If I Told You Then I'd Have to Kill You: The Standard for Discovery of Trade Secrets in South Carolina

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I. INTRODUCTION

In 1992, South Carolina joined a group of forty-five other states and the District of Columbia by enacting legislation based on the Uniform Trade Secrets Act.\(^1\) Apparently unsatisfied with this first enactment, in 1997, the South Carolina legislature enacted the South Carolina Trade Secrets Act\(^2\) (Act). The new Act contains most of the same language of the previous statute but includes additional provisions under the portion of the Act relating to the preservation of secrecy during the discovery phase of civil actions.\(^3\) This specific language of


2. S.C. CODE ANN. §§ 39-8-10 to -130 (Supp. 2009). This Act repealed the previous statutory provisions. See id.

the statute, which is unique to South Carolina, requires a party seeking discovery of a purported trade secret to show a “substantial need” for the information to compel discovery.4 The relationship between this statutory test and the inquiry applied in most jurisdictions, which was formulated from Rule 26(c) of the Federal Rules of Civil Procedure,5 remained unclear until the Supreme Court of South Carolina answered the question of what is the appropriate standard for discovery of trade secrets in South Carolina in Laffitte v. Bridgestone Corp.6 The court held that the proper standard was the “balancing test” associated with Rule 26(c) of the South Carolina Rules of Civil Procedure.7 In adopting the balancing test, the court held the provisions of the Act to be complementary to the balancing test.8 Because of this difference in application, the test as applied by the supreme court affords increased protection to the holder of trade secrets than that of other jurisdictions.

Part II of this Note offers an overview of trade secret law and discusses the policies and theories that shape this jurisprudence. Part III evaluates the Laffitte case and the standard for discovery of trade secrets adopted in the opinion within the general context of trade secret law. The first subpart of Part IV discusses the details of the standard and how it compares to the test employed by other jurisdictions. The second subpart of Part IV examines the possible impacts of adopting this test, such as the benefits of uniformity and any impact on the business community.

II. OVERVIEW OF TRADE SECRET LAW

Like other states that have enacted the Uniform Trade Secrets Act,9 South Carolina law defines a trade secret as the following:

information, including, but not limited to, a formula, pattern, compilation, program, device, method, technique, product, system, or process, design, prototype, procedure, or code that . . . derives independent economic value . . . from not being generally known to, and not being readily ascertainable . . . by the public or any other person who can obtain economic value from its disclosure or use, and . . . is the subject of efforts . . . to maintain its secrecy.10

5. FED. R. CIV. P. 26(c).
7. Id. at 475, 674 S.E.2d at 162–63.
8. Id. at 475, 674 S.E.2d at 162.
A trade secret could simply be a fact, or it could be a “series or sequence of items or procedures.” Trade secrets are not defined by their form or subject matter, but instead they are determined by their secrecy and economic value. Thus, trade secrets can be almost any information that imparts on its holder some competitive advantage, including “manufacturing processes, methods of doing business, formulae and ingredients, devices, computer programs and databases, and almost any other form of technology or business information.” Although many trade secrets are considered valuable assets to parties that possess them, this is not always the case, nor is it a requirement. Instead, the confidential information needs only to protect some competitive advantage for it to contain sufficient “economic value.”

Although high value may not be a prerequisite for trade secrets, such secrets are often important assets to businesses and their preservation can be determinative of a company’s success. Thus, providing protection to trade secrets has long been considered an important part of sustaining a healthy economy. State laws that are designed to protect trade secrets can serve the important function of allowing inventors to preserve the economic advantage of being the first producer of a product, which helps maximize the profit from their discovery.

Trade secret value can be immense, but that value depends on maintaining the secrecy of the information. Once a competitor knows a trade secret, the owner risks losing its competitive edge if the competitor chooses to exploit this knowledge. Thus, many companies go to great lengths to maintain the

11. Id. § 39-8-20(5)(b).
14. See Epstein, supra note 12, § 1.02[A].
15. Id. (internal quotation marks omitted).
16. Robert Unikel, Bridging the “Trade Secret” Gap: Protecting “Confidential Information” Not Rising to the Level of Trade Secrets, 29 Loy. U. Chi. L.J. 841, 841 (1998) (“In today’s highly competitive economic environment, even slight advances in technology, minor improvements in production, and small refinements in business methods can afford companies tremendous competitive advantages over their market rivals. Indeed, maintaining exclusive possession of valuable technical and commercial information often can mean the difference between cornering a particular market and fighting for financial survival.”).
19. Kelly Irene Phair, Note, Enabling American High-Tech Companies to Protect Their Secrets Abroad: A Comparative Analysis of Irish and American Trade Secret Regulation, 24 Hastings Int’l & Comp. L. Rev. 507, 515 (2001); see also Mayberry, 878 N.E.2d at 192 (“Unlike other assets, the value of a trade secret hinges on its secrecy. As more people or organizations learn the secret, the value quickly diminishes.”).
confidentiality of their trade secrets.\textsuperscript{21} Although trade secret holders have the responsibility of maintaining the secrecy of their own information, by providing legal protection to trade secrets, the law acknowledges that the interests of invention will not be well-served if companies spend too much time and money on insulating their trade secrets and less on research and development of new ideas.\textsuperscript{22} Therefore, part of trade secret law attempts to shoulder the burden of protection to encourage creativity.\textsuperscript{23} In addition to the policy of encouraging invention by ensuring that the inventor reaps some primary benefit from her creation, trade secret law also seeks to preserve corporate morals by criminalizing corrupt practices for obtaining competitors' trade secrets.\textsuperscript{24}

Although the aforementioned policies of encouraging invention and creation are widely accepted justifications of trade secret law, those assertions are not without dissent.\textsuperscript{25} Given the broader legal framework in which trade secret law functions, critics argue these policies appear unpersuasive when compared to the social costs involved and to the other means of protection inventors have to safeguard their creations, "such as patent, copyright, trademark, contract, and criminal law."\textsuperscript{26} The cost of secrecy can be high, not only for the trade secret holder seeking to preserve confidentiality, but also for other businesses in the industry that engage in "wasteful investments in reverse engineering and in continuing the invention race."\textsuperscript{27} It is generally acknowledged that innovation benefits from the free exchange of ideas,\textsuperscript{28} and the public potentially suffers from a "significant adverse impact on future innovation" caused by protecting trade secrets.\textsuperscript{29}

Furthermore, assuming that trade secret law serves a purpose in encouraging invention, it can conflict with other important policies, like preserving employee

\textsuperscript{21} Id. Two well-known examples are the recipes for Coca-Cola and Kentucky Fried Chicken (KFC). Susan V. Metcalfe, Comment, Protecting Trade Secrets: Is the Remedy Worse than the Wrong?, 104 DICK. L. REV. 503, 505 (2000). Coca-Cola has stored its formula in an Atlanta bank vault for about 100 years, while KFC keeps its recipe of eleven herbs and spices in a guarded time capsule at a secret location. Id.

\textsuperscript{22} See Unikel, supra note 16, at 847–48 ("[W]ithout legal protection against corporate theft, those businesses that continued to invest in innovation would be forced to expend a disproportionate amount of money on 'self-help' measures designed to protect their innovations from piracy.").

\textsuperscript{23} See id. at 848.

\textsuperscript{24} See id. at 846.

\textsuperscript{25} See, e.g., Robert G. Bone, A New Look at Trade Secret Law: Doctrine in Search of Justification, 86 CAL. L. REV. 241, 246 (1998) ("Those who tout economic efficiency [as a justification for trade secret law] either ignore the broader legal context within which trade secret law operates or fail to take into account all the costs of a trade secret system.").

\textsuperscript{26} Id. at 264.

\textsuperscript{27} Id. at 269.

\textsuperscript{28} Unikel, supra note 16, at 849.

\textsuperscript{29} Bone, supra note 25, at 270. But see Michael Risch, Why Do We Have Trade Secrets?, 11 MARQ. INTELL. PROP. L. REV. 1, 38–39 (2007) (arguing that these social costs are minimized because, absent trade secret law, owners would still keep the information secret, which would require others to discover it independently, and society may benefit from the improvements gleaned during attempts at reverse engineering or duplicate innovation).
mobility and free competition.\textsuperscript{30} Providing too much protection to trade secrets might impair a skilled employee’s ability to transition between employers in the same industry because the employee gained confidential institutional knowledge, which the first employer fears the employee will share.\textsuperscript{31}

Because state law governs trade secrets, jurisdictions differ on how to identify and protect this confidential information in judicial proceedings.\textsuperscript{32} Although no absolute privilege exists barring the discovery of trade secrets during the course of litigation,\textsuperscript{33} state courts have acknowledged that the property rights implicated in trade secrets provide the owners with a qualified privilege.\textsuperscript{34} Courts have therefore sought to protect the interests of trade secret holders by “preventing harmful disclosure of commercially valuable information.”\textsuperscript{35} Contrasted against these significant interests are the needs of prospective litigants who require confidential information to prove their claims.\textsuperscript{36} Thus, a discovery process involving trade secrets requires the court to balance the interests of the parties in a manner not typically required in discovery proceedings.\textsuperscript{37} In \textit{Laffitte v. Bridgestone Corp.}, the South Carolina Supreme Court explained how courts in South Carolina should approach this issue.\textsuperscript{38}

III. \textit{LAFFITTE V. BRIDGESTONE CORP.}

\textbf{A. Factual Background}

In \textit{Laffitte}, Angela Plyler and her three children were involved in a single vehicle accident on July 16, 2005, when the tread from the left rear tire of her 1999 Ford Explorer separated from the tire, allegedly causing the vehicle to overturn and hit a tree.\textsuperscript{39} The accident resulted in the deaths of both Ms. Plyler

\begin{thebibliography}{39}
\bibitem{} Unikel, supra note 16, at 849.
\bibitem{} See id.
\bibitem{} See Peter C. Quittmeyer, \textit{Trade Secrets and Confidential Information Under Georgia Law}, 19 Ga. L. Rev. 623, 633 (1985) (noting that states differ in how they determine if information is a trade secret); James J. Watson, Annotation, \textit{Discovery of Trade Secret in State Court Action}, 75 A.L.R. 4th 1009, 1016 (1990) (“[T]he criteria for discoverability of trade secrets which have been articulated by the courts are not uniform.”).
\bibitem{} \textit{8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE} \S 2043 (2010).
\bibitem{} Watson, supra note 32, at 1015.
\bibitem{} Id.
\bibitem{} See Coca-Cola Bottling Co. of Shreveport v. Coca-Cola Co., 107 F.R.D. 288, 293–94 (D. Del. 1985) (“It is true that the result may be to compel the defendant to disclose [trade secrets], and that that may damage the defendant . . . That is, however, an inevitable incident to any inquiry in such a case; unless the defendant may be made to answer, the plaintiff is deprived of its right to learn whether the defendant has done it a wrong.”) (alterations in original) (quoting Grasselli Chem. Co. v. Nat’l Aniline & Chem. Co., Inc., 282 F. 379, 381 (S.D.N.Y. 1920)); Watson, supra note 32, at 1015.
\bibitem{} Watson, supra note 32, at 1015.
\bibitem{} Id. at 464, 674 S.E.2d at 157.
\end{thebibliography}
and her teenage son Justin, and also caused serious injury to Ms. Plyler’s two minor daughters, Alania and Hannah.\textsuperscript{40} Russell Laffitte, acting as personal representative for the deceased and as conservator for Alania and Hannah, brought four lawsuits against various defendants, including Bridgestone, the maker of the left rear tire at issue in the case.\textsuperscript{41} Laffitte’s complaints, which alleged negligence, breach of warranty, and strict liability, claimed Bridgestone “used an inadequate tire design and failed to use proper manufacturing techniques.”\textsuperscript{42} Specifically, Laffitte alleged that Bridgestone had “failed to use sufficient antidegradents to protect the integrity of the tire.”\textsuperscript{43}

The court consolidated the four cases for discovery.\textsuperscript{44} Laffitte’s discovery requests to Bridgestone included a request that the company produce the steel belt skim stock compound\textsuperscript{45} formula that was used on the defective tire and other information related to that formula, including any changes that had been made or variations in formula that may be unique to the factory that had manufactured the tire.\textsuperscript{46} Bridgestone objected to disclosure of this material, contending that the information was a trade secret and that the plaintiff could adequately prove his claim without such confidential information.\textsuperscript{47} The trial court held a hearing on the plaintiff’s request for the skim stock formula, and after hearing testimony by experts from both sides, it subsequently issued an order compelling discovery of the formula.\textsuperscript{48} The court found that Laffitte had proven he could not properly pursue a design defect theory absent the formula for the skim stock that allegedly caused the accident.\textsuperscript{49}

Bridgestone then petitioned the Supreme Court of South Carolina for certiorari review of the trial court’s ruling, which the court granted on two issues: “the appropriate standard for the discovery of trade secret information in a product liability action” and whether the trial court erred “in finding that

\begin{addendum}
40. \textit{Id.}
41. \textit{Id.}
42. \textit{Id.} at 464–65, 674 S.E.2d at 157.
43. \textit{Id.} at 465, 674 S.E.2d at 157.
44. \textit{Id.}
45. \textit{See id.} Laffitte’s final brief described the skim stock compound in the following manner: The skim compound is the rubber used to make the steel belt package in a tire. The steel belt skim stock . . . refers to a specifically formulated rubber compound calendared onto the steel cord to form the steel belts in a steel belted passenger or light truck tire. It is formulated to provide, among other things, adhesion between the rubber and steel cord, and between the belts and surrounding components. If the skim compound rubber is not correctly formulated or is incorrectly mixed its ability to provide adhesion between the steel cord, belts and surrounding components may be compromised.
47. \textit{Id.} at 465, 674 S.E.2d at 157.
48. \textit{Id.} at 466, 674 S.E.2d at 157.
49. \textit{Id.} at 471, 674 S.E.2d at 160.
\end{addendum}
Respondent established the requisite need” to compel Bridgestone’s production of the skim stock formula.\textsuperscript{50}

\textbf{B. Supreme Court Analysis and Ruling on the Case}

In approaching its analysis of the questions presented, the court began by discussing the two tests proffered by the parties.\textsuperscript{51} Bridgestone asserted that the proper standard for determining whether a purported trade secret should be discoverable was the test found under the South Carolina Trade Secrets Act, which requires that a party seeking discovery of a purported trade secret demonstrate a “substantial need.”\textsuperscript{52} To establish “substantial need” under the Act, a requesting party must demonstrate the following:

1. the allegations in the initial pleading setting forth the factual predicate for or against liability have been plead with particularity;
2. the information sought is directly relevant to the allegations plead with particularity in the initial pleading;
3. the information is such that the proponent of the discovery will be substantially prejudiced if not permitted access to the information; and
4. a good faith basis exists for the belief that testimony based on or evidence deriving from the trade secret information will be admissible at trial.\textsuperscript{53}

Laffitte argued that the Act was inapplicable in products liability cases and that the appropriate test would be under Rule 26(c) of the South Carolina Rules of Civil Procedure.\textsuperscript{54} Laffitte contended that the plain language of the statute limited its applicability to cases involving misappropriation.\textsuperscript{55} Specifically, the Act provides that to which it does not apply:

Any and all other civil remedies that are not based upon misappropriation of a trade secret or upon protection against misappropriation of a trade secret are governed by the rules of procedure, rules of evidence, regulations, and the common law applicable to the administrative law tribunal or court where the action is filed.\textsuperscript{56}

\textsuperscript{50} Id.
\textsuperscript{51} See id. at 472–75, 674 S.E.2d at 161–62.
\textsuperscript{52} Id. at 473–74, 674 S.E.2d at 161–62.
\textsuperscript{53} S.C. CODE ANN. § 39-8-60(B)(1)-(4) (Supp. 2009).
\textsuperscript{54} Laffitte, 381 S.C. at 473–74, 674 S.E.2d at 161–62.
\textsuperscript{55} Id.
\textsuperscript{56} § 39-8-110(C).
Laffite argued that because this case was a products liability action and did not involve any misappropriation claims, the Act should not apply.57

The court rejected this assertion, finding that the Act specifically addressed discovery matters in broader terms, and cited section 31-8-60(B),58 which requires that “[i]n any civil action where discovery is sought of information designated by its holder as a trade secret, before ordering discovery a court shall first determine whether there is a substantial need by the party seeking discovery.”59 The court held that the plain language of the statute applied the Act to discovery in “any civil action” where trade secrets were at issue.60 Although the court rejected Laffite’s contention that the Act was not intended to apply to products liability cases, it agreed that the test associated with Rule 26(c) governed discovery in this matter.61 The relevant language of the rule provides as follows:

Upon motion by a party or by the person from whom discovery is sought, . . . the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden by expense, including . . . that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way.62

Although not explicit in its reasoning for adopting this test, the court recognized that this test is typically used by other courts, including in jurisdictions where trade secrets enjoy a codified evidentiary privilege.63 As the language of South Carolina Rule 26(c) mirrors the federal rule, the court adopted the interpretation of the federal rule, which has been applied as a “balancing test that incorporates a ‘relevant and necessary’ standard.”64 As explained by the court, this examination consists of three parts:

1. The party opposing discovery must show that the information sought is a trade secret and that disclosure would be harmful. 2. If trade secret status is established, the burden shifts to the party seeking discovery to show that the information is relevant and necessary to bring the matter to trial. 3. If both parties satisfy their burden, the court must

57. Respondent’s Final Brief, supra note 45. Laffite also relied on a South Carolina district court opinion, Griego v. Ford Motor Co., 19 F. Supp. 2d 531, 533 (D.S.C. 1998), in which the court interpreted the Act as applying only to misappropriation. See Respondent’s Final Brief, supra note 45.

59. § 39-8-60(B).
60. Laffite, 381 S.C. at 473–74, 674 S.E.2d at 161–62.
61. Id. at 475, 674 S.E.2d at 162–63.
63. Laffite, 381 S.C. at 474–75 & n.11, 674 S.E.2d at 162 & n.11.
64. Id. at 474 & n.10, 674 S.E.2d at 162 & n.10.
weigh the potential harm of disclosure against the need for the information in reaching a decision. 65

The court further explained the test by defining the "relevant" portion of the inquiry as requiring "that the information must be relevant not only to the general subject matter of the litigation, but also relevant specifically to the issues involved in the litigation." 66 Additionally, the court held that for the "information to be deemed 'necessary'" a party "cannot merely assert unfairness but must demonstrate with specificity exactly how the lack of the information will impair the presentation of the case on the merits to the point that an unjust result is a real, rather than a merely possible, threat." 67 In constructing this test, the court did not reject the "substantial need" provisions of the Act but instead found that as the Act "is consistent with Rule 26 in that both provide for reasonable restrictions on the discovery of trade secrets," it serves as a complement to Rule 26. 68

The court then applied this standard to the case and concluded that the trial court erred in ordering discovery of the skim stock formula. 69 The court addressed testimony of various experts provided by both the plaintiff and the defendant and held that, as a matter of law, the plaintiff failed to meet his burden of showing necessity. 70 The majority found that the plaintiff had not sufficiently shown that the formula was necessary to prove his claim. 71 In particular, the court found that the testimony of Laffitte’s experts lacked the "level of specificity" required to compel discovery because their arguments were not "sufficiently complete" in explaining the specific reasons why the skim stock formula was essential to a determination of the tire’s failure. 72 Additionally, the court noted the plaintiff’s lack of detail in explaining how the case could not be fairly adjudicated absent the trade secret information. 73 Despite denying the

65. Id. at 475, 674 S.E.2d at 162.
66. Id. at 475, 674 S.E.2d at 163.
67. Id. at 476, 674 S.E.2d at 163 (quoting In re Bridgestone/Firestone, Inc., 106 S.W.3d 730, 733 (Tex. 2003)).
68. Id. at 475, 674 S.E.2d at 162. In so holding, the court declined to address specifically that the tests provide different provisions in how to determine discoverability. See id. The court did cite to Bridgestone Ams. Holding, Inc. v. Mayberry, 878 N.E.2d 189 (Ind. 2007). Laffitte, 381 S.C. at 472, 674 S.E.2d at 161. In Mayberry, the Supreme Court of Indiana similarly held that Indiana’s discovery standard under Rule 26 should be “informed by Indiana’s enactment of the Uniform Trade Secrets Act”; however, the court concluded that the legislative intent of the enactment was to provide trade secret law that was uniform with other jurisdictions and determined that the best manner in which to serve this end would be to adopt the balancing test used by a “substantial number of courts.” 878 N.E.2d at 194. Given that South Carolina replaced the Uniform Trade Secrets Act with its own Act, the Mayberry court’s uniformity rationale would be inapplicable in South Carolina.
69. Laffitte, 381 S.C. at 480–81, 674 S.E.2d at 165–66.
70. Id. at 476–81, 674 S.E.2d at 163–66.
71. Id. at 480, 674 S.E.2d at 165.
72. Id. at 476–78, 674 S.E.2d at 163–64.
73. Id. at 478, 674 S.E.2d at 164.
request for the information, the court was careful not to preclude the possibility of revisiting this issue and indicated that although the testimony put forward was currently insufficient, the plaintiff could still satisfy his burden at another point.  

Justice Pleicones dissented on standard of review grounds, arguing that the court should sit to review errors of law and not substitute its judgment for that of the trial judge, which he claimed the majority had done. As he did not regard the lower court’s ruling as “‘wholly unsupported by the evidence,’” he would have affirmed.

IV. THE STANDARD FOR DISCOVERY OF TRADE SECRETS AND THE IMPLICATIONS OF LAFFITTE

Although the court adopted the balancing test derived from Rule 26 of the Federal Rules of Civil Procedure, the test expounded by the court is shaped by the language of the Act and presents some slight, but distinct, differences from the balancing test applied in other jurisdictions. Notably, the court’s interpretation of what the requesting party must demonstrate to show that the information requested is relevant differs from the requirements generally used by other jurisdictions. These differences, however, are not fundamental, but they do increase the burden on South Carolina litigants requesting discovery of a trade secret. By construing the “substantial need” inquiry as a complement to the balancing test it employed, the court retained the added protections for trade secrets owners that the legislature created while also maintaining the discretion afforded to courts by the balancing test. Although the additional protections provided by the statute place increased burdens on the party seeking discovery of a trade secret, the structure of the balancing test allows the court to consider the interests of both parties in determining whether to compel production. However, despite the appearance of equity and judicial discretion provided by the balancing test, the test as adopted by the supreme court serves the interests of a trade secret holder by making it more difficult for the party requesting production to pass the second prong of the test and make it to the discretionary prong. Because the test as applied by the court has more stringent requirements that differ from the test as generally applied in other jurisdictions, litigants who appear in South Carolina courts requesting discovery of trade secrets should

74. Id. at 481, 674 S.E.2d at 165 (“If at any time during the litigation, [the plaintiff] can satisfy his burden of showing necessity, this matter could be revisited.”).
75. See id. at 481–82, 674 S.E.2d at 166 (Pleicones, J., dissenting).
76. Id. (quoting Berry v. Spigner, 226 S.C. 183, 189, 84 S.E.2d 381, 384 (1954)).
77. Id. at 474–75 & n.10, 674 S.E.2d at 162–63 & n.10.
78. See id. at 475, 674 S.E.2d at 162.
79. See infra text accompanying notes 82–120.
80. See infra notes 82–110 and accompanying text.

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expect to bear a heavier burden in obtaining confidential information than in other jurisdictions.81

A. The Laffitte Standard

1. “Factual Predicate for or Against Liability”

In Laffitte, the court did not clearly indicate how it was using the first prong of the “substantial need” test in its application of the balancing test, and the parties presented differing interpretations on how to satisfy this inquiry.82 Laffitte argued that he need plead only specific facts as to the claims involved and the general basis for liability.83 Bridgestone argued that as the requesting party, the plaintiff must “set forth, with particularity, a ‘factual predicate’ supporting the claimed need.”84 Bridgestone read the statute to require that the requesting party plead specifically why the trade secret information was needed,85 while Laffitte understood the statute to simply require that the basis for liability had been sufficiently pled.86

Because the court did not directly address this prong, it is unclear whether the court agreed with Laffitte that he needed to show only that he had stated a factually based claim of liability or whether the prong was incorporated into another part of the balancing test. In examining necessity, the court looked to whether the plaintiff had alleged with sufficient specificity why the disclosure was essential to the presentation of his case.87 This first prong may have just influenced the court’s determination of the standard for demonstrating necessity,88 which requires that the plaintiff make a “particularized showing” that he needs the information to receive a fair adjudication of his claim.89

Additionally, the court may have recognized that this requirement of particularized pleading would serve both the plaintiff’s and the defendant’s interpretation of this prong in a case involving misappropriation, where a factual predicate establishing a claim of misappropriation should logically include why the allegations require the discovery of the trade secret information.90 Some

81. See discussion infra Part IV.A.
83. Respondent’s Final Brief, supra note 45.
84. See Petitioner’s Final Brief, supra note 82.
85. See id.
86. See Respondent’s Final Brief, supra note 45.
87. See Laffitte, 381 S.C. at 476, 674 S.E.2d at 163.
88. Id. (citing Bridgestone/Firestone, Inc. v. Superior Court, 9 Cal. Rptr. 2d 709, 713 (Ct. App. 1992); In re Bridgestone/Firestone, Inc., 106 S.W.3d 730, 733 (Tex. 2003)).
89. Bridgestone/Firestone, 9 Cal. Rptr. 2d at 713.
courts have required that plaintiffs demonstrate a factual basis for their claims of misappropriation prior to obtaining trade secret information from a competitor. By requiring that the claim at least have some specific, factual basis for alleging liability, courts can better prevent harm from unwarranted disclosure and thwart litigants who would seek to obtain confidential information merely through asserting a claim.

2. Specific Showing of Relevancy

Although the test as generally defined by the court is similar to other jurisdictions in its requirement that the requesting party prove that the information is relevant and necessary, the court asserts a minority opinion on what relevant means for the purposes of trade secret discovery. In Laffitte, the court defined relevant as not just relevant to the “general subject matter of the litigation, but also relevant specifically to the issues involved in the litigation.” This increased level of specificity is a departure from most jurisdictions, which recognize that, generally, “relevancy” should be construed more broadly at discovery than it would during trial. Interestingly, in Bridgestone Americas Holding, Inc. v. Mayberry and Coca-Cola Bottling Co. of Shreveport v. Coca-

91. See, e.g., Puritan-Bennett Corp. v. Pruitt, 142 F.R.D. 306, 308–09 (S.D. Iowa 1992) (requiring that a party seeking discovery of a trade secret demonstrate a substantial factual basis for its claim as a threshold requirement to the court’s inquiry into whether such information is relevant and necessary).

92. See Microwave, 110 F.R.D. at 672 (“[T]hat a litigant . . . alleges that he disclosed confidential and secret processes to a defendant, which the latter in turn denies, does not automatically entitle the plaintiff to obtain disclosure of the alleged offending processes in aid of discovery—otherwise it would be a simple matter to obtain one’s trade secret by the mere assertion of a claim. The end result of disclosure, where ultimately it develops that the asserted claim is without substance, may be so destructive of the interests of the prevailing party that more is required than mere allegation to warrant pretrial disclosure.” (quoting Ray v. Allied Chem. Corp., 34 F.R.D. 456, 457 (S.D.N.Y. 1964))).

93. Laffitte, 381 S.C. at 475, 674 S.E.2d at 163.

94. See, e.g., Ex parte Warrior Lighthouse, Inc., 789 So. 2d 858, 860 (Ala. 2001) (“‘Relevant,’ as that word is used in the discovery rules, means relating to the subject matter of the action and having a reasonable possibility that the information sought will lead to other evidence that will be admissible . . . .” (quoting Thomas v. State Farm Mut. Auto. Ins. Co. (Ex Parte Thomas), 628 So. 2d 483, 485 (Ala. 1991)) (internal quotation marks omitted)); Harrington Mfg. Co. v. Powell Mfg. Co., 216 S.E.2d 379, 381 (N.C. Ct. App. 1975) (requiring that the information sought be only “relevant to the subject matter” and “reasonably calculated to lead to the discovery of admissible evidence”); George v. Schirra, 814 A.2d 202, 205 (Pa. Super. Ct. 2002) (“[T]he relevancy standard during discovery is necessarily broader than it is for admission at trial. If it were not, there would be tremendous potential for relevant information and admissible evidence to be missed by the parties. The informational dragnet during discovery is meant to be wider so that all relevant and admissible evidence can be discovered pre-trial.”).

95. 878 N.E.2d 189 (Ind. 2007). Mayberry involved an accident that was allegedly caused by a Bridgestone tire. Id. at 190–91. The plaintiff in the case also requested the steel belt skim stock formula during discovery, to which Bridgestone objected. Id. at 191. After applying the Rule 26(c) balancing test, the court concluded the plaintiff had not proven a sufficient need for the court to
Cola Co.,96 two of the leading cases on trade secret discovery, both courts held that the relevance standard used in applying the balancing test is the same "general relevance" standard applicable to pretrial discovery.97 The intention behind allowing a broad scope of discovery is to ensure that litigants have access to all the material facts they may need to present their claims.98 Although this same standard of relevancy applies to any information requested for production, not just privileged information, the court in Mayberry reasoned that this part of the balancing test provided "an additional safeguard for the underlying trade secret" by requiring "relevance to be affirmatively reestablished."99

The Laffitte court instead followed the reasoning of a South Carolina district court case,100 Duplan Corp. v. Deering Milliken, Inc.,101 which held that parties must show a higher level of relevancy in cases where the requested information includes trade secrets.102 The court concluded that because of the real risk of allowing an opposing party to discover "doubtfully relevant trade secrets" and to then exploit them for their own business purposes, a requesting party should have to prove that the requested information is genuinely relevant to the issues involved.103 This narrower interpretation of "relevancy" is also more consistent with the language of the Act. Under the second prong of the substantial need test, a requesting party must demonstrate that "the information sought is directly relevant to the allegations . . . in the initial pleading."104 The Laffitte court compel discovery because the plaintiff did not demonstrate the likelihood of an unjust result absent the disclosure of this information. Id. at 193–97.

96. 107 F.R.D. 288 (D. Del. 1985). In Coca-Cola, the plaintiffs sued the Coca-Cola corporation for breach of contract, seeking an injunction to force the company to sell them the syrup used in Diet Coke. Id. at 289. In the course of discovery, they requested "the complete formula, including the secret ingredients," of several of Coca-Cola's drinks. Id. at 289–90. The court found the formulas were both relevant to the subject matter of the litigation and necessary for the plaintiffs to prepare for trial and therefore should be produced in discovery. Id. at 297–99.


98. Watson, supra note 32, at 1030.


102. Id. at 1185.

103. Id. Although this higher standard of relevance appears to be a minority interpretation, South Carolina is not alone in requiring a showing greater than the relevancy showing required in general discovery requests. See, e.g., Am. Standard Inc. v. Pfizer Inc., 828 F.2d 734, 742 (Fed. Cir. 1987) (requiring that a party requesting production of confidential information demonstrate "some relationship between the claimed invention and the information sought"); Futectic Corp. v. Co-Ordinated Indus., Inc., 183 U.S.P.Q. (BNA) 751, 751 (W.D. Pa. 1974) ("While there is no absolute privilege to prevent the discovery of trade secrets, the court is obligated under Rule 26 to protect parties from unnecessary disclosure of confidential information not immediately relevant to the controversy."); Int'l Nickel Co. v. Ford Motor Co., 15 F.R.D. 357, 357–58 (S.D.N.Y. 1954) (holding that in a suit for patent infringement where only the characteristics of the finished cast iron were at issue, confidential information relating to the manufacturing processes was irrelevant).

incorporated this provision into the balancing test by heightening the level of relevancy that a party must show to obtain discovery of a trade secret.105

The supreme court’s relevancy determination provides holders of trade secrets with more protection by affording them this extra precaution to ensure that the trade secret information requested is actually relevant to the issues at stake.106 The supreme court’s test thus uses additional steps to ensure that the parties do not use the judiciary “to achieve misappropriation or mere leverage.”107 Although avoiding misuse of the judicial process and preventing needless disclosure of confidential information are important considerations, it is unclear whether requiring this more specific showing of relevancy is needed to serve these policies. Other jurisdictions that use a general relevance standard must also consider preventing abuse of the judicial process,108 and there is no evidence that their standard insufficiently protects the interests of trade secret holders. Rather, the relevancy standard adopted in Laffitte may do little to decrease the unnecessary disclosure of trade secrets but much to increase the burden on requesting parties.109 During discovery, requesting parties must plead with specificity as to how the trade secret information is relevant to the issues involved and not just the subject matter of the litigation to pass the first part of their burden under South Carolina’s balancing test.110

3. Particularized Showing of Harm

In addition to choosing a narrower requirement of relevance, the court also adopted a more rigid interpretation of necessity than that applied elsewhere.111 The Coca-Cola court defined necessity as “necessary for the movant to prepare its case for trial, which includes proving its theories and rebutting its opponent’s theories.”112 However, there is a split in authority, and several jurisdictions have required more than just the need to prepare for trial as a predicate to allowing discovery of trade secret information.113 The Laffitte court adopted the more

105. See Laffitte, 381 S.C. at 475–76, 674 S.E.2d at 163.
106. See id.
109. Some jurisdictions do not even include the element of relevancy in their balancing tests. See In re Bridgestone/Firestone, Inc., 106 S.W.3d 730, 732 (Tex. 2003) (determining discoverability of trade secrets by analyzing whether “the information was necessary or essential to the fair adjudication of the case, [and] weighing the requesting party’s need for the information against the potential of harm to the resisting party” (citing In re Cont’l Gen. Tire, Inc., 979 S.W.2d 609, 609–13 (Tex. 1998))).
110. Laffitte, 381 S.C. at 475, 674 S.E.2d at 163.
111. See id. at 476, 674 S.E.2d at 163 (quoting In re Bridgestone/Firestone, Inc., 106 S.W.3d at 733).
112. Coca-Cola, 107 F.R.D. at 293.
113. See, e.g., Bridgestone/Firestone, Inc. v. Superior Court, 9 Cal. Rptr. 2d 709, 713 (Ct. App. 1992) (stating that to satisfy the necessity requirement, a litigant requesting the information
stringent view that a showing that the information is “necessary” requires more than just proof that the trade secret would be useful and should include evidence that without this information there is a real threat that injustice may occur as a result of the movant’s inability to present properly her case. While this standard is similar to that used in a few other jurisdictions, the court again chose a more narrow definition when determining necessity.

4. Information Must Lead to Admissible Evidence

In addition to requiring a stringent level of relevancy, when the court incorporates the other provisions of the “substantial need” test, South Carolina’s balancing test would also require a showing that the information sought will be admissible or lead to admissible evidence. As the Laffitte court stopped its inquiry after determining the plaintiff had failed to prove the necessity of the requested information, it is unsurprising that it never mentioned whether the admissibility of the evidence would have been relevant to its determination of whether to order discovery. Although at first blush, this admissibility test appears to be an additional burden upon the requesting party, the language of the Act can be read to demand no more than the general relevancy required for the discovery of any information. Any information sought must at least be “reasonably calculated to lead to the discovery of admissible evidence.” Furthermore, other jurisdictions have interpreted the balancing test as specifically not requiring proof of admissibility but still demanding that the information likely lead to some admissible evidence or testimony. Thus, the

must show it “would be unfairly disadvantaged in its proof absent the trade secret”); In re Bridgestone/Firestone, Inc., 106 S.W.3d at 733 (“[A] party seeking [trade secret] information cannot merely assert unfairness but must demonstrate with specificity exactly how the lack of the information will impair the presentation of the case on the merits to the point that an unjust result is a real, rather than a merely possible, threat.”), cited with approval in Mayberry, 878 N.E.2d at 196.

114. Laffitte, 381 S.C. at 476, 674 S.E.2d at 163 (citing In re Bridgestone/Firestone, Inc., 106 S.W.3d at 733).

115. See cases cited supra note 113.

116. See Laffitte, 381 S.C. at 473, 674 S.E.2d at 161 (citing S.C. CODE ANN. § 39-8-60(B)(4) (Supp. 2009)).

117. See id. at 476–81, 674 S.E.2d at 163–66.

118. Compare § 39-8-60(B)(4) (“Substantial need’ as used in this section means . . . a good faith basis exists for the belief that testimony based on or evidence deriving from the trade secret information will be admissible at trial.”), with S.C. R. CIV. P. 26(b)(1) (“It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.”).


120. See WRIGHT, MILLER & MARCUS, supra note 33, § 2043 (“It is important to note that relevance to the subject matter of the litigation is what must be shown and there is no requirement that the information sought be admissible at trial.”).

121. See Watson, supra note 32, at 1016 (“A number of courts . . . have held that discovery of a trade secret is not precluded by the fact that the evidence sought is not admissible since the rules provide that it is not a ground for objection to discovery that the evidence sought will be.
fourth prong of the substantial need test requirement that the requesting party demonstrate a “good faith basis” that the trade secret information will lead to admissible testimony or evidence does not present a new hurdle, but instead it codifies a consideration that should already take place in any determination of discoverability.

B. Lack of Uniformity with Other Jurisdictions

As previously mentioned, part of the original impetus for enacting the Uniform Trade Secrets Act stemmed from the desire to create interstate uniformity in the treatment of trade secrets.122 Although the South Carolina Supreme Court’s adoption of the balancing test is consistent with how other states and the federal courts approach the issue of trade secret discoverability, the application of the test includes several variations.123 Because the manner in which the test is applied varies across jurisdictions,124 South Carolina will lose some of the benefits of uniformity, such as predictability to potential litigants and the ability to use case law from more commercial jurisdictions as persuasive authority.

Although the court and the legislature acted contrary to the purpose of adopting a uniform law when applying different standards, they would have had difficulty adopting a standard that did not in some way differ from other jurisdictions.125 The main reason for this problem is that the way trade secret law has developed around the nation has now made it nearly impossible for states to achieve uniformity across jurisdictions.126 Thus, it appears that this statute serves more to distinguish South Carolina from other states by increasing the burden on the party requesting discovery of the trade secret.

Because the general purpose of uniform acts is to create consistency across jurisdictions in the application of the law, South Carolina’s deviations apparently

inadmissible at trial if it appears to be reasonably calculated to lead to the discovery of admissible evidence.”).

122. See UNIF. TRADE SECRETS ACT (amended 1985), 14 U.L.A. 531 prefatory note (2005) (“Notwithstanding the commercial importance of state trade secret law to interstate business, this law has not developed satisfactorily. In the first place, its development is uneven. Although there typically are a substantial number of reported decisions in states that are commercial centers, this is not the case in less populous and more agricultural jurisdictions.”).

123. See supra Part IV.A.


125. See id.

126. See id. at 773–74 (“[E]ven among the forty-six states that have enacted [the UTSA], differences remain because legislatures in those states have modified the UTSA and courts in those states have adopted different interpretations . . . includ[ing] fundamental differences about what constitutes a trade secret, what is required to misappropriate it, and what remedies are available.” (citing Lao, supra note 124, at 1649–50)).
seek to serve some other goal. Whether this test will result in anything more than an increased burden upon a litigant requesting a trade secret is questionable.

A. Effect of Laffitte on the Business Atmosphere

As another apparent purpose behind enacting the Trade Secrets Act was to continue developing the state’s probusiness atmosphere, it is worth discussing the likelihood that such an argument for this legislation carries weight. South Carolina prides itself on its consistent attempts to create a business friendly environment, and for these efforts, the state has repeatedly received recognition. The South Carolina Department of Commerce Web site lists numerous accolades that South Carolina has earned, including recognition as being one of the top ten probusiness states, having one of the top business climates, and having one of the best probusiness regulatory environments. The actual benefit received by the state and its residents due to this probusiness atmosphere is debatable. Although during the 1990s South Carolina added 200,000 jobs through tax breaks to companies, it remained last in SAT scores, had four out of ten homes unconnected to sewers, and maintained a “strained tax base that allow[ed] little leeway in improvement to the public infrastructure.” More recently, although South Carolina lured Boeing away from Washington through some $450 million in incentives, not everyone agrees the company was worth such a price or that this type of “race to the bottom” strategy best serves the citizens of the state. There is no assurance that the jobs created will go to current residents of the state even though state taxpayers will bear the burden of these incentives. Additionally, there is some evidence that Boeing would have expanded to South Carolina even absent the incentives.


130. See Yvonne Wenger & Katy Stech, Lawmakers Offered Lure Worth $450M, POST & COURIER (Charleston, S.C.), Oct. 29, 2009, at A1 (“South Carolina would be much better off pursuing a long-term strategy by investing in the workforce through education and improving the infrastructure, [Professor Calvin] Blackwell said.”); see also S.C. POLICY COUNCIL, A BAILOUT FOR BOEING (2009), available at http://www.scpolicycouncil.com/research-and-publications/#budget/801-boeingbailout102909 (“As it is, South Carolina has the 4th highest state unemployment rate in the country and the 46th lowest per capita income. Clearly, the economic incentives game is not working in our favor.”).

131. See S.C. POLICY COUNCIL, supra note 130 (“In the end, many questions remain about the Boeing incentives package. How much is it going to cost taxpayers? Will South Carolinians actually benefit from the new jobs or will these positions be filled by transplants or foreign workers?”).

132. See id.
By enacting a modified version of the Uniform Trade Secrets Act, South Carolina adopted an act generally considered probusiness in character for the protection it provides to the holders of trade secrets. The rationale behind promulgating probusiness legislation is the obvious desire to lure industry into the state to create jobs and stimulate the economy. Although attracting industries has often taken the form of tax incentives, states have recognized that tax breaks alone may provide insufficient enticement without additionally furnishing protection for businesses' assets, such as trade secrets and other confidential information. Because of the essentiality of trade secrets to many businesses' success and the increase in corporate espionage, trade secret law plays an important role in protecting these assets.

Although the frequent importance of trade secrets to their holders explains part of the impetus behind enacting stringent trade secret protections, the question remains whether rigid antidiscovery legislation is attractive to businesses if litigation involving trade secrets often includes the competing interests of two companies. By creating a higher threshold for proving relevancy and necessity, the balancing test employed in South Carolina courts may make it difficult for a corporate litigant to bring a claim against a competitor, because the litigant would be unable to conduct discovery to determine which secret may have been illegally obtained. At times, the owner of a trade secret may not be


134. The veracity of the claim that legislation or tax incentives meaningfully affect a company’s determination of relocation remains under debate. See Dale, supra note 129, at 255 (noting that numerous studies have shown that businesses do not base decisions to relocate on development incentives); Daniel P. Petrov, Note, Prisoners No More: State Investment Relocation Incentives and the Prisoners' Dilemma, 33 CASE W. RES. J. INT’L L. 71, 79 (2001) (stating that empirical data tends to demonstrate that incentives “‘play little or no role in investment decisions’” and additionally that these state incentives fail in stimulating state economic growth” (citing Robert G. Lynch, The Effectiveness of State and Local Tax Cuts and Incentives: A Review of the Literature, 11 ST. TAX NOTES 949, 949 (1996)).

135. See McClelland & Forgy, supra note 133, at 229 (“Without adequate safeguards to prevent the misappropriation or theft of these valuable property rights, the value of the other incentives may prove small indeed.”).

136. See Kurt M. Saunders, The Law and Ethics of Trade Secrets: A Case Study, 42 CAL. W. L. Rev. 209, 211 (2006) (citing a study estimating that the “typical business may derive seventy percent or more of its value from its intellectual property” and another that estimated that “trade secret theft resulting from industrial espionage” in 1995 resulted in losses exceeding $1.5 billion (citing ASIS INT’L, TRENDS IN PROPRIETARY INFORMATION LOSS 3 (2002); Janet S. Gleenlee, ‘Spies Like Them’: How to Protect Your Company from Industrial Spies, MGMT. ACCT., Dec. 1996, at 31, 31)).

137. See James R. McKown, Discovery of Trade Secrets, 10 SANTA CLARA COMPUTER & HIGH TECH. L.J. 35, 41 (1994) (“At some point, the plaintiff must identify the specific trade secrets that allegedly have been misappropriated. If the plaintiff is uncertain concerning which of its trade
able to identify accurately the trade secret allegedly misappropriated until after it has conducted discovery.\textsuperscript{138} Although commentary about the importance of trade secret protection in the law chastises the unscrupulous rival,\textsuperscript{139} at the onset of litigation, which of the parties is the “innocent” victim remains unclear.\textsuperscript{140} Discovery rules that contain a bias favoring a party with the information that it “designates as a trade secret” may not serve either the interests of justice or the business that actually suffered the harm. In this way, a more stringent threshold for obtaining discovery may not serve the business community as fully as the legislature had intended. Additionally, as these types of incentives may not even affect the business climate of the state, making the process of trade secret discovery more difficult may only disadvantage injured litigants without providing any real benefit to business.

V. CONCLUSION

The asserted policies behind providing legal protection for trade secrets include, most importantly, the need to uphold corporate morals by criminalizing corrupt practices used to obtain competitors’ trade secrets\textsuperscript{141} and the need to encourage invention by ensuring that the inventor reaps some primary benefit from her creation.\textsuperscript{142} In discovery matters, these interests must be weighed against the needs of prospective litigants who require confidential information to prove their claim.\textsuperscript{143} South Carolina’s approach to determining the

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\item Id. n.33 (quoting ROBERT C. DORR & CHRISTOPHER H. MUNCH, PROTECTING TRADE SECRETS, PATENTS, COPYRIGHTS, AND TRADEMARKS § 1.24, at 40-41 (1990)).
\item See Unikel, supra note 16, at 841-42 (“The law plays an important role in this ongoing battle for information by protecting information owners from the improper tactics of their hungry competitors.”).
\item McKown, supra note 137, at 35 (“When [a misappropriation case] is first filed, the court has no idea whether either party possesses a trade secret, whether a misappropriation has occurred, or whether either party used improper means to obtain the purported trade secret.”).
\item See Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 481 (1974) (“The maintenance of standards of commercial ethics and the encouragement of invention are the broadly stated policies behind trade secret law.”); see also McClelland & Forgy, supra note 133, at 233 (“Enforcement of ‘commercial ethics’ through the Trade Secrets Act prevents one person or business from profiting from trade developed by another, and thereby obtaining a free competitive advantage.”); Phair, supra note 19, at 512 (“First and foremost among the policy considerations [surrounding trade secret regulation] is the importance of maintaining a sense of morality and good faith on the part of modern companies.”).
\item See, e.g., Quittmeyer, supra note 32, at 626-27 (discussing how trade secret law allows inventors to control the dissemination of their technology, often resulting in increased profits that will further the inventors’ drive to create).
\item See Grasselli Chem. Co. v. Nat’l Aniline & Chem. Co., 282 F. 379, 381 (S.D.N.Y. 1920) (“It is true that the result may be to compel the defendant to disclose [trade secrets], . . . and that may damage the defendant. That is, however, an inevitable incident to any inquiry in such a case; unless the defendant may be made to answer, the plaintiff is deprived of its right to learn whether the defendant has done it a wrong.”).
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discoverability of a trade secret provides broad protection to the trade secret owner by requiring a particularized and specific showing of relevancy and necessity. Although the court’s constructions of these elements are not unique, its interpretations represent the narrower reading of both relevancy and necessity. As a result, litigants requesting discovery of a trade secret in South Carolina should expect a higher threshold for obtaining this information. Even though these added protections may have the intended purposes of preventing judicial abuse or providing a business friendly atmosphere, there is no evidence that jurisdictions that interpret the balancing test more broadly are deficient in those areas. Parties requesting discovery of a trade secret will encounter more obstacles in bringing their claim than in other jurisdictions, but this hindrance is unlikely to provide any of the intended additional benefits. In light of disagreements over the actual social value and efficiency of trade secret law, increasing trade secret protection may not serve the intended policies. Although trade secret holders benefit from the supreme court’s construction of the balancing test as it was intended by the legislature, the burden placed upon the requesting party appears disproportionate to any social benefits actually gained.

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