IN THE IOWA DISTRICT COURT FOR POLK COUNTY

IVON TOE, Individually and as Next Friend of YANFOR WRIGHT, NYANSA WRIGHT, RICHMOND WRIGHT and PAULEEN TOE, minors; ACHOL DENG MAWIEN; SEKOU JAI; individually and as Next Friend of HASSAN JAI, a minor; JAILAH NAYOU; individually and as next Friend of SUNDAY NAYOU, GEE NAYOU and ISAIH NAYOU, minors; EVELYN NAYOU; JOSEPHINE COLE;: Individually and as Next Friend of HOMPHREY VANIE and VENESSA VANIE, minors; and THE ESTATE OF ASSATA KARLAR, By its Administrator : GAYE KARLAR, and GAYE KARLAR, Individually, and as Father and Next Friend of TARLEY KARLAR, ESTER KARLAR, NIONBIAO KARLAR, KULEY KARLAR and LOVETTA KARLAR, minor children of ASSATA KARLAR,	:	**CASE NO: CL 106914**
Plaintiffs,	:	**ORDER ON DEFENDANT'S MOTION TO CONTINUE PROTECTIVE ORDER**
vs.	:	
COOPER TIRE AND RUBBER COMPANY	:	
Defendant.	:	

After trial and judgment was entered in this case, several hearings were held in this case concerning Defendant Cooper Tire and Rubber Company's resisted Motion to Continue the Protective Order to continue to provide protection for Cooper Tire's manufacturing documents which were introduced as evidence at trial and to extend the Protective Order to include portions of the trial transcript where these documents were discussed. Both Plaintiffs and Defendant were

represented by their various counsel at these hearings. In addition, Motions to Intervene were filed by counsel who represent plaintiffs in other jurisdictions with product liability claims against Cooper Tire and also by the Center for Auto Safety, seeking to be allowed to intervene and obtain access to the Cooper Tire documents and transcript presently at issue. The court allowed the Interveners to file briefing and also allowed one attorney representative on behalf of all intervening plaintiffs with Cooper Tire product liability cases and one attorney representative on behalf of the Center for Auto Safety to present their oral arguments to the court. Having reviewed the file, exhibits, and the trial transcript, and heard testimony and argument, the court enters the following ruling.

FINDINGS OF FACT

The Plaintiffs in this case were injured in a motor vehicle accident when they were riding in a passenger van which rolled over on a four-lane highway after one of its tires failed. Defendant Cooper Tire and Rubber Company ("Cooper Tire") manufactured the tire which failed. Cooper Tire's manufacturing documents concerning defects related to the tire which failed in this case became the focus of the Plaintiff's discovery efforts. To facilitate this discovery, the parties entered into a Protective Order covering the documents which Cooper Tire produced to the Plaintiffs. All parties signed this Protective Order, the court entered it at the request of the parties, and production of the Cooper Tire documents went forward.

The Cooper Tire Protective Order contained the often used provisions regarding the marking on documents as confidential by the Defendants and the ability to challenge such designation by the Plaintiffs within a certain specified time period. Plaintiffs did not challenge the designation of confidentiality of these documents under the provisions of the Protective Order

The Protective Order further specifically stated:

> 11. **Court Records.** In the event that any **confidential material** is in any way disclosed in any pleading, motion, transcript, videotape, exhibit, photograph, or other material filed with any court, the **confidential material** shall be filed in an attached sealed separate envelope containing the style of the case marked "CONFIDENTIAL MATERIAL Protected by Court Order," dated and kept under seal by the clerk of that court until further court order. Such **confidential material** shall, however, remain available to personnel authorized by that court and to **authorized** persons. When practicable, however, only the confidential portion of the pleadings filed with the court will be filed in a separate sealed envelope. If any **record** containing **confidential material** is furnished to any court, a duplicate copy with the discrete **confidential material** deleted may be substituted in the public record, if appropriate.

(Protective Order, pg. 6)

> 13. **Evidence at Trial.** Prior to seeking to introduce **confidential material** into evidence, Plaintiffs, Defendants and Intervenors (if any) shall give sufficient advance notice to the Court and to counsel of record for Defendant to allow arrangements to be made for *in camera* treatment of the **confidential material.** In the event that a transcript of the trial is prepared, any party may request that certain portions thereof, which contain trade secrets or other **confidential material**, be filed under seal.

(Protective Order, pg. 7)

Just prior to trial of this case, the Defendants asserted the Protective Order required that exhibits introduced into trial as well as the transcript would retain their confidentiality. The Plaintiffs strenuously resisted. To avoid a delay of trial and without adequate time to address this issue, the parties agreed and court ruled that the documents and trial transcript be kept confidential and not released until these issues could be resolved by the court after the trial. Voluminous briefing has been devoted to this issue post-trial with the Defendant Cooper Tire asserting that not only the documents but identified portions of the trial transcript where these documents are discussed should be kept confidential and the Plaintiffs arguing to the contrary.

One of the primary issues at trial of this case was whether or not the failure of the Cooper Tire on the Plaintiff's vehicle was cause by defects in the tire itself. Evidence was introduced

through Plaintiff's experts based upon the Cooper Tire documents that the tire in question failed due to defects in the skim stock used in the tire, and because of other defects in the design of Cooper Tire's 252H tire including the one on the Plaintiff's vehicle. Evidence introduced at trial included documents and testimony indicating that the tire in this case was designed and manufactured with various defects including weakness in the side wall design of the tire which caused it to fail as well as defective skim stock. The Court allowed introduction of Cooper Tire documents related to these issues at trial, including those related to Cooper Tire's knowledge of the defects. The documents introduced are more that fifteen years old and they are all manufacturing documents produced by Cooper Tire concerning tire development and research and production of Cooper Tire and Rubber Company.

At the hearings on these issues, Defendants presented expert testimony as to the factual basis for continued protection of these documents including that Cooper Tire spent money to product the documents, that these documents were and are valuable to Cooper Tire that Cooper Tire has continued to protect the confidentiality of these documents, and their release will result in harm to Cooper Tire. Plaintiffs presented testimony to the contrary through their expert.

CONCLUSIONS OF LAW

The Iowa Rules of Civil Procedure authorize entry of a protective order for discovery purposes holding that "a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way." I.R.Civ.P. 1.504(1)(a)(7). Pursuant to this Rule, a "trade secret" has been identified as "information used in one's business, and which gives the person an opportunity to obtain an advantage over competitors who do not know or use it." *State ex rel Miller v. National Dietary Research, Inc.*, 454 N.W. 2d 820, 824 (Iowa 1990). And the Iowa Code defines a trade secret as follows:

> 4. "Trade secret" means information, including but not limited to a formula, pattern, compilation, program, device, method, technique, or process that is both of the following:
> a. Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by a person able to obtain economic value from its disclosure or use.
> b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Iowa Code Sec. 550.2(4)(2011). Iowa's Rules of Civil Procedure concerning protective orders to protect trade secrets are very similar to the Federal Rules of Civil Procedure and Iowa courts look to interpretation of the federal rules for guidance when such rules are similar. See *Sherwood v. Nissen*, 179 N.W, 2d 336, 339 (Iowa 1970)

Iowa courts have set forth additional criteria for determining whether documents should retain confidential status pursuant to a protective order in civil litigation. In *Comes v. Microsoft*, 775 N.W.2d 302 (Iowa 2009) the Supreme Court held plaintiffs in Canadian litigation against this same defendant in the Iowa case were entitled to modification of the protective order to gain access to discovery in the Iowa law suit. In so holding, the *Comes* court discussed the considerations to look to when determining good cause for a protective order by stating:

> A district court should consider three criteria when evaluating the factual showing establishing good cause: (1) whether the harm posed by dissemination will be substantial and serious; (2) whether the protective order is precisely and narrowly drawn; and (3) whether any alternative means of protecting the public interest is available that would intrude less directly on expression. *Nat'l Dietary Research*, 454 N.W.2d at 823. " '[T]hese criteria strike a balance between the policy favoring discovery and free expression on one side and a party's interest in avoiding commercial damage and preventing an abuse of discovery on the other.' " *Id.* (quoting *Farnum,* 339 N.W.2d at 390).

Id., 775 at 305-306.

The *Comes* court also set out the requirements to modify a protective order by stating:

> After considering the various approaches other courts have taken to address requests to modify protective orders, we conclude the soundest approach is to balance the interests at stake, taking into account the reasons for the issuance of the protective order in the first place and whether the legitimate interests of the parties can still be protected with the

> suggested modification. The court should also consider to what extent the party opposing modification has reasonably relied on the terms of the protective order and whether the party would have relied on the protective order had the suggested modification initially been included in it. In a case such as this one, the court should consider the value of the interests of the party seeking modification, as well as any public interest in judicial economy and public disclosure, if appropriate. The court should consider whether the party seeking modification is attempting to circumvent discovery or evidentiary restrictions in some other jurisdiction. Because each situation in which a party or third party seeks modification will be different, we will not try to list all the considerations the district court may take into account when making its decision, but the court should fully and fairly consider all the circumstances supporting the modification, as well as the circumstances mitigating against it, and not employ any presumption for or against modification. To the extent that our decision in *Tratchel* implies there is a presumption against modification, we disavow it.

Id., 775 N.W.2d at 309-310.

A Federal Magistrate Judge, in refusing to sign a protective order similar to the one agreed to by the parties and entered by the court in this case which allowed confidential protection to trial exhibits and the trial transcript, reviewed federal law on these issues by stating:

> "The operations of the courts and the judicial conduct of judges are matters of utmost public concern." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978). As a result, "the courts of this country recognize a general right to inspect and copy ... judicial records and documents." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978). *See also Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 203 F.3d 291, 303 (4th Cir.2000) ("Publicity of such records, of course, is necessary in the long run so that the public can judge the product of the courts in a given case. It is hardly possible to come to a reasonable conclusion on that score without knowing the facts of the case."); *In re Krynicki*, 983 F.2d 74, 75 (7th Cir.1992) ("Judges deliberate in private but issue public decisions after public arguments based on public records. The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat; this requires rigorous justification.").[FN3]
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> FN3. The right of access to court records flows from the right of access to in-court proceedings; it applies in both civil and criminal cases. *See Rushford v. The New Yorker Magazine, Inc.*, 846 F.2d 249, 253 & n. 4 (4th Cir.1988).
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> "The right of public access to documents or materials filed in a district court derives from two independent sources: the common law and the First Amendment." *Virginia Dept. of State Police v. The Washington Post*, 386 F.3d 567, 575 (4th Cir.2004). "While the common law presumption in favor of access attaches to all 'judicial records and documents,' the First Amendment guarantee of access has been extended only to particular judicial records and documents." *Stone v. University of Md. Med. Sys. Corp.*,

> 855 F.2d 178, 180 (4th Cir.1988) (internal citation omitted). "The distinction between the rights of access afforded by the common law and the First Amendment is significant, because the common law does not afford as much substantive protection to the interests of the press and the public as does the First Amendment." *Virginia Dept. of State Police,* 386 F.3d at 575 (internal citations and quotation marks omitted). As a result, "different levels of protection may attach to the various records and documents involved in [a] case." *Stone,* 855 F.2d at 180.
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> In light of this legal framework, "[w]hen presented with a request to seal judicial records or documents, a district court must comply with certain substantive and procedural requirements. As to the substance, the district court first must determine the source of the right of access with respect to each document, because only then can it accurately weigh the competing interests at stake." *Virginia Dept. of State Police,* 386 F.3d at 576 (internal citations and quotation marks omitted). Procedurally:
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> [The district court] must give the public notice of the request to seal and a reasonable opportunity to challenge the request; it must consider less drastic alternatives to sealing; and if it decides to seal it must state the reasons (and specific supporting findings) for its decision and the reasons for rejecting alternatives to sealing. Adherence to this procedure serves to ensure that the decision to seal materials will not be made lightly and that it will be subject to meaningful appellate review. *Id.*

Hanesbrands, Inc. v. Van Stevenson, L1286669, 3-4 (M.D.N.C.2010). A federal judge sitting in Iowa, however, has held that the common-law right of access did not deprive protected documents used as exhibits at trial of their confidential status. *Jochims v. Isuzu Motors, Ltd.*, 151 F.R.D. 338, 340-341(S.D.Iowa 1993)(involving manufacturing documents in a products liability action against automobile manufacturer). See *Crestone Group, LLC v. Starbucks Corp*., unreported opinion, 2009 WL 1953397 (S.D.Cal. 2009)(court entered protective order allowing for exhibits and trial transcript to be identified as confidential); *Petersen v. Diamler Chrysler Corp*., Slip Opinion, 2007 WL 914738 (D.Utah 2007)(court entered a protective order allowing for exhibits and trial transcript to be identified as confidential in Cooper Tire case); *In re Matter of Trust for Gore,* Slip Opinion, 2010WL5644675 (Del.Ch. 2011)(redacting from trial transcript number and value of shares in a privately held company).

In this case the Plaintiffs agreed to an Order designating the Cooper Tire documents as confidential and to the court's knowledge did not challenge the confidential designation of any of

the documents prior to trial pursuant to the procedures set forth in the Protective Order. The Defendant Cooper Tire argues that its manufacturing documents produced pursuant to the Protective Order which were introduced at trial should retain their confidential designation because they are trade secret documents. The court agrees with this assessment. They are research and manufacturing documents created by Cooper Tire in the manufacturing process which Cooper Tire spent money to create and to protect from public dissemination, and which could provide an advantage to one of Cooper Tire's competitors if they came into their possession. And even though the age of the documents may have lessened their trade secret value, the court concludes after reviewing the documents, they contain sufficient information about Cooper Tire's manufacturing processes and analysis to outweigh the argument that age has destroyed the need for continued protection of the documents. See *Basic Chemicals, Inc., v. Benson*, 251 N.W.2d 220 (Iowa 1977). The court further concludes that Cooper Tire would be harmed by the release of the documents, the protective order is precise enough to allow documents which are not confidential to be relieved of this designation, and the interested persons who have a valid need for these documents such as the plaintiffs in other Cooper Tire litigation can pursue and obtain the documents in their own cases. In addition, a balancing of Cooper Tire's need for protection against the Toe Plaintiffs and others needs for full release of the documents tips the balance in favor of Cooper Tire. For these reasons, the court concludes the documents identified by Cooper Tire as confidential which were introduced at trial shall retain their confidentiality pursuant to the Protective Order agreed to and entered in this case and shall continue fall under the requirements of that Protective Order.

Defendant Cooper Tire further asks that portions of the trial transcript wherein the Cooper Tire documents were introduced and discussed should also be marked as confidential

pursuant to the Protective Order and thus not released to the public. As discussed above by the Federal Magistrate Judge, the request to seal a trial transcript is a highly unusual request and contravenes the long held right to a free and open trial and the right of other citizens to have access to what happens during such trial. The Toe trial was held, and the transcript was made, in open court with various individuals related to as well as unrelated to the case present during testimony when these documents were discussed. In addition, persons sitting in the courtroom could view the documents on a very large projector screen as they were being discussed. The court, having reviewed the trial transcript where these confidential documents were discussed, is not convinced that the small portions of the documents discussed at trial are of a sufficient trade secret value to provide any benefit to a Cooper Tire competitor, and thus no portion of the trial transcript will be placed under a protective order.

CONCLUSION

For the reasons stated above the court determines that the documents produced Cooper Tire in this litigation pursuant to the Protective Order agreed to by both parties and signed by the court, including those introduced at trial, should continue to be deemed as confidential. The court, however, does not believe that the small portion of these documents discussed during trial warrant or support the sealing of any portion of the trial transcript in this case and the trial transcript shall not be covered by the protective order.

In so finding, the court does not intend that any portion of this order shall be used to prohibit or interfere with the documents produced and/or admitted as evidence in this case being produced through discovery in any other Cooper Tire litigation, and in fact affirmatively makes a finding that these documents are relevant for purposes of discovery to cases in which plaintiffs

bring claims based upon defects in Cooper Tire, particularly those cases included 252H tire or containing the same skim stock used in the Toe tire.

RULING AND ORDER

IT IS THEREFORE ORDERED Cooper Tire's Motion To Extend Protective Order is GRANTED IN PART and DENIED IN PART. The Court finds that the documents produced during discovery by Cooper Tire to the Plaintiffs in this case shall remain covered by the protective order and even those documents introduced into evidence shall remain confidential and treated as required by the Protective Order. No portion, however, of the trial transcript in this case shall be covered by the Protective Order, including portions where the protected documents are discussed, and the trial transcript may now be released without restriction.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED this Order is stayed pending appeal of these issues. If the issues addressed in this order are not raised pursuant to an appeal filed within 30 days this lifting of the Protective Order related to the trial transcript in this case shall take affect and the trial transcript shall no longer be considered confidential and the trial transcript may be released. If these issues are raised on appeal the stay shall remain in place pending action by the reviewing court.

DATED this _____ day of January, 2012

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CARLA T. SCHEMMEL, JUDGE
Fifth Judicial District of Iowa

Copies to:

Frederick W. James
The James Law Firm, P.C.
604 Locust Street, Ste. 630
Des Moines, Ia 50309
fwjames@raccoon.com

Wesley Ball
Kyle W. Farrar
Farrar & Ball
1010 Lamar, Suite 1600
Houston, TX 77002
wes@fbtrial.com
Attorneys for Plaintiffs

Richard J. Sapp
Nyemaster, Goode, West, Hansell & O'Brien, P.C.
700 Walnut Street, Suite 1600
Des Moines, IA 50309-3899
rjs@nyemaster.com

and

Joe Thacker
THACKER MARTINSEK, LPA
3235 Levis Commons Blvd.
Perrysburg, Ohio 43551
jthacker@TMLPA.com
Attorneys for Cooper Tire & Rubber Co.

Terrence C. Thom
Stafford Rosenbaum LLP
325 North Corporate Dr.
Brookfield, WI 53045

and

R. Jeffrey Lewis
Brett
3900 Ingersoll
Des Moines, IA 50312
RJL@lewislaw-ia.com
Attorney for Alfred Lang

Leslie A. Bailey
lbailey@publicjustice.net

Emily Anderson
Timothy S.Semelroth
Pressley Henningsen
eanderson@riccololaw.com
Attorney for Intervenor Center for Auto Safety