

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION**

TERI SEE and DARREL SEE,

No. 3:13-cv-01765-BR

Petitioners ,

vs.

**REMINGTON ARMS COMPANY,
LLC.,** A Delaware Limited Liability
Company, and **SPORTING GOODS
PROPERTIES, INC.,** A Delaware
Corporation

**PETITION FOR RELIEF FROM
JUDGMENT TO REMEDY FRAUD ON
THE COURT**

Defendants.

**EXHIBIT 25
CHAPPA – JUSTICE DOGETT CONCURRING OPINION**

IN THE SUPREME COURT OF TEXAS

.....
No. C-9639
.....

LAURO HOMER CHAPA & RAQUEL LOPEZ CHAPA,
INDIVIDUALLY AND AS NEXT FRIEND OF
LUIS RICARDO CHAPA, A MINOR, RELATORS

v.

THE HONORABLE RICARDO H. GARCIA, JUDGE, RESPONDENT

.....
ON PETITION FOR WRIT OF MANDAMUS TO THE
229TH DISTRICT COURT OF DUVAL COUNTY, TEXAS
.....

CONCURRING OPINION

I join in the court's opinion and judgment, which correctly conclude that the trial court abused its discretion in refusing to order production of alternative design information clearly discoverable under *Jampole v. Touchy*, 673 S.W.2d 569 (Tex. 1984, orig. proceeding). I cannot agree with the dissenting justices, who would endanger the safety of Texas gun owners and their associates by granting absolute protection for these materials despite their relevance and importance in establishing Remington's knowledge that defects in the Model 700 Rifle caused it to discharge without pulling the trigger. Unable to prevail in this effort, the dissent completely misrepresents not only this concurrence but, more importantly, the clear command of the court's holding that in addition to those documents "identified for immediate release [, the trial court

should] perform a thorough and careful review, possibly with the assistance of an independent special master with firearms expertise, and provide to the Relators all documents of a similar nature." ___ S.W.2d at ___

I.

In December 1984, Luis Chapa was shot when a Remington Model 700 bolt-action rifle discharged during loading. In the ensuing products liability action, he claimed that the injury was attributable to design defects in the rifle's fire-control system. Chapa repeatedly sought to determine any Remington attempt to prevent misfiring through improvements in the design of this system. Among this discovery were requests for production of documents "relating to any design studies concerning alternate designs for the safety system or trigger assembly mechanism" and those "regarding the replacement of any of the fire control system with a different design" for certain identified rifle models.

The only discovery produced, however, was limited both as to scope -- research directed specifically to improvement of the Model 700 -- and as to time -- only through 1981. After Remington mistakenly provided minutes of its Firearms Business Team dated May 31, 1985 describing ongoing research into a New Bolt Action Rifle (NBAR) as a "replacement for the Model 700," Chapa demanded production of materials relating to the NBAR program under previous discovery requests for alternative design and replacement information. When Remington refused, Chapa served notices of depositions accompanied by subpoenas duces tecum requesting specific NBAR materials and filed a motion to compel production based on earlier

requests together with a motion for sanctions for discovery abuse.

At the first of five hearings concerning these matters, the trial court ordered production of the NBAR documents for an in camera inspection. Chapa subsequently filed a second motion to compel discovery of alternative design documents, including NBAR, and Remington filed a motion for protective order with respect to the deposition notices. After William H. Coleman II, Remington's Technical Manager responsible for NBAR, refused to answer deposition questions on November 1, 1989 concerning the scope and objectives of the NBAR program, Chapa sought an order compelling a response to questions "directed to his knowledge of alternative designs for the Model 700 and any replacement designs."

Within a few days of his refusing to be deposed about NBAR, Coleman described the program in a secret sworn statement,¹ which Remington refused to provide to Chapa. This affidavit, described in Remington's motion for protective order² as containing "technical information concerning the NBAR program [that] includes a comparison, to the extent possible, of NBAR design concepts to the Model 700," was sealed and tendered together with the NBAR documents for in camera inspection.³ Prior to the trial court's ruling, Chapa was permitted neither to examine this affidavit nor to depose Coleman regarding its contents or the relevancy of the NBAR information. Although discussed by generalized groupings in this ex parte

¹ This "Affidavit of William H. Coleman II" is incorporated in full as Appendix A.

² Defendant's Motion for Protective Order and Response to Plaintiffs' Motion to Compel and Motion for Sanctions (November 16, 1989) ("Motion for Protective Order") at 35.

³ A review of the affidavit indicates that this secret filing represented little more than a clever litigation tactic to take advantage of an adversary by getting the last unrebutted word with the trial judge. See *Remington Arms Co. v. Canales*, ___ S.W.2d ___ (Tex. 1992) (unanimously condemning the use of the identical *ex parte* filing).

affidavit, the documents transmitted for *in camera* review in a file cabinet contained no index of any kind for the trial court or Chapa.⁴ At a third hearing on the NBAR information on November 21, 1989, the trial court made no ruling.

In January 1990, after the court directed Coleman to submit to a deposition regarding "replacement" designs, Remington sought an order excluding any queries regarding NBAR pending the *in camera* inspection. Without a hearing, the trial court promptly issued an order of clarification adopting Remington's suggested language. At a fourth hearing on February 5, the court explained this order as entitling Chapa to information "[a]s long as it's relating to the 700 If it's not to the 700 you are not entitled to it."

At the fifth and final hearing on February 27, the trial court affirmed the limitation of questions that could be posed to Coleman by overruling Chapa's motion to compel, but stated that alternative design and replacement information for the Model 700 was discoverable. On March 15, questioning these rulings "that no discovery would be permitted on the subject of alternative or replacement design," Chapa asked that we mandate discoverability of the NBAR information and vacate the trial court's "decisions" concerning NBAR. Because the trial court did not issue a written order concerning this multiplicity of oral rulings, some of which apparently authorized discovery of the NBAR information and some of which did not, we directed the trial court on June 27, 1990 "to reduce to writing" the decision on pending motions

⁴ The manner in which these documents were provided has substantially impaired appellate review. They are not numbered by page, nor organized in a readily comprehensible way; handwritten notes of unidentified authors are numerous; many documents are undated, their origin within the company's filing system unknown. It would appear that Remington sought to impede rather than to encourage *in camera* inspection.

and cited Jampole v. Touchy, 673 S.W.2d 569 (Tex. 1984, orig. proceeding), in advising that "denial of discovery of alternative designs used in non-identical products constitutes an abuse of discretion."⁵

The trial court's subsequent written order of July 23, 1990 denied discovery, concluding that the NBAR materials did not include alternative design information.

II.

While objecting to the failure of the majority to address a trade secret claim, the dissenting justices undertake no examination into whether Remington met its burden of proof in establishing a right to protection. Neither the evidence nor the documents tendered by Remington establish such a right.

At a time of rapid technological change, genuine trade secrets certainly deserve the continued protection that our Texas courts have traditionally afforded. In *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), we relied upon the Restatement of Torts § 757,

⁵ The order, dated June 27, 1990, instructed the trial court:

to reduce to writing his oral ruling on pending motions of Plaintiffs and Defendants . . . in connection with his in camera inspection of documents of Remington Arms Co. relating to its New Bolt Action Rifle program ("NBAR"). See Jampole v. Touchy, 673 S.W.2d 569 (Tex. 1984) (trial court's denial of discovery of alternative designs utilized in non-identical products constitutes an abuse of discretion).

Justice Hecht oddly reserves his criticism of this order for more than two years after its issuance. He would further urge an interpretation of our appellate rules to bar mandamus relief when no written order is produced, ___ S.W.2d at ___, even when the trial court refuses to issue one.

comment b, in defining a trade secret as "any formula, pattern, device or compilation of information which is used in one's business, and which [provides] an opportunity to obtain an advantage over competitors who do not know or use it." 314 S.W.2d at 776. Like any other privilege, the burden of establishing the true existence of a trade secret and its value to the owner remains on the claimant, who must show:

(1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of the measures taken by him to guard the secrecy of the information; (4) the value of the information to him and his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Restatement of Torts § 757, comment b, at 6.

As these factors indicate, far more is necessary than simply showing that the information was developed in the course of trade or commerce. The showing required is substantial though certainly not insurmountable. Our limitation on the scope of trade secrets and allocation of the burden of proof to the privilege holder arise not from a lack of respect for their economic importance but from a realization that secrecy burdens the search for truth. In accord with the Restatement and our prior writing, unless the veil of secrecy is constrained, the very integrity of our system of justice is endangered. Our significant concern with this very real threat to truth has been firmly incorporated into our rules prohibiting protection of trade secrets that "tend to conceal fraud or otherwise work injustice." Tex. R. Civ. Evid. 507. To ensure that secrecy does not become subversion, the trade secret privilege is only "sparingly permitted." *Lehnhard*

v. Moore, 401 S.W.2d 232, 235 (Tex. 1966) (quoting Wigmore). Further, the privilege is a qualified one; the protection cannot be absolute: secrecy cannot "avail against demand for the truth in a court of justice." *Id.*

Remington did not meet this burden. Its evidence was limited to a single secret affidavit which, as a matter of law, cannot constitute supportive evidence. While this case was under submission, the court considered this identical affidavit in another proceeding involving the same counsel and unanimously condemned its *ex parte* filing. *Remington v. Canales*, ___ S.W.2d ___, ___ (Tex. 1992). Since such submission is improper, we held that it "cannot provide the evidence necessary to carry Remington's burden of proof" as to claimed privileges. *Id.* at _____. The only other evidence offered by Remington to support its claim of privilege are the documents themselves, of which I have made a thorough page by page examination.

The documents themselves, standing alone, do not satisfy the six-part Restatement test -- nothing is shown as to knowledge outside the company, the measures taken to guard the secrecy of the information, the value of the information, the difficulty of duplication of the information by others or the amount of effort or money expended in developing it. Moreover, many of the documents do not reflect they are confidential or proprietary; many do not indicate by whom they were prepared or received. Some of them are public information. Included within the claimed secret NBAR materials are copies of numerous public patents, advertising and informational brochures prepared by parts suppliers and manufacturers, and magazine articles concerning topics such as new rifles of competing manufacturers, gun experts and game hunters. Several relate only to the Model 700, but have been placed within the NBAR files either by mistake or

intentionally to avoid their production. As one court has recently concluded in reviewing what is apparently the same information:

A few documents are copies of magazine articles, already part of the public domain A large number of the NBAR documents include significant references to the Model 700, as well as to similar models of defendant's products. Under Remington's assertion, any document placed in these files is privileged as a trade secret because it is part of the "compilation of information." Taking defendant's argument to the "nth" degree would encourage defendants to merge research on existing/old products with development of new designs in order to avail themselves of the trade secret privilege for all documents placed in the on-going research files. The documents do not lose their relevance to plaintiff's claims simply by their placement in the NBAR files.

Two examples illustrate the overbreadth of defendant's contention that all the documents are entitled to absolute protection as NBAR trade secrets. The first example is an undated note from Ed Herring on a photocopied page from a magazine or book The note specifically addresses incorporating an alternative component in the Model 700 rifle. . . . The second example appears to be a customer letter, from Bob Hegel, about the Model 700 written on February 9, 1984 Mr. Hegel is a gun writer . . . [and] this letter discusses only the Model 700

Hartman v. Remington Arms Co., ___ F. Supp. ___ (W.D. Mo. 1992). Clearly all of the documents do not contain trade secret information; indiscriminately extending protection to everything Remington submitted would mock the law of privileges and invert the proper placement of the burden of proof.

Luis Chapa clearly established the relevance of and his need for the documents, by offering evidence demonstrating that the NBAR program had as its goal improvement of the

defective fire control on the Model 700 and that Chapa faced a significant time gap in the record as to Remington's knowledge of the defect.⁶ Included in Chapa's showing was:

- ♦ a 1985 Remington memorandum describing the NBAR program as one to design a "replacement for the Model 700"
- ♦ another Remington memorandum declaring that an improved fire control be installed in the Model 700 no later than October 1982 "to put us in a more secure position with respect to product liability"
- ♦ a memorandum evidencing an increase of \$130,000, in early 1981, in the research budget for development of an improved Model 700 fire control
- ♦ proof of the abrupt discontinuation of further research into the fire-control system of the Model 700 after December 1981 coincident in time with the commencement of the NBAR program
- ♦ deposition testimony that models of new, improved fire controls had been designed and assembled as part of NBAR, that prototypes had been built and tested, and that the NBAR fire controls could be retrofitted to the Model 700.
- ♦ Remington's admission that the fire control alternatives under consideration in the NBAR program and those it claims were geared solely to the Model 700 "attempt to execute the same idea (simultaneous blocking of the sear and trigger)"⁷
- ♦ Remington's concession that the fire-control system research adopted the name "NBAR" in "late 1980 or 1981," about the time of the substantial increase in research funds for the Model 700 fire-control system.
- ♦ Remington's admission that "NBAR components which are or have been under consideration include a . . . different fire control."

⁶ The fact that the NBAR documents were generated after the rifle that injured Luis Chapa was manufactured precludes neither their discoverability nor admissibility at trial. Rule 407(a), Tex. R. Civ. Evid., provides that subsequent remedial measures are admissible "in products liability cases based on strict liability." *See also* 2 J. Hadley Edgar, Jr. & James B. Sales, *Texas Torts and Remedies* § 41.03[3][d][i] (1990) (emphasis supplied) ("Evidence of actions that a defendant takes after a product causes damage or injury and that are intended to reduce the likelihood of a recurrence of such an event is admissible in strict liability actions.")

⁷ Motion for Protective Order at 13 (emphasis in original).

- ◆ Statements by Remington that NBAR information has relevance to the relative safety of its models compared to its competitors and the possible need for warnings:
"Also included within these documents are Remington's assessment of the designs executed by other manufacturers."

Presented with similar evidence, a federal district court concluded as to these same documents that:

Plaintiffs have also demonstrated the need for these documents. Without the NBAR documents, plaintiff is left with a significant time gap in the evidence concerning the information known to the defendant

Hartman v. Remington Arms Co., ___ F. Supp. at ___.

Moreover, the documents themselves demonstrate relevance and need. Many of them will provide evidence of great significance, perhaps the only evidence, as to Remington's knowledge of defects and of its ability to implement safer, alternative designs. These materials suggest that Remington's on-going research concerns were precisely those that are at issue in this litigation - whether it knew of problems with the safety in the Model 700 and whether improvement was feasible. Included among them are research reports and memoranda showing that new safety assemblies and fire controls had been tested in the Model 700 on several occasions before Chapa's injury; memoranda recommending improvements to the safety in the Model 700, including multiple blocking of the sear and trigger; competitive review of competing rifles' fire controls and safeties; and documents reflecting significant concerns regarding the Model 700 by Remington personnel. Luis Chapa should have an opportunity to examine these documents and to depose those Remington employees involved in these events relating to the Model 700. As

another court correctly concluded in reviewing these documents:

the evidence also provides the only source of admissions and information on defendant's knowledge of alleged Model 700 defects, testing done on Model 700 and alternative components.

Hartman v. Remington Arms Co., ___ F. Supp. at ___ (emphasis supplied). That court ordered disclosure of most of the documents we consider today. Contrary to the dissent's assertion, far more than "three or four" of these documents were improperly withheld.

Luis Chapa could not have made a more compelling showing. This court has recognized the considerable hardship associated with proving need for documents the contents of which a party has never seen and cannot possibly know. In *State v. Lowry*, 802 S.W.2d 669, 673 (Tex. 1991), we unanimously held that several insurance companies had sufficiently demonstrated the need for documents encompassed by a statutorily qualified privilege by showing that this information was obtained in an investigation of their conduct and could be useful to them. That writing properly recognized that:

It is difficult for the insurers to make a more particularized showing of need for these documents, the contents of which are unknown to them. We determine that a sufficient showing was made to establish substantial need.

This preference for openness should not be limited to only those circumstances benefitting insurance companies.

We have consistently recognized the importance of permitting full discovery combined

with narrowly drawn protective orders when necessary to protect genuine trade secrets.⁸ See Garcia v. Peebles, 734 S.W.2d 343, 346 (Tex. 1987).⁹ Here, Luis Chapa made clear his willingness to be bound by a lengthy protective order that was already in place to preserve any proprietary rights of Remington in information provided during discovery. Based on the same facts presented to the trial court in this case, one court has already concluded that a protective order would adequately safeguard Remington's proprietary interests with respect to virtually all of the NBAR documents. *Hartman*, ___ F. Supp. at ___.

The dissenters would permit an absolute privilege for all trade secrets tantamount to a legally sanctioned license for unfair competition or fraud, and would sanction the continued manufacture of dangerous products by the party asserting the privilege, by depriving the opposing litigant of the necessary evidence to prove its case. They would assure Remington the right to conceal evidence concerning the potentially dangerous features of its fire control and safety to the detriment not just of Luis Chapa but many other gun owners as well. Justice is not served by protection of information that precludes fair resolution of a lawsuit.

⁸ While discoverability by the parties is often confused with disclosability to the public, discoverability and disclosability issues must be resolved separately. Remington argues that discovery will hamper its ability to prevent the documents' public disclosure. Our order transferring the documents to the trial court in no way prevents Remington from seeking temporary or continuing relief from public dissemination pursuant to Tex. R. Civ. P. 76a & 166b(5). Although a protective order was already obtained, compliance with these provisions is required because the records in question constitute those from a pending case "exchanged after the effective date [of Rule 76a]." Tex. R. Civ. P. 76a(9).

⁹ The burden is on the movant to prove that the failure to issue a protective order will result in a "particular, articulated and demonstrable injury, as opposed to conclusory allegations." *Id.* at 345; see also Masinga v. Whittington, 792 S.W.2d 940, 940 (Tex. 1990, orig. proceeding).

III.

Nor can mandamus relief be denied here on grounds of administrative convenience, on the claim that this court does not have the time or the resources to review materials submitted for *in camera* inspection. This would contravene our recognized practice, reaffirmed only two weeks ago without objection:

When, as here, the documents themselves are the only evidence offered to establish an exception to a privilege, it is proper that the reviewing court review the documents to determine if they clearly support the exception.

Granada Corp. v. First Court of Appeals, ___ S.W.2d ___, ___ (Tex. 1992, orig. proceeding). *Accord Barnes v. Whittington*, 751 S.W.2d 493, 495 (Tex. 1988, orig. proceeding); *Weisel Enterprises, Inc. v. Curry*, 718 S.W.2d 56, 58 (Tex. 1986, orig. proceeding); *Jordan v. Fourth Court of Appeals*, 701 S.W.2d 644 (Tex. 1985). The dissenting justices disparage this effort as "micromanag[ing] discovery." ___ S.W.2d at ___. They fail to recognize that an appellate court's refusal to consider *in camera* submissions would grant to the trial court unbridled discretion in determining privilege. No matter how egregious the denial of discovery, how impossible the claim of privilege, or whether or not the trial judge ever even examined the tendered materials, no abuse of discretion could be shown if the trial court simply states that an *in camera* review has been performed.

Our obligation to ensure that the law of evidentiary privilege is correctly applied cannot be dependent upon the number of documents one seeking to avoid discovery submits for an *in*

camera inspection. A contrary approach would only encourage more unwarranted resistance to discovery -- an incentive to ship a boxcar of documents when only a box would suffice. Further, whether the error affects one document or one hundred, one percent or fifty percent, when the wrongful grant or denial of discovery substantially affects a party's rights, mandamus is appropriate. This court's mandamus jurisdiction protecting against abuse of discretion would be but a hollow promise if a different view were to prevail.

IV.

Today's opinion appropriately recognizes that "denial of these discovery materials severely vitiates [Luis Chapa's] ability to present a viable claim at trial," __ S.W.2d at __, thus meeting the standard set forth for mandamus relief in *Walker v. Packer*, 827 S.W.2d 833, 843 (Tex. 1992, orig. proceeding). Although I believe the *Walker* constraints on issuance of mandamus when discovery is wrongfully denied are too onerous, *see id.* at 846 (Doggett, J., dissenting), I agree that Chapa has fully shown he lacks an adequate remedy by appeal.

The dissent would interpret *Walker* to ensure that mandamus could never issue when discovery is denied, unless the applicant confesses that, without the materials sought, the trial court must and should direct a contrary verdict. Claiming that Luis Chapa has not shown his case will be vitiated without the NBAR documents, the dissenting justices rely exclusively on the fact that Chapa's counsel, in argument to this court, was unwilling to declare publicly that a jury finding of liability was impossible without the requested production. __ S.W.2d at __.

Neither Chapa nor his counsel has seen these documents. Because we have reviewed them, we can readily ascertain their value in the underlying litigation. Relief should not be denied simply because a party is unwilling to admit defeat or cannot guess the true worth of what is hidden in a sealed file cabinet.

V.

Just last year this court unanimously stated that:

Affording parties full discovery promotes the fair resolution of disputes by the judiciary. This court has vigorously sought to ensure that lawsuits are "decided by what the facts reveal, not by what facts are concealed." Discovery is thus the linchpin in the search for truth . . .

State v. Lowry, 802 S.W.2d at 671 (citations omitted). Today's decision ensures that this litigation will not be one of "gamesmanship and secrecy," *id.*, but instead will promote a fair resolution through revelation of the facts.

Lloyd Doggett
Justice

Opinion Delivered: December 31, 1992