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RECORD NO. 16-1172

In The
United States Court of Appeals
For The Fourth Circuit

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

Plaintiff – Appellee,

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

v.

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

Defendants – Appellants.

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

BRIEF OF *AMICUS CURIAE* SOUTH CAROLINA ASSOCIATION FOR JUSTICE IN SUPPORT OF PLAINTIFF-APPELLEE FOR AFFIRMANCE

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U.S. COURT OF APPEALS
FOURTH CIRCUIT

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 16-1172 Caption: Hartsock v. Goodyear Dunlop Tires

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If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

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Signature: /s/ John S. Nichols Date: 5-9-16

Counsel for: South Carolina Association for Justic

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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:

/s/ John S. Nichols
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QUESTION PRESENTED

United States District Courts within the Fourth Circuit have applied a reasonable test set forth in *Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co.* for balancing a plaintiff's need for information against a defendant manufacturer's desire to protect its trade secrets. The Supreme Court of South Carolina has held the South Carolina General Assembly's amendment to the South Carolina Trade Secrets Act provides a different test governing disclosure.

The issue currently before the Court in this interlocutory appeal is whether the test followed in this Circuit for disclosure of trade secrets under *Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co.* should be discarded in favor of a more restrictive test that results in unfairness to consumers.

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INTEREST OF *AMICUS CURIAE*[1]

The South Carolina Association for Justice ("SCAJ,") (formerly the South Carolina Trial Lawyers Association) was founded nearly sixty years ago to serve its members and those persons whom the members are sworn to protect. The Association currently has over 1,200 members who are lawyers and advocates for those who are harmed by the actions of others. Members engage in litigation on behalf of these injured parties, and discovery is an important part of all litigation, especially in a complex area such as products liability. The Court's determination of the questions presented in this interlocutory appeal will impact the ability of the SCAJ members to adequately represent those clients in both products liability and personal injury actions, thereby depriving consumers of their ability to have their claims fully explored by a jury in accord with the 7th Amendment of the United States Constitution. SCAJ is especially knowledgeable on the burdens of pursuing litigation, particularly products liability litigation that involves extensive discovery and difficult questions of evidentiary law.

[1] Pursuant to Rule 29(c)(5), FRAP, the *amicus curiae* certifies that no counsel for a party authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person — other than the *amicus curiae*, its members, or its counsel — contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

At issue before the Court is a discovery order in a products liability case based upon claims of both a design defect as well as a manufacturing defect in the subject tire. Each of these claims require the Plaintiff to establish specific essential elements to avoid summary disposition of the case. Finding South Carolina's Trade Secrets Act, S.C. Code Ann. §§ 39-8-10 *et seq.* provides "heightened" protection over the regularly applied standards set forth in *Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co.*, 107 F.R.D. 288 (D. Del. 1985) would chill, if not preclude, a plaintiff's ability to learn whether a defendant has done the plaintiff wrong, and to establish that wrong in court. It would also unfairly and unnecessarily deny that plaintiff his day in court. The Court should not change settled law which has worked well to protect consumers in this Circuit.

ARGUMENT

EVERY INJURED CONSUMER SHOULD HAVE A FAIR AND REASONABLE OPPORTUNITY TO BE HEARD BY A JURY

Under South Carolina law there are three defects a plaintiff in a products liability lawsuit can allege: (1) a manufacturing defect; (2) a warning defect; and (3) a design defect. *Watson v. Ford Motor Co.*, 699 S.E.2d 169, 174 (S.C. 2010). When a manufacturing defect claim is made, a plaintiff alleges that a particular product was defectively manufactured. *Id.* When a design defect claim is made, a plaintiff alleges that the product at issue was defectively designed, thus causing an entire line of products to be unreasonably dangerous. *Id.* By denying the plaintiff access to essential information, the court precludes the plaintiff from being able to prove his case.

For instance, in a manufacturing defect case, the Plaintiff would be unable to show that the particular tire was defectively manufactured under safety standards. The safety standards may be those generally accepted in a given industry or they may be those specifically developed and used by a particular manufacturer. In the latter instance, if the manufacturer is able hide behind a claim of trade secret protection against production, then plaintiff's ability to prove a defective manufacturing process is significantly impaired, if not completely stymied.

In addition, a plaintiff pursuing a products liability claim based on a negligent design theory must establish, among other things, that the defendant

failed to exercise due care in designing the product. *Branham v. Ford Motor Co.*, 701 S.E.2d 5, 9 (S.C. 2010). To successfully advance a design defect claim, the plaintiff must show that the design of the product caused it to be "unreasonably dangerous." *Id.* at 13. The *Branham* Court added that as part of that burden of proof, the plaintiff must present evidence of a reasonable alternative design. *Id.* at 16. The Court stated:

> The plaintiff will be required to point to a design flaw in the product and show how his alternative design would have prevented the product from being unreasonably dangerous. This presentation of an alternative design must include consideration of the costs, safety and functionality associated with the alternative design

Id. Where a manufacturer has product design standards in place, determining whether the flawed product failed to meet those design standards may establish that the product is unreasonably dangerous under the manufacturer's design criteria or provide a reasonable alternative design. In the case of a reasonable alternative design, considerations of costs, safety and functionality would be resolved because the manufacturer has already considered those matters in adopting the standard.

These are the things a plaintiff in a products liability case involving a claim of design defect must show in South Carolina. If the plaintiff fails to make a showing sufficient to establish the existence of an element essential to his case, and on which the plaintiff will bear the burden of proof at trial, there can be no "genuine issue as to any material fact" for purposes of Fed. R. Civ. P. 56(c).

Celotex Corp. v. Catrett, 477 U.S. 317, 322-323 (1986). As the Court in *Celotex* explained, "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Id.* at 323.

Furthermore, if the Court permits a company whose product is alleged to have injured a consumer to hide behind trade secret protection so as to hinder that consumer's ability to prove his case, the Court will essentially close the courthouse door to that consumer. Such a ruling would contravene the South Carolina constitutional guarantee to access to the courts. Article I, Section 9 provides that, "All courts shall be public, and every person shall have speedy remedy therein for wrongs sustained." S.C. Const. art. I § 9. "Judicial proceedings and court records are presumptively open to the public under the common law, the First Amendment of the federal constitution, and the state constitution." *Ex Parte Capital U-Drive-It, Inc.*, 630 S.E.2d 464, 469 (S.C. 2006). While the State Supreme Court in *Capital U-Drive-It* recognized that one's access to the courts can be restricted in certain circumstances (such as matters involving juveniles, trade secrets, or other privileged information), it should not be restricted solely on the basis of an individual's inability to obtain evidence the Court has ruled to be essential to

proving the claim. Absent certain exceptions, none of which are applicable in this case, the right to access to the courts should not be restricted.

In one of the earliest trade secret cases, Judge Learned Hand stated:

> The defendant, however, urges that it should not be required to disclose its secret processes. No doubt the situation is difficult, on the one hand, to secure the plaintiff's right to get relevant evidence, and, on the other, to protect the defendant from disclosing secrets which are not material. In the end, the right of the plaintiff to bring out the truth must prevail, in so far as the inquiry is honestly limited to the actual issue of infringement. In the case at bar there can be no doubt that at the hearing the defendant would be obliged to answer the questions here propounded, and, if so, I can see no good reason to preclude that examination now. It is true that the result may be to compel the defendant to disclose how far it goes in the process, though it does not use the process as a whole, and that that may damage the defendant. That is, however, an inevitable incident to any inquiry in such a case; unless the defendant may be made to answer, the plaintiff is deprived of its right to learn whether the defendant has done it a wrong.

Grasselli Chemical Corp. v. National Aniline & Chemical Co., 282 Fed. 379, 381 (S.D.N.Y. 1920).

The Court in *Coca-Cola* quoted this passage from *Grasselli* in formulating its legal standard applicable to the discovery of trade secrets. In *Coca-Cola*, the Court stated:

> It is well established that trade secrets are not absolutely privileged from discovery in litigation. In order to resist discovery of a trade secret, a party must first demonstrate by competent evidence that the information sought through discovery is a trade secret and that disclosure of the secret might be harmful. If this showing is made, the burden shifts to the party seeking discovery to establish that the disclosure of trade secrets is relevant and necessary to the action.

> When disclosure of trade secrets 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 that the material sought is relevant to the subject matter of the lawsuit. 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 its opponent's theories.
>
> Once relevancy and need have been established, the Court must balance the need for the information against the injury that would ensue if disclosure is ordered. Because protective orders are available to limit the extent to which disclosure is made, the relevant injury to be weighed in the balance is not the injury that would be caused by public disclosure, but the injury that would result from disclosure under an appropriate protective order. In this regard, it is presumed that disclosure to a party who is not in competition with the holder of the trade secret will be less harmful than disclosure to a competitor.
>
> The balance between the need for information and the need for protection against the injury caused by disclosure is tilted in favor of disclosure once relevance and necessity have been shown. As the Supreme Court has recognized, "orders forbidding any disclosure of trade secrets or confidential commercial information are rare." A survey of the relevant case law reveals that discovery is virtually always ordered once the movant has established that the secret information is relevant and necessary. The reason for allowing the discovery of trade secrets whenever they are needed to advance the just adjudication of a lawsuit is simple: in the absence of an applicable privilege, judicial inquiry should not be unduly hampered.

107 F.R.D. at 292-293 (citations omitted).

That standard is fair, and protects not only the ability of a manufacturer to protect its trade secrets, but also the right of an injured party to establish his case in court. As between the parties in these cases, a plaintiff's injury should not be subordinate to the company's claim of injury from disclosure. As in *Coca-Cola*,

Plaintiffs' need for the information in this products liability case outweighs the harm that disclosure under a protective order would cause.

The *Amicus* respectfully requests the Court take these points into consideration when deciding whether to adhere to the reasonable test set forth in *Coca-Cola* and consistently followed in this Circuit and in the District of South Carolina. See *In re Sealed Air Corp.*, 220 F.R.D. 452 (D.S.C. 2004) (Floyd, J) (applying *Coca-Cola* standard in patent infringement case to deny motion to quash and to compel production); *Insulate America v. Masco Corp.*, 227 F.R.D. 427 (W.D. N.C. 2005) (applying *Coca-Cola* standard to deny access to information); *Sensormatic Electronics Corp. v. Tag Co. U.S. LLC*, 2008 WL 217113 (D.S.C. 2008) (applying *Coca-Cola* standard to permit expert inspection under protective order); *Snoznik v. Jeld-Wen, Inc.*, 259 F.R.D. 217 (W.D. N.C. 2009) (applying *Coca-Cola* standard to enter protective order denying access to information); *Anthony v. Atlantic Group, Inc.*, 2012 WL 3597122 (D.S.C. 2012) (applying *Coca-Cola* standard to order production of information containing trade secrets); *Mustang Innovation, LLC v. Sonoco Products Co.*, 2015 WL 4508830 (D.S.C. 2015) (applying *Coca-Cola* in denying defendant's motion to quash).

CONCLUSION

In products liability cases in South Carolina that involve claims for manufacturing or design defects, a plaintiff has a specific burden of proof to survive to trial on the merits. The District Courts in this Circuit have successfully protected both a manufacturer's interest in its trade secrets and a plaintiff's access to evidence by applying the balancing test set forth in *Coca-Cola*. The District Court in this case followed this settled precedent. This Court should affirm.

Respectfully submitted,

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May 9, 2016

CERTIFICATE OF COMPLIANCE

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Dated: May 9, 2016

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I hereby certify that on this 9th day of May, 2016, I caused this Brief of *Amicus Curiae* to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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