Case No. 23-126314-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

MARQUISE JOHNSON, Plaintiff-Appellant,

v.

BASS PRO OUTDOOR WORLD, LLC, FABRICA D'ARMI PIETRO BERETTA, S.P.A., AND BERETTA U.S.A. CORP., Defendants-Appellees.

REPLY BRIEF OF APPELLANT MARQUISE JOHNSON

APPEAL FROM THE DISTRICT COURT OF LYON COUNTY
HONORABLE MERLIN G. WHEELER, JUDGE
DISTRICT COURT CASE NO. 2020CV000085

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Oral argument requested: 20 Minutes

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APPELLANT'S REPLY BRIEF

ARGUMENTS AND AUTHORITIES

Plaintiff files this reply to address new issues raised in Defendants' brief in opposition. This reply addresses the issues in the order raised in Defendants' brief. First, Plaintiff shows that his injuries are the "direct" result of the defective Handgun designed, imported and sold by Defendants. Second, Plaintiff distinguishes the *Patillo* case, on which Defendants have staked their "recklessness" argument. Next, Plaintiff explores more fully the evidence supporting the fact that Lewis pulled the Handgun's slide back before he pulled the trigger. Finally, Plaintiff addresses the case law raised by Defendants, establishing that Lewis's testimony regarding what would have happened if the Handgun include proper safety mechanisms is admissible and not based on "mere conjecture."

Plaintiff's injuries were "directly" caused by the defective Handgun.

On pages 16–18 of Defendants' appellate brief, Defendants argue that Plaintiff has failed to claim damages resulting "directly" from a manufacturing or design defect, under the statutory language of 15 U.S.C. § 7903(5)(A)(v). What the Court should recognize is that Defendants' argument sheds no light on what "directly" means in § 7903(5)(A)(v), other than Defendants' *ipse dixit* conclusion that Plaintiff's claims do not fit the bill. Defendants provide no statutory or dictionary definition of the word "directly," nor do they provide any case law to aid this Court's analysis. Defendants' silence on what "directly" actually means speaks volumes, especially in light of the fact that this argument was never raised in their summary judgment briefing.

In any case, Plaintiff's claims against Defendants are for "physical injuries or property damage resulting directly from a defect in design or manufacture of the product," as contemplated by § 7903(5)(A)(v). Black's Law Dictionary defines "directly" to mean: **1.** In a straightforward manner. **2.** In a straight line or course. **3.** Immediately. DIRECTLY, Black's Law Dictionary (11th ed. 2019). Plaintiff is alleging—and the evidence and common sense supports—that Plaintiff was injured as a direct result of the Handgun's lack of reasonable safety features. In a straightforward manner, Plaintiff would not have been injured or lost his leg if the Handgun had been equipped with the standard safety feature known as a magazine disconnect safety, which would have prevented a trigger pull with the magazine removed from the weapon. There is nothing "indirect" about Plaintiff's injuries as they relate to Defendants' failures.

***State v. Pattillo* is distinguishable.**

Pages 18–20 of Defendants' appellate brief discuss the criminal case of *State v. Pattillo*, 311 Kan. 995 (2020). Plaintiff agrees that *Pattillo* is an excellent illustration of recklessness. In *Pattillo*, a gang member had intentionally shot a gun 14 times from a moving van at a residence where he had seen a rival 30 minutes before. *Id.* at 996–98. The van driver was convicted of various crimes including criminal discharge of a firearm under K.S.A. 21-6308(a)(1)(A). Under that statute, the jury found Pattillo had aided and abetted the "reckless and unauthorized discharge of any firearm ... [a]t a dwelling, building, or structure in which there is a human being" and that great bodily harm occurred. *Id.* at 1007. On appeal, Pattillo argued that the district court had erred by—among other things—failing to instruct the jury on the elements of the lesser included offense of criminal discharge of

a firearm from a public road under § 21-6308(a)(3)(B). The Kansas Supreme Court disagreed that this failure was in error, as Pattillo failed to show the jury would have reached a different verdict if the lesser included instruction was given. *Id.* at 1016.

Pattillo's importance is in demonstrating "recklessness," which was required in that case and the one at hand. In *Pattillo*, the shooter (and by extension, the defendant van driver) had consciously disregarded a substantial and unjustifiable risk by intentionally firing a weapon at a residence where people were likely to be. "Pattillo argue[d] that to appreciate and then consciously disregard a risk to a child one must know the child is there." *Id.* at 1003. The Court rejected this argument and upheld the conviction. *Id.* at 1003–04. By its very nature, a residence is likely to contain one or more people. Thus, firing a gun 14 times toward a residence carries with it a substantial and unjustifiable risk of hitting a person inside the building, which would be obvious to any person.

There is a world of daylight between the recklessness in *Pattillo* and the action of André Lewis. Lewis *never* intentionally fired a gun, let alone 14 times. If he pulled the trigger *knowing* the Handgun was loaded and pointed at Plaintiff, Lewis would be guilty of an intentional shooting He did not. If he pulled the trigger while *unsure* whether the Handgun was unloaded and without taking steps to unload it—essentially, playing Russian roulette—Lewis would be guilty of recklessness. He did not. Rather, Lewis pulled the trigger after removing the magazine, when he honestly, reasonably, and *undisputedly* believed the gun was unloaded. This is no more than mere negligence.

Lewis retracted the slide on the Handgun.

Defendants devote pages 24–29 of their appellate brief to arguing that Plaintiff has not adequately disputed whether Lewis retracted the slide on the Handgun before pulling the trigger. Defendants do not accurately represent Plaintiff's evidence that Lewis *did*, in fact, retract the slide. Plaintiff takes the opportunity to do so here.

Defendants' Motion for Summary Judgment alleged, as an "undisputed" statement of fact, that Lewis "did not pull the Subject Pistol's slide back—not even a little bit—to visually determine whether a live cartridge was present in the firing chamber." (R. V, 51). In his response to Defendants' Motion, Plaintiff controverted this statement of fact by relying on the reports of Officer L. Doty and Detective D. Holmes of the Emporia Police Department. Their reports meet exceptions to hearsay under Kansas law, including business records and official documents under K.S.A. 60-460(m) and (o), respectively. Their reports contain statements by an eye-witness passenger, Mr. Ball, stating to law enforcement that "he saw Lewis drop the magazine out of the pistol *and pull the slide* [back] to remove a round from the chamber" and that "he saw Lewis remove the magazine then rack the slide, he assumed to make sure it was empty." (R. V, 51). These statements within the police records will be admissible evidence at trial, when Mr. Ball is present on the stand, under the hearsay exception for previous statements of a person present. *See* K.S.A. 60-460(a).

This fact is not dispositive of Plaintiff's claims, but it tends to establish that Lewis had taken steps that would support his reasonable belief that the Handgun was unloaded. The District Court failed to recognize the materiality of this fact, holding that the only

relevant fact regarding Lewis's conduct is that he intended to pull the trigger. Defendants argue on page 29 of their brief that if Lewis *did* pull the slide back to check the chamber, then he must have failed to do so properly or completely, because a round of ammunition obviously remained in the chamber. But Defendants fail to identify another crucial possibility. For if Lewis pulled the slide back, the Handgun should have ejected any remaining round of ammunition from the chamber. If it failed to do so, Plaintiff has yet another basis for claiming the Handgun was a defective and unreasonably dangerous product.

Mr. Ball's statements provide a material dispute for the jury to determine on the fact of whether Mr. Lewis pulled the Handgun's slide back. Mr. Lewis may testify that he did not pull the slide, while Mr. Ball's statement to the police indicates that Mr. Lewis did. This is a material question of fact for the jury, not a question that the Court is allowed to decide.

Lewis's causation testimony is based on his perceptions, not "mere conjecture."

On pages 41–47 of their brief, Defendants devote a considerable amount of space raising case law from other jurisdictions to show that federal courts applying FED. R. EVID. 701 have prevented lay witnesses from presenting causation testimony about what would have happened if they had seen various warnings. These cases are unhelpful examples here.

To recap, Mr. Lewis testified that if the Handgun had a magazine disconnect safety on it, his trigger pull would not have been able to discharge the Handgun with the magazine removed, preventing Plaintiff's injuries. (R. V, 171). Mr. Lewis testified further that if the Handgun had a loaded chamber indicator on it, then it would have indicated that there was

a round in the chamber even after he removed the magazine, and that in that scenario he would not have pulled the trigger and accidentally shot his football teammate and friend, plaintiff Marquise Johnson. (R. V, 170–171). The District Court held these statements were inadmissible speculation.

Defendants cites a handful of federal cases in which a plaintiff was not allowed to speculate about what would have happened if a specific type of warning had been in place at the time of past events. Plaintiff could do the same here. *See Akowskey v. Bombardier Recreational Prod., Inc.*, No. 3:15-CV-05571-RJB, 2016 WL 6094823, at *6 (W.D. Wash. Oct. 19, 2016) (holding under Fed. R. Evid. 701 that "Plaintiffs, as the persons who purchased the subject jet ski, are well-positioned to state what warnings they would have heeded, which is well within their purvey of their 'perception.'"); *see also Chamberlan v. Ford Motor Co.*, 369 F. Supp. 2d 1138, 1145 (N.D. Cal. 2005) (accepting plaintiffs' testimony that they would not have bought the cars had they been warned of the increased failure risk of the intake manifold). Further, Defendants fail to mention that under Kansas law, "there is a presumption that an adequate warning will be read and heeded" and a "presumption that [an] inadequate warning caused the injuries." *Meyerhoff v. Michelin Tire Corp.*, 852 F. Supp. 933, 946 (D. Kan. 1994), *aff'd*, 70 F.3d 1175 (10th Cir. 1995) (quoting *Wooderson v. Ortho Pharmaceutical Corp.*, 235 Kan. 387, 388, 681 P.2d 1038 (1984). This presumption renders federal case law from outside Kansas inherently suspect.

Regardless, the cases cited by Defendants all boil down to the same point: a witness is not allowed to provide opinion testimony "if the opinion is based on mere conjecture." *Kloepfer v. Honda Motor Co.*, 898 F.2d 1452, 1459 (10th Cir. 1990) (citing *Messenger v.*

Bucyrus-Erie Co., 507 F. Supp. 41, 43 (W.D. Pa. 1980)). But Mr. Lewis's testimony is not so limited in its basis. Nobody in this case disputes that Mr. Lewis was friends with Plaintiff and did not intend to shoot him. Mr. Lewis's testimony that he would not have pulled the trigger and shot his friend had he known a bullet remained in the Handgun's chamber is not "mere conjecture."

Mr. Lewis testified that a magazine disconnect safety would have prevented him from discharging the Handgun with the magazine removed, preventing Plaintiff's injuries. (R. V, 171). This testimony involves zero conjecture: it simply describes how a magazine disconnect safety works. Such a safety mechanism blocks the trigger pull from activating the firing mechanism. Mr. Lewis's testimony on this point is pure fact—a magazine disconnect safety would have erased any possibility of the Handgun firing, so Plaintiff would not have been injured. Defendants do not dispute this fact on the merits and could not if they tried.

Mr. Lewis also testified that a loaded chamber indicator on the Handgun would have also preventing Plaintiff's injuries. This testimony has two foundations. First, a truism: the Handgun had a round of ammunition in the chamber, so a loaded chamber indicator would have indicated a loaded chamber. This is not "mere conjecture." Second, his undisputed relationship with Plaintiff: Lewis would not have pulled the trigger accidentally shot his football teammate and friend if a loaded chamber indicator was indicating the Handgun was loaded. This is also not "mere conjecture." Mr. Lewis does not have to guess as to whether he would have chosen to pull the trigger of a loaded gun pointed as his friend and teammate. He knew then, and he knows now, that he never would have pulled the trigger

of the Handgun if he had known it was loaded—which Defendants do not dispute. A loaded chamber indicator would have made him aware the Handgun was loaded, so he would not have pulled the trigger. This testimony is not remotely speculative by any definition of the word. Rather, Mr. Lewis's testimony is the only logical conclusion based on Lewis's relationship with Plaintiff. The District Court's *sua sponte* ruling on Lewis's testimony robbed Plaintiff of the opportunity to make the Court aware of the testimony's context and establish its admissibility.

CONCLUSION

Plaintiff' injuries were directly caused by an unreasonably dangerous product, for which Defendants are responsible. Mr. Lewis removed the magazine and an eyewitness told police he also retracted the slide to remove the ammunition from the Handgun. After doing so, Mr. Lewis pulled the trigger to disassemble the Handgun, reasonably believing his actions had completely disarmed the Handgun. His conduct was negligent at worst; it could not be reckless because he was not consciously aware of *any* risk of the Handgun firing a bullet. Lacking recklessness, Lewis's mens rea fails to meet the culpability required for a criminal act, so PLCAA does not bar Plaintiff's claims. Further, Lewis's testimony that he never would have pulled the trigger or injured Plaintiff if the Handgun had either a magazine disconnect safety or a loaded chamber indicator is based on the undisputed fact that he had no intention of firing the Handgun at his friend and teammate that night.

Respectfully submitted,

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