

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Theodore G. Hartsock, Jr., as Personal)
Representative of the Estate of Sarah)
Mills Hartsock,)

Plaintiff,)

v.)

Goodyear Dunlop Tires North America)
LTD, *a foreign corporation*; and)
The Goodyear Tire & Rubber)
Company,)

Defendants.)

Civil Action No. 2:13-cv-00419-PMD

ORDER

This matter is before the undersigned United States Magistrate Judge upon Plaintiff’s Motion to Compel (Dkt. No. 100) as well as three Motions for Protective Order (Dkt. No. 103; Dkt. No. 105; Dkt. No. 107) filed by Defendants. By the Order of the Honorable Patrick Michael Duffy, these motions were referred to the undersigned. (Dkt. No. 112.) A hearing was held on these matters on August 31, 2015, during which the Motion for Protective Order (Dkt. No. 105) was granted as unopposed. (*See* Dkt. No. 123.) Additionally, Plaintiff’s Motion to Compel (Dkt. No. 100) was granted in part and denied in part. Two of Defendants’ Motions for Protective Order (Dkt. No. 103; Dkt. No. 107) were taken under advisement. (*See* Dkt. No. 123.) Pursuant to the undersigned’s instructions at the hearing, the parties have filed supplemental materials as to the motions taken under advisement. (*See* Dkt. No. 129; Dkt. No. 130; Dkt. No. 128.) After reviewing the parties’ supplemental filings, the undersigned conducted a telephone conference on September 21, 2015. (Dkt. No. 132.) During the telephone conference, the undersigned gave the parties ten days to propose alterations to the confidentiality order. (Dkt. No. 132.) On October 1, 2015, counsel for Defendants filed a letter indicating “that the danger and potential damage [of ordering Defendants to produce trade secret information] cannot be eliminated with revisions to the Confidentiality

Order.” (Dkt. No. 136.) This Order memorializes the Court’s rulings made at the hearing and rules on the issues taken under advisement.

Background

Plaintiff Theodore G. Hartsock, Jr., as Personal Representative of the Estate of Sarah Mills Hartsock, filed the instant action against Defendants Goodyear Dunlop Tires North America LTD (“Dunlop”) and Goodyear Tire & Rubber Company (“Goodyear”). (*See* Dkt. No. 22.) In his Amended Complaint, Plaintiff alleges that on July 6, 2010, a defective tire—manufactured by the Defendants—on a recreational vehicle failed, causing the “motor home [to] cross[] the median of Interstate Highway 26, bursting through the dividing cable barrier and striking Plaintiff’s decedent’s vehicle head on.” (Am. Compl. ¶¶ 16, 29.) Plaintiff’s Amended Complaint seeks damages for survival and wrongful death, and lists the following causes of action: negligence, strict liability, and breach of express and implied warranties. (*See generally* Dkt. No. 22.)

Discussion

A. Plaintiff’s Motion to Compel (Dkt. No. 100)

In the Motion to Compel, Plaintiff seeks an order compelling “full responses” to Plaintiff’s discovery request numbers 9, 57, 68, 96, and 107. (*See* Dkt. No. 100 at 1 of 15.) Plaintiff’s motion was granted in part and denied in part at the hearing. Specifically, Plaintiff’s motion was granted as to Exhibit K to Plaintiff’s motion. Plaintiff’s motion was additionally granted as to the “Subject Tire,” the G670RV 295/80R22.5 tire. Plaintiff’s motion was denied in all other respects.

Plaintiff has a right to reconvene the deposition of Mr. Koerner as to any documents produced to Plaintiff after the deposition of Mr. Koerner; Plaintiff shall identify such documents, in writing, by Bates number.

To the extent Defendants have not yet supplemented their discovery responses in conformance with this ruling, they shall do so within ten days of the date of this Order.

B. Motion for Protective Order (Dkt. No. 105)

In this motion, Defendants request a protective order “preserving its privileged objections and sustaining counsel’s instructions to the witness, Daniel Badzinski, not to answer questions protected by the attorney-client privilege and/or work-product doctrine; and, pursuant to Rule 26(c)(1), Fed.R.Civ.P, to prevent disclosure of highly confidential trade secrets.” (Dkt. No. 105 at 9-10 of 10.) This motion was granted as unopposed.

C. Motion for Protective Order (Dkt. No. 107)

This Motion for Protective Order (Dkt. No. 107) pertains to the deposition of Denise Seiler, an employee of Defendant Goodyear Dunlop Tires North America. According to Defendants, Ms. Seiler was identified as a Rule 30(b)(6) deponent “to testify concerning various areas including the design and development of the Tire at Issue.” (Dkt. No. 107 at 2-3 of 11.) Two sets of questions (Questions A and Questions B) are at issue in the motion, although Plaintiff consents to the protective order as to Questions B. (*See* Dkt. No. 107 at 3-5 of 11; Dkt. No. 114 at 2 of 6.) Accordingly, as to Questions B, Defendants’ motion is granted as unopposed.

Questions A pertain to the butyl content of the Subject Tire’s inner liner; Questions A are as follows:

Q. All right. What is the percentage of butyl rubber in the innerliner for the G670 tire?

MR. TOOLE: I’m instructing you not to answer based on the reasons I’ve instructed every other witness since last Friday.

BY MR. FOUNTAIN:

Q. Do you know the butyl content of the innerliner for the G670 tire?

MR. TOOLE: I’m instructing you not to answer based on the same reasons.

...

Q. Has [there] Been any change to the [butyl] content so the innerliner of the G670 from the time production began in May of 2003 to the present?

MR. TOOLE: Same instruction.

(Dkt. No. 107 at 3 of 11.)

In his Response in Opposition, Plaintiff “does not contend that the butyl content of the subject inner liner is not a trade secret.” (Dkt. No. 114 at 4.) Instead, Plaintiff asserts the butyl content of the subject liner “is relevant to the proof of his case—it explains in whole or in part the reasons for the tire’s failure and the manner in which the subject tire failed.” (Dkt. No. 114 at 4-5.) Plaintiff explains his theory of the case as follows:

Plaintiff’s main defect theories are that the design of the G670RV 295/80R22.5 tire, as well as its manufactured condition, allowed inflation pressurized air to migrate from the air chamber into the structure of the tire. The pressurized air in the tire structure and belts caused separations within the tire; interaction of the air with the compounds inside the tire caused those compounds to degrade, leading to separation of the tire plies and blowout. Two factors influence the ability of the air to migrate from the air chamber into the body of the tire; 1) the amount of butyl rubber in the compound of the inner liner, and 2) the thickness of the inner liner. Testimony of Defendants employees, coupled with Goodyear documents, has established that an inner liner gauge thinner than specified by the governing design specification required a tire to be scrapped. . . .

Of equal importance to Plaintiff’s defect theory is the rubber compound from which the inner liner was manufactured. Seiler testified that the inner liner is the only component of the tire that contains butyl. She also testified, as did Terrance Parsons, that the butyl compounds are resistant to air permeation into the structure of the tire. Whether the butyl content of this inner liner was 100 percent or 10 percent is relevant to the performance of the inner liner and additional design defects in the G670RV 295/80R22.5. Insufficient butyl content will contribute to intracarcass pressurization and the failure mode of the subject tire.

(Dkt. No. 114 at 2-3.)

Plaintiff asserts the Motion for Protective Order (Dkt. No. 107) should be denied as to the butyl content of the tire liner because (a) Plaintiff’s “ability . . . to prove his case outweighs the potential harm to Defendants,” and (b) the protective order in place in the case *sub judice* “will provide the protection Defendants seek for their trade secret.” (Dkt. No. 114 at 5.) Plaintiff requests an order “denying Defendants’ motion as to Seiler’s knowledge of the butyl content of the G670RV 295/80R22.5 inner liner, and allowing Plaintiff to reconvene Seiler’s deposition to inquire into this subject.” (*Id.* at 5.)

“There is no absolute privilege to protect trade secrets from disclosure during the discovery process.” *In re Pechiney Plastic Packaging, Inc. v. Curwood, Inc.*, 220 F.R.D. 452, 452 (D.S.C.

2004) (citing *Dunlap Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1185 (D.S.C. 1974)). As Judge Floyd stated in *In re Pechiney*,

The party resisting the discovery must demonstrate to the Court that the information being sought is a trade secret and that its disclosure might be harmful. Once shown, the burden shifts to the party that seeks the discovery to establish the relevance of the trade secret to the lawsuit and that it is necessary to the action. If relevance and necessity are established, then the Court “must balance the need for the information against the injury that would ensue if disclosure is ordered.”

Id. (quoting and citing *Coca-Cola Bottling of Shreveport, Inc. v. Coca-Cola Co.*, 107 F.R.D. 288, 292 (D. Del. 1985)). “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.” *Coca-Cola Bottling of Shreveport*, 107 F.R.D. at 293 (citations omitted). In assessing injury, the “relevant injury . . . is not the injury that would be caused by public disclosure, but the injury that would result from disclosure under an appropriate protective order.” *Id.* “[I]t 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.” *Id.* (citations omitted). The *Coca-Cola* court further stated,

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.” *Federal Open Market Committee v. Merrill*, 443 U.S. at 362 n. 24, 99 S.Ct. at 2813 n. 24; *see also Morrison-Knudsen Co. v. Department of Army*, 595 F.Supp. 352, 355 (D.D.C.1984), *aff’d mem.*, 762 F.2d 138 (D.C.Cir.1985). 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. *See, e.g., Pennwalt Corp. v. Plough, Inc.*, 85 F.R.D. at 259; *Struthers Scientific & Industrial Corp. v. General Foods Corp.*, 51 F.R.D. at 154; *United States v. An Article of Drug*, 43 F.R.D. at 189; *Centurion Industries*, 665 F.2d at 326; *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d at 999; *Kleinerman v. United States Postal Service*, 100 F.R.D. at 69–70; *Davis v. General Motors Corp.*, 64 F.R.D. 420, 422 (N.D.Ill.1974); *Maritime Cinema Service Corp. v. Movies En Route, Inc.*, 60 F.R.D. 587, 590 (S.D.N.Y.1973); *Spartanics, Ltd. v. Dynetics Engineering Corp.*, 54 F.R.D. 524, 526 (N.D.Ill.1972); *cf. Cleo Wrap Corp. v. Elsner Engineering Works, Inc.*, 59 F.R.D. 386, 388 (M.D.Pa.1972) (discovery denied where relevance slight, need small, and harm great). 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,

“[j]udicial inquiry should not be unduly hampered.” *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d at 999.

Coca-Cola Bottling of Shreveport, 107 F.R.D. at 293.

In the opinion of the undersigned, while the butyl content of the Subject Tire does constitute a trade secret, Plaintiff has established that the information is relevant and necessary. A careful reading of the report of Plaintiff’s expert indicates that the butyl content of the tire is a critical component of determining the cause of the tire failure in the case *sub judice*. (See Pl.’s Ex. 4 at 10-11.) Plaintiff’s expert specifically states that “[i]f the compound used and the manufactured thickness of the inner liner are not sufficient to restrict the migration of inflation pressurized air through the inner liner and into the structure of the tire, a known process referred to as pressurization of the carcass or intra carcass pressurization occurs.” (*Id.* at 11.) This expert further indicated that the tire at issue in the case *sub judice* suffered intra carcass pressurization. (*Id.* at 20.)

The undersigned has reviewed the portions of Plaintiff’s expert’s deposition provided to the Court. (See Dkt. No. 128 Ex. F.) Defense counsel inquired—numerous times—about the expert’s feasible, alternative design to the Subject Tire. (See *id.* at 188-89, 193-96, 204-05) The expert’s response indicated his proposed alternative design contained a specified butyl content. (*Id.* at 188-89, 193-96, 204-05, 323-24.) The expert further indicated that in order to assess one of the defense theories of the case, he needed the butyl content of the Subject Tire. (*Id.* at 325.)

Given all that Plaintiff has presented, it is difficult to imagine what more Plaintiff should be required to present in order to establish relevance and necessity. In the opinion of the undersigned, Plaintiff has met his burden. As noted above, if relevance and necessity are established, then the Court “must balance the need for the information against the injury that would ensue if disclosure is ordered.” *In re Pechiney*, 220 F.R.D. at 452. In assessing injury, the “relevant injury . . . is not the injury that would be caused by public disclosure, but the injury that would result from disclosure under an appropriate protective order.” *Coca-Cola Bottling of Shreveport*, 107 F.R.D. at 293.

In Defendants' supplemental briefing, Defendants complain—for the first time—that Plaintiff's expert "has a long history of failing to respect the intellectual property rights of tire companies" and that "courts have consistently found his views concerning protection of and actions regarding confidentiality of tire company information wanting." (Dkt. No. 130 at 2.) The undersigned will review the materials submitted by the Defendants in reverse chronological order. Defendants presented an "Amended Protective Order" issued on July 1, 2010 by the United States District Court for the Southern District of Texas in *Hobbs v. Goodyear Dunlop Tires of North America, Ltd.*, Civ. A. No. H-09-1765. (See Dkt. No. 130-3.) That Order provided, *inter alia*,

Confidential Documents and Information shall not be given, shown, made available, discussed or otherwise communicated in any way except to a "Covered Person," defined as follows . . . Independent professional engineers, accident reconstruction or other independent experts retained by a party or an attorney of record to assist in the preparation of this litigation, other than Dennis Carlson. If Mr. Carlson is consultant in this case, a court hearing shall be held in order to determine his access to any protected documents or testimony.

(Dkt. No. 130-3 at 3 of 11.) In *Galle v. The Goodyear Tire & Rubber Company, et al.*, Civ. A. No. 2007-CI-00418, the "First Amended Protective Order," which was issued on October 20, 2008, provides as follows: "Under no circumstances shall Dennis Carlson receive any protected or confidential documents of The Goodyear Tire & Rubber Company since the Court has found that he does not appear to take protected orders seriously." (Dkt. No. 130-2 at 5 of 22.)

On September 25, 2008, an attorney for Michelin North America, Inc. sent a letter to Mr. Carlson. (Dkt. No. 130-5.) That letter stated, *inter alia*,

It seems that you have to be periodically reminded of your obligations and agreements with Michelin. I am enclosing, again, a copy of your January 2000 Settlement Agreement with MNA and MARC. Specifically, I refer you to Paragraph 4 which sets forth in detail the only information you are allowed to reveal regarding your employment at MARC, and the information you obtained as a result of it.

I have been provided with a supplemental letter report you prepared in *Ramos v. Goodyear* dated September 5, 2008. In that report you purport a tolerance for belt splices at Michelin and Michelin's quality assurance procedures. This is the type of confidential information specifically addressed in the Settlement Agreement and you have now revealed confidential and trade secret information to one of Michelin's competitors. Michelin insists that you immediately withdraw the report, inform all parties to the case that you cannot render the opinions contained in it because it is a

violation of your agreements with Michelin, and retrieve all copies of the report and send them to me along with your certification that none exist other than the ones you send to me.

(Dkt. No. 130-5 at 2 of 13.)

On April 7, 2008, in *Crowther v. Goodyear Tire & Rubber Corporation*, Case No. 06041981 in Utah County, Utah, Mr. Carlson deposed as follows:

Q. Are you aware of any published testing, scientific studies or peer-reviewed literature indicating that waviness at the belt edge is a defect in the tire?

A. There are many company documents that indicate that, but every company I know of has a tolerance for joints and belt edges.

Q. I am going to object, nonresponsive. Are you talking about protected documents of other tire companies?

A. Yes.

Q. Then why are you talking about them?

A. I can tell you the general substance of what they say.

(Dkt. No. 130-6 at 2 of 4.)

In *Nevil v. Ford Motor Co.*, Civ. A. No. 294-015, 1999 WL 1338625 (S.D. Ga. Dec. 23, 1999), Judge Bowen found Mr. Carlson in contempt of court on December 23, 1999. Judge Bowen stated in his order,

[I]t is evident that Mr. Carlson disclosed information in his deposition testimony about the General Tire documents covered by the Protective Order. At several points in his testimony, Mr. Carlson discloses specific information contained in General Tire studies. Even if this general information is already in the public domain, his testimony reveals that he learned of this information from General Tire documents. Assertions that this evidence came from specific General Tire documents violates the terms of the Protective Order. Accordingly, I find that Mr. Carlson's actions are in contempt of this Court.

Nevil, 1999 WL 1338625, at *4.

Finally, in *Michelin Americas Research & Development Corp. v. Carlson*, C/A No. 96-CP-23-2943, Judge Simmons issued an order on July 24, 1997 in Michelin's action against Carlson (a former employee of Michelin) wherein Judge Simmons found that "the specific information disclosed

by Carlson in the Wilson affidavit was a trade secret or confidential information prior to its disclosure.” (Dkt. No. 130-4 at 6 of 8.) Carlson was “directed to comply with and restrained from violating the non-disclosure agreements previously executed.” (*Id.* at 7 of 8.)

Having reviewed the Defendant’s submissions, Defendants have certainly shown the *possibility* of injury in the disclosure. However, in balancing the need for the information against the injury that would ensure if disclosure is ordered, the undersigned concludes the balance weighs more heavily in favor of the need for the information. As detailed above, Plaintiffs have established the need for the information and its relevance. Moreover, Defendants’ arguments about Mr. Carlson have arisen at the end of this case. Defendants certainly knew Mr. Carlson would serve as an expert witness for Plaintiff by July 6, 2015, when Plaintiff filed his designation of experts and provided Defendants with a copy of Mr. Carlson’s expert report. (*See* Dkt. No. 118; *see also* Pl. Ex. 4 to Hr’g of Aug. 31, 2015.)¹ At the hearing on August 31, 2015, however, counsel for Defendants did not voice any concern regarding Mr. Carlson. The concern was first raised to the Court on September 15, 2015, via supplemental briefing. (*See generally* Dkt. No. 130.) During the telephone conference of September 21, 2015, counsel for Plaintiff indicated that, at this point, Mr. Carlson has already seen everything that has been produced. (Hr’g Tr. at 11, Sept. 21, 2015.)

At the time Defendants first raised their concern, only seventeen days remained in the discovery period. (*See* Dkt. No. 98; Dkt. No. 130.) In addition, the undersigned asked counsel for Defendants—without waiving Defendants’ position that the requested material is not discoverable—to confer with counsel for Plaintiff and propose language to strengthen the protection afforded by the confidentiality order. (Hr’g Tr. at 10-13, Sept. 21, 2015.) Defendants’ position is that “the danger and potential damage cannot be eliminated with revisions to the Confidentiality Order.” (Dkt. No. 136.)

Although Defendants have certainly raised the *possibility* of injury due to the disclosure to Mr. Carlson, the Plaintiff’s *actual, demonstrated* need for that information is outweighed by the

¹During the telephone conference on September 21, 2015, counsel for Plaintiff indicated that Defendants were aware of Mr. Carlson’s participation in this case as early as June of 2013. (*See* Hr’g Tr. at 6, Sept. 21, 2015.)

potential injury. Many of the items produced by Defendants to support their argument that Carlson should not have the at-issue information are in the distant past. And although the protective orders in *Hobbs* and *Galle* limit Mr. Carlson's access to confidential information, counsel for Plaintiff indicated during the telephone conference that Mr. Carlson may not have even been involved in those cases. (Hr'g Tr. at 9-10, Sept. 21, 2015.) In light of Plaintiff's demonstrated need for the information, the fact that many of the items presented by Defendants pertain to the distant past, and the fact that Defendants first raised this concern after the hearing and a mere seventeen days prior to the close of discovery, Defendants' Motion for Protective Order (Dkt. No. 107), as it pertains to butyl content, is denied. Plaintiff may reconvene the deposition of Ms. Seiler if Plaintiff wishes to do so.

D. Motion for Protective Order (Dkt. No. 103)

In this Motion for Protective Order, Defendants seek an order "protecting from disclosure certain privileged information addressed during the deposition of Terry Parsons, held on April 17, 2015. Defendants further seek protection . . . from Plaintiff's demand that Goodyear identify its confidential, trade secret compound formula." (Dkt. No. 103 at 1 of 12.) As set forth herein, Defendants' Motion for Protective Order (Dkt. No. 103) is granted in part and denied in part.

1. Butyl Content

Defendants contend that certain information sought in Parsons' deposition constitutes confidential trade secret information. (*See* Dkt. No. 103 at 9 of 12.) The following questions are at issue herein:

Q. Do you know the butyl content of the inner liner of the Hartsock case, Hartsock tire?

MR. TOOLE: I'm going to instruct you not to answer that question.

MR. FOUNTAIN: Why?

MR. TOOLE: Based on trade secret.

...

Q. Okay. Do you know the halobutyl content or the butyl rubber content of the inner line for the tire in this case?

A. I have an idea.

Q. Okay. Can you tell me what your idea is.

MR. TOOLE: I'm instructing him not to answer. You can ask the same question again and again I'm not going to allow it.

(Dkt. No. 103 at 4 of 12.)

For the reasons discussed above with respect to the Motion for Protective Order as to Seiler's deposition (Dkt. No. 107), Defendants' Motion for Protective Order (Dkt. No. 103) is denied to the extent the motion pertains to butyl content.

2. Attorney-Client Privilege and Work-Product Doctrine

Defendants assert that during his deposition, Mr. Parsons "was asked certain questions which required answers protected by the attorney-client privilege and the work-product doctrine." (Dkt. No. 103 at 3 of 12.) Defendants assert the following questions implicate the attorney-client privilege:

Q. And there is no real dispute that one of your main job duties is to examine claim tires that come to Goodyear where somebody says I bought a Goodyear tire, I had a problem that either caused property damage to my vehicle, it is in excess of 15 thousand, it caused an injury or caused a death, true?

MR. TOOLE: Objection. Form.

A. We examine claim tires as you described. If it is a property damage claim in excess of 15 thousand, if it's bodily injury or a death, we'll examine those. We'll also examine tires that are involved in a litigation of some kind.

Q. And you did that for this case. You examined the tire that was the subject of this case, the Hartsock case, right?

A. Yes, I did.

MR. TOOLE: I'm instructing you not to answer.

MR. FOUNTAIN: On what basis?

MR. TOOLE: He was asked to inspect the tire based on my request or my law firm's request or the request of the legal department at Goodyear Tire.

...

Q. Did you attempt to measure the inner liner thickness for the Hartsock tire?

MR. TOOLE: Don't answer.

Q. Did you reach a conclusion about the cause of the failure of the Hartsock tire?

MR. TOOLE: Don't answer.

(Dkt. No. 103 at 3-4 of 12.)

Defendants assert the following questions implicate the work-product doctrine:

Q. You did see the early warning document?

A. No. I saw an early warning standard document that discussed what an early warning was or is.

MR. TOOLE: If it's something shown to you by counsel, I'm instructing you not to answer. If you saw it other than with me you can answer.

Q. What did you see, I'm curious?

MR. TOOLE: If you saw whatever you are referring to, if you saw it with me being counsel of record, don't answer the question. If you saw it outside of with me you can answer.

A. I saw it with counsel.

(Dkt. No. 103 at 4-5 of 12.)

In opposing Defendants' motion as to the attorney-client privilege and the work-product doctrine, Plaintiff essentially contends that matter has already been ruled upon by the court. (*See* Dkt. No. 109 at 2-5 of 11.) At the April 2014 hearing, Judge Duffy allowed supplemental briefing "on the issue of whether employees Jim Stroble and Terrence Parsons are non-testifying experts who are exempt from giving a deposition under Rule 26(b)(4)(D) of the Federal Rules of Civil Procedure."

(Dkt. No. 83 at 5.) Judge Duffy denied Defendants' Motion for a Protective Order with respect to Parsons; his May 5, 2014 Order stated, *inter alia*,

A number of courts have found that in-house experts never fall within the ambit of Rule 26(b)(4)(D). Other courts, however, have recognized instances where an in-house expert can be considered "specially employed in anticipation of litigation" and thus fall within the protection of the rule. Notably, in cases finding that a regular employee may be deemed an in-house expert immune from discovery, the

courts seem to require that, in addition to being in anticipation of litigation, the special employment be on a project other than the kind the employee normally is engaged in.

The Court need not weigh in on which line of cases is correct; under either approach, neither Mr. Stroble nor any engineer in his department is subject to protection under Rule 26(b)(4)(D). The record evidence establishes that Mr. Stroble is the head of the Product Analysis Department and manages a team of three engineers. The duties of the engineers in that department include analyzing tires and field scenes that are involved with either a claim or an accident. In fact, there is no indication in the record that the engineers have any duties or responsibilities other than analyzing these tires and field scenes. According to Mr. Parsons' deposition testimony in the *Green* case, each engineer, including Mr. Stroble, looks at every tire that comes through the department. Therefore, when Mr. Stroble and the other engineers examined the Tire at Issue, they were not performing work outside the scope of their regular employment duties nor were they given a project that they would not ordinarily work on. The record thus demonstrates that Mr. Stroble and the engineers in the Product Analysis Department are regular employees of Defendants whose regular job duties include analyzing tires like the Tire at Issue. In other words, Mr. Stroble "is simply a general employee of the party not specially employed on the case." Fed. R. Civ. P. 26(b)(4)(D) advisory committee's note. Based on these facts, the Court concludes that neither Mr. Stroble nor any other engineer in that department (including Mr. Parsons) is "retained or specially employed" within the meaning of Rule 26(b)(4)(D).

(Dkt. No. 83 at 6-8 (citations omitted).)

Defendants filed a Motion for Reconsideration of Judge Duffy's Order; the Motion for Reconsideration was denied on June 16, 2014. (*See* Dkt. No. 84; Dkt. No. 92.) His June 2014 Order stated, *inter alia*,

[T]he Court is not persuaded by Defendants' arguments that the Court's ruling will result in manifest injustice. Defendants contend that "allowing the Court's Order to stand will cripple Defendants' efforts to defend themselves vigorously against product liability claims," will result in "wide ranging negative consequences for other product manufacturers," and "will have a chilling effect on the Company's willingness to specially employ its own resources in a litigation setting, thereby placing the Company at a severe disadvantage when defending its products." Mot. for Reconsideration 11, ECF 84. However, the Court does not agree that such dire consequences will follow from the Court's application of Rule 26(b)(4)(D) to the facts of this case. Rule 26(b)(4)(D) protects from deposition "an expert who has been retained or specially employed by another party in anticipation of litigation." As the Court explained in its Order, "there is no indication in the record that [Mr. Stroble and Mr. Parsons] have any duties or responsibilities other than analyzing . . . tires and field scenes" that are involved with either a claim or an accident. May 5, 2014 Order 8. The Court thus found that Mr. Parsons and Mr. Stroble—who are regular, salaried employees of Defendants whose regular job duties include evaluating all tires that are involved in litigation—have been neither retained nor specially employed by

Defendants in anticipation of litigation. If Defendants wish to invoke the protection of Rule 26(b)(4)(D) for non-testifying experts, they could retain an outside expert to evaluate the tires involved in litigation—which is clearly contemplated by the rule—or they could modify their policies and procedures to ensure that in-house experts who are asked to consult in a litigation matter are truly “specially employed” on the matter and not simply performing the same duties they are assigned to do as a matter of course.

Moreover, the Court finds unpersuasive Defendants’ assertion that they will suffer manifest injustice when the depositions go forward because Plaintiff will be “afforded unfair, unwarranted, and unjustified access to the opinions, thoughts, and mental impressions of their adversary in high stakes litigations.” Mot. for Reconsideration 12. **Although the Court has held that Mr. Stroble and Mr. Parsons are not protected from deposition under Rule 26(b)(4)(D), nothing in the May 5 Order prevents Defendants from properly asserting the protections of the attorney-client privilege or the work-product doctrine with respect to certain testimony or documents specifically related to this litigation.**

(Dkt. No. 92 at 5-6 (emphasis added).)

Rule 26(b)(3) provides, in relevant part,

(A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(I) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories

FED. R. CIV. P. 26(b)(3).

To the extent Plaintiff posed questions to Mr. Parsons concerning the early warning document or documents, Mr. Parsons need not answer those questions, as that information is protected. *See In re Allen*, 106 F.3d 582, 608 (4th Cir. 1997) (“We have held that attorney-client privilege does not protect [the selected pages of employment records concerning Donna Willis]. Yet, just as Allen[, the attorney,] prepared the interview notes and summaries in anticipation of litigation, she also chose and arranged these records in anticipation of litigation. This choice and arrangement constitutes opinion

work product because Allen’s selection and compilation of these particular documents reveals her thought processes and theories regarding this litigation.”).

The question is then whether Mr. Parsons’ examination of this tire is protected. Defendants assert as follows:

[C]ontrary to Plaintiff’s assertions, this litigation and the eventual examination of the tires and rims are not routine and arise directly from the request of legal counsel in defense of this litigation. As provided herein, the tires and rims were obtained in this litigation, the companion tires and rims are partly owned by Defendants, these tires and rims are the subject of multiple preservation orders, and all tires and rims were the subject of a Tire Inspection Agreement outlining the manner and method of the non-destructive testing.

(Dkt. No. 116 at 3-4.) Furthermore, Mr. Parsons stated as follows in his Affidavit:

14. I report directly to Jim Stroble. Mr. Stroble is employed as the Manager of the Product Analysis Department for The Goodyear Tire & Rubber Company.

15. Mr. Stroble and I examined the Tire at Issue, as well as the companion tires. This examination was completed at the request of legal counsel and in anticipation of and/or preparation for litigation.

(Parsons Aff. ¶¶ 14-15; Dkt. No. 103-4 at 4 of 6.)

Courts have analyzed the work product privilege in two contexts—fact work product and opinion work product. Both are generally protected and can be discovered only in limited circumstances. Fact work product can be discovered upon a showing of both a substantial need and an inability to secure the substantial equivalent of the materials by alternate means without undue hardship. Opinion work product is even more scrupulously protected as it represents the actual thoughts and impressions of the attorney, and the protection can be claimed by the client or the attorney.

In re Grand Jury Proceedings, Thursday Special Grand Jury Sept. Term, 1991, 33 F.3d 342, 348 (4th Cir. 1994) (citations omitted).

Regardless of whether Mr. Parsons regularly examines tires during the course of his job duties or not, the inescapable conclusion in this particular case is that Mr. Parsons examined the Tire at Issue as well as the companion tires at the request of counsel. (*See* Dkt. No. 103-4 ¶ 15; *see also* Dkt. No. 129-1 at 9 of 15; Dkt. No. 129-3.) In fact, in order for Defendants to obtain possession of the Tire at Issue and the companion tires for inspection, counsel for the parties entered into a “Tire Inspection Agreement.” (*See* Dkt. No. 103-7.) Mr. Parsons’ examination of these particular tires was not

performed to prevent a reoccurrence, to improve safety of the Subject Tire, or to respond to regulatory obligations. *See Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992). At the time he examined these tires, Mr. Parsons' employer clearly faced an actual claim that had already resulted in litigation. *See id.* The "Tire Inspection Agreement" was signed by Defendants' counsel on June 28, 2013 and signed by Plaintiff's counsel on July 8, 2013. (*See* Dkt. No. 103-7 at 4 of 4.) Mr. Parsons stated in an Affidavit that the inspection of the Tire at Issue and companion tires began in July of 2013. (*See* Dkt. No. 129-1 at 9 of 15.) The instant lawsuit had already begun, having been filed on February 15, 2013. (*See* Dkt. No. 1.) In light of the foregoing, the undersigned concludes that the subjects at issue in the present motion are in fact protected by the work product doctrine. To the extent the questions posed to Mr. Parsons are protected as fact work product, Plaintiffs have not shown a substantial need or an inability to secure the substantial equivalent of the evidence by alternate means without undue hardship. Plaintiff has hired his own expert witnesses to provide opinions on the cause of the tire failure. Plaintiff seeks, *inter alia*, the measurements Mr. Parsons took of the inner liner of the Tire at Issue, and Mr. Parsons' opinions as to why the Tire at Issue failed. Of course, Plaintiff's own experts have undoubtedly performed those measurements and analyses. Defendants' Motion for Protective Order (Dkt. No. 103) is granted with respect to the early warning document(s) as well as Parsons' examination of the Tire at Issue and companion tires. *See Hickman v. Taylor*, 329 U.S. 495, 516 (1947) (Jackson, J., concurring) ("Discovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary.").

Conclusion

It is therefore ORDERED, for the foregoing reasons, that Defendants' Motion for Protective Order (Dkt. No. 105) is GRANTED.

It is further ORDERED that Plaintiff's Motion to Compel (Dkt. No. 100) is GRANTED IN PART and DENIED IN PART. Plaintiff's motion (Dkt. No. 100) is granted as to Exhibit K to Plaintiff's motion as well as to the Subject Tire; Plaintiff's motion is denied in all other respects.

It is also ORDERED that Defendants' Motion for Protective Order (Dkt. No. 103) is GRANTED IN PART and DENIED IN PART. Defendants' motion (Dkt. No. 103) is denied as to the butyl content but granted in all other respects.

It is further ordered that Defendants' Motion for Protective Order (Dkt. No. 107) is GRANTED IN PART and DENIED IN PART. Defendants' motion (Dkt. No. 107) is granted as unopposed as to Questions B; the motion is denied as to Questions A, related to butyl content.

The parties shall comply with the rulings in this Order within ten (10) days of the date of this Order.

AND IT IS SO ORDERED.



MARY GORDON BAKER
UNITED STATES MAGISTRATE JUDGE

October 22, 2015
Charleston, South Carolina