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.

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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NATURE OF THE CASE

Plaintiff Marquise Johnson filed suit against Defendants alleging they should be held strictly liable or negligent for their respective roles in designing, manufacturing, and selling the defective Beretta APX 9mm handgun ("the Handgun"), which caused or contributed to cause Plaintiff's personal injury. This is an interlocutory appeal arising out of the District Court's Order granting summary judgment in favor of defendants Beretta U.S.A. Corp. and Bass Pro Outdoor World, LLC.

STATEMENT OF THE ISSUES ON APPEAL

Issue I: Plaintiff's claims against defendants Beretta U.S.A. Corp. and Bass Pro Outdoor World, LLC are not barred under the Protection of Lawful Commerce in Arm Act ("PLCAA") 15 U.S.C. §§ 7901, *et seq.*).

Issue II: The District Court erred in ruling *sua sponte* that causation testimony by former defendant and fact witness André Lewis is inadmissible.

STATEMENT OF THE FACTS

For purposes of their Motion for Summary Judgment, defendants Beretta U.S.A. Corp. and Bass Pro Outdoor World, LLC ("Defendants") did not challenge the legal sufficiency of Plaintiff's allegations or the evidence establishing Plaintiff's claims against them. However, Plaintiff's unchallenged allegations and factual recitations provide an important factual background for this Court's review of the legal issues at hand.

Defendants Beretta U.S.A. Corp. and Bass Pro Outdoor World, LLC imported and sold the Handgun that injured Plaintiff.

Plaintiff was injured when the Handgun unexpectedly and accidentally discharged a round of ammunition into both of Plaintiff's legs. (R. I, 207-209; 213-215). Defendant Fabbrica D'Armi Pietro Beretta, S.p.A. designed and manufactured the Handgun that

caused Plaintiff's injuries in this case. (R. I, 207-209; 221-229). Defendant Beretta U.S.A. Corp. imported, marketed, and wholesaled the Handgun to defendant Bass Pro. (R. I, 207-209; 213; 221-229). In 2018, defendant Bass Pro marketed and sold the Handgun to 21-year-old Emporia State University student André Lewis in Olathe, Kansas. (R. I, 213; 221-229). On appeal, there is no question that Defendants placed the Handgun in the stream of commerce and into Mr. Lewis's hands.

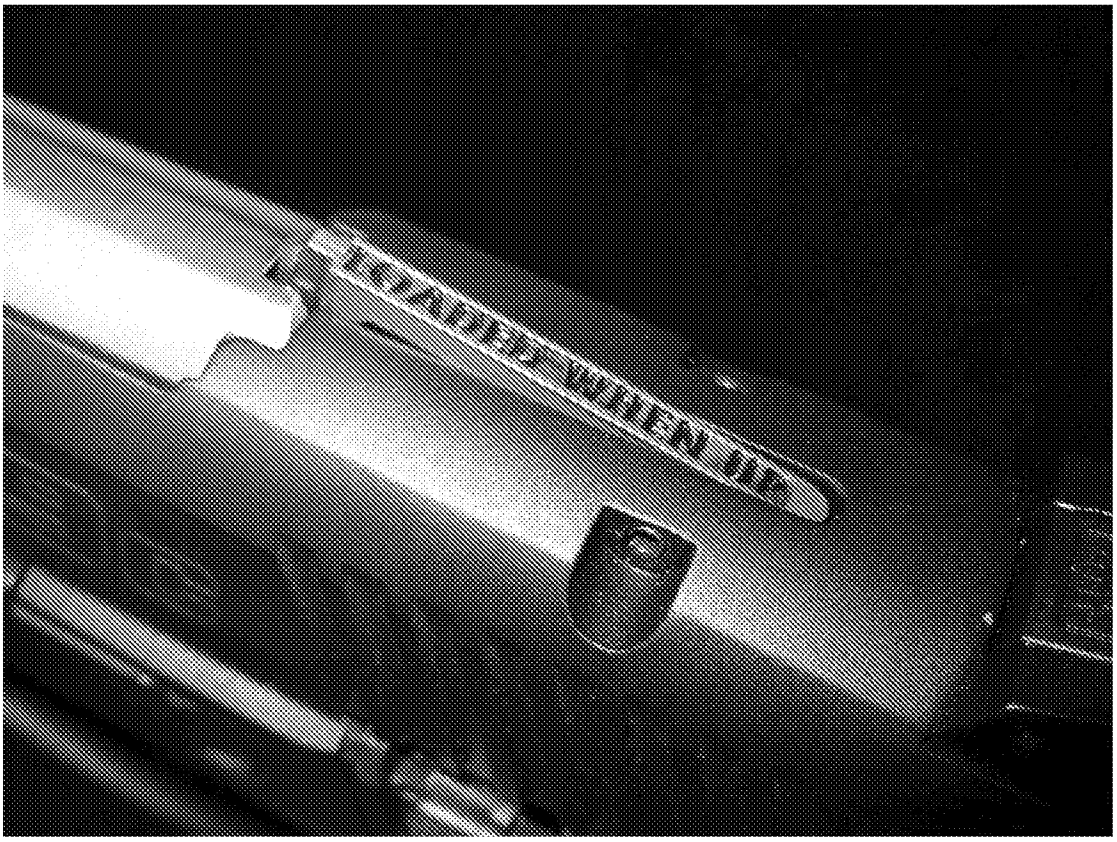
The Beretta APX handgun that injured Plaintiff was unreasonably dangerous because it lacked reasonable safety features commonly available on other handguns, including other models of the Beretta APX handgun.

Defendants are aware of the grave risk of injury and death their products pose to gun owners and their families and friends. (R. I, 210). Defendants know that many of their customers will foreseeably misuse or mishandle their firearms, and that as a result, many people will be injured unless those firearms are made with safety features to prevent those injuries. (R. I, 211).

Specifically, Defendants know that many people are often deceived by the design of semiautomatic firearms like the Handgun to believe that they are unloaded and safe after the ammunition magazine is removed, when the reality is that a live round of ammunition may remain in the chamber. (R. I, 211). Defendants know that many people are seriously wounded when a handgun is unintentionally discharged under those circumstances. (R. I, 211).

For years, Defendants have been aware of feasible safety features that can prevent these injuries. (R. I, 211). For example, a magazine disconnect safety is a device that blocks a trigger pull and prevents the firearm from firing when the magazine has been removed.

(R. I, 211). Magazine disconnect safeties were invented more than a century ago, precisely to prevent the risk of an unintentional discharge when the user believes the firearm to be unloaded. (R. I, 211). Another example of a standard safety feature is the loaded chamber indicator—example below—which provides a visual prompt to alert the user that a round of ammunition is chambered and a pull of the trigger will discharge the firearm. (R. I, 212).



Defendants were aware of magazine disconnect safety and loaded chamber indicator technology when they placed the Handgun in the stream of commerce. (R. I, 212). Indeed, Defendants sold a version of the Handgun that included these very safety features. Despite this knowledge, Defendants sold the Handgun without these safety features, which ended up in the hands of Mr. Lewis. (R. V, 170). Defendants do not challenge, for purposes of

this appeal, Plaintiff's evidence in support of his claims that the Handgun was unreasonably dangerous for lacking these safety features.

Plaintiff was injured by the Beretta APX handgun when its lack of reasonable safety features caused or contributed to cause an accidental discharge after the user mistakenly believed he had disarmed the Handgun.

On August 18, 2018, André Lewis was driving three teammates from the Emporia State University football team in his Dodge Charger. (R. I, 213). He was driving his teammates home after a football team dinner. (R. I, 213). One of his teammates, plaintiff Marquise Johnson, was riding in the passenger's seat next to Mr. Lewis. (R. I, 213).

In the car, Mr. Lewis revealed the Beretta APX 9mm handgun to his passengers. (R. I, 213). He intentionally removed the magazine from the Handgun for the purpose of disarming it. (R. V, 168). After removing the magazine from the Handgun, Mr. Lewis also pulled the slide back. (R. V, 168). Mr. Lewis mistakenly believed that the weapon was unloaded and would not fire at that point. (R. V, 168).

Mr. Lewis sought to show his teammates he could disassemble the weapon and believed he had to pull the trigger of the Handgun to do so, so he pulled the trigger with that purpose in mind. (R. V, 163-164). Unbeknownst to Mr. Lewis, despite his removal of the magazine and his pulling the slide back, a round of ammunition remained in the chamber and discharged from the Handgun into Plaintiff's legs when Mr. Lewis pulled the trigger. (R. I, 214-215). Mr. Lewis applied pressure to Plaintiff's leg and drove Plaintiff to the hospital for treatment. (R. V, 169). Plaintiff lost his left leg, which was ultimately amputated above the knee as a result. (R. I, 214).

Plaintiff's injury would have been prevented if the Beretta APX handgun had been designed, manufactured, or sold with reasonable safety features.

Mr. Lewis testified at his deposition that this shooting would not have occurred if the Handgun had certain safety features. 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. (R. V, 171). He admitted this would have prevented Plaintiff's injuries. (R. V, 171).

Mr. Lewis testified he did not know that there was a round of ammunition in the chamber of the Handgun. (R. V, 169). Mr. Lewis testified he would not have pulled the trigger on the Handgun if he knew there was a round in the chamber. (R. V, 169). Mr. Lewis admitted that if the Handgun had a loaded chamber indicator on it, the Handgun would have indicated the presence of a round in the chamber even when the magazine was out. (R. V, 170). He admitted that if a loaded chamber indicator signaled the Handgun was still loaded, he would not have pulled the trigger, preventing Plaintiff's injuries. (R. V, 171).

Plaintiff's injuries were the result of an accident, the unintentional discharge of the Handgun by Mr. Lewis.

Mr. Lewis testified that the discharge of the Handgun was an accident. (R. V, 171). The Emporia Police Department determined the shooting was an accident. (R. V, 171-172). The Lyon County Attorney's Office investigated the discharge of the Handgun and was unable to "find sufficient facts to support a conclusion of reckless behavior as defined by our statute." (R. V, 171). The Lyon County Attorney's Office determined that "the behavior prior to the discharge of the gun does not appear to meet the legal definition of disregarding

a substantial and unjustifiable risk or result." (R. V, 171). The Lyon County Attorney's Office determined that Mr. Lewis had not even violated K.S.A. 21-6308(a)(3)(B), which criminalizes discharging a firearm on a public road, because his actions were not those "the legislature contemplated in enacting that statute." (R. V, 171). Mr. Lewis was never arrested, let alone charged, for the discharge of the firearm. (R. V, 172).

ARGUMENTS AND AUTHORITIES

This case is about whether the accidental discharge of a firearm constitutes a volitional, criminal act under Kansas law such that Plaintiff's claims against defendants Beretta U.S.A. Corp. and Bass Pro Outdoor World, LLC (hereinafter "Defendants") are barred under federal law. Plaintiff was injured by a bullet that was accidentally fired from a Beretta APX handgun, when the gun's owner believed he had completely unloaded and disarmed the Handgun. Under PLCAA, a manufacturer or seller of a firearm is not subject to a civil action for damages "resulting from the criminal or unlawful misuse of" a firearm. 15 U.S.C. § 7903(5)(A). An exception, however, allows any action for physical injury resulting directly from a defect in design or manufacture of the firearm. But this exception does not apply when the discharge of the firearm was caused by "a volitional act that constituted a criminal offense." 15 U.S.C. § 7903(5)(A)(v).

Plaintiff's product defect claims against Defendants are, thus, allowed, unless Plaintiff's injuries constitute those "resulting from the criminal or unlawful misuse of" the Beretta APX handgun (satisfying the general definition in § 7903(5)(A)) *and* the mistaken firing of the Beretta APX handgun was "a volitional act that constituted a criminal offense" (satisfying the disqualifying phrase in the otherwise applicable exception in

§ 7903(5)(A)(v)). Here, the unintentional and accidental firing of the Beretta APX fails to satisfy *either* phrase.

The evidence Plaintiff presented to the District Court on summary judgment showed that this shooting did not result solely from a crime, as PLCAA requires. Rather, the shooting was completely accidental. Mr. Lewis exercised no volition—let alone criminal intent—to discharge the Beretta APX handgun. Law enforcement investigating the shooting concluded it was accidental, and the district attorney responsible for considering criminal charges opined that Mr. Lewis lacked criminal intent. Thus, the discharge of the firearm and Plaintiff's injuries did not result from a "criminal or unlawful misuse of" the Handgun, nor from a "volitional act that constituted a criminal offense." As such, PLCAA does not bar Plaintiff's product defect case against Defendants.

On summary judgment, the District Court erroneously held that the discharge of the firearm was a criminal act, despite the evidence that Mr. Lewis did not intend or wish to fire the Handgun. Because Mr. Lewis intentionally pulled the trigger to disassemble the Beretta APX handgun, the District Court determined that that the shooting of Plaintiff can also be considered volitional. These findings led the Court to hold that PLCAA prohibits Plaintiff's claims against Defendants and that Plaintiffs could not rely upon the exception in § 7903(5)(A)(v).

Additionally, the District Court incorrectly issued a *sua sponte* advisory opinion that certain causation testimony by Mr. Lewis—the accidental shooter—would be inadmissible at trial against the remaining defendant, the manufacturer of the Beretta APX handgun. The Court should take this opportunity to correct the District Court's ruling on this point, as the

matter has not been briefed, and Mr. Lewis's testimony on what he would have done differently is admissible causation testimony under Kansas law.

Standard of Review

This Court reviews de novo the district court's grant of summary judgment. *Long v. Turk*, 265 Kan 855, 865 (1998). "Summary judgment is seldom proper in negligence cases." *Bacon v. Mercy Hosp. of Ft. Scott, Kan.*, 243 Kan. 303, 307 (1988). "Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Bracken v. Dixon Industries, Inc.*, 272 Kan. 1272, 1274–75 (2002). The moving party must prove beyond a reasonable doubt that it is entitled to summary judgment. *See Mildfelt v. Lair*, 221 Kan. 557, 559 (1977).

The movant is not entitled to summary judgment when the responding party sets forth "specific facts showing a genuine issue for trial." *Doughty v. CSX Transp., Inc.*, 258 Kan. 493, 496 (1995). "The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought." *Bracken*, 272 Kan. at 1275. "When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact." *Id.* "In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case." *Id.* "On appeal, we apply the same rules and where we find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied." *Id.*

"Juries ordinarily decide fact questions." *Nash v. Blatchford*, 56 Kan. App. 2d 592, 615 (2019). A district court may only grant summary judgment to a defendant "if the material facts are undisputed or any disputes are resolved in the plaintiff's favor and those circumstances show either that no reasonable jury could find for the plaintiff or that the defendant is otherwise entitled to judgment as a matter of law." *Id.*

Issue 1: Plaintiff's claims against Defendants are not barred under PLCAA.

This section of the brief addresses the two sections of PLCAA that apply in this case. First, the brief will address PLCAA generally, explaining its applicable definitions and provisions. Second, the brief sets forth controlling authority from the United States Supreme Court requiring a narrow construction of PLCAA's protections. Third, the brief explains that Plaintiff's claim is not a "qualified civil liability action" barred by PLCAA because Plaintiff's injuries did not result from "the criminal or unlawful misuse of" the Beretta APX handgun. Next, the brief explains that Plaintiff's product defect claims are statutorily excluded from the definition of a "qualified civil liability action" because the shooting was not a "volitional act that constituted a criminal offense." Finally, Plaintiff's brief addresses the District Court's review of the facts and its holding that Plaintiff's claims are barred by PLCAA as a matter of law based on its conclusion that Mr. Lewis intentionally and criminally shot Plaintiff.

A. <u>PLCAA prohibits any claim that meets its definition of a "qualified civil liability action."</u>

In 2005, Congress passed (and the President signed) the Protection of Lawful Commerce in Arms Act, commonly referred to as the PLCAA, codified as 15 U.S.C.

§§ 7901-7903. Congress's findings and the purposes of PLCAA are set forth in 15 U.S.C. § 7901. Section 7902 sets forth the prohibition on certain civil cases: "A qualified civil liability action may not be brought in any Federal or State court." 15 U.S.C. § 7902(a). Section 7903 contains several definitions that culminate to define a "qualified civil liability action" that § 7902 bars.

The relevant definition of a "qualified civil liability action" under PLCAA for purposes of this case is as follows:

> The term "qualified civil liability action" means a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, ***resulting from the criminal or unlawful misuse of a qualified product by the person or a third party*** . . . .

§ 7903(5)(A) (emphasis added).

The first dispute in this case is whether Plaintiff's claims "[result] from the criminal or unlawful misuse of" the Beretta APX 9mm handgun, triggering PLCAA's prohibition on Plaintiff's claims. As used in the statute, "unlawful misuse" means "conduct that violates a statute, ordinance, or regulation as it relates to the use of" the firearm. 15 U.S.C. § 7903(9). Defendants have argued that Mr. Lewis's accidental discharge of the Handgun constituted a "criminal or unlawful misuse of" the Handgun. Conversely, Plaintiff has argued that an accident is just an accident, not a "criminal or unlawful misuse" under PLCAA.

The second dispute regarding PLCAA has to do with its "product defect" exception. The definition of a "qualified civil liability action" quoted above continues by stating that such barred claims

> shall not include-- . . . an action for death, physical injuries or property damage ***resulting directly from a defect in design or manufacture of the product***, when used as intended or in a reasonably foreseeable manner, ***except that where the discharge of the product was caused by a volitional act that constituted a criminal offense***, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage . . . .

§ 7903(5)(A)(v) (emphases added). Under this section of the statute, a claim alleging that a design or manufacturing defect caused personal injury is *not* considered a "qualified civil liability action," and is *allowed* by PLCAA unless the firearm discharge was caused by a "volitional act that constituted a criminal offense." In those circumstances, PLCAA says the volitional act constituting a criminal offense must be considered the sole proximate cause of any resulting injury.

Here, Defendants have argued that Mr. Lewis's accidental discharge of the firearm was a "volitional act that constituted a criminal offense" under Kansas law. Again, Plaintiff maintains that the accident, by definition, was not a "volitional act" and certainly not a criminal offense by any stretch.

If Plaintiff is correct in *either* statutory dispute, then summary judgment must be denied. That is, if the accidental discharge of the Handgun did *not* result from a "criminal or unlawful misuse" of the Handgun, then Plaintiff's claims do not meet the general statutory definition of a "qualified civil liability action." § 7903(5)(A). Independently, if the unintentional discharge was not a "volitional act that constituted a criminal offense,"

then Plaintiff's claims against Defendants fit § 7903(5)(A)(v)'s product defect exception from the definition of a "qualified civil liability action."

B. Controlling authority from the United States Supreme Court requires a narrow construction of PLCAA protections.

Precedent from the United States Supreme Court on the issue of federalism commands courts to narrowly construe the reach of federal laws like PLCAA that purport to intrude into areas of traditional state authority unless Congress has unmistakably stated an intent to broadly infringe on state law. *See Gregory v. Ashcroft,* 501 U.S. 452 (1991); *Bond v. United States*, 134 S. Ct. 2077 (2014); *Cipollone v. Liggett Group*, 505 U.S. 504 (1992). Here, PLCAA purports to intrude on a core aspect of Kansas's sovereign authority: its authority to exercise its police powers by empowering its courts to fashion and apply its tort law. *See Martinez v. California,* 444 U.S. 277, 282 (1980) ("the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational"). Common law rights to trial by jury and to a remedy in tort are so fundamental to Kansas's operation as an independent sovereign that they are expressly guaranteed by the Kansas Bill of Rights. *See Hilburn v. Enerpipe Ltd.*, 309 Kan. 1127 (Kan. 2019).

The requirement to narrowly construe federal laws like PLCAA means that a court applying PLCAA does not look for a plain statement that *excludes* Plaintiff's claims from PLCAA's prohibition; rather, the court looks for a plain statement that PLCAA's bar *includes* Plaintiff's claim. *See Gregory*, 501 U.S. at 467; *see also Bond,* 134 S. Ct. at 2090

(requiring a "clear indication" before reading a federal statute to intrude on state law). In *Cipollone*, the U.S. Supreme Court clarified that even when a statute's "express language" mandates some degree of preemption, the "presumption [against preemption] reinforces the appropriateness of a narrow reading" of the "scope" of the preemption. *See Cipollone*, 505 U.S. at 516-18; *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485 (1996) (discussing *Cipollone*) (emphasis omitted).

The Connecticut Supreme Court correctly recognized that these principles apply to force a narrow construction of PLCAA in *Soto v. Bushmaster Firearms Int'l, LLC*, 202 A.3d 262 (Conn. 2019) *cert denied sub nom. Remington Arms Co., LLC v. Soto,* 140 S. Ct. 513 (2019). The Court cited *Bond* and *Cipollone* in finding that "in the absence of a clear statement in the statutory text or legislative history [of PLCAA] that Congress intended to supersede the states' traditional authority . . . we are compelled to resolve any textual ambiguities in favor of the plaintiffs" and broadly interpreted PLCAA's predicate exception to allow a claim. *Soto,* 202 A.3d at 312-13, 313 n. 58.

A similar result is required here because PLCAA lacks the requisite clear statement of intent to prohibit actions like this under its definition of a prohibited "qualified civil liability action." Specifically, PLCAA lacks a clear statement of its application both as to (1) whether Plaintiff's harm "result[ed] from" Lewis's accidental discharge so as to satisfy the general definition of a "qualified civil liability action" in § 7903(5)(A), and (2) whether Lewis's accidental discharge of the Handgun was caused by "a volitional act that constituted a criminal offense" act so as to prevent application of the product liability exception in 15 U.S.C. § 7903(5)(A)(v). In the absence of such a clear statement by

Congress, PLCAA should be narrowly construed when applied to the facts supporting Plaintiff's claims.

C. Plaintiff's claims against Defendants are not "qualified civil liability actions" because they arise out of an accidental shooting, not a "criminal or unlawful misuse of" the Beretta APX 9mm handgun.

Under *Bond*, *Gregory* and *Cipollone*, for Defendants to be entitled to summary judgment under PLCAA, they must prove that Plaintiff's claims clearly fall within the definition of a "qualified civil liability action." *See* 15 U.S.C. §§ 7902(a), 7903(5)(A). But Defendants cannot prove that Plaintiff suffered injuries "resulting from the criminal or unlawful misuse of" the Beretta APX 9mm handgun for two reasons. First, because under PLCAA, "resulting from" means "solely caused by." Second, because Mr. Lewis's use of the Handgun was not criminal or unlawful. Thus, this case does not clearly fall within the general definition of a "qualified civil liability action" in § 7903(5)(A), and summary judgment should be denied.

1. In PLCAA, "resulting from" means "solely caused by."

The general definition of "qualified civil liability action" only encompasses actions against licensed gun companies for harm "resulting from the criminal or unlawful misuse" of a gun by a third party. 15 U.S.C. § 7903(5)(A). The phrase "resulting from" is undefined and must be read consistently with the rest of PLCAA's text because a statute must "be read as a whole." *Conroy v. Aniskoff*, 507 U.S. 511, 515-16 (1993) (internal quotation omitted). "Resulting from" also should be read to comply with "[t]he primary rule of statutory construction," which is "to give effect to the intention of the legislature." *Rodgers v. United States,* 185 U.S. 83, 86 (1902).

Therefore, the phrase "resulting from" should be read in accord with PLCAA's explicit purpose of limiting liability where harm was "solely caused" by criminal or unlawful misuse. § 7901(b)(1). That is, Congress made known its intent for PLCAA to bar gun company liability for harm *solely caused* by third-party criminal acts but to allow liability for harm also caused in part by a gun company's own tortious conduct.

This textual argument is bolstered by PLCAA's legislative history. PLCAA's chief sponsor in the United States Senate strongly expressed his view of PLCAA's effect:

> **[PLCAA] ... does not protect firearms or ammunition manufacturers, sellers, or trade associations from any other lawsuits based on their own negligence or criminal conduct** . . . As we have stressed repeatedly, this legislation will not bar the courthouse doors to victims who have been harmed by the negligence or misdeeds of anyone in the gun industry . . . **If manufacturers or dealers break the law or commit negligence, they are still liable . . . .**

(R. V, 199–200) (emphases added).

Reading the first Purpose's "solely caused" language consistently with the general definition of a prohibited "qualified civil liability action" in § 7903(5)(A) is particularly important because its addition appears to have been critical to PLCAA's passage. The inclusion of "solely" was one of the few changes made to an earlier version of PLCAA that failed to pass. *Compare* (R. V, 254–65) S. 1805, 108th Cong. § 2(b)(1) (2003) *with* (R. V, 266–68) 15 U.S.C. § 7901(b)(1). "It is a cardinal rule of statutory construction that a provision should not be interpreted as to render some language mere surplusage." *Rhodenbaugh v. Kansas Emp. Sec. Bd. of Rev.*, 52 Kan. App. 2d 621, 626 (2016). This is especially true for language that appears to have been essential to PLCAA's enactment. The inclusion of the "solely caused" limitation reveals Congress's intent to limit PLCAA

to a defense barring only theories of liability like that involved in *Kelley v. R.G. Industries, Inc.* 497 A.2d 1143 (Md. 1985) *superseded by statute*, which allowed a strict liability claim for manufacturing and selling certain guns favored by criminals even where there was *no allegation of negligent or unlawful misconduct* by a gun industry actor. Defendants are encouraging a broad reading of PLCAA that impermissibly transforms the phrase "solely caused" into surplusage.

Although reading "solely caused" into "resulting from" in § 7903(5)(A)'s definition of a "qualified civil liability action" is the most reasonable and natural way to resolve the ambiguity inherent in this term under traditional canons of statutory construction, Plaintiff underscores that the federalism-protective lens required under *Gregory*, *Bond* and *Cipollone* may force courts to adopt even strained statutory interpretations in order to prevent intrusions on state sovereignty. For example, in *Gregory*, the Court held that a federal law broadly barring age discrimination did not prohibit a state age limit on judges by finding that judges fell within an exception for "'appointee[s] at the policymaking level.'" *See* 501 U.S. at 466-67. The Court conceded that was "an odd way for Congress to exclude judges," but felt this reading was required because it could not be "absolutely certain" that Congress had intended to infringe on Missouri's sovereign right to regulate its judiciary. *See id.* at 464–67.

Similarly, in *Bond*, the Court found that a federal statute that criminalized uses of chemical weapons did not apply to a local crime that clearly violated the plain language of the law. 134 S. Ct. at 2094 (Scalia, J., concurring). Even though the statutory language was clear on its face, the Court found that "ambiguity derives from the improbably broad

reach of the key statutory definition." *Id.* at 2090. The Court refused to read the law's broad language as covering the offense absent a "clear indication" that Congress intended to "alter sensitive federal-state relationships" and "intrude[] on the police power of the States." *See id.* at 2090-91 (internal quotation omitted).

Here, PLCAA's "solely caused" language appears to expressly *permit* claims like Plaintiff's where misconduct by a gun industry was one cause of the resultant harm. However, at minimum, it provides a far stronger basis for a narrowing construction of the ambiguous term "resulting from" than the statutory text at issue in either *Gregory* or *Bond.* Indeed, *Soto* correctly emphasized PLCAA's "solely caused" limitation in support of a narrowing construction of PLCAA to permit at least one claim. *See Soto v. Bushmaster Firearms Int'l*, 202 A.3d at 309. A similar result is compelled here.

2. No criminal or unlawful misuse of the Handgun

Defendants' burden is to prove that Lewis's act of accidentally firing the Handgun constituted a "criminal or unlawful misuse" of the Handgun. But the undisputed facts make clear Defendants cannot meet this burden.

Mr. Lewis committed an accident, not a "criminal or unlawful misuse" of the weapon, as PLCAA requires. The eyewitnesses, including Plaintiff and Mr. Lewis, have stated that Lewis removed the magazine before handing it to Plaintiff, in an effort to disarm it. (R. V, 168–69). Mr. Lewis pulled the slide back to remove any round from the chamber before handing it to Plaintiff. (R. V, 169). He believed the gun was unloaded at that point and did not think it (or any gun) could fire with the magazine removed. (R. V, 169). He did not know there was a round in the chamber and would never have pulled the trigger to

disassemble the pistol if he had known it. (R. V, 169–70). After the Handgun accidentally fired, Mr. Lewis helped Plaintiff—his friend and football teammate—to the hospital. (R. V, 170). After a full investigation, law enforcement did not arrest Mr. Lewis for this accident, and prosecutors never charged him with a crime, despite analyzing the issue in depth. (R. V, 171–72).

There is no criminal statute making it a crime in Kansas to pull the trigger of a pistol for the sole purpose of disassembling it. Defendants argue that Mr. Lewis's conduct violated a number of criminal statutes in Kansas, citing K.S.A. §§ 21-5413(a) (battery), 21-5413(b) (aggravated battery), 21-6308(a)(3)(B) (criminal discharge of a firearm from a public road), 21-6308a (unlawful discharge of a firearm in a city), and 21-5429 (endangerment). But Defendants cannot prove a violation of *any* of the statutes they rely on, because those statutes all require a showing of the *mens rea* of criminal recklessness, which excludes Mr. Lewis's *accidental* shooting. Four of the five criminal statutes cited by Defendants explicitly require the state to establish a *mens rea* of "recklessness." *See* K.S.A. §§ 21-5413(a), 21-5413(b), 21-6308a, and 21-5429.

The fifth statute cited by Defendants—§ 21-6308(a)(3)(B)—criminalizes discharging a firearm from a public road. That statute says: "Criminal discharge of a firearm is the . . . discharge of any firearm . . . upon or from any public road, public road right-of-way or railroad right-of-way except as otherwise authorized by law." K.S.A. § 21-6308(a)(3)(B). On its face, the Kansas legislature's obvious intent in passing this statute was to criminalize drive-by shootings. *See State v. Pattillo*, 311 Kan. 995 (2020)

(upholding conviction under K.S.A. § 21-6308(a)(3)(B) based on a gang member firing 14 shots in 10 seconds from a moving van into a dwelling).

In any case, although § 21-6308(a)(3)(B) does not explicitly require showing criminal recklessness, Kansas law requires this showing anyway. This is because a culpable mental state of at least "recklessness" is required as an essential element of every crime defined by the Kansas criminal code "except as otherwise provided." K.S.A. § 21-5202(a). "If the definition of a crime does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition ***plainly dispenses*** with any mental element." K.S.A. 21-5202(d) (emphases added). "If the definition of a crime does not prescribe a culpable mental state . . . "intent," "knowledge" or "recklessness" suffices to establish criminal responsibility." K.S.A. 21-5202(e). In other words, when the statutory definition of a crime does not identify a required culpable mental state (as with § 21-6308(a)(3)(B)), the rule in Kansas is that recklessness must be shown at a minimum.

There are exceptions to the rule requiring a culpable mental state, but they do not apply here. K.S.A. 21-5203 specifically governs crimes for which "a person may be guilty of a crime without having a culpable mental state." This is allowed when the crime is a misdemeanor "and the statute defining the crime ***clearly indicates a legislative purpose*** to impose absolute liability for the conduct described." K.S.A. 21-5203(a) (emphasis added). This exception cannot possibly apply to § 21-6308(a)(3)(B). The mere omission of a culpable mental state cannot be read as "clearly indicating" a legislative purpose of imposing absolute immunity. The language of the statute does not "clearly indicate" any legislative *intention* of imposing absolute liability, let alone a legislative *purpose* to do so.

Thus, every criminal statute Defendants accuse Mr. Lewis of breaking requires a showing of recklessness, which cannot be shown in this case. "To act recklessly, a defendant must know that he or she is putting others in imminent danger" and consciously disregard that danger. *State v. Bolze-Sann*, 302 Kan. 198, 352 P.3d 511 (2015). It is undisputed that Lewis didn't know the Handgun could fire with the magazine out. (R. V, 169). It is undisputed that he never would have pulled the trigger if he knew it could still fire. (R. V, 169–70). So, Mr. Lewis was unaware of *any* risk of imminent danger, and—by definition—could not have *consciously disregarded* any such unknown risk. Defendants cannot prove criminal "recklessness."

The facts in this case bear out Plaintiff's argument that Mr. Lewis's conduct was accidental, not criminal. The law enforcement officers who investigated the shooting determined that Mr. Lewis's discharge of the Beretta APX pistol was accidental and never arrested or charged him for anything related to the discharge of the pistol. (R. V, 172). Further, the Lyon County Attorney' Office investigated the discharge of the firearm and concluded:

- They "cannot find sufficient facts to support a conclusion of reckless behavior as defined by our statute." (R. V, 171).
- "[T]he behavior prior to the discharge of the gun does not appear to meet the legal definition of disregarding a substantial and unjustifiable risk or result." (R. V, 171).

- Mr. Lewis had not even violated K.S.A. 21-6308(a)(3)(B) (discharge of a firearm on a public road), because his actions were not those "the legislature contemplated in enacting that statute." (R. V, 171).

Although Defendants may argue that Mr. Lewis knew that, as a general rule, it is "unsafe" to point a handgun at someone, in this specific case Mr. Lewis's *mens rea* was that he believed there was ***zero*** risk to Marquise Johnson in doing so.

Defendants' burden on summary judgment is to show that, based on the undisputed facts (or facts with all disputes resolved in Plaintiff's favor), no reasonable jury could find the Mr. Lewis's actions were anything other than criminal. *See Nash v. Blatchford*, 56 Kan. App. at 615. Defendants cannot bear their burden of showing that the only reasonable conclusion is that Mr. Lewis's conduct constituted a "criminal or unlawful misuse" of the Handgun. Therefore, Defendants are not entitled to judgment as a matter of law.

D. The accidental shooting was not the result of "a volitional act that constituted a criminal offense," so Plaintiff's product defect claims are excluded from PLCAA's definition of "qualified civil liability actions."

For the same reasons that Mr. Lewis's conduct did not constitute a "criminal or unlawful misuse" of the Handgun under § 7903(5)(A), Mr. Lewis's conduct did not constitute "a criminal offense" within the meaning of § 7903(5)(A)(v). Thus, the disqualifying phrase in § 7903(5)(A)(v)'s exception for product defect claims is not satisfied and Plaintiff's product defect claims against Defendants are allowed under that exception.

Further, even if, arguendo, Mr. Lewis's accidental discharge of the Handgun were a criminal offense, it was not a "volitional act," which is what Defendants must show to

prevent § 7903(5)(A)(v)'s exception for product defect claims from applying to allow this case. Black's Law Dictionary defines "volition" as: "[t]he ability to make a choice or determine something," or "[t]he act of making a choice or determining something." *Black's Law Dictionary* (11th ed. 2019), volition. Thus, when read in context, a "volitional act" which is the "cause" of a particular result (here, the "discharge" of the Handgun) must refer to an action whereby the actor was consciously choosing or determining to bring about that result. "Volitional," in other words, entails an element of intent.

Here, it is undisputed that Mr. Lewis was unaware that the Handgun remained loaded after removing the magazine. Not only was he not making a choice to discharge the gun by pulling the trigger, he was not even aware that such a discharge was a possibility. And far from being determined to bring about the accidental discharge, it is undisputed he pulled the trigger with the intent to bring about a different result: to disassemble the firearm. To describe the discharge of the firearm in this case as "caused by" a "volitional act" defies the definition and common usage of "volitional."

As established above, Mr. Lewis believed that pulling the trigger was required to release the slide and facilitate disassembling the Handgun. In the context of a Handgun that he believed to be unloaded and unable to fire with the magazine removed, his only purpose in pulling the trigger was an attempt to release the slide. It was *not* a nonsensical act undertaken with no legitimate purpose. *Contra Adames v. Sheahan*, 909 N.E.2d 742 (Ill. 2009) (13-year-old pulling the trigger to pretend to fire the gun); *Travieso v. Glock Inc.*, 526 F. Supp. 3d 533 (D. Ariz. 2021) (no explanation for why firearm discharged in the possession of 14-year-old who was not legally allowed to possess the gun under Arizona

law). It was done for the intended purpose of releasing the slide. Mr. Lewis acted with the belief that there was no chance that the gun could fire, let alone hurt anyone. Even if Mr. Lewis's pulling the trigger of the Handgun was a "volitional act," there is no dispute that his accidental firing of the weapon was not.

Defendants cannot dispute that § 7903(5)(A)(v) creates an exception from PLCAA's bar for product liability claims. Plaintiff has pleaded and produced unchallenged evidence supporting his product liability claims against Defendants. Defendants cannot show that Plaintiff's injuries arose out of a "volitional act," let alone a "volitional act constituting a criminal offense." Therefore, PLCAA's bar does not apply to Plaintiff's claims as a matter of law, and summary judgment should be denied.

E. The District Court erred in concluding that the accidental discharge of the Beretta APX handgun was "volitional" and "criminal/unlawful."

The District Court made errors in its analysis of the facts and its application of the law. This section of the brief first addresses the District Court's improper fact analysis. Next, this section reveals the District Court's errors in analyzing and applying Kansas criminal law. Finally, this section explains the District Court's error in determining Mr. Lewis *intentionally* shot Plaintiff despite the District Court's understanding that Mr. Lewis had no intent to do so.

1. Improper analysis of the facts

The District Court's committed its first mistake in how it viewed the facts in this case. Summary judgment is improper when a genuine issue as to any material fact exists. K.S.A. § 60-256(b)(2). As set forth above, "[t]he trial court is required to resolve all facts

and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought." *Bracken*, 272 Kan. at 1275. Because "[j]uries ordinarily decide fact questions," summary judgment is only appropriate "if the material facts are undisputed or any disputes are resolved in the plaintiff's favor and those circumstances show either that no reasonable jury could find for the plaintiff or that the defendant is otherwise entitled to judgment as a matter of law." *Nash v. Blatchford*, 56 Kan. App. 2d 592, 615 (2019). The District Court failed to apply these standards in its review of the facts.

First, Defendants stated in their motion for summary judgment that it was uncontroverted that Mr. Lewis did not pull the Handgun's slide back to visually determine whether a live cartridge was present in the firing chamber. (R. IV, 282) (Defendants' Statement of Fact No. 26). This fact is material because, if true, it lends itself to an argument that Mr. Lewis should have known he was putting Plaintiff at significant risk of bodily injury by pulling the trigger. Plaintiff controverted this factual statement by citing statements made by both Mr. Lewis and one of his passengers that night, Mr. Ball, indicating that Mr. Lewis did pull the slide back before pulling the trigger. (R. V, 163).

The District Court recognized that "there are contradictory statements regarding whether [Mr. Lewis] visually checked for a live cartridge, but the difference is, again, immaterial." (R. VI, 357). The District Court indicated that it was undisputed that a live cartridge remained in the chamber of the Handgun, so whether Mr. Lewis pulled back the slide or visually cleared the chamber was immaterial.

The testimony cited by Plaintiff is material because it creates a genuine issue as to Mr. Lewis's state of mind when he pulled the trigger. Pulling the slide back should have

ejected any remaining ammunition from the chamber. Viewed in Plaintiff's favor as it must be on summary judgment, Mr. Lewis had done everything he needed to disarm the Handgun and had no reason to believe the Handgun might remain loaded and dangerous. Mr. Lewis's conduct before pulling the trigger is crucial for considering whether the discharge of the firearm was "volitional" or constituted "recklessness" for purposes of criminal intent analysis.

Second, the District Court repeated this mistake in considering Plaintiff's uncontroverted statements of fact, which established the following:

- Mr. Lewis intentionally removed the magazine to disarm it before handing the pistol to Plaintiff.
- After removing the magazine from the Beretta APX pistol, and before handing it to Plaintiff, Mr. Lewis "pull[ed] the slide back to remove a round from the chamber."
- Mr. Lewis believed that if he removed the magazine from a pistol, including the Beretta APX pistol, that would mean there was not a round left in the chamber.
- Mr. Lewis would never remove the magazine from a pistol if he even thought there was a round in the chamber.
- Mr. Lewis did not think the Beretta APX pistol would fire if the magazine was removed from it.
- Mr. Lewis did not know that any gun could fire after the magazine was removed.

- Mr. Lewis did not know there was a cartridge in the chamber of the pistol when he handed the pistol to Plaintiff.
- Mr. Lewis would not have pulled the trigger on the Beretta APX pistol if he knew a round was still in the chamber.
- Mr. Lewis drove Plaintiff to the hospital and applied pressure to Plaintiff's leg.

(R. V, 168–70) (Plaintiff's Statements of Fact, Nos. 4–11).

The District Court held that "although objected to by the defendants, [these] are accurate statements presented from the record given me." (R. VI, 359). "However, they are not sufficient to raise a genuine issue of material fact to avoid summary judgment." *Id.*

As above, the District Court failed to appreciate that these facts all tend to establish that this was an accident. They are material because they establish the lack of *any* intent by Mr. Lewis to discharge the Handgun or injure Plaintiff, let alone a "volitional" or "reckless" intent.

Third, the District Court reviewed and rejected direct causation testimony by Mr. Lewis, a fact witness who purchased and unintentionally discharged the Handgun in this case. Plaintiff established the following statements of fact:

- If anyone from Bass Pro had discussed with Mr. Lewis the safety options of a loaded chamber indicator or magazine disconnect safety on the Beretta APX pistol or any other pistol, Mr. Lewis would have considered purchasing a gun with those safety features.
- If the Beretta APX had a loaded chamber indicator on it, it would have indicated that there was a round in the chamber even when the magazine was out.

- If Mr. Lewis had seen a loaded chamber indicator signaling the Beretta APX pistol was still loaded after removing the magazine, he would not have pulled the trigger to try to take the pistol apart, preventing Plaintiff's injuries.
- If the Beretta APX pistol had a magazine disconnect safety on it, it would have been unable to fire without the magazine in it.
- A magazine disconnect safety on the Beretta APX pistol would have prevented the gun from firing when Mr. Lewis pulled the trigger, preventing Plaintiff's injuries.

(R V, 170–71) (Plaintiff's Statements of Fact, Nos. 16–20).

The District Court recognized these statements as "accurate" and "true." (R. VI, 359). However, the District Court waived them away as immaterial. *Id.* As will be addressed in Section II of this brief, the District Court also ruled *sua sponte* that Mr. Lewis's testimony as to the actions he would have taken under different circumstances (Statements of Fact 16-19) "would be inadmissible as conjecture." *Id.*

These statements are material because they tend to establish Plaintiff's product defect claims. Under § 7903(5)(A)(v), the fact that Plaintiff can establish product defect claims is important. Further, these statements by Mr. Lewis add further weight to the conclusion that he did not intend to shoot the Handgun.

Finally, the District Court disregarded important findings by law enforcement officials that establish the lack of a "volitional" act and the lack of any crime having been committed. Plaintiff established the following statements of fact:

- Mr. Lewis's discharge of the firearm was an accident.

- The Lyon County Attorney's Office investigated the discharge of the firearm and concluded they "cannot find sufficient facts to support a conclusion of reckless behavior as defined by our statute."
- The Lyon County Attorney's Office determined "the behavior prior to the discharge of the gun does not appear to meet the legal definition of disregarding a substantial and unjustifiable risk or result."
- The Lyon County Attorney's Office determined that Mr. Lewis had not even violated K.S.A. 21-6308(a)(3)(B) (discharge of a firearm on a public road), because his actions were not those "the legislature contemplated in enacting that statute."
- Law enforcement and prosecutors who investigated the shooting determined that Mr. Lewis's discharge of the Beretta APX pistol was accidental.
- Mr. Lewis was never arrested or charged for his involvement in the discharge of the Beretta APX pistol.

(R. V, 171–72) (Plaintiff's Statements of Fact, Nos. 21–26).

The District Court discarded these facts as irrelevant and immaterial. (R. VI, 359–60). But Defendants entire motion for summary judgment hinges on whether Mr. Lewis's conduct was "volitional" or constituted a crime. It is obviously material to these matters that the law enforcement officers and prosecuting attorney decided Mr. Lewis's discharge of the Handgun was an accident, did not rise to the level of recklessness, and did not constitute a crime. These facts tend to establish that Mr. Lewis's conduct was not volitional

and not criminal, precluding the application of PLCAA. The District Court's failure to appreciate their materiality is clear error.

The District Court's failure to recognize the importance and materiality of these factual disputes stemmed from its mistaken legal conclusion that Mr. Lewis's "intent" to pull the trigger made the shooting an intentional act, discussed below in Section I.E.3. This legal error led the District Court to err by dismissing as immaterial the facts surrounding Mr. Lewis's mental state.

2. Erroneous understanding of Kansas criminal law

The District Court began its legal analysis by identifying the correct question: "whether Lewis's conduct violated any criminal code provisions." (R. VI, 361). However, the District Court erred by concluding that the accidental discharge of the Handgun constituted a crime. The District Court's conclusion was based on two erroneous lines of analysis. First, the District Court determined that Mr. Lewis violated § 21-6308(a)(3)(B), the statute prohibiting criminal discharge of a firearm on a public road, holding that this statute requires no showing of criminal intent whatsoever. Second, the District Court determined that Mr. Lewis's accidental discharge of the firearm was "reckless" under Kansas criminal law, so his conduct also violated the other statutes cited by Defendants. Plaintiff addresses these errors in turn.

The District Court noted correctly that "Kansas law, with some exceptions for *malum prohibitum* crimes requires one of three required mental states as an element of the crime." (R. VI, 361). "These include intent, knowing behavior, or reckless behavior." *Id.*

The District Court also noted correctly that nobody was contending Mr. Lewis "intended to shoot" Plaintiff. *Id.*

The District Court concluded Mr. Lewis's conduct violated K.S.A. 21-6308(a)(3)(B), discharge of a firearm upon a public roadway:

> There is no question that the facts support the conclusion that Lewis, in violation of K.S.A. 21-6308(a)(3)(8) [sic], discharged a firearm upon a public roadway. This statute does not require any specific mental state as an element of the crime. It is one of the *malum prohibitum* offenses. It is sufficient to simply show that the act occurred and the Court so finds.

(R. VI, 362). The Court provided no citation for its conclusion that this statute is "one of the *malum prohibitum* offense" under Kansas law, and counsel for Plaintiffs have not found any support for this statement.

On the contrary, as set forth in Section I.C.2, black letter Kansas law requires a showing of a culpable mental state of *at least* "recklessness" *unless* the definition of the crime "plainly dispenses with any mental element." K.S.A. § 21-5202(a), (d). When the statute merely fails to "prescribe a culpable mental state," it is black letter Kansas law that " 'intent,' 'knowledge' or 'recklessness' suffices to establish criminal responsibility." K.S.A. § 21-5202(e).

The only exception to these rules is when a crime is a misdemeanor and "and the statute defining the crime ***clearly indicates a legislative purpose*** to impose absolute liability for the conduct described." K.S.A. 21-5203(a) (emphasis added). But that is not the case with § 21-6308(a)(3)(B). That statute merely does not "prescribe a culpable mental state" (§ 21-5202(e)), but it gives no indication—let alone the statutorily-required "clearly

indication"—that the legislature's purpose in passing the statute is to "impose absolute liability." § 21-5203(a).

The District Court failed to address these arguments, which Plaintiff had raised in briefing. Instead, the District Court made an unsupported and incorrect conclusion of law that Kansas has no *mens rea* requirement for violations of § 21-6308(a)(3)(B). This Court should correct the District Court's error.

The District Court went further, concluding that Mr. Lewis's conduct was, in fact, "reckless," so he was also guilty of battery, aggravated battery, unlawful discharge of a firearm in a city, and endangerment. (R. VI, 362–65). The District Court began this analysis by setting forth the statutory definition of criminal recklessness, stating:

> K.S.A. 21-5202(j) provides, "A person acts recklessly or is reckless when such person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation."

(R. VI, 363). The District Court then interpreted this as a purely objective standard, excluding Mr. Lewis's subjective belief as "no assistance to plaintiff in responding to this motion." *Id.* This is where the District Court's erroneous view of the materiality of facts, discussed above, begins. Based on this erroneous view of "recklessness," the District Court concluded that Mr. Lewis's conduct in pulling the trigger of the Handgun was objectively reckless, providing sufficient *mens rea* to prove the crimes identified above. (R. VI, 363–65). The District Court went so far as to say that it "is truly immaterial" whether Mr. Lewis "looked and did not see [the bullet in the chamber] or just did not look" for the bullet before pulling the trigger. (R. 364–65).

The District Court's interpretation of "recklessness" is wrong. Although the statutory definition of "reckless" incorporates an objective "reasonable person" component, it also includes an explicitly *subjective* component: the actor's *actual* realization and *conscious* disregard of the imminence of danger to another person. "Reckless conduct is conduct done under circumstances that show a *realization* of the imminence of danger to the person of another and a *conscious* and unjustifiable disregard of that danger." *State v. Hickles*, 261 Kan. 74, 84 (1996) (emphases added). Logically, Mr. Lewis could not "realize"—let alone "consciously disregard"—a risk without having an actual subjective awareness of that risk.

As set forth above, the District Court recognized that Mr. Lewis believed that the Handgun was unloaded. Although the Court found this fact immaterial, under Kansas law the only permissible inference from this fact on summary judgment is that Mr. Lewis's subjective intent could not be "reckless." In fact, Mr. Lewis did not realize *any* imminence of danger to Plaintiff from what he believed to be an unloaded weapon.

Certainly, pulling the trigger in the belief that the gun is unloaded is a less culpable act than pulling the trigger with actual knowledge that it might be loaded. The first is an honest mistake; the second is Russian roulette. In any case, the District Court's application of a purely objective standard of what risks a reasonable person *should have* appreciated—despite the undisputed testimony that Mr. Lewis did not appreciate those risks here—conflicts with Kansas case law. *See Hickles*, 261 Kan. 74, 84 (1996). Even if the District Court's application of "recklessness" were correct, the notion that no reasonable jury could fail to convict Mr. Lewis of criminal recklessness is unsupported. Because Defendants

cannot prove that Mr. Lewis's conduct was criminally reckless, Plaintiff's claims against them are not barred by PLCAA. The District Court's ruling should be reversed on these grounds.

3. Incorrect analysis of whether the discharge of the Handgun was "volitional"

Finally, the District Court turned to the product defect exception from PLCAA's definition of a "qualified civil liability action," concluding that Plaintiff's claims do not fit the exception because the accidental discharge of the Handgun was a "volitional act constituting a criminal offense." (R. VI, 366). Again, the definition of "volition" requires a choice or determination. *See Black's Law Dictionary* (11th ed. 2019), volition. The District Court held that Mr. Lewis's conduct was "volitional" and "criminal" despite the fact that, as the District Court acknowledged, "No defendant has suggested, and plaintiff points out that even he has not contended that Lewis intended to shoot him." (R. VI, 361). The District Court recognized "that there's no evidence to support" a finding that Mr. Lewis "intended to fire the pistol." (R. VI, 364). That is, despite admitting in its factual findings that Mr. Lewis did not intend to shoot Plaintiff, the District Court held Plaintiff's injuries were caused by a "volitional act" under PLCAA.

Rather than grappling with the definition of "volitional act" or cases interpreting PLCAA or other federal laws using that phrase, the District Court based its analysis solely upon a divided Kansas Supreme Court's decision in *Thomas v. Benchmark Ins. Co.*, 285 Kan. 918 (2008). No party had cited or referenced *Thomas* in briefing or at oral argument—the District Court raised this case *sua sponte*. The likely reason the parties did not raise *Thomas* is because it has nothing to do with PLCAA or what qualifies as a "volitional act"

under federal law. Rather, *Thomas* is a Kansas case applying Kansas law to define what "intentional act" means in the context of an auto insurance policy. Ultimately, the District Court reached the wrong conclusion because its entire analysis of "volitional act" relied on *Thomas*—a non-authority on what "volitional act" means in PLCAA.

Kansas law has no bearing on what "volitional act" means under a federal statute like PLCAA. Even if it did, the relevant authorities to consider would be cases interpreting criminal intent. The Kansas Supreme Court's definition of "intentional" in the criminal context makes clear that Mr. Lewis did not shoot Plaintiff "intentionally": "Intentional conduct is defined as conduct that is purposeful and willful and not accidental." *State v. Mountjoy*, 257 Kan. 163, 170 (1995). "As used in the criminal code, the terms 'knowing,' 'willful,' 'purposeful,' and 'on purpose' are included within the term 'intentional.' " *Id.* (citing K.S.A. 21–3201(b)). "Simply stated, criminal intent is the intent to do what the law prohibits." *Id.* Under Kansas's appropriate definition of "intentional," Mr. Lewis's accidental discharge of the Handgun was not intentional, and therefore lacked "volition." *Thomas* simply does not apply to this case, and the District Court's reliance on it was clear error.

Even so, *Thomas* supports the opposite result from the one the District Court reached. *Thomas* arose out of an insurance coverage dispute over whether an insured's conduct was "intentional" so as to trigger the "intentional act" exclusion in an auto insurance policy. In that case, the insured driver killed one of her passengers and injured another when she fled police at excessive speed and flipped her vehicle. *Thomas*, 285 Kan. at 919–21. The surviving victim and heirs of the deceased victim brought a declaratory

judgment action seeking a determination of the parties' rights under the driver's insurance policy provided by Benchmark Insurance Company. *Id.* Benchmark argued that its insured's decision to drive at an excessive speed triggered the "intentional act" exclusion in its policy, which excluded "bodily injury caused intentionally by you or any family member or at your or any family member's direction." *Id.* at 921.

In *Thomas*, the District Court granted the plaintiffs' motion for summary judgment, but the Court of Appeals reversed. *Id.* at 922. Over one panel member's dissent, the Court of Appeals held that the driver's excessive speeding prohibited recovery under the intentional act exclusion. *Id.*

A divided Kansas Supreme Court upheld the reversal by the Court of Appeals, but only after significantly revising the applicable test for what constitutes an "intentional injury" under Kansas insurance law. As the Supreme Court pointed out, at that time, the "natural and probable consequences" test was used for determining intent. *Id.* at 923. Under that test, "intent to cause injury may be inferred if the injury is the natural and probable consequence of" an intentional act. *Id.* This test rendered irrelevant the question of whether the actor subjectively intended harm.

The Supreme Court traced Kansas' adoption of the "natural and probable consequences" test to *Rankin v. Farmers Elevator Mutual Insurance Company*, 393 F.2d 718 (10th Cir. 1968). *Thomas*, 285 Kan. at 923–24. In *Rankin*, the driver of a pickup truck confronted an adjacent motorcyclist by turning his truck into the motorcyclist. *Id.* The Tenth Circuit held that the truck driver's insurance excluded coverage for the motorcyclist's bodily injury, because the truck driver had caused the injury intentionally.

Id. The court held that the "serious injury of the rider of the motorcycle was a consequence of the deliberate collision and should have been expected and hence intended." *Id.* It set forth the following test, which numerous Kansas cases applied up until *Thomas*: "Where an intentional act results in injuries which are the natural and probable consequences of the act, the injuries, as well as the act, are intentional." *Id.*

In *Thomas v. Benchmark*, the Supreme Court cited *Casualty Reciprocal Exchange v. Thomas*, 7 Kan. App. 2d 718 (1982) as an example of a case in which the Court of Appeals had applied the *Rankin* test. *Thomas v. Benchmark*, 285 Kan. at 924. In *Casualty Reciprocal Exchange*, a homeowner shot a partygoer in the face "in a state of uncontrolled anger" at close range with a pistol. In a dispute over insurance coverage, the injured party argued "that there was no evidence that Thomas intended to injure the appellant by his actions." 7 Kan. App. 2d at 719–20. The Court of Appeals disagreed based on the *Rankin* test: "[H]ere one person aimed a gun at another and fired it. Under these facts, to say that the act of aiming and firing the gun was intentional, but the injury was not, draws too fine a distinction." *Id.* Thus, there was no insurance coverage for injuries arising out of the intentional act of aiming and firing a gun at another person. *See also*, *Shelter Mut. Ins. Co. v. Williams,* 248 Kan. 17 (1991) (cited and summarized in *Thomas v. Benchmark* as: "the exclusionary clause of an insurance policy applied when the insured's son intentionally opened fire on school grounds, even though he did not understand his actions were wrongful"); *Harris v. Richards,* 254 Kan. 549 (1994) (cited and summarized in *Thomas v. Benchmark* as: "[*Rankin*] test applied to shooting shotgun at occupied cab of pickup; coverage excluded under same clause").

The *Thomas v. Benchmark* Court then reviewed another case involving a gun, *Bell v. Tilton*, 234 Kan. 461 (1983). In *Bell*, a young boy suffered an eye injury at a birthday party when one of his peers "took aim and fired the BB gun at him." *Id.* at 462. Citing *Casualty Reciprocal Exchange* and applying the *Rankin* test, the Court in *Bell* held that the boy's eye injury was caused by an intentional act, despite the shooter not intending to injure his target's eye. *Id.* at 469–72. In other words, the shooter intended to fire a BB from his gun, so the fact that he did not intend the specific eye injury that arose was irrelevant.

After reviewing these and other cases, the *Thomas* Court noted that Kansas' adoption of the *Rankin* test "represents a minority approach." *Thomas v. Benchmark Ins. Co.*, 285 Kan. at 926. The Supreme Court criticized the test for blurring the lines between intentional conduct, proximate cause in a negligence case, and the concept of foreseeability. *Id.* at 928–29. Based largely on this confusion, the Supreme Court decided that "[t]he time has come to begin moving away from the problems caused by" the *Rankin* test. *Id.* at 930.

To replace the *Rankin* test, the Supreme Court in *Thomas* adopted the definition of "intent" from § 8A of the Restatement (Second) Torts (1964), which had been echoed—though not cited—in *Bell*:

> The word "intent" is used throughout the Restatement of this subject to denote that the actor [1] desires to cause the consequences of his act, or that [2] he believes that the consequences are substantially certain to result in it.

Thomas, 285 Kan. at 930–31 (citing § 8A of the Restatement (Second) Torts (1964)). The Supreme Court quoted Comment a to § 8A to illustrate that "intent" refers to the intended consequences of an act, rather than the mere intent to commit the act:

> "Intent," as it is used throughout the Restatement of Torts, has reference to the consequences of an act rather than the act itself. When an actor fires the gun in the midst of the Mojave Desert, he intends to pull the trigger; but when the bullet hits a person who is present in the desert without the actor's knowledge, he does not intend that result. *"Intent" is limited, where it is used, to the consequences of the act.*

Id. at 931 (emphasis added). The Supreme Court quoted Comment b for further explanation:

> All consequences which the actor desires to bring about are intended, as the word is used in this Restatement. Intent is not, however, limited to consequences which are desired. *If the actor knows that the consequences are certain, or substantially certain, to result from his act*, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.
>
> As the probability that the consequences will follow decreases, and becomes *less than substantial certainty*, the actor's conduct loses the character of intent, and becomes mere recklessness, as defined in § 500. As the probability decreases further, and amounts only to a risk that the result will follow, it becomes ordinary negligence, as defined in § 282. All three have their important place in the law of torts, but the liability attached to them will differ.

Id. (emphases in *Thomas*).

Finally, the Supreme Court in *Thomas* set forth the rule going forward for determining whether an injury was caused intentionally for purposes of examining an "intentional act" exclusion in an insurance policy:

> The insured must have intended both the act <u>and</u> *to cause some kind of injury or damage*. Intent to cause the injury or damage can be actual or it can be inferred from the nature of the act when the consequences are substantially certain to result from the act. It is not essential, however, that the harm be of the same character and magnitude as that intended.

Id. at 933 (emphases added). The Supreme Court commented that this test would clear up confusion caused by the *Rankin* test and "put 'intentional' injury in its rightful place on the

scale for measuring severity of conduct." *Id.* at 934 (quoting Comment b to Restatement (Second) of Torts § 8A).

Applying this new test to the facts in that case, the *Thomas* Court held that the driver intentionally caused the injuries and death suffered by her passengers. "Simply put, injury was substantially certain to result under these circumstances: driving the wrong way against traffic, failing to stop at a stop sign, and driving at 100 m.p.h. through neighborhoods." *Id.* at 935. The Court found significant that the injured passenger plaintiff Reyes had "correctly predicted, and warned" the insured driver who was fleeing from police at an excessive speed "against, the precise consequence of her act—bottoming out at the approaching intersection—shortly before it happened." *Id.* In other words, the driver in *Thomas* intentionally drove very dangerously and with full awareness of the likelihood of the consequences that resulted, so the bodily injuries she caused were "intentional" under the insurance policy's exclusion.

Even if analyzing Mr. Lewis's conduct under an insurance policy standard were appropriate—it is not—the District Court failed to properly apply that standard. Under *Thomas* and Restatement (Second) of Torts § 8A, for an injury to be considered the result of an intentional act, the actor "must have intended both the act *and to cause some kind of injury or damage*." *Thomas*, 285 Kan. at 933. Under the undisputed facts in this case—with all inferences from those facts considered in a light most favorable to Plaintiff as they must be at this stage—Mr. Lewis did not intend to cause *any* kind of injury or damages whatsoever. Thus, his conduct was not intentional or volitional.

Granted, "[i]ntent to cause the injury can be actual or it can be inferred by the nature of the act, when the consequences are substantially certain to result from the act." *Id.* But here, where it is undisputed that Mr. Lewis had *no* actual intent to cause injury, all inferences about the nature of Mr. Lewis's act and the consequences that were substantially certain to result must be resolved in Plaintiff's favor. There are no dangerous consequences substantially certain to result from pulling the trigger of an unloaded Handgun, which is what Mr. Lewis believed he was holding at the time. Therefore, Mr. Lewis had less than "a substantial certainty" that pulling the trigger of a gun he believed was unloaded—after removing the magazine and pulling the slide back—would cause any kind of harm.

This conclusion is supported by the numerous cases involving guns cited by the *Thomas* Court. In *Harris*, *Williams*, and *Bell*, cited above, the actor intentionally fired a gun, and harm from that action was necessarily "substantially certain to result." But those cases cast this one in stark relief, where Mr. Lewis's only intentional act was pulling the trigger with *zero* intent to actually fire the weapon.

The District Court acknowledged that it made a dispositive inference in *Defendants'* favor, contrary to what Kansas law requires on summary judgment:

> After review of the *Thomas v. Benchmark* case, the Court *struggled* with the question of whether the circumstances of this case permitted the *inference* that the injuries resulted from the intentional act. The Court concludes, notwithstanding any other consideration, that the pulling of the trigger under these circumstances leads to the unmistakable *inference* that the injuries were the result of a volitional act.

(R. VI, 369) (emphases added). This is an admission that the District Court supported its grant of summary judgment by making an inference that is directly *adverse* to Plaintiff.

See, e.g., *Miller v. Westport Ins. Corp.*, 288 Kan. 27, Syl. ¶ 1, 32 (2009) ("The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought."). An appropriate inference in Plaintiff's favor that Mr. Lewis's accidental firing of the gun was not "intentional" or "volitional," would have resulted in a denial of summary judgment.

That some intent to cause a discharge of the Handgun is necessary to qualify as a "volitional act" comports with common sense. It makes little sense to consider an act committed with no intent to harm anyone—e.g., pulling the trigger to disassemble the Handgun—to be a "volitional act that constituted a criminal offense" under PLCAA. For example, in *Heikkila v. Kahr Firearms Grp.*, No. 1:20-CV-02705-MDB, 2022 WL 17960555 (D. Colo. Dec. 27, 2022), a man was injured when he intentionally pulled up his pants, which caused his firearm to fall out of his pants and discharge when it hit the floor. *Id.* at 1. In a product liability suit against the firearm manufacturer, the defendant filed for summary judgment raising PLCAA as a defense and arguing that the product defect exception did not apply because the discharge was caused by a "volitional act that constituted a criminal offense" under 15 U.S.C. § 7903(5)(A)(v). *Id.* at 12. The U.S. District Court for the District of Colorado denied the defendant's motion for summary judgment, because the matter of whether the discharge was volitional was a fact question for the jury to decide. *Id.* The clear implication from *Heikkila* is that the plaintiff's "volitional act" of pulling up his pants is not necessarily a "volitional act" that caused the discharge of the firearm under PLCAA. The same holds true here.

Consider also the following illustrative example highlighted by judges analyzing the "volitional act" language in PLCAA:

> Even if pulling the trigger was "volitional," that does not make a discharge "caused by a volitional act" any more than an explosion would be "caused by [the] volitional act" of answering a cell phone if, unbeknownst to you, terrorists had wired your phone to a remote bomb. In both cases, there was "volition" to engage in a seemingly non-dangerous act, but not to cause an unforeseen dangerous result.

Gustafson v. Springfield, Inc., 2022 PA Super 140 (Aug. 12, 2022), *appeal granted in part*, No. 240 WAL 2022, 2023 WL 2982801 (Pa. Apr. 18, 2023).

In summary, in analyzing whether Plaintiff's injuries were caused by a "volitional act that constituted a criminal offense" act, the District Court applied the incorrect standard for what constitutes an "intentional" act, opting for an insurance law standard rather than a criminal law standard. The District Court then magnified its error by misapplying the test from *Thomas v. Benchmark* to conclude that an accident was "intentional," therefore, "volitional," when the *Thomas* test supports the opposite result. The District Court admitted that it came to this conclusion by making a factual inference in *Defendants*' favor. A proper review by the District Court at any of these steps would have led to the inevitable (and correct) conclusion that the accidental discharge of the Handgun in this case was not "volitional," let alone "criminal" or "unlawful," so PLCAA does not apply to bar Plaintiff's claims against Defendants. This Court should reverse the District Court's grant of summary judgment and remand the case for trial for these reasons.

Issue 2: The District Court erred by ruling, *sua sponte*, that causation testimony by André Lewis, a former defendant and fact witness, is inadmissible.

In its Journal Entry granting summary judgment, the District Court also gave advisory rulings striking down certain testimony as inadmissible. (R. VI, 359, 365). The District Court's advisory rulings on this testimony were *sua sponte*: no party had sought rulings on the admissibility of this testimony and no party briefed the matter. The District Court's ruling constitutes clear error.

As the case stands now, even if Plaintiff's appeal were unsuccessful, Plaintiff faces trial against the remaining defendant, firearm manufacturer Beretta-Italy. A review of this legal ruling has value related to the other appealable issues as well as independent value in the case. Though this issue might otherwise be considered non-appealable at this stage, it is inextricably intertwined with the appealable issues raised above and, therefore, proper for this Court's review. *See Cypress Media, Inc. v. City of Overland Park*, 268 Kan. 407, 415 (2000).

The Kansas Supreme Court has established a multistep analysis for reviewing a ruling on the admissibility of evidence on appeal. *State v. Shadden*, 290 Kan. 803 817 (2010). "On appeal, the question of whether evidence is probative is judged under an abuse of discretion standard; materiality is judged under a de novo standard." *Id.* (internal citation omitted). "The second step is to determine which rules of evidence or other legal principles apply." *Id.* "On appeal, this conclusion is reviewed de novo." *Id.* (internal citation omitted). "In the third step of the analysis, a district court must apply the applicable rule or principle. *Id.* "The appellate court's standard of review of this third step varies depending on the rule or principle that is being applied." *Id.* "Some rules and principles grant the district court discretion, while others raise matters of law." *Id.* (internal citation omitted).

Candidly, it is unclear to Plaintiff exactly what standard of review the Court of Appeals should apply in reviewing the District Court's advisory opinion regarding Mr. Lewis's testimony. In this case, the District Court did not specifically rule on the testimony's probative value or materiality. It simply struck the testimony after concluding, without argument, that it would be "hindsight speculation" and "inadmissible as conjecture." (R. VI, 359, 365). Regardless of whether the review is de novo or for an abuse of discretion, the result is the same: the District Court, in effect, granted a motion in limine on the admissibility of testimony before any such motion was filed, briefed, or argued.

Plaintiff's briefing in response to Defendants' motion for summary judgment raised the following undisputed material facts supported by the deposition testimony of then- Mr. Lewis:

> 16. If anyone from Bass Pro had discussed with defendant Lewis the safety options of a loaded chamber indicator or magazine disconnect safety on the Beretta APX pistol or any other pistol, defendant Lewis would have considered purchasing a gun with those safety features.
>
> 17. If the Beretta APX had a loaded chamber indicator on it, it would have indicated that there was a round in the chamber even when the magazine was out.
>
> 18. If defendant Lewis had seen a loaded chamber indicator signaling the Beretta APX pistol was still loaded after removing the magazine, he would not have pulled the trigger to try to take the pistol apart, preventing Plaintiff's injuries.
>
> 19. If the Beretta APX pistol had a magazine disconnect safety on it, it would have been unable to fire without the magazine in it.

(R. v, 160-161) (internal citations to Lewis's deposition omitted).

In the section of its ruling considering the facts presented by the parties, the District Court noted that statements 16 and 19 were "accurate recitations from the record, and they

relate to Lewis's subjective beliefs as to the actions he might have taken." (R. VI, 359). However, the Court continued, "They would be inadmissible as conjecture . . . ." *Id.* Later in its ruling, the Court commented on this testimony again: "Lewis has speculated that if either of the suggested additional safety mechanisms were in place, he would not have shot his friend." (R. VI, 365). The Court discarded this testimony with a comment that such testimony was "hindsight speculation and not admissible." *Id.*

What the District Court seemed unaware of—likely because of the complete absence of briefing on the matter—is that Mr. Lewis's testimony is classic causation testimony. This type of lay opinion testimony is admissible under black letter Kansas law. "Under K.S.A. 60–456(a), a layperson is allowed to offer opinions or inferences as the judge finds may be rationally based on the perception of the witness and are helpful to a clearer understanding of the witness' testimony." *Shadden*, 290 Kan. at 804. Under Kansas law, any conclusion that testimony is too speculative to be admissible must be explained, which the District Court utterly failed to do. *See State v. Lowrance*, 298 Kan. 274, 294 (2013) (upholding admissibility of lay witness's opinion testimony when no explanation was given for why such testimony was "speculative").

Mr. Lewis's testimony is clearly admissible opinion testimony, as it is based on his own perception of his actions and would directly help the jury understand the rest of his testimony. The element of causation is required in every tort case. The plaintiff must always prove what would have happened if the duty owed by the tortfeasor had not been breached. Thus, Mr. Lewis's testimony about what he would have done is relevant. There is no rule in Kansas law that says that testimony about what would have happened under a

counterfactual is inadmissible. If this were so, tort law would be severely undermined because this is precisely what causation testimony is. Direct testimony from a tortfeasor about what he would have done differently is not unduly speculative—by definition, Mr. Lewis is the most knowledgeable person on that topic.

At the very least, the District Court's advisory opinion on admissibility violated the requirement that all evidence on summary judgment be viewed in light most favorable to Plaintiff. Because of the District Court's *sua sponte* ruling on this issue, Plaintiff had no opportunity to address this issue. This Court should make clear that Mr. Lewis's testimony is admissible. Alternatively, this Court should vacate the District Court's ruling to allow the parties to fully brief and argue the matter, if necessary.

CONCLUSION

Plaintiff's claims against Defendants are simple: Plaintiff was injured because Defendants imported and sold an unreasonably dangerous product that risked accidental discharge when the user believed it was unloaded. Such accidental discharge cost Plaintiff his left leg. The District Court erred in concluding that the accidental discharge of the defective Beretta APX handgun constituted a crime, let alone a crime of volition, such that PLCAA bars Plaintiff's claims. The District Court erred further when it pre-emptively—and without briefing or argument on the subject—ruled that Mr. Lewis's causation testimony would be inadmissible at trial. This Court should reverse the District Court on both points.

Respectfully submitted,

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The undersigned hereby certifies that a true and correct copy of the foregoing was served on this 30th day of June, 2023, by mail and by electronically filing a copy with the Kansas Judicial Branch e-filing website which sent notices to the following:

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