

STATE OF MICHIGAN
COURT OF APPEALS

WHITESELL INTERNATIONAL
CORPORATION,

Plaintiff-Counterdefendant-
Appellant,

v

WILLIAM WHITAKER,

Defendant-Counterplaintiff-
Appellee,

and

MRC INDUSTRIAL GROUP, INC.,

Defendant,

and

PIERCETEK, INC.,

Defendant/Counter-Plaintiff.

UNPUBLISHED
September 14, 2010

No. 287569
Wayne Circuit Court
LC No. 05-518716-CZ

Before: MURPHY, C.J., and JANSEN and ZAHRA, JJ.

MURPHY, C.J. (*dissenting*).

Because I conclude that the doctrine of res judicata is inapplicable and that the trial court prejudicially erred in directing a verdict on the issue of whether the Stamptech Process (method of making interconnected pierce nuts) constituted a “trade secret,” I respectfully dissent.

I. THE COMPLAINT AND COUNTERCLAIM

In the complaint filed by plaintiff-counterdefendant Whitesell International Corporation (WIC), it was alleged, in part, that the Stamptech Process was a trade secret, that defendant-counterplaintiff William Whitaker had previously executed a confidentiality agreement and an

assignment of manufacturing rights,¹ and that the confidentiality agreement and assignment precluded Whitaker from disclosing and utilizing the Stamptech Process, given that it was a trade secret and any rights in the process held by Whitaker had been released and assigned to WIC's predecessor, Whitesell of Michigan, Inc. (WOM). WIC further asserted that Whitaker was currently employed by defendants MRC Industrial Group, Inc. (MRC), and Piercetec, Inc., a division of MRC. Count I of the complaint alleged misappropriation of trade secrets, accusing Whitaker of disclosing the Stamptech Process and other trade secrets to MRC and Piercetec. There is no dispute that the activities of Whitaker relative to his involvement with MRC and Piercetec and challenged by WIC in this suit took place after the conclusion of the Washtenaw County lawsuit and the federal action brought against Whitaker. Count II alleged tortious interference with contractual relations and advantageous business opportunities, claiming that Whitaker, MRC, and Piercetec had solicited customers of WIC by improperly advancing and employing the Stamptech Process, which was WIC's assigned and protected trade secret.² Count III alleged misappropriation of a patent application, and Count IV sought injunctive relief.

Whitaker's counterclaim presented antitrust and tortious interference claims. Whitaker alleged that WIC violated the Michigan Antitrust Reform Act, MCL 445.771 *et seq.*, gaining control of the market for self-piercing fastening products used in the automotive and appliance industries. Whitaker also alleged that WIC tortiously interfered with his business relationships and expectancies, improperly interjecting itself in certain bankruptcy proceedings, threatening companies interested in working with Whitaker, and stopping Whitaker from developing viable companies in the relevant market.

II. RES JUDICATA

The trial court summarily dismissed WIC's complaint on the basis of res judicata, and the majority affirms, holding:

We conclude that claims in which Whitaker sought to disclose trade secrets should have been raised in relation to [Whitaker's Washtenaw County counterclaim] . . . to null and void a non-competition agreement. How Whitaker would attempt to compete with WOM, especially considering his former experience, would clearly form a convenient trial unit. Further, little diligence would need be exercised to discover any potential trade secret disclosure, given pleadings indicating that, Whitaker "has now commenced operations making pierce nuts for a company known as the 'Pierce Nut Company' [PNC] located in

¹ The confidentiality agreement provided that Whitaker would not "disclose or release . . . confidential trade secrets." The assignment of manufacturing rights reflected that Whitaker had assigned, conveyed, and released all interests and rights "in any manufacturing processes . . . related to Pierce Nuts . . . previously produced by Stamptech" to WIC's predecessor.

² A consent judgment was entered in favor of WIC against MRC and Piercetec. MRC and Piercetec admitted liability for misappropriating trade secrets relative to the Stamptech Process, and they also admitted liability for tortious interference with WIC's contractual and business relationships.

Livonia, Michigan. This company manufactures the same product and sells it to the same customer base as does Stamptech.”

Further, for the same reasons, the instant case is barred by res judicata because of the resolution of the federal action. In that case, there was no question that Whitaker was competing against WOM and his method of competition would have been highly relevant. The trial court correctly granted Whitaker’s motion for summary disposition. [*Ante* at ____.]

We review de novo a trial court’s ruling on a motion for summary disposition as well as the legal question of whether the doctrine of res judicata bars a subsequent lawsuit. *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 686; 762 NW2d 529 (2008).

In *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004), our Supreme Court set forth the elements necessary to invoke and apply the defense of res judicata:

The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action. The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. *Sewell v Clean Cut Mgt, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001). This Court has taken a broad approach to the doctrine of res judicata, holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not. *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999).

Additionally, the decree in the prior action must have been a final decision. *Richards v Tibaldi*, 272 Mich App 522, 531; 726 NW2d 770 (2006). “The burden of establishing the applicability of res judicata is on the party asserting the doctrine.” *Id.*

With respect to the third element of res judicata, i.e., the matter in the second case was, or could have been, resolved in the first case, the *Adair* Court indicated that Michigan follows a broad “same transaction” or “transactional” test. *Adair*, 470 Mich at 123-125. The transactional test provides that the assertion of different theories or kinds of relief still constitutes a sole cause of action if a single group of operative facts give rise to the assertion of relief. *Id.* at 124. Under the transactional approach, a claim is viewed in factual terms and is considered coterminous with the transaction, regardless of the number of substantive theories or variant forms of relief that flows from those theories which may be available to a plaintiff and regardless of any variations in the evidence necessary to support the theories or rights. *Id.* The question whether a factual grouping constitutes a “transaction” is determined pragmatically by considering whether the facts are related in time, space, origin, or motivation, along with whether they form a convenient trial unit. *Id.* at 125.

Adair entailed issues concerning the Headlee Amendment, Const 1963, art 9, § 29, and *Durant v Michigan*, 456 Mich 175; 566 NW2d 272 (1997), referred to as *Durant I*, was the underlying case upon which the *Adair* defendants were claiming the defense of res judicata. The *Adair* Court stated:

Of all plaintiffs' claims concerning the seven administrative rules, thirteen statutes, and one executive order, only a few involve post-*Durant I* mandates. Of the seven administrative rules identified in count I, six were promulgated in 1987 and one in 1983. Thus, none postdates *Durant I*, and the analysis in the res judicata . . . section[] of this opinion applies to bar these claims. Regarding count II, it concerns MCL 380.1284, for which the last amendment making substantive changes to mandated activities was 1995 PA 289. Thus, it similarly is barred. With regard to count III, one claim was withdrawn and one of the identified statutes was repealed. Of the remaining ten statutes, only two, MCL 380.1277 and 380.1282, include changes regarding activities added after *Durant I*. The executive order also postdates *Durant I*, having been issued in 2000.

This leaves, then, these three claims that arguably are based on post-*Durant I* mandates. [*Adair*, 470 Mich at 128-129.]

This passage reflects our Supreme Court's refusal to apply res judicata to activities that occurred after the underlying case was concluded. Courts in other jurisdictions have also held that res judicata cannot bar a claim predicated on events that had not yet transpired at the time of the previous litigation. *Alston v Hormel Foods Corp*, 273 Neb 422, 434; 730 NW2d 376 (2007); *Page v United States*, 234 US App DC 332, 335; 729 F2d 818 (1984). In *Lawlor v Nat'l Screen Service Corp*, 349 US 322, 328; 75 S Ct 865; 99 L Ed 1122 (1955), the United States Supreme Court stated that, "[w]hile the . . . judgment precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case."

Here, it is impossible to conclude that WIC could have brought a claim or cause of action in the two earlier suits pertaining to Whitaker's use and disclosure of the Stamptech Process relative to his association with MRC and Piercetec, given that said use and disclosure had not yet transpired when those previous suits were litigated and closed. The disclosure to MRC and Piercetec was a future event, as was the use of the Stamptech Process by those companies, which was made possible by Whitaker's assistance, and thus no exercise of reasonable diligence during the earlier litigation would have resulted in a claim being brought against Whitaker with respect to the MRC and Piercetec disclosure and use. Res judicata, which concerns *claim* preclusion, *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001),³ cannot bar WIC's claims against Whitaker here because they did not arise from the same transaction involved in the previous lawsuits. The group of operative facts in existence giving rise to the assertion of relief by WIC and WOM against Whitaker in the Washtenaw County litigation included the presence of a non-competition agreement executed by Whitaker and acts by Whitaker that allegedly violated the non-competition agreement. The group of operative facts in existence at that time also included, while not directly the subject of the Washtenaw County litigation, the presence of

³ I note that a judgment predicated on acceptance of a case evaluation, as was the situation in the Washtenaw County suit, "shall be deemed to dispose of all claims in the action[.]" MCR 2.403(M)(1).

the confidentiality agreement and the assignment of manufacturing rights executed by Whitaker, disclosure of the Stamptech Process by Whitaker to PNC, and use of the Stamptech Process by PNC with Whitaker's aid.⁴ By the time of the subsequent federal lawsuit, all of the facts referenced above had of course transpired and were in existence, but the events concerning MRC and Piercetec had not yet taken place. Although encompassing a disclosure of the Stamptech Process by Whitaker to PNC and its use, the group of operative facts in existence before and during the two earlier lawsuits did not encompass a disclosure to MRC and Piercetec and use of the process by those companies. And therefore, no cause of action, regardless of the theory espoused, could even have been alleged against Whitaker in connection with his involvement and activities with MRC and Piercetec. As stated by the *Ditmore* panel, “[t]he present case involves facts and events separate from those involved in the [original] dispute, and the doctrine of res judicata was therefore inapplicable.” *Ditmore*, 244 Mich App at 577. Because the facts and events that were part of the transaction associated with WIC, WOM, and Whitaker did not previously include the disclosure to MRC and Piercetec and the related use of the Stamptech Process, res judicata is simply inapplicable.

As may be gleaned from the preceding paragraph, the facts underlying the instant suit necessary to state and form a cause of action and the facts existing at the time of the earlier litigation are not *fully* related in time, space, origin, and motivation, but they are partially related. I emphasize my use of the word “fully” considering that part of the factual predicate needed to support WIC’s lawsuit here did in fact exist during the timeframe of the previous litigation. There are some undeniable factual parallels. To pursue the instant action and succeed, it needed to be established (1) that the confidentiality agreement and/or assignment of manufacturing rights were valid and enforceable, (2) that the Stamptech Process constituted a protected “trade secret” and the interest in it had been assigned and conveyed by Whitaker to WOM for purposes of the confidentiality agreement and assignment, and (3) that Whitaker, without consent, disclosed and used the Stamptech Process trade secret relative to his association with MRC and Piercetec.⁵ See *Aerospace America, Inc v Abatement Technologies, Inc*, 738 F Supp 1061, 1069 (ED Mich, 1990); *CMI Int’l, Inc v Internet Int’l Corp*, 251 Mich App 125, 132; 649 NW2d 808 (2002). The first two elements could have been raised as issues in the Washtenaw County and federal actions, considering that they pertain to operative facts already in existence at the time of

⁴ With respect to the majority’s reliance on WIC and WOM pleadings in the Washtenaw County case referring to Whitaker’s actions in making pierce nuts for PNC, the reliance is misplaced because WIC’s suit here does not pertain to Whitaker’s activities relative to PNC, but rather to his *later* activities with MRC and Piercetec. The majority seems to suggest that *any* disclosure or *any* use of the Stamptech Process supports imposition of res judicata, but such an approach ignores the factual basis of WIC’s suit and is inconsistent with the “same transaction” test set forth in *Adair*.

⁵ All three elements had to be shown in order to support a claim or cause of action. As I indicated above, res judicata concerns “claim” preclusion and without an improper disclosure or unauthorized use in connection with Whitaker’s relationship with MRC and Piercetec, no claim or cause of action could arise as to events regarding that relationship.

those suits. Stated differently, WIC could have previously litigated the issues regarding whether the confidentiality agreement and assignment were valid and enforceable and whether the Stamptech Process was a true trade secret that had been assigned; the facts necessary for resolution were in place. But the final part of the puzzle, before there could be any recovery here on a claim, entailed the third element and the issue of whether there was an improper disclosure and use of the Stamptech Process relative to MRC and Piercetec. Therefore, as I view it, there are multiple issues or elements that beg and require resolution within the context of a single claim or cause of action. My analysis focusing on different factual issues that are components of a single claim gives rise, in my opinion, to the possibility of applying the doctrine of collateral estoppel, not res judicata.

Collateral estoppel, as opposed to res judicata, concerns *issue* preclusion. *Ditmore*, 244 Mich App at 577. In *Estes v Titus*, 481 Mich 573, 585; 751 NW2d 493 (2008), our Supreme Court discussed collateral estoppel, stating:

That doctrine requires that (1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) there was mutuality of estoppel.

The doctrine of collateral estoppel does not apply to consent judgments where factual issues are neither tried nor conceded. *Smit v State Farm Mut Automobile Ins Co*, 207 Mich App 674; 525 NW2d 528 (1994).

In the Washtenaw County case, a judgment was entered after the parties accepted the case evaluation. The judgment provided that it was entered “in favor of Plaintiffs Whitesell Corporation and Whitesell of Michigan, Inc., jointly and severally, and against Defendant[] Bill Whitaker” Again, the Washtenaw County case addressed a claim that Whitaker had breached the non-competition agreement, along with a counterclaim by Whitaker that the non-competition agreement was invalid. I respectfully disagree with the majority’s assessment that Whitaker’s counterclaim in the Washtenaw County case seeking to void and nullify the non-competition agreement somehow supports dismissal of the instant action. If anything, the judgment could be interpreted as implicitly entailing a determination that the non-competition agreement was valid and was breached by Whitaker. It certainly cannot be concluded that the judgment reflects the contrary.

Regardless, given that the Washtenaw County judgment was essentially a consent judgment and that the issues concerning the enforceability of the confidentiality agreement and assignment and whether the Stamptech Process constituted a trade secret that had been assigned were not tried, conceded, or determined, collateral estoppel cannot be invoked here to dismiss WIC’s lawsuit against Whitaker. Hypothetically, had those issues actually been fully litigated with a final determination in favor of Whitaker on even just one of the issues, collateral estoppel could be invoked to bar WIC’s suit. This is because WIC could not succeed on its claims, even with the presence of new events pertaining to MRC and Piercetec, absent an enforceable confidentiality agreement or assignment and the existence of a valid trade secret that had been assigned, as WIC would not be able to establish all the requisite elements. In that same vein, had WIC or its predecessor actually and fully litigated the Washtenaw County suit with a favorable determination on those issues, it would defy logic to preclude WIC from pursuing the instant

action against Whitaker. To rule otherwise in such a scenario would be to empower Whitaker to brazenly breach the confidentiality agreement and assignment in relation to future trade secret disclosures and use of the Stamptech Process, where he could argue that there was a prior suit that had already involved the issues concerning enforceability and whether the process was a trade secret that had been assigned, *despite losing on those issues in the prior case*. This illustrates the defect in the majority's reasoning. By employing the doctrine of res judicata, the majority is effectively rewarding Whitaker and punishing WIC even though it cannot reasonably be concluded in any fashion whatsoever that Whitaker won on his counterclaim or that he received a favorable determination on the relevant issues, let alone that said issues were even litigated and determined. If Whitaker wanted WIC off his proverbial back on a permanent basis with respect to future use and disclosure of the Stamptech Process, he should have fully litigated the Washtenaw County case or reached a settlement which included a specific finding that the confidentiality agreement and assignment were unenforceable or that the Stamptech Process did not constitute a trade secret that had been assigned. WIC also could have headed off the need for this litigation with a definitive determination, by way of full litigation or settlement, on those issues.

Accordingly, I would conclude that the trial court erred in summarily dismissing WIC's lawsuit against Whitaker. I note that Whitaker himself makes, in my estimation, a half-hearted argument in favor of the trial court's ruling on the res judicata issue. Instead, Whitaker places more emphasis on the argument that, regardless of the soundness of the res judicata ruling, dismissal was proper because there was no trade secret misappropriation, as evidenced by the directed verdict, and because the jury found that WIC's suit was a sham. This argument necessarily leads me to the next issue concerning whether the trial court erred in directing a verdict in favor of Whitaker, finding that the Stamptech Process was not a trade secret and instructing the jury that it was not a trade secret.

III. TRADE SECRET AND THE DIRECTED VERDICT

We review de novo a trial court's ruling on a motion for directed verdict. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). With respect to the motion, the evidence and all legitimate inferences are examined in a light most favorable to the nonmoving party. *Id.* "A motion for directed verdict or JNOV should be granted only if the evidence viewed in this light fails to establish a claim as a matter of law." *Id.* If reasonable jurors could have honestly reached different conclusions, we cannot interfere with the jury's verdict, which must be allowed to stand. *Zantel Marketing Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005). "Further, this Court recognizes the unique opportunity of the jury and the trial judge to observe witnesses and the fact-finder's responsibility to determine the credibility and weight of the testimony." *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 491; 668 NW2d 402 (2003).

MCL 445.1902 provides:

(d) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that is both of the following:

(i) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

(ii) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The trial court, relying on the cross-examination of two WIC witnesses, Harold Woods and Jorge Gonzalez, found that the Stamptech Process was not a trade secret as it had been divulged in patent materials that were public. The trial court directed a verdict in favor of Whitaker on the issue, finding that there was no trade secret as a matter of law and taking the question away from the jury. I disagree with the trial court's ruling as the court misinterpreted the testimony given by Woods and Gonzalez. Although indicating that the patent materials revealed finished products constructed through the use of the Stamptech Process and generally recognized said process, the testimony and evidence did not indicate that the patent materials particularly described the process itself. When their testimony is fairly characterized, Woods and Gonzalez did not articulate that the Stamptech Process was disclosed in the patent materials. Indeed, Woods expressly testified that it was not so disclosed. And Gonzalez repeatedly indicated that the patent materials did not divulge the Stamptech Process, as they said nothing about the details concerning the manner by which to achieve synchronization of the machinery, nothing about the configuration of the dies and how the dies work, and nothing about the tappers and the balancing of the tooling. On the entire record, there was sharply conflicting evidence presented at trial concerning whether the Stamptech Process was a trade secret falling within the definition in MCL 445.1902(d). The trial court erred in granting the directed verdict on the issue.

The majority, apparently sensing the problems with the trial court's ruling, states that it is not necessary to determine whether the court erred as any presumed error was harmless. The majority reasons:

There is no error requiring reversal if, on balance, the theories of the parties and the applicable law were adequately and fairly presented to the jury. Here, even assuming that the trial court, by directing a verdict that there was no trade secret, improperly suggested to the jury that WIC's interest in the Stamptech process was not a protected trade secret, the jury was nonetheless required to conclude that the WIC's primary objective in bringing the trade secret claim was to hurt Whitaker. This additional finding rendered the court's ruling harmless. [Ante at __ (citations omitted).]

This analysis implicates the *Noerr-Pennington* doctrine, which is a doctrine derived from two United States Supreme Court cases pertaining to the Petition Clause and the antitrust laws. *J & J Constr Co v Bricklayers & Allied Craftsmen, Local 1*, 468 Mich 722, 727 n 5; 664 NW2d 728 (2003). The doctrine is a principle of constitutional law that bars litigation arising from injuries received as a result of First Amendment petitioning activity, regardless of the underlying cause of action alleged by a plaintiff. *Azzar v Primebank, FSB*, 198 Mich App 512, 517; 499 NW2d 793 (1993). The protection of the *Noerr-Pennington* doctrine also extends to efforts to influence administrative agencies and the courts of law. *Arim v Gen Motors Corp*, 206 Mich App 178, 190; 520 NW2d 695 (1994). Here, WIC sought to use the doctrine to shield itself from

liability relative to Whitaker's causes of action, arguing that the doctrine protected its activities, including the filing of suits against Whitaker. Whitaker asserted that he could proceed on his claims and that the *Noerr-Pennington* doctrine was inapplicable under the "sham" exception to the doctrine. Whitaker posited that the pattern of three unsuccessful lawsuits supported imposition of the "sham" exception and evidenced WIC's antitrust activities.

Indeed, a recognized exception to the *Noerr-Pennington* doctrine is the sham exception. *Arim*, 206 Mich App at 190. The sham exception is implicated when a petitioning party is not at all serious about the object of that petition, yet engages in the petitioning activity merely to inconvenience its competitor. *Id.* The sham exception applies when one party has begun litigation not to win that litigation, but rather to force its competitor to waste time and money in presenting a defense. *Id.* Under the exception, if challenged litigation is objectively meritless, a court may examine the litigant's subjective motivation. *Professional Real Estate Investors, Inc v Columbia Pictures Industries, Inc*, 508 US 49, 60; 113 S Ct 1920; 123 L Ed 2d 611 (1993). The sham exception requires that the lawsuit be objectively baseless in that no reasonable litigant could realistically expect success on the merits. *Id.*

Here, the jury found that WIC's suit was objectively baseless such that no reasonable litigant could realistically have expected to win. The jury also found that WIC's primary objective in filing suit was to hurt Whitaker and not to obtain the relief sought in its complaint.

I first mention that the trial court allowed the jury to consider the summary dismissal of WIC's suit in evaluating the applicability of the sham exception and that Whitaker repeatedly drove home the point to the jurors that WIC's trade secret suit had been summarily dismissed. If the trial court had not dismissed WIC's action, consistent with my conclusion that res judicata was inapplicable, the jury would never have considered any summary dismissal, which likely would have impacted the jury's verdict concerning the sham exception.

With respect to the directed verdict on the trade secret question, even without contemplating the res judicata error, I cannot conclude that the court's error, assumed or otherwise, was harmless. I agree with the majority that the court's ruling still allowed the jury to possibly find that WIC's purpose in filing suit was not to harm Whitaker and that WIC had an objective basis to sue that was reasonable, with a realistic expectation to win. But with the court directing a verdict that there was no trade secret, which alleged trade secret formed the heart of WIC's suit, it became a forgone conclusion how the jury would decide the sham exception. By effectively communicating to the jury that WIC's trade secret argument was so unwarranted and lacking in merit that the court was not even going to allow the jurors themselves to decide the issue despite all the testimony on the matter, the die was cast and WIC's efforts to still avoid application of the sham exception became untenable. I do not think that it is sound to conclude, as the majority essentially does, that the jury would necessarily have reached the same verdict. Although the jury may have found that there was no trade secret had it been permitted to answer the question, this would be pure speculation, and I am not prepared to find any error harmless. WIC was deprived of having the jury fairly assess its defense under the *Noerr-Pennington* doctrine. Moreover, when the error on the res judicata issue is added to the mix, it would undoubtedly be inappropriate to apply the harmless error principle. Additionally, the directed verdict on the trade secret issue certainly aided in solidifying the substance of Whitaker's antitrust claim.

The trial court did not instruct the jury on the *Noerr-Pennington* doctrine and the sham exception relative to Whitaker's tortious interference claim. However, this Court in *Azzar*, 198 Mich App at 517, stated that the doctrine is applicable "regardless of the underlying cause of action asserted[.]" See also *Melea, Ltd v Quality Models, Ltd*, 345 F Supp 2d 743, 758 (ED Mich, 2004) (*Noerr-Pennington* doctrine barred counterclaim for tortious interference with a business relationship). Accordingly, the trial court erred in this regard. The tortious interference cause of action pursued by Whitaker related to WIC's activities in declaring its alleged trade secret rights and threatening to protect those rights in connection with certain bankruptcy proceedings and prospective corporate dealings that would have been beneficial to Whitaker. WIC was improperly deprived of having the jury consider a *Noerr-Pennington* defense to the tortious interference claim, and even though the jury found the sham exception to be applicable, albeit in regard to the antitrust claim, the exception was not fairly evaluated given the error in directing a verdict on the trade secret issue and the error in invoking res judicata to dismiss WIC's suit.

IV. CONCLUSION

I conclude that the doctrine of res judicata is inapplicable and that the trial court erred in directing a verdict on the issue of whether the Stamptech Process constituted a "trade secret," severely prejudicing WIC. WIC is entitled to a new trial. Accordingly, I respectfully dissent.

/s/ William B. Murphy