

Products Liability Law Daily Wrap Up, EVIDENTIARY ISSUES—MOTOR VEHICLE EQUIPMENT—4th Cir.: Question of whether South Carolina recognizes evidentiary privilege for trade secrets certified, (Nov. 30, 2016)

Products Liability Law Daily Wrap Up

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By Peter Reap, J.D., LL.M.

In a wrongful death case brought by the estate of an individual killed as the result of an allegedly defective tire, the U.S. Court of Appeals in Richmond, Virginia, has certified the following question to the South Carolina Supreme Court: "Does South Carolina recognize an evidentiary privilege for trade secrets?" (*Hartsock, Jr. v. Goodyear Dunlop Tires North America Ltd.*, November 29, 2016, *per curiam.*).

The decedent's estate representative brought a survival and wrongful death action asserting claims under South Carolina law for negligence, strict liability, and breach of warranty. The representative alleged that the vehicle in which the decedent was riding was struck head-on by another vehicle. That vehicle had crossed the median after suffering a blowout of an allegedly defective tire designed, manufactured, and marketed by defendants Goodyear Dunlop Tires North America Ltd. and Goodyear Tire & Rubber Company (collectively, "Goodyear").

During pretrial discovery, Goodyear objected to producing a certain Goodyear material, asserting that it constituted trade secrets. The district court eventually found, and the representative did not dispute, that the material does, in fact, constitute trade secrets. However, the court ordered Goodyear to produce the material subject to a confidentiality order. In doing so, the court applied federal discovery standards, rejecting Goodyear's contention that South Carolina trade secret law applied.

Goodyear thereafter moved for reconsideration. The district court denied the motion but certified its order for interlocutory review pursuant to 28 U.S.C. §1292(b). The court also stayed the proceedings pending Goodyear's anticipated appeal.

Goodyear contended that "the district court erred when it applied Rule 26 [of the Federal Rules of Civil Procedure] and federal case law, rather than the South Carolina Trade Secrets Act ("SCTSA") ... in determining the burden of production and persuasion that [the estate representative] must bear to overcome the trade secret privileges asserted by Defendants." The representative agreed that the issue presented "is the legal standard to be applied in determining when and under what conditions ... trade secrets [must be] disclosed in products liability litigation based on diversity jurisdiction."

Because this was a diversity case, the court applied state substantive law and federal procedural law. The issue presented involved both a matter of pretrial discovery and evidence. Ordinarily, "the Federal Rules of Civil Procedure and Federal Rules of Evidence govern the disputes concerning discovery and the admission of evidence." *Bradshaw v. FFE Transp. Servs., Inc.*, 715 F.3d 1104, 1107 (8th Cir. 2013).

However, Goodyear argued that South Carolina recognizes an evidentiary privilege for trade secrets and the standard for disclosure of such information is more stringent than the federal standard. Goodyear's argument implicated Rule 501 of the Federal Rules of Evidence, which provides that "in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision." Under this rule, when, as here, "the substantive decision ... is governed by state law, the state law also determines the privilege of a witness," according to the court. *Seidman v. Fishburne-Hudgins Educ. Found., Inc.*, 724 F.2d 413, 415 n.1 (4th Cir. 1984).

Thus, the sole question on appeal was whether South Carolina recognizes such a privilege, the court observed. The parties vigorously disputed the point. If Goodyear was correct that South Carolina recognizes an evidentiary privilege for trade secrets, then South Carolina law would govern the determination of whether

the estate representative met his burden to require Goodyear to produce the trade secrets. Conversely, if the representative was correct, then federal law would apply.

There is no South Carolina authority that definitively answers the question on appeal, the Fourth Circuit observed. Indeed, different provisions of South Carolina law tend to point to different answers.

Of course, the appellate court noted that it was aware of the SCTSA and the state supreme court's interpretation of the act in *Laffitte v. Bridgestone Corp.*, 674 S.E.2d 154 (S.C. 2009). Unquestionably, the SCTSA reflected the state legislature's intent to provide trade secrets a significant level of protection. However, whether that protection amounted to an evidentiary privilege was not clear from either the SCTSA or *Laffitte*.

On one hand, the *Laffitte* standard for handling civil discovery of trade secrets seemed akin to the qualified evidentiary privilege for trade secrets that generally applies in federal courts. On the other hand, in explaining the three-part balancing test it adopted for determining whether trade secret information is subject to a discovery protective order, the *Laffitte* court observed that "in jurisdictions where trade secrets are protected by a codified evidentiary privilege, the courts apply a similar balancing test." This observation reasonably could be read to mean that unlike those other jurisdictions, South Carolina does not have a codified evidentiary privilege for trade secrets.

In light of the foregoing, the issue of whether South Carolina recognizes an evidentiary privilege for trade secrets is both unresolved by any definitive state law and sufficiently debatable to warrant certification of the question to the Supreme Court of South Carolina, the court determined.

Because this appeal was primarily focused on the applicability of state or federal law rather than the purported difference between the two bodies of law, and because the district court appeared to view the state standard as being more stringent, the Fourth Circuit accepted that view for purposes of this order. In this posture, if the court comes to the conclusion that South Carolina law applies, then the Fourth Circuit would vacate the discovery order and remand for further proceedings in the district court.

The case is No. [16-1172](#).

Attorneys: Earle Duncan Getchell, Jr. (McGuirewoods LLP) for Goodyear Dunlop Tires North America Ltd. and Goodyear Tire & Rubber Company. Mark Charles Tanenbaum (Mark C. Tanenbaum, P.A.) for Theodore G. Hartsock, Jr.

Companies: Goodyear Dunlop Tires North America Ltd.; Goodyear Tire & Rubber Company

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