IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

WANDA CASTLEBERRY, Individually and for THE ESTATE AND HEIRS OF TOMMY JOE CASTLEBERRY	§	C.A. No. C-85-357
VS.	§	
REMINGTON ARMS CO., INC.	§	

PLAINTIFFS' MOTION FOR SANCTIONS

TO THE HONORABLE UNITED STATES DISTRICT COURT:

COMES NOW, Wanda Castleberry, Individually and for The Estate and Heirs of Tommy Joe Castleberry, and respectfully file this motion for sanctions pursuant to Fed. R. Civ. P. 37. Plaintiffs respectfully submit that the flagrant abuse of discovery by Remington in the face of this Court's prior order compelling discovery and imposing sanctions justifies severe sanctions, including an order pursuant to Rule 37(b)(2)(C) striking Remington's pleadings and rendering a default judgment as to liability, and imposing such other sanctions as the Court finds warranted.

I.

BACKGROUND

This case involves Plaintiffs' claims for the wrongful death of Tommy Joe Castleberry when a defective Remington Model 660 rifle fired when Wanda Castleberry moved the safety lever from the safe position to the fire position in order to unload the rifle. The design of the rifle, which Plaintiffs contend was unreasonably dangerous, contained a bolt-lock feature, which required the user to put the safety in the fire position in order

to begin unloading the rifle. Additionally, the rifle in question, and a majority of rifles of this model, were defective in that they would discharge when the safety lever was moved. Thus, the design required the user to take an action -- i.e., moving the safety lever -- which would result in the rifle firing without anyone touching the trigger.

As part of legitimate discovery, Plaintiffs sent Remington a first request for production of documents (Attachment "A") and first set of written interrogatories (Attachment "B"). Interrogatory 6 and requests for production 4 and 20 specifically inquired about other complaints and other incidents as follows:

> Interrogatory 6: If you now have, or have ever had, any claims against you arising out of the use of a Remington model firearm utilizing a two-position bolt-lock safety device, identify each and every claimant and state the date, nature, and substance of his or her claim.
>
> Request for Production 4: All documents relating to any other complaint relating to a two-position bolt-lock safety design relating to any firearm that you have designed and/or manufactured, including, but not limited to any incidence of a firearm "firing off safe," firing without engagement of the trigger, or firing o[n] release of the safety.
>
> Request for Production 20: All documents, including complainant letters, which you have received or

obtained and which relate to any accidental discharge or alleged accidental discharge of any firearm with a two-position bolt-lock safety device which was either designed and/or manufactured by you.

Remington responded with objections, resulting in the filing of Plaintiffs' motion to compel discovery and impose sanctions, which was filed September 26, 1986, after informal efforts to resolve the difference with Remington's counsel were concluded. A hearing on the motion was held December 10, 1986, before the Honorable Eduardo E. De Ases, United States Magistrate.

At the hearing, counsel for Remington admitted that Remington had a duty to supply documents regarding the Model 600 series. The real dispute between the parties was whether Remington should also have to produce documents relating to the Model 700 series. (Attachment "C"; hearing transcript p. 36). Remington's counsel further represented that Remington had produced all customer complaints. (p. 38). Remington's counsel also acknowledged that the Mohawk 600 would be considered part of the Model 600 series for purposes of producing documents. (p. 50). The following exchange also took place:

Mr. Demars: Your Honor, there's over 250,000 of these rifles out in the market. Now, this is a serious case which involves a shooting by a gun that allegedly discharged when the safety was moved. If we have a letter from someone who said, "You know, my stock cracked in the heat of my back seat," I don't feel we should [be] put to the burden of

having to show that we might have had a cosmetic problem, that some guy wrote and said he couldn't hit the broad side of a barn with it. I mean, those types of things, Your Honor, we have given them complaints that have dealt with the accidental discharge of the weapon.

* * *

The Court: This request or these requests for documents regarding defects is limited to the same model of firearm as is involved in this lawsuit?

Mr. Kincaid: Yes, sir, to the extent of all problems -- we want all problems on this model firearm, the 600-660.

Mr. Demars: Your Honor --

The Court: Yes, Sir.

Mr. Demars: -- Remington segregates problems or complaints they have with regard to safety. It's something that they can take care of and make sure they have a handle on. . . .

The Court: Excuse me. You're willing to produce to Mr. Kincaid in response to his request any documents concerning safety defects of the same model firearm?

Mr. Demars: Yes, sir.

The Court: All right. I'm going to order you to do that in response to the Plaintiffs' requests[.]

(PP. 52-54, emphasis added).

These agreements and the rulings from the bench were incorporated into a written order approved as to form by the parties and signed by Magistrate De Ases on February 17, 1987. (Attachment "D"). The very first page of the order provided:

> (1) **Model 600 Series:**
>
> With respect to the Model 600 series, including the Models 600, 660, Mohawk 600, and XP-100 pistol, Defendant shall fully and completely answer interrogatories 5, 6, and 7, and requests for production 3, 4, 5, 6, 10, 11, 20, and 22 . . . . Provided further, Defendant's response to interrogatory 6 and 7, and Requests 4 and 20 shall include documents relating to safeness problems, but need not include complaints or problems that do not relate to safeness, such as cosmetic defects or accuracy problems.

A separate order dated March 19, 1987, awarded Plaintiffs $2,106.35 as monetary sanctions from Remington based on the Magistrate's finding that Remington's opposition to Plaintiffs' discovery was not substantially justified. (Attachment "E").

It is against this factual backdrop that this Honorable Court must consider Remington's conduct in failing to produce information that was specifically sought by Plaintiffs, that was specifically ordered produced by Remington, that Remington's counsel specifically agreed to produce, and that is extremely relevant to the issues in this case.

II.

WILLFUL CONCEALMENT OF EVIDENCE OF SIMILAR COMPLAINTS

Despite the prior order and Plaintiffs' legitimate discovery requests, Remington withheld other customer complaint documents in this case, even including a complaint letter from a gentleman residing in Corpus Christi, who experienced precisely the same malfunction alleged by Plaintiffs. Specifically, the following complaints were withheld:

Exhibit	Description
18	Gunsmith call report, 11/13/71, from Boyer's Sport, Marine & Gunshop, involving a complaint that a Model 600 fired on closing of the bolt.
19	Gun repair invoice, 12/14/79, involving a claim that a Model 600 fired when the bolt closed.
25	Letter from Walt Smith, 2/28/85, involving a claim that a Model 600 fired on safe.
32	Letter from D. L. Whorrall, April 20, 1986, involving a claim that a Model 660 fired on safe.
36	Letter from Dennis N. Howard, 12/1/86, involving a claim that a Model 660 fired on safe.
37	Record of telephone call, from Sanders Byrd, 12/4/86, involving a claim that a Model 600 fired when the safety was released.
38	Letter from E. J. Bradshaw, 1/6/87, involving a claim that a Model 600 which had been subject to a recall by Remington accidentally discharged.
39	Letter from C. N. Armfield, 2/26/87, involving a claim that a Model 600 fired when the safety was released.
40	Letter from Kyle D. Fink, 12/22/87, involving a claim that a Model 660 fired when the safety was released.
41	Record of telephone call, from Peron Einkauf, 1/4/88, involving a claim that a Model 600 fired when the safety was released.

Copies of Remington's own documents, not produced in this case, relating to each of these complaints are attached. (Attachment "F").

As the Court can see from the example provided by E. J. Bradshaw (Plaintiffs' Exhibit 38), who resides in Corpus Christi, the information withheld by Remington is highly relevant to Plaintiffs' claims. Mr. Bradshaw specifically alleged that the rifle "has almost caused (two) people to be shot[.]" Moreover, Mr. Bradshaw's rifle was part of the Remington recall of the Model 600 series in 1978.

There is no excuse for Remington's failure to produce this highly relevant and highly damaging information. At this point, a mere slap on the wrist is insufficient. Remedial sanctions are not sufficient; it is necessary and appropriate for the Court to impose sanctions to punish Remington for its abuse of the discovery process as an example to deter such misconduct. National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976) (cited in Jarrett v. Warhola, 695 S.W.2d 8, 10 (Tex. App.--Houston [14th Dist.] 1985, writ ref'd)).

To make matters worse, Remington's failure to provide this information pursuant to the Court's order came despite Plaintiffs' prior briefing to the Court citing authorities that clearly establish that evidence of problems with similar products is not only discoverable it is admissible to show the design in question is defective. Jackson v. Firestone Tire & Rubber Co., 779 F.2d 1047, 1055-56, 1060 (5th Cir. 1986); McInnes v. Yamaha

Motor Corp., U.S.A., 659 S.W.2d 704, 710 (Tex. App.--Corpus Christi 1983), affirmed, 673 S.W.2d 185 (Tex. 1984).

It gets worse. Remington also withheld a number of gun examination reports, which have not been made available to Plaintiffs to this day. Plaintiffs' counsel have only learned of them through other attorneys who had greater success in fighting discovery battles with Remington.

When Remington receives a telephone call or a complaint letter from a customer, its normal procedure is to request that the customer return the rifle to Remington's factory for inspection. A document called a "gun examination report" is then generated as part of the inspection. As the attached listing (Attachment "G") shows, there are at least thirty other gun examination reports involving complaints that a Model 600 series firearm accidentally discharged. These complaints extend from 1979 to 1982, but none have been produced in this case. This failure by Remington to produce highly relevant information is inexcusable.

Remington may claim it could not produce such documents because they were destroyed pursuant to Remington's document "retention" policy, which Remington contends causes them to dispose of such information after three years. This Honorable Court should reject any such false assertion. First, such an assertion would be utterly discredited by Remington's own responses to Plaintiffs' second request for production of documents. In that request, Plaintiffs knew of and specifically identified certain specific complaint documents, dating back to

1979 to 1981, which Remington then finally produced once they were identified by name and date so that Remington could not plausibly deny their existence. When pushed, Remington is able to produce complaints beyond its self-imposed three year boundary.

Second, the three year document destruction policy is itself evidence of bad faith. One federal circuit court has noted this fact. See Lewy v. Remington Arms Co., Inc., 836 F.2d 1104, 1112 (8th Cir. 1988) (stating standards by which on remand trial court was to determine whether Remington's document destruction policy justified instruction allowing jury to infer that destroyed evidence was unfavorable to Remington).

III.

OTHER EVIDENCE OF BAD FAITH

The facts strongly indicate that this Court should be disinclined to show any leniancy toward Remington. This is not an isolated incident of abuse. As the Court's own records show, Remington has been sanctioned in this case for resisting discovery, was ordered to provide discovery, and now has been shown to have not complied. The documents presented to the Court were obtained only in May of 1988 because Plaintiffs' counsel were involved in another lawsuit against Remington, Moore v. Remington, Cause No. A-85-CA-549 in the Western District of Texas, Austin Division. In that case, Remington filed frivolous objections, which were found to be untimely and were overruled by the Honorable James Nowlin. In response to Judge Nowlin's order

(Attachment "H"), these documents were obtained in the other lawsuit, which involved a Model 700 rifle.

Further, Remington has been found in bad faith in yet another suit, Thomsen v. Messer, No. 10718 (California Superior Court, Calaveras County). In Thomsen, Remington was found in contempt for its discovery abuses. The court found Remington's non-compliance "inexcusable" and "a flagrant disregard of the law," which justified "the imposition of severe sanctions." (Attachment "I"). Also attached from the Thomsen case are copies of pleadings, including an affidavit from a California assistant attorney general, which provided a factual summary of Remington's discovery abuses in that case, including falsely stating that information was unavailable pursuant to its document destruction policy. (Attachments "J," "K," and "L").

IV.

CONCLUSION

In summary, Remington's demonstrated policy is to divide and conquer. By stringing out litigants in various courts, all of whom have been injured by the same defective design of Remington bolt action, bolt-lock firearms, Remington avoids ever providing the incriminating documents it knows exists that establish its guilt. One by one, plaintiffs are told that documents are not retained, that there are no other documents, or that documents relating to other firearms are not similar. Each litigant is forced to mount an expensive, time consuming, often ineffective campaign against Remington in an attempt to obtain vital information. Especially in federal court, with court-imposed

deadlines, information as in this case is often found shortly before trial, when it seems too late to pursue additional discovery or too late to complain of Remington's abuses.

Plaintiffs respectfully submit that it is proper for this Court to declare that "the buck stops here." Remington has been caught trying to conceal another incident witness in the very city in which the lawsuit is pending. Remington has been caught falsely promising to produce other complaints. And Remington has been caught flouting an order requiring it to produce such information. Plaintiffs respectfully pray that the Court impose sanctions sufficient to punish such conduct, including an order striking Remington's pleadings and rendering a default judgment as to liability and imposing such other sanctions as the Court may find just.

Respectfully submitted,

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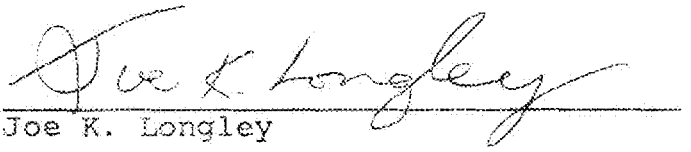
CERTIFICATE OF CONFERENCE

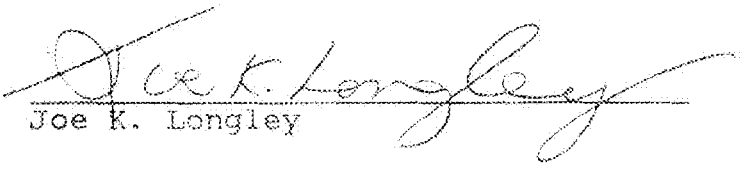
The undersigned has consulted with David Demars, attorney for Defendant, on or about the 4th day of August, 1988, and counsel were unable to reach an agreement upon the disposition of the matters raised by this motion.



Joe K. Longley

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been furnished to all counsel of record in this case on the 4th day of August, 1988.



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