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96-0425
GENERAL TIRE, INC. V. KEPPLE

LAWYER: May it please the court. I represent General Tire in this case. The issue here is whether 76(a) Sealing Procedures apply anytime a party seeks a limited protected order to protect its unfiled discovery. In other words, does a party like General Tire have to resort to Rule 76a in its severe cumbersome and expensive procedures in order to have limited protection of its proprietary documents? Or can it do as has been done for decades and done well in this state and just go to the court when it's seeking this limited protection and get from the TC a limited protective order that protects those documents in this case from its competitors but still allow dissemination and distribution of those documents to the people that need to see the documents?

ABBOTT: Would that be dissemination only to plaintiff's attorneys in cases currently pending or would it also include dissemination to plaintiff's attorneys in future cases?

LAWYER: Well in this case of course your honor that is what occurred, the latter example that you gave. In this case the protective order was very broad and the dissemination was not just to the attorneys in the case, the experts, the parties, and the consultants, but it was also to the plaintiff's attorneys and potential plaintiff's attorneys in the case. Now to resolve this case obviously on these facts I think that that is probably an example of almost as broad a protective order as you get. Quite frankly I think from a policy standpoint that the protective order would not even need to be that broad in order to have what I would consider a normal protective order, a protective order under Rule 166b to be effective and still not have to resort to the sealing orders under Rule 76a.

OWEN: What would be sealing? You say this is not, what would be?

LAWYER: That's a good question. I think that's one of the key questions in the case. I do think it's important and I will answer your question. I do think it is important in this case to understand that this is extremely broad and that whenever the order goes even beyond that, all the way to the point of allowing people outside the case to see the documents, that that is about as broad a protective order as you can get. At least in a normal circumstance. But to answer your question, I think that as severe as 76a is, that the limitations should be even more severe than that, and for 76a to apply, that the sealing should only be to the plaintiffs, to the parties in the case and the attorneys, and not even to their consultants and to their experts. But I think that's one of the questions that the court will have to answer: Just what is sealing? If the court agrees with our theory and that is that sealing should only apply whenever it's very, very severe. And admittedly that's a very severe and would be a very severe approach. And again as I say that's not one that took place in this case and you wouldn't have to go that far to have this particular procedure disapproved of here.

ABBOTT: Under the protective order that you have in place, or that you would desire to have in place in this case, would you still consider it to be a valid protective order that you would not need Rule 76a to come into play if the information was, let's say the information known by the asbestos industry, and you agreed that sure there may be information out there that could be harmful to everyone's health in the future, but you're going to limit the information from being disseminated to anyone other than plaintiff's lawyers in this case and future cases as well as consultants in this case and future cases?

LAWYER: In other words, if as in the asbestos cases if the information is clearly harmful, is that the import of the question? Well I think that's where the discretion of the trial judge comes in and I do think that that is the kind of situation that didn't occur here. But even if it did occur, I think that the procedures leading to a protective order are sufficient to protect against that because the TC exercises its discretion and would have the ability to exercise its discretion.

ABBOTT: I am not sure of your answer. What I am trying to figure out is is this protective order that you want to have implemented is that good for all fact situations, or is it good only for fact situations where you contend that the information being sought to not be disseminated is not really harmful to the general public?

LAWYER: Well whether the information is harmful to the general public is, I don't know if there's an absolute answer to that. I mean in our situation of course there's been no showing and that's part of our argument is that there was no showing that this information is harmful. In fact we don't believe that it is and don't think that the plaintiff met its burden of proof of showing that it's harmful to the general public. But there is a tremendous amount of protection I think in talking about our particular protective order. Because the very class of people that would be affected by this protective order have access to these documents. In our case specifically those being the plaintiff's lawyers and potential plaintiffs who would have cases against General Tire. And so I think that that interest is protected under this particular protective order because of the broad dissemination allowed in the protective order.

I think that there is another aspect of it and it would be disingenuous to say anything else and that is that it's a balancing kind of a test, that there is potential for abuse, there is potential for this protective order to not do everything and protect the interest...

BAKER: Isn't it your position that you don't think under 156b, that you have to get involved with 76a, and that's what you want this court to hold when you are asking for a protective order?

LAWYER: That's correct to the extent that if you are asking for anything short of sealing..

BAKER: But you don't want to be involved with 76a. My question is how do you get around where the Act says clearly I think in part C of paragraph 5, that if you are going to ask for sealing or distribution, or restrictive disclosure, that any order under this subparagraph shall be made

in accordance with the provisions of rule 76a with respect to all court records. Even if you're asking how I would read this for restrictive disclosure you still have to comply with 76a. How do you get around that language?

LAWYER: Well it's a different interpretation of the language quite frankly. And I can understand that there are different ways to read it.. But it seems to me that in reading it that what the rule does is really give 3 different options. It says that the court may issue a protective order that does one of three things: it seals it; or it limits the distribution; or it restricts disclosure.

BAKER: Then how do you interpret any order?

LAWYER: Any order under this which would mean to me to be any sealing order. In other words...

BAKER: So you are going to exclude lesser protective orders from the language of the rule?

LAWYER: Yes. Because what I would say...

BAKER: And that's the bottom line is that right?

LAWYER: The bottom line is that that sentence only comes into play whenever you are talking about sealing. And I think that there is further support for that if you look over onto Rule 76a itself and it says that sealing shall not be allowed if there is any less restrictive way of protecting the interest sought to be protected.

BAKER: But that's under the provisions of 76a, which this rule C part seems to indicate _____. But your viewpoint is that even though it says that you are not going to be required to go through all of the steps of 76a to get a lesser order. Is that your position?

LAWYER: That's my position. But I think that my position is grounded in the words of both of those rules. Because even assuming that my interpretation of Rule 166b is not correct, and it does indeed fit, okay now you look over at 76a, once you get to 76a, 76a says that if you can do something less than sealing, you don't deal, and in essence I think this rule doesn't apply.

BAKER: What do you mean this rule doesn't apply?

LAWYER: 76a.

BAKER: But don't you have to have a 76a procedure to decide whether it applies or not, whether it's court records which is your other point in this case?

LAWYER: Right. That's correct. But I think that you only reach...

BAKER: And isn't 76a the rule that governs whether to seal or let lesser protective things _____?

LAWYER: Well I think it governs sealing. And that it does not govern, and this is honestly our whole point, that if you are seeking something less than sealing, that it does not apply and that rule 166b applies.

PHILLIPS: What is your definition of sealing?

LAWYER: My definition of sealing would be that whenever a court restricts dissemination of documents to the plaintiffs and the parties, and allows it to no one else. The court would not have to go that far in this case because...

PHILLIPS: I'm not talking about this case.

LAWYER: In this case this is not a sealing.

PHILLIPS: If it ever goes beyond that, if any consulting expert gets to see a document or any testifying expert, then it's not sealing it's protection, and 76a goes out the window?

LAWYER: Yes your honor.

ENOCH: Does it become sealing if as a part of the disclosure that that protective order requires any information to be returned to the defendant so that it is gathered from all of these experts from all these other plaintiffs and given back to the defendant, would that then be sealing?

LAWYER: I think that that would nudge it that direction to make it more like sealing. Ultimately the protective order would say if I understand what you're saying is the protective order would say: Okay these documents now can be distributed to this class of people, but once litigation is over it has to be returned to the party.

ENOCH: But isn't that view really contrary to the purpose of 76a? Isn't 76a not a disclosure to parties that own it, but 76a is disclosure to the newspapers? Isn't that really what it is?

LAWYER: To the newspapers or to public interest groups, I think that's right.

ENOCH: And so wouldn't any effort to protect documents from being disseminated publically be contrary to 76a?

LAWYER: Depending on what the interpretation of 76a is. And I think that the practical effect of 76a has been that it's not being used to meet the kind of goals that you are talking about...

ENOCH: I might agree with that. But this issue under 76a is it was designed to keep the

parties from agreeing to keep information secret, that apparently the drafters of the rule this court's adopted say ought to be made public. And it's not just court records. It's not just documents that have been filed with the court, that have been sealed, but it's any discovery that's floating out there. If I request from you highly confidential information, and it leads to admissible evidence therefore it's otherwise discoverable even though it's never been filed of record, it's never been brought into the public arena, this rule seems to say it's public and it's to be released to the public unless certain exceptions are met. Now isn't any order of protection which keeps the document from being disseminated to the public in fact a sealing order under 76a? Assume for the moment that it concerns matters affecting a probable affect of public health, whatever that is, assuming it's that, then any order that protects it from public dissemination isn't that...

LAWYER: I think that's the issue in this case quite frankly is whether that's the case or not.

ENOCH: If it's read that way would that rule be at all workable in our litigation system?

LAWYER: I think that's the problem is that the way that it's come about is that it's not workable. And that instead of meeting the goals that you were talking about instead it's a hammer that plaintiffs are using to quite frankly be a form of judicial extortion over defendants. Because they are such a threat as in this case over incredibly important proprietary information. I mean in this case we are talking about the recipes for General Tire's tires.

ENOCH: In that regard one way to make the rule less draconian would be a very narrow view of what is a probable adverse effect on public health?

LAWYER: That's true.

ENOCH: Could the documents here that General Tire's position is that these are simply recipes for building a tire which is proprietary trade secret information and the argument is that no particular document's been tied to the danger that's been asserted here, which is the tire loses its tread and causes a blow-out. Would one mechanism be to take that and say that to craft a narrow view of what this is on discovery that's out there, it's not a public record, it's still in the party's possession, but it may lead to admissible evidence to define that so tightly that really the only burden that is on the defendant is when these documents are really tied to this danger that is of significance to the public?

LAWYER: Right. And I think that certainly in this case General Tire would be satisfied with that because clearly in this case there is as you indicated or at least indicated what our position is, there is no evidence in fact there is no testimony or evidence that tied these particular documents to the claimed harm to the public. The problem though and the question really for the court is is it going to be a requirement? Does the court want 76a proceedings to have to go forward in these kinds of situations when somebody is seeking very limited protection. I participated in this and it will come as no surprise to the court it is a very honors proceeding and really a trial within a trial and not only a trial within a trial but if it occurs before resolution of the case, ours was after settlement,

there is also appeals that will go on. So there's trials within a trial, and then appeals going on before the case even goes to trial.

GONZALEZ: Would you briefly touch on the second issue assuming 76a applies and the standard of review?

LAWYER: The standard of review as you know there is a conflict among the jurisdictions whether sufficiency of the evidence applied or whether there's an abuse of discretion standard. In this case the CA applied an abuse of discretion standard. We think that we win either way because there's no conflicting evidence that there was in fact no evidence to tie these particular documents to the alleged harm to the public. But in any event our view would be that sufficiency of the evidence should apply here for many reasons. For one, there's an evidentiary standard in rule 76a that is a preponderance of the evidence standard. The 76a also refers to the special appearance rule for the procedures that should be applied. And of course as the court knows whenever a nonresident is asserting long-arm statute and the basis for special appearance on that also that is judged on sufficiency of the evidence entered. So I think it's a weighing of the evidence that's involved.

BAKER: What about the argument that it's a pretrial ordinarily proceeding and more often than not matters of pretrial procedure are discretionary with the trial court and therefore, that's the standard that should apply to the court's decision in this type of proceeding?

LAWYER: Well I think that that is certainly true that most of the time it is an abuse of discretion standard. But there are exceptions as I mentioned special appearance. And I think that given the circumstances, the weighing of the evidence that this is an evidentiary hearing, as I characterized it before a trial within a trial, that this is a time where it is appropriate to deviate from what is more common, but certainly not an absolute rule and to apply sufficiency of the evidence rather than abuse of discretion. But I may be overreaching here because I think that an abuse of discretion....

BAKER: Did y'all ask for findings of facts and conclusions of law because your theory is that it's an evidentiary?

LAWYER: Well there were findings of fact and conclusions...

BAKER: No, but did you ask for them?

LAWYER: No. Perhaps I should have in retrospect. But no I did not.

CORNYN: In rule 76a, paragraph b, says that part of the burden on the defendant in your client's case was to show that no less restrictive means other than sealing would adequately protect the interests that your client is seeking to protect. By the use of the term of the phrase "no less restrictive means", what does that mean other than a rule 166b protective order?

LAWYER: Your honor I don't know. Because to me and in response to what Judge Baker was saying before, I probably inarticulately was trying to make that point that what is less restrictive? In our view less restrictive would be a protective order under 166b.

CORNYN: And if that's true, doesn't that necessarily mean that these two rules interrelate in a way that the TC used them in this case? How can you divorce one from the other if in fact 76a requires the movant to show that no less restrictive means other than sealing would protect the property interest?

LAWYER: Well we did show that there was a less restrictive way and that that was the protective order that was in place. And our position to the TC and now is that a less restrictive way was used, less restrictive than sealing, and that this wasn't a sealing and therefore 76a did not apply.

PHILLIPS: You contend that these documents are trade secrets?

LAWYER: That's correct.

PHILLIPS: And of course trade secrets are an exception to 76a under 76(a)(2)(c). I am trying to understand why 76a is so much more onerous to prove that than going in under rule 166h, and establishing that these are trade secret documents. I mean you talk about how burdensome the rule is if it's too broadly applied. And I understand the interlocutory appeal method, which of course may help you and may hurt you I guess depending on how the judge rules, but what else is different?

LAWYER: The other things that are different about it is that you can't just do like in a normal protective order where there is notice requirements, it has to be posted at the courthouse, that's not a big deal. But then you end up with interveners coming in. I believe we had 10 interveners in this case. When you have the interveners come in that of course lengthens the case. Instead of having it be at most a full morning and more likely a 15 or 30 minute proceeding, it was in this case a 2 day evidentiary proceeding. You have the additional risk of dissemination of the document. I mean in this case basically the court held that you can ignore 76a, and you can come in and pay $25 and see the documents. I mean she allowed all of the interveners to have copies of the documents.

PHILLIPS: Is this moot as far...

LAWYER: That's a good question too. She did ultimately order them to keep those documents confidential and the plaintiff not just voluntarily, then ultimately based on stay orders has not disseminated the documents. So it is not moot. But the interveners did have access. I am progressing a little bit from answering your question. The answer to your question is that there are many things in here that are required that make this much more burdensome and much more complicated than would what I think of normal anyway seeking of a protective order.

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RESPONDENT

LAWYER: May it please the court. I would like to address three points before the court that the court has addressed in its questioning. First of all the question about whether limited protective orders that are not sealing orders somehow 76a doesn't apply. The question of whether the abuse of discretion standard applies and the question of probable adverse affect and what that means. First of all as I understand their argument, they are contending that since they asked for a limited protective order and not a sealing order, that rule 76a doesn't apply. As Judge Garcia said below, that's not what the rule says. In fact rule 166b(5) says specifically that it deals with sealing orders, orders that it's distribution be limited or that it's disclosure be to restrict it. It says: Any order under this subparagraph (5)(c) shall be made in accordance with the provisions of rule 76a, with respect to court records subject to that rule.

Now the intent of that rule as those justices who are on the court that wrote the rule understand, the intent was to prevent the very abuses of protective orders which are represented here.

HECHT: And, then, therefore to apply 76a to every protective order in a discovery context?

LAWYER: Not every protective order. Protective orders that raise the issues of court records. It's only protective orders also that are trying to conceal discovery and not every protective order does that. Some deal with time, place and manner.

HECHT: But since the litigants may disagree about that don't you have to give notice so that perhaps the media or other public interest groups can come in and contend that these really are court records even though perhaps the plaintiff and the defendant don't?

LAWYER: That's our point exactly. If you have protective orders that are issued in a case, the intent of those protective orders is to withhold information from the public. And if you're going to have that kind of a protective order, 76a procedure should apply.

HECHT: Whether they are court records or not, because the intervener who wants to come in and contest that is entitled to notice rather than just have the parties decide that for him.

LAWYER: Well I think if they are trying to conceal discovery I think the issue of whether their court records can be raised either by the judge or by an intervener. But I think it still has to be raised whether they are court records because it was just...if they were withholding information that had nothing to do with public health or safety, then of course it wouldn't fall within the parameters of 76a.

OWEN: When do you make that determination though? If the TC and the parties both say they are not court records, you would never give notice to allow intermediators to come in and _____ when is that determination made?

LAWYER: Well the determination of whether a 76a hearing is...

OWEN: No when is the determination made that it's not a court record? Does the court have to give notice and all of that is what makes the determination that it's not a court record?

LAWYER: Yes. Several courts have held that the 76a hearing that one of the purposes of a 76a hearing is first to determine whether they are court records. And you give notice in order for that determination to be made.

HECHT: So you have to give it in every case?

LAWYER: Well not necessarily in every case.

HECHT: Why not?

LAWYER: In some cases the protective order would have nothing to do with court records. And in that case...

HECHT: My point is that there are people out there who get a say in that, not just the people in the case.

LAWYER: That's correct.

HECHT: You're not going to know what they say till you give them notice.

LAWYER: The protective order is a public record and if someone wants that information they can come in as an intervener even after judgment and the intervener can say: I believe that that information that's being withheld is court records. And then they can then have a 76a hearing to determine that.

There are cases, the Chandler v. Hundai case on remand says that that threshold determination can be made and should be made at the 76a hearing.

HECHT: My question to you is: How do you have a 76a hearing until you give a notice to the world as the rule provides, and if you have to have that hearing to decide if there are court records, don't you have to give that notice anytime you want limited protection in discovery?

LAWYER: I see your point. I don't believe it would arise in every case because I don't think in every case it involves court records. In this case there was an allegation that it involved court records and therefore they had to have the 76a hearing. And they don't contest the fact by the way in their reply brief on page 16, they don't contest the fact that a single 76a hearing is necessary; first to determine court records. If they are not court records and the court determines they are not court records, then the 76a matter is moot. And you go back into the protective order procedure.

OWEN: But you have to have a 76a hearing to decide if you have a 76a hearing? That's

my question.

LAWYER: That's what the rule provides. And the rule provides that it's covered by 76a.

ENOCH: Under the Hundai opinion, the specific holding of that is the TC ruled that this was not a court record for the purposes of 76a and therefore never had the 76a hearing. And that came up on appeal. So Chandler really stands for the proposition that 76a permits an appeal of a decision not to have a 76a hearing. That's apparently what it stands for. Using Chandler couldn't the court craft a procedure whereby the court is....I want an order for protection, the party requesting information disagrees that a protection is deserving. And that party may argue that this document affects the probable adverse affect of the public health and therefore is subject to 76a notices. It's a disputed issue. The TC looks in camera at the documents and decides the documents are not a risk to public health or concerns matters of risk to public health, and determines not to have a 76a hearing. That issue under Chandler v. Hundai is appealable through the CA, the CA reviews that issue and decides yea or nay to have a 76a. Why wouldn't that be the procedure that would make this rule workable? In other words unless there is some sort of contest over whether or not these are court documents under the discovery deal, which would be appealable no matter how the court ruled. Either yes, there is 76a or no it gets appealable. Why isn't that the mechanism to be used here? Have a threshold determination of whether or not they are court documents before you get into the position of having 76a?

LAWYER: Well I think the purpose of the rule is to allow the public knowledge of the fact that there may be documents that are being withheld from the public. I mean that 76a determination should be made with the participation of the public. If for example the public is saying it's affecting our safety, then of course the public should have an ability to prove that to the court. Chandler v. Hundai stands for one proposition. In the CA Chandler v. Hundai they argued the same thing this General Tire argues and that is that since we are just dealing with a limited protective order, then the appeal procedures of 76a don't apply. And in that case he was trying to contend well the court erred by not conducting a court records determination. And they said: Well since you are just dealing with a limited protective order and not a sealing order, 76a doesn't apply. This court said 76a does apply relying on 166(b)(5)(c). And on remand the court said that the TC had erred by failing to conduct a 76a hearing, by failing to say that they conduct a hearing to comply with 76a, that deals both with the court records and deals with the probable adverse effect.

ABBOTT: Under your application of rule 166b(5), let's assume that Microsoft has a dispute with one of its former employees; concerned that one of its former employees may be disseminating some trade secrets. And they get involved in state court litigation and Microsoft wants to file a motion for protection under 166b(5). And then applying (b)(5)(c) since there will be an order prohibiting the dissemination of these records that Microsoft or the x-employee may be turning over to the other side, under your reading of (b)(5) that would automatically necessitate a rule 76a hearing to determine whether or not those documents are indeed court records?

LAWYER; I have two responses to that. First of all the rule says that any order regarding 76a

with regard to court records. Court records is defined in 76a and one of the exclusions from court records is if a suit is brought concerning bona fide trade secrets.

ABBOTT: What I am saying is that that analysis that you are talking about is the analysis that the parties would be forced to undertake because your interpretation of 166(b)(5)(c) triggers that analysis. And what one party could do would be to jerk around the other party by forcing them to undertake the rule 76a analysis which they will prevail upon because they are trade secrets or because they can prove that nothing that Microsoft has would be harmful to public safety. But still they would have to go through that rule 76a procedure.

LAWYER: Well actually there's a procedure that you go through before you even get to that point and that's by asserting a trade secret privilege under Texas Rule 507. And if they assert a trade secret privilege then that information doesn't have to get out. And if it gets out it can be narrowly tailored so that it doesn't affect court records or anything else.

ABBOTT: Well didn't the other party in this case claim that there were trade secrets involved?

LAWYER: They never asserted a privilege for trade secrets. The first time it was raised was when they tried to make an argument concerning the trade secret privilege concerning the protective order. I would like you all to look at the protective order that they asked for. That's in the transcript at page 108. The protective order that they asked for isn't a broad protective order. It only allows dissemination to plaintiffs and plaintiff's attorneys in pending cases and their experts. It doesn't allow dissemination to victims, potential victims, newspapers, consumer groups, governmental agencies. At one time Mr. Cook said I would like to give this to the governmental agency, and that's why I am here. And they say you can't. And you do so at your own peril.

ABBOTT: Clarify that for me, because I thought I asked Ms. Liberado whether or not it also covered dissemination to attorneys, for plaintiffs in future cases that she said that it did include.

LAWYER: With all due respect in the Nov. 14th statement of facts as in the record, Ms. Liberado said: We are trying to give this only to plaintiff's attorneys in pending cases. And that was her interpretation. And my interpretation is that it only deals with people with pending cases before General Tire. Now the harm of that of course is that the purpose of the rule is to inform the public before there's an injury. If you just give it to people with pending cases, then the public never learns of potential hazards.

CORNYN: I am still a little unclear and I don't know if you've had a chance to address this directly: If a defendant makes a proper assertion of a trade secret in a product's liability case like this, would you explain to me how they can protect that trade secret if in fact it is a court record?

LAWYER: There's at least 3 means that they can protect it. First of all they can assert the privilege. The privilege for trade secrets. They haven't done that.

CORNYN: Then that takes it out of the definition of court records?

LAWYER: That takes it out of the court records.

CORNYN: Not subject to 76a at all?

LAWYER: Not subject to 76a.

CORNYN: And they can still protect that by 166b protective order?

LAWYER: Well it would be protected by privilege. It would be protected by Evidentiary Rule 507. That's one way. Secondly, they get to the procedure of showing that they have a specific serious and substantial interest that outweighs the public interest that is asserted. If that's true, then they are entitled to sealing. Now it says that the court can only...

CORNYN: And that would be if it is a court record?

LAWYERS: That's correct. Now the rule says that they are only entitled to seal if there are not less restrictive means. Now what Justice Doggett's law review article says and what the courts have done is that the less restrictive means means that you can give it to the public, but you redact certain information. Like you redact information that's unnecessary to the point. In other words, they could redact everything about the trade secrets except for for example the things that deal with the public hazards specifically.

CORNYN: Even if the very basis of the claim is say a design defect claim wouldn't the design which is they say protected by trade secret be a very basis of the litigation?

LAWYER: If they prove that there is a legitimate trade secret interest I think that the rule gives the court the power to craft the means of protecting that information. Here, however, there was no legitimate trade secret established. They say that these are the recipes for the tires. I would like you to look at the March 28 hearing, on page 53, at that time they said well we don't want to give up the formulas for our tire and the court said you don't have to. Those recipes or formulas were never produced in discovery and they weren't subject to this particular order. What they were trying to do was to keep out information about tread separation from the public. This information about tread separation involved a tire that had been last designed over 10 years earlier, last produced over 6-1/2 years earlier for a vehicle that was discontinued. There was no competitive injury. And there was evidence that went both ways on that. And the problem with it is that their own experts admitted that General tires cause public hazards. One expert that they don't talk about anywhere in their briefs, Dr. Steven Winder, and his testimony was: that there were 33 fatal accidents that involved tire failure in General Tire in Bronco II accidents. Fatal accidents. His position of course was : well that's not many. So the interest in public safety is minimal. But then he had to admit when asked: Well isn't one too many?

ENOCH: On that regard General Tire says there's nothing in these documents that are tied to the tire failure by any of the witnesses.

LAWYER: That's certainly their position. I think if you reviewed the evidence you will see that that's not the case. The problem being we know that the tires are failing and they are falling apart on the highway and they are causing injuries and deaths. What we don't know is why.

ENOCH: And the documents demonstrate why they are failing?

LAWYER: The documents give you information necessary for someone to determine the nature and extent of the _____. The allegations were that it was caused by weak tread separation or what they called in the record "skim compound failure." These were records that involved changes in the skim compound. Adjustment data.

ENOCH: Isn't that a recipe? Isn't the document detailing what the composition was for this skim compound?

LAWYER: What they are talking about is the adhesion. Yes, I suppose that...

ENOCH: And did any of the experts identify in this _____ show this is what that was and the reason it failed is because that was not a good composition?

LAWYER: Of course we never get to defect because there was no trial on the merits. You can't prove defects and so there was no trial on the merits. What you are trying to do is get information about potential hazards.

ENOCH: Well that raises the issue. Discovery permits you to look for anything that might lead to discoverable information. But it looks to me like the rule says it doesn't limit it to the admissible information. It's to any relevant document out there. So the document from General Tire might be a document that has to be produced because of the discovery request. The argument is 76a has to apply to it because it has a probable adverse affect on the public. But this document is only tangentially relate to whatever it is that somebody argues was the danger in the tire. If I am arguing that this document does not concern a matter that has probable adverse affect on the public, wouldn't your burden be to demonstrate this document can be tied to what we are arguing is the defect in the tire?

LAWYER: I think that's an excellent question. And I think the question is can you point to a specific document and tell me how this particular document endangers public safety? But of course that's not the analysis under the rule. It says that discovery, whether the discovery concerns matters that have a probable adverse affect on public safety. And the courts have said that you look at documents or categories of documents...

ENOCH: Let's talk about one of the cases that some car had rear gas tank, I think a Ford

Pinto The argument being the document demonstrates that Ford was aware that there was a higher incidence of fire related deaths in a Pinto accidents from rear injuries because of the placement of the gas tank. This is a document - it's a memo. Clearly probable adverse affect on the public. Here's the memo:

> We are aware that Pintos have a higher incidence of fire related deaths. We don't know why. We just know it's out there.

And then you've got another document that says:

> Rear gas tanks are put at 5" from the rear bumper - 6" from the front, etc.

Arguably someone could say I want to look at that document for the design characteristics of the gas tank. But there is no connection between that document and the claim of the fire to the car. Where we have not discovered that it is the result of the gas tank. It's just that we have that and here's just the design specifications for the car. Wouldn't it be necessary to show that that document or that class of documents - design specifications has a probable adverse affect to demonstrate that we are at least looking at the placement of the gas tank as the cause of this injury. And wouldn't there have to be some documents that would tie the placement of the gas tank to the higher incidents before this becomes a public _____?

LAWYER: Well I think that's the purpose of the presentation of evidence in a 76a hearing.

ENOCH: So in your case do we have any evidence in the record from experts that says this document describes a chemical composition for this adhesive and that's the adhesive we are looking at for the purposes of this tire. Is there any evidence in the record about this?

LAWYER: Yes. If you look at Edward's testimony and you look at Carlson's testimony. Both of them talked about the weak adhesion and the skim compound failure. Both of them talked about and made the connection between the tire failures that have been occurring on the highway, the weak adhesion and the problems that they saw in the documents. In other words, General Tire one of the documents for example shows that their adjustments or customer's returns for defects in tread separation...

ENOCH: But that's Edwards' testimony?

LAWYER: Right. But they were extremely high. There's also a expert _____ who has testified, he's a tire development engineer for General Tire, and he testified that if there was a skim compound failure at high speeds the vehicle could roll over making then the connection between the rollover and the skim compound failure. It was a deposition excerpt so he didn't go into it as an expert would, but that's the problem. I mean you have cases that they enter into protective

orders, enter into secret settlements before there is any determination on the merits. The only way the public knows about these potential hazards is to get the information necessary to determine the nature and effect.

PHILLIPS: You've heard opposing counsel's definition of sealing. What is your definition of sealing?

LAWYER: Well I could understand her interpretation because there is a distinction made in Rule 166(b)(5) between sealing and limited protective orders. But my interpretation of sealing and the intent of Rule 76a is that any time the public, the press is excluded from information, that's sealing.

PHILLIPS: You believe there's no difference? The distinction alluded to in the rule simply can't or doesn't exist?

LAWYER: I believe what the intent of the rule is and I wasn't in the court at the time so I don't know the intent of the rule so I am just speculating, but my reading of the rule is that it doesn't matter. It doesn't matter whether you ask for sealing; it doesn't matter whether you ask for limited disclosure; it doesn't matter whether you ask for limited distribution. All of that is going to be covered by rule 76a.

BAKER: If it's a court record?

LAWYER: If it's a court record.

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REBUTTAL

LAWYER: Let me begin by going back to the line of questioning that Judge Enoch was talking about in regard to tying up these potential adverse affect or probable adverse affect on the public and health and safety through these particular documents. I think a review of the evidence will show that there is not that link-up. In regard to the skim stock one of the experts testified that he suspected that there was a problem with the skim stock and that's about as specific as he could get. But I think the important thing from a policy standpoint is not although of course it is important in this record, but as a broad concept is to analyze what the plaintiff is saying and that is essentially to say that in any product's case when there is allegations that the product causes harm, that that then moves these documents just by nature of the allegation and by nature of there being the potential will make these documents subject to public disclosure. To take their example or to take their position to its logical conclusion in any product's case there is going to be a probable adverse affect on the public health and safety. Just because there has been damage, just because there is allegations of injury and I think that that is one of the key problems that they have with their position.

CORNYN: I think Mr. Holman said that all you have to do in order to protect your trade

secrets is to assert the trade secret privilege which takes it out of the definition of court records and takes it out of 76a. What's your response to that?

LAWYER: And I would like to address that too. I think that's an important issue. We didn't make that allegation and I think as a matter of public policy that's a bad rule to follow. We didn't make that allegation because we didn't assert our privilege because we turned over the documents. The court will remember the facts in the case we gave the documents to the plaintiffs. They had our documents. Does that further open discovery? Does that further good public policy to have us keep the documents and assert that privilege and keep them even from the plaintiffs?

CORNYN: Did you give them to the plaintiff because you thought you could not keep the plaintiff from them, or because you didn't claim they were trade secrets?

LAWYER: We didn't claim they were trade secrets. We thought they were entitled to them. We thought they were trade secrets but it wasn't necessary to make that claim as long as we had the protection of a protective order.

CORNYN: So if they were trade secrets you were willing to waive _____?

LAWYER: I don't know if it was as much a waiver - well I guess it was a waiver in the sense that we were willing to give them these documents. We were willing to let them look at these documents, to have the documents, to use those documents in their case. And I think that's the better policy behind that.

The last thing on Judge Baker's question about the sufficiency of the evidence standard verses the abuse of discretion. I think that one thing that really distinguishes a 76a order from other pre-trial orders is that it is in essence a final determination. It is much more akin to a final judgment because it is appealable, because it does resolve major issues in the case. And that's another reason I think it's the sufficiency of the evidence...