

ORAL ARGUMENT — 9/15/99
98-0520
BAKER HUGHES V. KECO

FROST: Baker Hughes is before the court today requesting the court to render the judgment that the TC and the CA should have rendered. Specifically Baker Hughes is here asking the court to affirm the TC's summary judgment on limitations, which the CA erroneously reversed by unconstitutionally applying Tex. Civ. Prac. & Rem Code §16.010 to that claim.

Baker Hughes also asks the court to render the judgment the TC should have rendered with respect to its motion for summary judgment for breach of contract. The CA erroneously dodged that issue in its incorrect interpretation of *Cincinnati Life v. Cates*. Baker Hughes submits that if this court takes these actions as requested that the other issues in this appeal will be moot.

The plaintiff's petition which was filed in Oct. 1993, alleged a breach of a confidential disclosure agreement by Baker Hughes' predecessor. The petition the plaintiffs filed alleged that Baker Hughes manufactured products or components of original KECO design in competition with KECO, had violated the confidential disclosure agreement. KECO sought actual damages for that violation. They also claimed that Baker Hughes conspired to breach the contract with Envirotech, its own division, and then they also claimed that punitive damages were appropriately awardable for the defendants undefined outrageous conduct.

After some discovery, and the case was pending for awhile, in May of 1994, Baker Hughes moved for summary judgment. It appeared that the gravamen of the plaintiff's complaint was that Baker Hughes had purchased conditioning units from someone other than KECO. Specifically Baker Hughes after relations with KECO soured and fell apart, Baker Hughes began buying conditioning units from a company called Kin-Tek. It was KECO's complaint really that we were no longer buying conditioning units from them, but instead were buying them from Kin-Tek.

Because Baker Hughes did not manufacture any conditioning units at all, and the claim in the case was that we had breached the agreement by manufacturing these conditioning units of original KECO design in competition, the only way that could have occurred is through our purchase of conditioning units from Kin-Tek.

ENOCH: Is this undisputed in the record or is it disputed in the record about whether Baker Hughes manufactures these conditioning units?

FROST: It's undisputed that Baker Hughes does not manufacturer. The dispute centers on whether Kin-Tek's manufacturer violates this agreement. Because the only way Kin-Tek could have allegedly manufactured these devices in competition and of original KECO design was by Baker Hughes providing them with some sort of trade secret or confidential information. Because

punitive damages were sought, outrageous conduct was alleged.

To the extent that there was a possible allegation of a misappropriation of trade secret as the tortious conduct underlying these pleadings, Baker Hughes moved for summary judgment on the basis that any misappropriation of trade secret or confidential information was barred by the two-year statute of limitations. And the court granted that motion and correctly.

The record is clear that in April 1991, KECO's president wrote to Baker Hughes telling Baker Hughes that they had violated the agreement by publishing a paper or delivering a paper at a trade conference, and that that paper they later testified contained trade secrets. So in April of 1991, they alleged a breach of the agreement and a misappropriation or disclosure of a trade secret. Under this court's later decision in *Altai*, the cause of action for misappropriation of trade secrets accrues when the misappropriation occurs. If the misappropriation is as they alleged our giving confidential information or trade secrets to Kin-Tek to make a competing device, that also occurred in the April, May 1991 time frame.

O'NEILL: Does it really matter the later date of them providing the disassembled piece of equipment. If limitations ran from there it would still be barred, is that correct?

FROST: Correct. It doesn't matter whether you are looking at April or May, they didn't file their suit until Oct. 1993. Well outside the 2-year statute of limitations.

BAKER: Was what you were just talking about limitations to only ground in the May 1994 motion for summary judgment?

FROST: Yes.

BAKER: The contract manufacturer business was not part of _____?

FROST: Right. That was a subsequent motion. Baker Hughes then after the tort claims were disposed of or any implicit tort claims in the pleadings were disposed of by the court's motion Baker Hughes filed a contract motion for summary judgment on June 22, 1994.

ENOCH: There was a reference by KECO that part of its suit on the breach of contract was the contract was a requirements contract. But you haven't referenced that as part of the pleadings that were on file when this summary judgment becomes _____?

FROST: No. It never becomes part of the pleadings in this case. The pleading that I referred to is all that this case was ever based on. The requirements contract is something that they came up with in one of their responses to our summary judgment motion. There is nothing in the contract to say there is a requirements contract. Really where they try to go with that requirements contract notion is based on some alleged oral understandings they claim occurred between the

parties. There's no pleading to support a breach of an oral contract and there is no evidence that there was such a contract or that a requirements contract is involved. Moreover, when that was discussed...

ENOCH: So in your view that's not an issue in this case?

FROST: It should not be. It certainly is not an issue that we ever felt was appropriately raised by the pleading. And it was discussed in the summary judgment motions and Baker Hughes did file a response to their claim of a requirements contract by saying, first of all it's not a requirements contract; look at the contract; second to the extent you're claiming some sort of oral agreement, there is no evidence of any oral agreement here, plus there is no pleading to support a breach of an oral agreement; and third, any kind of requirements contract were probably of the type they were suggesting existed here would violate the anti-competitive laws in any event.

ENOCH: If it's part of the summary judgment motion, and it's a part of the response to the summary judgment motion and you are arguing that the summary judgment should have been granted based on Baker Hughes' materials, whether or not its a requirements contract is an issue that we have to reach?

FROST: If the - I think it's only an issue - yes, you certainly can look at it. I do not believe it's supported by any pleading though, but should not have prevented the court from granting a summary judgment motion to us on the basis of breach of contract. Because it is totally unsupported.

Baker Hughes did move for summary judgment on the ground that it didn't breach the confidential disclosure agreement with KECO basically on setting forth evidence to refute at least one and I think three of the essential elements of KECO's claim. First, we submitted the affidavit of the knowledgeable Baker Hughes' employee who dealt with Kin-Tek and the request for providing us a substitute conditioning unit because of our problems with KECO. Mr. Heiman dealt with Kin-Tek and he submitted an affidavit which supports our summary judgment that the only information that he gave to Kin-Tek when he called them and asked them would they please build a conditioning unit for us was Baker Hughes' test data and Baker Hughes' performance requirements. Under the confidential disclosure agreement absolutely, unequivocally, and clearly Baker Hughes' test data belongs to Baker Hughes. It's the last page of the agreement, last paragraph. Secondly, performance requirements are the requirements that Baker Hughes had for the performance of the unit that it imposed on any manufacturer. Neither one of those pieces of information or types of information were confidential or trade secrets.

In their response to our motion for summary judgment they did not take issue with this. In fact, they didn't really even address it other than to kind of flip it off as being sort of immaterial. Because what they focused on was what they said was the ultimate issue in the case. And that is, did the Texas Ranger, their product, which we gave to Kin-Tek did it contain trade

secrets? That was how they principally defended the summary judgment based on that.

The TC denied our breach of contract motion for summary judgment. And we believe that was erroneous and we request this court to review that issue and render the judgment that the TC should have rendered because what is unequivocal and uncontroverted is that Kin-Tek never used the Ranger. Never. There is no evidence controverting the fact that Kin-Tek never used it. In fact, the person Mr. McKinley who was in charge of building the unit at Kin-Tek could not even really remember ever having had it and surmised only that if he had it, the only thing he would have used it for was to measure the opening to see where the conditioning unit connected to Baker Hughes' bigger product so that he could make sure the diameter was appropriate. He wasn't even sure he did that.

O'NEILL: This wasn't a no evidence summary judgment. It was not their burden to come forward with that type of evidence?

FROST: No it wasn't but we came forward the evidence that they didn't use it.

O'NEILL: But wasn't there testimony that a disassembled Ranger was provided?

FROST: Yes, and we came forward with evidence that although it was provided, Kin-Tek never used it. Therefore, there could be no causation or no damages.

O'NEILL: But that's not really controvertible is it?

FROST: I believe it is really controvertible for Mr. Kimbell. Mr. Kimbell, the president of KECO, could very easily I think have come in by affidavit and said what needed to - that it was - in order for them to have designed that product, they would have had to have had the disassembled unit. Here is the Kin-Tek product, which they could have acquired, it is the same as my product. It's curious how they could not have built it without copying my product. Here is how it did copy my product. There is no affidavit evidence of any kind like that. The only affidavit evidence comes much, much later after the summary judgment is denied. There is one piece of evidence that comes in 1 year later where KECO's president says that in his opinion they couldn't have designed it that quickly had they not had more information than just the Ranger, and had they had the Ranger and used it. But that was much longer after the summary judgment was denied. It wasn't before the court then, and it's a conclusion that we think cannot create a fact issue.

OWEN: Do you concede essentially that the statute on its face does apply to the claims here?

FROST: No. We do not believe that the court can. If the question is, is the CA supposed to apply the law in effect at the time of its decision and it was okay for it to look at 16.010, sure.

OWEN: No the question is on its face did the legislature intend for the that statute to apply?

FROST: Yes, this statute would apply to this type of case. But it would be unconstitutional to apply it to this case on these facts.

OWEN: So you're not trying to mount an argument that the wording itself would not allow you to apply the statute to this case since judgment had been entered before?

FROST: We think that the second enabling or effective date provision of the statute is probably unconstitutional. Period. Because I can't fathom a case where it could be applied constitutionally when it would be relevant, when the statute had for example already run when the case was filed.

O'NEILL: As for as the constitutional question goes, do you want us to find error in the CA for not addressing that point and remand it to the court for _____ constitutional issue?

FROST: Certainly that is an alternative prayer that we have.

O'NEILL: Which would be the appropriate?

FROST: The appropriate thing we believe would be under either the *Lujan(?)* case or former rule 180 for this court to render the judgment that the lower could should have rendered.

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RESPONDENT

BRYANT: I think the court has had an opportunity to review some of the record, and I think the statements by counsel for petitioner were not entirely correct. The issue of whether or not there was a requirements contract was raised by petitioners in their counter-claim. We responded to a motion for summary judgment and alleged that it was indeed a requirements contract, just as petitioners had alleged in their counter-claim.

If you look at the contract itself, it does provide for the requirements arrangement where KECO would be providing all of Baker Hughes' requirements for this particular device.

Now with respect to the provision of the Texas Ranger to Kin-Tek, we do contest whether or not this constitutes a breach of contract in and of itself. It's at least evidence of an intent to participate in the manufacturer of a competing product.

HECHT: How could that be when Mr. Kimbell testified in his affidavit that you couldn't reverse engineer from one of these?

BRYANT: The other part to that is that in order for them to have participated in the manufacture of that product, they would also had to have provided confidential information, trade secret information to Kin-Tek.

HECHT: What did they have other than their test results that they were entitled to?

BRYANT: If you look at the affidavit of Charley Kimbell, this was a relationship that was developed over time. The confidential disclosure agreement was signed in Dec. 1989.

HECHT: What did they have besides test data that they were entitled to and a product that you couldn't tell anything about?

BRYANT: I believe the record discloses that Mr. Kimbell in response to questions from Baker Hughes provided additional information about how the product is actually manufactured. And that gave rise to the request for the disclosure agreement with Confidential Disclosure written on it.

HECHT: But you concede as Mr. Kimbell appears to say that the article does not inform one how to build a Texas Ranger. It's been manufactured in such a way that an unauthorized opening will result in the destruction of critical portions of the device and even if it didn't, all you could know was some things but not everything, not enough.

BRYANT: That's correct.

HECHT: The breach of contract issue then turns on whether KECO gave Baker Hughes some other confidential information besides test results and the product itself?

BRYANT: I believe that's only part of it. I think our argument is two-fold. The first part is what you just said, that the provision of trade secrets in order to manufacture this product was a breach of the contract. But if you look at the terms of the agreement it says that Tracor Atlas will not manufacture in competition with KECO a component with original KECO design. If the UCC applies to this contract, which petitioners admit that it does, in fact they claim they had a right to cover under UCC 715, if that's true, then there is an implied duty of good faith and fair dealing. The case law that interprets that in the Restatement of Contracts specifically states that you cannot engage in this kind of subterfuge - basically hiring someone else to do your duty work, the things that you can't do by virtue of your contract.

HECHT: Is there any evidence or charge that Kin-Tek and Baker Hughes shared in the profits of this or that this was a joint enterprise?

BRYANT: I think they necessarily did. I'm not sure that that was specifically addressed in that manner. But necessarily Kin-Tek is going to profit from it and so is Baker Hughes by virtue of the fact that Baker Hughes is going to have replacement product and Kin-Tek is going to have a new customer. So I think they both did profit. I'm not sure if it was a joint enterprise or something like that. But nevertheless I think petitioners are implying that we are raising for the first time on appeal the issue of this subterfuge. I think if you look at the responses to the motions for summary judgment, we've always said that the actions of Baker Hughes in cooperating with Kin-Tek to come up with this substitute product constitutes a breach of contract however you look at it. I just merely in my brief, I just cited them all that supports that conclusion that that is indeed a breach of contract. So I don't believe that's something that's been raised for the first time in this court.

O'NEILL: Your argument that there is no vested right for the _____ defense is that the law was unsettled at the TC. In what way was it unsettled? *Altai* was decided and decided this issue conclusively while the case was still pending in the TC. So why would that issue still be unsettled?

BRYANT: First of all, you've got the fact that the limitations period, Civ. Prac. & Rem. Code §16.003 was an accrual statute. And at the point in time this lawsuit was filed that's when you determine what the law is applicable to the case in terms of whether limitations have run. If the case law had not determined whether or not the discovery rule was applicable to the trade secrets claim, I don't see how the right to rely upon limitations could have vested at that time.

O'NEILL: But wasn't that issue finalized in *Altai*?

BRYANT: This court did rule that the discovery rule does not apply in 1996. Since that time the legislature has come back in and said, The discovery rule does apply. Now that's a question in this case. I've got the opinion of the CA.

O'NEILL: I am having a hard time understanding why it was unsettled while the case was in the TC.

BRYANT: Because of the status of the law. If you look...

O'NEILL: But *Altai* decided that didn't it?

BRYANT: In 1996, that's right.

O'NEILL: And wasn't the case still pending in the TC in 1996?

BRYANT: No. I believe the decision came out during the same month that the court in this case entered her final judgment. I think March 1 was the date that the...

O'NEILL: Well *Altai* came out in March of 1996, and the trade secrets motion was granted in June of 1996.

BRYANT: I believe that's when the final judgment was entered.

O'NEILL: But in any event it was still pending in the TC when this issue was settled. So I'm having a hard time understanding the vested right argument or the statement that the law was uncertain. It was certainly determined at a point in time in the TC when it could have affected the entry of the final judgment.

BRYANT: That is correct. My point was that at the time suit was filed when you look to determine whether limitations had run, the law was unsettled. I take the position that this is not even an issue in this case by virtue of the fact that the CA's opinion does not work the way the petitioners claim it works. I admit, it could have been more articulate with respect to whether or not the 3-year period of limitations applies to this case. But if you look at the language of the opinion, that's not what the court did. What the court did was apply the discovery rule. Plain and simple. If the court had in fact applied the 3-year limitations period it would have been wholly unnecessary for the court to consider when KECO knew or should have known of its claims, of its injuries. On page 9 of the original slip opinion, it cites the new statute. It goes on and says, KECO's suit was pending on May 1, 1997; accordingly, the 3-year statute of limitations applies. The evidence raises a fact issue about when the misappropriation was or should have been discovered and whether the suit was timely filed. Therefore, summary judgment was inappropriate. If the court had actually applied the 3-year limitations period, it wouldn't have been necessary to discuss the discovery rule. Under the 3-year limitations period, the suit would have been timely filed without consideration.

HANKINSON: But the new statute is where the discovery rule kicks in. So the discussion of the discovery rule also comes from the statute. So I don't understand your argument about why the court is not applying the new statute then.

BRYANT: Because they don't say that. They don't apply it. If they were to apply the statute itself, the entire statute and not just the discovery rule, it would not be necessary to address the discovery issues. All you would have to say is the suit was timely filed.

HANKINSON: Unless you apply the statute, you don't have the discovery rule.

BRYANT: I understand the dilemma. This court has upheld its own rules that the discovery rule applies to particular causes of action that are pending. In fact, the *Burnes v. Thomas* case is one case where the petitioners requested that the court not apply the discovery rule because of the fact that the decision making it applicable came out after the case had been tried. And this court held that the law is that the court may permit application of the discovery rule retroactively.

OWEN: But the point was, we said in *Altai* there is no discovery rule for trade secret

cases. So unless you have the statute, you don't have a discovery rule.

BRYANT: That's true,

PHILLIPS: If the statute applies, you prevail on this and if it doesn't, you don't. The argument by petitioners is the application of the statute is unconstitutional. So would you give us just a capsule of the arguments that it is constitutional?

BRYANT: The capsule of the argument if you look at the case law that is cited by each and every one of these cases that are cited talk about when the cause of action accrues, which determines when the right to rely upon limitations vest. Our position is that if the law is unsettled at the time the case is filed, then the defendant does not have a vested right to rely upon the defense of limitations.

PHILLIPS: But if the law was settled would you concede petitioners were correct?

BRYANT: If the law was settled.

PHILLIPS: But then the legislature attempted more than they legally do?

BRYANT: If you try to apply the entire statute, the 3-year limitations period, that would be correct.

GONZALES: So what you're saying is that if we haven't answered the question under the discovery rule with respect to particular tort, that you can't rely upon the statute of limitations?

BRYANT: If you have an accrual statute, that would be true. Because the legislature has specifically left open the decision of when the cause of action accrues by virtue of including the accrual language and not specifying a particular date on which the limitations period begins to run.

BAKER: Do I understand that the motion for summary judgment based on limitations although interlocutory a final judgment that disposed of the tort claim?

BRYANT: That would be true.

BAKER: Well does that mean that you could construe that part B of 16.010 applies rather than part (a)(2) because there was a trial that determined limitations, vis a vis that particular cause of action, so it's all over and therefore the previous law applied? It says in an action commenced before the effective date of this act, which is the situation here, a trial, a new trial or retrial that's in progress on the effective date is governed by the law applicable to the trial even before the effective date. That applies if you are going to argue that 16.010 applies, then the (B) part applies to say that the tort action was already barred because the trial was held on it.

BRYANT: Summary judgment was granted on it. Our position is we still have a claim pending, the whole case is still alive.

BAKER: But you don't have legally now a claim pending for a tort action because the TC held it's barred by limitations, the 2 year statute which was in effect when that summary judgment was heard and determined.

BRYANT: That's what the court held.

BAKER: So why doesn't that end the limitations argument?

BRYANT: Like I've said, our position is that it's within the authority of the legislature to apply the discovery rule retroactively. Our position is, that if the case is still pending, the court can go back and consider whether or not the discovery rule applies and resolve those factual issues.

BAKER: You've pointed out to us that the CA applied the discovery rule based on the 3-year statute. Is there any question in your mind that it was discovered even if it applies in April of 1991?

BRYANT: Yes. The affidavit of Charley Kimbell states the actions that he undertook to try to determine whether or not Baker Hughes had actually used his trade secrets. He apparently had to go through a lot of investigation to determine whether or not they were _____.

BAKER: So you wouldn't agree with the question I asked whether part B applies instead of Part (a)(2) because there was a trial on the tort claim before this active and became in effect?

BRYANT: That's right.

ENOCH: It seems to me your argument is this. If you had a trade secret case, you took it through the court, got a judgment out of the court that your claim is barred because the court does not recognize a discovery rule. And the legislature shortly thereafter passes a statute saying the SC is wrong that the discovery rule does apply to theft cases, that you would be entitled to that statute in rebringing your claim to say it's not barred. In effect though, you're saying the legislature has overruled our decision on whether or not the statute of limitations applies, and consequently you should be entitled to reurge your claim?

BRYANT: That is correct.

ENOCH: They brought a summary judgment they claim there is no fact disputes about the breach of contract that's here. And they think as a matter of law they've established no breach of contract. What do you say are the fact issues?

BRYANT: Number 1, whether or not the actual participating of Baker Hughes in manufacturing or having a competitor of KECO manufacture a product in violation of the agreement whether that constitutes breach of contract. Number 2, if there are issues regarding the existence of trade secrets, which we think the summary judgment evidence at least establishes fact questions regarding whether the information claimed to be trade secrets was actually trade secrets and whether it had to have been used to manufacture this competing product. And whether or not it was used, is an issue regarding breach of contract.

HECHT: Coming back to the beginning, the product itself could not be used in essence to clone or redesign another product. That's the summary judgment record?

BRYANT: Without the use of trade secrets.

HECHT: And what information was provided to Baker Hughes that together with anything else made it possible for them to redesign the product?

BRYANT: I think one of the thing is the - if you look at the affidavit of Charley Kimbell there are certain things that have to take place before this product can be manufactured. Especially the _____ barrier, the barrier that lets the gas escape at a certain rate. It has a special preparation. And that's the sort of information that Baker Hughes was seeking. That's the sort of information that Mr. Kimbell was concerned about disclosing without the existence of a confidential disclosure agreement.

HECHT: The record says he disclosed that before 1989?

BRYANT: He indicates that he disclosed a number of trade secrets to them.

HECHT: And what I'm trying to get at is what?

BRYANT: There was a dispute about how that should be disclosed, because once you disclose them it's a matter of public record. I think there was some difficulty in getting to the point of what are the trade secrets. There is also the issue of Mr. Kimbell wasn't provided the opportunity to examine the Kin-Tek product at the time to determine what was used.

HECHT: To come right down to it, the affidavit says KECO made a number of disclosures of confidential and trade secret information to defendants prior to Dec. 6, 1989. Is there any more in the summary judgment record about that subject and that statement?

BRYANT: What page of the record are you reading from?

HECHT: Page 385 of the record. That's Mr. Kimbell's affidavit of Feb. 1996. "That's all I know about it." Is that it?

BRYANT: Yes.

GONZALES: Do you want to address *Cincinnati*?

BRYANT: Yes. I've read the case 10 times. And what I get from the case is that it basically tells litigants and CA's when they can review the denial of summary judgment. The case specifically states that under those circumstances, the summary judgment under review has to be case dispositive. I think some other courts have cited *Cincinnati Life* and the proposition that it applies when both parties file competing motions for summary judgment. I would submit, that's the situation that *Cincinnati Life* is designed to cover. It's not designed to cover a situation where the TC decides on their own initiative to - she doesn't have time to deal with the nuances of the case, and dismisses the case without fully adjudicating all issues.

OWEN: Why should it matter if you file 3 motions that in combination are dispositive as opposed to combining them all one motion?

BRYANT: Because the language of *Cincinnati Life* basically says that the motions are case dispositive. But the question is going to be whether or not it is right for appeal.

OWEN: At the end of the day let's say they decided to file the same 3 motions in a single document as opposed to spreading them out over a period of months. At the end of the day the court ultimately rules on each piece of the summary judgment, have a final judgment. What difference does it make from a policy standpoint, appellate policy, whether you look at the summary judgment in a single document or you look at 3 separate summary judgments taken in combination that are dispositive?

BRYANT: I'm not sure that it actually does it in practice. I didn't read the language of *Cincinnati Life* to be authorizing it. To me that would be an interlocutory appeal of the denial of summary judgment. If you group them together, then I think your honor is correct. And that was the case that *Cincinnati Life* dealt with was competing motions for summary judgment that are in fact case dispositive.

HANKINSON: Your position is that Mr. Kimbell says in his affidavit that trade secrets were used by Baker Hughes. But there is no place specifically where he delineates what kind of information he's talking about and presented it to the TC for consideration?

BRYANT: At some point it was presented. I believe in the petitioner's motion for summary judgment claiming that certain things are not trade secrets. Mr. Kimbell's affidavit doesn't disclose which particular items were provided.

HANKINSON: Is it correct that this information is now no longer trade secrets because this device has been patented and so it's in the public domain? My point in all of this is that was there

any problem with joining issue on the summary judgment motion because of concerns about confidentiality over the information and would there have been at that point in time since the device was patented?

BRYANT: Absolutely.

HANKINSON: Well then how was that presented to the TC so that your client would have the opportunity to present the evidence that it needed to controvert the breach of contract summary judgment motion?

BRYANT: I think in response to the motion for summary judgment one of the legal issues was whether or not it's necessary to have all trade secrets disclosed by virtue of the patent. There may be technical know how. In fact there's a letter attached to one of the responses from Tracor Atlas, where he said, We don't know what your material is in the middle. Well that's one of the issues.

HANKINSON: My point is the _____ really is in terms of the state of the record. I kind of heard in your response to Judge Hecht's question that that's all he could say in the affidavit because they were trade secrets and there was a concern about revealing them. Is that right?

BRYANT: That is correct.

HANKINSON: Was there any effort made though to provide that kind of information to the trial judge in a way to maintain the confidentiality so that the trial judge could have the information necessary to dispose of the motion? Was that issue even raised?

BRYANT: I can't tell you for sure. I know that there is a portion of the record that was sealed.

O'NEILL: I understand there's affidavit testimony that this use of equipment could not be reversed engineered because if you intended to open it certain parts would be destroyed. Is there any significance to the fact that or any summary judgment proof that there is no significance to the fact that the use of equipment was provided to Kin-Tek disassembled?

BRYANT: It's evidence that Baker Hughes wasn't simply looking for a replacement product. They actually participated in producing it, which in our opinion is a breach of contract. They are not allowed to do that.

O'NEILL: I guess my question is, if it were produced disassembled, to say that these parts would not be destroyed from opening it, could it then be reverse engineer or is there any summary judgment proof of that _____?

BRYANT: There is something to that effect, but I'm not sure that the device that was provided to Kin-Tek is one of those devices. Mr. Kimbell apparently had some concerns at some point that people would be cutting this thing open. At some point he did start replacing component parts when they came back in for service or whatever with the type that would explode, or something would happen internally that would prevent it from being used again if they cut it open. I don't believe this is one of those but I'm not for certain.

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REBUTTAL

FROST: Justice Hankinson if I may address the question you addressed to my opponent. There was no problem with Mr. Kimbell being able to freely disclose trade secrets to us or to the court. There is a Rule 11 agreement among counsels functioning as a protective order in the record at 53. Moreover, as the court may be aware from our last point of error we raised, there is a significant part of the record that's missing. Specifically, the TC went to great pains and efforts to get Mr. Kimbell to disclose what he thought were trade secrets. There was a protracted discovery dispute that went on for quite awhile. Ultimately, the court ordered him to list trade secrets. He ultimately did pursuant to this protective order. There was an ex-parte sealing order entered with regard to those lists of trade secrets after the final judgment was entered, and it's that trade secret list that is missing from the record that we discussed. So there was no impediment to his being able to come forward with additional summary judgment evidence to meet our summary judgment. That was just not the case.

HECHT: Why isn't his provision of those 18 or however many there were trade secrets in combination with the statement that he provided that before Dec. 1989 some evidence or raises a fact issue that Baker Hughes could have pirated or reversed engineer or stolen the product?

FROST: I think that the critical distinction in the case, and I'm glad you asked me that question, because I was going to address your questions next, there's a big distinction between what Baker Hughes knew and what Kin-Tek knew. The whole case here is, Did Baker Hughes somehow give information to Kin-Tek when it manufactured the replacement conditioning unit that was a violation of this agreement. We do not dispute that there were other pieces of information that Baker Hughes had. The question is, What did Baker Hughes give or stated differently, What did Kin-Tek get. The summary judgment evidence is absolutely solid. Kin-Tek received and used 2 things: Baker Hughes' test data which was Baker Hughes' property - no dispute; and Baker Hughes' performance requirements which are inherently axiomatically its own. It's not KECO's trade secret or confidential information. It's Baker Hughes' requirements for its own conditioning unit and analyzer system.

The only other thing that was provided is the Ranger, which as the court has observed, they have said cannot be reverse engineered and can't disclose anything. And to make it even stronger for summary judgment purposes, Kin-Tek's people _____ and it's uncontroverted

but they didn't use it.

OWEN: But you say in your brief it can be reverse engineered?

FROST: We believe that it could, yes.

OWEN: So why doesn't that raise a fact issue?

FROST: Because Kin-Tek didn't use. It's undisputed. So whether it has trade secrets in it, whether it can be reversed engineered or not doesn't matter in this case because Kin-Tek didn't use to replicate the device. They made their own device.

ENOCH: Now Mr. Kimbell takes the position that Kin-Tek could not have produced that product unless it had the information you say Baker didn't give them and unless they had the Ranger product, which you say Kin-Tek didn't use. Why isn't that a fact question?

FROST: Because the affidavit testimony that Mr. Kimbell raises is no more than his own conclusion. He says, I don't believe that it would be possible for Kin-Tek to have done this without using other information. But he doesn't say what other information. He doesn't say anything. That kind of a conclusion we submit is completely...

O'NEILL: _____ shift the burden in the first place. And you're asking us to take an interested witness's word for the fact that it wasn't used.

FROST: Certainly _____ is an interested witness. I'm not sure Kin-Tek is an interested witness. Kin-Tek/McKinley is an interested witness. Perhaps he is. But I'm not necessarily sure that follows. They were just an independent manufacturer.

O'NEILL: If he were an interested witness...

BAKER: Is Kin-Tek the conspirator?

FROST: No.

BAKER: He's not a party to the litigation?

FROST: No. But I believe that conclusion is insufficient to raise a fact issue no matter what. And certainly not enough to controvert the testimony even if Mr. McKinley were _____.