

IN THE SUPREME COURT OF TEXAS

=====
No. 96-0425
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GENERAL TIRE, INC., PETITIONER

v.

KENNETH KEPPLER, A/N/F OF KYLE E. KEPPLER, ET AL., RESPONDENTS

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ON APPLICATION FOR WRIT OF ERROR TO THE
COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS
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Argued on January 15, 1997

JUSTICE SPECTOR, joined by JUSTICE HANKINSON, concurring in part and dissenting in part.

I join in the Court's opinion except for part IV-B. I conclude that the trial court acted within its discretion in classifying the "adjustment" documents as court records subject to Rule 76a and in refusing to seal them. I accordingly dissent from that part of the Court's judgment reinstating the protective order on the adjustment documents. I concur in the rest of the Court's judgment.

I.

The threshold issue for the trial court was whether the adjustment documents are "court records," defined as

discovery, not filed of record, concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government

TEX. R. CIV. P. 76a(2)(c). As the Court recognizes, a trial court does not abuse its discretion when it bases its decision on conflicting evidence. *See Davis v. Huey*, 571 S.W.2d 859, 862 (Tex. 1978).

That is the situation here.

George Edwards, an expert in tire failure analysis, specifically testified that the adjustment data reflected "an extraordinary amount of tread separations," and thus affected the public's safety:

Q: Now, I want to talk about adjustment records. What are adjustment records, Mr.

Edwards?

A: Report card, I guess, on the tire industry, where they stand.

Q: Are the people that are doing the grading the customers of the tire industry?

A: Yes.

Q: Does the information that's reflected in the adjustment records that you viewed in the *Kepple* case--you have viewed the adjustment records in the *Kepple* case, have you not?

A: I did.

Q: Is the information that you have reviewed in the adjustment records in the *Kepple* case, does that affect the public safety, in your view?

A: It certainly does.

Q: And why is that, sir?

A: There's, there's an extraordinary amount of tread separations. When I say tread separations, I have to qualify that and say tread and belt separation, and I will explain that later.

* * *

Q: All right. If you just turn randomly, or just turn to page 243 of No. 10, and you look at cumulative returns and the percent shown for those months, I don't want you to tell me what those figures show, direct number-wise, but what I want to know is, are those figures something that could seriously affect the public safety?

A: Yes.

Q: And do you feel that it's vitally and critically important that those figures be made public?

A: I do.

Q: Do you think the government ought to be given those figures?

A: I certainly do.

The Court disregards this testimony because Tom Lee, General's expert, disputed the accuracy of the adjustment figures on which Edwards based his opinion. On cross examination, however, Lee admitted that he had no firsthand knowledge about the underlying data. Also, the adjustment figures on which Edwards relied were those which General had supplied to Kepple during discovery. Additionally, Lee was very vague about when he discovered the alleged discrepancy.

Based on this conflicting evidence, I conclude that the trial court did not abuse its discretion in holding that General's tire adjustment data met the standard for "court records" under Rule 76a(2)(c). *See Davis*, 571 S.W.2d at 863.

II.

Because I conclude that the trial court did not abuse its discretion in determining that the adjustment documents are court records, I must consider whether the trial court properly refused to seal those documents. To overcome the presumption of openness, General bears the burden of demonstrating all of the following:

- (a) a specific, serious and substantial interest which clearly outweighs:
 - (1) this presumption of openness;
 - (2) any probable adverse effect that sealing will have upon the general public health or safety;
- (b) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.

TEX. R. CIV. P. 76a(1)(a), (b). As with the "court records" determination, we review the trial court's decision not to seal the documents for an abuse of discretion.

A properly proven trade secret is an interest that trial courts should consider in determining whether to seal records under Rule 76a. *Eli Lilly & Co. v. Marshall*, 829 S.W.2d 157, 158 (Tex. 1992). General presented evidence that the adjustment reports contain trade secrets. Lee testified that a competitor could use General's adjustment data to influence tire dealers to switch manufacturers. He further testified that the adjustment data shows not only the number of returns but also production figures, which another manufacturer could use for competitive purposes. Lee stated that General has always taken efforts to restrict the dissemination of its adjustment information.

Kepple presented evidence, however, that much of the adjustment data relates to a tire model that General has not manufactured since 1988. Indeed, the key adjustment figures on which the parties focused at the hearing are from 1986 and 1987. Regarding the production figures reflected

in the adjustment data, Dennis Carlson, a tire failure analyst with extensive research and development experience in the tire industry, testified that he “[could not] see why it would be important” to maintain the confidentiality of production statistics of a discontinued tire model. Carlson further testified that plant production capacities are common knowledge, and are even published in trade journals.

Based on this conflicting testimony, I conclude that the trial court did not abuse its discretion in finding that General failed to meet its burden for sealing the documents under Rule 76a(1).

* * *

For the foregoing reasons, I dissent from that part of the Court’s judgment reinstating the protective order for the adjustment documents.

Rose Spector
Justice

Opinion Delivered: June 5, 1998