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Supreme Court, Appellate Division, First
 Department, New York.
 Raman MANN, an infant, by his guardian ad litem,
 George S. AKST, et al., Plaintiffs-Appellants,
 v.
 The COOPER TIRE COMPANY, et al., Defendants-
 Respondents,
 Nancy Esperanza Mann, etc., et al., Defendants.
 June 1, 2006.

Background: Plaintiffs, who were passengers in vehicle involved in accident, brought action for negligence, product liability, and breach of warranty against tire manufacturer and distributor. Defendants moved for protective order against discovery on the grounds that information about tire manufacture constituted trade secrets. The Supreme Court, Bronx County, [Nelson Roman](#), J., granted defendants' motion. Plaintiffs appealed.

Holdings: The Supreme Court, Appellate Division, [Catterson](#), J., held that:

6(1) manufacturer did not establish that formula and ingredients of tires were trade secrets;

8(2) ingredients of tire were subject to previous disclosure;

10(3) disclosure of ingredients was indispensable to plaintiffs;

11(4) disclosure would not cause manufacturer irreparable harm;

12(5) plaintiffs were entitled to disclosure beyond merely information relating to tires with same green tire specification;

13(6) plaintiffs were entitled to disclosure of documents dating back to 1985; and

18(7) manufacturer's proposed protective order and confidentiality agreement were unacceptable as to form.

Affirmed as modified.

West Headnotes

[1] Pretrial Procedure 307A 19

[307A](#) Pretrial Procedure

[307AII](#) Depositions and Discovery

[307AII\(A\)](#) Discovery in General

[307Ak19](#) k. Discretion of Court. [Most Cited](#)

[Cases](#)

Discovery determinations rest within the sound discretion of the motion court.

[2] Appeal and Error 30 961

[30](#) Appeal and Error

[30XVI](#) Review

[30XVI\(H\)](#) Discretion of Lower Court

[30k961](#) k. Depositions, Affidavits, or

Discovery. [Most Cited Cases](#)

It is rare that motion court determinations as to discovery are reversed or modified on the law; rather, the appellate court is vested with the power to substitute its own discretion for that of the trial court even in the absence of abuse. [McKinney's CPLR 3101\(a\)](#).

[3] Pretrial Procedure 307A 13

[307A](#) Pretrial Procedure

[307AII](#) Depositions and Discovery

[307AII\(A\)](#) Discovery in General

[307Ak13](#) k. Construction of Discovery

Provisions. [Most Cited Cases](#)

Pretrial Procedure 307A 27.1

[307A](#) Pretrial Procedure

[307AII](#) Depositions and Discovery

[307AII\(A\)](#) Discovery in General

[307Ak27](#) Scope of Discovery

[307Ak27.1](#) k. In General. [Most Cited](#)

[Cases](#)

The scope of disclosure provided by discovery statute is generous, broad, and is to be construed liberally. [McKinney's CPLR 3101](#).

[4] Pretrial Procedure 307A 41

[307A](#) Pretrial Procedure

[307AII](#) Depositions and Discovery
[307AII\(A\)](#) Discovery in General
[307Ak41](#) k. Objections and Protective Orders. [Most Cited Cases](#)

When trade secrets are sought by an adverse party in litigation, the burden of establishing that the information sought is a trade secret lies with the disclosure objectant, and if that burden is met, the party seeking disclosure must show that the information appears to be indispensable and cannot be acquired in any other way.

[\[5\] Pretrial Procedure 307A](#) 33

[307A](#) Pretrial Procedure
[307AII](#) Depositions and Discovery
[307AII\(A\)](#) Discovery in General
[307Ak33](#) k. Privileged Matters in General.
[Most Cited Cases](#)

For purposes of determining whether a disclosure requested in discovery is a trade secret, a distinction can be made between the formula for a product and the ingredients thereof.

[\[6\] Pretrial Procedure 307A](#) 36.1

[307A](#) Pretrial Procedure
[307AII](#) Depositions and Discovery
[307AII\(A\)](#) Discovery in General
[307Ak36](#) Particular Subjects of Disclosure
[307Ak36.1](#) k. In General. [Most Cited Cases](#)

Tire manufacturer did not establish that formula and ingredients of tire allegedly responsible for vehicle accident constituted trade secret, for purposes of discovery; manufacturer's conclusory assertion that formula and ingredients were the result of a great deal of time and money and that disclosure of formula could devastate the company was insufficient to demonstrate that information was trade secret, and nothing in record suggested that manufacturer continued to use formula and ingredients because tire at issue in litigation had been manufactured 11 years before.

[\[7\] Pretrial Procedure 307A](#) 33

[307A](#) Pretrial Procedure
[307AII](#) Depositions and Discovery
[307AII\(A\)](#) Discovery in General
[307Ak33](#) k. Privileged Matters in General.
[Most Cited Cases](#)

Cost, whether it be assessed in time, dollars, or both, is not dispositive in determining whether a process or

formula involves a trade secret that would be protected from disclosure during discovery.

[\[8\] Pretrial Procedure 307A](#) 36.1

[307A](#) Pretrial Procedure
[307AII](#) Depositions and Discovery
[307AII\(A\)](#) Discovery in General
[307Ak36](#) Particular Subjects of Disclosure
[307Ak36.1](#) k. In General. [Most Cited Cases](#)

Ingredients of tire had been subject to previous disclosure and were therefore not entitled to protection from discovery as trade secret in action against tire manufacturer by plaintiffs injured in accident allegedly caused by defective tire; publication that reverse engineered tires and identified their components contained information on construction of tires, as confirmed by manufacturer's chemist in a separate defective tire litigation, and another chemist had testified as to ingredients in tires in separate litigation without demand for confidentiality.

[\[9\] Pretrial Procedure 307A](#) 33

[307A](#) Pretrial Procedure
[307AII](#) Depositions and Discovery
[307AII\(A\)](#) Discovery in General
[307Ak33](#) k. Privileged Matters in General.
[Most Cited Cases](#)

Considerations pertinent in determining whether information alleged to be trade secret protected from discovery is "secret" include the extent to which the information is known outside the business and the ease or difficulty with which the information could be properly acquired or duplicated by others.

[\[10\] Pretrial Procedure 307A](#) 36.1

[307A](#) Pretrial Procedure
[307AII](#) Depositions and Discovery
[307AII\(A\)](#) Discovery in General
[307Ak36](#) Particular Subjects of Disclosure
[307Ak36.1](#) k. In General. [Most Cited Cases](#)

Disclosure of tire ingredients was indispensable to product liability lawsuit against tire manufacturer by plaintiffs injured in accident allegedly caused by defective tire, even if plaintiffs' expert had already found tire to be defective; plaintiffs asserted that they needed to know whether tire manufacturer used components like halobutyl, a superior form of rubber compound, and various antioxidants and antiozoants

for their design defect claim.

[11] Pretrial Procedure 307A 41

[307A](#) Pretrial Procedure

[307AII](#) Depositions and Discovery

[307AII\(A\)](#) Discovery in General

[307Ak41](#) k. Objections and Protective

Orders. [Most Cited Cases](#)

Disclosure of tire ingredients by tire manufacturer in products liability action by plaintiffs injured in accident allegedly caused by defective tire would not cause manufacturer irreparable harm, notwithstanding manufacturer's contention that even if ingredients were subject to protective order and plaintiffs' witnesses or experts did not retain copies of formulae, the formulae would "remain in their memory."

[12] Pretrial Procedure 307A 371

[307A](#) Pretrial Procedure

[307AII](#) Depositions and Discovery

[307AII\(E\)](#) Production of Documents and Things and Entry on Land

[307AII\(E\)3](#) Particular Documents or Things

[307Ak371](#) k. Documents, Papers, and

Books in General. [Most Cited Cases](#)

Plaintiffs were entitled to disclosure of information by tire manufacturer beyond merely documents relating to tires manufactured to same green tire specification as tire at issue in plaintiffs' products liability action against manufacturer; green tire specification, which stated dimensions, weights, physical attributes of tire components and order in which tire was put together, was too limiting, since tires manufactured to same green tire specifications were identical right down to color of sidewalls, and tread separation problems might be present in other tires than those sharing same green tire specifications.

[13] Pretrial Procedure 307A 371

[307A](#) Pretrial Procedure

[307AII](#) Depositions and Discovery

[307AII\(E\)](#) Production of Documents and Things and Entry on Land

[307AII\(E\)3](#) Particular Documents or Things

[307Ak371](#) k. Documents, Papers, and

Books in General. [Most Cited Cases](#)

Plaintiffs were entitled to disclosure of documents prior to manufacture of tire at issue in their product liability action against tire manufacturer and dating

back to 1985; plaintiffs had established that manufacturer had proposed settlement of defective tire class actions by offering replacement tires for every tire manufactured between 1985 and 2001 that suffered tread separation due to manufacturing defect, and therefore disclosure going back to 1985 was relevant as to manufacturer's notice of product defects.

[14] Pretrial Procedure 307A 403

[307A](#) Pretrial Procedure

[307AII](#) Depositions and Discovery

[307AII\(E\)](#) Production of Documents and Things and Entry on Land

[307AII\(E\)4](#) Proceedings

[307Ak403](#) k. Request, Notice, or Motion

and Response or Objection. [Most Cited Cases](#)

Tire manufacturer's disclosure of documents related to tire tread separation as a result of manufacturing defects was not unduly burdensome in products liability action by plaintiffs allegedly injured by defective tire, where manufacturer had produced the same documents in other actions involving tire tread separation, and manufacturer had all such information in its computer system.

[15] Pretrial Procedure 307A 41

[307A](#) Pretrial Procedure

[307AII](#) Depositions and Discovery

[307AII\(A\)](#) Discovery in General

[307Ak41](#) k. Objections and Protective

Orders. [Most Cited Cases](#)

Judicial safeguards against discovery in the form of protective orders and confidentiality agreements exist and are mandated for information which is subject to abuse if widely disseminated.

[16] Pretrial Procedure 307A 36.1

[307A](#) Pretrial Procedure

[307AII](#) Depositions and Discovery

[307AII\(A\)](#) Discovery in General

[307Ak36](#) Particular Subjects of Disclosure

[307Ak36.1](#) k. In General. [Most Cited](#)

[Cases](#)

Pretrial Procedure 307A 375

[307A](#) Pretrial Procedure

[307AII](#) Depositions and Discovery

[307AII\(E\)](#) Production of Documents and

Things and Entry on Land

[307AII\(E\)3](#) Particular Documents or Things
[307Ak375](#) k. Business and Financial
Records and Reports. [Most Cited Cases](#)

Pretrial Procedure 307A 378

[307A](#) Pretrial Procedure
[307AII](#) Depositions and Discovery
[307AII\(E\)](#) Production of Documents and
Things and Entry on Land
[307AII\(E\)3](#) Particular Documents or Things
[307Ak378](#) k. Employment Records.
[Most Cited Cases](#)

Pretrial Procedure 307A 389

[307A](#) Pretrial Procedure
[307AII](#) Depositions and Discovery
[307AII\(E\)](#) Production of Documents and
Things and Entry on Land
[307AII\(E\)3](#) Particular Documents or Things
[307Ak389](#) k. Transcripts or Records of
Prior Proceedings. [Most Cited Cases](#)

Pretrial Procedure 307A 413.1

[307A](#) Pretrial Procedure
[307AII](#) Depositions and Discovery
[307AII\(E\)](#) Production of Documents and
Things and Entry on Land
[307AII\(E\)4](#) Proceedings
[307Ak413](#) Protective Orders
[307Ak413.1](#) k. In General. [Most
Cited Cases](#)

The following were not trade or business secrets and were not proper subjects of a protective order or promise of confidentiality in product liability action involving defective tires: (1) the job descriptions of identified personnel; (2) pleadings and bills of particulars for similar litigation; (3) customer complaints; (4) records of returns involving tire tread separation; (5) the brand names of tires having the same green tire specifications; and (6) sources of parts and materials, unless manufacturer bought all of its ingredients from outside sources.

[17] Pretrial Procedure 307A 371

[307A](#) Pretrial Procedure
[307AII](#) Depositions and Discovery
[307AII\(E\)](#) Production of Documents and
Things and Entry on Land
[307AII\(E\)3](#) Particular Documents or Things
[307Ak371](#) k. Documents, Papers, and

Books in General. [Most Cited Cases](#)

Pretrial Procedure 307A 380

[307A](#) Pretrial Procedure
[307AII](#) Depositions and Discovery
[307AII\(E\)](#) Production of Documents and
Things and Entry on Land
[307AII\(E\)3](#) Particular Documents or Things
[307Ak380](#) k. Government Records and
Papers. [Most Cited Cases](#)

Pretrial Procedure 307A 413.1

[307A](#) Pretrial Procedure
[307AII](#) Depositions and Discovery
[307AII\(E\)](#) Production of Documents and
Things and Entry on Land
[307AII\(E\)4](#) Proceedings
[307Ak413](#) Protective Orders
[307Ak413.1](#) k. In General. [Most
Cited Cases](#)

Confidential material subject to protective order or promise of confidentiality in product liability action involving defective tires did not include: (1) advertising materials; (2) materials that on their face showed they had been published to the general public; or (3) documents that had been submitted to any governmental entity without request for confidential treatment.

[18] Pretrial Procedure 307A 413.1

[307A](#) Pretrial Procedure
[307AII](#) Depositions and Discovery
[307AII\(E\)](#) Production of Documents and
Things and Entry on Land
[307AII\(E\)4](#) Proceedings
[307Ak413](#) Protective Orders
[307Ak413.1](#) k. In General. [Most
Cited Cases](#)

Tire manufacturer's proposed protective order and confidentiality agreement in product liability action, which varied substantially in form from protective orders used in past cases involving manufacturer, were unacceptable as to form, where proposed order contained clause threatening potential witnesses with 10-year jail sentence for disclosure of information, prevented from viewing confidential documents anyone who had consulted with competitor or entity in privity with competitor within past two years, or who expected to perform such consultation in next two years, and apparently prevented actual plaintiffs from seeing confidential material unless they were

deposed.

*48 Trief & Olk, New York ([Barbara E. Olk](#) of counsel), for appellants.
Herrick, Feinstein LLP, New York ([Alan D. Kaplan](#) of counsel), for respondents.

[JOHN T. BUCKLEY](#), P.J., [GEORGE D. MARLOW](#),
[JOHN W. SWEENEY, JR.](#), [JAMES M. CATTERSON](#),
[JAMES M. McGUIRE](#), JJ.
[CATTERSON](#), J.

In this personal injury action arising out of an automobile accident allegedly caused by a defective tire, the plaintiffs appeal from an order partially denying their motion to compel disclosure. The plaintiffs claim, *inter alia*, that the motion court narrowed disclosure to the point of “absurdity” and, in granting defendant-respondent Cooper Tire’s cross motion, imposed a “crippling” and draconian confidentiality agreement that ostensibly bars the plaintiffs themselves from access to relevant documents.

The underlying personal injury action arises out of an accident on March 4, 2001, when a vehicle owned by defendant Nancy Esperanza Mann and driven by Chamkaur Singh Mann overturned on a trip in Quebec, Canada. The driver was killed in the accident and plaintiffs Raman Mann, an infant, Sundee Singh, and Sukhjit Kaur (hereinafter referred to as “plaintiffs”), were seriously injured. The right rear tire of the vehicle was designed and manufactured by defendant Cooper Tire Company and distributed and/or sold by defendant TBC Corporation (hereinafter collectively referred to as “Cooper Tire”).^{FN1} The tire was manufactured at Cooper Tire’s Albany, Georgia plant between May 14 and May 20, 1995.

^{FN1}. The defendants-respondents are represented by the same counsel.

The plaintiffs sued Cooper Tire for negligence, product liability, and breach of *49 warranty. Specifically, they alleged that the accident was caused by tread separation on the car’s rear tire, that the tire was defectively designed and manufactured, and that Cooper Tire failed to provide adequate warnings. Subsequently, plaintiffs also alleged that Cooper Tire failed to prevent the tire from being contaminated by foreign objects and moisture during the manufacturing process.

Cooper Tire initially sought unsuccessfully to have the complaint dismissed as barred by Quebec law. [Mann v. Cooper Tire](#), 306 A.D.2d 23, 761 N.Y.S.2d 635 (2003). The plaintiffs then served interrogatories and document production requests on Cooper Tire. On September 29, 2003, dissatisfied with Cooper Tire’s responses, the plaintiffs moved to compel disclosure.

In their affidavit of support for the motion, the plaintiffs complained that Cooper Tire’s response to virtually every disclosure demand was that the demand was “overly broad and burdensome.” The plaintiffs provided detailed examples of Cooper Tire’s “frivolous responses and objections,” such as Cooper Tire’s response to an interrogatory asking for the identity of “persons and entities” who designed the tire. Without naming a single individual or entity, Cooper Tire responded: “Cooper employs many individuals in the various tasks which collectively can be considered ‘designing’ a particular tire thus no single person can be considered to have ‘designed’ the subject tire.”

A response to an interrogatory about the company’s “implementation of any policy, procedure or method and/or material to prevent tread separation” stated unhelpfully and in total contravention of any disclosure standards: “Cooper continually seeks to improve the quality of its products including but not limited to elements such as ride, appearance, uniformity, noise and durability.”

The plaintiffs allege that Cooper Tire’s failure to comply with legitimate disclosure requests is part of its “programmed response to discovery in cases involving tread separation.” In support of this claim, the plaintiffs produced five court orders in five different lawsuits against Cooper Tire in which both state and federal courts held that the company engaged in, *inter alia*, “bad faith” and “wilful disobedience” during the discovery process.

On October 24, 2003, Cooper Tire cross-moved for a protective order and to compel plaintiffs to produce the subject tire for its inspection.^{FN2} The motion court in a decision of June 8, 2004, ordered Cooper Tire to provide “more adequate responses.” The court further ordered Cooper Tire to disclose, subject to a protective order, the ingredients of its tire formula though not the amounts or order in which they were used, and a general description of the curing process. Additionally, the court limited the scope of disclosure to tires with the “same green tire specifications” and limited the time frame regarding

post-manufacture records to the period from March 14, 1995 (the date the court designated as the manufacturing date of the subject tire) to the date of the accident on March 1, 2001. The order of June 8 further held that plaintiffs were entitled to pre-manufacturing documents regarding the design of the subject tire, and post-manufacture documents relating to the testing and inspection of the tire; as well as documents regarding any complaints, legal or consumer, about tread separation.

[FN2](#). It is worth noting that plaintiffs allege that they, themselves were not able to examine the tire except for limited access because its release by Canadian authorities was, in fact, predicated on Cooper Tire's consent in writing.

***50** On June 21, 2004, Cooper Tire sought a stay of enforcement and moved to reargue. Protective order notwithstanding, Cooper Tire argued that the motion court had misapplied the law because its tire formula and ingredients are trade secrets and “not subject to disclosure under any circumstances.”

On November 10, 2004, the motion court rescinded its June 8 order, holding that it had misapplied the relevant law. The court now held that Cooper Tire's tire formula and curing process were trade secrets and not discoverable. It further ordered that the remainder of the disclosure sought by the plaintiffs be subject to a confidentiality agreement drafted by Cooper Tire, to the extent that the plaintiffs seek “technical data, research, materials, and documents that provide insight as to the inner workings of the company.” The court reinstated that part of its order limiting disclosure to tires with the “same green tire specification” and limiting the time of post-manufacture documents to the period between manufacture in March 1995 and the accident. Documents relating to the tire's design, testing and manufacture were further limited to a period of two years prior to the manufacture of the subject tire in March 1995 or from the time the tire was first designed, whichever was greater.

On appeal, the plaintiffs assert that the motion court erred in granting Cooper Tire's motion and in curtailing disclosure in a “manner tantamount to allowing respondents to conceal any relevant documents.” The plaintiffs further argue that the confidentiality order “cripples” their ability to conduct discovery and that the court's superceding order ignores Cooper Tire's history of wilful

disobedience and egregious conduct, which in several instances has prompted other courts to impose sanctions in the tens of thousands of dollars.

Specifically, the plaintiffs assert that disclosure relating to the ingredients of the tire formula goes to the heart of their products liability lawsuit, and that, in any event, Cooper Tire's formula for the now 11-year-old tire is not a trade secret. They further assert that evidence of available alternatives is particularly relevant and that limiting disclosure to the “same green tire specifications” is an “absurdity” given that it prohibits disclosure that could lead to relevant information of tread separation in other tires manufactured by Cooper Tire.

[\[1\]\[2\]](#) For the following reasons we agree, and modify the motion court's order to compel disclosure as detailed below. At the outset, we acknowledge that discovery determinations rest within the sound discretion of the motion court. [Andon v. 302-304 Mott St. Assoc.](#), 94 N.Y.2d 740, 745, 709 N.Y.S.2d 873, 876, 731 N.E.2d 589, 592 (2000), citing [Brady v. Ottawa Newspapers](#), 63 N.Y.2d 1031, 1032, 484 N.Y.S.2d 798, 798, 473 N.E.2d 1172, 1172 (1984). Further, we note that it is rare that such motion court determinations are reversed or modified on the law. Patrick M. Connors, *Practice Commentaries*, McKinney's Consol. Laws of N.Y. (2005), Book 7B, [C.P.L.R. 3101\(a\)](#), p 20. Rather, this Court is vested with the power to substitute its own discretion for that of the trial court even in the absence of abuse. [Andon v. 302-304 Mott St. Assoc.](#), 94 N.Y.2d at 745, 709 N.Y.S.2d at 876, 731 N.E.2d 589.

Here, upon review of the record, and having evaluated the competing interests, i.e., plaintiffs' need for information on the one hand and defendants' need to protect against competitive harm and burdensome demands on the other, we find that the ***51** motion court misapplied the law, and exercised its discretion improvidently.

[\[3\]](#) The law pertaining to disclosure in New York is clear and well settled. The scope of disclosure provided by [C.P.L.R. 3101](#) ^{FN3} is generous, broad, and is to be construed liberally. [Allen v. Crowell-Collier Publishing Co.](#), 21 N.Y.2d 403, 406, 288 N.Y.S.2d 449, 452, 235 N.E.2d 430, 432 (1968) (phrase “material and necessary” must be “interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy ...”). Article 31 was substantially amended in 1993 to broaden the reach of disclosure devices, but the general view is that the amendments merely codified

what New York courts had already effectively determined by making disclosure standards comparable to the liberal, federal standard of discovery under [F.R.C.P. 26\(b\)\(1\)](#). See *id.* at 407, 288 N.Y.S.2d at 452-453, 235 N.E.2d 430, citing *Rios v. Donovan*, 21 A.D.2d 409, 411, 250 N.Y.S.2d 818, 820 (1st Dept.1964); see also e.g. *Fell v. Presbyterian Hospital*, 98 A.D.2d 624, 469 N.Y.S.2d 375 (1st Dept.1983) (“pretrial disclosure extends not only to admissible proof but also to testimony or documents which may lead to the disclosure of admissible proof”). In effect, the interpretation of [C.P.L.R.’s 3101](#) disclosure standard by the courts of this state “demonstrates New York’s commitment to ensuring that cases be decided on their merits after a full vetting of the facts.” Patrick M. Connors, *Practice Commentaries*, McKinney’s Consol. Laws(2005), Book 7B, p. 18.

[FN3. C.P.L.R. 3101\(a\)](#) provides that “There shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof.”

Cooper Tire seeks to roll back the clock on liberal disclosure. Review of the record in this case reveals instances where Cooper Tire has exhibited “wilful disobedience, bad faith and gross indifference to plaintiffs’ rights” in the discovery process. Courts in different jurisdictions have found that Cooper Tire has committed numerous discovery violations, including improperly withholding documents; wilfully concealing evidence; wilfully concealing the existence of discoverable information; and destroying documents it knew or should have known would become material in litigation. Now, Cooper Tire arrives at our door exhibiting what can only be characterized as a serious misapprehension that this Court will permit it to violate disclosure requirements in New York. [FN4](#)

[FN4.](#) As an illustration of Cooper Tire’s bad faith and attempt to mislead this Court we note that in its motion to reargue, Cooper Tire assured the court below that it would be willing to indicate “whether or not halobutyl rubber was used in the manufacture of the subject tire.” Now, on appeal, Cooper Tire argues thus: “information regarding specific ingredients of the compound formula (halobutyl, antioxidants and antiozonants) is clearly part and parcel of the trade secrets

protection granted by the court below [and] as pointed out in its motion to reargue, Cooper’s rubber compound ingredient and formula cannot be disclosed under any circumstances.”

First, we modify that part of the motion court’s November 10, 2004 order holding that the tire formulae and curing process are trade secrets and not “discoverable” if by the term “formulae” the court intended to include the ingredients of the formulae. [FN5](#) *52 Additionally, even if the ingredients of the formula for the subject tire were deemed to be a trade secret by the court below, the court erred in determining they are not discoverable.

[FN5.](#) In its June 8, 2004 order the motion court held that “defendant has met the burden of demonstrating that the *formula of ingredients* used in the manufacture of tires [is a trade secret].” The court then ordered defendants to disclose “the ingredients in its tire formula” but not the “amounts of each ingredient” or the “order in which they are used.”

Cooper Tire moved to reargue asserting, inter alia, that both the “ingredients” and the “compound formulae,” that is the “manner and order they are put together” are trade secrets, and that the motion court had made an invalid distinction between them. Cooper Tire thus argued that neither the ingredients nor the formulae could be subject to discovery “in any fashion.” On November 10, 2004, the motion court rescinded its original order finding that it had “mis-applied the relevant law.” The motion court then observed that Cooper has demonstrated that its “tire formulae” is a trade secret, and not discoverable by plaintiffs.” However, nowhere in its entire opinion, did the motion court refer to Cooper Tire’s argument about the invalidity of the distinction, or state that the term “formulae” as used in the new order included the ingredients/components in the formula as well as the manner and order in which they were used.

[\[4\]](#) In New York when trade secrets are sought by an adverse party in litigation, the burden of establishing that the information sought is a trade secret lies with the disclosure objectant. If that burden is met, the party seeking disclosure must show that the

information appears to be indispensable and cannot be acquired in any other way. [Curtis v. Complete Foam Insulation Corp.](#), 116 A.D.2d 907, 909, 498 N.Y.S.2d 216, 217 (3d Dept.1986) citing [Drake v. Herrman](#), 261 N.Y. 414, 185 N.E. 685 (1933).

[5] Cooper Tire urges this Court to accept that the motion court properly determined that the ingredients as well as the formula are trade secrets, and that the plaintiffs failed to establish that the information is indispensable to their case. The plaintiffs, however, maintain that the court's November 10 order merely restated that the defendant's tire formulae and curing process are trade secrets and that the ingredients about which the plaintiffs seek disclosure were not intended to fall within the term "formulae." Regardless of the motion court's intent, we reject Cooper Tire's assertion that the "formula is the ingredients" and find that a distinction can be made between the formula and the ingredients thereof. See [Thomas v. Soft Sheen Product Co.](#), 118 A.D.2d 493, 500 N.Y.S.2d 108 (1st Dept.1986) (distinction made between actual combination and percentage of ingredients in a hair care formula and the ingredients themselves). More significantly, we are not persuaded that either the ingredients or the formula of the subject tire deserve trade secret protection in this case.

New York law has adopted the definition of a trade secret from the Restatement of Torts (§ 757, comment b) and recognizes that a trade secret exists where there is a "formula, pattern, device or compilation of information ... used in one's business, ... which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it." [Ashland Mgt. Inc. v. Janien](#), 82 N.Y.2d 395, 407, 604 N.Y.S.2d 912, 917, 624 N.E.2d 1007, 1013 (1993) (internal quotation marks omitted); see [Wiener v. Lazard Freres & Co.](#), 241 A.D.2d 114, 123-124, 672 N.Y.S.2d 8, 15-16 (1st Dept.1998), citing [Restatement \(Third\) of Unfair Competition § 39](#).

[6][7] Cooper Tire seeks to categorize the formula and ingredients of an 11-year-old tire as a trade secret stating that it is "crown jewel scientific information developed through thousands of man-hours of research and testing and the expenditure of un-told millions of dollars." This conclusory assertion does not meet Cooper Tire's burden to demonstrate that the information at issue is in fact a trade secret. First, cost, whether it be assessed in time, dollars or both, is not dispositive in determining whether a process or formula involves a trade secret. Second, although

*53 Cooper Tire asserts that disclosure of a formula and/or ingredients of a tire manufactured more than 11 years ago could have a "devastating" effect, and that the formula is the "lifeblood" of the company, there is nothing in the record to suggest Cooper Tire continues to use the same formula or ingredients that it used more than a decade ago in the manufacture of the subject tire. On the contrary, the following is an illuminating passage from a case that Cooper Tire cited extensively before this Court: "[a]s automobiles ... continually change through technological improvement ... this, of course, necessitates continuing changes in the components of those tires and in the rubber compounds used in those components." [Bridgestone/Firestone, Inc. v. Superior Court](#), 7 Cal.App.4th 1384, 9 Cal.Rptr.2d 709, 715 (1992).

[8][9] In any event, as the Court of Appeals has observed, information cannot qualify for trade secret protection unless it is, in fact, secret. [Ashland Mgt. v. Janien](#), 82 N.Y.2d at 407, 604 N.Y.S.2d at 917, 624 N.E.2d 1007. Considerations pertinent in determining whether information is secret include "the extent to which the information is known outside the business" and "the ease or difficulty with which the information could be properly acquired or duplicated by others." *Id.*, citing [Restatement of Torts § 757](#), comment b.

The plaintiffs, who state that they are not seeking the formula but only information about ingredients, argue that to classify those as a trade secret is improper because some of this information is patently not secret. For example, a publication titled the Smithers Report reverse engineers tires, and thus identifies various components of tires produced by various tire manufacturers. The record includes confirmation during the deposition of a principal chemist for Cooper Tire in another lawsuit involving a defective tire, [Coleman v. Cooper Tire and Rubber Company](#), CV202-036 (S.D. Ga. Brunswick Div.2002), that the Smithers Report, on a regular basis, identifies ingredients used in the construction of tires. For example, the reports include whether natural or synthetic rubber is used, and information about polymers, chemical compounds that make up the skim stock compound, reinforcement material and softeners or plasticizers used in the tire. Further, the plaintiffs point to the testimony of another Cooper Tire chemist as to ingredients used in making certain tires, and establish that testimony was given without any demand for confidentiality.^{FN6}

[FN6](#). The availability of information through sources like the Smithers Report does not necessarily aid the plaintiffs since first, it is unlikely that the Report would be admissible evidence; second we find most persuasive the plaintiffs' argument that while forensic tire experts can testify as to propriety of the compound formula by observation and inspection or testing similar tires, "unless the [information] is provided the defendants will undoubtedly seek to discredit the plaintiffs' expert at the time of trial by claiming either that observation and inspection alone is insufficient or that the testing was erroneous and did not correctly identify the components."

[\[10\]](#) Even if Cooper Tire had met its burden to show that the ingredients are a trade secret, it would be unavailing since there is merit in the plaintiffs' assertion that disclosure of the ingredients and alternative tire designs is indispensable to their products liability lawsuit. Cooper Tire argues that plaintiffs do not need the information about the formula or the ingredients since they claim that plaintiffs' expert has already examined the tire and found it defective without that information. Cooper Tire also cites to [*54Bridgestone/Firestone, 7 Cal.App.4th 1384, 9 Cal.Rptr.2d 709](#), where the plaintiffs failed to show that tire formulae were "relevant and necessary" to prove that the tire was defective. In that case, however, the focus of discovery demands was the rubber compound formula, and the tire expert for the plaintiffs in the product liability action conceded that he did not need the formula to establish a prima facie case that the tire was defective.

Here, the plaintiffs maintain that it is not the formula that is the focus of their disclosure demand but the ingredients or components of the subject tire. Further, they assert that, since they are alleging a design defect, the information they seek about the ingredients is indispensable to their cause of action. The plaintiffs correctly assert that they "must be able to demonstrate to a jury how and why the tire failed and what design and manufacturing alternatives existed which were not employed in the design and manufacture of the subject tire."

Specifically, the plaintiffs assert that they must learn whether Cooper Tire used components like halobutyl, a superior form of rubber compound, and various antioxidants and antiozoants. They maintain that in a products liability action, evidence of available

alternatives is particularly relevant.

[\[11\]](#) Ultimately, in substituting our discretion for that of the motion court and compelling disclosure of the ingredients in the formula for the subject tire, we must balance the plaintiffs' need against the defendants' possible injury from competitive harm. The motion court accepted the conclusory assertions of the affidavit submitted by Lyle Campbell, Cooper Tire's in-house forensic tire expert and consultant, wherein Mr. Campbell stated that disclosure of the formula and curing process would "put the company out of business" and cause "irreparable harm." The motion court observed that Mr. Campbell "appears to be qualified to make such an assessment."

We are not persuaded by Mr. Campbell's assessment or by Cooper Tire's assertion that even if the ingredients are subject to a protective order and even if the plaintiffs' witnesses or experts are not given copies of the formulae to retain, nevertheless the recipe for the compounds "*would remain in their memory.*"

Thus, Cooper Tire is ordered to make disclosure forthwith of such information about the ingredients of the subject tire and about alternative designs as the plaintiffs have requested. More specifically, Cooper Tire will provide the plaintiffs with documents and answers responsive to their inquiries as to whether halobutyl rubber was used in the manufacture of the subject tire, and if it was not, to identify the product that was used instead; and will disclose whether antioxidants and antiozoants were used in the manufacture of the subject tire; and Cooper is further ordered to provide information and documents regarding Cooper's use of nylon overlay.

[\[12\]](#) Next, we find that the motion court erroneously limited the scope of disclosure to tires with the "same green tire specification" as the tire in question. The plaintiffs initially moved to compel disclosure, in part, because Cooper Tire refused to produce documents unless they related to tires that had the 'same green tire specifications' and were manufactured in the same plant as the subject tire. The plaintiffs requested disclosure on similar tires, defined as those with the same or substantially similar skim stock material and those with the same or substantially similar belt wire material. We accept Cooper Tire's explanation that tires, even those with the same belt wire or skim [*55](#) stock, may be different in size or type and therefore do not qualify as substantially similar.

However, we reject the claim of Lyle Campbell, Cooper Tire's previously mentioned forensic and technical consultant, that "from an engineering and technical standpoint" similar tires are those manufactured to the same green tire specifications and that only those tires manufactured to the same green tire specifications are sufficiently similar to be "capable of meaningful comparison."

According to an affidavit submitted by Cooper Tire, a green tire specification is the "blueprint to which a given tire is manufactured ... It states the dimensions, weights, and physical attributes of the components in a tire. It also states the order in which the components are placed in the tire during the manufacturing process." Where "same" green tire specifications exist they refer to tires that are identical right down to the color of the sidewalls. According to Cooper Tire's expert, tires have different green tire specifications even though they are identical except for the color of their sidewalls.

In effect, the motion court's order to limit disclosure to tires with same green tire specification limits disclosure to identical tires. Yet, there is simply no evidence in the record, nor any rationale, that suggests that tread separation is limited to either one or a range of green tire specifications. Tread separation problems may be present in tires other than those sharing the same green tire specifications, and thus the scope of discovery in this case should include documents relating generally to the tread separation defect or problem.

To rule otherwise would mean, as the plaintiffs assert, that Cooper Tire would not produce documents in which tread separation and foreign object contamination is discussed generally. For example, the plaintiffs point to Cooper Tire's communications with government agencies, or company documents where tread separation in tires made of the same materials but not same specifications has been analyzed. The plaintiffs maintain, and we agree, that such information is of "vital importance irrespective of the make of tire involved [since] it contains evidence of what Cooper Tire knew of belt and tread separations." As plaintiffs assert, to limit disclosure to "same green tire specifications" rather than to tires with the same defect of tread separation is an "absurdity" since Cooper Tire will be able to conceal documents probative on the issues of notice, defectiveness and dangerousness. For the same reasons, it would be absurd to limit disclosure to the same plant as the one where the subject tire was manufactured.

[13] We have held that disclosure on the issues of the manufacturer's notice of the alleged product defect is an essential factor in products liability and negligence actions. Power v. Crown Equip. Corp., 189 A.D.2d 310, 596 N.Y.S.2d 38 (1993). Thus, the plaintiffs are entitled to pre-manufacture disclosure going back to 1985, which information is material and relevant on the issue of whether Cooper Tire had notice of the alleged defective condition that resulted in tread separation. See Harmon v. Ford Motor Co., 89 A.D.2d 800, 453 N.Y.S.2d 475 (1982). The plaintiffs have established in the record that Cooper Tire proposed a settlement of 32 pending class actions and offered their customers a free replacement tire for every steel-belted radial manufactured between 1985 and 2001 that suffered tread separation as a result of a manufacturing defect. Therefore, the motion court's ruling that the only pre-manufacturing disclosure allowed was that relating to the subject tire's design, testing and manufacture for a period *56 limited by the court is erroneous as is the ruling that denied plaintiffs discovery as to notice of defective conditions.

[14] While defendants contend that it is unduly burdensome to produce these requested documents, the claim is without merit since Cooper Tire has had to produce the same documents in other actions involving tread separation and, as other courts have found, the company has the information concerning all of its radial passenger tires with allegations of tread separation in its computer system.

[15] Finally, we acknowledge that judicial safeguards in the form of protective orders and confidentiality agreements exist and are mandated for information which is "subject to abuse if widely disseminated." McLaughlin v. G.D. Searle Inc., 38 A.D.2d 810, 811, 328 N.Y.S.2d 899, 900 (1st Dept.1972). In this case, however, the motion court improperly adopted wholesale the "draconian" protective order drafted by Cooper Tire whereby Cooper Tire was effectively permitted to unilaterally designate any document it chose as confidential.

[16][17] In Bristol, Litynski, Wojcik, P.C. v. Queensbury, 166 A.D.2d 772, 773-774, 562 N.Y.S.2d 976, 977-978 (3d Dept.1990), the court held that protective orders should be limited to trade or business secrets and are required to be specific. In similar fashion, this Court finds that the following are not trade or business secrets and are not proper subjects of a protective order or promise of confidentiality: the job descriptions of identified

personnel; pleadings and bills of particulars for similar litigation; customer complaints; records of returns involving tire tread separation; the brand names of tires having the same green tire specifications; sources of parts and materials-unless Cooper buys all of its ingredients from outside sources. Further, "confidential" material shall not include (a) advertising materials, (b) materials that on their face show that they have been published to the general public, or (c) documents that have been submitted to any governmental entity without request for confidential treatment.

[18] Moreover, Cooper Tire's confidentiality agreement is unacceptable as to form. The plaintiffs assert, and upon review of the record we agree that, as drafted, the protective order and Promise of Confidentiality varies substantially in form from the protective orders granted Cooper Tire in other cases. Particularly unacceptable is the clause dealing with the threat of a 10-year jail sentence. None of the confidentiality promises from other cases submitted by Cooper Tire threatens potential witnesses with a 10-year jail sentence. Second, none of the protective orders from other cases submitted by Cooper goes so far as to prevent anyone who has consulted for a competitor or an entity in privity with a competitor within the past two years, or who expects to perform such consultation in the next two years, from seeing confidential documents, even at a deposition. That provision must be amended before the confidentiality agreement is used. As presently written, the protective order also appears to prevent the actual plaintiffs (the clients, as opposed to their lawyers) from seeing confidential material unless they happen to be deponents. On appeal, however, the defendants concede that the plaintiffs may have access to confidential material.

Accordingly, the order of the Supreme Court, Bronx County (Nelson Roman, J.), entered November 18, 2004, which, in an action for personal injuries allegedly caused by a defective tire, upon reargument, granted defendants manufacturer's (Cooper Tire) and distributor's (TBC Corporation) motion for a protective order, *57 and partially denied plaintiffs' motion to compel disclosure, should be modified, on the law, the facts and in the exercise of discretion, to compel full disclosure as detailed in, and consistent with, this Opinion, and otherwise affirmed, with costs in favor of plaintiffs payable by defendant Cooper Tire.

Order, Supreme Court, Bronx County (Nelson Roman, J.), entered November 18, 2004, modified,

on the law, the facts and in the exercise of discretion, to compel full disclosure as detailed in, and consistent with, the Opinion herein, and otherwise affirmed, with costs in favor of plaintiffs payable by respondent Cooper Tire.

All concur.
N.Y.A.D. 1 Dept.,2006.
Mann ex rel. Akst v. Cooper Tire Co.
816 N.Y.S.2d 45, 2006 N.Y. Slip Op. 04335

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