# ORAL ARGUMENT – 09/25/02
# 01-1165
# BRIDGESTONE V. TEXAS PLAINTIFFS STEERING COMMITTEE

YEATES We're here today on mandamus because Judge Mayes contrary to other Texas courts and contrary to the courts in the rest of the country, has held that Firestone must disclose its secret formula for its skim stock in its tires. And the plaintiffs admit at page 9 of their brief on the merits, they say they do not challenge Judge Mayes' finding that Firestone skim stock formula is a trade secret. So that means that the right analysis...

ENOCH: Do you agree with their statement that your client settled every time a TC orders them to produce the skim stock formula?

YEATES I think that statement actually was made in connection with counsel's statement that his understanding was that it had been produced. And we cited the cases, including a case from this court, that understanding is not personal knowledge. There is no evidence of any personal knowledge that this formula has ever been disclosed anywhere else.

ENOCH: No it wasn't the disclosure. Bridgestone makes a point that there is no record of any court having ordered this to be produced. And his comment was, well there is no record of that because the moment the court says they are going to order production, that particular case gets settled and the production isn't met. So I'm just asking if you agree with that?

YEATES I'm not aware of that. It's not my understanding. There's no evidence in this record of that. Certainly the formula has never been turned over. Going to the Continental Tire case analysis, the first step in the analysis is that it is established that the formula is a trade secret. So we move to the second step, which on our poster is the red step. Where the burden shifts to the plaintiff to produce evidence to establish that disclosure of the trade secret is necessary for fair adjudication.

Now what is necessary for fair adjudication mean? In the Continental case the court held that necessary to fair adjudication is a heightened burden of proof, and it's more than mere relevance. So on our spectrum we start in the blue area with information that's useful in the sense that it might lead to relevant evidence. Then you go up higher, you get to evidence that's actually relevant and probative. And finally above that you have evidence that is necessary to the litigation.

HANKINSON: What does necessary to the litigation mean?

YEATES That's exactly the question that we're here on today. And some of the courts that have addressed it are excerpted in Tab 2 of our poster booklet. There are two cases in particular that this court relied on heavily in Continental Tire. One is this court's decision in Automatic Drilling. And the other is a California court decision in the Bridgestone case, where that court said

that necessary means necessary to the proof of the plaintiff's cause of action.

HANKINSON: But does that mean that the plaintiff has to say, my case would be disposed of as a matter of law. I have no case to put on if I don't have this evidence. Do they have to go that far?

YEATES They have to prove that if they needed to make out a case.

HANKINSON: In other words, does that mean they have to say I have no other proof but this, so let me have this otherwise I can't do it?

YEATES They have to say they have no other proof that would permit them to make out a cause of action.

HANKINSON: So this is a pretty risky move on the part of a plaintiff to go into court and say, if I don't get this proof, then I can't go forward with my case. Because the next thing you're going to do is come in with your summary judgment motion and you're going to say, they are out of here because they didn't meet...this becomes dispositive of the case.

YEATES We're balancing two competing interests.

HANKINSON: I understand. But your view of necessary means it becomes dispositive of the case. Couldn't there be another view of necessary though? Would you agree that since cases are about persuading, that it's not just a matter. We certainly like cases if we are either defending or prosecuting them in which we have multiple pieces of information to put to the jury, because the more we can say to the fact finding the more likely we are to persuade.

YEATES Yes.

HANKINSON: But you don't get that option in a case involving trade secrets?

YEATES I think you're talking about relevance. I think relevant information, all the relevant information you have that's otherwise admissible, and I'm talking about a trade secret privilege which has its own value to be protected, which I have to establish that it's really a trade secret. In the case before you, is a case where it's established that it's really a trade secret. That's a special kind of thing.

ENOCH: You're leaning to my question about that. Is this additional step over relevance is the heightened burden higher than getting at attorney work product privilege, which you can under the rule, is this burden trade secret due to a greater protection than work product privilege of the attorney or the same protection of work product?

YEATES It's probably analogous. Because you know, fraud for example is an exception

for work product, and 507, the rule on trade secret of course talks about except for fraud, and where necessary for fair adjudication you don't get the trade secret.

ENOCH: Attorney/client privilege is not discoverable. Core work product of the attorney is not discoverable. But there is work product that is privileged, but if you meet a certain standard you can get that information. So you're saying this is really what we're talking about.

YEATES Right. That's the analogy. Because in the Continental Tire case, the court rejects the notion that there's an absolute trade secret privilege, and allows for situations where you meet this burden of proof to get it.

HANKINSON: But the good cause exception under the work product doctrine is a little bit less than the necessary standard.

YEATES I think that's probably right. I didn't say they were equivalent. But I think this case is really easier than what you're struggling with because you have to look at the evidence that these plaintiffs put on. And there's only two affidavits. There are only a few pages in the record. It's the affidavit of expert Och, and the affidavit of expert Carlson.

HANKINSON: As I understand it under your definition of what evidence is necessary, you contend that the fact that the plaintiff's experts have also said that they can study the tires themselves to make the determination basically puts them out of the ball game. That it doesn't really matter what else they said. It matters that they said we can also get there another way.

YEATES You can dispose of it before you reach that point. I think that's true what you say.

HANKINSON: Under your theory of necessary isn't that right?

YEATES Yes. But I think you can dispose of it without reaching that issue if you look at their affidavits, because the affidavits don't say the evidence is necessary. The affidavits say the evidence is relevant and it's probative. And they say here's why it's relevant. It's relevant in that they want to compare what is supposed to be in a tire with what material is actually found in the failed tire. This is why they say they want the skim stock formula. And they don't tell the court that they have to have the skim stock formula to make this comparison.

HANKINSON: What does best way mean compared to necessary?

YEATES That's exactly where I am going. If you look at the language in their affidavit they say the best way to decide what's supposed to be in the tire is to have the formula. Now the reason that experts Carlson and Och say that's the best way is that they know it's not the only way. So you see on the face of their affidavits they are conceding that it's not the only way.

And let me show you another way to look at that, and that is our experts show, and this is not disputed by Och and Carlson, because after they say looking at the formula is only the best way to know what's in the tire, we say that you can compare the - if you're looking for contaminants, which is what they are looking for, that you can compare the failed tire to other finished tires and say, look, you know there's something in the failed tire that's not supposed to be there.

HANKINSON: But why does what your expert say make any difference? This is an abuse of discretion standard, and if we've got conflicting evidence then - I mean if they've met the necessary standard, the fact that your experts may have said something different doesn't make any difference because it would be within the discretion...

YEATES But look at what their experts say.

HANKINSON: I understand. I'm just trying to understand how all this is going to work. Under the abuse of discretion of standard if they really did meet the necessary standard and you came back with your expert saying, no, that's really not necessary and here's why, and the trial judge chose to believe their experts, then game over because we've got an abuse of discretion standard and it would be up to the TC to decide...

YEATES But that's not this case.

HANKINSON: I understand. I'm trying to understand the implications for all this. If that is the case, then in fact we would not overturn a TC's decision under those circumstances.

YEATES If there was evidence that we have the step of necessary for the adjudication, then you would be in a different scenario. But our position here on this mandamus is that they don't have that evidence and on the face of their own affidavits they don't have the evidence. Because they say the best way to decide what's in the tire is to look at the skim stock. And they don't say, the only way to know what's in the tire or supposed to be in the tire is the skim stock. And if you go back to the two cases that this court relies on, In re Continental that are excerpted at Tab 2, and Automatic Drilling that's a case from this court that is cited with approval in Continental. This court said it has to be necessary to the litigation and unavailable from any other source. And our position is, when their experts say the best way to know what's in the tire, they are conceding that it's available, ie. it being what's in the tire is available from other sources.

HANKINSON: I understand that there is some debate on whether there's an allegation in this case that there may have been some sort of cost cutting that led to a formula using inferior ingredients. And then if we talk about the best way is to - we've got to know what's in it if we are going to determine if there was cost cutting. I know that there is also questions about the manufacturing process. But there may be a theory in this case if there was cost cutting associated with the ingredients being inferior at the front end. Doesn't that present a different issue and a different analysis?

YEATES No. Because they still would have to have evidence that they needed the skim stock formula, that it was necessary for them to demonstrate the defect at the front end in order for the cost cutting to have any relevance. And that's what they are lacking here. What they don't do, is they don't come into court because they can't, because it's not true. They don't come into court and assert in their expert affidavits or otherwise that they need this formula in order to opine that the tires are defective. They couldn't of course, because in hundreds of these cases across the country their experts have been opining all over the place that these tires are defective without the skim stock formula.

And in the California Bridgestone case at Tab 2, the court said, in order to show necessary for the adjudication, the expert must show how the formula is a predicate to the expert's ability to reach his conclusions. And these experts are telling the court, we don't need it to reach our conclusions, but we would like to have it. That's what they are saying. And if you read their affidavits that's what's so fascinating. Because first they admit there's another way to figure out what should be in the tire, and then they go on to say I would like to have it. They say, I would like to see it, to see if they reveal further information regarding the tires. And that kind of evidence on your spectrum here is down in the blue.

RODRIGUEZ: Just to be clear. They admit that there's another way and your basis for saying that is because they say the best way, which assumes that there is another way?

YEATES Yes. And the fact that there is other evidence in the record that they don't refute that there is others way. What I was trying to demonstrate that, their own expert, Mr. Och, admits repeatedly in deposition and admits in his affidavit that the tire curing process chemically changes some of the ingredients. That's the vulcanization process.

So what we've said along is, why do you want the skim stock formula? The skim stock formula is a chemical composition that is changed through vulcanization, and then you get to a completed tire. And the completed tire, which of course if the rubber that really hits the road, the completed tire is what the chemical composition is really supposed to look like in a finished tire. And so that's why we have said that's the better comparison. But you know, I don't care whether my comparison is better or his is better. It doesn't matter. The point is there's at least two comparisons that can be made, and, therefore, they don't meet the standard under Automatic Drilling from this court that there's no other way for them to make this out. And it's also interesting what's not in their affidavits.

O'NEILL: How does this work at trial? It seems like it would be real easy to open the door, and when that's happened in the past has the case just settled?

YEATES What we say, and we said it in the TC and I'll say it today, we're perfectly willing to have a limine order that says we're not supposed to say that our formula is not defective or is great or anything like that, that we're not supposed to mention the formula.

O'NEILL: I'm not talking about your mentioning it. In picking apart their expert, I could see how you would try to say, well but you're picking holes in their theory when they have said the best way is to do it this way. So it would seem to me at trial it would be fairly easy to open the door on it. And I just didn't know if that's happened.

YEATES The truth of the matter is, if you look in our record, we provide excerpts from their various depositions, excerpts from their reports where they show you how they prove defect. And that's what my pie chart is trying to show. I'm trying to address your point that they can easily go into defect without opening the door, because they do it in all these cases.

O'NEILL: I'm talking about you opening the door on cross-examination.

YEATES If I open the door, then we've left ourselves open to that argument as far as the formula. That's our whole point here, because it's not necessary to adjudicate these cases, we don't need to open the door. And we want.

HANKINSON: Is it also inappropriate if you prevail under this particular rule and keep the skim stock formula from being disclosed, that you could be limined at trial from cross-examining their witnesses at all in a way in which would imply that their work is incomplete or they haven't done things the best way, because they haven't looked at your skin stock formula? In other words, I understand if they are sitting there saying this is the best way and they would like to see it and you all have the information, you have information that you could use against them at trial, so you would say that another step of this would be, it would be appropriate for the trial judge to grant the motion in limine to prevent cross-examination that could go back to this particular issue.

YEATES With respect to the skim stock. But when you look at all the other different ways they are going to prove defect we'll have lots of ways to cross-examine.

ENOCH: I suppose there's any manner of way that the manufacturing process could be defective. But it seems to me there's any manner of way the designing process could be defective. And the design this is just a chemical reaction, so the design could be the composition of the chemicals could it not?

YEATES It could.

ENOCH: So if I allege there's a design defect in the tire under any chemical composition scenario that's _____ trade secret by the manufacturer. You can't get the trade secret if you can prove "defect". But how do they prove a design defect if that's their complaint?

YEATES The same way they've done it in all the matters that are in our record. They look at the properties of the tire that a tire should have like adhesion or elasticity. And they examine the tire and they say, that's the expert examining and testing the failed tire, they compare it to other tires. And they look at the root cause study all of which have been done without the skim sock

formula. So they look at this mass of universe of tires and they say, tires should have these properties -elasticity, adhesiability, that kind of thing, and they say this tire does not. And they look at the failure of the tire. And this is what these experts have done in these cases. They look at the way the tire failed.

ENOCH: And so the jury is free to infer that the chemical composition must have been wrong?

YEATES They don't go that far. If they were going that far their affidavits would be different here. They are able to get to defect...

ENOCH: Bridgestone takes the position that one of the reasons the skim stock is not important in this case is because tires cannot be reverse engineered. You can't melt the tire down and determine what the original formula was. But do scientist agree that - I mean is it commonly accepted that because it cannot be reversed engineered, the original formula plays no role in the design of the tire?

YEATES No. the real reason that we brought up you can't reverse engineer is to prove trade secret, because obviously if you could reverse engineer you could go down to the Firestone store and buy a tire and figure out what the formula was.

ENOCH: But the flip side of it is, doesn't that raise the level of this notion of the best evidence of a design defect if everybody concedes that simply looking at the failed tire or even a brand new tire will not reveal one of the significant design characteristics of the tire, which is the chemicals that are used and the ratio of these chemicals to that tire. And the experts are saying, we can prove any number of defects about the tire, but there's one significant component in the design process of this tire that is the chemical mixture that they used, which is not available to us under any circumstance and Bridgestone agrees. You can do anything you want to this tire, but we agree, we will not reveal one of the significant design characteristics of the tire which is the chemical.

YEATES Keep in mind that their own expert, Mr. Och, while he admits that the ingredients are changed, claims that it's very relevant to him to know what the formula was anyway, even though he admits you can't reverse engineer. The finished tire has chemical components and properties. You can take a finished nondefective tire and analyze the heck out of it and know all of what its chemical properties are. And that tells the plaintiffs' experts a whole bunch. If you will look at the root cause studies that have been done...

ENOCH: But it doesn't reveal the design characteristics.

YEATES But you're assuming that they need to know that in order to show defect. And all of the root cause studies, which have all been done without the formula...

ENOCH: Maybe I make a distinction between - to show a defect and to show a design

defect when one of the significant design components is not available for them, and the admission that no matter how much work they put on the tire, they will never find the design components.

YEATES This skim stock formulas is used in all our passenger tires. It's the same skim stock formula for every passenger tire, not just the tires in this litigation. Nobody is here asserting that every Firestone tire is defective. That's why they really don't need the formula, because they are able to determine what's wrong with this particular line of tires, just like it's been done in all the root cause analyses that have been done by Ford, Firestone, Dr. ____, and the National Highway Safety without the formula by the methods that we talked about: by testing the tire, by comparing it to other tires, by testing the universe of returned tires by doing other laboratory tests on the chemical components without having the trade secret. So, yes, would it be nice to have the trade secret? Maybe if you wanted to have every piece of relevant evidence, but that's the point of the Continental standard. You have to weigh how bad do they really need that formula against the fact that it's a trade secret.

You know the other companies have never revealed their formulas. They don't have somebody elses formula to go compare my formula too it, because these are all trade secrets.

O'NEILL: Have your experts ever taken the position that the failures were caused by a combination of events that science currently can't figure out?

YEATES: No. I don't think that's our position. They do take the position that there are a combination of factors that have to come together to cause these accidents: like the degree of inflation of the tire, the heat, how hot the climate is. That's why we've had more of the accidents in the Southern states. There are a number of factors that come together, including one of the things they pointed out is the manufacturing process in the Decatur plant. Which by the way is also a trade secret, but Judge Mayes let them have that and we didn't dispute that on mandamus. So these folks have been through the manufacturing process in the Decatur plant. The very thing that the root cause studies point to as the problem, they've seen. They have all that evidence.

That's the point here. They've got all kinds of evidence in this case. They don't need this. And you know J. Enoch, you started with the point about it settles when you order. That's really the fairness factor that I think we ought to look at. How it skews the litigation. Because they want to get your trade secret, and if they can get your trade secret boy that puts a real onerous on a defendant to want to settle. It sure does. And think about how that skews the litigation in a situation such as this where they have not met their burden to prove they really need it for a fair adjudication of their case.

* * * * * * * * * *

RESPONDENT

PHIFER: I think this case is one of historical significance for not only Texas but for the

rest of this nation. Texas unfortunately was one of the hardest hit states by this tragedy. This is a product recall involving 19 million tires. The ATX and Wilderness tires that were manufactured by Firestone. Hundreds perhaps thousands of deaths or injuries have been associated and attributed to these tires as they failed in use on the highways of this country.

It is the largest recall of tires in American history. And yet Firestone contends that this tire is still deserving of protection.

HANKINSON: What do you think necessary for a fair adjudication means? What's your position on that?

PHIFER: That's a question that I think we have to look at Dupont v. Robinson for an answer, and for guidance. Because this is a standard that this court has struggled with before is how do we raise the standards for expert testimony to make sure that we have a fair presentation of the evidence to the jury, so that they aren't missing valuable pieces of the litigation puzzle.

And in Dupont v. Robinson they say that you have to look at the methodology of the expert. He has to be able to exclude other causes of the problem. Are we going to take the best evidence away from that expert? Are we going to not allow him to have a critical piece of the design puzzle and then present him to the jury?

HECHT: I'm unclear from your brief of - when you say, on the one hand we have opinion evidence of defect, and then in another place in your brief you say, we can't prove our case without this formula. And then in a third place you say, well we don't really have to say one way or the other. So I'm not clear what your position is on how important this has to be.

PHIFER: I think it is extremely important because of fairness and because of assembling all of the pieces of evidence. And I think it goes back to J. Hankinson's question earlier about do we withhold this piece of evidence? Do we make the lawyer and the witness come into court and say...

HANKINSON: I think J. Hecht and I are asking the same question. What does necessary for a fair adjudication mean? What do you have to prove? What standard do you have to meet in order to be able under Continental Tire to access this information? I understand you're talking all the policy reasons behind it. Ms. Yeates says it really has to be the only way. What do you think it means?

PHIFER: I would go back to the opinion that was written by Judge Mayes in which he weighed the interest of the parties. The risk of the harm to Firestone verses the particularized need of the plaintiffs for this information. I think he made a very reasoned and well founded analysis of the issue. He considered the conflicting affidavits from the experts and came to the opinion that in the fairness analysis...

HANKINSON: But let's say I have to write the opinion in this case. Because someone else

is going to be looking at it and they are going to want to know in a hearing the next time this issue comes up what their proof needs to look like. What am I going to say in this opinion about your proof that met the Continental Tire standard? How am I going to describe it? What am I going to say about it?

PHIFER: If I turn to the affidavits of our experts, first of all they give the opinion that they believe that there is a rubber compounding problem with the Firestone ATX, Wilderness tires. I do not see that level of proof in any of the other cases that the defendants have cited in which courts have held that this should not be produced.

HECHT: But why do they think that? Don't they think that because they can look at the tire that failed and say it didn't hold together the way it should?

PHIFER: That's a very good question. And I think that there is other evidence out there. If you look back at what Ford did and there is a great deal of evidence in the trial record that we attached, Tim Davis who was head of quality control at Ford, how investigations that Ford did in their root causes identified problems with the skim stock compound. In fact, the Firestone/Ford engineers when they met on this issue in July or August 2001 voted on what they considered to be the top 10 possibilities for problems with these tires and compounds was identified in the top 10 possibilities. And the Ford testing confirmed several problems with these compounds. A higher crossling(?) density in the compound, but they also identified high levels of sulphur in the compound. Much higher than any competitors tires.

HECHT: But when you say in the compound, do you mean in the vulcanized tire? When you take the failed tire and look at it, those are problems the experts think it has?

PHIFER: Not only us, but Ford.

HECHT: But what does that have to do with the formula? What difference does it make what the formula was as long as that's the end result?

PHIFER: Because that goes back to the initial design of the tire. Are they using more sulphur in the tire because it's a cheaper additive to use in the tire than using some other necessary material?

HECHT: I guess my problem is, I don't understand what difference it makes if they are or they aren't if the reason the tire failed is it's got too much sulphur in it.

PHIFER: I think then that question raises, are all of these tires suspect? Is the entire universe of these tires suspect? Even though these tires have been recalled, they have not admitted that all these tires are defective. In fact, they contend in their affidavit submitted to this court that there are a variety of other reasons why these tires can fail in service. What they don't want us to do is to get back to that basic design element, that basic _____ block of the tire and to be able to

say that the formula itself is intrinsically flawed.

HANKINSON: Can an expert look one of these tires that has too much sulphur in it and determine why there's too much sulphur in it?

PHIFER: My understanding is that they cannot. It could be a contaminant in the process. It could have been an initial ingredient in the manufacturing process.

HANKINSON: They just know there shouldn't be excessive sulphur or shouldn't be any or whatever?

PHIFER: Yes.

OWEN: I guess I'm confused. If some of the tires don't have an excess sulphur product and some do and they were all made at the same time at the same company, that indicates that it's not a formula problem doesn't it?

PHIFER: I don't think we've examined the whole universe of the tire. My understanding is that Ford routinely identified in these tires a higher than normal sulphur content across the manufacturing process. And that wasn't just a one tire or an isolated tire.

OWEN: Higher than normal as compared to other tires? What is normal? You're saying higher than normal.

PHIFER: Higher than the competitor's tires and higher than what Ford would have expected...

O'NEILL: You don't know the competitor's formulas though. So the only way you can compare is by the post-vulcanized comparison and that's apples to oranges.

PHIFER: Well the tire industry has a done very good job of aggressively pursuing this issue. In fact, I think that almost everyone of these cases that have been cited to this court have been tire cases. And Mr. Moran who is the attorney who argued for Firestone before Judge Mayes was the attorney who argued in almost everyone of these cases. The tire companies have taken a position, which I think is a mousetrap argument, that you can never have this formula unless you come in and say that you have no proof otherwise.

HECHT: You say at one point the only way that Firestone's defenses can be rebutted successfully is through discovery of the compound formulas. Is that your position? I mean you're going to lose this case if you don't discover these formulas.

PHIFER: I'm not saying that we are going to lose this case...

HECHT: What does that sentence mean? I'm quoting from your brief.

PHIFER: What I'm saying is this, and this is something that's very important, Ms. Yeates continued to talk about the investigations that Ford and Firestone have done. The Firestone root cause investigation, they had this material available to them. And the affidavits that they gave to the courts they say there's nothing wrong with the skim stock. Because we did our investigation there's nothing wrong with them. Trust us and accept our opinion without allowing anyone else to do an examination to verify that.

HANKINSON: Did Ford get to use the skim stock formula in its evaluations?

PHIFER: It's my understanding that Ford did not have that available.

PHILLIPS: Are you saying that the formulation we have _____ court said about what's necessary to get a trade secret _____, or at least it's got to be bent in a case where the damages are high enough, or do you just say that the way we have articulated the test is right and you meet that articulation?

PHIFER: I think that the test that you articulated in Continental is a very good test. And I think it relies upon the trial judge to do the very balancing that he did between the risk of harm and the...

PHILLIPS: You say Continental is right and Judge Mayes followed Continental.

PHIFER: I believe that's true.

PHILLIPS: Under Continental, how does this - you make all these arguments about it's the largest recall and all the damages and the people that are injured. How does that enter into our Continental test?

PHIFER: In everyone of these cases that I'm aware of that's been cited by Firestone in which courts have denied this, it's been an isolated incident involving a tire. We know that in this situation where there's smoke there's fire. They would not recall 19 million tires unless something was intrinsically wrong. We know from the number of tires that both of these experts who have given affidavits on the plaintiff's behalf have looked at, that there is a problem with the compounds, the glue that holds these tires together. And we know that from their own reports that they have identified a problem.

HECHT: But see if you know that, I don't see what else you're going to know by having the formula.

PHIFER: We're going to know whether that formula itself is flawed intrinsically. And there's another issue I would like to address, which is there are cases that are pending in which there

is no tire available for examination or analysis. And it is my understanding that Firestone is filing a motion for summary judgment in those cases on the basis that there is no tire available. And it's not due to the fault of the plaintiffs, because usually what happened these accidents occurred before the recall was announced: insurance companies may have taken the vehicle and destroyed the tire when they scrapped the vehicle. And without knowing that formula, in those cases there is no evidence.

O'NEILL: So you're saying that could be an instance not our instance, but it could be an instance in which it's the only way?

PHIFER: It is an instance before this court because this is a consolidated proceeding that govern all the cases in Texas. So those cases are before this court as well. There are over 150 cases that were consolidated together in these rule 11 proceedings.

PHILLIPS: You say this is all the cases in Texas, or is it all the cases in the 2nd Admin. Region?

PHIFER: No. This order applies to all of the cases in Texas. Judge Mayes what happened, he would have a hearing and then he would discuss with the other judges his recommendations and findings. And then an order would be entered across the entire state.

PHILLIPS: So all of the consolidated judges, whoever they are, have signed on to _____?

PHIFER: That's my understanding.

O'NEILL: If the tire is not available, is there any other way to prove a defect in the tire? What are they going to tell me is going to be their alternative avenue for you to pursue...

PHIFER: What is Firestone going to tell you?

O'NEILL: Yes.

PHIFER: Firestone is going to tell you it should be a summary judgment case and it should be dismissed because there is no proof.

O'NEILL: I suspect Ms. Yeates probably won't tell me that. She's probably going to tell me that the root studies will still get you there without the tire.

PHIFER: That's not the position they have taken. I know the motion for summary judgment was granted on this very issue in the _____ before Judge Varga, because the tire was not available.

That is what concerns me is that the defendant comes in and says, Please trust

us. The formula isn't bad. We've looked at it. No one else can look at it, and we assure you that it's not bad. But yet, we can use this aggressively and offensively this privilege, which I don't believe is proper. That's why privileges have to be closely construed because they do tend to hide and conceal information.

HECHT: But I don't hear them to be saying either thing. I don't hear them to be saying trust us. I hear them to be saying it doesn't matter to your case. You've got the proof or you don't have the proof. What difference does it make if the glue won't hold the steel together whether it's because they heated it at the wrong temperature or they used a chemical that they shouldn't have, or they omitted some chemical? If it won't hold together it won't hold together.

PHIFER: They do not admit that though in these cases. They fight that issue. They would like to come in and admit to this court that they are admitting that the tires are defective. They don't. They fight everyone of these cases. They contend that they are not defective. So we need all of the evidence that is available to us to prove that they are defective. And design defect is one of the issues that we have pleaded in this case.

And the question I would have is what is the risk of harm to Firestone on this issue if these tires had been recalled? And I have to disagree with Ms. Yeates. It is not my understanding that this is the skim stock that's used in everyone of their passenger car tires. I don't believe that is a correct statement.

PHILLIPS: And how do you know that?

PHIFER: Because I have seen the internal Firestone documents. I spent all of last year in depositions with these defendants. Mr. _____, CEO of the company, engineers throughout the company, the Ford engineers. I took Tim Davison's deposition who is head of quality control at Ford. I do not believe is the skim stock that's used in every other passenger tire. In fact there has been more than one generation of skim stock that has been used in these tires. It's inappropriate to talk just one skim stock because there's been more than one generation. And I do know there was a cost cutting program imported from Bridgestone in Japan, called C95, in which they actually took rubber and steel out of these tires during a critical period of their manufacturing.

OWEN: If you know all of that why do you need the formula?

PHIFER: I would like to see if they took materials out of the formula to save money that compromised the safety.

OWEN: But if you already know they did take it out why do you...

PHIFER: I don't know that they took it out of the formula because those documents have never been made available.

OWEN: If you know they took it out of the tire why do you need the formula?

PHIFER: Because the tire is the _____. I do not know if they took it out of the formula. We have never seen any documents relating to the formula. What I was talking about is tire's materials. I know that they decreased the size of the wedge in the tire. I know they decreased the amount of skim stock, the thickness of skim stock that was actually applied to the steel belts in the tires. I have seen documents indicating they did various other things: taking bulk materials out. The formula, we have never seen any documents on.

OWEN: My point is, if you know all of that, if you know they did those things, why isn't that enough for your experts to opine that's what caused the defect, and what difference does it make if the formula called for those very things?

PHIFER: Because we still go back to DuPont v. Robinson standard. They have not excluded all of their causes, which include the design defect and the basic chemical formula for the tires. And that's why the question I have for this court is withholding this information here not inconsistent with DuPont v. Robinson?

I think the DuPont v. Robinson decision did wonderful things for raising the bar for expert testimony in this state.

OWEN: Have they ever taken the position that the tire failures are caused by scientific or events that science can't yet figure out, which is unknown?

PHIFER: I'm not for sure if that particular position has been taken. But I do know that it's never their fault. And Mr. Gardner, who gave the affidavit on their behalf, I took his deposition several years ago in one of the first cases involving the ATX tires from Decatur before the recall told me he had never testified or given the opinion that a Firestone tire was defective. He told me the tire in my case was not defective. But he did tell me about what was going on in Decatur at the time.

ENOCH: On the Robinson standard it is true. The expert has to exclude other possibilities. If Bridgestone/Firestone stipulates that the skim stock would not be a cause that would have to be excluded by your expert was a cause of the defect in here, would you then have any other concern about having to look at the skim stock? You don't have to exclude it as a cause anymore, and so all you have to do is focus on what you consider to the other design defects of the tire.

PHIFER: I would have a grave concern, because by their very expert getting on the stand and testifying, he's basically representing impliedly to the jury that there's nothing wrong with this skim stock. This is same issue. If we don't talk about it with the jury, if we don't discuss this issue with them, what are they to believe other than that there is nothing wrong with it.

HECHT: Your argument seems to be if they deny liability we're entitled to the formula.

PHIFER: No that's not what I believe.

HECHT: Well you keep saying as long as they put up any defense at all, we're entitled to the formula..

PHIFER: I think we have an extraordinary set of circumstances in this case in which the need because of the massive amount of tires involved, because of the tragedy visited upon the public, and because of the fact that something appears to be wrong even by their own experts admission with this basic _____ block for the tires, that's why I think it is a particularized need that has been shown in this case that outweighs the risk of harm to Firestone. It's the balancing test. What they would like to do is have a bright line and it's not that. It's a balancing test which a trial judge has to apply.

HANKINSON: So you disagree with Ms. Yeates that you have to basically say I don't have a case without this?

PHIFER: If any lawyer that would walk into a courtroom and say that is subject to be sanctioned for filing a frivolous lawsuit. It's a mousetrap argument. But yet that's the argument. And Judge Mayes asked this very question of Mr. Moran in the argument a year ago in Conroe. And he said, no.

OWEN: We didn't just say relevance. We used the term necessary. And so you're basically making a relevance argument, and we meant something more than that. So what is the something more that we meant?

PHIFER: I think that what I'm saying is that on the balance that's necessary to a fair adjudication. And I think fairness is a keystone, because fairness is a keystone of the justice system. The privilege cannot be allowed to conceal a problem or work an injustice.

OWEN: If your experts were saying, we just can't figure out what happened unless we have the skim stock, that would be one situation. But you're telling us we have all this information, your experts do about what they took out of the tire, what was in the tire that shouldn't have been there, and they opine from all of those facts that the tires were defective and that it was Firestone's fault. What more do you need? You're talking about now persuasion, relevance, icing on the cake, but not necessity.

PHIFER: The basic design of the tire and whether there's a design defect in the basic fundamental building blocks of the tire. Why should that be _____.

* * * * * * * * *

REBUTTAL

O'NEILL: I'm having trouble with if the test is necessary to a fair adjudication. It seems

like you're saying necessary to adjudication. Does your argument rise and fall on whether it's the only way to prove it?

YEATES: No. Truthfully, my argument rises and falls on what evidence they put in front of Judge Mayes and the fact that their own experts didn't stand in their affidavits and say what Mr. Phifer is telling you today. But I do think the only way is a valid way to look at it, that's the way the court looked at it in Automatic Drilling, which is this court's case.

O'NEILL: What if we said that it's not just dispositive, it's the only way. If we went something a little looser and said there were three ways to do it would you lose?

YEATES: I don't think so because I think that they still - if you say three ways, how many pieces of the pie do you want to cut. There are all kinds of ways to prove defect here, because see what's getting confused...

O'NEILL: Let's say we have three ways and one is the best way, then...

YEATES: I do not think they have to have the best way. I would not agree that necessary to a fair adjudication should not mean the best way.

O'NEILL: So really you are saying it has to be the only way.

YEATES: No. Because the best way implies that there are other ways to do it. Maybe there are lots of other ways to do it.

HANKINSON: But your position is the only way right? I thought that's what your argument was.

YEATES: It is my argument that they have other ways to do it. And see he wants to talk about balancing. But you can't start balancing until he has proof of necessity. And what's getting confused here is this word skim stock. When he says skim stock that means the rubber compound. Okay. They have lots of the rubber compound. They have it in millions of returned tires. Brand new tires. They have all kinds of this rubber compound to analyze. What they want is the formula that goes through vulcanization to the rubber compound. So it's not like they can't prove design defect without the formula.

ENOCH: It's Bridgstone's position that you can do anything you want to with this tire, but it's not going to reveal the skim stock formula. So we now know that there's nothing the experts can do that will reveal this formula. So at the trial of the case, the expert gets up there and says, it was the mechanical process that put the tire together. And Bridgstone says, well here's our mechanical process. And the jury concludes that was not faulted. There was no manufacturing defect. They say, well then the gluing process, the thickness of the glue they put in here was defective and the expert gets up from Bridgestone and says, No, that wasn't the defect. So the jury

concludes that there was not a gluing defect.

YEATES: Are you trying to assume there's not a design defect, because he can prove design defect without the formula.

ENOCH: No. I'm trying to prove what is the evidence that - the hypothet is, all of their evidence - they have any number of ways that they argue there's a defect in the manufacturing and any elements of design. But the one element of design that will never be before the jury, what happens if that proves to be the defect?

YEATES: I understand. But that's not what their experts are saying. Their experts are saying in hundreds of cases they are testifying - in fact we put one of them in Tab 7 where their own expert Dr. Ochs said, if Judge Ramirez doesn't give me the formula, you bet I'm still going to say this tire is defective. I can opine on design defect and manufacturing defect. For one thing they've got the skim stock. See they have the actual rubber. They know what it looks like and feels like and what it's chemical composition is after it comes out of vulcanization.

O'NEILL: What about when the tire is not available?

YEATES: In my opinion, that's a false argument here. I don't know why the summary judgment was asserted. Maybe there wasn't any evidence of why the accident happened. I don't know that particular case. But the tire not available still allows them to use the root cause studies, and to look at the hundreds and millions of other recalled tires to look at finished, never used, cured tires that are not defective that meet all the properties of the tire. In other words, they know what a Firestone tire is supposed to look at perfect. They know what all these other tires in the industry look like, brand new and supposedly perfect.

PHILLIPS: Conceding here that you would never be entitled to a summary judgment merely involves the tire had been destroyed at some point before the recall?

YEATES: I'm not prepared to answer that question. I don't know what the argument was in the case. He's right about one thing. This is a critically important case. This is going to decide, not just for the Texas litigation, but across the country. Because you know the Arizona court has already said, you can't have the skim stock formula but if the Texas appellate court says you can, I am going to revisit.

HANKINSON: If we disagree with you and don't think that necessary means the only way, and instead we agree with the plaintiffs in this case that we have to look at necessary to a fair adjudication, then balancing is what happens at this phase. Then why doesn't the protective order that Judge Mayes put in place provide all the protection that Firestone needs for its trade secret? We've got another net underneath here.

YEATES: Because under your hypothetical, you've assumed they've reached the next

step to balancing. But see you're assuming it because you're saying well I'm going to let them have three ways to do it. You have to do it based on the evidence here and they didn't say it was necessary.

HANKINSON: But he has a different interpretation of what necessary for a fair adjudication means. You're each putting a different legal analysis underneath that language. If we agree with him and we don't think it's the only way, and it's a balancing because we're looking at necessary for a fair adjudication, not necessary to adjudicate, then I want to go to the next step and I want you to tell me if the protective order that's in place here is sufficient to protect Bridgestone's trade secret?

YEATES: If the protective order - you can't substitute the protective order for the proof of necessity. But if the hypothetical you want to give me is you think they got there on necessity, then I think the protective order - we still have problems with the protective order being sufficient without proof of necessity, because Carlson, one of their experts, has already been held in contempt for revealing this stuff. That's the problem with letting the trade secret information get out.

HANKINSON: But there's a different expert who's been designated as the one person who would be allowed to look at the formula.

YEATES: I'm glad you brought that up. It's a ____ chemist, because the experts that gave these affidavits aren't qualified to study these compounds.

HANKINSON: Is that order sufficient to protect the trade secret?

YEATES: I think as protective orders go, that would be sufficient if you think they already have reached the standard.

PHILLIPS: You claim that there's tens of millions of tires all with the same skim stock out on the road or in junkyards somewhere. And he says, no there is more than one skim stock. At the very least, if one of the ways you can determine a defect is to look at other tires, aren't the plaintiffs entitled to know we have secret formula no 1 that was used for these tires, and secret formula no. 2 for these tires.

YEATES: We would be happy to tell them this particular type of tire has skim stock no, you know our secret numbers. This one is the other number. If you're asking me would we tell them which skim stock was used, right. But we still wouldn't disclose the actual formula for any of the skim stocks because for any of the tires those formulas are trade secrets. And the reason the tire industry fights so hard on this is it's a log margin industry, and the only way they make money in the industry is to hold on to their secret formulas.

The undisputed evidence is we are still using this skim stock number. He's right that it's evolutionary and it's been evolved from one secret number to the next secret number,

but we're still using the second number in our tires.