Section K

"Both Remington and experts hired by plaintiff lawyers have conducted testing on guns returned from the field which were alleged to have fired without a trigger pull, and neither has ever been able to duplicate such an event on guns which had been properly maintained and which had not been altered after sale."

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

RICHARD BARBER and BARBARA BARBER,	)	Cause No. CV-12-43-BU-DLC
Plaintiffs,	)	
vs.	)	
REMINGTON ARMS COMPANY, INC., SPORTING GOODS PROPERTIES, INC., and E. I. DuPONT DE NEMOURS AND COMPANY,	)	
Defendants.	)	

AFFIDAVIT OF JOHN T. BUTTERS, PE

I, John T. Butters, of lawful age, being first duly sworn upon his oath, states as follows:

My name is John T. (Tom) Butters, and I reside near Center Point, Texas. I am over 18 years of age. My statements herein are based upon my personal knowledge.

I am a registered professional engineer and have testified by deposition or at trial on behalf of plaintiffs in numerous Remington bolt action cases where it was alleged that the rifles fired in the absence of a trigger pull including *Lewy v. Remington, Chapa v. Remington,* and *Collins v. Remington.*

The Lewy rifle was a 30-06 caliber Remington Model 700 claimed to have discharged when its two position bolt locking safety lever was moved from the "Safe" position to the "Fire" position in order to enable the bolt to be cycled so as to unload a live cartridge from the chamber. When the safety was moved, the rifle discharged, reportedly in the absence of any contact with the trigger by the gun handler and with the bullet passing through the ceiling of a basement room into living spaces above where it caused serious and disabling injury to the leg of the gun handler's mother. Prior to the incident the Lewy rifle had been adequately maintained and its trigger pull had been adjusted within Remington specifications according to procedures published in Remington owners' manuals for the Model 700. Upon examination it was discovered that the trigger pull adjustment spring had in normal use developed a shortening in its overall length resulting in reduced trigger return force causing intermittent failure of the trigger assembly to return to a position in which it would reliably control the sear and prevent the release of the firing pin when the restraint provided by the safety mechanism in the "Safe" mode was removed. During continuing joint examinations conducted pursuant to

discovery, it was observed that the propensity to malfunction displayed by the Lewy rifle increased with the continued normal cycling of the rifle's action and fire control system. Measurement of the trigger pull adjustment spring showed a progressive shortening and a corresponding decrease in trigger return force until the rifle would release its firing mechanism in the absence of a trigger pull nearly every time that the rifle was cocked and its safety was cycled from "Safe" to "Fire", a condition noted and recorded by Remington representatives.

The Chapa rifle was a 270 Winchester caliber Model 700 Remington that was claimed to have discharged in the absence of a trigger pull upon closure of its bolt as the gun handler was loading it in the field. The bullet struck the buttstock of a rifle slung over the shoulder of the gun handler's nephew who was behind brush out of sight of and at a distance from the gun handler and then passed into the nephew's knee in an expanded state carrying with it numerous splinters and fragments which resulted in a permanently disabling injury to the young boy. Upon examination, the Chapa rifle was found to be adequately maintained and aside from minor and inconsequential marring to be expected in normal use, was in as-manufactured factory condition and adjustment. In spite of the apparent external condition of the rifle, it would intermittently release its firing mechanism from a cocked condition upon bolt closure or cycling of its safety from "Safe" to "Fire". This critical and dangerous malfunction is the result of unreliable mechanical

mechanical cooperation between fire control parts hidden by the wood and steel of the stock and action. These parts are not normally visible to the gun handler and give no external indication that they may suddenly fail to perform as expected. On several occasions I personally observed the Chapa rifle failing to perform in accordance with normal usage expectations in that it released its firing mechanism in the absence of a purposely pulled trigger.

The Collins rifle was a 7mm Remington Magnum caliber Model 700 Remington rifle that was claimed to have discharged in the absence of a pulled trigger when its safety was moved from the "Safe" position to the "Fire" position, the bullet striking the gun handler in the foot. Upon examination, I found the rifle to be adequately maintained, within specification and in unaltered as-manufactured condition and adjustment. I was present in the court room at time of trial when B. Lee Ware, counsel for Remington, requested that one of Remington's experts, Wayne Barnett, gunsmith from Houston, Texas, demonstrate on the witness stand that the Collins gun would not release its firing mechanism from a cocked condition when the safety was moved from "Safe" to "Fire". When Mr. Barnett complied, the firing pin was released in the absence of a pulled trigger, an event that was duly noted by the court and was undoubtedly apparent to Remington representatives present. If there had been a live round in the chamber at that time, it would have been fired in the courtroom. That and any other unexpected and

uncommanded release of the Collin rifle firing mechanism was the result of improper, intermittent and unreliabl : cooperation of concealed fire control parts.

Dated this 1 day of February, 2013.

John T. Butters

SWORN TO and SUBSCRI ED before me by John T. Butters on this 1 day of February, 2013.

AURORA A. VILLANUEVA
NY COMMISSION EXPIRES
August 23, 2016

Notary Public In and For the State of Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

Case: 2:12-cv-00043

RICHARD BARBER AND	§
BARBARA BARBER	§
	§
V.	§
	§
REMINGTON ARMS COMPANY, INC.,	§
SPORTING GOODS PROPERTIES, INC.	§
and E.I. DUPONT DE NEMOURS	§
AND COMPANY	§

AFFIDAVIT

On this 30th day of January, 2013, personally appeared before me the undersigned notary public, ROBERT A. CHAFFIN, and after I administered an oath to him, upon his oath, stated as follows:

My name is Robert A. Chaffin and I have been licensed to practice law in Texas since 1972. I am a member in good standing of the State Bar of Texas. All of the statements contained within this Affidavit are made of my own personal knowledge.

I have been involved for over 20 years with cases involving the Remington Model 700 series of rifles that have been involved in accidents where the rifles were claimed to have fired without the trigger being pulled for over twenty years. In 1994 I was lead trial attorney for the case of Glenn Collins v. Remington Arms. The Collins case involved a Remington Model 700 rifle which was claimed to have fired when the safety was released without the trigger having been pulled resulting in a gunshot wound to the lower leg of Mr. Collins which necessitated the amputation of his foot below the ankle. The Collins rifle had not been altered since its date of manufacture and had been maintained in the usual and ordinary manner most hunters maintain such field rifles. In fact, Remington's own expert testified the gun had been well maintained. During the course of the trial, while the expert witness retained by Remington, Mr. Barnett, was demonstrating how the accident happened, the Collins rifle did in fact have an incident where the rifle fired when the bolt was operated without the trigger being pulled. According to my notes from the trial the witness testified "that time it followed down". The judge in the cased noted on the record that the rifle had in fact fired. When I say fired here that does not mean that a bullet was actually discharged but rather that the trigger released and the firing pin fell just as it should when the trigger is pulled. Following this

incident in the Collins trial. Remington then for the balance of the trial declined to handle the Collins rifle but instead used a substitute Model 700 rifle which was outfitted with a sling and scope to appear exactly as the Collins rifle.

I was also involved with another case around this same time period known as Chapa v. Remington. This was a case in which a Model 700 rifle which had never been altered since date of manufacture and was well maintained was reported to have fired when the bolt was closed while loading the rifle with the bullet striking a 12 year old boy in the leg resulting in truly devastating injuries. The trigger was not pulled according to the individual handling the rifle. I personally tested this rifle myself and found that the rifle would intermittently fire when the bolt was being closed or the safety was released without the trigger being pulled. By intermittently I mean that the rifle would only fire a relatively small percentage of time without the trigger being pulled. It was impossible to tell when the rifle was going to fire as it only happened intermittently and after a period of time for some unknown reason the misfires became even less frequent. I did however personally experience the misfiring of this rifle multiple times without the trigger being pulled.

I have also personally reviewed hundreds of complaints from owners of Model 700 rifles where they have reported to Remington that their rifle has fired without the trigger being pulled. These complaints were in fact offered into evidence and many of them were admitted into evidence in the Collins trial which resulted in a verdict in excess of $17,000,000 against Remington including $15,000,000 in punitive damages. In addition, during the course of the Collins trial a number of witnesses were called either live or via deposition who testified that while operating a Model 700 the rifle had fired without the trigger being pulled. One of these witnesses was an experienced law enforcement officer.

Robert A. Chaffin

ROBERT A. CHAFFIN

SWORN TO and SUBSCRIBED before me by ROBERT A. CHAFFIN on this 30th day of January, 2013.

Patricia Barnes

Notary Public In and For The State of Texas

PATRICIA BARNES
NOTARY PUBLIC, STATE OF TEXAS
MY COMMISSION EXPIRES
FEB. 8, 2016

EXHIBIT "C"

cc: J. P. Glas

REMINGTON ARMS COMPANY, INC.

Bridgeport, Connecticut
April 21, 1981

TO: R. B. Sperling

FROM: E. G. Larson

SUBJECT: SAAMI - NSSF SAFETY ADVERTISING

E. F. Barrett called today (April 20, 1981), advising that W. Born (President of Federal) has contacted J. P. McAndrews about an extension of the above program beyond the ten items already covered in the media and contained in the SAAMI booklet.

He feels additional items will dilute the ten originally selected.

E. F. Barrett has asked me to comment on each of four new items from a complaint and practical view, and R. B. Sperling from a legal standpoint.

He then suggested that we have J. Glas hold a product safety meeting, and in discussing with Joe, he asked that we have our information available for the April 24 safety meeting. After that discussion, we are to advise J. P. McAndrews and E. F. Barrett of our combined opinions.

It was my opinion from the start of this program, that we would select ten items we felt were most important, and get them out to the public. Once that was done, based on complaint and legal experience, we would suggest others to SAAMI and that this would be a continuing program. By so doing, we would be in a stronger position legally because we could show the industry did publicize these many safety items.

A couple of weeks ago, E. F. Barrett/J. P. McAndrews sent me a letter to the Executive Committee from SAAMI with the four new items, and they asked for comments, which I supplied. I do not have the full wording of each, but basically they related to the following:

1. Obtain and read fully the Owner's Manual.
2. Use proper cartridge or shell in the gun chambered for it.
3. Periodic maintenance check of firearms.
4. Never alter or modify a firearm.

A

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IREM 0002410

THE HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

THOMAS DEAN HULL, JR., Plaintiff, vs. REMINGTON ARMS COMPANY, INC., Defendant.	No. CV-10-05010 RBL ORDER ON VARIOUS MOTIONS [Dkt. #s 30, 32, and 39]

THIS MATTER is before the Court on the following Motions: Plaintiff Hull's Motion for Sanctions for Alleged Spoliation of Evidence [Dkt. #30]; Defendant Remington's Motion for Summary Judgment excluding the causation opinion of Plaintiff's Expert, Mr. Belk [Dkt. #32]; and the Plaintiff Hull's Motion for Summary Judgment on Defendants' twelve affirmative defenses [Dkt. # 39]. The Court has considered the pleadings and the parties' submissions on these motions. Its rulings are set forth below.

Background

This design defect case arises out of the accidental shooting of Plaintiff Hull by his non-party friend, Alex Sotomayor. Hull and Sotomayor were hunting together on October 25, 1990, near Sequim, Washington. Hull was the more experienced hunter. After the hunt they returned to Hull's truck. Sotomayor opened the passenger door and placed his loaded

Remington Model 700 bolt action rifle on the seat. Sotomayor later testified that the safety was on. Hull was on the other side of the truck, by the driver's side door. Sotomayor was wearing gloves. While he was unloading the rifle, the gun discharged, and Hull was injured. He denies pulling the trigger. Plaintiff sued Remington, asserting claims for strict liability and negligence, alleging that the 1981 Model 700 bolt action rifle was defective in design and manufacture, and that Remington failed to warn consumers that the gun could fire without the trigger being pulled.

They allege that these "Fire on Safe Release" or "FSR" incidents have happened thousands of times, and that Remington is aware of them (and indeed that "FSR," along with "FBO" (Fire on Bolt Open) and "FBC" (Fire on Bolt Closing) are Remington-created acronyms). They allege that Remington has designed and implemented a new, safer alternative firing mechanism, but has not recalled or warned the public of the dangers of the Walker fire control models.

Like many Remington models, the 700 Model employs a "Walker fire control" mechanism. Generally speaking, this system uses a "connector" between the trigger and the "sear" which is unique to the Walker fire control system. The Defendant's Motion to Exclude Opinion of Plaintiff's Causation Expert and Motion for Summary Judgment [Dkt. # 32] contains a detailed description of the design and operation of the Walker fire control mechanism. Other than its alleged propensity for firing without a trigger pull, the operation of the Walker fire control system does not appear to be in dispute. The parties' respective counsel have apparently litigated several of these cases in the past and have demonstrated an intimate knowledge of the design and operation of the Walker fire control system in Remington Model 700 rifles.

A. Plaintiff's Motion for sanctions for spoliation of evidence.

Plaintiff argues that Defendants are guilty of spoliation of evidence. This claim is based on Remington's admission that since 2002, it has not sought to save, document or otherwise preserve evidence of up to 200 incidents where its brand new rifles fired absent a trigger pull, during end-of-manufacturing test firing in the "gallery."

Plaintiff argues that Remington had a duty to preserve the evidence, and seeks sanctions for its failure to do so. Citing, for example, *Glover v. BIC Corp.* 917 F.2d 1410 (9th Cir. 1993), Plaintiff argues for a range of sanctions, from an instruction that the jury is entitled to draw an adverse inference from the destruction of relevant evidence, to striking Defendant's defenses, to precluding it from attacking the Plaintiff's expert's opinions under *Daubert*.

It emphasizes that Remington has been sued approximately 135 times by plaintiffs alleging that the Walker fire control is defective in design, that Remington itself issued a "suspension order" in 1994, instructing its employees to retain all evidence in anticipation of litigation. It points out that in these cases, Remington "always" claims that the inadvertent discharges are the fault of the shooter; it claims (as it has in this case) that the trigger was pulled or the rifle was improperly maintained or was altered. Plaintiff argues that Remington should not benefit from its own failure to document and preserve the very evidence that would support or refute these claims.

Remington denies that it had a duty to preserve the rifles which fire without an apparent trigger pull. It argues that its practice of destroying or "re-working" the fire controls on these rifles is consistent with the industry quality control standard, and with Plaintiff's expert's own practice. Implicit in its argument is the claim that any inadvertent firing on a

new rifle in the gallery is the result of a manufacturing defect, not a design defect. They also emphasize that even Plaintiff's expert does not claim that such an analysis of the fire control mechanisms, or the ability to inspect those rifles which fired without an apparent trigger pull in gallery testing would assist him in forming his opinions.

Remington argues, correctly, that the duty to preserve evidence attaches only if (1) the party has notice that the would-be evidence was relevant to the litigation and (2) fails to offer a credible explanation for the destruction such evidence. *See U.S. v. Kitsap Physicians Serv.*, 314 F.3d 995 (9th Cir. 2002). Under Washington law, a rebuttable presumption that the missing evidence would be damaging to the party who did not produce arises (only) where (1) the evidence was relevant, (2) was in the control of the party whose interest "naturally would be to produce it," and (3) the party fails to produce the evidence without a satisfactory explanation." *See Henderson v. Tyrell, 80 Wn. App. 592, 606* (1996).

This is not a case where the actual item or product in question was destroyed by one party or the other. It is not a case where the only evidence of "what happened" has been destroyed. The parties have each inspected, test fired, measured and X-rayed (or CT scanned) the rifle at issue in great detail. There is a high speed video of the Walker fire control mechanism in action, and Plaintiff has access to it. Neither party nor their experts can replicate the inadvertent discharge absent a trigger pull. Indeed, Remington claims without rebuttal that the "FSR" has not been replicated on any of the rifles involved in any of the prior cases on this subject.

It is Plaintiff's theory, roughly, that the FSR (or FBO, or FBC) incidents happen frequently enough to constitute a design defect, but that they happen without warning and without predictability. They appear to concede that these sorts of discharges cannot be

repeated at will, in a testing environment. In short, they claim it can happen, it has happened, and it will continue to happen without warning in rifles using the Walker fire control system.

Because it is less than clear that the discarded rifle parts would be relevant to the issues in this case, and because it is not clear that they were discarded for any improper purpose, the Motion to impose sanctions for Spoliation is DENIED. However, that does not mean that the evidence that rifles failed, and that they were discarded, is not relevant and admissible. Remington will not be permitted to claim that they have never had an FSR, FBO or FBC incident, or that they documented or tested the offending units after they failed in the gallery. Specific evidentiary issues will be addressed as they arise.

The Plaintiff's Motion for Sanctions for Alleged Spoliation on of Evidence [Dkt. # 30] is DENIED.

B. Defendants' Motion to Exclude Causation Opinion Testimony of Plaintiff's Expert and Motion for Summary Judgment on Causation.

Defendant seeks an Order Excluding the opinion testimony of Jack Belk, Plaintiff's expert on causation, arguing that his testimony is not admissible under *Daubert v. Merrill Dow Pharms, Inc., 353 F.3d 1107* (9th Cir. 2003), and it progeny. Belk, too, is a veteran[1] of prior Remington Model 700 bolt action rifle litigation.

Belk's opinion is that the Walker fire control mechanism is defectively designed, because its use of an unnecessary "connector" between the trigger and the sear can permit a rifle to fire absent a trigger pull. In his deposition, Mr. Belk conceded that one possible reason for the firing of the subject rifle was that Sotomayor pulled the trigger. He also

[1] According to Plaintiff, Belk has testified in at least 7 cases in six states, and has not had his opinion excluded.

admitted that he disregarded Sotomayor's testimony that the safety was on, because it was not possible for the rifle to fire in that condition.

Defendant seeks to exclude Belk's opinion under *Daubert*. Its Motion is based primarily on Belks' admitted inability to discount the other possible causes of the firing, including most specifically that Sotomayor pulled the trigger.

The gist of Belk's opinion is that the mechanism is defective in design, because the trigger/connector interface can (and does, as evidenced in the video) separate during firing, and the engagement of the connector and the sear (which is released when the trigger is pulled) is too slight – about half the thickness of a dime (what he calls "precipitous engagement"). Belk claims that the connector does not add any benefits, and instead adds the possibility of debris or other contaminants "holding" the connector away from the trigger, allowing the gun to fire absent a trigger pull in a number of situations.

Defendants argue first that because he cannot rule out the possibility that the trigger was in fact pulled by Sotomayor, his opinion that the trigger mechanism was defectively designed is not admissible under *Daubert*. The fact that Belk admits that one possible cause of the accident was that Sotomayor pulled the trigger is not fatal to his opinion that, if the trigger was not pulled, the discharge was the result of a design defect in the Walker fire control mechanism. Whether Sotomayor pulled the trigger is, of course, a question for the jury. The Motion on this basis is DENIED.

This reasoning is equally applicable to the alternate bases for Defendant's Motion. Specifically, Defendants argue that because Belk recognizes and admits a number of other potential causes for the rifle's firing , and cannot "rule out" that they caused what happened here his testimony should be excluded and summary judgment should be granted. These

issues too present questions of fact, as is demonstrated by the Defendants' own affirmative defenses, discussed below. Plaintiff's expert's opinion does not fail as matter of law under *Daubert*, and Defendant's Motion for Summary Judgment on Causation [Dkt. #32] is therefore DENIED.

C. Plaintiff's "No evidence" Motion for Summary Judgment on Defendant's Affirmative Defenses.

Plaintiff moves for summary judgment on Defendants' affirmative defenses, under *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Plaintiff argues that the Defendant cannot meet its initial burden of proof on these defenses because there is no evidence supporting them.

Defendant concedes that it has no evidence supporting affirmative defenses nos. 3, 4, and 7. The Plaintiff's Motion on those affirmative defenses is GRANTED and those specific defenses are DISMISSED.

The remaining defenses may or may not be viable at trial. Defendant continues to bear the burden of proof on those defenses (generally, that the accident was the fault of someone else, that the warnings were adequate, that the design's benefits outweigh its risks, and that there were no warranties made). The removal of these issues from the case would not make it meaningfully easier, faster, or more efficient to try. The Plaintiff's "no evidence"

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Motion [Dkt. #39] is therefore DENIED as to affirmative defense nos. 1, 2, 5, 6, 8, 9, 10, 11 and 12. It is GRANTED as to affirmative defense nos. 3, 4, and 7.

IT IS SO ORDERED.

DATED this 3rd day of February, 2011.

RONALD B. LEIGHTON
UNITED STATES DISTRICT JUDGE