

10-1074

IN THE SUPREME COURT OF THE STATE OF ARKANSAS

THE COOPER TIRE COMPANY,

Petitioner,

v.

10-1074

THE HONORABLE OLLY NEAL,

Respondent,

and

LEE ANDREW TUCKER, as the Administrator
of the Estate of Mary Tucker, Deceased;
LEE ANDREW TUCKER, Individually;
LEE ANDREW TUCKER, As Closest Next of
Kin of LEE ANDREW TUCKER, JR., A Minor;
NADINE COLEMAN, As the Administratrix of
the Estate of Olivia Coleman, Deceased,

Real Parties in
Interest

RECEIVED
SUPREME CT/CT OF APPEALS
CLERK'S OFFICE
2010 OCT 19 A 11:42
LESLIE W. STEEN, CLERK

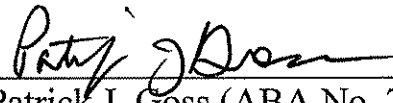
THE RUBBER MANUFACTURERS ASSOCIATION'S AND THE NATIONAL ASSOCIATION OF MANUFACTURERS' MOTION FOR LEAVE TO APPEAR AS AMICI CURIAE

The Rubber Manufacturers Association ("RMA") and the National
Association of Manufacturers ("NAM") pursuant to Rule 6.1 of the Rules of the

Arkansas Supreme Court jointly move this Court for leave to appear as *amici curiae* in support of the Petition for Writ of Certiorari filed by the Cooper Tire & Rubber Company. In support of their motion, the RMA and NAM incorporate by reference the points and authorities and arguments in the accompanying brief.

Respectfully submitted,

ROSE LAW FIRM
A Professional Association
120 East Fourth Street
Little Rock, AR 72201-2893
(501) 375-9131
(501) 375-1309 (fax)

By: 
Patrick J. Goss (ABA No. 73042)
pgoss@sbcglobal.net

and

Kenneth J. Moran
MORAN REEVES & CONN PC
Virginia Bar No. 17902
4110 E. Parham Road
Richmond, Virginia 23228
(804) 421-6250
(804) 421-6251 (fax)

ATTORNEYS FOR THE
RUBBER MANUFACTURERS
ASSOCIATION AND
NATIONAL ASSOCIATION
OF MANUFACTURERS

CERTIFICATE OF SERVICE

On October 19, 2010 I served the foregoing on the Real Parties in Interest by mailing copies of it to their attorneys,

Phillip Allen
Charles P. Allen
ALLEN & ALLEN LAW FIRM, P.A.
P.O. Box 2602
West Helena, AR 72390,

Ted Connell
MERKEL & COCKE, P.A.
P.O. Box 1388
Clarksdale, MS 38614,

E. Dion Wilson
WILSON LAW FIRM, P.A.
Wilson, Valley & Etherly Ofc. Bldg.
Suite 1
423 Rightor Street
Helena, AR 72342, and

David A. Hodges
Centre Place – Fifth Floor
212 Center Place
Little Rock, AR 72201-2429;

on Petitioner, The Cooper Tire Company, by mailing copies of it to its attorneys,

Philip S. Anderson
Jess Askew
Andrew King
WILLIAMS & ANDERSON PLC
Twenty-Second Floor
111 Center Street
Little Rock, AR 72201,

Alex Purvis
BRADLEY ARANT BOULT
CUMMINGS LLP
One Jackson Place, Suite 400
188 East Capital Street
P.O. Box 1789
Jackson, MS 39215-1789,

Justin T. McDonald
Scott Burnett Smith
BRADLEY ARANT BOULT
CUMMINGS LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203-2119, and

Kirkman T. Dougherty
C. Ryan Norton
HARDIN, JESSON & TERRY, PLC
Attorneys at law
P.O. Box 10127
Fort Smith, AR 72917-0127

on the Product Liability Advisory Council, Inc., which has filed a motion for leave to appear as *amicus curiae*, by mailing a copy of it to its attorneys,

Steven W. Quattlebaum
E. B. Chiles, IV
Clarke Tucker
QUATTLEBAUM, GROOMS,
TULL & BURROW PLLC
111 Center Street, Suite 1900
Little Rock, AR 72201;

and on Jack's Garage and Auto Sales, Inc., a defendant below, by mailing a copy of it to its attorney,

Kevin W. Cole
BARRETT & DEACON, P.A.
P.O. Box 1700
Jonesboro, AR 72403.

I also mailed a copy of the foregoing to,

The Honorable Olly Neal
Circuit Judge
15 East Chestnut Street
Marianna, AR 72360,

and a copy to Judge Neal at

The Phillips County Courthouse
620 Cherry Street
Helena, AR 72342-3397.



Patrick J. Goss

10-1074

IN THE SUPREME COURT OF THE STATE OF ARKANSAS

THE COOPER TIRE COMPANY,

Petitioner,

v. 10-1074

THE HONORABLE OLLY NEAL,

Respondent,

and

LEE ANDREW TUCKER, as the Administrator
of the Estate of Mary Tucker, Deceased;
LEE ANDREW TUCKER, Individually;
LEE ANDREW TUCKER, As Closest Next of
Kin of LEE ANDREW TUCKER, JR., A Minor;
NADINE COLEMAN, As the Administratrix of
the Estate of Olivia Coleman, Deceased,

Real Parties in
Interest

**BRIEF IN SUPPORT OF THE RUBBER
MANUFACTURERS ASSOCIATION'S AND
NATIONAL ASSOCIATION OF MANUFACTURERS'
MOTION FOR LEAVE TO APPEAR AS AMICI CURIAE**

The Rubber Manufacturers Association (“RMA”) and National Association of Manufacturers (“NAM”), pursuant to Rules 2-1(e) and 6.1 of the Rules of the Arkansas Supreme Court, submit the following joint brief in support of their Motion to Appear as *Amici Curiae* in support of the Cooper Tire & Rubber Company’s Petition for Writ of Certiorari. The RMA and NAM will pay all costs associated with the filing of this joint motion and brief, and with the filing of any *amicus* briefs.

I. INTRODUCTION

Neither the RMA nor NAM designed, manufactured or sold any of the products allegedly at issue in this lawsuit.

Rather, the RMA is the primary trade association representing the interests of the tire manufacturing industry in the United States. RMA’s membership includes all of the country’s major tire manufacturers, including the Cooper Tire & Rubber Company (“Cooper Tire”). RMA’s tire company members employ over 50,000 people throughout the United States, with manufacturing facilities in 17 states, including 30 manufacturing plants and numerous distribution centers. Cooper Tire, for example, has a tire manufacturing plant in Arkansas, and there are many wholesale/retail tire outlets in Arkansas. Annually, the RMA members’ domestic manufacturing plants produce approximately 140 million passenger, light

truck and commercial truck tires. Annual tire sales in North America currently approximate \$30 billion. The tire industry is a critical supplier to the nation's motor vehicle industry, which includes not only cars, but also trucks, buses, industrial, agricultural and military vehicles. Thus, the RMA is in a better position than any of its members to analyze both the national and global economic trends in the automotive industry and the availability of raw materials to support that industry.

Similarly, the National Association of Manufacturers is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

Both the RMA and NAM are vitally interested in this case because it involves the unfettered disclosure of Cooper Tire's trade secrets and other valuable commercial and technical information. This information allows Cooper Tire to compete in the automotive (tire) industry, and forms the backbone essential to the continued economic recovery in this country and abroad.

The trial court in this matter failed to follow Arkansas law and the applicable law from other jurisdictions by ordering the production of Cooper Tire's technical and proprietary documents without any protective order under Ark. R. Civ. P. 26(c)(7). Many of these documents, from the face of plaintiffs' requests, contain Cooper Tire's invaluable trade secrets and other technical know-how. The unfettered disclosure of these documents would cause Cooper Tire irreparable harm since once a trade secret is disclosed, it can never be recovered.

Federal and most state courts follow a three-step process for granting or denying discovery of trade secrets. First, the party claiming a trade secret privilege must show by competent evidence that the requested information constitutes or contains a trade secret. Then, the burden of proof shifts to the party requesting the information to make a particularized showing that the information is both relevant and necessary to prove a material fact at trial. Finally, if both parties have met their burdens, the trial court must weigh the actual need of the requesting party for the information against the potential harm of its disclosure to the trade secret holder. If the balance favors disclosure, then the court must craft a protective order that will effectively prevent any use and dissemination of the trade secret beyond its case-specific need for disclosure. But if the court concludes that even a protective order would not effectively preserve the information's confidentiality, then it may refuse production despite the requesting party's need for the

information. *See Bridgestone Ams. Holding, Inc. v. Mayberry*, 878 N.E.2d 189, 193 (Ind. 2007) (extensively citing federal and state cases following this process); Milgrim & E. Bensen, 3 *Milgrim on Trade Secrets*, § 14.04[4][d], at 14-168 (2009) (stating general rule). Arkansas should follow this approach.

Since the trial court committed error by requiring the production of Cooper Tire's trade secret and other proprietary information and Cooper Tire will be irreparably harmed by that decision, the RMA and NAM urge this Court to grant Cooper Tire's petition and the RMA and NAM's request to appear as *amici curiae* in this proceeding, and to schedule appropriate briefing in which the RMA and NAM may participate.

II. STATEMENT OF THE CASE

The background of this product liability case and the instant discovery dispute are aptly described in Cooper Tire's Petition for Writ of Certiorari and Emergency Motion for Stay of Discovery Order. Succinctly stated, this lawsuit arises from an alleged Cooper tire failure on a 1997 Buick LeSabre. Mary Tucker and Nadine Coleman, unbelted passengers in the vehicle, died in the ensuing one vehicle rollover which was allegedly caused by the tread separation of the left rear tire – a P205/70R15 steel belted radial passenger tire manufactured by Cooper Tire in Tupelo, Mississippi during the 34th week of 1998. (R.4.)

Plaintiffs engaged in discovery in this matter in two waves. At the beginning of the lawsuit, Cooper Tire provided more than 5,000 documents in response to plaintiffs' first wave of discovery. (R.363-66, 425-68, 487.) Between April 26, 2010 and May 5, 2010, plaintiffs served four sets of requests for production on Cooper Tire, totaling 467 individual requests. Most of those requests sought the production of trade secret or commercially sensitive information. Request No. 42, for example, of plaintiffs' Sixth (sic Fifth) Requests for Production asks for:

All protected or trade secret materials provided in response to requests to produce, answers to interrogatories, or protected depositions for the following [5 prior] cases[.]

(R.198-99.) Even though many of the requested documents had previously been produced subject to a protective order and many are privileged under Arkansas Rule of Evidence 507, the trial court ordered their production without the benefit of any protection sought by Cooper Tire. As a result, Cooper Tire may suffer irreparable harm from the unfettered disclosure of its technology and know-how. Moreover, Judge Neal's discovery order will resound adversely and potentially affect all technology-based industries as the country moves forward with its economic recovery. Therefore, the RMA and NAM respectfully request that their motion to appear as *amici curiae* in this proceeding and Cooper's petition for writ of certiorari be granted.

III. ARGUMENT

By requiring the production of Cooper Tire's trade secret and commercially sensitive information without any showing of need by plaintiffs and without any protective order, the trial court violated a number of procedural and evidentiary rules in Arkansas. This clear departure from existing law marks the trial court's legal error and places Cooper Tire in the position of suffering irreparable harm unless this Court intervenes. Thus, this case lends itself to certiorari adjudication, and Cooper Tire's petition should be granted. In addition, the economic effect of such an unwarranted disclosure of proprietary information underscores the RMA and NAM's request for *amici curiae* status.

Manufacturers go to great lengths to guard their secret formulas and other proprietary information since no manufacturer wants its know-how revealed. *See In re Bridgestone Firestone*, 106 S.W.3d 730, 731 (Tex. 2003). Therefore, federal and state courts across the nation have almost uniformly held that the rubber formulas and other trade secrets of tire manufacturers are protected from disclosure. *See* List of Nationwide Rulings, Exhibit A. These decisions were rendered mainly under the trade secret protection laws of states that, like Arkansas, have adopted the Uniform Trade Secrets Act ("UTSA").

The trial court, however, ignored these decisions and their underlying public policy by requiring Cooper Tire to produce its trade secrets and other proprietary

information and ordered that those documents be produced without a properly framed protective order. Cooper Tire and technology-based industries will be irreparably harmed by the trial court's order, and the RMA and NAM respectfully request that Cooper Tire's petition be granted and that they be granted leave to appear as *amici curiae* in this matter and participate in any briefing schedule ordered by this Court.

A. Certiorari Is the Appropriate Remedy in These Circumstances.

The need for a clear, unmistakable and stringent standard for the discovery of trade secrets and other proprietary information is highlighted by the real and disruptive danger that unwarranted disclosure presents, ultimately to the harm of consumers and the economy of the Arkansas and the United States. Cooper Tire is one of the last two American global tire companies competing in the world today. It is well recognized that the protection of this information is a necessary component of commerce, and has been protected since the Roman Empire. *Restatement (Third) of Unfair Competition*, § 39, cmt a. (1995). As one observer has noted:

In this information age, the trade secrets of any business are both its strength and its vulnerability. Key strategic plans, product specifications, and interested customer information allow a company to distinguish itself from competitors and pursue windows of opportunity in the marketplace.

The Trade Secret Handbook (Michael J. Lockerby, ed., American Bar Association 2000).

Under Arkansas law certiorari vacating a lower court order is appropriate when “... it is apparent on the face of the record that there has been a plain, manifest, clear, and gross abuse of discretion and there is no other adequate remedy.” *Kraemer v. Patterson*, 342 Ark. 481, 485, 129 S.W.3d 684, 686 (2000) (court granted certiorari to vacate trial court order permitting use of treating physician as expert in violation of Ark. R. Evid. 503(c)); *see also Dougan v. Gray*, 318 Ark. 6, 884 S.W.2d 239 (1994); *Lupo v. Lineberger*, 313 Ark. 315, 319, 855 S.W.2d 293, 295 (1993). Since once a trade secret is disclosed, there is no way to retrieve it. *See In re Remington Arms Co.*, 952 F.2d 1029, 1033 (8th Cir. 1991). Cooper Tire cannot wait for a final appeal of this matter, and certiorari is appropriate.

Therefore, the RMA and NAM respectfully request that the Court grant their motion to appear as *amici curiae* in this proceeding and participate in any briefing schedule the Court may order.

B. Documents Sought by Plaintiffs Contain Proprietary Information.

There is no question that many of the documents sought from Cooper Tire in plaintiffs’ second wave of discovery are trade secret under the Arkansas Trade Secrets Act (“ATSA”). The ATSA defines “trade secret” as

information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(A) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(B) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Ark. Code Ann. § 4-75-601(4) (2010). The *Restatement (First) of Torts* § 757, which this Court considers when applying the ATSA, defines trade secrets in a similar fashion. *Wal-Mart Stores, Inc. v. P.O. Market, Inc.*, 347 Ark. 651, 66 S.W.3d 620 (2002).

Cooper Tire addressed each of the factors listed under the ATSA and the *Restatement* in the affidavit of Anthony E. Brinkman, former forensic engineer at Cooper Tire. Plaintiffs submitted no evidence whatsoever to challenge or rebut Mr. Brinkman's affidavit. Rather, they argued that Cooper Tire offered nothing to show the trade secret content of each requested document, even though the proprietary nature of the documents was clear from plaintiffs' request itself. (R.198-99.) The inescapable conclusion is, therefore, that many of Cooper Tire's documents requested by plaintiffs are trade secret. This is consistent with nationwide rulings on this very issue. *See* Exhibit A. The remainder of Cooper Tire's documents, while perhaps not rising to the level of trade secret under the ATSA, clearly contain commercially valuable business information about Cooper Tire and its customers. *See Cardinal Freight Carriers, Inc. v. J. D. Hunt*

Transport Services, Inc., 363 Ark. 143, 150, 987 S.W.2d 642, 645 (1999). Nevertheless, the trial court ordered Cooper Tire to produce these documents without any recognition of their proprietary and confidential nature and without any protective order or other protection to prevent dissemination to Cooper Tire's competitors. The trial court's ruling is contrary to Arkansas law and should be vacated.

In re Remington Arms, supra, undoubtedly is the seminal decision on the discovery of trade secrets and other confidential information. In *Remington Arms*, the plaintiff in a personal injury action sought discovery of Remington's New Bolt Action Rifle ("NBAR") program. Without addressing any of Remington's trade secret objections, the trial court ordered the production of NBAR information. 952 F.2d at 1031. The Eighth Circuit granted certiorari and vacated the trial court's order. The Eighth Circuit found: (1) that confidential business information has long been recognized as "property," citing *Carpenter v. United States*, 484 U.S. 19, 26 (1987); (2) that once the producing party establishes a trade secret or other confidential information under F.R.C.P. 26(c)(7), the burden shifts to the requesting party to show both relevance and need for the information (citations omitted); (3) if the district court orders production after balancing the requesting party's need for the information against the producing party's interest in protecting its proprietary nature, then an appropriate protective order is required to safeguard

those property rights; and (4) recognizing that a protective order may be “largely ineffective in a trade secrets case, however, for once the information is wrongfully released, the trade secret is lost forever and no sanction imposed on the violator can retrieve it.” *Id.* at 1032-1033.

Arkansas Rule of Civil Procedure 26(b)(1) provides that “[p]arties may obtain discovery regarding any matter, *not privileged*, which is relevant to the issues in the pending action.” (Emphasis added). Additionally, Rule 26(c)(7) allows a trial court to issue a protective order “that a trade secret or other confidential research, development, or consumer information not be disclosed or be disclosed only in a designated way.” Rule 507 of the Arkansas Rules of Evidence also protects trade secrets by granting them a conditional privilege: “[a] person has a privilege ... to refuse to disclose and to prevent others from disclosing a trade secret owned by him, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.” Therefore, trade secrets are not discoverable absent a showing that allowing the privilege would conceal a fraud or work injustice.

In the instant matter, no such showing was made. Rather, without discussing any of the specific requests served by plaintiffs, the trial court ordered Cooper Tire to produce all of the requested documents by a certain date and without the benefit of a protective order. Even if plaintiffs had demonstrated a compelling need for

disclosure of some confidential information, which they have not, the proprietary and confidential information must be protected from public disclosure.

Thus, the trial court's order was manifest legal error and a clear departure from existing law on these issues. The order literally "takes" the intellectual property of Cooper Tire, creating irreversible harm. Cooper Tire and manufacturing industries in general will be unable to rely on their trade secrets and technology to differentiate themselves in the marketplace to the detriment of both companies and consumers at large. The RMA and NAM respectfully request leave to appear as *amici curiae* in these proceedings and that Cooper Tire's petition be granted.

C. Plaintiffs Failed to Establish the Requisite Level of Need for the Requested Documents.

In this case, the trial court never considered the content or nature of the documents requested by plaintiffs. Without any showing of need by plaintiffs, the trial court ordered Cooper Tire to produce those documents. The trial court exacerbated this dilemma by not protecting these documents, despite the fact that they had been protected when produced by Cooper Tire in prior litigation. The trial court put the cart before the horse by ordering Cooper Tire to produce its proprietary documents before determining whether those documents contained trade secrets, were privileged or even subject to discovery under Arkansas law. Furthermore, the trial court ordered disclosure of this information without any

showing of plaintiffs' need to prosecute their product liability claim. Under the trial court's order, Cooper Tire will lose the protection it has developed for this information since it will not be afforded a protective order.

While a number of states protect trade secret and proprietary information from disclosure, it is difficult to point to a clear definition of the need that plaintiffs must demonstrate to obtain this information. The Texas Supreme Court, for instance, addressed this issue in *In re Bridgestone Firestone, Inc.*, 106 S.W.3d 730, 732 (Tex. 2003). The court opined that "the degree to which information is necessary in a case depends upon the nature of the information and the context of the case." In an earlier trade secret case, the court suggested that the information had to be "material and necessary to the litigation and unavailable from any other source." *Automatic Drilling Machines, Inc. v. Miller*, 515 S.W.2d 256, 259 (Tex. 1974). Other courts have likewise articulated similar standards for the required proof. In the California case of *Bridgestone/Firestone v. Superior Court of Alameda County*, 9 Cal. Rptr. 2d 709 (Cal. Ct. App. 1992), the court discussed evidence that was necessary to the proof of one or more causes of action or necessary to provide a predicate for an expert's conclusion in the case. The *Kleinerman v. U.S. Postal Service*, 100 F.R.D. 66, 69 (D. Mass. 1983) decision referenced "issues [that] cannot be fairly adjudicated unless this information is available." Under any of these definitions employed by courts, the requesting

party must make some evidentiary showing to satisfy their burden of proving need for the trade secret information.

In this case, plaintiffs submitted an affidavit from their trial expert, Dennis P. Carlson, purporting to demonstrate, *inter alia*, a need for Cooper Tire's proprietary materials. (R.395-97.) According to Mr. Carlson, the requested documents "are material and relevant to tread separation cases." In addition, since the documents present evidence on "any important universal or near-universal issues," they are particularly relevant to him. But mere relevance is not enough. *See In re Continental General Tire*, 979 S.W.2d 609, 611 (Tex. 1998) (recognizing that a "requesting party must establish more than mere relevance to discover trade secrets, or the statutory privilege would be 'meaningless.'"). However, Mr. Carlson does not indicate how those documents are necessary to form his opinion or that he will be unable to reach an opinion with regard to the subject tire without access to the documents.* In sum, Mr. Carlson's conclusory comments do not establish the requisite level of need to vitiate Cooper Tire's proprietary interest in

* Both the RMA and NAM are concerned by the fact that Mr. Carlson, who will have access to Cooper Tire's proprietary materials under Judge Neal's order, has violated previous protective orders and failed to safeguard the company's confidential materials. *See Nevil v. Ford Motor Co.*, No. CV294-015, 1999 WL 1338625 (S.D. Ga. 1999).

its business and technology. *See Laffitte v. Bridgestone Corp.*, 674 S.E.2d 154 (S.C. 2009). By making conclusions of “relevance” and “materiality,” he merely makes legal conclusions and does not even approach the evidentiary standard of specific compelling necessity for information, characterized by the plaintiffs themselves as “trade secrets.” *See In re Bridgestone/Firestone, Inc.*, 106 S.W.3d at 733-34.

In the context of this matter, the decisions cited by the RMA and NAM suggest that trade secrets are privileged and protected unless an expert is unable to reach a material opinion without access to them, or where plaintiffs’ claims cannot be fairly tried without the information. Conversely, invading trade secrets to increase the settlement value of a case, or to insulate an expert from a *Daubert* challenge, or when the information is merely helpful, are insufficient bases to disclose trade secrets. Therefore, the RMA and NAM respectfully request that this Court grant them leave to appear as *amici curiae*, order a briefing schedule for Cooper Tire’s petition, and vacate the trial court’s discovery order.

D. Sound Public Policy Underscores the Need to Vacate the Trial Court’s Discovery Order.

Trade secrets, such as compound formulas, the curing procedures for those compounds, proprietary “know-how” and test data, are vital trade secrets in the tire manufacturing industry. Likewise, commercially sensitive information like customer satisfaction and/or relations programs, while perhaps not rising to the

level of trade secret, is equally important to a tire manufacturers' ability to compete. No manufacturer can allow its competitors to have access to its highly proprietary information, whether currently in use or previously used. Industry Week recently reported, for example, that one of Michelin's employees offered to sell confidential information to Bridgestone Corporation, which cooperated with authorities in the investigation and conviction of that employee. See Exhibit B attached hereto. Similarly, two individuals were recently indicted in the Eastern District of Tennessee for attempting to steal trade secrets from Goodyear for a Chinese tire company. See *United States v. Clark Alan Roberts & Sean Edward Howley*, No. 3:08-cr-00175 (E.D. Tenn.); Two Indicted for Conspiring to Steal Trade Secrets from Goodyear Tire and Rubber Co., 2009 WLNR 5483721 (Mar. 22, 2009).

Competition for the sale of products in the tire industry, as in other manufacturing industries, is largely technology-driven and based on company know-how obtained over a number of decades. Tire companies, like other manufacturers, invest millions of dollars in their research and development programs. Many of these companies have designed and developed their own proprietary rubber formulas and employ unique manufacturing processes based on those formulas. In an industry depending on the sale of typically low-margin products, trade secret and proprietary information provide the means to compete

effectively, even in difficult economic times. *See, e.g.,* Richard Russell “*How the Rubber Hits the Road*,” Globe & Mail, Feb. 12, 2009. The unwarranted and unnecessary disclosure of these trade secrets adversely affects competition within the industry, both in the United States and abroad. In fact, the number of tires imported from third world countries like China, India, South Korea, and those in Eastern Europe has been increasing annually. *See* Bruce Davis, *Chinese-Made Tire Imports Gain Shares*, Tire Business (May 25, 2009). The tire companies in those countries would be eager to obtain Cooper’s knowledge, technology and trade secrets. The disruption of lawful competition through the improper acquisition of that “know-how” could adversely affect consumers both in Arkansas and throughout the nation in the form of higher prices and lost jobs.

At the same time, the threat to trade secret and proprietary information has never been more apparent. In a recent survey, for example, the American Society of Industrial Security (“ASIS”) International and PricewaterhouseCoopers estimated that Fortune 1000 companies and other small and mid-sized businesses sustained losses of more than \$53 billion from the theft of their proprietary information from July 1, 2000 through June 30, 2001. *See “Trends in Proprietary Information Loss: Survey Report,”* 1 (PricewaterhouseCoopers, U.S. Chamber of Commerce, & ASIS Foundation, Sept. 2002). According to the survey, the largest average dollar value of loss per incident occurred in the research and development

area, and loss of competitive advantage was noted as “the most serious problem.” *Id.* Additionally, there have been numerous reports of companies being forced out of business when competitors obtained the hard-earned “know-how” and expensive trade secrets of those companies.

The enormity of this risk is dramatically emphasized in the well-publicized case of Ellery Systems, Inc., a software supplier to NASA and the Department of Defense. After one of its employees resigned and sold the company’s source code to a foreign country, which then established its own software development firm in the United States, Ellery Systems was forced out of business. This episode, and others like it, led to the passage of the Federal Economic Espionage Act of 1996. *See* Testimony of Geoffrey Shaw, former CEO of Ellery Systems, before a joint session of the U.S. Senate Select Committee on Intelligence and the Subcommittee on Terrorism, Technology and Government Information of the Joint Judiciary Committee, (Feb. 27, 1996). *See also* Jonathan Landay, “Congress Moves to Stop Spies in the Work Place,” The Christian Science Monitor (March 12, 1996) at 1.

The trial court’s order marks a clear departure from the decisions of other trial and appellate courts which have protected trade secrets from unwarranted disclosure. Those courts have required the requesting party to demonstrate that the information is both “relevant and necessary to its case” before vitiating the producing party’s proprietary interest in its know-how. Even then, an appropriate

protective order may be required to further protect the producing party's proprietary interests. This is in accord with sound economic policy that respects the fundamental property rights of the parties. *See* Michael J. Hutter, "The Case for Adoption of a Uniform Trade Secrets Act in New York," 10 Alb. L. J. of Sci. & Tech. 1, 3 (1999) ("innovation is key to a dynamic economy... sound public policy seeks to encourage invention of new products, processes and technologies.").

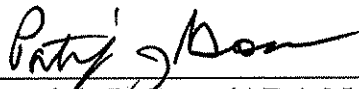
For these reasons, the RMA and NAM urge this Court to grant Cooper Tire's petition for writ of certiorari, grant the RMA and NAM leave to appear as *amici curiae* on behalf of that petition and to order appropriate briefing of these issues.

IV. CONCLUSION

The trial court abused its discretion by ordering the disclosure of Cooper Tire's confidential and proprietary information without a protective order limiting the dissemination of the information and without showing that the proprietary information was essential to plaintiffs' case. To prevent this and future abuses, this Court should vacate that order and allow the Rubber Manufacturers Association and the National Association of Manufacturers to appear as *amici curiae* and to file additional briefs as this Court may require.

Respectfully submitted,

ROSE LAW FIRM
A Professional Association
120 East Fourth Street
Little Rock, AR 72201-2893
(501) 375-9131
(501) 375-1309 (fax)

By: 
Patrick J. Goss (ABA No. 73042)
pgoss@sbcglobal.net

and

MORAN REEVES & CONN PC
Kenneth J. Moran
Virginia Bar No. 17902
4110 E. Parham Road
Richmond, Virginia 23228
(804) 421-6250
(804) 421-6251 (fax)

ATTORNEYS FOR THE
RUBBER MANUFACTURERS
ASSOCIATION AND
NATIONAL ASSOCIATION
OF MANUFACTURERS

CERTIFICATE OF SERVICE

On October 19, 2010 I served the foregoing on the Real Parties in Interest by mailing copies of it to their attorneys,

Phillip Allen
Charles P. Allen
ALLEN & ALLEN LAW FIRM, P.A.
P.O. Box 2602
West Helena, AR 72390,

Ted Connell
MERKEL & COCKE, P.A.
P.O. Box 1388
Clarksdale, MS 38614,

E. Dion Wilson
WILSON LAW FIRM, P.A.
Wilson, Valley & Etherly Ofc. Bldg.
Suite 1
423 Rightor Street
Helena, AR 72342, and

David A. Hodges
Centre Place – Fifth Floor
212 Center Place
Little Rock, AR 72201-2429;

on Petitioner, The Cooper Tire Company, by mailing copies of it to its attorneys,

Philip S. Anderson
Jess Askew
Andrew King
WILLIAMS & ANDERSON PLC
Twenty-Second Floor
111 Center Street
Little Rock, AR 72201,

Alex Purvis
BRADLEY ARANT BOULT
CUMMINGS LLP
One Jackson Place, Suite 400
188 East Capital Street
P.O. Box 1789
Jackson, MS 39215-1789,

Justin T. McDonald
Scott Burnett Smith
BRADLEY ARANT BOULT
CUMMINGS LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203-2119, and

Kirkman T. Dougherty
C. Ryan Norton
HARDIN, JESSON & TERRY, PLC
Attorneys at law
P.O. Box 10127
Fort Smith, AR 72917-0127

on the Product Liability Advisory Council, Inc., which has filed a motion for leave to appear as *amicus curiae*, by mailing a copy of it to its attorneys,

Steven W. Quattlebaum
E. B. Chiles, IV
Clarke Tucker
QUATTLEBAUM, GROOMS,
TULL & BURROW PLLC
111 Center Street, Suite 1900
Little Rock, AR 72201;

and on Jack's Garage and Auto Sales, Inc., a defendant below, by mailing a copy of it to its attorney,

Kevin W. Cole
BARRETT & DEACON, P.A.
P.O. Box 1700
Jonesboro, AR 72403.

I also mailed a copy of the foregoing to,

The Honorable Olly Neal
Circuit Judge
15 East Chestnut Street
Marianna, AR 72360,

and a copy to Judge Neal at

The Phillips County Courthouse
620 Cherry Street
Helena, AR 72342-3397.


Patrick J. Goss

**LIST OF NATIONWIDE RULINGS PROTECTING
TIRE MANUFACTURERS' TRADE SECRET RUBBER FORMULAS**

CASE	DATE
<i>Hajek v. Kumho Tire Co., Inc.</i> , 2010 WL 503044 (D. Neb. 2010)	Feb. 8, 2010
<i>Laffitte v. Bridgestone Corp.</i> , 674 S.E.2d 154 (S.C. 2009)	Mar. 2, 2009
<i>Celeste Brennan v. Bridgestone/Firestone North American Tire, LLC, et al.</i> , Cause No. ADV-06- 1218(B) (Cascade County, Mont.)	Jan. 20, 2009
<i>Burnett v. Pirelli North America, Inc.</i> , No. A476187 (Clark Co., Nevada) Order affirming Discovery Commissioner's Report and Recommendation (skim compound and innerliner compound are trade secret and protected from discovery)	Mar. 20, 2007
<i>Manuel Angulo, et al. v. Continental Tire North America, Inc., et al.</i> , No. BC 374740 (County of Los Angeles, CA) (determining that CTNA's compound formulas constituted trade secret information)	Nov. 19, 2007
<i>Bridgestone Americas Holding, Inc. v. Mayberry</i> , 878 N.E.2d 189 (Ind. 2007)	Dec. 18, 2007
<i>Alfredo Ramos v. On the Hill Auto, et al.</i> , No. 00474 (Philadelphia County, Pa), Order dated Oct. 1, 2007 (denying disclosure of Goodyear's rubber formulas where plaintiffs failed to meet their burden to show that the trade secret information was both relevant and necessary)	Oct. 1, 2007
<i>Barcnas v. Ford Motor Co. & Bridgestone/Firestone, Inc.</i> , No. C03-04644 (N.D. Cal. San Jose Division), Order dated February 28, 2005 - rubber compound formulas constitute trade secrets and are protected from discovery	Feb. 28, 2005



<i>Sagiv v. Continental Tire North America, Inc.</i> , Index No. 48051103 (County of Kings, NY), Order dated January 4, 2005 - skim stock formulas and manufacturing plant procedures are protected trade secrets	Jan.4, 2005
<i>Lopez-Diaz v. Cooper Tire & Rubber Co.</i> , No. D- 0101 CV-2002-1714 (Santa Fe County, NM), Rulings & Recommendations dated April 29, 2004 - rubber compound formula protected	Apr. 29, 2004
<i>Schifo v. Continental Tire North America Inc.</i> , No. CV2002-024873 (Maricopa County, AZ), Order dated April 12, 2004 – “skim stock and inner liner compound formulas ... are, without question, trade secrets”	Apr. 12, 2004
<i>Holland v. Bridgestone/Firestone, Inc.</i> , No. CJ- 2002-6216 (Oklahoma County, OK), Order dated March 2, 2004 - skim stock formula is trade secret, no disclosure allowed	Mar. 2, 2004
<i>In re Bridgestone Firestone</i> , 106 S.W.3d 730 (Tex. 2003)	May 22, 2003
<i>In re Bridgestone/Firestone Tire Litigation</i> , Case No. 01 MD2 (Davidson County, TN), Order dated December 18, 2002 - Firestone not required to produce skim stock formula	Dec. 18, 2002
<i>Hughes v. Mid-States Retreaders, Inc.</i> , Case No. 00-CV-222495 (Jackson County, MO) Order dated October 7, 2002 - denying production of protected Bridgestone/Firestone trade secret information	Oct. 7, 2002
<i>Coleman v. Cooper Tire & Rubber Co.</i> , No. CV202-036 (S.D. Ga.), Order dated October 1, 2002 - refusing to require Cooper Tire to produce its trade secret formulas where plaintiff's expert had not demonstrated the requisite relevance and need for disclosure of the formulas and had not shown that the formulas would be properly safeguarded if disclosed	Oct. 1, 2002

McDonald v. Cooper Tire & Rubber Co., Case No. 8:01-CV-1306-T-27TGW (U.S.D.C. M.D. Fla.), Orders and Transcript of Tape-Recorded Hearing, January 30, 2002, and March 28, 2003 - court denied plaintiffs request for the formula, absent “a remarkable showing that you really most sincerely need it.”

Jan. 30, 2002
Mar. 28, 2003

In re Ford Explorer/Firestone ATX, No. CV-1998-009813 (Maricopa County, Ariz.) Order dated November 8, 2001 “more harm would be done to Firestone from the disclosure of the skim stock formula than would be gained by Plaintiffs.”

Nov. 8, 2001

Church v. Ford Motor Co., No. 99-CV228935 (Jackson County, Mo.), Order dated June 5, 2001 - denying plaintiff’s motion to compel discovery of trade secret formula

June 5, 2001

Hall v. Ford Motor Co., No. 99VS152700C (Fulton County, Ga.), Orders dated Oct. 24, 2000, and Feb. 1, 2001 - trial court twice refused to require production of Continental General Tire’s trade secret skim stock formula

Feb. 1, 2001
Oct. 24, 2000

Rodriguez v. Bridgestone/Firestone, Inc., Cause No. C-512-00-A (92nd Judicial District, Hidalgo County, Texas) Order dated November 17, 2000 - denied production of Firestone’s trade secret rubber compound formula

Nov. 17, 2000

In re: Esteban Martinez, No. 13-00-541-CV (Tex. App.-Corpus Christi, October 4, 2000, orig. proc.) - Court of Appeals order denying mandamus for production of skim stock

Oct. 4, 2000

Martinez v. Ford Motor Co., No. C-6376-98-F (332nd Dist. Ct., Hidalgo Co., Texas) - Order denying production of skim stock formula from General Tire

Feb. 29, 2000

In re Continental General Tire, 979 S.W.2d 609 (Tex. 1998)

Oct. 22, 1998

Anderson v. Continental General Tire, Inc., Case
No. 195CC 1806 (Greene County, MO), Order
dated Sept. 10, 1996 - denied production of
Continental Tire skim stock formula

Sept. 10, 1996

*Bridgestone/Firestone v. Superior Court of
Alameda County*, 9 Cal. Rptr. 2d 709 (Cal. Ct. App.
1992)

June 24, 1992

Staab v. Uniroyal Tire Co., No. 91-4096-CV-W-2
(W.D. Mo., May 20, 1992) - Order Denying
Plaintiffs Motion to Compel Uniroyal's rubber
compound recipe

May 20, 1992



IndustryWeek.com
LEADERSHIP IN MANUFACTURING

Attend IndustryWeek's Best Plants Conference

April 19-21, 2010
Cleveland, Ohio

<http://www.lwbestplants.com>

Special Offer: Save over \$100.00 on each conference registration when you register by February 19, 2010 by taking advantage of our "Early, Early Bird" rates. Don't be closed out of your first choice plant tour. Register Now

Home : Economy & Public Policy : Courts : Former Michelin Man on Trial for Peddling Company Secrets

Former Michelin Man on Trial for Peddling Company Secrets

Marwan Arbache faces a maximum 10-year jail sentence if convicted for offering Bridgestone confidential information about new tire manufacturing techniques.

Tuesday, May 04, 2010

By . Agence France-Presse

A former executive at French tire king Michelin went on trial on May 3 accused of attempting to sell company secrets to the firm's main competitor in Japan.

Marwan Arbache faces a maximum 10-year jail sentence if convicted and a heavy fine for offering in a July 2007 email to Japan's Bridgestone to sell them confidential information about tire manufacturing.

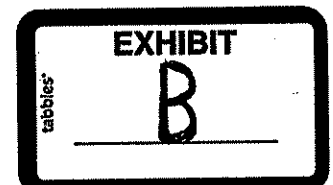
Michelin was tipped off by Bridgestone and the Japanese competitor ultimately helped its French rival nail the suspect.

The 34-year-old Arbache refused to make comments when he arrived at the courthouse in Clermont-Ferrand, Michelin's headquarters in central France.

The former executive, who worked seven years for Michelin, is charged with supplying information to a foreign company that could have "undermined the country's fundamental interests," violating trademark secrets and breach of trust.

Michelin has argued that Arbache would have delivered a serious blow to the company if he had succeeded in selling the secrets about new tire manufacturing techniques for heavy transport designed to improve durability.

<http://www.industryweek.com/PrintArticle.aspx?ArticleID=21745>



Arbache, who was arrested in January 2008, had offered to sell the company secrets for about 115,000 euros (US\$150,000).

A former director for Europe of Michelin's heavy transport division, Arbache was uncovered in "Operation Fukuda" in which Michelin security officials posing as Japanese clients found out about his dealings.

Lawyers for Arbache argued that no secret documents fell into Bridgestone's hands and that their client did not intend to follow through with his offer to sell the information.

Copyright Agence France-Presse, 2010

©2010 IndustryWeek. All Rights Reserved.

This copy is for your personal, non-commercial use only. To order distribution-ready copies or to electronically reproduce this material on your site, contact the IndustryWeek Reprints Department at 1-888-858-8851, or by e-mail at jkirk@penton.com. A complimentary subscription to IndustryWeek magazine is available to those who qualify. Fill out our online form at <http://www.submag.com/sub/iy?pk=W0105>. Distribution and use of this material are governed by copyright law. Copyright© 1998-2010 Penton Media, Inc. All rights reserved.