Liability law and Regulation*,
Rand Corp., 7 J. of Prods. Liab. 263 (1984) 8

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Jon S. Vernick et al., <i>Role of Litigation in Preventing Product-Related Injuries</i> , 25 <i>Epidemiologic Reviews</i> 90 (2003).....	6
<i>Lifesavers: CJ&D’s Guide to Lawsuits That Protect Us All</i> , Center for Justice & Democracy (2002)	6, 7, 14
Margaret Cronin Fisk, <i>GM Ignition Switch Nightmare Won’t Go Away, For Victims or Company</i> , Bloomberg (Jan. 8, 2016)	10
<i>Melton Family Charges GM with Fraud, Asks for Sanctions</i> , Safety Research & Strategies (May 12, 2014)	10
Michael V. Ciresi et al., <i>Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation</i> , 25 <i>William Mitchell L. Rev.</i> 476, 477, 479 (1999).....	15, 18
<i>NHTSA Opens EQ Investigation into Hercules Tire Recall at Lawyer’s Request</i> , Safety Research & Strategies (Apr. 13, 2015)	11
<i>Report No. DOT HS 811 296, Tire Aging Test Development Project – Tire Innerliner Analysis</i> , Nat’l Highway Traffic Safety Admin. (March 2010)	22, 24
Request for Public Comments on NHTSA Enforced Guidance Bulletin 2015-01: Recommended Best Practices for Protective Orders and Settlement Agreements in Civil Litigation, 80 <i>Fed. Reg.</i> 57046 (Sept. 21, 2015)	9
Scott Cohn, <i>Remington Hid Dangers of Controversial Trigger: Documents</i> , CNBC (Dec. 8, 2015).....	13
<i>The Tobacco Industry Documents: What They Are, What They Tell Us, and How to Search Them</i> , World Health Organization (2005).....	15
<i>TQ10-004</i> , NHTSA (Dec. 20, 2010).....	11
Wendy Wagner, <i>When All Else Fails: Regulating Risky Products Through Tort Litigation</i> , 95 <i>Georgetown L. J.</i> 693 (2007).....	6

STATEMENT OF IDENTITY AND INTEREST

The Safety Institute (TSI) is a 501c3 non-profit organization that emphasizes injury prevention and product safety as an important basis for a healthy and productive society. The organization, founded by well-known safety advocate Sean Kane, focuses on injury prevention and product safety across a broad spectrum and bases its plans and priorities on issues that require greater study and emphasis, as well as those that may be underserved by other organizations and advocates. The Institute gives special attention to those areas of emerging importance to injury and product safety, including the effects of new and changing technologies.

TSI has an interest in this case because of its involvement in efforts to understand and improve tire safety. In addition, TSI understands the important role civil litigation plays in improving safety for U.S. citizens – and how companies have successfully hidden information relevant to public safety by keeping their documents under seal or out of the reach of plaintiffs who have been harmed by their products.

In 2015, TSI sponsored a study of tire-related deaths and injuries in U.S. motor vehicles that was presented, by request, at the National Transportation Safety Board's (NTSB) first ever tire safety symposium. The study is particularly important because its findings are in stark contrast to data released by the

government authority, the National Highway Traffic Safety Administration (NHTSA), which has used other data and methods to inform tire regulatory policy and consumer education materials. The study provided a marked advance in understanding the real tragedies associated with tire-related vehicle crashes on U.S. roadways and its methods and findings have been adopted by NTSB.

TSI also has an interest in records that are produced in civil litigation that pertain to public safety. TSI and The Center for Auto Safety filed a Motion to Intervene and to unseal records in *United States ex rel. Harman v. Trinity Industries, Inc.*, a federal whistleblower case related to guardrails used throughout the U.S. That case concluded with a \$525 million judgment against Trinity Industries, Inc., for defrauding the federal government. TSI's efforts ultimately led to the Fifth Circuit Court of Appeals rejection of an appeal by Trinity Industries Inc. to keep secret the documents that revealed their fraud.

Although the innerliner documents will be produced under a protective order, TSI is writing to clarify the importance of this information, and other documents defendants often assert privilege over, in a plaintiff's case and to public safety generally.

STATEMENT REGARDING PARTICIPATION

TSI is paying all costs associated with this brief, and the brief was prepared solely by TSI and undersigned counsel. No counsel for any party authored this brief in whole or in part; no party or counsel for any party made a monetary contribution to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

At first blush, this case appears to involve a relatively straightforward analysis of which standard is applicable to trade secret disclosure in a products liability case based on diversity jurisdiction. However, the case also presents a quandary from a public policy perspective: At what point does the imperative to protect the public from potentially dangerous products outweigh a corporation's right to protect information it feels is vital to maintaining its competitive stance? The Safety Institute feels that once a concern about public safety is implicated, that should always take precedence.

Civil litigation plays a vital role in ensuring public safety. Regulatory agencies like NHTSA have admitted they are unable to force manufacturers to disclose all of their safety-related documents, even when their products are causing serious injuries. Discovery is often the most effective mechanism for exposing the magnitude of a product's dangers. Information gleaned through lawsuits has also

revealed manufacturers' attempts to conceal their knowledge of defective design or manufacturing. Often, these lawsuits prompt regulatory action, recalls, and redesigned products.

Discovery is aimed at leveling the playing field so that all parties are equally knowledgeable as the litigation proceeds. This is especially necessary when an individual sues a manufacturer because the defendant possesses all of the information relevant to the allegedly defective product. Unfortunately, corporate defendants have long tried to sidestep the noble goals of discovery, asserting privileges and confidentiality to obfuscate the process and delay the outcome as long as possible. Some defendants have gone beyond delaying tactics to outright misrepresentations about their possession of documents that demonstrate the corporation has long known of its product's dangers but has taken no action to prevent them. Goodyear itself is no stranger to sanctions by courts frustrated with its delaying tactics and, much worse, its attempts to hide documents through fraud and deceit.

In this case, as in many cases, Goodyear asserts in its appellate brief that innerliner formulas are "closely guarded, confidential information held by the Defendants, withheld even from GTRC's tire designers, and that this compound formula cannot be obtained by any other proper means." Brief of Appellants at 9. The Rubber Manufacturers Association emphatically asserts that, "[n]o

manufacturer can allow its competitors access to its highly proprietary formulas or designs” because of the irreparable harm it would cause. Amicus Brief of Rubber Manufacturers Association at 4.

Although Hartsock has conceded that the innerliner formula and design specifications are a trade secret, TSI does not concede that is true. Tire manufacturers regularly obtain information about each other’s chemical and material formulas and tire design specifications through industry-funded labs, like Smithers Rapra, by utilizing their “benchmarking” services or by subscription to their Tire Analysis Report.

Because these same resources are not available to plaintiffs, they are at a significant disadvantage. This contradicts the claims that the innerliner formula in question in this case is a “trade secret” – it is only secret because of the pay-to-play system that limits those who can get access to it.

Even if the innerliner formula and specifications were trade secrets, public safety concerns outweigh Goodyear’s economic interests. If, as Hartsock alleges, the formula was inadequate and contributed to the tire separation that caused Sarah Hartsock’s death, the requested information is of paramount importance to Hartsock’s case. Thus, as Hartsock has effectively argued in his brief, the

information is both relevant and necessary to his action, as required by the applicable federal law.

Goodyear should not be permitted to use its desire for a competitive edge as a shield to protect it from liability for the harm its defective product caused. This is particularly true when there is a strict protective order in place that prevents the parties from sharing the information. The Safety Institute urges the Court to affirm the District Court's ruling that Goodyear must produce the information.

ARGUMENT

I. Civil litigation discovery plays a vital role in exposing dangers to public safety, which should take precedence over economic interests

Countless products liability cases in the past several decades have exposed dangerous products that had been hidden for years – even as deaths and injuries continued to occur. Without these cases and the recalls or improvements they brought about, the public would have remained unaware of the danger they faced every time they used the product. *See e.g.*, Center for Justice and Democracy, *Lifesavers: CJ&D's Guide to Lawsuits That Protect Us All* (Joanne Doroshow ed. 2002); Am. Ass'n for Justice, *Driven to Safety: How Litigation Spurred Auto Safety Innovations* (April 2010); Wendy Wagner, *When All Else Fails: Regulating Risky Products Through Tort Litigation*, 95 *Georgetown L. J.* 693 (2007); Jon S.

Vernick et al., *Role of Litigation in Preventing Product-Related Injuries*, 25 *Epidemiologic Reviews* 90 (2003).

As one article noted, civil litigation is such a necessary tool in part because the public does not have another mechanism to force manufacturers to confirm that a danger exists.

Because the American legal scheme (and culture at-large) is in many ways dependent on private parties checking the behavior of other private parties, especially those with greater affluence and more bargaining power, a judicial mechanism by which injured litigants can gain access to court records without bearing gratuitous costs and by which the public can be made aware of potential dangers to its health and safety is essential.

David S. Sanson, *The Pervasive Problem of Court-Sanctioned Secrecy and the Exigency of National Reform*, 53 *Duke L. J.* 807 (2003), at 11.

A. In surveys conducted by business-friendly organizations, manufacturers have acknowledged that litigation spurs safety improvements

Manufacturers themselves have acknowledged that litigation is often the catalyst for their safety improvements. As the Center for Justice & Democracy reports, in 1987 the industry-funded Conference Board conducted a study of 232 corporate risk managers and concluded that:

Where product liability has had a notable impact – where it has most significantly affected management decision-making – has been in the quality of the products themselves. Managers say products have become safer,

manufacturing procedures have been improved, and labels and use instructions have become more explicit.

Lifesavers, supra, at A-3 (quoting Nathan Weber, *Product Liability: The Corporate Response*, Research Report #893, The Conference Board (1987)).

Similarly, the Rand Corporation interviewed representatives from large corporations in 1984 and found that:

Of all the various external social pressures, product liability has the greatest influence on product design decisions...In industries with potentially high-hazard products, but not subject to significant product-related regulation (e.g. industrial machinery), product liability probably dominates design decisions, in terms of safety considerations.

George Eads & Peter Reuter, *Designing Safer Products: Corporate Responses to Product Liability law and Regulation*, Rand Corp., 7 J. of Prods. Liab. 263, 290 (1984).

B. Manufacturers refuse to produce documents even when legally required to do so

Manufacturers have frequently argued that regulation is the appropriate mechanism for revealing harms to the public, not discovery during litigation. However, government agencies have complained that manufacturers often circumvent their efforts to regulate. In 2015, NHTSA recognized that it is unable to effectively safeguard the public against hazardous automobile-related products

because manufacturers often refuse to produce the documents that reveal the dangers, even when legally required.

NHTSA's ability to identify and define safety-related motor vehicle defects relies in large part on timely and accurate reporting by manufacturers, suppliers, and various parties throughout the industry... Although federal law may require industry participants to report certain information to NHTSA, or do not do so in a timely manner...[Thus] *a potentially defective product may not come across NHTSA's radar until dozens, if not hundreds of people have sustained serious injury – if it ever reaches NHTSA at all.*

Request for Public Comments on NHTSA Enforcement Guidance Bulletin 2015-01: Recommended Best Practices for Protective Orders and Settlement Agreements in Civil Litigation, 80 Fed. Reg. 57046, 57047 (Sept. 21, 2015) (emphasis added).

NHTSA is seeking to establish a voluntary guideline encouraging litigation parties to include a provision in confidentiality orders that allows parties to share the information with NHTSA. The agency noted:

There is no doubt that confidentiality provisions, protective orders, and the sealing of cases are appropriate litigation tools in some circumstances. In most instances, however, the interests of public health and safety trump any confidentiality interests.

Id.

C. There are numerous examples of specific cases that have brought about changes that protect public safety

One recent case to expose a coverup of a defective product that caused hundreds of deaths and injuries is the General Motors ignition switch defect. GM

knew for almost a decade that the ignition switch in many of its models could slip, moving the vehicle from the “run” position to the “accessory” position, causing loss of power steering and anti-lock brakes, and disabling the airbags. GM officially linked the defect to 399 deaths and injuries, though safety advocates argue the actual tally is much higher. See Margaret Cronin Fisk, *GM Ignition Switch Nightmare Won't Go Away, For Victims or Company*, Bloomberg (Jan. 8, 2016).

During discovery in a case brought by the parents of a woman who died when the ignition switch failed in her Cobalt, GM documents revealed that it had known about the defect since the ignition switch's inception but had declined to implement effective alternative designs for cost-saving reasons, despite injury and death claims. *Melton v. Gen'l Motors LLC*, Ga., No. 14A 19974 (Cobb Co. St. compl. filed May 12, 2014), Addendum Ex. 1.

When the automaker finally issued a recall, it did not cover all affected models, and the plaintiffs' attorney filed a Timeliness Query with NHTSA, informing the agency he had seen protected documents that proved GM was concealing the full extent of the problem. See e.g., *Melton Family Charges GM with Fraud, Asks for Sanctions*, Safety Research & Strategies (May 12, 2014). When additional documents were produced to NHTSA, the plaintiffs learned GM's engineers had committed perjury during depositions and refiled their suit,

originally settled in 2013, adding fraud claims. *Melton*, at 47. The disclosures prompted recalls totaling about 13 million vehicles and thousands of lawsuits.

There have been several other automobile defect cases that shed light on the manufacturers' knowledge and inaction. In 2015, for instance, NHTSA opened an Equipment Query into importer Hercules Tire and Rubber Co. after learning that it did not recall tires that were the same design as tires recalled by a different importer because the partial nylon cap could lead to tread separation. The query was prompted by an attorney who learned of Hercules's similar tire during discovery on a case against the other importer and requested that NHTSA investigate. *See NHTSA Opens EQ Investigation into Hercules Tire Recall at Lawyer's Request*, Safety Research & Strategies (Apr. 13, 2015).

In December 2010, Toyota paid a \$16.05 million fine to NHTSA after the agency opened a Timeliness Query to investigate allegations it did not recall defective relay rods in the United States until a year after it had recalled them in Japan following a Japanese criminal investigation into its executives' knowledge of the defect. NHTSA TQ10-004 (Dec. 20, 2010). Toyota had represented to NHTSA that it had received no complaints of a similar defect in U.S. vehicles, but discovery during a lawsuit brought by the parents of an 18-year-old who died in a rollover found that it had been receiving incident reports since 2000. *Id.*

A final example, of many, is the Ford thick film ignition (TFI) module, an electronic ignition system Ford mounted under the hood on the hot distributor, despite awareness that the TFI was vulnerable to “thermal stress” and had caused stalling in pre-production. *Howard v. Ford Motor Co.*, No. 763785-2, at 7 (Cal., Alameda Co. Super. Oct 11, 2000). Discovery during litigation revealed internal documents detailing the failures, employee concerns, attempts to rectify the problem, cost concerns, and considerations of alternative designs – some of the documents had not been divulged to NHTSA investigations into stalling incidents. *Id.* at 8, 10. The court granted restitution to the plaintiffs and ordered Ford to recall the affected vehicles. *Id.* at 21.

In addition to automobile-related cases, defects in multiple other consumer products have been revealed through discovery in litigation. Some examples include:

- **Firearms:** For decades, Remington Arms Co. has been the subject of litigation because several rifle models have a trigger mechanism that can fire without the trigger being pulled when debris gets into the trigger connector. The Rubber Manufacturers Association cited the Eighth Circuit’s opinion in *In re Remington Arms Co.* in support of its argument that once a trade secret – here, documents detailing an alternative design – is wrongfully released, the damage is irreparable. Rubber Manufacturers Association Brief at 6-7.

However, the RMA does not mention that on remand, the federal trial court – and others hearing cases at that time – reviewed the materials in camera and ordered that they be produced under protective order. *Hartman v. Remington Arms Co., Inc.*, 143 F.R.D. 673 (W.D. Mo. 1992).

Once the collective documents from lawsuits were publicly revealed in 2015 as part of a class action settlement requiring trigger replacement, they showed Remington had known of the inadvertent firing since shortly after the trigger was designed and had decided against a redesign in 1989 and subsequent years because it might encourage more lawsuits. *See* Scott Cohn, *Remington Hid Dangers of Controversial Trigger: Documents*, CNBC (Dec. 8, 2015). When Remington implemented a new design, it did not recall the defective rifles, leading to more than two dozen deaths and hundreds of injuries. *Id.*

- **Pajamas:** After 4-year-old Lee Ann Gryc suffered burns over much of her body in under 12 seconds after her pajamas caught fire, her parents sued children's pajama maker Riegel Textile Corp. The manufacturer claimed they did not at the time have the capability to produce flame-resistant fabric soft enough for pajamas. The plaintiffs were able to show through discovery, however, that in the United States, the technology for producing comparable flame-retardant fabric had been available since 1962 and that England had

required flame-retardant sleepwear since the 1950s. Internal documents showed Riegel had rejected its use for cost reasons. *Gyrc v. Dayton-Hudson Corp.*, 297 N.W.2d 727 (Minn. 1980). After the jury found for the plaintiffs, Congress amended the Flammable Fabrics Act to better regulate children's pajamas. *See Lifesavers, supra*, at A-11 (citations omitted).

- **Prescription Drugs:** Lawsuits related to several medications have uncovered evidence that drugmakers were aware of their drugs' dangers and did not disclose them even as injuries and deaths accumulated. Some drugs include: Actos linked to bladder cancer, Bextra and Celebrex linked to heart attacks, Fosamax causing jaw necrosis, Paxil resulting in birth defects, and Pradaxa linked to uncontrolled bleeding.

The U.S. Supreme Court has acknowledged the importance of litigation in uncovering dangerous drugs. In the famous preemption case *Wyeth v. Levine*, in which the plaintiff uncovered evidence the defendant knew of 20 previous incidents of amputations caused by its drug, the Supreme Court noted:

State tort suits uncover unknown drug hazards and provide incentives for drug manufacturers to disclose safety risks promptly. They also serve a distinct compensatory function that may motivate injured persons to come forward with information.

Wyeth v. Levine, 129 S. Ct. 1187, 1202 (2009).

- **Tobacco:** As the world now knows, the tobacco industry for decades hid documents disclosing its awareness of health hazards and addictiveness, its decision to increase nicotine's potency, and its targeting of youth to perpetuate addiction to its products. Michael V. Ciresi et al., *Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation*, 25 William Mitchell L. Rev. 476, 479 (1999). Of the industry's discovery tactics, one article notes:

Every strategy is designed to force the massive expenditure of frequently scarce plaintiff's resources in order to sort out the data provided or fight for the enforcement of discovery orders...They have done this by [among other things] resisting all discovery aimed at them, thus requiring a court hearing and order before plaintiffs can obtain even the most rudimentary discovery.

Id. at 481 (citation omitted).

Although the documents were produced in waves under protective orders during multiple cases, it was not until 1998, when the industry settled suits with Minnesota and three other states, that the documents were made public.

World Health Organization, *The Tobacco Industry Documents: What They Are, What They Tell Us, and How to Search Them*, at 09-10 (2005).

II. Discovery is a powerful tool designed to ascertain the truth and should not be precluded when there are countervailing public interest concerns

Discovery has a noble goal: to expose all of the facts so that case resolutions are based solely on the truth. The U.S. Supreme Court noted shortly after the

federal discovery rules were created that discovery was aimed at ascertaining the facts, so that

[C]ivil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial.

Hickman v. Taylor, 329 U.S. 495, 500-501 (1947). The Court emphasized that:

[T]he deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of “fishing expedition” serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise.

Id. at 507.

A. Courts should consider public interest when determining whether discovery must be produced.

The U.S. 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 Court said exceptions may be justified, however, by “a ‘public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.’” *Id.* (quoting *Trammel v. United States*, 445 U.S. 40, 50 (1980)) “Our cases make clear that an asserted privilege must also ‘serv[e] public ends.’” *Id.* at 11.

Public interest and safety are significant factors in the court's decisions on whether to require disclosure. The Third Circuit has noted that:

When courts rule on a motion for confidentiality, such as a protective order guarding trade secrets, they must consider the public's interest, and [c]ircumstances weighing against confidentiality exist when confidentiality is being sought over information important to public health and safety.

Pansy v. Borough of Stroudsburg, 23 F.3d 772, 787 (3d Cir. 1994). The court further explained:

[T]he court ... must balance the requesting party's need for information against the injury that might result if uncontrolled disclosure is compelled. When the risk of harm to the owner of [a] trade secret or confidential information outweighs the need for discovery, disclosure [through discovery] cannot be compelled, but *this is an infrequent result*... Whether this disclosure will be limited depends on a judicial balancing of the harm to the party seeking protection (or third persons) and the importance of disclosure to the public. Courts also have a great deal of flexibility in crafting the contents of protective orders to minimize the negative consequences of disclosure and serve the public interest simultaneously.

Id. (emphasis added).

Regarding trade secrets, numerous courts have held that trade secrets are not granted an absolute privilege, but, rather, are generally discoverable with the use of protective orders. *See e.g., Fed. Open Mkt. Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 362 (1979); *MDK, Inc. v. Mike's Train House*, 27 F.3d 116, 120 (4th Cir. 1994); *Nat'l Acad. of Recreational Arts & Sci. v. On Point Events*, 256 F.R.D. 678, 681 (C.D. Cal. 2009). *See also Laffitte v. Bridgestone Corp.*, 674 S.E.2d 154, 161 (S.C. 2009) (noting that "[i]t is also true that 'trade secrets may be valuable

during the course of litigation not involving misappropriation claims, and there are moments when justice requires disclosure.’”) (citation omitted).

B. Corporate defendants have been known to delay and obfuscate discovery in products liability cases

Many case studies and scholarly articles have chronicled a pattern and practice by defendants in products liability cases of delaying discovery to run out the discovery clock, often by asserting privileges and confidentiality that require sweeping protective orders, and sometimes by actively concealing internal documents. *See e.g.* David Halperin, *Discovery Abuse: How Defendants in Products Liability Lawsuits Hide and Destroy Evidence*, Congress Watch, July 1997; Michael V. Ciresi et al., *Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation*, 25 William Mitchell L. Rev. 477 (1999); and James E. Butler Jr. & Keith A. Pittman, *Civil Discovery and Corporate Defendants: Why Some of the Latter Would Do Away with the Former*, <http://www.butlerwooten.com/Articles/Civil-Discovery-and-Corporate-Defendants.pdf> (all discussing court orders sanctioning defendants for discovery abuses). *See also* 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.”).

In product liability lawsuits, there is an imbalance of power because the defendant often possesses most of the documents 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. Thus, it is imperative that courts carefully consider any attempt to keep documents out of plaintiffs’ hands.

C. This is especially true when a party has previously been sanctioned for discovery abuses, as Goodyear has

In 2012, Judge Roslyn Silver of the District of Arizona issued a scathing order imposing monetary sanctions against Goodyear and two of its attorneys and requiring that Goodyear file a copy of the order in every case involving the same type of tire. *Haeger v. Goodyear Tire and Rubber Co.*, 906 F. Supp. 2d 938 (D. Ariz. Nov. 8, 2012), *aff’d*, No. 12-17718 (9th Cir. Feb. 16, 2016). The court cited the Goodyear defendants’ “repeated, deliberate decisions ... to delay the production of relevant information, make misleading and false in-court statements, and conceal relevant documents.” *Id.* at 1-2.

The plaintiffs had argued that the G159 tire, which incidentally was the predecessor tire to the one involved in *Hartsock*, was not designed for high-speed use on a recreational vehicle. They had requested all testing Goodyear had performed on the tire to ensure it could handle prolonged high speeds. Goodyear’s counsel located testing but did not provide any tests to the plaintiffs until several

months later and did not provide all testing despite its assertions to the court that it had. *Id.* at 19-21. The court found that:

Goodyear and its attorneys adopted a strategy...to resist all legitimate discovery, withhold obviously responsive documents, allow Plaintiffs and their experts to operate under erroneous facts, disclose small subsets of documents as late as possible, and otherwise attempt to turn this case based on a motor vehicle accident into an Arizona version of *Jarndyce and Jarndyce*.

Id. at 66 (referring to Charles Dickens's *Bleak House* 3 (1853)).

In 2010, the Nevada Supreme Court affirmed a trial court's order striking Goodyear's answer as to liability "based upon Goodyear's unverified interrogatory responses and boilerplate or proprietary and trade-secret objections." *Bahena v. Goodyear Tire & Rubber Co.*, 235 P.3d 592, 595 (Nev. 2010). The court noted that Goodyear's tactics caused stalling and unnecessary delays designed to push back the trial date. *Id.* at 596.

III. As a matter of public policy, tire manufacturers should not be allowed to assert trade secret confidentiality as a bar to producing innerliner formulas and specifications.

Although the plaintiff conceded that the information sought involves trade secrets, TSI feels it is important to refute Goodyear's assertion on the record. Restatement of Torts § 757, comment b defines "trade secret" as one that "may consist of any formula, pattern, device or compilation of information which is used

in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.”

A central tenet of a trade secret is that “[t]he subject matter of a trade secret must be secret. Matters of public knowledge or of general knowledge in an industry cannot be appropriated by one as his secret.” Restatement of Torts § 757, comment b. *See also Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002 (1984) (“Because of the intangible nature of a trade secret, the extent of the property right therein is defined by the extent to which the owner of the secret protects his interest from disclosure to others.”)

Among other factors, courts should consider “the extent of measures taken by him to guard the secrecy of the information” and “the ease or difficulty with which the information could be properly acquired or duplicated by others” in determining whether the information is a trade secret. Restatement of Torts § 757, comment b.

A. Innerliner formulas and design specifications are not ‘trade secrets’ because they are not, in fact, secret at all.

The Rubber Manufacturers Association asserts the sought after information is “unquestionably confidential, proprietary, and competitively sensitive information.” Rubber Manufacturers Amicus Brief at 11. However, an innerliner material and chemical composition can be determined and is in fact readily

available to manufacturers that can employ and fund industry-only labs, or to federal agencies that have the time and financial support for their studies to develop methods to obtain this needed information. It is only plaintiffs who cannot access this valuable information.

In its study of certain tires, NHTSA found that although “example formulations for tire innerliner compounds were common in literature, the actual composition of a given tire’s innerliner ... is not *publicly* available.” Nat’l Highway Traffic Safety Admin., Report No. DOT HS 811 296, *Tire Aging Test Development Project – Tire Innerliner Analysis*, at i (Mar. 2010) (emphasis added). Further, the agency was not able to identify “a published analytical method for determining the exact material composition of an innerliner.” *Id.* at vii. As a result, NHTSA established its own methodology, allowing the agency to determine a tire’s innerliner composition.

In the private sector, Smithers Rapra regularly provides information about each manufacturer’s tire formulas to other manufacturers. According to Smithers Rapra’s website, <http://www.smithersrapra.com/about-us>, the company is “a global leader in rubber, plastics and polymer testing” in the tire industry. One of Smithers’s core services is testing:

Whether you need analyses of raw materials, reinforcements, rubber component formulations or tire construction, Smithers Rapra can help.

Benchmark comparisons of tires and tire components have become critical for manufacturers, dealers and importers as the tire industry has become global in structure.

Our services involve studying the physical and chemical properties of a tire and its components and provide objective, third-party data to our clients. In addition, Smithers Rapra can provide consulting services involving data assessment, assistance in product development and various others.

See <http://www.smithersrapra.com/testing-services/by-sector/automotive/tire-testing/laboratory-tire-analysis> (emphasis added).

Importantly, Smithers produces The Smithers Tire Analysis Report, a high-value, subscription publication for tire manufacturers that reverse-engineers tires, providing information about each tire's chemical compounds, polymers, and other materials. Upon information and report, these reports are heavily guarded intellectual property available only to manufacturers. Manufacturers are under penalty of legal action if they reveal the contents. Thus, the tire manufacturers are well aware of each other's formulas – but plaintiffs have no mechanism for accessing the information.

This general knowledge within the industry and proven ability to reverse-engineer the tire's chemical formulas belie the defendant's and supporting amici curiae's assertions that the disclosure of the innerliner formula and design specifications would cause Goodyear irreparable harm. At least one court has agreed. See *Mann v. Cooper Tire Co.*, slip op. 33 A.D.3d 24, 32 (N.Y. App. 2006)

(rejecting the defendant's trade secrets argument based on the availability of The Smithers Tire Analysis Report).

B. Even assuming that innerliner formulas and specifications are trade secrets, their relevance and necessity in a tire defect case overrides the defendant's economic interests.

The parties' briefs provide a thorough discussion on the issue whether federal or state law standards apply in determining when and under what conditions courts may compel disclosure of trade secrets. TSI agrees with Hartsock that Federal Rule of Civil Procedure 26 is the applicable standard and that the South Carolina Trade Secrets Act is compatible with, not contrary to, the federal standard. However, even if the Court finds there is a heightened standard of "substantial need," Hartsock has met that requirement here.

The innerliner is a thin layer of rubber, frequently laminated with another layer, on the inside of a tubeless tire. It is primarily intended to prevent air and moisture from penetrating into the internal components of the tire and to maintain proper inflation pressure retention. These factors are critical to tire performance characteristics and directly affect tire safety. As NHTSA says in its report:

Since the innerliner is the main barrier to permeation of the pressurized inflation gas (containing degradative oxygen) through the tire, it was desired to know material composition, thickness, and permeability of a large cross-

section of passenger vehicle tire innerliners in order to understand their influence on whole-tire performance in a tire-aging test.

NHTSA Report, at vii.

The published literature is replete with examples of innerliner formulas and how the formulation can affect tire performance and safety. *See e.g.*, Donald S. Tracey et al., *Innerliners and Tire Durability*, Presented at ITEC, at 7 (Sept. 2004) (“The first step in air loss in a tire is permeation through the innerliner, which is the rate-limiting step since the innerliner is compounded for excellent barrier properties. Thus, the permeability of the polymer selected for the innerliner is the most significant factor in compounding.”); and D.A. Paterson and K.M. Wolniak, *Tire Innerliner Technology – Unseen Advances*, at 1, ITEC Paper #24A/B (1994) (“At higher sustained air pressures over longer service lives, maintaining the long-term stability of vulcanizate crosslinks in all interior components of the tire is clearly affected by innerliner performance.”)

American Jurisprudence has probably addressed this issue most succinctly:

The disclosure of tire ingredients was indispensable to a product liability lawsuit against a tire manufacturer by plaintiffs injured in an accident allegedly caused by a defective tire, even if the plaintiffs' expert had already found the tire to be defective; the plaintiffs asserted that they needed to know whether the tire manufacturer used components like halobutyl, a superior form of rubber compound, and various antioxidants and antiozoants for their design defect claim.

63B Am. Jur. 2d Prods. Liab. § 1652.

Thus, the innerliner design details are substantially necessary in tire defect cases, and plaintiffs should have the ability to access and review the innerliner formula in order to assess its potential effects on the subject failure.

C. Goodyear and other manufacturers have disclosed their rubber content before without harm.

Goodyear and Goodyear-Dunlop Tires have both previously disclosed the halobutyl content of their innerliner rubber without even requiring the claimants to file a motion to compel. An affidavit sworn by an attorney who brought suit against Goodyear states that:

In the course of the *Patel* litigation, Goodyear voluntarily produced documents and a corporate representative that disclosed the halobutyl content in the innerliner of the failed tire in our case. Goodyear never indicated after this disclosure of Goodyear's halobutyl content that it had any ill effect on Goodyear.

Patel v. Goodyear Tire & Rubber Co., 12-0336-NP, Mich. Berrien Co. Cir. (affidavit signed May 5, 2016), Addendum Ex. 2.

According to an affidavit from an attorney who brought suit against Sumitomo Rubber Industries, LTD, which owns Goodyear-Dunlop Tires, the company voluntarily disclosed the halobutyl content of its innerliner rubber pursuant to a confidentiality order in *Kaynatma v. Sumitomo Rubber Industries, LTD*, No. 08-38042, Fla., Broward Co. 17th Jud. Cir. (affidavit signed Apr. 25, 2016), Addendum Ex. 3.

Such a disclosure of rubber formulas is not at all unique. Hankook Tire has disclosed the halobutyl content of its innerliner rubber. *Celaya v. Hankook Tire Am. Corp.*, CV-11-00429-TUC-RM, 2015 WL 1874101, at *3 (D. Ariz. Mar. 31, 2015) (“assuming the halobutyl content is a trade secret, the record shows that Plaintiffs sufficiently demonstrated that the halobutyl content is relevant and necessary to their claimed defective design, and therefore should be disclosed despite any trade secret status.”).

Cooper Tire & Rubber has also disclosed its formulas for all of its tire rubbers (not limited to the innerliner rubber composition). *See, e.g., Lavelock v. Cooper Tire & Rubber Co.*, No. 00-CV-221072 (Mo., Jackson Co. Cir. Aug. 18, 2003), Addendum Ex. 4. Continental-General has disclosed its rubber formulas. *See, e.g., Fein v. Chenault*, 767 S.E.2d 766, 767 (2014), *cert. denied* (Mar. 30, 2015) (claimant argued that “a number of other courts have in fact ordered both the disclosure of halobutyl content in tires, as well as the full formulas” and “attached orders from Missouri, Florida, and New York courts directing Cooper Tire Company to disclose information regarding the content or existence of halobutyl in the innerliner of the subject tires, and an order from a Montana court directing Continental to disclose tire compound formulas”).

Nexen Tire has disclosed its rubber formulas. *See, e.g., Pimsner v. Nexen Tire Corp.*, No. 1:03-cv-01373 (N.D.N.Y. Nov. 29, 2004), Addendum, Ex. 5.

Bridgestone/Firestone has disclosed its rubber formulas. *See, e.g., Vigil v. Bridgestone Americas Holding, Inc.*, No. D-0101-CV-2006-2463 (N.M., Santa Fe Co. Dist. Apr. 14, 2010), Addendum Ex. 6; *Plyler v. Bridgestone Corp.*, No. 05-CP-25-531 (S.C., Hampton Co. Com. Pleas Aug. 20, 2007), Addendum Ex. 7.

CONCLUSION

TSI agrees with Hartsock that the District Court was correct in applying Rule 26 in holding that Hartsock was entitled to discovery of the innerliner formula and specifications, as they are necessary and relevant to his tire defect case. However, TSI feels, for the reasons stated above, that the Court should also consider public policy in making its determination. Corporations' economic interests are important and should be protected, but when those trade secret protections could impair public safety by not exposing a defective product, public safety should be of paramount importance.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 9th day of May, the foregoing Amicus Brief and attached Addendum were served on all parties or their counsel of record through the CM/ECF system.

May 9, 2016
Date

/s/ Courtney L. Davenport
Courtney L. Davenport

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 16-1172

Caption: Hartsock v. Goodyear Dunlop Tires N. Am. Ltd.

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Attorney for The Safety Institute

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as the

(party name)

appellant(s) appellee(s) petitioner(s) respondent(s) amicus curiae intervenor(s) movant(s)

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I certify that on May 9, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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Hartsock v. Goodyear Dunlop Tires North America Ltd., No. 16-1172

ADDENDUM

Hartsock v. Goodyear Dunlop Tires North America Ltd., No. 16-1172

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Exhibit 1:

Melton v. Gen'l Motors LLC, Ga., No. 14A 19974 (Cobb Co. St. compl. filed May 12, 2014)

Exhibit 2:

Patel v. Goodyear Tire & Rubber Co., 12-0336-NP, Mich. Berrien Co. Cir. (affidavit signed May 5, 2016)

Exhibit 3:

Kaynatma v. Sumitomo Rubber Industries, LTD, No. 08-38042, Fla., Broward Co. 17th Jud. Cir. (affidavit signed Apr. 25, 2016)

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Exhibit 7:

Plyler v. Bridgestone Corp., No. 05-CP-25-531 (S.C., Hampton Co. Com. Pleas Aug. 20, 2007)

EXHIBIT 1

injured in the single vehicle crash of a 2005 Chevrolet Cobalt on March 10, 2011, and who died shortly thereafter.

2. GM is one of the largest car and truck manufacturers in the United States. It designed and manufactured the 2005 Chevrolet Cobalt that is at issue in this case, along with over a million other similar cars. All of these cars contained the same safety-related defects.

3. More than nine years before Brooke's injury and death, GM knew about the safety-related defects in the Chevrolet Cobalt, and did nothing to recall or fully remedy the defects or warn users about them. Rather, GM intentionally, purposely, fraudulently, and systematically concealed the defects from the Meltons and Brooke, the National Highway Traffic Safety Administration ("NHTSA"), and the driving public.

4. GM's misconduct, fraudulent concealment, and systematic concealment of the safety-related defects, toll the statute of limitations that might otherwise be applicable to this action.

5. Thornton, the Chevrolet car dealership that serviced Brooke's car right before her death, knew of the problems that Brooke was having with her Chevrolet Cobalt. It undertook to repair her car, repaired the wrong parts, overlooked a critical GM Technical Safety Bulletin, performed unnecessary and

ineffective repairs, failed to test drive it, and without repairing her car returned it to Brooke as “repaired.”

II. Parties, Jurisdiction, and Venue

6. The Meltons are citizens of Georgia and reside in Cobb County, Georgia. They are the lawfully appointed Administrators of the Estate of Jennifer Brooke Melton.

7. GM is a Delaware limited liability company doing business in all fifty states with its principal place of business in Detroit, Michigan. GM does business in this district and division and maintains its registered agent here as well. GM is the successor corporation to General Motors Corporation, which underwent bankruptcy in 2009. Through that bankruptcy and asset sale from GMC to GM, GM assumed the liabilities of GM as set out herein. GM may be served via its registered agent CSC of Cobb County, 192 Anderson Street, S.E., Suite 125, Marietta, GA 30060.

8. GM is subject to the jurisdiction of and venue in this Court.

9. Defendant Thornton is a corporation organized and existing under the laws of the State of Georgia, having as its principal place of business, 1971 Thornton Road, Lithia Springs, Douglas County, Georgia 30122-2633. Thornton's registered agent for service of process is John W. Thornton, 1971 Thornton Road, Lithia Springs, Georgia, 30122.

10. Defendant Thornton is subject to the jurisdiction of and venue in this Court.

11. The Meltons renew their action against Thornton pursuant to O.C.G.A. § 9-2-61, and show that they have not previously dismissed their case against Thornton in state or federal court. Renewal under O.C.G.A. § 9-2-61 is thereby appropriate and proper, and this Court has jurisdiction over Thornton as a result.

III. Facts

The Purchase of the 2005 Chevrolet Cobalt

12. On August 31, 2005, Brooke Melton purchased the 2005 Chevrolet Cobalt from Bill Heard Chevrolet in Cobb County, Georgia.

The Wreck and Brooke's Injury and Death

13. On March 10, 2010, Brooke was driving her 2005 Chevrolet Cobalt north on Georgia Highway 9. She was wearing her lap/shoulder belt.

14. Because of the nature of the crash, the known safety-related defects in the 2005 Chevrolet Cobalt caused the key in Brooke's car to turn from the run to accessory/off position as she was driving on Highway 9. Once the key turned, the engine shut off. The safety-related defects in the Cobalt shut off her power steering, and greatly reduced her braking power and function. As a result

of the engine shutting off, Brooke lost control of the Chevrolet Cobalt, crossed the center lane, and was struck by a car driven by Shannon Jones.

15. Only 29 years old at the time, Brooke suffered a catastrophic brain injury and died the evening of the crash.

GM's Knowledge of Safety-Related Defects In The Chevrolet Cobalt and Its Concealment of Them

16. The 2005 Chevrolet Cobalt has safety-related design defects. First, a low torque detent in the ignition switch allows the key to be inadvertently turned from the run to accessory/off position. Second, because of the low position of the key lock module on the steering column, a driver can inadvertently bump the key fob or chain which results in the key turning from run to the accessory/off position. Third, the key sold with the Cobalt has a slot design which allows the key fob or chain to hang lower on the key and increases the chance of the key inadvertently moving from the run to accessory/off position during ordinary driving maneuvers. The design of the ignition switch, position of the key lock module, and slot design of the key are hereinafter referred to as the "Key System."

17. In 2001, during developmental testing of the 2003 Saturn Ion, GM learned that the engines in those cars were stalling due to defects in the Key System. GM chose not to fix the defects.

18. In 2002, GM began manufacturing and selling 2003 Saturn Ions with the defective Key System. It later began selling Chevrolet Cobalts with the same defective Key System.

19. In 2004, GM engineers reported that the ignition switch on the Saturn Ion was so weak and so low on the steering column that a driver's knee could easily bump the key and turn off the car.

20. This defect was sufficiently serious for a GM engineer, in January 2004, as part of GM's vehicle evaluation program, to affirmatively conclude, in writing, that "[t]his is a basic design flaw and should be corrected if we want repeat sales."

21. In 2004, GM began manufacturing and selling the 2005 Chevrolet Cobalt. The Cobalt was a sister vehicle (essentially the same car with a different badge or name) of the Saturn Ion. As noted, GM installed the same Key System on the 2005 Cobalt as it did on the Saturn Ion.

22. On October 29, 2004, around the time of GM's market launch of the 2005 Cobalt, Gary Altman – GM's program-engineering manager for the Cobalt – test drove the Cobalt with the standard key and key fob. During the test drive, when Altman's knee bumped the key, the engine turned off, causing the engine to stall. Altman reported this incident to GM.

23. In response to Altman's report, GM launched an engineering inquiry to investigate the potential for the key to move from the "run" to the "accessory/off" position during ordinary driving conditions. This inquiry is known within GM as a Problem Resolution Tracking System Inquiry ("PRTS"). The specific complaint which resulted in the PRTS was that the "the vehicle can be keyed off with knee while driving."

24. On February 1, 2005, as part of the PRTS, GM engineers concluded:

There are two main reasons that [sic] we believe can cause a lower effort in turning the key: 1. A low torque detent in the ignition switch. 2. A low position of the lock module in the column. (PRTS – Complete Report N172404).

25. As part of the PRTS, GM engineers also began looking into ways to solve the problem of the key moving from the "run" to the "accessory/off" position during ordinary driving.

26. On February 18, 2005, GM engineers presented several possible solutions to the Cockpit Program Integration Team ("CPIT"). GM engineers determined the only "sure solution" to fixing the problem of the key inadvertently moving from the "run" to the "accessory/off" position required changing from a low mount to a high mount lock module, which would considerably reduce the possibility of the key/key fob being impacted by a driver.

27. According to GM engineers, this change in the key position on the lock module, **combined with** increasing the detent in the ignition switch, would be a “sure solution.” GM, however, through Altman, rejected this “sure solution,” in part, because the cost to implement the solution would be too high.

28. During this PRTS, GM also considered changing the key from a slot to a hole as a way to attempt to contain this problem, but not as a solution to the problem.

29. Changing the key from a slot to a hole would reduce the lever arm of the key and the key chain. With the slot design, the key chain would hang lower on the key which would increase the torque force on the ignition switch when the chain was contacted or moved in any way. GM engineers determined this key change would significantly reduce the chance of the key inadvertently moving from the “run” to the “accessory/off” position during ordinary driving maneuvers.

30. A GM engineer conducted a cost analysis of this key change and determined that the cost to make this change would be less than one dollar per vehicle or around 57 cents per part.

31. GM, however, rejected this proposed key change and, on March 9, 2005, GM closed the PRTS without taking any steps to fix the defective Key System in Ions and Cobalts. The PRTS detailed the reasons why GM took no action.

Per GMX001 PEM's [Gary Altman] directive we are closing this PRTS with no action. The main reasons are as following: All possible solutions were presented to CPIT and VAPIR: a. The lead-time for all the solutions is too long. b. The tooling cost and piece price are too high. c. None of the solutions seem to fully countermeasure the possibility of the key being turned (ignition turn off) during driving. Thus **none of the solutions represents an acceptable business case.** (emphasis added)

32. On February 28, 2005, GM issued a bulletin to its dealers regarding engine-stalling incidents in 2005 Cobalts and 2005 Pontiac Pursuits (the Canadian version of the Pontiac G5).

33. The February 28, 2005, bulletin addressed the potential for drivers of these vehicles to inadvertently turn off the ignition due to low key ignition cylinder torque/effort.

34. In the February 28, 2005, bulletin, GM provided the following recommendations/instructions to its dealers – **but not to Brooke or the public in general:**

There is potential for the driver to inadvertently turn off the ignition due to low key ignition cylinder torque/effort. The concern is more likely to occur if the driver is short and has a large heavy key chain.

In the cases this condition was documented, the driver's knee would contact the key chain while the vehicle was turning. The steering column was adjusted all the way down. This is more likely to happen to a

person that is short as they will have the seat positioned closer to the steering column.

In cases that fit this profile, question the customer thoroughly to determine if this may be the cause. The customer should be advised of this potential and to take steps, such as removing unessential items from their key chains, to prevent it.

Please follow this diagnosis process thoroughly and complete each step. If the condition exhibited is resolved without completing every step, the remaining steps do not need to be performed.

35. At that time, however, GM knew that the inadvertent turning off of the ignition in the vehicles was due to design defects in the Key System in those vehicles, including the Chevrolet Cobalt, and **was not** limited to short drivers using large heavy key chains.

36. GM failed to disclose and, in fact, concealed, the February 28, 2005 bulletin – and/or the information contained therein, from Chevrolet Cobalt owners, including Brooke, and sent affirmative representations to dealers that did not accurately describe the nature of the problem, the multiple design steps needed for a “sure solution” to the problem, and GM’s knowledge of it.

37. Indeed, rather than disclosing this serious safety problem that uniformly affected all Chevrolet Cobalt cars, GM, instead, concealed and obscured the problems, electing to wait until customers brought their cars to a dealership after an engine-stalling incident, and offered even its own dealers only an

incomplete, incorrect, and insufficient description of the defects and the manner in which to actually remedy them.

38. As of February 2005, GM engineers knew that the Saturn Ion and Chevrolet Cobalt vehicles had the Key System safety-related defects discussed in this Complaint.

39. Pursuant to 49 C.F.R. § 573.6, which requires an automobile manufacturer to “furnish a report to the NHTSA for each defect...related to motor vehicle safety,” GM had a duty, no later than February 2005 to disclose the safety-related defects in the Saturn Ion and Chevrolet Cobalt vehicles.

40. Instead of complying with its legal obligations, however, GM fraudulently concealed the Key System defect from the public – including Brooke – and continued to manufacture and sell Ions and Cobalts with these known safety defects, causing Brooke to continue to own a vehicle that contained a defective and dangerous Key System.

41. In March 2005, following its receipt of a customer complaint that his/her Cobalt vehicle ignition turned off while driving, GM opened another PRTS – Complete Report (0793/2005-US). Steve Oakley, the brand quality manager for the Cobalt, originated the PRTS. As part of the PRTS, Mr. Oakley reviewed an email dated March 9, 2005 from Jack Weber, a GM engineer. The subject of the email was “Cobalt SS Ignition Turn Off.” In the email Mr. Weber stated:

I've had a chance to drive a Cobalt SS and attempt to turn off the ignition during heel/toe down shifting. Much to my surprise, the first time I turned off the ignition switch was during a normal traffic brake application on I-96. After that I was able to do a static reproduction of the condition in a parking lot. I've attached photos of the condition with comments. My Anthropometric Measurements are attached below:

Static view of keys, fob and registration hitting knee.

Position of RKE fob during normal driving. Dynamic evaluation.

View of steering column cover and Pass Key 3+ "lump" under the key slot.

Key in run position, knee contacting the fob and the split ring is pulling on the key to move it to the "off" position. Static evaluation.

Fob has levered around the steering column cover and turned the ignition off.

Unobstructed view of the fob and column cover.

Attached below is documentation of a RAMSIS study performed to attempt to duplicate the real world condition.

Please call at (586) 986-0622 with questions.

Jack Weber

Mr. Weber clearly identified the defects in the Key System while he was driving the Cobalt.

42. Despite the clear evidence of the safety-related defect with the Key System, during the March 2005 PRTS, GM engineers decided not to reconsider any of the proposed solutions discussed during the February 2005 PRTS. Instead, the GM engineers leading the PRTS recommended that sole corrective action GM should recommend would be to advise customers to remove excess material from their key rings, **even though GM knew that the inadvertent turning off of the ignition in these vehicles was due to design defects in the Key System in those vehicles, and was not limited to drivers having excess key ring materials.**

43. In May 2005, GM, following its receipt of another customer complaint that his/her Cobalt vehicle ignition turned off while driving, it opened another PRTS.

44. During the May 2005 PRTS, GM decided to redesign the key in order to reduce the possibility that a driver may inadvertently turn the key from the “run” to the “accessory/off” position during ordinary driving.

45. Despite this initial safety/redesign commitment, however, GM ultimately failed to follow through on its own decision and closed this PRTS without any action, further concealing what it knew from the public and continuing to subject the public, including the Meltons, to the defective vehicles’ serious safety risks.

46. At or about this same time, GM, through Alan Adler, GM's Manager, Product Safety Communications, issued the following statement with respect to the Chevrolet Cobalt's inadvertent shut-off problems, affirmatively representing in its "Statement on Chevrolet Cobalt Inadvertent Shut-offs" that:

In rare cases when a combination of factors is present, a Chevrolet Cobalt driver can cut power to the engine by inadvertently bumping the ignition key to the accessory or off position while the car is running.

When this happens, the Cobalt is still controllable. The engine can be restarted after shifting to neutral.

GM has analyzed this condition and believes it may occur when a driver overloads a key ring, or when the driver's leg moves amid factors such as steering column position, seat height and placement. Depending on these factors, a driver can unintentionally turn the vehicle off.

Service advisers are telling customers they can virtually eliminate this possibility by taking several steps, including removing non-essential material from their key rings.

Ignition systems are designed to have "on" and "off" positions, and practically any vehicle can have power to a running engine cut off by inadvertently bumping the ignition from the run to accessory or off position.

GM's statement, however, was demonstrably false and misleading.

47. Contrary to GM's above-referenced statement, GM's internal testing documents showed that these incidents occurred when drivers were using

keys with the standard key fob. GM knew that these incidents were not caused by heavy key chains or a driver's size and seating position. GM knew that removing the non-essential material from key rings would not "virtually eliminate" the possibility of inadvertent bumping of the ignition key from the "run" to the "accessory/off" position while the car is running.

48. GM's above-referenced statement was further demonstrably false and misleading because GM knew that these incidents were ultimately caused by the safety-related defects in the Key System identified in the February 2005 PRTS.

49. But GM's affirmative concealment of the problems with the defective vehicles, including the Chevrolet Cobalt cars, did not end there.

50. On July 29, 2005, Amber Marie Rose, a sixteen year old Clinton, Maryland resident, was driving a 2005 Cobalt when she drove off the road and struck a tree head-on. Amber's driver's side frontal airbag did not deploy and she died as a result of the injuries she sustained in the crash.

51. GM received notice of Amber's incident in September 2005 and opened an internal investigation file pertaining to this incident shortly thereafter.

52. During its investigation of the incident, GM learned that the key in Amber's Cobalt was in the "accessory/off" position at the time of the crash.

53. During its investigation of the incident in which Amber was killed in her Cobalt vehicle, GM also knew that the driver's side frontal airbag

should have deployed given the circumstances of the crash. Upon information and belief, GM subsequently entered into a confidential settlement agreement with Amber's mother.

54. In December 2005, shortly after it commenced its internal investigation into the incident leading to Amber's death, GM issued a Technical Service Bulletin (05-02-35-007) (the "TSB").

55. The TSB, which GM affirmatively represented applied to 2005–2006 Chevrolet Cobalts, 2006 Chevrolet HHRs, 2005–2006 Pontiac Pursuit, 2006 Pontiac Solstices, and 2003–2006 Saturn Ions, provided, "Information on inadvertent Turning of Key Cylinder, Loss of Electrical System and no DTCs," provided the following service information:

There is potential for the driver to inadvertently turn off the ignition due to low ignition key cylinder torque/effort.

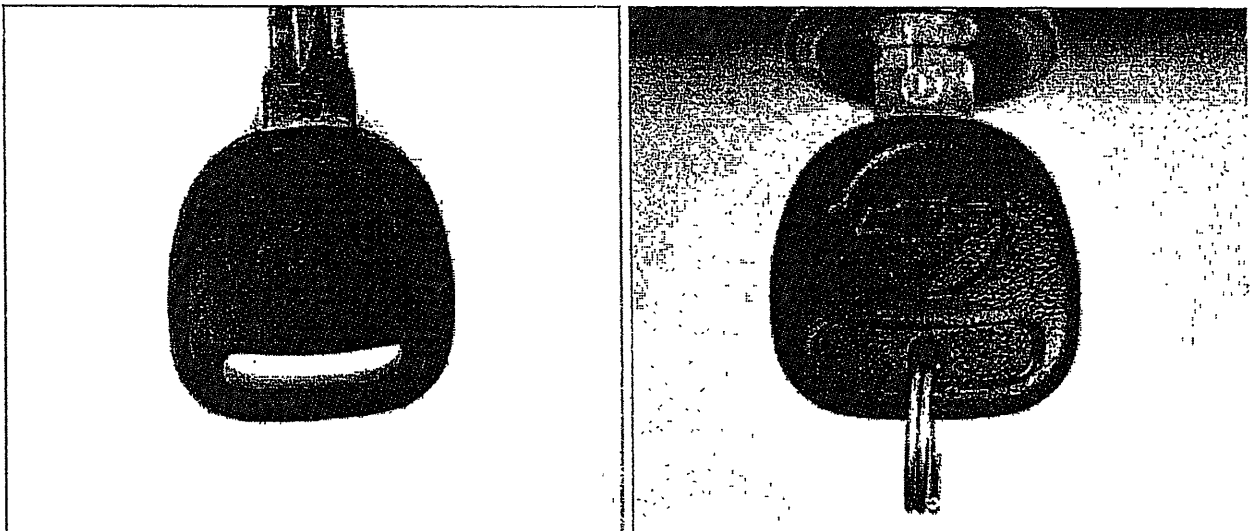
The concern is more likely to occur if the driver is short and has a large and/or heavy key chain. In these cases, this condition was documented and the driver's knee would contact the key chain while the vehicle was turning and the steering column was adjusted all the way down. This is more likely to happen to a person who is short, as they have the seat positioned closer to the steering column.

In cases that fit this profile, question the customer thoroughly to determine if this may be the cause. The customer should be advised of this potential and should

take steps to prevent it - such as removing unessential items from their key chain.

Engineering has come up with an insert for the key ring so that it goes from a "slot" design to a "hole" design. As a result, the key ring cannot move up and down in the slot any longer - it can only rotate on the hole. In addition, the previous key ring has been replaced with a smaller, 13 mm (0.5 in) design. This will result in the keys not hanging as low as in the past.

56. An image of the insert changing the "slot" design to a "hole" design appears as follows:



57. As with its prior statement regarding the defective vehicles (see above), the information GM provided in this TSB was also false and misleading.

58. In the two PRTSs GM issued before it issued the TSB, GM engineers never represented that short drivers or heavy key chains were the reasons why these incidents were happening.

59. Indeed, at the time it issued the TSB, GM knew that these incidents were happening to drivers of all sizes using keys with the standard key fobs.

60. In other words, GM knew these incidents were not caused by short drivers with heavy key chains, but were caused by the safety-related defects in the Key System of its defective vehicles, including the Chevrolet Cobalt cars.

61. In 2005, GM began buying back Cobalts from certain customers who were experiencing engine stalling incidents. GM never told the public, including Brooke, that it was buying back Cobalts under these circumstances. GM refused to buy back Cobalts from other customers who had also experienced engine stalling incidents. In fact, for many of the customers who complained about experiencing engine-stalling incidents, GM never informed these customers of the TSB and/or the availability of the key insert.

62. On November 17, 2005, shortly after Amber's death and immediately before GM's issuance of the TSB, there was **another** incident involving a 2005 Cobalt in Baldwin, Louisiana. In that incident, the Cobalt went off the road and hit a tree. The frontal airbags did not deploy in this accident. GM received notice of this accident, opened a file, and referred to it as the "Colbert" incident.

63. On February 10, 2006, in Lanexa, Virginia, shortly after GM issued the TSB, a 2005 Cobalt drove off of the road and hit a light pole. As with the Colbert incident (above), the frontal airbags failed to deploy in this incident as well. The download of the SDM (the vehicle's "black box") showed the key was in the "accessory/off" position at the time of the crash. GM received notice of this accident, opened a file, and referred to it as the "Carroll" incident.

64. On March 14, 2006, in Frederick, Maryland, a 2005 Cobalt traveled off the road and struck a utility pole. The frontal airbags did not deploy in this incident. The download of the SDM showed the key was in the "accessory/off" position at the time of the crash. GM received notice of this incident, opened a file, and referred to it as the "Oakley" incident.

65. On August 1, 2006, following its receipt of a customer complaint about a Cobalt stalling while driving, GM opened yet another PRTS relating to this issue. GM closed this PRTS on October 2, 2006 however, without taking any action.

66. In October 2006, GM updated the TSB (05-02-35-007) to include additional model years: the 2007 Saturn Ion and Sky, 2007 Chevrolet HHR, 2007 Cobalt and 2007 Pontiac Solstice and G5. These vehicles had the same safety-related defects in the Key System as the vehicles in the original TSB.

All of the vehicles identified in the original TSB and updated TSB are hereinafter referred to as the “Defective Vehicles.”

67. On December 29, 2006, in Sellenville, Pennsylvania, a 2005 Cobalt drove off the road and hit a tree. The frontal airbags failed to deploy in this incident. GM received notice of this incident, opened a file, and referred to it as the “Frei” incident.

68. On February 6, 2007, in Shaker Township, Pennsylvania, a 2006 Cobalt sailed off the road and struck a truck. Despite there being a frontal impact in this incident, the frontal airbags failed to deploy. The download of the SDM showed the key was in the “accessory/off” position. GM received notice of this incident, opened a file, and referred to it as the “White” incident.

69. On August 6, 2007, in Cross Lanes, West Virginia, a 2006 Cobalt rear-ended a truck. The frontal airbags failed to deploy. GM received notice of this incident, opened a file, and referred to it as the “McCormick” incident.

70. On September 25, 2007, in New Orleans, Louisiana, a 2007 Chevrolet Cobalt lost control and struck a guardrail. Despite there being a frontal impact in this incident, the frontal airbags failed to deploy. GM received notice of this incident, opened a file, and referred to it as the “Gathe” incident.

71. On October 16, 2007, in Lyndhurst, Ohio, a 2005 Chevrolet Cobalt traveled off road and hit a tree. The frontal airbags failed to deploy. GM received notice of this incident, opened a file, and referred to it as the "Breen" incident.

72. On April 5, 2008, in Sommerville, Tennessee, a 2006 Chevrolet Cobalt traveled off the road and struck a tree. Despite there being a frontal impact in this incident, the frontal airbags failed to deploy. The download of the SDM showed the key was in the "accessory/off" position. GM received notice of this incident, opened a file, and referred to it as the "Freeman" incident.

73. On May 21, 2008, in Argyle, Wisconsin, a 2007 Pontiac G5 traveled off the road and struck a tree. Despite there being a frontal impact in this incident, the frontal airbags failed to deploy. The download of the SDM showed the key was in the "accessory/off" position. GM received notice of this incident, opened a file, and referred to it as the "Wild" incident.

74. On May 28, 2008, in Lufkin, Texas, a 2007 Chevrolet Cobalt traveled off the road and struck a tree. Despite there being a frontal impact in this incident, the frontal airbags failed to deploy. GM received notice of this incident, opened a file, and referred to it as the "McDonald" incident.

75. On September 13, 2008, in Lincoln Township, Michigan, a 2006 Chevrolet Cobalt traveled off the road and struck a tree. Despite there being a

frontal impact in this incident, the frontal airbags failed to deploy. GM received notice of this incident, opened a file, and referred to it as the "Harding" incident.

76. On November 29, 2008, in Rolling Hills Estates, California, a 2008 Chevrolet Cobalt traveled off the road and hit a tree. Despite there being a frontal impact in this incident, the frontal airbags failed to deploy. GM received notice of this incident, opened a file, and referred to it as the "Dunn" incident.

77. On December 6, 2008, in Lake Placid, Florida, a 2007 Chevrolet Cobalt traveled off the road and hit a utility pole. Despite there being a frontal impact in this incident, the frontal airbags failed to deploy. The download of the SDM showed the key was in the "accessory/off" position. GM received notice of this incident, opened a file, and referred to it as the "Grondona" incident.

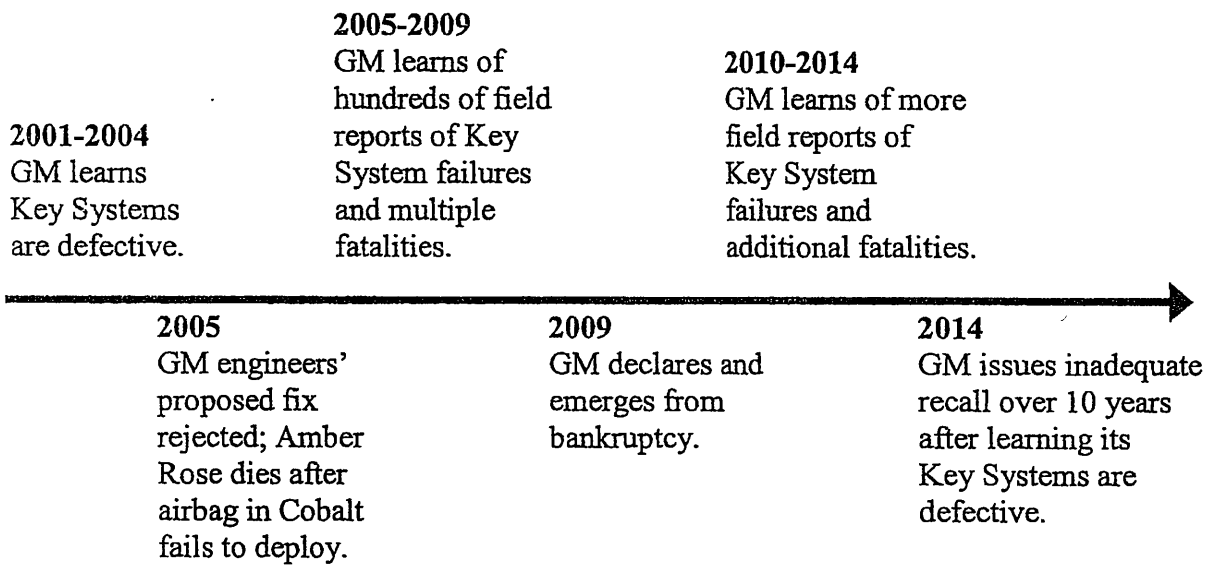
78. In February 2009, GM opened yet another PRTS with respect to the Defective Vehicles – this time to investigate why the slot in the key in Cobalts allowed the key chain to hang too low in the vehicles, as well as the inadvertent shutting off of the vehicles.

79. Through this PRTS, GM determined that changing the key from a slot to a hole would significantly reduce the likelihood of inadvertent turning off the ignition switch.

80. In March 2009, GM approved of the design change in the key from the slot to a hole. According to GM, this redesigned change was

implemented in model year 2010 Chevrolet Cobalts. GM, however, chose not to provide these redesigned keys the owners or lessees of any of the vehicles implicated in the TSB, including the 2005 Cobalt.

81. This timeline gives a short overview of some key points between 2004 and the present, as discussed above:



82. Throughout this entire time period, GM was selling the Defective Vehicles to consumers for full price, and consumers were purchasing them believing that the vehicles were non-defective, but all the while GM was concealing the extent and nature of the defects in the Defective Vehicles.

**Old GM's Marketing Represented to the Public
that the Defective Vehicles Were Safe**

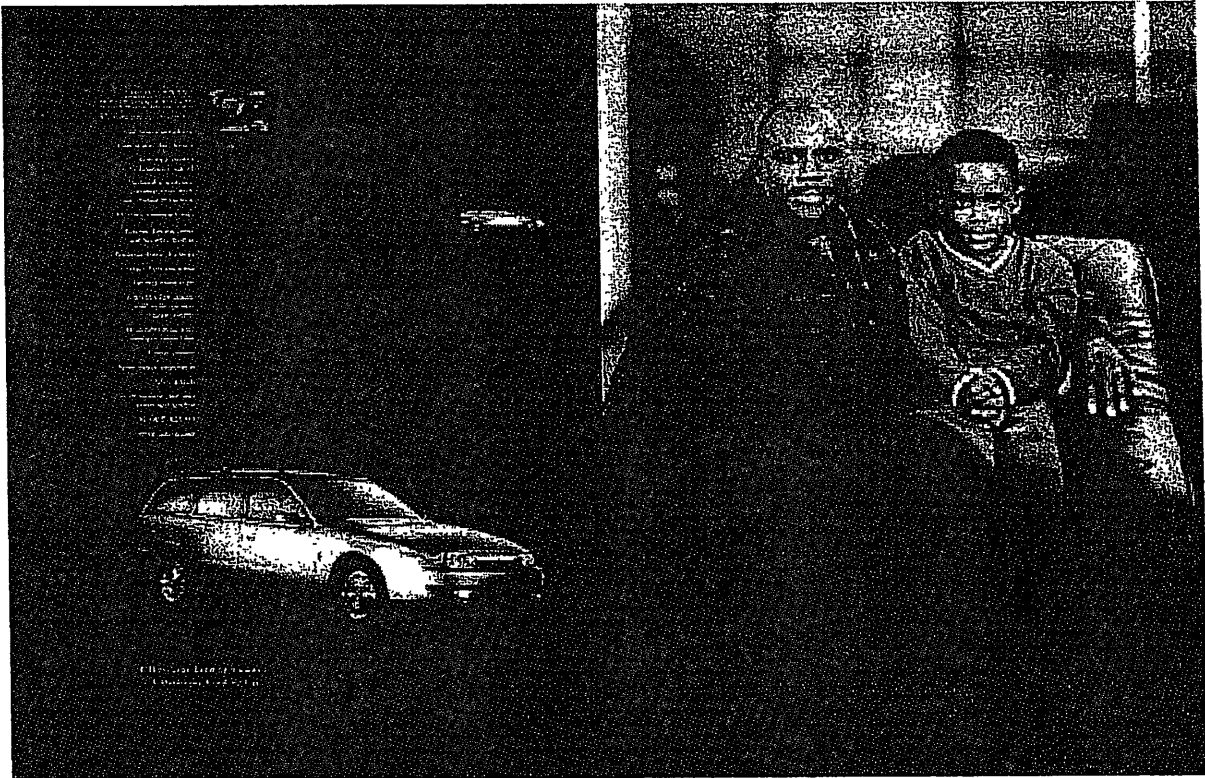
83. In a section called "safety," Old GM's Chevrolet website stated:

OUR COMMITMENT

Your family's safety is important to us. Whether it's a short errand around town or a cross-country road trip, Chevrolet is committed to keeping you and your family safe — from the start of your journey to your destination. That's why every Chevrolet is designed with a comprehensive list of safety and security features to help give you peace of mind. Choose from the safety features below to learn more about how they work, and which Chevy vehicles offer them.

84. Similarly, old GM promoted its Saturn vehicle line on television with statements like "Putting people first," and "Saturn. People First."

85. Saturn's print ad campaign featured advertisements like the following, which stated, among other things, "Need is where you begin. In cars, it's about things like reliability, durability and, of course, safety. That's where we started when developing our new line of cars":



86. In sum, in order to increase sales, old GM touted the safety of its vehicles.

87. But, when the time came for the company to stay true to its words, GM did not disclose its knowledge about the dangerous Key System defects to its customers, including Brooke.

Meet the New GM, Same as the Old GM

88. In 2009, GM declared bankruptcy and, weeks later, it emerged from bankruptcy. Both before and after GM's bankruptcy, the Key Systems in the Defective Vehicles continued to fail and GM, in all iterations, continued to conceal the truth.

89. On May 15, 2009, GM again met with Continental AG, an airbag component supplier, and requested that Continental download SDM data from a 2006 Chevrolet Cobalt accident where the airbags failed to deploy.

90. On December 31, 2010, in Rutherford County Tennessee, a 2006 Chevrolet Cobalt traveled off the road and struck a tree. Despite there being a frontal impact in this incident, the frontal airbags failed to deploy. The download of the SDM showed the key was in the "accessory/off" position. GM received notice of this incident, opened a file, and referred to it as the "Chansuthus" incident.

91. On December 31, 2010, in Harlingen, Texas, a 2006 Chevrolet Cobalt traveled off the road and struck a curb. Despite there being a frontal impact in this incident, the frontal airbags failed to deploy. GM received notice of this incident, opened a file, and referred to it as the "Najera" incident.

92. On March 22, 2011, Ryan Jahr, a GM engineer, downloaded the SDM from Brooke's Cobalt. The information from the SDM download showed that the key in Brooke's Cobalt turned from the "run" to the "accessory/off" position 3-4 seconds before the crash.

93. On December 18, 2011, in Parksville, South Carolina, a 2007 Chevrolet Cobalt traveled off the road and struck a tree. Despite there being a frontal impact in this incident, the frontal airbags failed to deploy. The download

of the SDM showed the key was in the “accessory/off” position. GM received notice of this incident, opened a file, and referred to it as the “Sullivan” incident.

94. These incidents are not limited to vehicles of model year 2007 and before. According to GM’s own investigation, there have been over 250 crashes involving 2008-2010 Chevrolet Cobalts in which the airbags failed to deploy.

GM Investigates Further, but Continues to Conceal the Defect

95. In 2010, GM began a formal investigation of the frontal airbag non-deployment incidents in Chevrolet Cobalts and Pontiac G5s. GM subsequently elevated the investigation to a Field Performance Evaluation (“FPE”).

96. In August 2011, GM assigned Engineering Group Manager, Brian Stouffer as the Field Performance Assessment Engineer (“FPAE”) to assist with the FPE investigation.

97. In Spring 2012, Stouffer asked Jim Federico, a high level executive and chief engineer at GM, to oversee the FPE investigation. Federico was the “executive champion” for the investigation to help coordinate resources for the FPE investigation.

98. In May 2012, GM engineers tested the torque on the ignition switches for 2005-2009 Cobalts, 2007 and 2009 Pontiac G5s, 2006-2009 HHRs,

and 2003-2007 Ion vehicles in a junkyard. The results of these tests showed that the torque required to turn the ignition switches in most of these vehicles from the “run” to the “accessory/off” position did not meet GM’s minimum torque specification requirements, including the 2008-2009 vehicles. These results were reported to Stouffer and other members of the FPE.

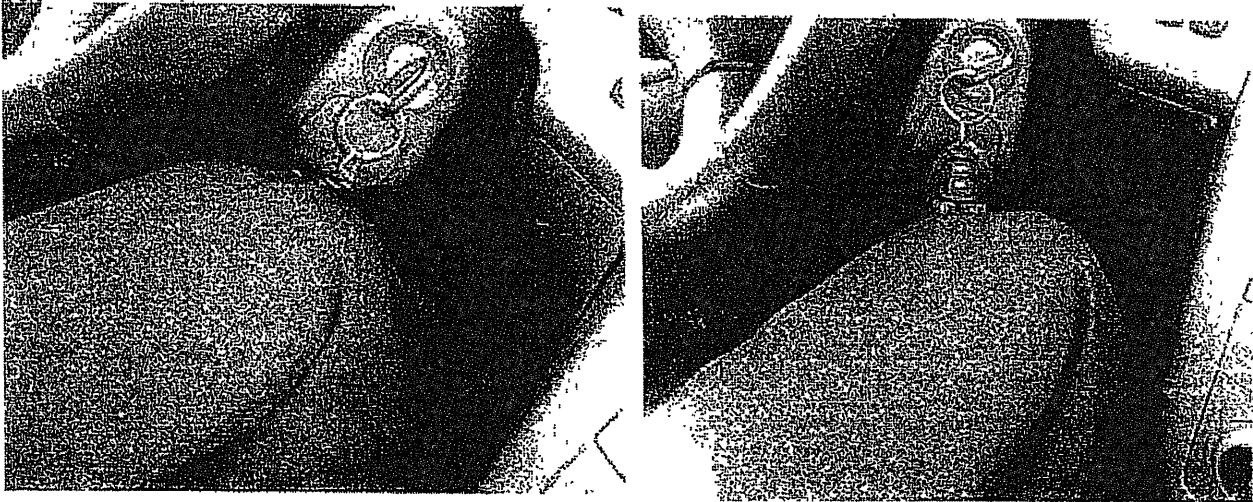
99. In September 2012, Stouffer requested assistance from a “Red X Team” as part of the FPE investigation. The Red X Team was a group of engineers within GM assigned to find the root cause of the airbag non-deployments in frontal accidents involving Chevrolet Cobalts and Pontiac G5s. By that time, however, it was clear that the root cause of the airbag non-deployments in a majority of the frontal accidents was the defective Key System. The Red X Team became involved in the investigation shortly after Mr. Stouffer’s request.

100. During the field-performance-evaluation process, GM determined that, although increasing the detent in the ignition switch would reduce the chance that the key would inadvertently move from the “run” to the “accessory/off” position, it would not be a total solution to the problem.

101. Indeed, the GM engineers identified several additional ways to actually fix the problem. These ideas included adding a shroud to prevent a driver’s knee from contacting the key, modifying the key and lock cylinder to orient the key in an upward facing orientation when in the run position, and adding

a push button to the lock cylinder to prevent it from slipping out of run. GM rejected each of these ideas.

102. The photographs below are of a GM engineer in the driver's seat of a Cobalt during the investigation of Cobalt engine stalling incidents.



103. These photographs show the dangerous condition of the position of the key in the lock module on the steering column, as well as the key with the slot, which allow the key fob to hang too low off of the steering column. GM engineers understood that the key fob may be impacted and pinched between the driver's knee and the steering column which causes the key to be inadvertently turned from the run to accessory/off position. The photographs show why the GM engineers understood that increasing the detent in the ignition switch would not be a total solution to the problem. It also shows why GM engineers believed that the

additional changes to the Key System (such as the shroud) were necessary to fix the defects with the Key System.

104. The GM engineers clearly understood that increasing the detent in the ignition switch alone was not a solution to the problem but GM concealed – and continued to conceal – from the public, the nature and extent of the defects.

105. By 2012, Federico, Stouffer, and the remaining members of the Red X Team knew that the Key System in the Ion, the Cobalt, and the G5 vehicles had safety-related defects that would cause the key to move from the “run” to the “accessory/off” position while driving these vehicles. They also knew that when this happened the airbags would no longer work in frontal crashes.

106. Federico, Stouffer, and the other members of the Red X Team also understood that these safety-related defects had caused or contributed to numerous accidents and multiple fatalities. Despite this knowledge, GM chose to conceal this information from the public, NHTSA, and Plaintiffs.

107. Under 49 C.F.R. ¶ 573.6, GM had a duty in 2012 to disclose the safety-related defects in the Ion, Cobalt, and G5 vehicles. Rather than comply with their legal obligations, GM continued to fraudulently conceal these defects from the public and the U.S. government.

108. In December 2012, in Pensacola, Florida, Ebram Handy, a GM engineer, participated in an inspection of components from Brooke Melton’s

Cobalt, including the ignition switch. At that inspection, Handy, along with Mark Hood, a mechanical engineer retained by the Meltons, conducted testing on the ignition switch from Brooke Melton's vehicle, as well as a replacement ignition switch for the 2005 Cobalt.

109. At that inspection, Handy observed that the results of the testing showed that the torque performance on the ignition switch from Brooke Melton's Cobalt was well below GM's minimum torque performance specifications. Handy also observed that the torque performance on the replacement ignition switch was significantly higher than the torque performance on the ignition switch in Brooke Melton's Cobalt.

110. In January 2013, Handy, in preparation for a Rule 30(b)(6) deposition, spoke with several GM engineers, including DeGiorgio and Stouffer. At that time, Handy knew that, based on the testing he had observed, the original ignition switch in the 2005 Cobalt failed to meet GM's minimum torque performance specifications. GM knew that an ignition switch that did not meet its minimum torque performance requirements was a safety-related defect.

**GM Fraudulently Conceals
Evidence From The Meltons**

111. On February 13, 2013, this Court entered an order compelling GM to produce certain documents, including all documents relating to the design

and testing of the ignition switch in the cars which were the subject of the initial TSB, including the 2007 Cobalt.

112. On February 28, 2013, GM produced what it said were all documents within its possession responsive to the Court's February 13, 2013 Order. GM did not produce any documents relating to any change in the ignition switch in the Cobalt, or any other Defective Vehicles, during the 2007 model year.

113. On April 29, 2013, the Meltons' counsel deposed Ray DeGiorgio, the chief design engineer for the ignition switches in the Defective Vehicles, in Detroit, Michigan. When asked whether there were any changes in the ignition switch in the Cobalt between model years 2005-2010, Mr. DeGiorgio testified:

Q. And that there weren't any changes made – or were there changes made to the switch between '05 and 2010 that would have affected the torque values to move the key from the various positions in the cylinder?

A. There was one change made to the resistor in '08, but that should not have affected the torque or the displacement of the switch.

I can restate this way: There was an electrical change made in '08, but not a mechanical change – at least there were no official changes, mechanical changes, made to the switch that I know of.

Q. When you say no official, could there be unofficial changes made?

A. I'm not saying that there was, I'm just saying if there was something changed at the supplier side, we were not aware of it and we did not approve it; okay?

(DeGiorgio Deposition, pp. 57-58).

114. Mr. DeGiorgio then testified about taking apart current production Cobalt ignition switches to determine whether there were any design changes GM was not aware of:

A. When I was approached by field investigation to provide a history or summary of the design changes, I wanted to make sure, you know, are there anything [sic] in the design that may have changed that we're not aware of? That's when I proceeded to take a couple of switches and take a look at it.

Q. And what did you find?

A. I saw nothing out of the norm that would suggest, you know, a potential issue.

Q. And what switches did you look at?

A. It was the Cobalt ignition switch.

Q. Which one? What model year?

A. I want to say these were current production switches because that's where they're available, so I want to say actually they were service parts, which we had just gotten.

(DeGiorgio Deposition, pp. 69-70).

115. At page 90, Mr. DeGiorgio reiterated that he was not aware of any changes in the ignition switches of 2005-2007 Cobalts:

Q. Do you know whether his '07 Cobalt, if it's the same ignition switch as was in the '05 and '06?

A. It came from the factory as is. I couldn't tell you if it was '05, '06 or '07. I'm not aware of any differences between the three. It's the original switch that came with the vehicle. How's that?

(DeGiorgio Deposition, p. 90).

116. Mr. DeGiorgio also testified he obtained Cobalt replacement ignition switches directly from the manufacturer, Delphi:

Q. Have you talked with anyone at Delphi regarding this – these reported incidents where they key moves from the run to the accessory position under certain driving conditions?

A. I did get ahold of Delphi, I did talk to Mary, and I had requested some ignition switches from her. Also, I was asked to investigate or look into, is Delphi still making the switch for GM or somebody else?

So I was in contact with Mary, I did get information such as, you know, do we still make the switches, were they made, and if I could get some switches from them.

Q. Did she say they're still making the switches?

A. They're still making the switches for service, GM service.

(DeGiorgio Deposition, p. 114)

Q. Okay. And what did you do with the switches that Ms. Fitz provided to you?

A. Again, I tore open a couple of these switches trying to see if there's anything blatantly different than might have been produced. I want to say, with the initial ION ignition switch. It

was like, are there any differences, you know, between the designs?

My intent was to look at the current switch and see if there's any changes that may have been made without our knowledge that would help explain, I want to say, this issue.

(DeGiorgio Deposition, p. 116).

117. Mr. DeGiorgio also provided the following additional testimony about Delphi:

Q. Did you ask Mary Fitz or anyone from Delphi whether there, in fact, had been any changes made to the ignition switch?

A. Yes, yes I did. And they came back, said there's been no changes made to the switch since the introduction to production.

Q. Who told you that?

A. Mary Fitz.

Q. Where is she located?

A. She's located in, I want to say, Delphi headquarters here in Michigan.

(DeGiorgio Deposition, pp. 117-118)

118. Mr. DeGiorgio's testimony left no doubt that he had spoken with Delphi employees and that they confirmed there were no changes made to the ignition switch in 2005-2010 Cobalts.

119. At his deposition, Mr. DeGiorgio was shown photographs of the differences between the ignition switch in Brooke's Cobalt and the ignition switch in the 2008 Cobalt or replacement ignition switch. After looking at the photographs of the different ignition switches, Mr. DeGiorgio testified as follows:

Q. The one on the right, Exhibit 13 is an '05 or an '06, and the one on the left, Exhibit 14, is either an '08 or replacement. Do you see the difference?

A. Yes.

Q. Have you noticed that before today, Mr. DeGiorgio?

A. No sir.

Q. Were you aware of this before today, Mr. DeGiorgio?

MR. HOLLADAY: Object to the form. You can answer.

THE WITNESS: No sir.

Q. It appears to be pretty clear that the plunger and the cap is taller on Exhibit 14 compared to Exhibit 13, isn't it?

A. That's correct.

Q. How is a taller cap going to affect the rotational resistance?

A. It's hard to determine from these pictures exactly if it is a taller cap or is it recessed inside the housing or not. It's hard for me to assess, really, what I'm looking at.

Q. You've taken apart a number of switches and you're telling the jury you've never noticed the difference in the plunger between the '05 and '06 versus the new resistor or switch?

MR. HOLLADAY: Object to the form.

THE WITNESS: I did not notice, no.

(DeGiorgio Deposition, pp. 149-150)

120. Mr. DeGiorgio was then further questioned about his knowledge of any differences in the ignition switches:

Q. And I'll ask the same question. You were not aware before today that GM had changed the spring – the spring on the ignition switch had been changed from '05 to the replacement switch?

MR. HOLLADAY: Object to the form. Lack of predicate and foundation. You can answer.

THE WITNESS: I was not aware of a detent plunger switch change. We certainly did not approve a detent plunger design change.

Q. Well, suppliers aren't supposed to make changes such as this without GM's approval, correct?

A. That is correct.

Q. And you are saying that no one at GM, as far as you know, was aware of this before today?

MR. HOLLADAY: Object. Lack of predicate and foundation. You can answer.

THE WITNESS: I am not aware about this change.

(DeGiorgio Deposition, pp. 151-152)

121. Mr. DeGiorgio signed his errata sheet on May 23, 2013. In the signed errata sheet, Mr. DeGiorgio did not change any testimony referenced in this Complaint:

122. Mr. DeGiorgio's testimony left no doubt that he had absolutely no knowledge of any change in the ignition switch in 2005-2010 Cobalts.

123. On May 13, 2013, the Meltons served their Fifth Request for Production of Documents on GM. In RPD No. 1, the Meltons requested:

All documents and materials relating to GM's investigation into the change in the cap and spring in the 2005 Cobalt ignition switch to the cap and spring in the 2008 Cobalt ignition switch, as well as the replacement ignition switches for the Cobalt.

124. On June 17, 2013, GM filed its Response to the Fifth Request for Production of Documents. In response to RPD No. 1, GM stated:

As design release engineer Ray DeGiorgio testified, GM LLC did not request and was not asked to authorize or approve a change in the cap and spring in the ignition switch used in the 2008 Chevrolet Cobalt or in replacement ignition switches for the 2005-2007 Chevrolet Cobalt that would affect the torque required to move the key from the run to accessory position. GM LLC objects to this Request to the extent it seeks information protected from disclosure by the attorney-client privilege and/or the work product doctrine.

125. GM then approached the Meltons about mediating their case.

On August 21, 2013, the Meltons and GM attended the mediation at Bay
Mediation.

126. Up to and including the date of the mediation, GM continued to state that no one at GM had authorized or approved any change to the ignition switch in 2005-2010 Cobalts.

127. The Meltons relied on the testimony of Mr. DeGiorgio, as well as the representations of GM and its attorneys, that no one from GM knew about any changes in the design of the ignition switch in 2005-2010 Cobalts.

128. The Meltons subsequently settled their claims against GM on August 22, 2013.

129. The Meltons executed the Settlement Agreement with GM on September 9, 2013.

130. On February 7, 2014, GM, in a letter from Carmen Benavides, Director – Product Investigations and Safety Regulations for GM, informed NHTSA that it was conducting Recall No. 13454 for certain 2005-2007 model year Chevrolet Cobalts and 2007 model year Pontiac G5 vehicles.

131. In its February 7, 2014, letter to NHTSA, GM represented that as replacement ignition switches became available, GM would replace the ignition switches on the Defective Vehicles.

132. On February 19, 2014, a request for timeliness query of General Motors' Safety Recall 13454 was sent to NHTSA. The timeliness query pointed out that GM had failed to recall all of the vehicles with the defective ignition switches.

133. The February 19, 2014, request for timeliness query also asked NHTSA to investigate GM's failure to fulfill its legal obligation to report the safety-related defects in the Defective Vehicles to NHTSA within five days of discovering the defect.

134. On February 24, 2014, GM in a letter from Carmen Benavides, informed NHTSA it was expanding the recall to include 2006-2007 model year (MY) Chevrolet HHR and Pontiac Solstice, 2003-2007 MY Saturn Ion, and 2007 MY Saturn Sky vehicles.

135. GM included an Attachment to the February 24, 2014 letter. In the Attachment GM, **for the first time**, admitted that GM authorized a change in the ignition switch in 2006. Specifically, GM stated:

On April 26, 2006, the GM design engineer responsible for the Cobalt's ignition switch signed a document approving changes to the ignition switch proposed by the supplier, Delphi Mechatronics. The approved changes included, among other things, the use of a new detent plunger and spring that increased torque force in the ignition switch. This change to the ignition switch was not reflected in a corresponding change in the part number for the ignition switch. GM believes that the supplier began providing the re-designed ignition switch to GM at some

point during the 2007 model year. (GM's February 24, 2014 letter and Attachment are attached as **Exhibit A.**)

136. GM then produced documents in response to Congressional requests leading up to the hearings April 1 and 2, 2014. Among the documents produced by GM is a document titled, "GENERAL MOTORS COMMODITY VALIDATION SIGN-OFF," dated April 26, 2006. This document is attached as **Exhibit B.** According to this document, Delphi had met all of the sign-off requirements in order to provide a new ignition switch for certain GM vehicles. GM has acknowledged that the ignition switch in the Cobalt was included in this design change.

137. The design change included a new detent plunger "to increase torque force in the switch." Mr. DeGiorgio's signature is on this page as the GM authorized engineer who signed off on this change to the ignition switch.

138. This GM Commodity Validation Sign-Off shows that Mr. DeGiorgio repeatedly perjured himself during his deposition on April 29, 2013. Mr. DeGiorgio perjured himself in order to fraudulently conceal evidence from the Meltons that GM had signed off on the change in the ignition switch so that the Meltons, and ultimately a jury, would never know that GM was changing the switches in 2007 and later model year Cobalts and concealing these changes from Brooke.

139. Mr. DeGiorgio perjured himself when he signed the errata sheet confirming that all the testimony was true and accurate.

140. GM fraudulently concealed this critical evidence of the design change in the ignition switch from the Meltons in its response to RPD No. 1 in Plaintiff's Fifth Request for Production of Documents wherein it said, "GM LLC did not request and was not asked to authorize or approve a change in the cap and spring in the ignition switch used in the 2008 Chevrolet Cobalt or in replacement ignition switches for the 2005-2007 Chevrolet Cobalt that would affect the torque required to move the key from the run to accessory position." GM served this response in its continuing effort to fraudulently conceal evidence from the Meltons that GM had signed off on the change in the ignition switch so that the Meltons, and ultimately a jury, would never know that GM was changing the switches in 2007 and later model year Cobalts and concealing these changes from Brooke.

Thornton's Role In Brooke's Injuries and Death

141. On March 6, 2010, Brooke took her 2005 Chevrolet Cobalt to Thornton for service because the engine shut off while she was driving. She told Thornton about her problems with the Cobalt, and confirmed to her father that she had explained to Thornton was happening with her Cobalt and that the engine was shutting off.

142. Despite having the GM TSB in their system, Thornton never found it and failed to discover that the Cobalt was shutting off because of the issues mentioned in the TSB.

143. Thornton performed work on Brooke's car, including a TBI injection clean on the vehicle. The TBI injection clean was not performed to correct the problem with the engine shutting off while driving. Thornton, however, told Brooke that it had performed the TBI injection clean in order to address the problem of the engine shutting off while she was driving. Thornton tried to sell Brooke other unnecessary and unneeded work on her car.

144. Based on the Miles In and the Miles Out on its service form, Thornton returned Brooke's car to her without even doing a test drive. Thornton, however, told Brooke that it had performed the TBI injection clean in order to address the problem of the engine shutting off while she was driving. Thornton never performed the work addressed in the GM TSB and never told Brooke about the GM TSB.

145. After she picked up her car, Brooke told her father that Thornton claimed to have repaired her Cobalt.

IV. Rescission

146. On June 24, 2011, the Meltons filed their original lawsuit against GM. On August 21, 2013, the Meltons mediated the case and agreed to

settle on August 22, 2013. The Meltons subsequently executed the Settlement Agreement with GM on September 9, 2013. The Meltons settled their case based on the information they had at the time, which did not include the information contained in Paragraph Nos. 135 to 140.

147. GM's fraudulent concealment of the evidence from the Meltons, as well as Mr. DeGiorgio's repeated perjury, resulted in the Meltons being misled about the true facts of the case and, thus, their settlement was based on incomplete false data that GM had withheld solely to induce them to settle their case.

148. On or about April 1, 2014, the Meltons learned that GM fraudulently concealed relevant evidence and affirmatively misled them, and that their settlement was based on incomplete and false data, and that GM had withheld that data solely to induce them to settle their case.

149. After reviewing the information now available because of the GM recall, the Meltons realized the full scope of GM's deception. On or about April 11, 2014, therefore, the Meltons tendered an offer of rescission to GM. The Meltons gave GM until April 20, 2014 to accept or deny the tender and rescission. GM responded on April 19, 2014 and declined the Meltons' offer of rescission.

V. Renewed Claims Against GM and Claims Against Thornton

The Meltons assert the following claims against GM:

Count One: Strict Liability

150. All preceding statements and allegations of Plaintiffs' Complaint are incorporated herein and realleged as if expressly set forth herein.

151. GM designed, selected, inspected, tested, manufactured, assembled, equipped, marketed, distributed, and sold the Chevrolet Cobalt, and its components, including but not limited to, equipping it with the Key System.

152. GM designed, selected, inspected, tested, manufactured, assembled, equipped, marketed, distributed, and sold the Key System which was selected and installed in the Chevrolet Cobalt.

153. GM had a legal duty to design, inspect, test, manufacture, and assemble the Chevrolet Cobalt so that it would be reasonably crashworthy and provide a reasonable degree of occupant safety in foreseeable collisions occurring in the highway environment of its expected use.

154. Among other things, the 2005 Chevrolet Cobalt is not crashworthy, is defective, and is unreasonably dangerous and unsafe for foreseeable users and occupants in each of the following particulars:

- (a) having a Key System that is inadequately designed and constructed, and located, which may result in the key moving

- from the run to accessory/off position during normal driving maneuvers;
- (b) having a Key System that allows the Chevrolet Cobalt to stall or lose engine power, and steering and/or full braking ability while driving;
 - (c) having frontal airbags that do not deploy when the key is in the accessory/off position;
 - (d) failing to adequately warn Brooke, other consumers, or the public in general, about the unsafe and defective condition and design of the vehicle known to GM, so that individuals like Brooke and the Meltons could make informed and prudent decisions regarding traveling or riding in such vehicles.

155. The defective nature of the Chevrolet Cobalt was the proximate cause of the damages sustained by Brooke, and the Meltons, as set forth herein, thus rendering GM strictly liable.

Count Two: Negligence

156. All preceding statements and allegations of Plaintiffs' Complaint are incorporated herein and realleged as if expressly set forth herein.

157. GM was negligent in designing, inspecting, testing, manufacturing, assembling, marketing, selling and providing warnings for the Chevrolet Cobalt, as set out in the paragraphs above.

158. GM's negligence proximately caused the damages sustained by Brooke and the Meltons, as set forth herein.

Count Three: Breach of Implied Warranty

159. All preceding statements and allegations of Plaintiffs' Complaint are incorporated herein and realleged as if expressly set forth herein.

160. GM breached its implied warranty of merchantability by selling the Chevrolet Cobalt when it was not fit for the ordinary purpose for which such goods are sold.

161. This breach of warranty proximately caused the damages sustained by Brooke and the Meltons, as set forth herein.

Count Four: Fraud and Fraudulent Concealment

162. All preceding statements and allegations of Plaintiffs' Complaint are incorporated herein and realleged as if expressly set forth herein.

163. GM intentionally concealed material facts from Brooke and the Meltons, the public, and NHTSA. GM knew that the Chevrolet Cobalt and other GM vehicles were designed and manufactured with Key System defects, but GM concealed those material facts. Although the defective GM vehicles contain

safety-related defects that GM knew of, or should have known of, at the time of distribution, GM recklessly manufactured and distributed those vehicles to consumers in the United States. Those consumers had no knowledge of the safety-related defects.

164. GM had a duty to disclose the facts to Brooke, the public who owned defective GM cars, and NHTSA, but failed to do so.

165. GM knew that Brooke had no knowledge of those facts and that she did not have an equal opportunity to discover the facts. GM was in a position of superiority over Brooke. Indeed, Brooke trusted GM not to sell her a car that was defective or that violated federal law governing motor vehicle safety. Brooke further trusted GM to warn of defects and to recall defective vehicles timely and before they caused injury.

166. By failing to disclose these material facts, GM intended to induce Brooke to purchase the Chevrolet Cobalt and/or to continue to use and drive it. GM further intended to induce NHTSA not to recall Brooke's Cobalt, well as the other defective GM vehicles, in order to reduce its eventual financial exposure.

167. Brooke reasonably relied on GM's nondisclosure, and reasonably but unknowingly continued to use the Chevrolet 2005 Cobalt until the date of the wreck.

168. Brooke would not have purchased the Chevrolet Cobalt had she known of the Key System defects; and certainly would not have continued to drive it.

169. As a direct and proximate result of GM's wrongful conduct and fraudulent concealment, Brooke and the Meltons suffered the damages described herein, including the full economic and intangible value of the life of Brooke Melton to her had she lived.

170. GM's conduct was knowing, intentional, with malice, demonstrated a complete lack of care, and was in reckless disregard for the rights of Brooke and the Meltons, such that punitive damages are appropriate.

Count Five: Negligence of Thornton

171. All preceding statements and allegations of Plaintiffs' Complaint are incorporated herein and realleged as if expressly set forth herein.

172. On March 6, 2010, Brooke brought her Cobalt to Thornton for service because the engine shut off while she was driving. Thornton performed a TBI injection clean on the vehicle and led Brooke to believe that this service would resolve the problem of the engine shutting off while driving.

173. Thornton was, or should have been, aware of the TSB which applied to Brooke's vehicle. Thornton, however, did not perform the work pursuant to the TSB.

174. Thornton knew, or should have known, that not performing the TSB work would result in the Chevrolet Cobalt being unsafe to drive because there was the potential that the key could move from the run to accessory position due to the low ignition key cylinder torque effort.

175. On March 10, just before the collision which resulted in Brooke's death, the key in the Cobalt turned from the run to the accessory position which ultimately caused Brooke to lose control of the Cobalt.

176. Thornton's negligence in failing to properly diagnose the source of the Chevrolet Cobalt's engine shutting off, as well as its decision to return the Cobalt to Brooke without having diagnosed and fixed the problem, was a proximate cause of the damages sustained by Plaintiffs, as set forth herein.

Count Six: Punitive Damages

177. All preceding statements and allegations of Plaintiffs' Complaint are incorporated herein and realleged as if expressly set forth herein.

178. GM, through its conduct in designing, testing, manufacturing, assembling, marketing, selling, and failing to adequately repair the Cobalt, demonstrated an entire want of care, evidencing a reckless indifference and disregard to the consequences of their actions. GM's actions also constitute fraudulent concealment.

179. Thornton, in failing to find and employ the TSB, in repairing the wrong part of Brooke's car, and failing to test drive the car, and in failed to properly apprise her of the remaining issues in her car and of the fact they had not safely repaired it, Thornton demonstrated an entire want of care, evidencing a reckless indifference and disregard to the consequences of their actions.

180. Plaintiffs, pursuant to O.C.G.A. § 51-12-5.1, are entitled to an award of punitive damages to deter GM and Thornton, and other similarly situated entities, from such conduct in the future.

Count Seven: Attorney's Fees and Expenses

181. All preceding statements and allegations of Plaintiffs' Complaint are incorporated herein and realleged as if expressly set forth herein.

182. GM's and Thornton's actions have been in bad faith and have caused Brooke and the Meltons to suffer unnecessary trouble and expense. Brooke and the Meltons are, therefore, entitled to recover from GM all expenses of litigation, including attorney's fees, costs and expenses pursuant to O.C.G.A. § 13-6-11.

V. Damages

183. All preceding statements and allegations of Plaintiffs' Complaint are incorporated herein and realleged as if expressly set forth herein.

184. Kenneth David Melton and Mary Elizabeth Melton, the natural parents of Jennifer Brooke Melton, deceased, have standing to recover for the wrongful death of Jennifer Brooke Melton.

185. Kenneth David Melton and Mary Elizabeth Melton, as Administrators of the Estate of Jennifer Brooke Melton, have standing to recover the general damages and special damages of Jennifer Brooke Melton.

186. As a direct and proximate result of the negligence and misconduct of both Defendants, as well as the defective, unsafe and unreasonably dangerous Cobalt, Jennifer Brooke Melton was killed, and Plaintiffs are entitled to recover from all the Defendants the full value of the life of Brooke.

187. As a direct and proximate result of the negligence and misconduct of both Defendants, as well as the defective, unsafe and unreasonably dangerous Cobalt, Brooke experienced physical pain and suffering.

188. As a direct and proximate result of the negligence and misconduct of both Defendants, as well as the defective, unsafe and unreasonably dangerous Cobalt, Brooke experienced mental pain and suffering, including shock, fright, and terror.

189. As a direct and proximate result of the negligence and misconduct of both Defendants, Brooke's 's Estate incurred funeral and burial expenses.

Prayer For Relief

Plaintiffs, the Meltons, demand judgment and other relief as follows:

a. Judgment against GM and Thornton in an amount sufficient to fully and fairly compensate Brooke's Estate and the Meltons for her physical and emotional injuries, her medical bills and funeral expenses, all of her general and special damages, and for the full value of her life.

b. Punitive damages against both GM and Thornton pursuant to O.C.G.A. § 51-12-5.1;

c. Attorney's fees and costs of litigation from both GM and Thornton pursuant to O.C.G.A. § 13-6-11;

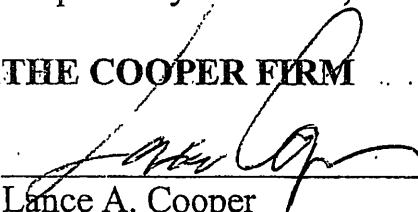
d. Trial by jury; and

e. Such other relief as the Court deems just and proper under the circumstances.

DATED: May 12, 2014.

Respectfully submitted,

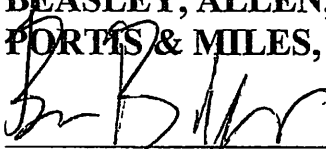
THE COOPER FIRM



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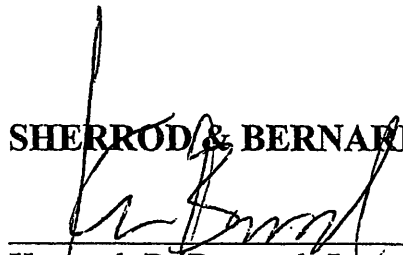
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Attorneys for Plaintiffs

EXHIBIT 2

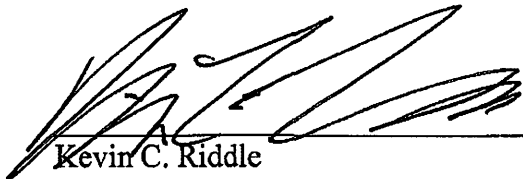
AFFIDAVIT

STATE OF MICHIGAN §
 §
COUNTY OF OAKLAND §

BEFORE ME, the undersigned authority, on this day personally appeared Kevin C. Riddle, who, being by me duly sworn, deposed and stated as follows:

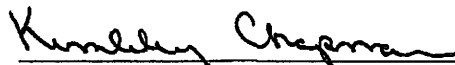
1. “My name is Kevin C. Riddle. I am of sound mind. I am over eighteen years of age, and have never been convicted of a felony crime or other crime involving moral turpitude. I am fully competent to make this affidavit. The following facts are true and correct and are within my personal knowledge.
2. I am an attorney licensed to practice law in the State of Michigan, and I am employed by Hilborn & Hilborn, P.C., and served as counsel of record in *Patel v. Goodyear Tire & Rubber Co., et al.*, in the Circuit Court for the County of Berrien, in the State of Michigan.
3. In the course of the *Patel* litigation, Goodyear voluntarily produced documents and a corporate representative that disclosed the halobutyl content in the innerliner of the failed tire in our case.
4. Goodyear never indicated after this disclosure of Goodyear’s halobutyl content that it had any ill effect on Goodyear.

Further affiant sayeth not.”



Kevin C. Riddle

SWORN AND SUBSCRIBED TO on this 5th day of May, 2016, as witness whereof is set my hand and seal of office.



Notary Public in and for the State of Michigan

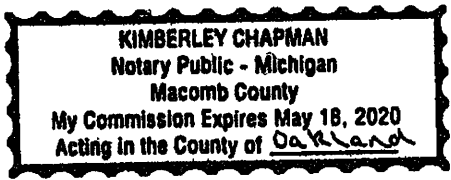


EXHIBIT 3

AFFIDAVIT

STATE OF FLORIDA

}§

COUNTY OF DADE

1. My name is Jay Halpern. I am an attorney licensed to practice law in the State of Florida, and have been so licensed since 1978. My office address is 150 Alhambra Circle, Suite 1100, Coral Gables, FL 33134.
2. In 1999, I formed Jay Halpern & Associates, P.A. During the course of my entire legal career, I have represented Plaintiffs in personal injury civil actions.
3. I have handled over 100 cases involving tire failures and defective tires, typically resulting in rollover events and significant injuries. I have been associate counsel on tire cases in jurisdictions other than Florida after being admitted pro hac vice in those jurisdictions.
4. I was lead counsel for the Plaintiff in a case styled: IN THE CIRCUIT COURT OF THE 17TH JUDICIAL IN AND FOR BROWARD COUNTY FLORIDA, COMPLEX CIVIL DIVISION, CASE NO. 08-38042 (26), ALTAN J. KAYNATMA, by and through his mother and natural guardian, MARTHA KAYNATMA v. SUMITOMO RUBBER INDUSTRIES, LTD., a foreign corporation (herein after referred to as KAYNATMA v. SUMITOMO).
5. In the KAYNATMA v. SUMITOMO case, we alleged that a Dunlop tire manufactured by Sumitomo was defective by reason of manufacturing and design defects.
6. During the course of discovery in the case, we sought information pertaining to the innerliner formula on the subject tire. A second set of interrogatories was propounded to the Defendant, SUMITOMO, with a single interrogatory question regarding the specific chemical content of the innerliner of the subject tire. A copy of the interrogatory is attached hereto and is marked "exhibit A".

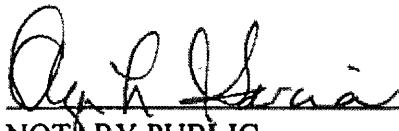
7. During the course of the litigation, SUMITOMO agreed to voluntarily provide the information requested in the attached interrogatory (exhibit A) pursuant to a Confidentiality Order. The specific information requested in the attached interrogatory was in fact provided.

FURTHER AFFIANT SAYETH NAUGHT.



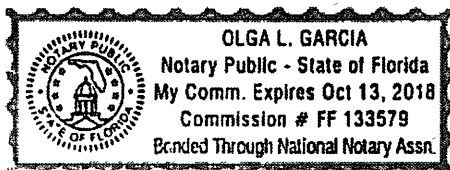
JAY HALPERN

On this 25th day of April, 2016 before me personally appeared JAY HALPERN, who voluntarily executed this document, under oath, Document produced: _____; or personally known.



NOTARY PUBLIC

My commission expires:



**SECOND SET OF INTERROGATORIES TO DEFENDANT,
SUMITOMO RUBBER INDUSTRIES, LTD., a foreign corporation**

INNER LINER INTERROGATORY

DEFINITIONS:

For purposes of these interrogatories, the following definition shall apply:

SUBJECT TIRE: Where the term *subject tire* is used reference is made to the tire on the right rear wheel position of the vehicle involved in this civil action and described as follows:

DUNLOP TG 35 Grand Trek Radial Tire
Size P255/65R 16
DOT#: U26D2K3289

1. Please identify and describe the chemical content of the inner liner with specific gauge (pre-cured and post-cured gauge) and material content, including but not limited to the percentage of halobutyl in the inner liner with regard to the subject tire.



EXHIBIT 4

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE

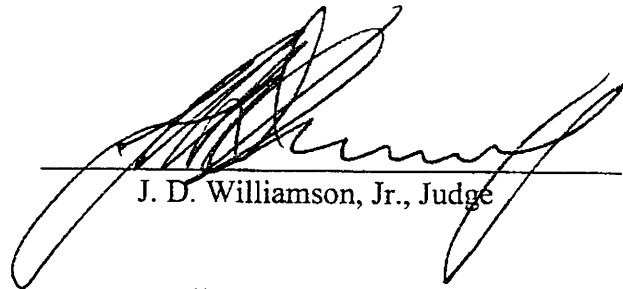
Thera O. Lavelock and)
Rodger Lavelock,)
Plaintiffs,)
vs.) Case No: 00-CV-221072
Cooper Tire & Rubber Company,)
Defendant.) Division 11

ORDER

Upon consideration of Brief Regarding Pending Discovery Disputes, Defendant Cooper Tire & Rubber Company's Suggestions in Opposition and arguments heard on August 14, 2003, the Court hereby ORDERS Defendant Cooper Tire & Rubber Company to disclose the percentage of halobutyl content in the innerliner and thickness of the innerliner in the type of tire which is subject of this action within 10 (ten) days of the date of this order. Pursuant to the terms set out in Plaintiff's Brief, Plaintiff is allowed to do a physical testing on in the tire involved in the occurrence here in dispute. The Defendants may have an expert or other representative present at such testing if they so elect; otherwise Defendants shall be supplied with a copy of the videotape of that procedure as set out in Plaintiff's Brief.

IT IS SO ORDERED.

Dated Aug-18, 03



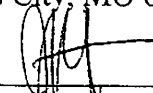
J. D. Williamson, Jr., Judge

Copies mailed AUG 18, 03 to all counsel of record:

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Craig O'Dear
Julie Cox
Bryan Cave, LLP
3500 Once Kansas City Place
1200 Main Street
Kansas City, MO 64105



Jody R. Gondring
Judicial Law Clerk

EXHIBIT 5

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

JUSTIN PIMSNER et al.,
Plaintiffs,

v.

No. 03-CV-1373
(TJM/DRH)

NEXEN TIRE CORPORATION et al.,
Defendants.

**DAVID R. HOMER
U.S. MAGISTRATE JUDGE**

ORDER

A discovery conference was held on-the-record in the above captioned case on November 29, 2004 with counsel for all parties. As decided during that conference and for the reasons stated at that time, which are incorporated herein by reference, it is hereby

ORDERED that:

1. On or before **December 3, 2004**, defendants shall provide plaintiffs with copies of the "skim stock recipe for the entire tire," and disclosure of this material shall be subject to a protective order pursuant to Fed. R. Civ. P. 26(c) according to the terms and conditions determined during the telephone conference;

2. On or before **December 20, 2004**, defendants shall provide plaintiffs with the documents listed in paragraph 1(b)-(k) of plaintiffs' "Issues for November 29, 2004 Conference";


3. Plaintiffs are granted leave to re-depose defendants' Fed. R. Civ. P. 30(b)(6) representative, Mr. Shin, concerning the documents disclosed by defendants subsequent to the deposition of Mr. Shin on November 19, 2004 with the deposition to occur in New York City on or before **January 16, 2005**;

4. Plaintiffs' request to remove certain documents provided by defendants in response to discovery demands from the limitations of a protective order is **DENIED**; and

5. The Uniform Pretrial Scheduling Order filed February 12, 2004 (Docket No. 18) is hereby amended to the limited extent that the deadline for completion of discovery is extended to **January 16, 2005**, and the Uniform Pretrial Scheduling Order, as amended, remains in full force and effect in all other respects, including the deadline for filing dispositive motions of **February 16, 2005**, the "Trial Ready" date of **February 16, 2005**, and the date for commencement of trial of **May 10, 2005**.

IT IS SO ORDERED.

DATED: November 29, 2004
Albany, New York



United States Magistrate Judge

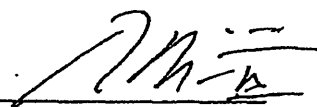
EXHIBIT 6

Bridgestone/Firestone North American Tire, LLC's ("Firestone's") assertion of trade secret as outlined by *Pincheira*, Firestone is ordered to produce all documents responsive to Request for Production No. 12. Prior to the production of responsive documents, the parties are ordered to submit an agreed protective order to the Court for approval no later than March 19th, 2010. If the parties are unable to reach agreement on a protective order for the production of documents responsive to Request for Production No. 12, the parties are ordered to request a hearing on any contested issues regarding the protective order.

2. Firestone's oral motion for an interlocutory appeal of the Court's ruling set forth in Paragraph 1 above, pursuant to NMRA 12-203, is DENIED.
3. Firestone is ordered to produce all documents responsive to Request for Production No. 84 no later than March 30, 2010. If Firestone contends that it has already produced documents responsive to Request for Production No. 84, Firestone is ordered to provide no later than March 30th, 2010, a supplemental response to Request for Production No. 84 identifying a bates-number reference to all such documents. If any document responsive to Request for Production No. 84 no longer exists, Firestone is ordered to provide no later than March 30, 2010, a sworn statement identifying the date any document was destroyed or discarded, the reason for Firestone's failure to retain the document, and the person or persons responsible for Firestone's failure to retain the document.
4. To the extent ~~Plaintiffs'~~ ^{Plaintiffs'} Second Motion to Compel and for Sanctions sought ~~monetary~~ ^{monetary} sanctions under Rule 1-037, Plaintiffs' motion is DENIED.


THE HONORABLE STEVE PFEFFER
DISTRICT COURT JUDGE

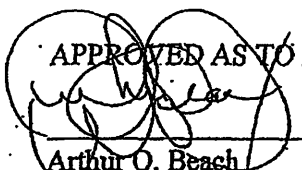
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Individually and as Personal Representative
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MELYNDA MONTANO, as Next Friend of CERA
and ISAAC VIGIL, Minor Children of
CHRISTOPHER VIGIL, and JOHN N. VIGIL

APPROVED AS TO FORM:


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Counsel for Defendant BRIDGESTONE AMERICAS HOLDING, INC.
and BRIDGESTONE/FIRESTONE NORTH AMERICAN TIRE, LLC.

EXHIBIT 7

STATE OF SOUTH CAROLINA
COUNTY OF **HAMPTON**
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

FILED

CASE NO. **2005-CP-25-456 + 531 + 532**

2007 AUG 20 AM 2:23⁺⁵³³

PLYLER
PLAINTIFF(S)

MYLINDA D. NETTLES
CLERK OF COURT
HAMPTON COUNTY, S.C.

BRIDGESTONE/FIRESTONE, ETAL
DEFENDANT(S)

BY _____

CHECK ONE:

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED** (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other .
- ACTION STRICKEN** (CHECK REASON): Rule 40(j) SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other .

IT IS ORDERED AND ADJUDGED: See attached order; Statement of Judgment by the Court:
SEE ATTACHED ORDER COMPELLING DISCOVERY AND ENTRY OF A PROTECTIVE ORDER

Dated at **HAMPTON**, South Carolina, this **20TH** day of **AUGUST**, 2007.

PRESIDING JUDGE

This judgment was entered on the 20TH day of AUGUST, 2007, and a copy mailed first class this 20TH day of AUGUST, 2007 to attorneys of record or to parties (when appearing pro se) as follows:

RONNIE CROSBY

ATTORNEY(S) FOR THE PLAINTIFF(S)

ERIN DEAN
M. DAWES COOKE
DAVID COX
HENRY SMYTHE

ATTORNEY(S) FOR THE DEFENDANT(S)

Mylinda D. Nettles

CLERK OF COURT

STATE OF SOUTH CAROLINA)
COUNTY OF HAMPTON)

RICKIE LEWIS PLYLER, as Personal Representative of the Estate)
of ANGELA LYNN PLYLER,)
Plaintiff,)

vs.)

BRIDGESTONE CORPORATION, BRIDGESTONE/FIRESTONE)
NORTH AMERICA TIRE, LLC, BUBBA WINDHAM AND CHUCK)
HORTON D/B/A VINTAGE MOTORS,)
Defendant)

RICKIE LEWIS PLYLER, as Personal Representative of the Estate)
of JUSTIN PLYLER,)
Plaintiff,)

vs.)

BRIDGESTONE CORPORATION, BRIDGESTONE/FIRESTONE)
NORTH AMERICA TIRE, LLC, BUBBA WINDHAM AND CHUCK)
HORTON D/B/A VINTAGE MOTORS,)
Defendant)

ALANIA PLYLER, a minor by and through her natural parent and)
Guardian ad Litem, RICKIE LEWIS PLYLER,)
Plaintiff,)

vs.)

BRIDGESTONE CORPORATION, BRIDGESTONE/FIRESTONE)
NORTH AMERICA TIRE, LLC, BUBBA WINDHAM AND CHUCK)
HORTON D/B/A VINTAGE MOTORS,)
Defendant)

HANNAH PLYLER, a minor by and through her natural parent and)
Guardian ad Litem, RICKIE LEWIS PLYLER,)
Plaintiff,)

vs.)

BRIDGESTONE CORPORATION, BRIDGESTONE/FIRESTONE)
NORTH AMERICA TIRE, LLC, BUBBA WINDHAM AND CHUCK)
HORTON D/B/A VINTAGE MOTORS,)
Defendant)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

CASE NO 05-CP-25-456

CASE NO. 05-CP-25-531

CASE NO 05-CP-25-532

CASE NO 05-CP-25-533

BY _____
MYLINDA D. BATTLES
CLERK OF COURT
HAMPTON COUNTY, S.C.

2007 AUG 20 AM 1:26

FILED

ORDER COMPELLING DISCOVERY AND ENTRY OF A PROTECTIVE ORDER

This matter came before me on Plaintiffs' Motion to Compel Discovery and defendant Bridgestone's cross Motion for a Protective Order. The Plaintiffs have sought discovery of the skim stock formula of the subject tire to which Bridgestone objects on grounds that the formula is trade secret information and should not be subject to discovery. After reviewing the materials and arguments provided by counsel, I granted

Plaintiffs' Motion to Compel the skim stock formula of the subject tire and further granted Bridgestone's Motion for a Protective Order by requiring the trade secret materials to be produced in such a manner to ensure that the trade secret status of the information being disclosed to the Plaintiffs would be properly protected and not be disclosed beyond this litigation.

Prior to entry of a formal order, Bridgestone requested that I stay its order and allow it the opportunity to depose the expert witnesses who provided affidavits in support of the Plaintiffs' motion to compel in order for Bridgestone to inquire as to the reason Plaintiffs' needed access to the requested information. Over the objection of the Plaintiffs', I granted Bridgestone's request for a stay and ordered that the Plaintiffs produce their expert witnesses such that Bridgestone could interrogate them on the Plaintiffs' need for the trade secret information.

Subsequently the parties completed the depositions and have made additional submissions. After reviewing the additional materials, I find that the skim stock formula of the subject tire is discoverable and should be produced under a restrictive protective order to ensure that no competitive harm results to Bridgestone by allowing Plaintiffs access to this information. It is my intent to allow Plaintiffs to have access to information needed to investigate and prosecute this litigation and to protect Bridgestone from any unwarranted disclosure that may cause it to suffer competitive harm.

Facts

This case arises from a single vehicle automobile collision that occurred on I-95 in Hampton County on July 16, 2005. Alania Plyler and Hannah Plyler, both minor children, were injured in the accident. Their mother Angela Plyler and brother Justin

Plyler were both killed in the collision. The complaint filed on behalf of the Plaintiffs alleges that the collision occurred as a result of the failure of a tire manufactured ten (10) years ago by Bridgestone. Specifically the Plaintiffs claim that the tire experienced a steel belt separation. Bridgestone has denied any defect in the tire.

The complaint filed by the Plaintiffs alleges causes of action for negligence, strict liability and breach of warranty. Under each theory the Plaintiffs claim that the tire was defective and that the defect was the cause of the accident and resulting damages. The complaint alleges both manufacturing and design defect theories.

The Plaintiffs have served numerous discovery requests seeking information relevant to their investigation of the nature of the defect alleged to exist in the tire. A number of the discovery requests seek to obtain information about the materials and processes used to manufacture the subject tire. The Plaintiffs have directed these requests to the steel belt package and rubber compound used to bond the steel cords together. The trade secret objection was raised with regard to numerous requests which by agreement of counsel will all be treated the same for purposes of this Order. (These discovery requests will collectively be referred to as the skim compound documents for the subject tire only.) Bridgestone objects to producing the documents, claiming that the materials sought constitute trade secret information and should not be provided in discovery. Bridgestone argues that the Plaintiffs can prove their cases without access to this information. The Plaintiffs claim that this information is essential to the determination of whether a design defect exists in the failed tire and their ability to show the jury how and why the subject tire failed.

Discussion

As an initial matter I start with the general guide that “parties may obtain discovery regarding any matter not privileged, which is relevant to the subject matter involved in the pending action”. Rule 26(b) SCRCF. In a products liability action such as this case, the method and materials used to manufacture the alleged defective product are relevant and generally discoverable. I find that the skim compound documents as to the subject tire are discoverable and that Bridgestone has made no showing that this information is not relevant to the Plaintiffs claims or outside the permissible bounds of discovery.

Bridgestone argues that the skim compound documents contain materials that constitute its trade secrets and requests I enter a protective order pursuant to Rule 26 (c) (7) SCRCF that discovery of this information not be had in this case. Bridgestone has presented the affidavit of Brian Queiser, an employee of its American subsidiary Bridgestone Firestone North American Tire, LLC, in support of its position. Throughout his affidavit Mr. Queiser raises concerns about the competitive harm that could result to a tire company if a rubber formulation fell into the hands of a competitor. This is a legitimate concern and something that has not been disputed by the Plaintiffs. This concern, that a competitor could have access to trade secret information, must be balanced with the Plaintiffs’ need to have access to discovery to properly investigate the cause of the tire failure.

As an initial matter I must determine the proper legal standard to apply in ruling on the competing motions. The Plaintiff argues that Rule 26 SCRCF governs the discovery of trade secrets in a products liability action and Bridgestone has filed its

motion for a protective order under Rule 26 (c)(7) SCRCF. At the hearing Bridgestone argued that the discovery of trade secrets is governed by S.C. Code Ann. 39-8-10 et. seq., known as the South Carolina Trade Secrets Act. Given that Bridgestone has indicated to me that it will likely seek appellate review of any decision to order discovery of the skim compound documents, I have analyzed the issue under both provisions and have concluded that discovery should be allowed subject to a restrictive protective order under either standard. ¹

1. Rule 26 (C) SCRCF

Rule 26 provides the trial court with authority to “make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden by expense, including one or more of the following: (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way”. The Plaintiffs do not contest the trade secret status of the skim compound and are agreeable to a restrictive protective order.

Bridgestone argues that the materials should not be produced at all in this litigation because of their trade secret status.

It is well settled that there is no absolute privilege to protect trade secrets from disclosure during the discovery process. *Ex Parte Sealed Air Corp.*, 220 F.R.D. 452, 70 U.S.P.Q.2d 1575 (D.S.C. 2004); citing, *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1185 (D.S.C. 1974). As the United States Supreme Court recognized in *Federal Open Market Committee of the Federal Reserve System v. Merrill*, 442 U.S. 340, 99 S. Ct. 2800, 61 L.Ed. 587 (1979), “[t]he courts have not given trade secrets automatic

¹ The Court is aware of *Griego v. Ford Motor Co.*, 19 F. Supp. 2d 531 (D.S.C. (1998), wherein Judge Anderson has ruled the Trade Secrets Act inapplicable to a products liability action.

and complete immunity against disclosure, but have in each case weighed their claim to privacy against the need for disclosure. Frequently they have been afforded a limited protection.” *Id.* at 442 U.S. 362. Moreover, the United States Supreme Court has recognized that “orders forbidding any disclosure of trade secrets or confidential information are rare. More commonly, the trial court will enter a protective order restricting disclosure to counsel.” *Id.*; accord, *MDK, Incorporated v. Mike’s Train House, Inc.*, 27 F.3d 116, 29 Fed. R. Serv. 3d 1472 (4th Cir. 1994) (noting that trade secrets have “widely been held to be discoverable” upon appropriate findings and with an appropriate protective order).

Rather, discovery of confidential information and trade secrets “is virtually always ordered once the movant has established that the secret information is relevant and necessary.” *Sealed Air Corp.* at 453; *Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co.*, 107 F.R.D. 288, 292 (D.Del. 1985). “When disclosure of a trade secret is sought during discovery, the governing relevance standard that the movant must satisfy is the broad relevance standard applicable to pre-trial discovery, i.e., the movant must show the material sought is relevant to the subject matter of the lawsuit.” *Id.* at 293; *Sealed Air Corp.*, *supra*; 8 C. Wright & Miller, Federal Practice & Procedure: Civil § 2043, at 301 (1970). Once the party seeking discovery of the trade secret establishes that the information sought is relevant to the subject matter of the litigation, the party must then show that the information is necessary to the action. *Sealed Air Corp.*, *supra*; *In re Remington Arms Company, Inc.*, 952 F.2d 1029 (8th Cir. 1991). “The level of necessity that must be shown is that the information must be necessary for the movant to prepare its

case for trial, which includes proving its theories and rebutting the opponent's theories.”

Coca-Cola Bottling Co. of Shreveport, Inc., supra.

2. South Carolina Trade Secrets Act

Under the South Carolina Trade Secrets Act, like Rule 26, the Court is required to make a finding that the party seeking discovery of trade secret information has need of the materials in order to prepare their case. Section 39-8-60(B) provides:

In any civil action where discovery is sought of information designated by its holder as a trade secret, before ordering discovery a court shall first determine whether there is substantial need by the party seeking discovery for the information.

The test for need under the trade secrets act appears to be more stringent than what is required under Rule 26 for discovery of trade secrets inasmuch as it requires a showing of substantial need rather than a showing that the information is necessary for the party to prove their case or rebut the defense of their opponent.

Under § 39-8-60(B) substantial need is determined by consideration of four factors. “Substantial need” as used in this section means: (1) the allegations in the initial pleading setting forth the factual predicate for or against liability have been plead with particularity; (2) the information sought is directly relevant to the allegations plead with particularity in the initial pleading; (3) the information is such that the proponent of the discovery will be substantially prejudiced if not permitted access to the information; and (4) a good faith basis exists for the belief that testimony based on or evidence deriving from the trade secret information will be admissible at trial.”

3. Need for skim compound documents

After reviewing the materials submitted by both parties, I find that the Plaintiffs have demonstrated substantial need for the skim compound documents of the subject tire. In support of their request for discovery the Plaintiffs provided affidavits and/or depositions from three expert witnesses retained to aid in their analysis of the cause of the tire failure. The first expert, Robert Ochs, is an engineer with 25 + years experience at Michelin where as part of his work he analyzed failed tires to determine the cause of the failure. Mr. Ochs has examined the tire and found it to be defective. However, Mr. Ochs has been unable to determine whether the defect is in the design of the tire or in a manufacturing defect. Mr. Ochs states that:

Because this failure involves a separation of the tread belt, it will be necessary to examine the skim compound formula to aid in determining the true nature of the defect. Once the skim compound used to manufacture the subject tire is analyzed, both for its intended physical properties and as compared to the central compound formula, I will then be able to render opinions on the true nature of the defect.

Similarly, expert James E. Dudley, Ph.D. provided an affidavit in support of the request for the skim compound documents. Dr. Dudley, formerly with Goodyear where he worked in rubber compounding, has been asked to assist Mr. Ochs in determining whether a design defect exists in the tire. Dr. Dudley states:

In order for me to do the work requested by the plaintiff it is necessary to have access to the central compound formula and the compound formula actually used to manufacture the tire. I also need access to documents showing the initial physical properties of the rubber compound to determine whether there exists a plant specific manufacturing issue or an overall design issue. Without access to the materials requested by the plaintiff concerning the skim stock formula, changes, testing, allowable deviations and other materials, I will be unable to perform the work requested by the plaintiffs and unable to adequately assist other experts hired by the plaintiffs.

At the request of Bridgestone, Dr. Dudley was deposed with regard to the Plaintiffs' need for the skim compound documents. In its supplemental filing,

Bridgestone points to what it sees as deficiencies in Dr. Duddey's qualifications to analyze the skim compound and to a lack of analytical protocols in place to test various components of the skim compound. However, I have read the entire deposition transcript and I am of the belief that Dr. Duddey arguably has sufficient experience in rubber compounding to aid the Plaintiffs in analyzing the materials and methods used to manufacture the subject tire. In addition, the Plaintiffs have retained a tire design engineer and an analytical chemist to aid in their investigation of the cause of the tire failure. Given that the Plaintiffs and their experts have yet to be provided the skim stock formula, it is premature to pass judgment on any methodology that may be employed to analyze the skim compound. Questions about expert qualifications to render opinions and the methodology used to reach their opinions are for the trial judge to decide and cannot be properly answered at this stage of the litigation.

In his deposition, Dr. Duddey reaffirmed the Plaintiffs' need for the skim compound.

Q. Is it necessary in order for you to reach opinions regarding any specific material that may or may not have an effect on what you saw with the tire, is it necessary for you to have access to information regarding the materials that went into the skim compound to do that?

A. In order to make any type of judgment at all, you need to know where you are starting from.

Duddey Deposition Page 77, Line 18 – 25

Q. But then do you also need to look at the manufacturing processes to see if that had an effect?

A. That's the next level: Is there something that's being introduced during the manufacturing of the rubber of the tire that's causing the problem.

Duddey Deposition Page 78, Line 7 – 11

Q. And in your opinion, is there any way for the Plaintiff to fully investigate the existence or nonexistence of a design defect in this tire related to the hardness and cracking that you saw in the tire without access to the information that we requested?

A. The material and design go hand-in-hand. You could have good material and a poor design that is going to fail or you could go the other way and have a good design, good structure and the material fails. So you need to examine both paths.

Duddey Deposition Page 80, Line 15 – 24

The Defendant also took the deposition of expert Richard Smythe Ph.D. who works as an analytical chemist. Dr. Smythe has been retained to provide support to Dr. Duddey and Mr. Ochs concerning the various materials used to manufacture the skim compound and their effect on one another from an analytical chemistry standpoint. One of the Plaintiffs' theories is that the failed tire was not designed sufficiently to counteract the natural oxidative process that occurs over time.

Dr. Smythe in his deposition, testifies the Plaintiffs need the skim compound documents in order to investigate the cause of the tire failure:

Q. In order for you to render opinions that as an analytical chemist on any product including a tire, is [sic] it a rubber compound, is it necessary for you to know all of the ingredients that go into that polymer?

A. Absolutely.

Smythe Deposition Page 29, Line 9 – 15

Q. If you were provided with the intended physical properties of what, in this case, Bridgestone intended the physical properties of this tire to be when it was manufactured – would you be able to aid, given the materials and knowledge about the process by which the tire was manufactured, would you be able to aid in determining why, assuming hypothetically, the tire did not live up to those physical properties or did not experience the service life that was intended for that tire? Would you be able to aid us in that through analytical chemistry?

A. Yes sir... That's chemical analysis and that's what I do and that's what I contribute to Dr. Duddey's work and engineer Och's work.

Q. And in doing this is it imperative that you be provided access to the full array of information concerning both the manufacturing process and the materials that have gone into making this tire?

A. Yes, sir. I need both major components of – I need both major compositions of the components and I need the trace quantities of components of individual members that make up the tire, everything, because of the fact that if we are going to design an analysis, we need to have – we'll reproduce the one that is going to stand up to scrutiny by the Court.

In addition to the materials provided by the Plaintiffs, I have reviewed the affidavit of Brian Queiser, an engineer employed by Bridgestone Firestone North American Tire LLC. Mr. Queiser confirms that the skim compound formula is the part of the tire designed to provide adhesion between the steel belts, which is where the failure of the subject tire is alleged to have occurred. "The belt skim stock, for example, refers to a specifically formulated rubber compound calendared onto the steel cord to form the steel belts in a steel belted radial passenger or light truck tire. It is formulated to provide, among other things adhesion between the rubber and steel cord, and between the belts and surrounding components." Queiser's affidavit, paragraph 28.

Based on what is before me, it appears that the Plaintiffs' claim that the failed tire, experienced a steel belt separation. It further appears it is the skim stock compound that is designed to provide adhesion between the steel belts and between surrounding components. As such, the composition of the ingredients, both actual and intended, and the method by which the rubber compound was made is relevant to the inquiry into why the subject tire failed. While it may be possible, it appears unlikely that the Plaintiffs could seriously pursue a design defect theory without access to the materials and methods

used to manufacture the portion of the tire claimed to be responsible for the failure. "The plaintiffs correctly assert that they must be able to demonstrate to a jury how and why the tire failed and what design and manufacturing alternatives existed which were not employed in the design and manufacture of the subject tire." *Mann v. Cooper Tire Company*, 816 N.Y.S.2d 45, 2006 (N.Y. 2006)

Furthermore, each of the Plaintiffs' experts has stated that they need access to this information in order to determine whether a design defect is present in the tire.

I find that the Plaintiffs have substantial need for the skim compound documents and will suffer substantial prejudice if this information is not provided in the discovery of this case. During the hearing, I asked counsel for Bridgestone if Bridgestone admitted that a defect existed in the tire. Counsel for Bridgestone confirmed that Bridgestone intended to contest the claim of defect and thus Plaintiffs will be required to provide proof of the alleged defect. I further find that the Plaintiffs have met all predicates for discovery of trade secret information under the South Carolina Trade Secrets Act and under Rule 26 SCRPC and based on the foregoing hereby grant the Plaintiffs' Motion to Compel as it relates to the skim formula and documents regarding the subject tire and any plant specific deviations regarding the subject tire.

4. Protective Order

Both Rule 26 and the Trade Secrets Act require that any disclosure of trade secret information be governed by a protective order designed to protect the trade secret status of the materials being disclosed. I am confident that a protective order can be entered that will serve the need of the Plaintiffs for access to the skim compound documents and protect the trade secret status of this information. Because the parties are in a better

position to narrow the issues on the terms of a protective order I hereby instruct the attorneys for Plaintiffs and Bridgestone to meet within ten days of this Order and work on the terms of a protective order that is suitable to both sides. If the parties are unable to agree to all terms then the attorneys are to contact me for resolution of any areas where agreement cannot be reached. The parties are to submit an agreed protective order within 20 days or contact me for resolution of any issues such that a protective order can be entered prior to the 30 day time for production of the skim stock formula documents.

IT IS HEREBY ORDERED that Plaintiffs' Motion to Compel the skim stock documents of the subject tire is GRANTED. IT IS FURTHER ORDERED that Bridgestone's Motion for a Protective Order is DENIED in part and GRANTED in part as set forth above.

IT IS SO ORDERED.

8-15-07
Beaufort, South Carolina

C T Mullen
Carmen T. Mullen
Presiding Judge