

NO. 1121330

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**IN THE SUPREME COURT OF ALABAMA**

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EX PARTE MICHELIN NORTH AMERICA, INC.,

PETITIONER

(IN RE: BETTY C. BROWN

V.

MICHELIN NORTH AMERICA, INC.; ET AL.)

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On Petition for a Writ of Mandamus  
to the Circuit Court of Mobile County, Alabama  
No. CV-2011-902482

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**BRIEF OF AMICUS CURIAE  
PRODUCT LIABILITY ADVISORY COUNCIL**

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## STATEMENT OF INTEREST

The Product Liability Advisory Counsel, Inc. (PLAC) is a non-profit association with 107 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983 PLAC has filed over 1,000 briefs as amicus curiae in both state and federal courts, including this court, representing the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached as Appendix A.

PLAC members are frequently confronted with attempts to discover their trade secrets, which represents a very

serious economic risk if not carefully protected. "Compelling need" is the standard adopted by courts for deciding this issue, in Alabama and across the nation. The ruling below, however, disregards that standard by allowing an opposing party to access trade secret information (specifically entry into Michelin's plant) without any showing of necessity.

PLAC submits this *amicus curiae* brief in support of Michelin's petition and to serve as a resource for this Court on the meaning of "compelling need" in this context. The ruling below (essentially granting Plaintiff's counsel a photo-op inside Michelin's plant for future use in jury presentation) is very alarming because of its casual disregard for the "compelling need" standard and its consequences if not vacated.

### **STATEMENT OF THE ISSUE**

Whether the "compelling need" standard, which governs a dispute over disclosure of a confidential trade secret, is satisfied by counsel's request to take photos or video of his/her opponent's manufacturing process for future use in a jury presentation.

### **SUMMARY OF THE ARGUMENT**

A party must show a "compelling need" to force an opposing party to disclose trade secrets in discovery. "Compelling need" means that the information is essential to the requesting party's ability to prove its claims and that no alternative is available, making an unjust result inevitable without disclosure. Courts uniformly have held that an attorney's desire to tour and photograph an opponent's manufacturing plant does not meet that "compelling need" standard. This rationale is consistent with longstanding public policy.

## ARGUMENT

PLAC adopts Petitioner's argument discussing how this Court generally applies the burden-shifting test for deciding when a protected trade secret must be disclosed to an opposing party. Operating within that burden-shifting framework is the "compelling need" standard, which a requesting party must satisfy. PLAC writes to discuss what "compelling need" means in this context, and why that standard is not met by a party's request to tour and photograph his/her opponent's manufacturing plant for use in a future jury presentation.

**A. The "Compelling Need" Standard Is Not Satisfied by Counsel's Desire to Enter a Defendant's Manufacturing Premises Merely to Take Photos and Video For Use in a Jury Presentation.**

**1. The meaning of "compelling need" in the burden-shifting analysis.**

Under Alabama law, "compelling need" is the legal standard that determines whether a party may discover privileged or other confidential information, including trade secrets. That has been the holding in a consistent line of cases applying Alabama law.

In Ex parte Alabama State Univ., 553 So. 2d 561, 562 (Ala. 1989), this Court granted a writ of mandamus and

instructed the trial court to vacate a decision compelling the defendant to produce his confidential tax and property records for an *in camera* inspection. Id. It held that the plaintiffs had not shown a "compelling need" to overcome the qualified privilege attached to personal tax records, since they were not directly at issue in the suit. Id.

More recently, the Alabama Court of Civil Appeals held that the "compelling need" standard governs the discovery of one's confidential personnel files, and that the requesting party must also show the information "is not otherwise readily obtainable." Ex parte Liberty Mutual Ins. Co., 92 So. 3d 90, 102 (Ala. Civ. App. 2012) (internal citations omitted).

Similarly, in Cowan v. Cmty. Home Banc Inc., 2003 WL 22965488, at \*4 (Ala. Cir. Ct. 2003), the court considered whether the plaintiffs were entitled to answers from a news reporter who asserted the "reporter's privilege." The judge held that no "compelling need" was shown because the plaintiffs wanted to use the information merely to attack the credibility of the defendants, not to prove part of their claims. Id.

Alabama's strict enforcement of the "compelling need" standard is consistent with other jurisdictions, which vary only in their name for it. In general, "[n]ecessity" means that without discovery of the particular trade secret, the discovering party would be unable to present its case 'to the point that an *unjust result is a real, rather than a merely possible, threat.*'" Bridgestone Americas Holding, Inc. v. Mayberry, 878 N.E.2d 189, 196 (Ind. 2007) (quoting In re Bridgestone/Firestone, Inc., 106 S.W.3d 730, 733 (Tex. 2003)) (emphasis added). Black's Law Dictionary, upon which this Court often relies in construing terms,<sup>1</sup> defines "compelling need" as a "need so great that irreparable harm or injustice would result if it is not met." Black's Law Dictionary (9th ed. 2009).

The term used in South Carolina to describe this standard is "substantial need." Laffitte v. Bridgestone Corp., 647 S.E.2d 154, 163 (S.C. 2009). It means that a trade secret is discoverable "only when 'the issues

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<sup>1</sup> See, e.g., Tin Man Roofing Co., Inc. v. Birmingham Bd. of Educ., 536 So. 2d 1383, 1385 (Ala. 1988).

cannot be fairly adjudicated unless the information is available.'" Id. (quoting Wright & Miller, § 2043).

Essentially, a "compelling need" for trade secrets can be demonstrated only by showing that the "information is required in order to prove an element of one of [its] claims." Bonanno v. Quizno's Franchise Co., 255 F.R.D. 550, 555 (D. Colo. 2009). Accord Splater v. Thermal Ease Hydronic Sys., Inc., 863 N.E. 1060, 1063-64 (Ohio App. 2006) (expert's contention that trade secret information would be "helpful" in formulating his opinions falls "far short of a compelling need.")

**2. A party's desire for photos does not meet the "compelling need" standard.**

An attorney's desire to take photos and video to aid in his/her jury presentation at trial does not meet the "compelling need" test. "The standard for discovery of trade secret information is 'necessary,' not 'useful.'" Laffitte, 674 S.E.2d at 164. As one court concluded, the desire for a "show piece" to use at trial is not sufficient to gain access to confidential business information. McDonald's Rests. of Fla., Inc. v. Doe, 87 So. 3d 791, 794 (Fla. Dist. Ct. App. 2012) (plaintiff's

"concession that many of the items were show pieces for trial suggests a fishing expedition").

Other courts have refused requests similar to the one plaintiff proposes here. In In re Continental Tire NA, 74 S.W.3d 884, 886 (Tex. App. 2002), a Texas appellate court when granting a writ of mandamus held that the trial court abused its discretion in allowing plaintiff to inspect and photograph a tire plant when the plaintiff had not established that the information sought was "necessary for a fair adjudication" of her claims.

Similarly, in McCloud v. Goodyear Dunlop Tires N. Am., Ltd., 2006 WL 2450993, at \*2 (C.D. Ill. 2006), the court denied a request for inspection, reasoning that "the process for manufacturing the subject tire is not so complex that a videotape of the process is *required* to assist the jury in its role as fact-finder." (emphasis added).

In Hajek v. Kumho Tire Co., 2010 WL 503044, at \*10 (D. Neb. 2010) objections overruled, 2010 WL 1292447 (D. Neb. 2010), the court denied a plaintiff's request to inspect a tire manufacturing plant, stating that it could not "determine how or if the requested trade secret

information could assist in proving the plaintiffs' claims or rebutting Kumho's defenses."

Courts likewise have denied requests for plant inspections in industries other than tire manufacturing. In Long v. U.S. Brass Corp., 2004 WL 1725766 (D. Colo. 2004), the plaintiff requested a videotaped inspection of a plant that made components for an allegedly defective propane heater. The defendant objected, citing the confidentiality of its equipment and processes. Id. at \*4. The court denied the plaintiff's request, holding she did not prove that an inspection was necessary simply because she thought part of the manufacturing process "could be capable" of producing a defect in the component. Id.

This case is not like Morton v. Cooper Tire & Rubber Co., 288 F.R.D. 126, 132 (N.D. Miss. 2012), wherein the court allowed a plant inspection. Morton was an amputee with a prosthetic leg who previously worked in the subject plant. He sued under the Americans with Disabilities Act after Cooper Tire forced him to resign. The central issue was whether Morton could operate a certain machine in the plant. Morton sought the

inspection so he could videotape the actual machine, which the Court found was "critical" to his proof that he could operate it. Id. at 131. In allowing the inspection, the court distinguished the type of inspection sought here. Id. at 131-32. It reasoned that Morton's ability to prove he could operate the machine was the "only matter at issue," and thus satisfied the compelling need test. Id. The distinction is obvious.

Even courts facing requests for on-site inspections outside of the manufacturing context have refused to allow similar inspections where confidential information is at risk. In E.E.O.C. v. U.S. Bakery, 2004 WL 1307915, at \*4, (D. Or. 2004), the EEOC argued that a videotaped inspection of the plaintiffs' former workplace would "assist plaintiffs' attorneys and expert in gaining a better understanding of plaintiff intervenors' work conditions, allow the expert to observe the specific areas of defendant's premises where the alleged harassment occurred, and that a videographer is necessary to create a visual record that will assist the trier of fact." The court held that such an inspection was not

warranted, as the physical location of the workplace was not directly at issue in the harassment suit. Id.

Similarly, in Schwab v. Wyndham Int'l, Inc., 225 F.R.D. 538 (N.D. Tex. 2005), the plaintiff in a Title VII case sought to photograph the offices of his former workplace. His justification was "so that he and his counsel can gain an understanding of the layout of the office and the nature and method in which the discriminatory and retaliatory acts occurred." Id. In denying the inspection, the trial court (upon objection by the employer on grounds of confidentiality) noted that the plaintiff had not "articulated, much less proved, a need for inspecting and photographing the premises." Id. at 539.

**B. Plaintiff's "Necessity" Argument Also Is Undermined by the Existence of Other Means of Depicting the Tire Making Process without Encroaching on Trade Secrets.**

By definition, an item of evidence is not "necessary" if an alternative exists that will accomplish the same purpose. Plaintiff's "necessity" argument is thus undermined by the existence of other ways to depict

the tire making process without encroaching on trade secrets.

As one court stated, “[i]mplicit in [the necessity requirement] is the notion that suitable substitutes must be completely lacking.” Bridgestone Americas Holding, Inc. v. Mayberry, 878 N.E.2d 189, 196 (Ind. 2007). Thus, in Mayberry, the plaintiff was not entitled to discovery of the manufacturer’s trade secrets when “an inspection of the failed tire” was “more than an adequate substitute for examining the skim stock formula.” Id.

There are other ways of depicting the manufacturing process that do not require an inspection to make photographs of the defendant’s plant. When denying the plaintiff’s request for a plant inspection, one court noted that diagrams, manuals, or preexisting videotapes could serve the same purpose as plaintiff’s videotaped inspection. Mobley v. Edison Chouest Offshore, Inc., 1996 WL 363496, at \*1 (E.D. La. 1996). Similarly, the judge in McCloud noted that the parties “put on an adequate demonstration of the tire manufacturing process at the *Daubert* hearing” without an inspection video. McCloud, 2006 WL 2450993, at \*2.

C. **As Recognized by Courts Across the Country, Trade Secret Protection is Sound Public Policy.**

Trade secrets are valuable precisely because of their confidentiality. American law has long recognized these legal protections since at least the middle of the 19th century. See Restatement (Third) of Unfair Competition § 39 (1995), cmt. a (noting protection for trade secrets under Roman law). See also Gorham Mfg. Co. v. Emery-Bird-Thayer Dry-Goods Co., 92 F. 774, 779 (C.C.W.D. Mo. 1899) aff'd, 104 F. 243 (8th Cir. 1900) (trade secret may not be disclosed where not "essential to the proper maintenance of the complainant's suit") (emphasis added).

Courts and commentators have recognized a multitude of important policy goals that are served by the protection of trade secrets. "[T]he protection afforded under the law of trade secrets against breaches of confidence and improper physical intrusions furthers the interest in personal privacy," and encourages investment in research and the useful exploitation of knowledge. Restatement (Third) of Unfair Competition § 39 (1995) cmt. a; see also IMED Corp. v. Systems Engineering Assocs., 602 So. 2d 344, 346 (Ala. 1992).

A business has a Constitutional property right in its trade secrets, protected against government taking by the Fifth Amendment. See Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1003-04 (1984). “[A] trade secret is valuable only so long as its holder can prevent its unlimited disclosure.” Mark V. Thigpen, A New Age of Discovery: Your Trade Secrets Are Safe in South Carolina, 49 S.C. L. REV. 615, 616-17 (1998). However, “[p]ublic disclosure of trade secrets extinguishes the owner's property rights.” In re Remington Arms, 952 F.2d 1029, 1032 (8th Cir. 1991). As trade secrets lose their protected status and thereby are devalued, companies have less incentive to invest in research and manufacturing.

Protective orders cannot always keep disclosed information confidential. See generally William G. Childs, When the Bell Can't Be Unrung: Document Leaks and Protective Orders in Mass Tort Litigation, 27 REV. LITIG. 565 (2008) (discussing specific instances of confidential document leaks). A recent case from the Sixth Circuit shows the real threat of harm from leaked photos and video of a tire manufacturing plant. In United States v. Howley, 707 F.3d 575, 578 (6th Cir. 2013), two engineers

were convicted of stealing trade secrets after they surreptitiously took photos while at a Goodyear Plant on other business. After obtaining just seven poor quality photos of a tire assembly machine, the engineers thought they had "enough" to leak some valuable design information to Chinese competitors. Id.

As this Court has recognized, there is no adequate remedy to compensate for the harm caused by the unnecessary disclosure and dissemination of trade secrets. See Ex parte Miltope Corp., 823 So. 2d 640, 644 (Ala. 2001). Neither secrecy nor value can be restored once lost.

#### **CONCLUSION**

The security of trade secrets often depends upon a court's application of the "compelling need" standard, which is not satisfied by opposing counsel's desire to take photos of its opponent's manufacturing plant for a jury presentation. PLAC respectfully urges this Court to grant Michelin's petition for a writ of mandamus and to vacate the order below.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing AMICUS CURIAE BRIEF OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. has been served on the following counsel of record by directing same to their office addresses through first-class, United States mail, postage prepaid, on this the 23rd day of August, 2013.

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## Appendix A

# Corporate Members of the Product Liability Advisory Council

as of 8/8/2013

Total: 107

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3M	Emerson Electric Co.
Altec, Inc.	Engineered Controls International, LLC
Altria Client Services Inc.	Exxon Mobil Corporation
Anadarko Petroleum Corporation	Ford Motor Company
AngioDynamics, Inc.	General Electric Company
Ansell Healthcare Products LLC	General Motors LLC
Astec Industries	Georgia-Pacific Corporation
Bayer Corporation	GlaxoSmithKline
BIC Corporation	The Goodyear Tire & Rubber Company
Biro Manufacturing Company, Inc.	Great Dane Limited Partnership
BMW of North America, LLC	Harley-Davidson Motor Company
Boehringer Ingelheim Corporation	Honda North America, Inc.
The Boeing Company	Hyundai Motor America
Bombardier Recreational Products, Inc.	Illinois Tool Works Inc.
Bridgestone Americas, Inc.	Isuzu North America Corporation
Brown-Forman Corporation	Jaguar Land Rover North America, LLC
Caterpillar Inc.	Jarden Corporation
CC Industries, Inc.	Johnson & Johnson
Celgene Corporation	Kawasaki Motors Corp., U.S.A.
Chrysler Group LLC	KBR, Inc.
Cirrus Design Corporation	Kia Motors America, Inc.
CNH America LLC	Kolcraft Enterprises, Inc.
Continental Tire the Americas LLC	Lincoln Electric Company
Cooper Tire & Rubber Company	Lorillard Tobacco Co.
Crane Co.	Magna International Inc.
Crown Cork & Seal Company, Inc.	Marucci Sports, L.L.C.
Crown Equipment Corporation	Mazak Corporation
Daimler Trucks North America LLC	Mazda Motor of America, Inc.
Deere & Company	Medtronic, Inc.
Delphi Automotive Systems	Merck & Co., Inc.
Discount Tire	Meritor WABCO
The Dow Chemical Company	Michelin North America, Inc.
E.I. duPont de Nemours and Company	Microsoft Corporation
Eli Lilly and Company	Mine Safety Appliances Company

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as of 8/8/2013

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Mueller Water Products

Mutual Pharmaceutical Company, Inc.

Navistar, Inc.

Nissan North America, Inc.

Novartis Pharmaceuticals Corporation

Novo Nordisk, Inc.

PACCAR Inc.

Panasonic Corporation of North America

Peabody Energy

Pella Corporation

Pfizer Inc.

Pirelli Tire, LLC

Polaris Industries, Inc.

Porsche Cars North America, Inc.

Purdue Pharma L.P.

RJ Reynolds Tobacco Company

SABMiller Plc

Schindler Elevator Corporation

SCM Group USA Inc.

Shell Oil Company

The Sherwin-Williams Company

Smith & Nephew, Inc.

St. Jude Medical, Inc.

Stanley Black & Decker, Inc.

Subaru of America, Inc.

Techtronic Industries North America, Inc.

Teva Pharmaceuticals USA, Inc.

TK Holdings Inc.

Toyota Motor Sales, USA, Inc.

Vermeer Manufacturing Company

The Viking Corporation

Volkswagen Group of America, Inc.

Volvo Cars of North America, Inc.

Wal-Mart Stores, Inc.

Whirlpool Corporation

Yamaha Motor Corporation, U.S.A.

Yokohama Tire Corporation

Zimmer, Inc.