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, FABBRICA D'ARMI PIETRO BERETTA S.p.A, AND BERETTA U.S.A. CORP., Defendants-Appellees.

BRIEF OF APPELLEES BASS PRO OUTDOOR WORLD, LLC AND BERETTA U.S.A. CORP.

APPEAL FROM THE DISTRICT COURT OF LYON COUNTY
HONORABLE MERLIN G. WHEELER, JUDGE
DISTRICT COURT CASE NO. 2022CV00085

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Oral argument requested: 20 minutes

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NATURE OF THE CASE

In this personal injury action, Plaintiff/Appellant Marquise Johnson seeks damages for injuries he sustained when his Emporia State University football teammate, Andre Lewis, shot him while showing his Beretta Model APX 9mm pistol off to Johnson and two other teammates. But Lewis was not trying to impress his friends at a shooting range or some other safe shooting location; rather, he was doing this while the four young men were in Lewis's car at a stop light in downtown Emporia following a team dinner. Lewis acted so recklessly in the handling of his pistol – a firearm he purchased for personal protection six months earlier – that he deliberately and intentionally pulled the pistol's trigger while the barrel was pointed at Appellant who was in the front passenger seat. Lewis's reckless mishandling of the subject pistol constituted criminal or unlawful misuse under the Protection of Lawful Commerce in Arms Act (P.L. 109-92, 119 Stat. 2033, Oct. 26, 2005) and thus Johnson's claims are barred as to defendant/appellee Beretta U.S.A. Corp. ("Beretta USA"), the pistol's importer and distributor, and defendant/appellee Bass Pro Outdoor World, LLC ("BPOW"), the pistol's retail dealer. The District Court correctly found the PLCAA applied to this case and granted summary judgment. For the reasons set forth below, this Court should affirm.

STATEMENT OF ISSUES ON APPEAL

Issue 1: Appellant's Product Liability Lawsuit Against Firearm Sellers Is a Precluded "Qualified Civil Liability Action" Under the PLCAA Which Cannot Be Saved by The Product Liability Exception Because Lewis's Reckless Discharge of The APX Pistol Was a "Volitional Act Which Constitutes a Criminal Offense."

Issue 2: The District Court Properly Excluded Lewis's Self-Serving and Speculative Lay Opinion Testimony as To What He Would Have Done At The Time of The Subject Pistol's Purchase Had He Received Different or Additional Information.

STATEMENT OF FACTS

Appellant's opening brief includes what he terms "unchallenged allegations" relating to pistol defects and inadequate warnings. See, Appellant's Brief at pp. 1 – 6. Since Firearm Sellers' MSJ was based only on the PLCAA, it was unnecessary to address unsupported allegations of defect. Suffice it to say, however, Beretta Italy, Beretta USA and BPOW have firmly and unequivocally denied all of Appellant's defect allegations. See, Answers to Appellant's Second Am. Petition by Beretta Italy (R Vol. 1, 279-301), Beretta USA (R Vol. 1, 268-275) and BPOW (R Vol. 1, 337-344).

A. The Subject Beretta APX Pistol

The involved pistol is a Beretta Model APX 9mm semi-automatic pistol. See, Firearm Sellers Motion for Summary Judgment ("MSJ"), Uncontroverted Fact ("UF") No. 1. R Vol. 5, 67-68; R Vol. 6, 355. The APX pistol was designed and manufactured by defendant Fabbrica d'Armi Pietro Beretta S.p.A. in Italy ("Beretta Italy").[1] UF No. 2. R Vol. 5, 68; R Vol. 6, 355; R Vol. 1, 280.

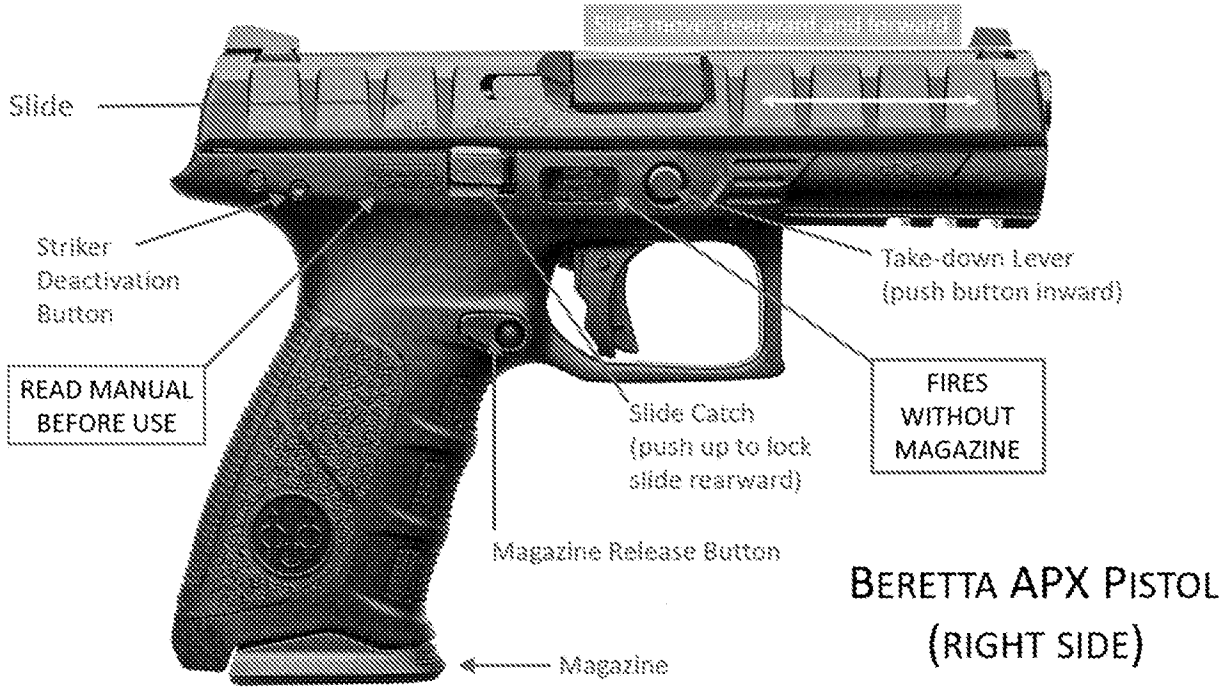
Beretta USA, a federal firearms licensee, imported the subject pistol from Beretta Italy in March 2017 and thereafter sold it to BPOW. UF Nos. 3-4. R Vol. 5, 68; R Vol. 6,

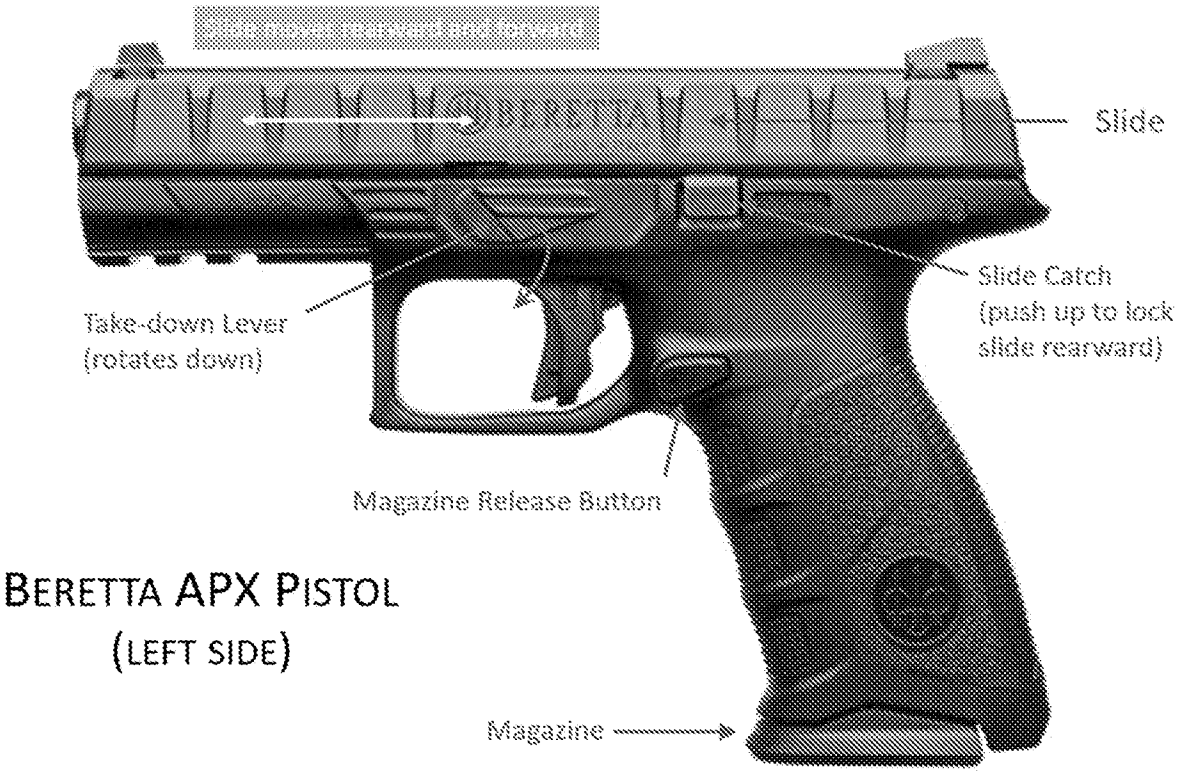
[1] Beretta Italy did not join in Firearm Sellers' motion because it is a foreign firearms manufacturer and does not possess a Federal Firearms License. Without an FFL, Beretta Italy arguably did not fall within the definition of "manufacturer" under the PLCAA. *See*, 15 U.S.C. § 7903(2). Beretta Italy therefore remains a party in this case and will continue to defend itself up through trial.

355. (Though Appellant purported to oppose this fact in his MSJ response, he offered no factual support for it at the MSJ hearing. R Vol. 7, 101.)

The subject pistol incorporated a feature called the "Striker Deactivation Button" which Lewis could have depressed to safely release the striker before disassembly. UF No. 28, R Vol. 5, 72; R Vol. 6, 357. (Lewis conceded he did not know about this feature because he did not read the APX Pistol User Manual. *Id.*)

Two warnings were stamped directly into the pistol's polymer chassis – "READ MANUAL BEFORE USE" and "FIRES WITHOUT MAGAZINE." UF No. 32. R Vol. 5, 72; Vol. 6, 358.





(Right and Left Side Views of a Beretta APX Pistol with Relevant Features)

Finally, a User Manual accompanied the subject pistol and it contained basic safety rules, as well as information and instructions regarding general operation, loading, firing and disassembly. UF No. 35. R Vol. 5, 73; R Vol. 6, 356, 358. For example, the APX Pistol User Manual contained the following warnings and instructions:

a. ⚠ WARNING: ALL FIREARMS HAVE LETHAL POTENTIAL. READ THE BASIC SAFETY RULES CAREFULLY AND UNDERSTAND THEM FULLY BEFORE ATTEMPTING TO USE THIS FIREARM. (User Manual at p. 5) R Vol. 9, 107.

⚠ WARNING: READ THE ENTIRE MANUAL CAREFULLY BEFORE USING THIS FIREARM. MAKE SURE THAT ANY PERSON USING OR HAVING ACCESS TO THIS FIREARM READS AND UNDERSTANDS ALL OF THIS MANUAL PRIOR TO USE OR ACCESS. (User Manual at p. 5) R Vol. 9, 107.

b. "⚠ WARNING: This firearm has the capability of taking your life or the life of someone else! Always be extremely careful with your firearm. An accident is almost always the result of not following basic firearm safety rules." (User Manual

at p. 9) R Vol. 9, 111.

c. NEVER POINT A FIREARM AT SOMETHING THAT IS NOT SAFE TO SHOOT.

ALWAYS TREAT A FIREARM AS IF IT WERE LOADED.

KNOW THE SAFETY FEATURES OF THE FIREARM YOU ARE USING, BUT REMEMBER: SAFETY DEVICES ARE NOT A SUBSTITUTE FOR SAFE HANDLING PROCEDURES.

NEVER TRANSPORT A LOADED FIREARM. (User Manual at pp. 6-9) R Vol. 9, 108-111.

AS LONG AS THERE IS AMMUNITION IN THE MAGAZINE, A PISTOL WHICH IS LOADED AND FIRED, WILL AUTOMATICALLY PICK UP THE NEXT ROUND AND FEED IT INTO THE FIRING CHAMBER. (User Manual at p. 14) R Vol. 9, 116.

d. ⚠ WARNING: Always visually inspect the firing chamber to ensure that it is empty. The chamber is empty when no cartridge is visible when looking from the ejection port into the open chamber. (User Manual at p. 15) R Vol. 9, 117.

e. With the slide in the locked position, make sure that you visually inspect the chamber to ensure that it is empty. (User Manual at p. 15) R Vol. 9, 117.

f. ⚠ WARNING: Be certain the firearm is pointed in a SAFE direction. Keep your finger away from the trigger. (User Manual at p. 16) R Vol. 9, 118.

g. **Striker deactivation button**. Beretta APX pistols have a unique feature that allows the user to deactivate the internal striker mechanism prior to disassembly. This means the pistol can be disassembled WITHOUT PULLING THE TRIGGER. (User Manual at p. 18) R Vol. 9, 120.

h. The User Manual also provides directions for general operation of the firearm, including *how to check whether the firearm is unloaded* (User Manual at pp. 24-25):

The entire APX Pistol User Manual can be found at R Vol. 9, 103-145.

B. Andre Lewis And His Firearms Experience

Andre Lewis was raised in Ottawa, Kansas, and he began shooting firearms at an early age. During his teenage years, Lewis gained experience shooting shotguns, rifles, and handguns. He attended a Hunter's Safety Course while in 8th grade at Ottawa Middle School. His experience with handguns included shooting Glock pistols, Hi-Point pistols, and a variety of revolvers. At the age of 18, Lewis received his first hunting rifle.

Lewis turned 21 years old on January 19, 2018. A few weeks later, on February 3, 2018, he purchased the subject pistol. UF 7. R Vol. 5, 68. Lewis received the Beretta "APX Pistol User Manual" with the pistol. UF Nos. 9, 35. R Vol. 5, 69, R Vol. 5, 73-75. He also received a safety sheet from Bass Pro Shop, colloquially referred to as the "Bass Pro 10 Commandments of Safe Gun Handling." UF No. 8. R Vol. 5, 68. He admits spending only several minutes reviewing this safety sheet before acknowledging *in writing* he read and understood its contents. Regrettably, Lewis did not thereafter read the APX User Manual (*see* UF No. 10, R Vol. 5, 69) and therefore did not understand how the features of the subject APX pistol differed from other pistols he had handled in the past, including Glock pistols.

Between February 3, 2018 and the August 16, 2018 shooting incident, Lewis successfully completed a Kansas Concealed Carry Handgun course he took at Gun Guys in Ottawa where he was reminded of a number of important safe gun handling rules, including always point a gun in a safe direction, keeping your finger off the trigger and visually inspecting the chamber to ensure the gun is unloaded. UF No. 12. R Vol. 5, 69; Vol. 6, 355.

Because of his firearms experience and training, Lewis knew a live cartridge of ammunition could remain in the firing chamber of a semi-automatic pistol like the Beretta APX pistol even if the magazine had been removed. Lewis also understood how to pull the slide of the pistol rearward to visually inspect the firing chamber for the presence of a live cartridge. UF No. 25, R Vol. 5, 71.

C. BPOW's Sale of The Subject Pistol to Lewis

BPOW, also a federal firearms licensee, is a retail firearms dealer. UF Nos. 5-6. R Vol. 5, 68; Vol. 6, 355. (Appellant also half-heartedly opposed this fact, but again offered no supporting facts at the hearing. R Vol. 7, 101.) On February 3, 2018, BPOW legally sold the subject pistol to Lewis at its Olathe store. UF No. 7. R Vol. 5, 68; R. Vol. 9, 37-38, 40-41, 99-101. Lewis purchased the pistol as a personal protection firearm and he therefore appreciated its lethal capabilities. UF No. 11. R Vol. 5, 69; R Vol. 6, 356.

When he bought the subject pistol, Lewis received and signed the Bass Pro Shop "10 Commandments of Safe Gun Handling" which included 10 universally accepted safe gun handling rules. UF No. 8. R Vol. 5, 68; (Journal Entry at ["J.E."] pg. 5-6) R Vol. 6, 355.

The "10 Commandments of Safe Gun Handling Form" included important safe gun handling rules, some of which included the following:

a. "ALWAYS keep the muzzle pointed in a safe direction,"

b. "Treat EVERY firearm as if it were loaded,"

c. ALWAYS keep the action open except when actually hunting or preparing to shoot,"

d. "Avoid ALL horseplay with a firearm and NEVER point at anything you don't want to shoot," and

e. "Firearms and ammunition should be stored and locked separately."

UF No. 35. R Vol. 5, 73; R Vol. 6, 358. (The complete BPOW "10 Commandments of Safe Gun Handling" form can be seen at R Vol. 9, 102.)

Lewis also received the APX Pistol User Manual. UF No. 9. R Vol. 5, 69; R Vol. 6, 356; UF No. 35 R Vol. 5, 73-75. Lewis never actually read the manual; rather, he only recalls "skimming through it" once and not in any detail. UF No. 10. R Vol. 5, 69; R Vol. 6, 356. As a result, he did not appreciate the APX model pistol incorporated a "Striker Deactivation Button" which allows a user to depress a button located on the chassis to safely release the striker (firing pin) without it coming in contact with a chambered cartridge. UF No. 28. R Vol. 5, 72; R Vol. 6, 357. By depressing the Striker Deactivation Button, a subsequent trigger pull will not result in a discharge.[2]

D. The Shooting Incident of August 16, 2018.

After its purchase and while attending ESU, Lewis kept the subject pistol loaded either in his apartment or in his car. In early August 2018, Lewis returned to his apartment at ESU from Ottawa for pre-season football camp. Just before the underlying incident, Lewis was keeping the subject pistol loaded and tucked under the driver's seat of his 2007 Dodge Charger. UF No. 13. R Vol. 5, 70; Vol. 6, 355.

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[2] Because of this unique feature, the APX pistol operated differently than the Glock pistols with which Lewis was familiar. Unlike the APX pistol, a trigger pull is often required to release the striker and disassemble a Glock pistol (but only when the pistol is pointed in a completely safe direction of course).

On August 18, 2018, Lewis drove Appellant and two other ESU football teammates to the Olpe Chicken House for a team dinner, and those same teammates drove back to Emporia with him after the dinner. UF No. 14. R Vol. 5, 70; R Vol. 1, 213.

Appellant was sitting in the front passenger seat as Lewis drove into Emporia and north on Commercial Street towards campus. UF No. 15. R Vol. 5, 70. While operating his automobile, Lewis pulled the subject pistol from beneath his seat, though he cannot recall his reasons for doing so. UF No. 16. R Vol. 5, 70. Appellant asked to see the subject pistol, so Lewis handed it to him. This exchange took place while Lewis's car was stopped at the stoplight on Commercial Street at 4th Street with other vehicles directly in front of and behind Lewis's car. UF No. 17. R Vol. 5, 70.

Lewis took the subject pistol back from Appellant at which time Appellant asked Lewis if knew how to take the subject pistol apart. UF No. 18 R Vol. 5, 70. Lewis said he did and even told Appellant he could do so in "2.2 seconds." UF No. 19. R Vol. 5, 71. While his vehicle was still at the stoplight, and without any justifiable reason to do so, Lewis began to disassemble the subject pistol. UF No. 20. R Vol. 5, 71. J.E. at pg. 6-7. R Vol. 6, 356-357.

Lewis was not intending to clean the pistol (UF No. 22. R Vol. 5, 71), and he conceded he could have simply *told* Appellant he knew how to take the subject pistol apart without doing anything further. UF No. 23. R Vol. 5, 71. Lewis Depo. at pp. 228:6-229:3. R Vol. 9, 69-70.

While he held the subject pistol in his left hand, the barrel was pointed directly at Appellant – something Lewis knew dangerously violated safe gun handling rules. UF No. 24. R Vol. 5, 71.

When Lewis cleaned the subject pistol before, he would retract the slide and check to make sure no cartridge was in the chamber. UF No. 25. R Vol. 5, 71; R Vol. 6, 357. But on the evening of the shooting, Lewis admitted he 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. UF No. 26. R Vol. 5, 71; R Vol. 6, 357. (Appellant has inadequately disputed UF No. 26 as discussed below *infra* at section C.)

As Lewis began the disassembly, he assumed it worked just like a Glock pistol (*see* fn. 4 *supra*), so he *deliberately and intentionally pulled the trigger* believing he needed to do so to remove the slide. UF No. 29. R Vol. 5, 72; R Vol. 6, 358. J.E. at pg. 8 R Vol. 6, 358. When he pulled the trigger, the pistol discharged the bullet that struck Appellant's legs. UF No. 30. R Vol. 5, 72; R Vol. 6, 358.

At that moment, (1) Lewis knew he was holding a real gun; (2) that had been loaded with real bullets; (3) but he had not pulled the slide rearward to see if a live cartridge was loaded in the chamber; (4) with the barrel pointed in the direction of another human being, and; (5) while he was driving his car back to ESU. Lewis agrees his actions were unreasonable. UF No. 31. R Vol. 5, 72; R Vol. 6, 358. Lewis also conceded that at the time of the shooting, he violated five of the rules in the BPOW "10 Commandments of Safe Gun Handling." UF No. 34. R Vol. 5, 73. Moreover, he also conceded he failed to follow eight

sets of instructions and safety rules in the Beretta APX User Manual. UF No. 36. R Vol. 5, 75.

As the above undisputed facts plainly demonstrate, Lewis wanted to impress his friends by taking the subject pistol apart, boasting he could do so in "2.2 seconds." Rather than simply put the pistol away, Lewis chose that moment – *while sitting behind the steering wheel, surrounded by other cars also in transit from the team dinner, and while stopped at the Commercial St. stoplight at 4th Avenue inside Emporia City Limits* – to begin disassembling the subject pistol. He had no justifiable reason to do so at that time and place; there was no malfunction to troubleshoot, nor was he intending to clean it while driving through downtown Emporia.

Appellant commenced this action on August 6, 2020 and filed the operative Second Amended Petition on January 5, 2021. The SAP contains three counts: (1) Count I for Strict Liability as to the Subject pistol; (2) Count II for Negligent Design as to the Subject pistol, and: (3) Count III for Negligence as to Andre Lewis. (Lewis was dismissed after the District Court's MSJ ruling in favor of Firearms Sellers. R Vol. 6, 339-41.)

In granting Firearm Sellers MSJ, the District Court correctly concluded Appellant's suit is barred by the PLCAA because it is a "qualified civil liability action" that is not saved by any applicable exception. That ruling should be affirmed.

LEGAL DISCUSSION

Issue 1: Appellant's Product Liability Lawsuit Is a Precluded "Qualified Civil Liability Action" Under the PLCAA Which Cannot Be Saved by The Product Liability Exception Since Lewis's Reckless Discharge of The Beretta APX Pistol Was a "Volitional Act Which Constitutes a Criminal Offense."

A. The PLCAA Created a New Federal Standard That Governs When a Manufacturer or Seller Of a Firearm May Be Sued For Harm Resulting From Its Criminal or Unlawful Misuse.

The PLCAA's preamble describes the statute as "an act to prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages, injunctive, or other relief resulting from the misuse of their products by others." The PLCAA consists of a series of findings (§ 7901(a)(1)-(8)) and purposes (§ 7901(b)(1)-(7)), followed by two directory provisions (§ 7902(a) & (b)) and a set of definitions (§ 7903(1)-(9)).

The findings of the PLCAA make clear that the Act was intended to address lawsuits, like the instant case, brought against manufacturers and sellers of firearms and ammunition for harm resulting from the criminal or unlawful misuse of their lawfully sold products and which Congress concluded are unreasonable and impose undue burdens on interstate and foreign commerce. *See* 15 U.S.C. §§ 7901(a)(3) – (5), 7901(b)(1), (4). In those findings, Congress specifically identified lawsuits seeking money damages against manufacturers of firearms "that operate as designed and intended" for harm "caused by the misuse of firearms by third parties and criminals." 15 U.S.C. § 7901(a)(3). Congress also found that firearm manufacturers and sellers lawfully engaged in the "design, manufacture, marketing, distribution, importation or sale" of firearms shipped interstate "are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended." 15 U.S.C. § 7901(a)(5). Finally, Congress found that such lawsuits "constitute[] an

unreasonable burden on interstate and foreign commerce of the United States." 15 U.S.C. § 7901(a)(3).

One of the main purposes of the Act, then, was to "prohibit" lawsuits against manufacturers and sellers "for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others *when the product functioned as designed and intended*." 15 U.S.C. § 7901(b)(1)(emphasis added).

To give effect to the Act, the directory provisions bar the bringing of a "qualified civil liability action" in any state or federal court (§ 7902(a)) and require that any "qualified civil liability action that is pending shall be immediately dismissed by the court in which the action was brought or is currently pending." 15 U.S.C. § 7902(b). A "qualified civil liability action" is defined, in pertinent part, as:

> [A] *civil action* . . . brought by *any person* against a *manufacturer* or seller of a qualified product [i.e., a firearm that has been transported or shipped in interstate or foreign commerce] . . . *for damages* . . . or other relief, *resulting from the criminal or unlawful misuse* of a qualified product by the person *or a third party*…

15 U.S.C. § 7903(5)(A)(emphasis added).

Six specific exceptions follow the general prohibition against qualified civil liability actions. *See* 15 U.S.C. § 7903(5)(A)(i)–(vi). Only claims that fit within one of the six enumerated exceptions may proceed. All other claims – whether based on state common law or state statute – are preempted and barred. Once enacted, the Supremacy Clause of the U.S. Constitution allows the PLCAA to displace conflicting state law. U.S. CONST. art. VI, cl. 2; *see also*, *Geier v. Am. Honda Motor Co.,* 529 U.S. 861, 873 (2000).

Under the PLCAA, the questions in this case simply become: (1) whether Appellant's suit is a precluded qualified civil liability action under section 7903(5)(A), and if so, (2) whether it fits within the exception set forth in section 7903(5)(A)(v) – known as the "product liability exception" – and is permitted to proceed. The answer is inescapable: Appellant's claims against Appellees are barred by the PLCAA as the District Court correctly concluded.

B. The District Court Correctly Found This Case Is a "Qualified Civil Liability Action" Under The PLCAA and The Product Liability Exception Is Unavailable To Appellant Because Lewis's Conduct Was Criminal in Nature.

The instant action is exactly the type of lawsuit the PLCAA was intended to preclude, and the District Court so found. Under the Act, only "qualified civil liability actions" are to be dismissed. Because the action here falls squarely within this definition – that is, a "civil action" brought "against a manufacturer" of a firearm [a "qualified product" under section 7903(4)] "for damages" "resulting from the criminal or unlawful misuse" of that firearm "by a third party" – the question becomes whether one of the exceptions to the definition of "qualified civil liability action" applies.

Under the product liability exception found in Section 7903(5)(A)(v) – the only applicable exception as Appellant concedes (R Vol. 7, 92) – personal injury, wrongful death and property damage claims can go forward against firearm and ammunition manufacturers "resulting *directly from* a defect in design or manufacture of the product, *when used as intended or in a reasonably foreseeable manner.*" 15 U.S.C. §§ 7903(5)(A)(v)(emphasis added). Thus, if the firearm suffers a catastrophic failure during a target shooting session

due to a flaw in its materials, a personal injury action could be brought. Similarly, if a firearm discharges when accidentally dropped and the injured Appellant claims an alternative design feature would have prevented such a discharge, that claim could proceed as well.

Traditional product liability claims are not limitless under the Act, however. The product liability exception does not apply "where the discharge of the product was caused by a volitional act that constituted a criminal offense . . . ." 15 U.S.C. § 7903(5)(A)(v). Under such circumstances, the PLCAA dictates "such an act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage . . . ." *Id.*

Despite Appellant's protestations otherwise, this "exception to the exception" does indeed allow some traditional product liability actions to go forward even if they involve conduct that is "volitional," but not criminal in nature. For example, the deliberate "volitional" discharge of a shotgun which results in a barrel burst injury to the user or a bystander could well be the result of a manufacturing defect – a flaw in the barrel's steel. Or if a deliberate "volitional" closing of the bolt on a bolt action rifle discharges a chambered cartridge thereby injuring the shooter or someone else, a viable design defect claim could exist. Such situations involve "volitional" acts that do not constitute criminal offenses and could therefore proceed under section 7903(5)(A)(v).

What the PLCAA does preclude, however, are those cases in which a "volitional act," *i.e.* pulling the trigger, causes the firearm to discharge, and that act "constituted a criminal offense." *Id.* In creating the "exception to the exception" in section 7903(5)(A)(v), Congress expressed its intention to preclude actions like the one here where creative

pleading attempts to give rise to a design defect case. Here, Appellant cannot seriously contest the fact Lewis pointed the subject APX pistol – which he knew to be a real firearm capable of firing real cartridges – at Appellant and then pulled the trigger. *See*, UF Nos. 11, 19-30. R Vol. 5, 69-72. Based on his own Complaint, and incontrovertible facts, the instant action falls within the definition of a "qualified civil liability action" and cannot be saved by the product liability exception.

In an attempted end run around the product liability exception, Appellant argues that exception precludes actions where a plaintiff can pursue multiple defendants in search of full compensation. Opening Brief at pp. 14. But the language in the product liability exception forecloses this argument.

Section 7903(5)(A)(v) excepts traditional product liability claims, but only when the death, injury or property damage results "directly" from an alleged design defect or manufacturing defect. 15 U.S.C. § 7903(5)(A)(v). The Act does not use the word "indirectly," "partially," "concurrently" or some other limiting term. Rather it uses the term "directly," thereby expressing Congress's intent to preclude claims, like this one, where creative pleading asserts a design defect claim as an alternative theory of recovery in addition to, or in lieu of, a direct action against the directly culpable party. Here, Appellant pursued a negligence claim against Lewis – which occupied just 4 paragraphs of Appellant's 160-paragraph Second Amended Petition – and that claim has now been resolved with the recent filing of Lewis's dismissal. R Vol. 6, 339-341.

The situation here is akin to suit in which a person, injured by an intoxicated joyriding teen whose parents failed to prevent access to the involved vehicle, sues General

Motors for failing to install a device which would have required an ignition cut-out absent an alcohol-free breath test. In such a case, the claims against GM would be far-removed from the claims against the responsible teen driver and/or his parents.

So, too, here. Appellant's damages do not arise "directly" from the pistol's design; rather, they are attenuated from the actual causes of the injury-producing discharge – Lewis's reckless mishandling of the subject APX pistol.

And there is virtually no end to the creativity with which an Appellant can argue alternative design features could have prevented a tragic firearm injury or death, regardless of the underlying fact pattern. This case is one such example. Here, Appellant alleges the subject pistol was defective in its design, in part, because it lacked an internal locking device "that would secure it against unintentional use." Second Am. Petition, ¶ 80. R Vol. 1, 218. Appellant includes such allegations even though the pistol was being handled *by its owner* at the time of the incident, thereby demonstrating unauthorized access has nothing to do with this case or the subject APX pistol. *See*, Second Am. Petition at ¶¶ 80-95. R Vol. 1, 218-220. Unlike a case involving a teenager who was able to access a parent's unsecured firearm to cause injury, Lewis accessed *his own* firearm which he kept in *his own car* for self-protection purposes. Thus, the lack of an internal locking device is entirely irrelevant to the facts of this case.

Indeed, the fact Appellant even alleges the subject APX pistol was defective because it did not incorporate an internal locking device is tantamount to an admission his damages claims do not result "directly" from the pistol's design (*see* 15 U.S.C. § 7903(5)(A)(v)),

but are instead attenuated from the real cause of this shooting – Lewis's reckless gun handling and deliberate trigger pull.

The subject pistol is designed to discharge a live chambered cartridge when the trigger is pulled. This is exactly what occurred when Lewis pulled the trigger without first ensuring there was no live cartridge in the chamber. And while the grievous injury to Appellant was not the intended result, it is what the pistol was supposed to do in a loaded condition. If the pistol did not fire under those circumstances, it would likely have been because of some defect with either the pistol or the ammunition. Nonetheless, it is universally understood that *the user* of a firearm is the only one who can ensure that it is handled safely by following all warnings, instructions, and safe handling principles. Sadly, Lewis failed mightily in this regard.

Notwithstanding, Lewis's actions here were both volitional and constituted a criminal offense; thus, there can be no dispute the PLCAA bars Appellant's claims and the District Court's dismissal should be affirmed.

1. While Lewis Did Not Intend to Shoot Appellant, His Conduct Was Reckless Because He Disregarded a Substantial and Unjustifiable Risk When He Pulled the Pistol's Trigger Under the Circumstances Here.

Appellant repeatedly asserts, alternatively, that Lewis did not intend to shoot him, and that the injury-producing discharge was just an unfortunate accident. *See, e.g.*, Opening Brief at pp. 5-6, 17-18, and 26. Appellees have never contended otherwise. This shooting was very much an accident in that Lewis surely did not want to cause such a horrific injury to his friend and football teammate. However, to simply suggest that Lewis's conduct was an accident because the result was not intended ignores the totality of the circumstances

leading up to the shooting, all of which caused the District Court to correctly conclude Lewis was reckless under K.S.A. 21-5202(j)["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." (emphasis added)] *See*, Firearm Sellers MSJ at pp. 21-23. R Vol. 5, 81-83. *State v. Pattillo*, 311 Kan. 995 (2020).

Pattillo is both instructive and controlling.[3] It involved a conviction for discharging a firearm into a residence which resulted in the death of a young boy who was inside the home. *Id.* at 997-99. The defense argued Pattillo did not know a child was in the house and thus he could not have acted recklessly. The Court found Pattillo's subjective belief to be irrelevant, since the focus of K.S.A. 21-5202(j) is on *the risks* of the defendant's conduct not his knowledge or belief. *Id.* at 1003-04. There, the conviction was upheld because the Court found sufficient facts to allow a reasonable person to conclude Pattillo should have

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[3] Appellant gives *Pattillo* short shrift, and merely cites it for the unsupported proposition that "the Kansas legislature's obvious intent" in passing K.S.A. 21-6308(a)(3)(B) – one of the statutes appellees relied upon to demonstrate "criminal or unlawful" conduct under the PLCAA – "was to criminalize drive-by shootings." Opening Brief at pp. 18-19. But, K.S.A 21-6308(a)(3)(B) was not at issue in that case. Regardless, appellant makes this leap even though K.S.A. 6308(a)(3)(B) only criminalizes the discharge of a firearm "upon or from any public road, public road right-of-way or railroad right-of-way except as otherwise authorized by law." On the other hand, K.S.A. 6308(a)(1)(A) – the statute actually involved in *Pattillo* – criminalizes "(1) Reckless and unauthorized discharge of any firearm at: (A) A dwelling, building or structure in which there is a human being, regardless of whether the person discharging the firearm knows or has reason to know that there is a human being present." K.S.A. 6308(a)(1)(A). *See*, *Pattillo*, 311 Kan. at 1007-09. The import of *Pattillo*, of course, is its discussion of what constitutes recklessness under K.S.A. 21-5202(j).

been aware of a risk the victim was in the house and he therefore acted recklessly by discharging a firearm into the home. *Id.* at 1005-06.

The District Court correctly concluded, "[I]t is without question that Lewis consciously disregarded known, substantial, and unjustifiable risks arising from the circumstances apparent in this case." J.E. at pg. 15. R Vol. 6, 365. Lewis clearly knew he was handling a real firearm that had been loaded with a magazine of real ammunition. UF 31. R Vol. 5, 72. He claims to have removed the magazine from the pistol but admits he did not visually check the firing chamber to determine if it was chamber loaded. *Id.* While stopped at a stoplight in a car he was driving, Lewis chose to quickly disassemble the subject pistol "in 2.2 seconds" for no other reason than to show off to his friends. UF Nos. 18-22. R Vol. 5, 70-71. With the pistol's barrel pointed directly at Appellant's legs, Lewis intentionally and deliberately pulled the trigger (erroneously thinking he needed to do so to disassemble the pistol). UF Nos. 28-29. R Vol. 5, 72. Lewis therefore violated safe gun handling information he had received during hunter safety training, his concealed carry class, in the Bass Pro "10 Commandments" form and prominently located throughout numerous sections of Beretta's APX Pistol User Manual.

Upon these undisputed facts, the District Court concluded that Lewis acted recklessly when he disregarded "known, substantial and unjustifiable risks" that pulling the trigger of a real firearm – and without having first determined the loaded status of the pistol – would cause a discharge, and such conduct was "without question" a "gross deviation from the standard of care" of a reasonable person. J.E. at p. 14-15; R Vol. 6, 364-65. To be sure, looking at these facts, any reasonable person would have appreciated *the*

risk of a discharge upon pulling the trigger, and therefore would not have done so. Evidence of Lewis's recklessness is overwhelming and compelling, and it can therefore be decided as a question of law. *Gruhin v. Overland Park*, 17 Kan.App.2d 388, 392 (1992).

2. Lewis's Actions in Pointing the Subject pistol at Appellant and Then Deliberately Pulling The Trigger Were "Volitional" and The District Court's Reliance on *Thomas v. Benchmark Ins.* Was Misplaced.

After correctly concluding Appellant's lawsuit is a barred "qualified civil liability action" under the PLCAA, the District Court evaluated whether the product liability exception in section 7903(5)(A)(v) would save Appellant's action. Under that exception, design and manufacturing defect claims may proceed against a firearm or ammunition manufacturer or seller, when those products are "used and intended or in a reasonably foreseeable manner," subject to a key caveat: if the injury-producing discharge 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." 15 U.S.C. § 7903(5)(A)(v). In considering whether Lewis's actions were "volitional," the District Court thought it necessary to analyze the issue as one of intent[4] and proceeded to do so under *Thomas v. Benchmark Ins.*, 285 Kan. 918 (2008). As Appellant agrees (*see*, Opening Brief at pp. 33-34), the District Court's reliance on *Benchmark* was misplaced because a "volitional act" under the PLCAA is not synonymous with an intent to cause injury.

[4] "While the Court agrees [with plaintiff/appellant] the term 'volitional act' would add the element of intent, the question is whether the intentional act of pulling the trigger includes the intent to cause injury." J.E. at pg. 16. R Vol. 6, 366.

Benchmark set forth the proper standard to evaluate an intentional act exclusion in an insurance policy. *Id.* at 933. The court held that "the 'intentional act' or 'intentional injury' exclusion test in Kansas should require a finding that the insured must have intended both the act and to cause some kind of injury or damage, which could be inferred from the nature of the act when the consequences are substantially certain to result from the act." *Id.*

Under the PLCAA, the analysis is much different. A court faced with a PLCAA motion implicating the product liability exception need to go no further than a determination of whether the injury-producing discharge was caused by a "volitional act" which constituted a criminal offense. 15 U.S.C. § 7903(5)(A)(v). Section 7903(5)(A)(v) does not use the word "intentional" though Congress could easily have done so. Rather, section 7903(5)(A)(v) uses the word "volitional" to modify "act." Then, it is the "act" which must "constitute a criminal offense" for the exception to the product liability exception to apply and preclude a claim like the instant case.

A volitional act is simply one in which the person willfully takes some action regardless of the consequences. Here, the act of Lewis pointing the subject pistol in Appellant's directions is such a volitional act. This is so because the muzzle of the pistol did not become pointed at Appellant by happenstance or some involuntary arm or hand movement while holding the pistol. Rather, Lewis willfully manipulated the orientation of the pistol in such a way that he caused it to be pointed directly at Appellant. UF No. 24. R Vol. 5, 71. As Lewis conceded, this was an unsafe action on his part. *Id.*

The same is true of Lewis's pulling of the trigger at the time of the discharge. He pulled the trigger willfully; it was not the result of some involuntary muscle spasm.[5] Rather, Lewis pulled the trigger because of his mistaken belief it was necessary to disassemble the pistol, even though he knew pointing a firearm at another person violated universal safe gun handling rules, numerous warnings and instructions in the APX User's Manual and the Bass Pro Shop "10 Commandments of Gun Safety" (R Vol. 9, 102), as well as the on-product warning "FIRES WITHOUT MAGAZINE." Though Lewis did not want to shoot Appellant, he certainly pointed the pistol at Appellant and pulled the trigger volitionally. *See, e.g., Adames v. Sheahan,* 233 Ill.2d 276, 313-14 (2009), *cert. denied sub nom Adames v. Beretta U.S.A. Corp.*, 175 L.Ed.2d 634, 2009 U.S. LEXIS 9085 (U.S. 2009)(pointing pistol at victim and pulling trigger "volitional" even though discharge not intended); *Travieso v. Glock, Inc.*, 526 F.Supp.3d 533, 548 (D. Ariz. 2021) ("Thus, the mere fact the Shooter did not intentionally shoot the Plaintiff or fire the gun does not mean she did not act volitionally." (emphasis in original).)[6]

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[5] For example, had Lewis kept the subject pistol in a backpack along with other items and thereafter accidentally dropped the backpack causing one of those items to depress the pistol's trigger and discharge a chambered round, appellees would likely be unable to argue the trigger pull was a "volitional act." Similarly, had Lewis dropped the subject pistol and it discharged – something it should not do absent a trigger pull – appellant would be able to pursue a design or manufacturing defect claim. But here, the discharge was the result of Lewis's admittedly deliberate – or "volitional" – pull of the pistol's trigger.

[6] Appellant's reference to *Heikkila v. Kahr Firearms Grp.*, 2022 U.S. Dist. LEXIS 231967 (D. Colo. 2022), is unavailing. There, the incident occurred when the plaintiff pulled up his pants while in a movie theater bathroom stall only to have the pistol fall to the ground and discharge a bullet into his own abdomen. *Id.* at *3. Here, of course, pointing the pistol at Appellant and pulling the trigger are without question sufficient volitional acts to preclude application of the product liability exception.

C. Appellant Has Not Adequately Disputed the Fact Lewis Failed to Look Into The Pistol's Chamber For a Live Cartridge. But Even If That Fact Is Disputed, The District Court Correctly Concluded That Fact Was Immaterial to Appellees' Motion

In support of their MSJ, Appellees included UF Nos. 25 and 26 relating to Lewis's prior experience in pulling the pistol's slide back to inspect the firing chamber, as well as his failure to do so just prior to shooting Appellant. Those UFs are set forth fully below:

> 25. In Lewis's prior experience cleaning the Subject pistol, he would normally fully retract the slide and check to make sure there was no cartridge in the chamber before beginning the disassembly process. R Vol. 5, 71.
>
> 26. But on the night of the shooting, Lewis admitted he 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 Vol. 5, 71.

Appellant attempted to controvert UF No. 25 by arguing that Lewis had not conceded he "fully" retracted the slide to check for a live cartridge on *prior occasions*, only that he had pulled the slide back "far enough to see inside the chamber and make sure there was no cartridge in it before he started cleaning it." Appellants' MSJ Response at pp. 15 (R Vol. 5, 162), citing Lewis depo. at 295:1-12. R Vol. 9, 92. The District Court agreed Appellant more accurately cited the Lewis deposition testimony, but concluded it was a distinction without a difference and the dispute therefore did not raise a genuine issue of material fact. J.E. at pg. 7. R Vol. 6, 357. Notwithstanding the minor differences in wording between UF 25 and Lewis's testimony, the import of this fact is that Lewis had on prior occasions made his APX pistol safe before starting to clean it by pulling the slide back "fully" – or at least "far enough" – to visualize if a live cartridge was present in the firing

chamber. Thus, by his own admission, Lewis knew *how* to ensure the pistol was completely empty – even after the magazine was removed – and in fact had done so numerous times.

Appellant also attempted to dispute UF 26 despite Lewis's unequivocal deposition testimony he *did not* pull the slide back – *even a little bit* – in the moments before the shooting to see if a live round was in the chamber. Plt.'s MSJ Response at pg. 16. R Vol. 5, 163. To manufacture the dispute, Appellant ignored Lewis's plain deposition testimony at pages 233-34 (R Vol. 9, 74-75), and instead cited to a later portion of the deposition wherein Lewis is simply asked whether excerpts from the Emporia P.D. investigative report, which quote one of the other occupants of Lewis's vehicle at the time of the shooting, have been read correctly. R Vol. 5, 163. In their Reply, Appellees objected to Appellant's use of these later deposition excerpts on grounds Lewis's testimony did not actually contradict his earlier testimony, but instead simply expressed his agreement that Appellant's counsel was reading excerpts of the investigative report correctly. Defs.' Reply at pg. 3, 12-15 (R Vol. 6, 60-63).

The District Court erred in concluding UF 26 was disputed in the first instance. J.E. at pg. 7. R Vol. 6, 357. Nonetheless, the District Court correctly concluded the "disputed" fact was not material to deciding the motion because the fact of the matter was the injury-producing discharge occurred – which necessarily meant a live cartridge was in the chamber – and that Lewis either did not check the chamber or failed to do so adequately. *Id.*

1. Appellant Failed to Sufficiently Dispute Appellees' UF No. 26.

By relying on testimony in which Lewis simply agrees that Appellant's counsel has read excerpts of the Emporia P.D. investigative report correctly, Appellant has failed to sufficiently dispute Appellees' UF No. 26.

Lewis's deposition testimony, cited in support of UF 26, could not be more clear that he *did not* pull the pistol's slide back to check the chamber for a live cartridge in the moments before the shooting.

> Q: Prior to doing that, prior to pulling the trigger you had not pulled the slide all the way to the rear to be able to look inside the chamber and confirm for yourself that there was no cartridge in the chamber?
>
> A: *I never even looked in it.*
>
> Q: So you never even pulled it back to look?
>
> A: I took clip out, *didn't look in it.*
>
> Q: *So you didn't even pull the slide back a little bit*?
>
> A: *No.*
>
> Q: But you knew that if you wanted to eject a cartridge that was in the chamber, if there was, *all you had to do was pull the slide all the way back; right*?
>
> A: *Yes.*
>
> Q: But you didn't do that?
>
> A: *No.*

Defs' MSJ, Ex. B at 233:13–234:7 (emphasis added). R Vol. 9, 74-75.

Appellant then incorrectly argues that Lewis provided conflicting testimony later in his deposition. Plt. Response to UF No. 26. R Vol. 5, 163. Appellant sought to controvert

this fact with a hearsay-within-hearsay statement from the police report by an investigating officer interview of one of the backseat passengers in Lewis's vehicle at the time of the incident (Trenton Ball). Under friendly questioning by Appellant's counsel, Lewis *merely agrees* that excerpts of the Emporia P.D. investigative report, which purport to quote Mr. Ball as to what he saw, are read verbatim. However, Lewis does not testify what Ball claims to have seen is true or actually occurred. Rather, he *merely agrees* the report excerpt was read correctly. Below is the actual quoted testimony from Lewis's deposition as Appellant's counsel read through portions of the Emporia P.D. Investigation Report:

> Q: And I'm going to go down in that same paragraph about four lines from the bottom. There's a sentence that starts in the middle of that page. It says "Ball also told me he saw Lewis drop the magazine out of the pistol and pull the slide back to remove a round from the chamber. Ball told me he did not see a round come out of the chamber when Lewis pulled the slide back." *Did I read that correctly*?
>
> A: Yes.

Pls' MSJ Response Br., Ex. E (Lewis Depo. p. 284) R Vol. 5, 228. (emphasis added) reading from the Emporia P.D. report at 00136. R Vol. 5, 241.

The statement that Lewis "pulled the slide back" was not from Lewis himself; it was a statement purportedly made by Ball while he was being interviewed by investigating officers. Indeed, Appellant's counsel did not ask Lewis whether he actually *agreed with* Ball's purported statement, or whether what Ball may have related to the officers was true. Nor did Appellant's counsel then ask Lewis what actually happened or whether Lewis did, indeed, pull the slide back. Rather, all that was asked of Lewis was whether counsel *read the report excerpts correctly*.

This testimony in no way contradicts Lewis's earlier clear deposition testimony in which he unequivocally denies he pulled the slide back – even a little bit – to check for a chambered cartridge. Lewis Depo. at pp. 233:13–234:7, Defs' MSJ, Ex. B. R Vol. 9, 74-75. Such a statement does not raise a fact issue when opposing summary judgment under Kansas law. *See Schultz v. Schwartz*, 28 Kan. App. 2d 11 P.3d 530 84, 89–90 (2000) (rejecting the litigant's attempt to create a fact issue in opposition to summary judgment when the supporting affidavit was based on inadmissible hearsay and holding: "It would make no sense to deny summary judgment and proceed to trial on the basis of evidence that could not be presented at trial."); *Vore v. U.S. Bank, N.A.*, 2004 WL 324418, at *3 (Kan. App. Ct. Feb. 20, 2004) (citing *Schultz* for same). Indeed, this testimony fails to even create a reasonable inference that Lewis was somehow contradicting his clear earlier testimony.

And even if the statement was not based on inadmissible hearsay, Appellant's argument that Lewis did in fact pull the slide back flies in the face of plain logic and common sense. The subject APX pistol discharged when Lewis intentionally pulled the trigger to begin the disassembly process. UF No. 29. R Vol. 5, 72. Logically, a live cartridge was in the firing chamber for a discharge to occur. It is undisputed a chambered cartridge will be ejected if a user fully retracts the slide of the subject APX pistol; Lewis knew this and had done so on prior occasions. UF No. 25. R Vol. 5, 71. But, as Lewis readily conceded, he *did not* pull the slide back at all, or at least not far enough to eject the chambered cartridge. Lewis Depo. at pp. 233:13–234:7. R Vol. 9, 74-75. A statement that is untrue on its face does not create a fact issue in opposing summary judgment because it has no "evidentiary value"; it is neither probative nor material; and no reasonable mind

could differ on this point. *See*, *e.g.*, *Seibert v. Vic Regnier Builders, Inc.*, 253 Kan. 540, 541 (1993); *Hare v. Wendler*, 263 Kan. 434 (1997).

2. The District Court Correctly Concluded That Whether Lewis Visually Checked the Chamber for a Live Cartridge Was Not Material to Appellees' Motion.

Even though it erred in concluding Appellant had disputed Appellees' UF 26, the District Court correctly found "this factual dispute [did] not rise to the level of a material issue," because whether Lewis checked the chamber or not, "the fact is undisputed that there was a live cartridge in the chamber of the firearm which discharged when Lewis pulled the trigger." J.E. at pg. 7. R Vol. 6, 357. Logically, Lewis either pulled the slide back to visually check the chamber or he did not. If he did not, as his own deposition testimony demonstrates, his mishandling of the subject pistol was egregious.

If, on the other hand, Lewis did pull the slide back to check the chamber, he certainly failed to do so properly or completely. Under this latter hypothetical scenario, then, Lewis would have partially pulled the slide back and then failed to visualize a chambered cartridge for any number of reasons, such as inattentiveness, distractions, his hastiness in attempting to disassemble the subject pistol "in 2.2 seconds," or the conditions that may have existed in or around his vehicle at the time (*e.g.*, low light, loud music, horseplay, a changing signal light, etc.). Why Lewis failed to observe the live round is of little moment, as the District Court observed, because it was the fact Lewis pointed the pistol in Appellant's direction and deliberately pulled the trigger which caused Appellant's damages. The District Court was therefore correct in deciding that UF 26, even if adequately disputed, was not material to the outcome of Appellees' motion.

D. Because The PLCAA Expressly Pre-empts Certain Claims, The District Court was Not Required to Narrowly Construe the Act.

Citing *Gregory v. Ashcroft*, 501 U.S. 452 (1991) and *Bond v. United States*, 572 U.S. 844 (2014), Appellant argues the "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." Opening Brief at pg. 12. Appellant then argues the "PLCAA lacks the requisite clear statement of intent to prohibit actions like this under its definition of 'qualified civil liability action.'" *Id.* at 13. Appellant's reliance on *Gregory* and *Bond* is misplaced because those cases dealt with implied preemption whereas the PLCAA "expressly and unambiguously preempts state tort law, subject to the enumerated exceptions." *Delana v. CED Sales, Inc.*, 486 S.W.3d 316, 322-23 (Mo. 2016).

Like the constitutional avoidance doctrine generally, *Bond* and *Gregory* stand for the proposition that statutes should be narrowly construed, if necessary, to avoid "upset[ting] the usual constitutional balance of federal and state powers," thereby creating "a potential constitutional problem." *Gregory*, 501 U.S. at 460, 464; *see Bond*, 572 U.S. at 858, 860.

In *Gregory*, the Supreme Court addressed the issue of whether a provision in the Missouri Constitution providing that all "judges other than municipal judges shall retire at the age of seventy years" violates the Age Discrimination in Employment Act ("ADEA") and comports with equal protection pursuant to the federal constitution. 501 U.S. at 455. The Court noted that:

> Congressional interference with this decision [requiring judges to retire at the age of seventy years] of the people of Missouri, defining their

> constitutional officers, would upset the usual constitutional balance of federal and state powers. For this reason, it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides this balance.

501 U.S. at 460 (citation and quotation marks omitted).

Nevertheless, the Court explained that as long as it is "acting within the powers granted it under the Constitution, Congress may impose its will on the States." *Id.*

To determine whether Congress intended to alter the balance of power between the states and the federal government, the Supreme Court applies the plain statement rule, pursuant to which "Congress should make its intention clear and manifest if it intends to preempt the historic powers of the States." *Gregory*, 501 U.S. at 461 (citation and quotation marks omitted). In *Gregory*, the Court noted that the ADEA excluded from the definition of a covered employee any "person elected to public office in any State or political subdivision of any State" and an "appointee on the policy making level." *Id.* at 465 (quoting 29 U.S.C. § 630(f)). The Supreme Court concluded that, in the context of the ADEA, a statute that "plainly excludes most important state public officials, 'appointee on a policymaking level' is sufficiently broad that we cannot conclude that the statute plainly covers appointed state judges. Therefore, it does not." *Id.* at 467.

In *Bond v. United States*, the Supreme Court interpreted the Chemical Weapons Convention Implementation Act ("CWCIA"), a federal statute passed to effectuate the terms of a treaty known as the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction. *Bond*, 572 U.S. at 848-51. The Court held that the CWCIA did not apply to the conduct of a

woman who applied legal, commercially available chemicals to various surfaces hoping that her best friend, who was pregnant by her husband, would come into contact with them and "develop an uncomfortable rash," which resulted in the intended victim suffering a "minor chemical burn on her thumb, which she treated by rinsing with water." *Id.* at 852-53. The Court noted that the CWCIA was designed to implement a treaty about the use of chemical weapons in "war crimes and acts of terrorism," *id.* at 855-56, and there was no clear indication that Congress intended it to apply to local criminal offenses. *Id.* at 865-66 (noting that the case is unusual and the analysis appropriately limited).

In *Delana*, *supra*, the Missouri Supreme Court unanimously rejected Appellant's argument that *Gregory* and *Bond* required that court to "narrowly construe the PLCAA to avoid federalism issues," quickly disposing of an argument that it found to be "without merit." *Delana*, *supra*, 486 S.W.3d at 322-23. The *Delana* court explained that:

> *Gregory* and *Bond* involved implied preemption. In both cases, the Court held that expansive statutory definitions should be narrowly construed to avoid excessive federal intrusion into traditional issues of state concern. *Gregory* and *Bond* are not applicable to this case because the PLCAA expressly and unambiguously preempts state tort law, subject to the enumerated exceptions. This preemption is accomplished pursuant to Congress's constitutional power to regulate interstate commerce. Because Congress has expressly and unambiguously exercised its constitutionally delegated authority to preempt state law negligence actions against sellers of firearms, there is no need to employ a narrow construction to avoid federalism issues.

Id. at 323 (internal citations omitted).[7]

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[7] *Delana* is not even cited, much less discussed, in the Opening Brief, despite the fact appellant's co-counsel at Brady United was counsel of record for Appellant Janet Delana in that case from the trial court up through the Missouri Supreme Court's decision.

The Supreme Court's decisions in *Gregory* and *Bond* address the issue of constitutional avoidance. Although not addressing those specific decisions, other courts have held that the doctrine of constitutional avoidance is inapplicable to construction of the PLCAA because its intent to bar qualified civil liability actions is clearly expressed and because there are no serious doubts about its constitutionality. *See*, e.g., *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1143 (9th Cir. 2009) (holding that the doctrine of constitutional avoidance is not applicable to interpreting the PLCAA because "congressional intent is clear from the text and purpose of the statute," and there are no grave doubts over its constitutionality), *cert. denied*, 560 U.S. 924 (2010); *see also*, *Estate of Kim ex rel. Alexander v. Coxe*, 295 P.3d 380, 387-88 (Alaska 2013) (narrow construction argument unavailing because "[t]he PLCAA expressly preempts state common law by requiring that state courts immediately dismiss qualified civil liability actions.");[8] *Prescott v. Slide Fire Sols. L.P.*, 410 F.Supp.3d 1123, 1132 n.3 (D. Nev. 2019) (rejecting argument that federalism principles stated in *Gregory* and *Bond* require "a narrower construction of the PLCAA"); *accord Travieso*, *supra*, 526 F.Supp.3d at 540-41, 545-46; *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 326 (2008) (rejecting dissent and finding no serious constitutional issue raised by preemption of tort laws where "the statute itself speaks clearly to the point . . . ").

As discussed at length *infra*, the PLCAA clearly indicates Congress's intention to "prohibit causes of action" brought under state tort law. 15 U.S.C. § 7901(b)(1); *see id.* §

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[8] As with *Delana*, *Estate of Kim* is not cited in appellant's Opening Brief even though his co-counsel at Brady United was counsel of record for the Estate of Simone Young Kim and its personal representatives.

7902(a) (providing that certain tort actions "may not be brought in any Federal or State court"). There can be no question that in enacting the PLCAA, "Congress has expressly and unambiguously exercised its constitutionally delegated authority to preempt state law negligence actions against [manufacturers and] sellers of firearms, there is no need to employ a narrow construction to avoid federalism issues." *Delana*, 486 S.W.3d at 323; *accord Travieso*, 526 F.Supp.3d at 541; *Prescott*, 410 F.Supp.3d at 1132 n.3 ("reject[ing] . . . argument in favor of a narrower construction of the PLCAA").

1. Appellant's Reliance on Soto v. Bushmaster Firearms Int'l, LLC Is Misplaced.

Appellant's citation to *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), is misplaced. *Soto* involved a lawsuit against a firearm manufacturer arising out of the Newtown school massacre. There, Appellants argued their negligent entrustment claims and Connecticut Unlawful Trade Practices Act ("CUTPA") claims were not barred by the PLCAA because those claims arguably fell within two exceptions to a qualified civil liability action – negligent entrustment claims under section 7903(5)(A)(ii), and CUTPA claims under the "predicate exception" in section 7903(5)(A)(iii)(knowing violations of "a State or Federal statutes applicable to the sale and marketing of the product [firearms or ammunition)"]. This exception has come to be known as the "predicate exception," requiring proof of a knowing violation of a "predicate statute." *Ileto*, *supra*, 565 F.3d at 1132.

The *Soto* court rejected the negligent entrustment claim because it was, at its core, a claim that "the social costs of such sales [AR-15 rifles] outweigh the perceived benefits." *Id.* at 283. As to the CUTPA claims, the court concluded the PLCAA "does not bar the Appellants' wrongful marketing claims and that, at least to the extent that it prohibits the unethical advertising of dangerous products for illegal purposes, CUTPA qualifies as a predicate statute." *Id.* at 325.

Soto is inapposite for several reasons. First, that case involved negligent entrustment and wrongful marketing claims and thus the applicability of two exceptions not at issue here. (Appellant has conceded that the only qualified civil liability action exception even remotely applicable is the product defect exception in section 7903(5)(A)(v). R Vol. 7, 92-93.) Second, the citation to *Soto* upon which Appellant relies involved an interpretation of the PLCAA as it specifically relates to the predicate exception. Opening Brief at pg. 13 (citing *Soto* at pg. 312-313 and n. 58). Indeed, had Appellant cited that passage fully, it would have been clear the Court's statement related specifically to whether Connecticut's CUTPA sought to "regulate *the wrongful advertising of dangerous products such as firearms* . . ." *Soto*, 202 A.3d at 313 (emphasis added). *Soto* therefore has nothing to do with the product defect exception and has no bearing on any issue in this appeal.

E. Appellant's Desire to Re-Write the Definition of Qualified Civil Liability Action Should Be Rejected.

Appellant essentially argues that the phrase "resulting from the criminal or unlawful misuse of a qualified product" in the definition of "qualified civil liability action" in section 7903(5)(A) should be interpreted as though it actually reads "solely caused by" criminal or

unlawful misuse of a qualified product. Opening Brief at pp. 14-17. Besides *Soto v Bushmaster Firearms Int'l*, which is distinguished *supra*, Appellant does not cite a single PLCAA case where this argument has been accepted.

As his counsel knows all too well, that same argument was made and rejected by the Supreme Court of Alaska in *Estate of Kim*. In *Estate of Kim*, the estate of a deceased shooting victim brought a wrongful death action against the victim's shooter and the gun store from which the shooter obtained the weapon used in the killing. *Estate of Kim*, *supra*, 295 P.3d at 384. The estate alleged that the gun store negligently or illegally provided the shooter with the involved rifle. *Id.* at 385. As here, Appellant there argued (*see*, Opening Brief at pp. 14-16) that language found in the congressional findings and purposes sections of the PLCAA supports the view that the Act "provides immunity only in cases where the harm is caused solely by others." *Id.* at 386. In other words, the estate there argued that the PLCAA does not apply in cases alleging that a firearm seller and a criminal actor concurrently caused harm.

The Alaska Supreme Court unequivocally rejected the argument, stating that the estate's construction of the PLCAA "seeks to elevate the preamble over the substantive portion of the statute, giving effect to one word in the preamble at the expense of making the enumerated exceptions meaningless." *Id.* at 387. The court further noted that a statutory preamble "can neither restrain nor extend the meaning of an unambiguous statute; nor can it be used to create doubt or uncertainty which does not otherwise exist." *Id.* at 386 (quoting *Commercial Fisheries Entry Comm'n v. Apokedak*, 680 P.2d 486, 488 n. 3 (Alaska 1984) (internal quotations omitted). Moreover, the court held that the "plain reading" of the

PLCAA's "qualified civil liability action" definition "supports a prohibition on general negligence actions — including negligence with concurrent causation." *Id.* *Accord*, *Phillips v. Lucky Gunner, LLC*, 84 F.Supp.3d 1216, 1223-24 (D. Colo. 2015); *Sambrano v. Savage Arms, Inc.*, 338 P.3d 103, 106 (N.M. Ct. App. 2014)["no distinction in the [Congress'] intent" between "solely caused" phrase in one of the PLCAA's purposes (15 U.S.C. § 7901(b)(1)) and the "resulting from" language in the QCLA definition in section 7903(5)(A)]; *Delana*, *supra*, 486 S.W.3d at 321-22 ("The general statement of the purpose of the PLCAA does not redefine the plain language of a statute" *quoting, H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 245 (1989).) The PLCAA's statement of purpose does not overcome the substantive provisions of the PLCAA, including the definition of a QCLA, which expressly preempt actions against firearms sellers resulting from criminal or unlawful misuse.

F. Neither the Emporia Police Department's Conclusions About the "Accidental" Nature of the Shooting, nor the Lyon County Attorney's Decision Not to Prosecute Lewis, Are Binding on The District Court as to the Finding of Recklessness or Application of the PLCAA.

Finally, Appellant argues he raised a triable issue of fact below sufficient to warrant denial of Appellees' summary judgment because Emporia Police Department personnel believed the underlying shooting was accidental, and also because the Lyon County Attorney's Office declined to prosecute Lewis for any crime. Opening Brief at pp. 26-28, *citing* Appellant's UF Nos. 21-26. R Vol. 5, 171-72. The District Court correctly concluded that none of these "facts" warranted denial of the motion. J.E. at pp. 10-12. R Vol. 6, 360-62. This is so, in large part, because in Appellees' MSJ and numerous exhibits, the District

Court was provided with a plethora of factual details and admissions from Lewis which were culled from his September 9, 2021 deposition under oath and were therefore not available to either Emporia P.D. or the Lyon County Attorney back in August 2018. The District Court used these undisputed factual details and admissions to conclude Lewis's conduct was reckless under Kansas law.

Appellant's arguments are unavailing for a number of other reasons as well. The definition of a "qualified civil liability action" under section 7903(5)(A) does not require a criminal conviction or even a criminal charge. 15 U.S.C. § 7903(5)(A); *see, also, Adames*, *supra*, 233 Ill.2d at 310-11. The *Adames* court concluded the definition of "qualified civil liability action" did not require criminal intent or a criminal conviction; rather, it required only "the criminal or unlawful misuse of a qualified product by the person or a third party." *Id.* at 310-311. Moreover, the *Adames* court observed that the PLCAA defined unlawful misuse as "conduct that violates a statute, ordinance, or regulation as it relates to the use of a qualified product," and that the term "criminal" modifies "misuse" and therefore means "having the character of a crime; in the nature of a crime . . ." *Id.* at 309; *see also*, 15 U.S.C. § 7903(9)

In *Delana*, *supra*, the estate argued the PLCAA did not apply because the shooter was not convicted of a criminal offense. The en banc *Delana* court rejected this argument, finding "PLCAA preemption is based on 'criminal or unlawful misuse' and not the existence of a criminal conviction." *Id.*, citing *Adames*.

The Massachusetts Appellate Court found the PLCAA to apply in a scenario one step removed from the instant case. *Ryan v. Hughes-Ortiz*, 959 N.E.2d 1000 (2012). There,

the Appellant Elizabeth Ryan – administratrix of Charles Milot's estate – filed suit against the owner and the manufacturer of the firearm that resulted in decedent's death (Glock, Inc.). At the time of his death, Milot was on probation and stole the firearm from its owner. Milot was attempting to put the pistol back in its storage container when a round fired and struck Milot in his left thigh and severed his femoral artery, causing him to bleed to death. *See id.* at pp. 1002-03. No criminal charges were brought against Milot in relation to the incident (obviously) and, therefore, there was no criminal conviction. *Id.* p. at 1008. Ryan's claims against Glock included breach of implied warranties, negligence, wrongful death, and unfair and deceptive business practices. *Id.* Despite the lack of criminal charges or the absence of a conviction, the appellate court found the PLCAA barred the Appellant's claims against the gun manufacturer because Milot's possession of the pistol constituted "criminal or unlawful misuse" in light of Milot's prior felony conviction (pursuant to 18 U.S.C. § 922(g)(1)) and barred the civil suit against Glock. *Id.* Citing *Adames*, the *Ryan* court stated, "the PLCAA does not require a criminal conviction in order for an activity to qualify as 'criminal or unlawful misuse.'" *Ryan*, 959 N.E.2d at 1008.

Travieso, *supra*, provides additional support on nearly identical facts to those present here. There, Appellant was shot in the back with a Glock 19 pistol while driving home from a church youth camping trip. 526 F.Supp.3d at 536. A 14-year-old camper came into possession of the pistol and discharged a chambered round, even though the magazine had been removed. *Id.* Appellant suffered severe spinal injuries rendering him a paraplegic. *Id.* No charges were filed against the shooter. *Id.* The design defect claims were virtually

identical to those here – lack of a magazine disconnect, lack of an effective loaded chamber indicator, lack of internal locking device and related warnings claims. *Id.*

Despite lack of criminal charges against the shooter, much less a criminal conviction, the court found that the shooter's volitional actions violated a number of state and federal laws. *Id.* at 546-47. Accordingly, these actions were sufficient to trigger the PLCAA's preemption of Appellant's product liability claims. *Id.*

Finally, as the *Adames* court observed, the conclusion that no conviction is required is also buttressed by the PLCAA's use of the phrase "constituted a criminal" offense in section 7903(5)(A)(v) and the different term "convicted" used in another exception in section 7903(5)(A)(i). *Adames*, *supra*, 233 Ill.2d at p. 310-311. Under "standard principle[s] of statutory interpretation . . .[,] 'where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *United States v. Pauler*, 857 F.3d 1073, 1076 (10th Cir. 2017), *quoting Russello v. United States*, 464 U.S. 16, 23 (1983); *see*, *also*, *Dept. of Homeland Sec. v. MacLean* 574 U.S. 383, 392 (2015) ("[C]ongress generally acts intentionally when it uses particular language in one section of a statute but omits it in another."). Indeed, the *Adames* court relied on similar statutory interpretation law. *Adames*, 233 Ill.2d at 311 ("Therefore, because Congress specifically included language requiring a conviction in section 7903(5)(A)(i), but did not include such language in section 7903(5)(A), we presume that Congress did not intend criminal misuse to require proof of a criminal conviction.").

Moreover, practical reasons support the conclusion that no criminal charge or subsequent conviction are required to apply the criminal offense exception to the PLCAA's product defect exception. There are many reasons why a County Attorney may use his or her prosecutorial discretion to choose not to formally charge a person with a crime, even though the underlying conduct clearly constituted a criminal offense. For example, an armed robbery suspect may never be charged with that crime if he enters into a plea agreement requiring cooperation in the prosecution of an accomplice. Or a County Attorney may firmly believe a crime has been committed but doubts a unanimous guilty verdict beyond a reasonable doubt can be obtained for any number of reasons (e.g., the unavailability of a key witness, prosecution witness credibility problems, sympathy for the defendant, to name a few). Simply stated, one cannot logically conclude that conduct constituting a criminal offense is lacking simply because a particular County Attorney has decided not to charge or try a defendant. *Travieso*, *supra*, 526 F.Supp.3d at 547.

The *Travieso* court concluded that Congress could not have intended for prosecutorial discretion to stand in the way of PLCAA preemption. "To hinge the effect of the PLCAA on a state's discretionary choice would be contrary to Congress's purpose. The applicability of an act intended to preempt and prevent state action would be rendered entirely dependent on an individual state officer's charging decision." *Travieso*, *supra*, 536 F.Supp.3d at 547.

Issue 2: The District Court Properly Excluded Lewis's Self-Serving and Speculative Lay Opinion Testimony as To What He Would Have Done at The Time of The Subject Pistol's Purchase Had He Received Different or Additional

Information.

In Appellant's Issue 2, he claims error in the District Court's ruling on the inadmissibility of Lewis's statements as to what he would have done had he known of the availability of firearms from other manufacturers with different operational features or had the subject pistol incorporated various other features. Opening Brief at pp. 42-46. Appellant characterizes these statements, which were offered as Appellant's Undisputed Fact Nos. 16 to 19 in his Response to Firearm Sellers' MSJ (R Vol. 5, 170-71), alternatively as "classic causation testimony" and "clearly admissible opinion testimony." Opening Brief at pg. 45. Curiously, Appellant describes the District Court's rulings as *sua sponte* "advisory rulings" constituting "clear error." *Id.* at p. 43. Appellant is incorrect on both counts.

Appellant's response to the motion included "Undisputed Fact" Nos. 16 to 19 in which he offers Lewis's September 2021 deposition testimony, obtained some three years after the August 2018 incident, stating what he "would have" or "would not have" done at the time of the subject APX pistol's purchase or at the time of the shooting. R Vol. 5, 170-71. In its reply, Appellees objected to these facts as being speculative and conjectural and therefore inadmissible to undercut the motion. *See*, Firearms Sellers' Reply at section II.B. at pg. 3-4. R Vol. 6, 51-52. (Even at the time of Lewis's deposition, it was clear this line of questioning was objectionable and thus appellees' counsel asserted objections on the record. *See*, Andre Lewis Depo. at pp. 272, 275-76. R Vol. 5, 226-27.) Thereafter, the District Court reviewed the evidence in support of and in opposition to the motion, as it was required to do, and issued a number of rulings, among them rulings that Lewis's statements were "inadmissible as conjecture" (J.E. at 9, R Vol. 6, 359), and "hindsight

speculation and not admissible." J.E. pg. 15. R Vol. 6, 365. The District Court was spot on in its rulings.

On summary judgment, "admission of evidence lies within the sound discretion of the trial court," which will be disturbed on appeal only upon a showing of abuse of discretion by the party attacking the ruling. *Garrett v. Read*, 278 Kan. 662, 667 (2004), overruled in part on other grounds, *Nelson v. Nelson*, 288 Kan. 570, 581 (2009). The abuse of discretion standard also applies to whether a witness, layman or expert, can testify as to his or her opinions. *State v. Sasser*, 305 Kan. 1231, 1243 (2017).

Here, some three years after the shooting in which Lewis injured Appellant so severely that his left leg was amputated above the knee, and while he was a named defendant in Appellant's personal injury action, Lewis provided self-serving testimony – under friendly questioning from appellee's counsel no less – as to what he would have done, or would not have done, at the time of the pistol's purchase or at the time of this unfortunate incident. Far from being "classic causation testimony," these statements are instead classic speculation and conjecture in the form of lay opinion testimony which the District Court properly refused to consider.

K.S.A. 60-456(a) provides: "If the witness is not testifying as an expert, the testimony in the form of opinions or inferences is limited to such opinions or inferences as the judge finds: (1) Are rationally based on the perception of the witness; (2) are helpful to a clearer understanding of the testimony of the witness; and (3) are not based on scientific, technical or other specialized knowledge within the scope of subsection (b)." K.S.A. 60-456(a). Before a lay witness can offer non-scientific opinion testimony, there must be a

showing that the opinion is based on the observations of the witness and that it will help the jury understand the witnesses' testimony.[9] When neither of those prerequisites are satisfied, as in the case of speculative conclusions, the lay opinion testimony is inadmissible. *State v. Crum*, 286 Kan. 145, 152-53 (2008) (criminal defendant's lay opinion on cross examination as to a killer's premeditation had no bearing on jury's ability to understand his testimony and was irrelevant under K.S.A. 60-456(a)).

Federal Rule of Evidence 701 is virtually identical to K.S.A. 60-456(a). Under FRE 701, "speculative opinion testimony by lay witnesses – *i.e.*, testimony not based upon the witness's perception – is generally considered inadmissible." *Washington v. Dept. of Transportation*, 8 F.3d 296, 300 (5th Cir. 1993). In *Washington*, a product liability action involving a shop vacuum, the court upheld the trial court's exclusion of the testimony of the Appellant, a lay witness, "as to what he would have done had he seen the warning label" as such testimony "would not have been based upon [the Appellant's] perception, but upon his self-serving speculation . . . ." *Id.* "Rule 701 [of the Federal Rules of Evidence] limits opinion testimony of a lay witness allowing it only when it is rationally based on the

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[9] Appellant's reliance on *State v. Shadden*, 290 Kan. 803 (2010) (Opening Brief at pg. 45) is curious. The issue there was the admissibility of a police officer's testimony about *his own observations* of defendant's performance on field sobriety tests, not as circumstantial evidence of intoxication, but rather as evidence of a specific blood alcohol level. The court concluded such testimony was admissible as to the former but not the latter. *Id.* at 823-24. However, *Shadden* is entirely inapplicable in this case, because the testimony appellant seeks to use from Lewis is not based in any way on his own observations at the time of the subject APX pistol's purchase because he never had a conversation with the Bass Pro sales associate about other pistols or other features, nor did he observe any other pistols with other features. His testimony about what *he would have done* in difference circumstances, then, is truly speculative and conjectural.

perception of the witness." *Kloepfer v. Honda Motor Co., Ltd.*, 898 F.2d 1452, 1459 (10th Cir. 1990) (internal quotation marks omitted), quoting *Messenger v. Bucyrus-Erie Co.*, 507 F.Supp. 41, 43 (W.D. Pa. 1980), *aff'd*, 672 F.2d 903 (3d Cir. 1981), *cert. denied*, 455 U.S. 944 (1982).

In *Messenger*, a product liability action involving a truck crane, the appellant sought a new trial on grounds he had been prevented from offering his opinions as to what he would have done had the truck crane been equipped with a different feature. In ruling on a motion in limine, the court excluded such opinions under FRE 701 finding the testimony "was a pure conclusion based on speculation, was self-serving, and contained no adequate basis of factual support," and "was not based on evidence of any perceptions of the Appellant." *Messenger*, 507 F.Supp. at pg. 43. Appellant's motion for new trial and JNOV were denied.

In *Kloepfer*, the Tenth Circuit Court of Appeals found that the testimony of the Appellant, a lay witness, offered on whether she would have obeyed a "proper" all-terrain vehicle warning, "was not based on any of [her] 'perceptions' nor was it helpful to a clear understanding of [her] testimony--Even expert testimony may not be admitted into evidence if the opinion is based on mere conjecture." *Kloepfer*, 898 F.2d at 1459, (internal quotation marks omitted) quoting *Messenger*, 507 F. Supp. at 43. The court in *Kloepfer* agreed with the defendant "that the [trial] court was well within its discretion in refusing to allow [the Appellant] to make speculative and self-serving statements to the effect that had a different warning been on the vehicle, she would not have allowed her six-year-old son to ride it." *Id.*

Other cases involving what a witness would or would not have done in the past are in accord. *See, e.g., Magoffe v. JLG Indust.*, 2008 U.S. Dist. LEXIS 990080 (D.N.M. 2008) at pg. 92-96 (in product liability action involving a scissor lift tip-over, Appellant's opinions in response to manufacturer's summary judgment as to what *he would have done* if lift had different features or if he had been provided with different warnings stricken under FRE 701 as too speculative and not based on a situation actually perceived); *Green v. Five Star Mfg.*, 2016 U.S. Dist. LEXIS 41852 at pg. 7-8; 2016 WL 1243757 (N.D. Ala. 2016)(product liability Appellant's affidavit in opposition to manufacturer's summary judgment stating *what he would have done* if alternative strap design (nylon versus steel) was available at time of incident was inadmissible as both speculative and conclusory because "not rooted in fact" and is "pure conjecture."); *Alfano v. BRP Inc.*, 2010 U.S. Dist. LEXIS 64182 (S.D. Cal. 2010) at pg. 7-8 (in product liability action involving personal watercraft, Appellant's testimony opposing summary judgment that she *would have acted a certain way or heeded to the warning had it been adequate* is inadmissible as too speculative and self-serving pursuant to FRE 602 and 701).

Here, Appellant's Undisputed Fact Nos. 16 to 19 are exactly the kind of speculative and self-serving lay opinion testimony that was excluded in each of the cases cited above. What Lewis would have done at the time of the subject pistol's purchase, with the benefit of hindsight, as well as the immense guilt he must feel having caused such a horrific injury, is pure speculation and is not based on any facts he perceived at the time of the APX pistol purchase, nor would it help explain his testimony to a jury. Finding these statements inadmissible conjecture, the District Court properly excluded appellee's Undisputed Fact

Nos. 16-19 from consideration on summary judgment motion response. Those evidentiary rulings should be affirmed.

CONCLUSION

Appellant was severely injured for one simple reason: While driving his ESU football teammates home from a team dinner, Lewis recklessly mishandled the subject APX pistol while attempting to show them how quickly he could disassemble it. He pointed the pistol directly at Appellant and deliberately pulled the trigger. In so doing, he disregarded a substantial and unjustifiable *risk* of the discharge that severely injured Appellant. No reasonable person would do what Lewis did to cause Appellant's injuries. His reckless conduct violated numerous universally accepted safe handling rules, his own firearms training, the Bass Pro "10 Commandments of Safe Gun Handling" and a host of warnings and instructions in the Beretta APX Pistol User Manual he chose not to read. More importantly, his conduct violated a number of Kansas criminal codes and his actions of pointing the pistol at Appellant and deliberately pulling the trigger were volitional. As such, Appellant's lawsuit is a "qualified civil liability action" which is barred by the PLCAA, and it cannot be saved by the product defect exception in section 7903(5)(A)(v). The District Court so found, following extensive briefing and a considered analysis of the evidence. That ruling should be affirmed and both Beretta USA and BPOW should be dismissed.

Dated: July 31, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of July, 2023, the foregoing was filed electronically using the Court's ECF system, which will notify all counsel of record, including:

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APPENDIX

Heikkila v. Kahr Firearms Grp.

United States District Court for the District of Colorado

December 22, 2022, Decided; December 27, 2022, Filed

Civil Action No. 1:20-cv-02705-MDB

Reporter
2022 U.S. Dist. LEXIS 231967 *; 2022 WL 17960555

JOHN HEIKKILA, Plaintiff, v. KAHR FIREARMS GROUP, Defendant.

Subsequent History: Motion denied by Heikkila v. Kahr Firearms Grp., 2023 U.S. Dist. LEXIS 36961 (D. Colo., Mar. 6, 2023)

Counsel: [*1] For John Heikkila, Plaintiff: Christian C. Samuelson, Samuelson Law Firm PLLC, Colorado Springs, CO.

For Kahr Firearms Group, Defendant: Christopher Renzulli, LEAD ATTORNEY, Anthony James Odorisi, Jeffrey Martin Malsch, Renzulli Law Firm LLP, White Plains, NY; Elizabeth K. Olson, Hall & Evans LLC, Denver, CO.

Judges: Maritza Dominguez Braswell, United States Magistrate Judge.

Opinion by: Maritza Dominguez Braswell

Opinion

ORDER

This matter is before the Court on two motions. Defendant Kahr Firearms Group filed a Motion to Preclude Plaintiff's Proposed Expert Paul Paradis. (["Daubert Motion"], Doc. No. 56.) Plaintiff filed a response in opposition, and Defendant replied. (["Daubert Response"], Doc. No. 67; ["Daubert Reply"], Doc. No. 69.) Defendant also filed a Motion for Summary Judgment. (["SJ Motion"], Doc. No. 61.) Plaintiff filed a response in opposition, and Defendant replied. (["SJ Response"], Doc. No. 66; ["SJ Reply"], Doc. No. 70.)

For the reasons described herein, the Daubert Motion is **DENIED**, and the SJ Motion is **GRANTED IN PART AND DENIED IN PART**.

I. BACKGROUND

The Incident

This is a products liability action arising from an incident that occurred at a Cinemark Movie Theater in Colorado Springs, Colorado, on **[*2]** August 12, 2018. (*See* Doc. No. 61 at 3; Doc. No. 66 at 2.) The following facts are detailed in Defendant's Statement of Material Facts, and admitted by Plaintiff in his Response to Defendant's Statement of Material Facts:

- On August 12, 2018, before visiting the Cinemark Movie Theater ("Movie Theater") located in Colorado Springs, Colorado, Plaintiff, his wife, and daughter stopped at Big R, a retail store, to purchase a Blackhawk Holster.
- After leaving Big R, Plaintiff, his wife, and daughter went to have lunch.
- After eating lunch, Plaintiff and his family proceeded to the Movie Theater.
- Plaintiff was prohibited from carrying a firearm in the Movie Theater as it is against Cinemark's policy.

- After gaining access to the Movie Theater, Plaintiff went to the bathroom, entered the stall, pulled down his pants with the holstered pistol still attached to his belt, and used the bathroom.
- While proceeding to get up from the toilet, Plaintiff pulled up his pants to below his waist, while trying to hold his pants in place by spreading his legs. (Ex. A, at 81-82).
- As he started tucking in his shirt, the right side of his jeans "tipped down," and he heard a gunshot.

- After realizing what **[*3]** happened, Plaintiff buttoned his pants, picked up the Subject Pistol, removed the spent casing, put the Subject Pistol in his pants pocket, and proceeded out of the bathroom.
- Without notifying staff of the incident, Plaintiff proceeded to the concession stand of the Movie Theater and told his wife and daughter that they had to leave.
- Plaintiff's wife then transported him to the hospital for treatment.

(*See* Doc. No. 61 at 3-4; Doc. No. 66 at 2-3 (internal cites to the record omitted).) In his Statement of Additional Disputed Facts, Plaintiff adds that on the day in question the gun "fell out of its holster and discharged when the upper right corner of the rear slide struck the tile floor, striking him in the abdomen." (Doc. No. 66 at 4 (citing Doc. No. 61-4 [Heikkila Depo.], at 82: 15-16).) As evidence of this, Plaintiff states that "[t]here are chips in the tile flooring where the gun struck upon impact that are consistent with the dimensions of the rear slide." (*Id.* (internal cites to the record omitted).) Defendant denies "Plaintiff's account of the manner in which the Subject Pistol discharged," citing to its expert report for support, and arguing "that the chips in the tile flooring **[*4]** likely occurred when the tile was being installed." (Doc. No. 70 at 2.) Additionally, Defendant argues that the alleged facts concerning the discharging of the gun when it fell to the floor, are immaterial. (*Id.* At 1-2.)

Plaintiff brought negligence and products liability claims, alleging that Defendant breached its duties to manufacture and sell the pistol "in a safe and reasonable manner that would not allow for accidental discharges when the weapon was dropped." (Doc. No. 3 at ¶ 18.)

The Experts

Plaintiff hired Paul Paradis, a retired Criminalist for the Colorado State Public Defenders and owner of Paradise Sales, a Colorado firearms store, to render an expert opinion in this case. (["Paradis Report"], Doc. 56-3.) Mr. Paradis's opinion is that "the discharge was more likely than not caused by a significant impact of the firearm against a hard surface due to being dropped." (*Id.* at 7.) In his report, Mr. Paradis notes that he investigated the scene, investigated Plaintiff's clothing, and inspected the firearm. (*Id.* at 3-4.) He also explains how he tested the firearm, and notes that he was "precluded from doing a drop test of this firearm by Kahr's attorneys and [is] unaware of what **[*5]** types of drop-testing, if any, [have] been conducted by Kahr on any of their firearms." (*Id.* at 4.)

Defendant retained Michael Shain, who inspected the incident-related evidence at Mr. Paradis's shop and conducted drop testing of new-in-box exemplar firearms. (Doc. No. 61-5 at 3-7.) Mr. Shain also reviewed Plaintiff's deposition, the police report, the report and photos of Mr. Paradis, and other materials. Mr. Shain formed the following opinions:

- Plaintiff used Blackhawk holster for his firearm and that holster was not designed for this application.
- Plaintiff also "incorrectly employed the holster as an 'open carry,' outside the pants holster, when it was specifically intended to be worn as an 'Inside-The-Pants' concealment holster."

• In doing so, Plaintiff "created an unsecure and unsafe condition."
• Plaintiff also "recklessly failed to secure his fully loaded pistol and allowed the still holstered pistol to be completely unsecured and uncontrolled while in the Cinemark Theater Men's Room stall."
• The "extensive drop testing revealed no discharges of Exemplar Kahr pistols."

• "Based on this extensive testing...the Kahr PM45 pistol is not susceptible to a drop discharge under the conditions **[*6]** set forth in this case."
• "There is no physical evidence or testing data in the record to support the allegation that an impact discharge of the Kahr PM45 pistol caused Mr. Heikkila's injury. In fact, the physical evidence and the testing data support a discharge that was not the result of a drop impact."
• "By eliminating a drop fire discharge from consideration through testing, Mr. Heikkila's injury was most likely a self-inflicted wound as the result of an accidental or inadvertent trigger pull."
• "...the Kahr PM45 is of a safe design, passes the relevant industry and state imposed 'drop safety' standards, and it can be handled safely and used safely for its intended use."

(Doc. No. 61-5 at 21-22.)

Defendant also retained Derek Watkins, who inspected the firearm, plaintiff's clothing, and the scene of the incident. (*See generally* Doc. No. 61-4). Mr. Watkins also conducted what he refers to as abuse tests. (*Id.*) Additionally, Mr. Watkins also employed "[a] computer simulation incident reconstruction...to investigate the feasibility of [Plaintiff's] testimony." (*Id.* at 3.) Mr. Watkins issued the following opinions:

• "No design or manufacturing defects were found in the subject pistol[.]" **[*7]**
• "No defects were found in the design or manufacture of the subject pistol which were in any way related to Mr. Heikkila's shooting incident[.]"
• "The subject pistol is safe in design and manufacture for its intended and reasonably foreseeable uses[.]"
• "The incident reconstruction modeling indicates that the discharge of Mr. Heikkila's pistol and his resulting injury were caused by his negligent and careless handling of the pistol in the bathroom stall and his failure to follow safe gun handling practices[.]"
• "The firearm's design, extensive drop testing, and the physical evidence of this case all indicate that this incident was caused by an accidental or intentional trigger pull, and was not the result of the firearm striking the tile floor of the bathroom[.]"

(*Id.* at 21.)

In his rebuttal report, Mr. Paradis notes that Defendant's experts point to the American National Standards Institute (ANSI) and Sporting Arms & Ammunition Institute (SAAMI) for standards that manufacturers must meet to ensure public safety. (Doc. No. 56-4 at 2-3.) However, according to Mr. Paradis, the experts' failure to "acknowledge the failure of the ANSI and SAAMI standards," is notable because despite complying **[*8]** with those standards, certain firearms have failed/fired when dropped. (*Id.*) Mr. Paradis also appears to call the Defense experts' drop testing into question, noting that the firearms they tested "were not the Kahr PM45 in question," and reflecting concern that testing of the subject firearm was precluded by Kahr. (*Id.* at 4.)

Mr. Paradis addresses the Defense experts' conclusions that Plaintiff mishandled the weapon, by stating, "[i]gnorance is unfortunately common in the firearm world; I am

not surprised by Mr. Heikkila's use of his firearm in this case. Further I can understand use of the holster as the belt tension is just about as great in the pants as well as outside the pants." (*Id.* at 5.) Mr. Paradis does not elaborate further on this, other than to say, "the industry as a whole needs more improvement with regard to consumer education." (*Id.*)

Mr. Paradis also addresses the evidence and Defense experts' version of what most likely happened on the day in question. Specifically, Mr. Paradis addresses the blood-stained clothes Plaintiff was wearing that day, the medical records, the stall where the incident occurred, the cracked tile on the floor, and the accident reconstruction video **[*9]** prepared by Mr. Watkins and his team. (*Id.* at 5-22.) The Court will not recite all of Mr. Paradis's rebuttal points, but notes that Mr. Paradis criticizes Mr. Watkins's reconstruction animation as "not reliable or probable," because it "leaves out critical information such as Mr. Heikkila's pants and that he was wearing cowboy boots at the time of the discharge." (*Id.* at 16-17.) Mr. Paradis also notes that certain measurements in the reconstruction are not supported by physical and medical evidence, and that the "absence of gun residue on the clothing," as well as the absence of any "stippling on his skin near the entry wound," support Plaintiff's assertion that the gun did not discharge in close proximity to Plaintiff's body." (*Id.* 18-34.) In concluding his rebuttal report, Mr. Paradis' states that the bullet's path "is consistent with an impact from the floor," the "lack of muzzle effluent on the clothing or stippling on the skin show that his firearm discharged outside of arms reach[,]" the "damage to the floor tiles [is] consistent with the gun having been dropped," and "historical information show[s] that a drop fire incident has happened in the past with Kahr and other firearm **[*10]** manufacturers despite adherence to ANSI and SAMMI standards." (*Id.* at 35.) In short, Mr. Paradis does not identify a particular defect, but he explains why a defect causing discharge on impact, is more probable than an intentional or accidental trigger pull by Plaintiff.

II. LEGAL STANDARD

A. Legal Standard on Defendant's Daubert Motion

The standard for admitting expert testimony is set forth in Rule 702 of the Federal Rules of Evidence ("FRE") as interpreted by the United States Supreme Court in, *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). FRE 702 states:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Under *Daubert*, district courts "must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert*, 509 U.S. at 589. In this sense, a court acts as a "gatekeeper" in admitting or excluding **[*11]** expert testimony. *Bitler v. A.O. Smith Corp.*, 400 F.3d 1227, 1232 (10th Cir. 2005); *Pinon Sun Condo. Ass'n Inc. v. Atain Specialty Ins. Co.*, 2020 U.S. Dist. LEXIS 51465, 2020 WL 1452166, at *3 (D. Colo. Mar. 25, 2020). Fulfilling this gatekeeping function requires a two-part analysis. First, the Court must consider whether the expert testimony is relevant. Expert testimony is relevant if it would "assist the trier of fact to understand the

evidence or to determine a fact in issue." Fed. R. Evid. 702. Second, the Court must consider whether the expert opinions are reliable. They are reliable if: (1) the expert is qualified "by knowledge, skill, experience, training, or education," (2) the opinions are "based upon sufficient facts or data," and (3) they are "the product of reliable principles and methods." *Id.* The burden to show the expert's testimony is relevant and reliable (and therefore admissible), is on the proponent of the testimony. *United States v. Nacchio*, 555 F.3d 1234, 1241 (10th Cir. 2009).

B. Legal Standard on Defendant's Summary Judgment Motion

The Court may grant summary judgment if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party has the burden of showing an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). "Once the moving party meets this burden, the burden shifts to the nonmoving party to demonstrate a genuine issue for trial on a material matter." **[*12]** *Concrete Works, Inc. v. City & Cnty. of Denver*, 36 F.3d 1513, 1518 (10th Cir. 1994) (citing *Celotex*, 477 U.S. at 325). The nonmoving party may not rest solely on the allegations in the pleadings, but instead, must designate "specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324; *see also* Fed. R. Civ. P. 56(c).

"A 'judge's function' at summary judgment is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" *Tolan v. Cotton*, 572 U.S. 650, 656, 134 S. Ct. 1861, 188 L. Ed. 2d 895 (2014) (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). Whether there is a genuine dispute as to a material fact depends upon "whether the evidence presents a sufficient disagreement to require submission to a jury," or conversely, whether the evidence "is so one-sided that one party must prevail as a matter of law." *Carey v. U.S. Postal Serv.*, 812 F.2d 621, 623 (quoting *Anderson*, 477 U.S. at 251-52). A disputed fact is "material" if "under the substantive law it is essential to the proper disposition of the claim." *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998) (citing *Anderson*, 477 U.S. at 248). A dispute is "genuine" if the evidence is such that it might lead a reasonable jury to return a verdict for the nonmoving party. *Thomas v. Metro. Life Ins. Co.*, 631 F.3d 1153, 1160 (10th Cir. 2011) (citing *Anderson*, 477 U.S. at 248). "Where the record taken as a whole could not lead a rational trier of fact to find for the [nonmovant], there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (citing *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968)).

III. ANALYSIS

A. Defendant's *Daubert* Motion

Defendant argues that Plaintiff has proffered Mr. Paradis "in an effort to establish **[*13]** that the Subject Pistol is defective and unreasonably dangerous. However, Paradis is not qualified by education, training or experience to render any such opinions. Further even if he was qualified, he simply fails to identify an actual defect in the Subject Pistol and his overall opinions are unreliable." (Doc. No. 56 at 2.) In other words, Defendant has challenged Mr. Paradis's expert opinions under the reliability prong of this Court's gatekeeping function, arguing that Mr. Paradis's opinions are not reliable because: (1) Mr. Paradis is not qualified "by knowledge, skill,

experience, training, or education," and (2) the opinions are not "based upon sufficient facts or data," and they are not "the product of reliable principles and methods." Fed. R. Evid. 702. The Court will address each challenge in turn.

1. Knowledge, skill, experience, training, education

Defendant argues that Mr. Paradis is not an expert in the design or manufacture of firearms and is therefore not qualified to offer opinions about the "design characteristics of firearms[.]" (Doc. No. 56 at 11.) Defendant elaborates as follows:

> Paradis admits that he does not consider himself a firearms design expert or a firearms manufacturing **[*14]** expert. He has never been involved in the design of a firearm; he has never been employed by a manufacturer of firearms; prior to this case he had never been hired as a consultant to a firearm manufacturer; he has not completed coursework or received a certificate related to gunsmithing; he has no experience in firearm design; he holds no patents; and he has never designed a firearm or firearm component part.

(*Id.* at 11-12 (internal cites to the record omitted).) Defendant analogizes this case to, *Hauck v. Michelin N. Am., Inc.*, 343 F. Supp. 2d 976, 982 (D. Colo. 2004). There, "plaintiff's purported expert sought to testify regarding an alleged defect in defendant's tire," but during deposition admitted he was "not an expert in tire design or manufacture." (Doc. No. 56 at 10-11 (internal quotations omitted).) The court stated, "to be qualified in one area of discipline or science does not necessarily demonstrate that the tendered expert is qualified in other areas of the discipline." (*Id.*) Relying on *Hauck*, Defendant argues that Mr. Paradis "could potentially qualify as an expert to discuss the retail sales of firearms and training persons to safely handle firearms. But .... [h]e certainly is not qualified to provide opinion testimony to a jury in this case **[*15]** with respect to the design characteristics of firearms, the testing of firearms by manufacturers to meet industry and governmental standards, the manufacturing process for firearms, or other aspects of firearm production." (*Id.* at 11.)

Plaintiff responds that, "Mr. Paradis' testimony ... shows the angle at which the PM 45 discharged, the distance that Plaintiff was shot from, the place where the PM 45 likely made impact, and the likely location where the gun dropped[,]" and that Mr. Paradis' expertise allows him to form the opinion "that it is improbable and unlikely that Plaintiff was able to shoot himself in the bathroom stall by mishandling the firearm or pulling the trigger, but instead, the weapon is defective and that it discharged upon strike [sic] the bathroom floor when it fell out of the holster." (Doc. No. 67 at 10-11.) In other words, Plaintiff does not dispute that Mr. Paradis cannot identify the actual defect in the subject firearm. Instead, Plaintiff contends that the information in Mr. Paradis's report "relates to how the discharge occurred and the likelihood of a deadly defect in the gun's design." (Doc. No. 67 at 12.)

As a threshold matter, the Court observes that there **[*16]** appears to be a disconnect as to the scope of Mr. Paradis's testimony. Defendant argues that Mr. Paradis is offering "opinions regarding the design or manufacture of the Subject Pistol[.]" (Doc. Not. 56 at 2.) Plaintiff on the other hand, argues that Mr. Paradis's opinion concerns the circumstances of the discharge, focusing on the angle and distance Plaintiff was shot from, the place of impact, and the likely location of the drop. (Doc. No. 67 at 10-11.) According to Plaintiff, Mr. Paradis's "expert opinion measures the likelihood of different scenarios and paints a clearer picture of what happened during the incident." (*Id.* at 12.) The Court has reviewed

Mr. Paradis's reports carefully and assessed the scope of his opinions. Based on those reports, it appears Mr. Paradis will not opine on a particular defect. In other words, Plaintiff will not seek to qualify Mr. Paradis as a design or manufacturing expert, but rather an expert on the handling of firearms and the circumstances surrounding the discharge.[1] The Court will now analyze Mr. Paradis's experience, training, and qualifications accordingly.

"Mr. Paradis was an active-duty **[*17]** soldier in the United States Army Infantry from 1975-1979 and a member of the Colorado National Guard from 1980-1988 where he served as both a small arms instructor and a gun chief. He spent many years in the military handling weapons, learning how to disassemble and reassemble them and he is trained on a variety of firearms." (Doc. No. 67 at 2; Doc. No. 67-1 [Paradis CV].) He also "owned and operated a firearms and gunsmithing business since 1983," and "is a certified firearms instructor." (Doc. No. 67 at 2; Doc. No. 67-1.) He "has testified in excess of fifty times on firearms and ammunition cases throughout the State of Colorado and in the Federal District Court of Colorado, and has provided his expertise as an expert consultant to law enforcement, the Colorado Springs Metro Crime Lab, the Department of the Air Force Office of Special Investigations Detachment, and the Department of the Army Military Police Battalion." (Doc. No. 67 at 3; Doc. No. 67-1.) For approximately fifteen years, "Mr. Paradis was employed as a crime scene investigator and criminologist with the El Paso County, Colorado Public Defender's Office, specializing in gunshot cases, crime scene reconstruction, blood **[*18]** spatter analysis and forensic investigations[.]" (Doc. No. 67 at 3; Doc. No. 67-1.) He has also "authored and co-authored numerous published articles and texts on accidental shootings, gun design, human factors in fatal shootings, human factors issues in the design and operation of firearms, and human factors issues in handgun safety and forensics." (Doc. No. 67 at 3; Doc. No. 67-1.) Additionally, Mr. Paradis "has received specialized training, education and experience in all aspects of crime scene and shooting incident reconstruction, forensic investigation, bloodstain pattern analysis, firearms and toolmark examination, accidental and unintentional discharges, proper trajectory measurement, wound ballistics, gunshot residue (GSR) muzzle effluent, GSR analysis, gunpowder pattern analysis, microscopic analysis, fiber and textile analysis, gunshot distance determinations, and numerous other topics." (Doc. No. 67 at 3-4; Doc. No. 67-1.)

The Court finds that Mr. Paradis can offer valuable opinions about the circumstances surrounding this shooting incident, the handling of the firearm, and whether the firearm was discharged in close proximity to Plaintiff's body or from a distance. However, **[*19]** Mr. Paradis is not an expert in the design or manufacture of firearms. Indeed, he admits that much. (Doc. 56-6 [Paradis Depo.] at 96: 5-10 (testifying that he does not consider himself a "firearms design expert," or a "firearms manufacturing expert.").)

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[1] The Court notes that in at least one portion of his Daubert Response, Plaintiff's argument could be construed to mean that Mr. Paradis will opine that the firearm is actually defective. (Doc. No. 67 at 12 (stating that Mr. Paradis opines, "it is improbable and unlikely that Plaintiff was able to shoot himself ... but instead, *that the weapon is defective* and that it discharged ... when it fell out of the holster.").) However, based on Mr. Paradis's unequivocal testimony that he cannot identify the defect, (Doc. No. 61-3 [Paradis Depo.] at 124:20-25), and based on the overall content of Mr. Paradis's reports, the Court construes counsel's statements to mean that Mr. Paradis will testify about the facts and circumstances *from which a jury could infer* that it is more probable than not that the firearm was defective, but not that Mr. Paradis will testify that there is indeed a defect or that he knows what the defect is. To the extent Mr. Paradis strays from the confines of his reports and attempts to testify that he knows of a specific defect in the firearm, that testimony will not be permitted at trial.

2. Facts, data, and reliable principles

Defendant argues that the "Paradis' opinions are solely based on assumptions and unsupported speculation," and that they "are not the product of reliable scientific or otherwise accepted principles and methods." (Doc. No. 56 at 12.) Specifically, Defendant argues that Mr. Paradis has a "discharge theory" (namely, that the gun likely discharged when it hit the ground) but no testing results to support his theory, because when Mr. Paradis conducted drop testing and impact tests on an exemplar firearm, "he was never able to get it to discharge." (*Id.* at 13.) Defendant also argues that "[a]lthough there is a clear analytical gap between the data and his conclusions...Paradis chooses to ignore the scientific method in its entirety and seeks to proffer his unsupported opinion that the Subject Pistol drop fired when his only valid basis in science is directly inapposite to his conclusions." (*Id.*) Relatedly, **[*20]** Defendant argues that "Paradis 'cherry-picks' other purported evidence, such as reports of recalls from other firearms manufacturers and a news article related to another claimed incident involving a Kahr firearm, and somehow concludes Plaintiff's story is justifiable." (Doc. No. 56 at 15 (internal citations omitted).) This, Defendant argues, "is the definition of a speculative, unreliable, *ipse dixit* opinion that the U.S. Supreme Court has determined should not be presented to a jury." (*Id.*)

Plaintiff responds that Mr. Paradis: 1) "inspected Plaintiff's clothing...utilizing high powered microscopic analysis," 2) "conducted an inspection of Plaintiff's medical reports," 3) "conducted test firing of an exemplar Kahr PM 45 with identical ammunition, and 3) "conducted a reconstruction of the shooting in this incident using the trajectory of the bullet from the point of entry into Plaintiff's body and the current location of the bullet behind Plaintiff's lower-left rib cage[.]" (Doc. No. 67 at 5-6.)The Court has reviewed Mr. Paradis's reports, resume, and deposition testimony excerpts, and agrees with Plaintiff that Mr. Paradis's opinions are reliable because they are based on the application **[*21]** of his training and experience to the evidence in this case and to the reconstruction work and opinions offered by Defendant's experts. Specifically, Mr. Paradis has multiple certifications concerning firearms handling, extensive experience as a firearms instructor, and he was a criminalist for the State of Colorado for over fifteen years. (Doc. No. 67-1.) Mr. Paradis has completed workshops and training for crime scene reconstruction and shooting incident reconstruction, and his resume reflects meaningful continuing education for forensic professionals, including in bloodstain pattern analysis. (*Id.*) It is clear from Mr. Paradis's reports that he brought all of his professional training, education, and experience to bear when he analyzed the forensic evidence and formed opinions about, for example, the trajectory of the bullet, the blood stains on Plaintiff's clothes, the gun residue or lack thereof, and more. This is not a case of "cherry-picking" evidence. Mr. Paradis acknowledges that he was not able to cause the exemplar firearm to discharge, but notes that he was not able to drop test the actual firearm, and that although rare, it is possible that even firearms that meet all **[*22]** safety standards can on occasion discharge when dropped. Against that backdrop, Mr. Paradis opines that in *this* case, the blood stains, medical records, relevant distances in the bathroom stall, the floor tile, and lack of residue and stippling, indicate the gun was discharged from the floor and not in closer proximity to Plaintiff's body.

In short, the opinions Mr. Paradis seeks to offer may not be based on drop testing—and a jury may take issue with that—but his opinions are based on facts, data, testing, and reliable principles and methods. The Court finds Defendant's arguments go to the weight the jury may give to the testimony, but not to

admissibility.

B. Defendant's Summary Judgment Motion

Described at a high level, Defendant's summary judgment arguments are that: 1) Plaintiff cannot carry his burden of proving a defect or causation, and 2) Plaintiff's claims must be dismissed because the Protection of Lawful Commerce in Arms Act ("PLCAA") precludes claims against manufacturers of firearms for damages "resulting from the criminal or unlawful misuse of a qualified product by the person or a third party...." 15 U.S.C. § 7903(5)(A). (*See generally* Doc. No. 61.) The Court will address each argument in turn. **[*23]**

1. Proof of defect and causation

This argument is based—almost entirely—on the same arguments Defendant made in connection with its Daubert Motion. First, Defendant incorporates its arguments from the Daubert Motion, arguing that if Plaintiff's expert is excluded, the jury cannot "address the risk-benefits of adopting certain designs, safety features and other critical aspects of a firearm." (Doc. No. 61 at 8-9.) Next, Defendant argues that even if Mr. Paradis is not excluded, Defendant is entitled to a Colo. Rev. Stat. § 13-21-403(1)(b) presumption[2] that the firearm is non-defective, and Plaintiff has failed to rebut that presumption because he "has not presented any evidence establishing a defect in the design or manufacture of the Subject Pistol." (Doc. 61 at 11-12.) Defendant argues that Mr. Paradis's "admission alone that he could not locate or identify a defect in the Subject Pistol warrants summary judgment." (Doc. No. 61 at 13.) And finally, Defendant argues that if Mr. Paradis cannot identify a defect, it follows he cannot opine that the defect caused Plaintiff's injuries. (*Id.* ("Plaintiff's proposed expert could not identify a defect let alone determine if it caused Plaintiff's injuries.").) Said another way, **[*24]** Defendant is arguing that Plaintiff needs an expert, and even assuming Plaintiff's expert is permitted to testify, Plaintiff cannot prove defect and causation.

Defendant's argument that Plaintiff's claims fail without expert testimony is moot because the Court has already decided it will allow Mr. Paradis to testify. However, the Court will consider whether "[t]he evidence clearly demonstrates that there was no defect in the Subject Pistol." (Doc. No. 61 at 13.)

Plaintiff argues that both Mr. Paradis's **[*25]** report and Plaintiff's testimony "allege that the gun discharge was due to it simply dropping with enough force. A gun that can discharge by simply dropping should be considered defective and unreasonably dangerous, but that is a question for the jury." (Doc. No. 66 at 11 (citing *Johnson v. Colt Indus. Operating Corp.*, 797 F.2d 1530, 1534-35 (10th Cir. 1986).) Plaintiff also points to "doctor's reports...and physical evidence supporting the

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[2] Although not relevant to the Court's determination on the SJ Motion, the Court looks ahead to trial and notes that the Colorado Supreme Court has—in the context of overturning a jury instruction based on this presumption—stated the following:

> It is precisely because the plaintiff (the party against whom the presumption is directed) already has the burden of going forward with evidence in this case that an instruction based on the statutory presumption of section 13-21-403(3) is meaningless. If a plaintiff fails to present sufficient evidence that a product is defective, he cannot satisfy the burden of persuasion or establish a prima facie case and a court will direct a verdict for the defendant. On the other hand, a plaintiff who has presented sufficient evidence to defeat a motion for a directed verdict has necessarily rebutted the presumption of section 13-21-403(3). Therefore, no reason exists for a trial judge to instruct a jury on the statutory presumption of section 13-21-403(3).

Mile Hi Concrete, Inc. v. Matz, 842 P.2d 198, 205-06 (Colo. 1992) (citing *Sexton v. Bell Helmets, Inc.*, 926 F.2d 331 (4th Cir.1991)).

fact that the gun was discharged after dropping on the floor[,]" and notes that "[t]he weight given to that evidence is something for the jury to consider." (Doc. No. 66 at 12.) The Court will not recite each of Mr. Paradis's observations, but it has reviewed Mr. Paradis's reports and Plaintiff's purported evidence and finds there is evidence from which a jury might conclude that the gun was discharged at a distance rather than in close proximity to Plaintiff's body. For example, the jury might believe that the angle of the wound, the crack on the floor, the absence of residue and stippling, all indicate that the gun was discharged from a distance. From that, a jury might infer that the firearm discharged upon impact, and from that a jury might infer that the firearm was defective. Thus, Plaintiff's evidence—even if not direct **[*26]** proof of a defect—is sufficient to survive summary judgment. *See generally Union Ins. Co. v. RCA Corp.*, 724 P.2d 80, 83 (Colo. App. 1986) (holding that despite plaintiff's inability to obtain direct proof of a defect, "plaintiff's evidence was sufficient as a matter of law to create an issue of fact as to the element of defect."), overruled on grounds unrelated to this proposition by *Mile Hi Concrete, Inc. v. Matz*, 842 P.2d 198, 206 n. 17 (Colo. 1992); § 54:9, *Circumstantial Evidence*, Am. L. Prod. Liab. 3d § 54:9 ("In general, the elements of a products liability case may be proven by circumstantial as well as direct evidence, and circumstantial evidence may establish the entire basis for recovery under negligence, strict products liability, or breach of warranty."); *see also Olivero v. Trek Bicycle Corporation*, 291 F. Supp. 3d 1209, 1221-1224 (D. Colo. 2017) (rejecting the notion that a plaintiff seeking to prove a manufacturing defect must always retain an expert to perform special testing on the product itself, and finding that circumstantial evidence, even if "less-than-ideal," could allow a jury to conclude there was a manufacturing defect).

The Court also notes that in this case circumstantial evidence may be the only way a jury could conclude that this particular firearm was defective because Defendant did not permit drop testing of the subject firearm. *See generally Oja v. Howmedica, Inc.*, 111 F.3d 782, 793 (10th Cir. 1997) (where direct proof of a manufacturing defect was impossible because the product **[*27]** at issue was missing, and plaintiff had to rely on circumstantial evidence exclusively, the court held, "[u]nder such circumstances, we hold that a jury could reasonably conclude that [plaintiff's] PCA hip suffered from a manufacturing defect."). The Court cannot allow Defendant to shield the subject firearm from drop testing (which could theoretically generate direct evidence of a manufacturing defect), then use the lack of direct evidence as a sword against Plaintiff's claims. Certainly the jury can discount Plaintiff's circumstantial evidence, disbelieve Plaintiff's witnesses, or find that Plaintiff's evidence is outweighed by Defendant's evidence, but those are not reasons for this Court to grant summary judgment.

That said, the Court does not see a genuine dispute over the existence of a *design* defect. The multiple drop tests conducted by experts on exemplar firearms, coupled with Mr. Paradis's admission that he could not re-create the discharge on exemplar firearms, or identify a specific defect, leave little doubt that at trial Plaintiff will not be able to offer credible evidence of a *design* defect. The only circumstantial evidence Plaintiff may be able to point to is Mr. Paradis's **[*28]** knowledge of other shooting incidents, but that alone is insufficient to carry his burden on a design defect claim. Certainly Mr. Paradis can testify about other discharge incidents and how they inform his theory of what occurred here, and certainly he can use that information to support a *manufacturing* defect theory that is supported by other evidence, but given the overwhelming evidence against a *design* defect, and given Mr. Paradis's admission that he failed to find a design defect, no reasonable jury could

conclude that the firearm was defectively designed. Therefore, the Court finds that Defendant is entitled to summary judgment on Plaintiff's claims, only to the extent they are based on *design* defect.

2. PLCAA

Next, Defendant argues that the PLCAA requires dismissal. Subject to some exceptions, the PLCAA requires dismissal of any civil action that is:

> 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, or penalties or other relief ***resulting from the criminal or unlawful misuse of a qualified product by the person*** or a third party. . . .

15 U.S.C. §§ 7902, 7903(5)(A) (emphasis added). One exception **[*29]** to this general bar against suit, is when an action is based on "physical injuries ... resulting directly from a defect in design or manufacture of the product," so long as the firearm was "used as intended or in a reasonably foreseeable manner[.]" 15 U.S.C. § 7903(5)(A)(v). However, this products liability exception will not apply if, "the discharge of the product was caused by a volitional act that constituted a criminal offense," because that act will "be considered the sole proximate cause of any resulting ... personal injuries[.]" *Id.*

In support of its PLCAA argument, Defendant cites the following cases:

Adames v. Sheahan, 233 Ill. 2d 276, 909 N.E.2d 742, 330 Ill. Dec. 720 (Ill. 2009)

In *Adames*, a thirteen-year-old boy named Billy Swan was playing with his father's semi-automatic Beretta pistol when he accidentally shot and killed his friend, Josh Adames. 909 N.E.2d at 745. Plaintiffs sued the pistol manufacturer, among others, "alleging design defect, failure to warn, and breach of the implied warranty of merchantability." *Id.* at 759. "The PLCAA was enacted on October 26, 2005, two months after the trial court entered summary judgment in favor of defendants, and applied retroactively," therefore the Illinois Supreme Court carefully reviewed the statute for applicability and made a few findings relevant to this case. **[*30]** *Id.* at 759-60 First, the court held that the PLCAA, "does not contain a requirement that there be criminal intent or a criminal conviction." *Id.* at 761. Billy's juvenile adjudication and the lack of criminal intent notwithstanding, the court found that "Billy's misuse of the Beretta ... had the character of a crime and was "in the nature of a crime" and, therefore, was a criminal misuse," in the context of the PLCAA. *Id.* The court also found "that Billy's act was a volitional act[,]" because "even if Billy did not intend to shoot Josh, Billy did choose and determine to point the Beretta at Josh and did choose and determine to pull the trigger. Although Billy did not intend the consequences of his act, his act nonetheless was a volitional act." *Id.* at 763. The court also rejected plaintiffs' constitutional arguments and ultimately found that the PLCAA required dismissal of the only remaining products liability claim, a failure to warn claim. *Id.* at 765.

Ryan v. Hughes-Ortiz, 81 Mass. App. Ct. 90, 959 N.E.2d 1000 (Ma. Ct. App. 2012)

In *Ryan*, while Charles Milot was released on probation, Thomas Hughes allegedly helped him by lending money, providing jobs around his house, and generally helping him back on his feet. 959 N.E.2d at 1002. At some point during the arrangement, Mr. Milot took firearms from Mr. Hughes's home. One day, **[*31]** Mr. Hughes picked up Mr. Milot and took him to Mr. Hughes's home where Mr. Milot was supposed to repair some items. Mr. Hughes left, and when

he returned two hours later, he found Mr. Milot's dead body covered in blood. Upon investigation, the police found that Mr. Milot "was attempting to put the gun back in the container when the round was fired, striking the victim in the upper left leg....The victim apparently walked out of the bedroom, down the front stairs, into the living room, used the telephone and walked to the front door where he collapsed and died." *Id.* "The plaintiff brought claims of breach of the implied warranty of merchantability, negligence, wrongful death, and unfair and deceptive acts and practices against Glock" in connection with Mr. Milot's death. *Id.* at 1006. The plaintiff's defect theory was that "the Glock pistol and gun case 'were defective because the [gun] case caused the loaded Glock ... pistol ... to discharge through the case and because the pistol was likely to discharge unintendedly' and that 'Glock so negligently and carelessly designed the Glock Model pistol and storage case ... that the pistol discharged into the Decedent's body mortally wounding the Decedent.'" **[*32]** *Id.* at 1006-07.

On appeal from the trial court's grant of summary judgment under the PLCAA, plaintiffs made two arguments relevant here. First, plaintiffs argued there was no evidence that the gun was "misused" either criminally or unlawfully. Second, they argued the discharge of the firearm was an accident, not "caused by a volitional act that constituted a criminal offense," and therefore the act could not cut off the causation element of the product defect theory. *Id.* at 1008. The court disagreed with plaintiffs, acknowledging there were no criminal charges brought against Mr. Milot in connection with the incident, but noting that Mr. Milot possessed the firearm after having been convicted of a felony. *Id.* The court held that was sufficient to meet the "criminal or unlawful misuse" element of the PLCAA. *Id.* The court also found that "the relevant volitional act that caused the gun's discharge was Milot's unlawful possession of the Glock pistol. Milot's volitional act constituted a criminal offense and the design defect exception is therefore not applicable." *Id.* at 1008-09. In other words, given Mr. Milot's prior conviction, the possession of the pistol alone, satisfied both the criminal misuse requirement (sufficient **[*33]** to bring the matter within the ambit of the PLCAA), and the volitional act requirement (sufficient to cut off causation and preclude the products liability exception to the PLCAA).

Travieso v. Glock, Inc., 526 F. Supp.3d 533 (D. Ariz. 2021)

In *Travieso*, a 14-year old girl somehow came into possession of a Glock handgun, which she had on her person while travelling home from a youth camping trip. 526 F. Supp.3d at 536. Carlos Daniel Travieso was in the same vehicle with the girl when the gun discharged and hit Mr. Travieso in his back, causing spinal injuries and rendering him a paraplegic. *Id.* Criminal charges were never brought against the girl. *Id.* Plaintiff brought a products liability claim against the firearm manufacturer. The *Travieso* court conducted an extensive analysis of the PLCAA to determine whether it barred the claim. Specifically, the court considered whether the civil action resulted from "the criminal or unlawful misuse" of the firearm, such that the PLCAA applied. *Id.* at 546. The Court held that even though the young girl was not criminally charged, her actions "violated multiple criminal statutes including the federal law against possession of a handgun by a juvenile," and the PLCAA's immunity was "triggered by the criminal nature of the act, not whether the actor is or **[*34]** can be charged with the crime." *Id.* at 546-47. Next, the court considered whether there was a "volitional act" that precluded application of the products liability exception. The Court found there was, because even if the shooting was not intentional, the girl "took other volition[al] acts that were criminal offenses, such as

intentionally taking possession of the gun and pulling the trigger while in the vehicle with the gun pointed at another person." *Id.* at 548. For the *Travieso* court, "volitional" appeared to be interchangeable with "reckless." *Id.* It held that because "the shooing [was] caused by criminal possession and recklessness of a third party[,]" the PLCAA's products liability exception did not apply and the PLCAA precluded plaintiff's claim. *Id.*

Although each of these PLCAA cases is helpful and informative, the Court notes that it is not bound by any of these decisions. Still, like other courts considering whether a claim is precluded by the PLCAA, the Court will conduct its analysis in two steps. First, it will consider whether the claim is a qualified civil liability action, "resulting from the criminal or unlawful misuse" of the pistol, thereby requiring application of the PLCAA. 15 U.S.C. § 7903(5)(A), Second, the Court **[*35]** will consider whether the products liability exception saves Plaintiff's claim from dismissal, recognizing that the exception cannot apply if "the discharge of the product was caused by a volitional act that constituted a criminal offense." 15 U.S.C. § 7903(5)(A)(v).

a. Is this claim the result of "criminal or unlawful misuse"?

As noted above, several courts have held that the phrase "criminal or unlawful misuse" does not necessarily require a criminal conviction or even a criminal charge. The Court agrees. Had Congress intended to limit the application of the PLCAA only to instances where a person was charged or convicted of a crime, it could have said as much. Here, Defendant argues that "Plaintiff disregarded the ban on firearms in the Movie Theater, was likely carrying this pistol in a concealed fashion without a permit, and illegally discharged the weapon." (Doc. No. 61 at 17). The Court will analyze each act to determine whether any act constitutes "criminal or unlawful misuse" for purposes of the PLCAA.

Movie theatre ban on firearms

Defendant does not argue that carrying a weapon in a private facility prohibiting weapons, is criminal. Therefore, the Court assumes that Defendant references the violation **[*36]** of the movie theatre's policies as "unlawful misuse." The PLCAA expressly sets forth conduct that will be considered "unlawful misuse," defining it as any "conduct that violates a statute, ordinance, or regulation as it relates to the use of a qualified product." 15 U.S.C. § 7903(9). Defendant has not cited any statute, ordinance, or regulation that was violated simply because Plaintiff possessed the firearm in the movie theatre. Under the doctrine of *expressio unius est exclusio alterius*, the Court presumes Congress intended the list of violations to be exhaustive and will not read into it other types of misconduct. *See generally Fish v. Kobach*, 840 F.3d 710, 745 (10th Cir. 2016) (finding that "the fact that Congress spoke only to requiring information on the motor voter form tends to cut against rather than in favor of Secretary Kobach's approach. The omission of requirements for, or prohibitions on, other documents that states might require does not suggest that states may require anything that they desire to facilitate the registration process beyond the form itself. To the contrary, it suggests by the negative-implication canon, *expressio unius est exclusio alterius*, that Congress intended that the motor voter form would—at least presumptively—constitute **[*37]** the beginning and the end of the registration process."). Moreover, misconduct at a private establishment is not automatically "unlawful." Therefore, the act of carrying a weapon into a private facility prohibiting weapons, will not—on its own—trigger the PLCAA.

Concealed carry

Next, the Court considers whether the manner in which Plaintiff carried the pistol will satisfy the "criminal or unlawful misuse" requirement. Although Defendant does not cite a particular statue, regulation, or ordinance in connection with this argument, it notes that the weapon may have been concealed. (Doc. 61 at 17.) If it was, Plaintiff may have been in violation of Colorado state law. *See* Colo. Rev. Stat. § 18-12-105. However, by Defendant's own admission, this fact is not undisputed. (*Id.* ("Plaintiff ... was *likely* carrying this pistol in a concealed fashion without a [.]") (emphasis added).) Moreover, and even if it was undisputed that Plaintiff was carrying a concealed weapon in violation of state law, the causation element also turns on unresolved questions of fact. *See* 15 U.S.C. §§ 7902, 7903(5)(A) (requiring dismissal if a claim is "***resulting from*** the criminal or unlawful misuse of a qualified product..." (emphasis added).).

Illegal discharge

Turning next **[*38]** to Defendant's argument that Plaintiff's illegal discharge of the weapon is "criminal or unlawful misuse" that requires PLCAA immunity, the Court agrees. Plaintiff notes that he "entered a plea of nolo contendere and received a deferred judgment and sentence which ultimately resulted in dismissal of the charges whereupon the subject pistol was returned to [Plaintiff] by law enforcement." (Doc. No. 66 at 6.) However, whether Plaintiff entered a plea of guilty or nolo contendere, is irrelevant. The facts and circumstances of the incident gave rise to the criminal charge, and the conduct was therefore criminal in nature. (*Id.*) Indeed, under the statute that criminalizes discharge in a building, a person can be guilty of this offense based on a knowing or reckless discharge. *See* Colo. Rev. Stat. 18-12-107.5 ("Any person who knowingly or recklessly discharges a firearm into any dwelling or any other building or occupied structure, or into any motor vehicle occupied by any person, commits the offense of illegal discharge of a firearm."). Moreover, the PLCAA's language is broad, and its application is not limited based on a person's conviction or plea. It is not for this Court to place constraints on Congress's broad **[*39]** language. Because the firearm's discharge in a public building was criminal in nature, and because that discharge resulted in this claim, the Court concludes the PLCAA applies.

b. Was the discharge caused by a volitional act that constituted a criminal offense?

According to Defendant, the products liability exception does not save Plaintiff's claim because the discharge was caused by a "volitional act that constituted a criminal offense." 15 U.S.C. § 7903(5)(A)(v). However, the Court finds this determination turns on facts that are still in dispute. This case is not like *Ryan*, which Defendant argues is most analogous. (Doc. No. 70 at 10.) In *Ryan*, the shooter shot himself presumably as Plaintiff did here, by accident. 959 N.E.2d at 1008. However, in that case, the plaintiff was a convicted felon in possession of a weapon and the Court found it was that volitional act (the unlawful possession) that constituted a criminal offense which ultimately caused the accident. *Id.* at 1008-09. Here, Plaintiff's possession alone was not a criminal offense.

This case is also not like the other cases Defendant cites—*Adames*, and *Travieso*. In those cases, the shooters were minors who also possessed the weapons illegally (even if they were never charged or convicted). In this case, **[*40]** and as noted above, the only criminal or unlawful act is the illegal discharge. However, while "unlawful misuse" resulting in a

civil action is sufficient to require *application* of the PLCAA, a different finding is required under the products liability exception. *See generally Chavez v. Glock, Inc.*, 207 Cal. App. 4th 1283, 1317-18, 144 Cal. Rptr. 3d 326 (Cal. Ct. App. 2012) (finding that "[u]nlike the definition of 'a qualified civil liability action,' which broadly includes any civil action 'resulting from the criminal or unlawful misuse' of a firearm, Congress much more narrowly defined the exclusion from excepted product defect suits to apply only if 'the discharge of the product was caused by a volitional act that constituted a criminal offense'.... Indeed, to construe the exclusion as expansively as do [defendants], would effectively eliminate the exception for product design defect claims expressly provided by Congress."). Here, Plaintiff's alleged illegal discharge is not enough to preclude application of the products liability exception as a matter of law because a jury would still need to determine whether the illegal discharge (or some other criminal offense) was volitional. Additionally, Defendant faces a heightened causation requirement under the products liability **[*41]** exception. Application of the PLCAA only requires that the claim result from criminal or unlawful misuse, however, the products liability exception hinges on whether or not the volitional criminal offense caused the actual "discharge of the product[.]" 15 U.S.C. § 7903(5)(A)(v).

CONCLUSION

For the foregoing reasons, **IT IS ORDERED THAT**:

(1) Saeilo, Inc. D/B/A Kahr Arms I/S/H/A Kahr Firearms Group's Motion to Preclude Plaintiff's Proposed Expert Paul Paradis (Doc. No. 56) is **DENIED**.

(2) Defendant's Motion for Summary Judgment with Statement of Material Facts and Memorandum in Support (Doc. No. 61) is **GRANTED TO THE EXTENT ANY PORTION OF PLAINTIFF'S CLAIM(S) IS GROUNDED IN DESIGN DEFECT THEORIES, AND DENIED IN ALL OTHER RESPECTS**.

Dated this 22nd day of December, 2022

BY THE COURT:

/s/ Maritza Dominguez Braswell

Maritza Dominguez Braswell

United States Magistrate Judge

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Green v. Five Star Mfg.

United States District Court for the Northern District of Alabama, Southern Division

March 30, 2016, Decided; March 30, 2016, Filed

Case No.: 2:14-cv-00449-SGC

Reporter

2016 U.S. Dist. LEXIS 41852 *; 2016 WL 1243757

BERT GREEN and LINDA GREEN, Plaintiffs, v. FIVE STAR MANUFACTURING, INC., Defendant.

Counsel: [*1] For Bert Green, an individual, Linda Green, an individual, Plaintiffs: Craig P Niedenthal, LEAD ATTORNEY, Shunnarah Injury Lawyers, P.C., Birmingham, AL.

For Five Star Manufacturing Inc, a Missouri foreign corporation, Defendant: C Peter Bolvig, III, LEAD ATTORNEY, HALL CONERLY & BOLVIG PC, Birmingham, AL; Brandon J Clapp, WHITAKER MUDD LUKE & WELLS LLC, Birmingham, AL.

Judges: STACI G. CORNELIUS, UNITED STATES MAGISTRATE JUDGE.

Opinion by: STACI G. CORNELIUS

Opinion

MEMORANDUM OPINION[1]

This is a products liability action brought by Bert and Linda Green against Five Star Manufacturing, Inc. It is before the undersigned on Five Star's (1) motion to preclude the expert testimony of Peter J. Leiss (Doc. 19), (2) motion for summary judgment (Doc. 20), (3) motion to strike the affidavits of Bert Green and Leiss submitted in opposition to its motion to preclude and motion for summary judgment (Doc. 29), and (4) motion for leave to file a reply brief in support of its motion for summary judgment that exceeds the page limitation established by the initial order governing this case (Doc. 30). The last enumerated **[*2]** motion is unopposed and due to be granted for good cause shown. For the reasons discussed below, the motion to strike the affidavits of Bert Green and Leiss is due to be granted in part and denied in part, the motion to preclude Leiss's expert testimony is due to be granted in part and denied in part, and summary judgment is due to be granted in Five Star's favor on all claims.

I. Facts

Viewed in the light most favorable to the plaintiffs and giving the plaintiffs the benefit of all reasonable inferences, the relevant facts are as follows: Bert Green purchased a set of two ramps manufactured by Five Star from a third-party retailer some time before 2004. (Doc. 21 at ¶ 3; Doc. 28 at ¶ 3). The ramps, which may be used to load a riding lawnmower onto the bed of a pickup truck, arch at the top to sit on a tailgate. (*See* Doc. 21-2 at 6). The model Green purchased came equipped with steel safety cables intended to secure the ramps to a truck bumper. (Doc. 21 at ¶ 3; Doc. 28 at ¶ 3). In 2003 or 2004, Five Star

[1] The parties have consented to the exercise of dispositive jurisdiction by a magistrate judge pursuant to 28 U.S.C. § 636(c). (Doc. 15).

substituted nylon safety straps for steel safety cables. (Doc. 21 at ¶ 3; Doc. 28 at ¶ 3).

Five Star would have sold the ramps to the retailer packaged in cardboard, and a safety manual **[*3]** would have been attached to the ramps. (Doc. 21 at ¶¶ 4-5; Doc. 28 at ¶¶ 4-5). However, Green did not receive the packaging or safety manual, presumably because he purchased the ramps off the floor, where the retailer had set them up as a display model. (Doc. 21 at ¶ 2; Doc. 28 at ¶ 2). Both the packaging and the safety manual include a depiction of the ramps attached to a truck with the steel safety cables. (Doc. 21 at ¶¶ 4, 6; Doc. 28 at ¶¶ 4, 6). Additionally, the packaging contains the verbiage "Be sure to always use your safety cables when loading and unloading equipment," while the safety manual instructs the user to "[a]ttach safety cables to the bumper or frame of the truck or trailer. . . . to keep the ramps in place until the weight of the equipment you are loading/unloading is on the ramps." (Doc. 21 at ¶¶ 4, 6; Doc. 28 at ¶¶ 4, 6). A decal on each ramp itself cautions the user to read the safety manual and warns that the "safety cable must be present and hooked." (Doc. 21 at ¶ 7; Doc. 28 at ¶ 7). As packaged—and as sold to Green—each safety cable, made of steel, was attached to a ramp. One end was looped around part of a ramp and secured with a cable clamp. The other end, to which **[*4]** a hook had been pressure fitted, was hooked to the ramp. (Doc. 21 at ¶ 11; Doc. 28 at ¶ 11).

On March 18, 2012, Green was using the ramps to load his riding lawnmower into the bed of his pickup truck. (Doc. 21 at ¶ 22; Doc. 28 at ¶ 22). He did not secure the ramps to his truck with the steel safety cables. (Doc. 21 at ¶ 22; Doc. 28 at ¶ 22). One of the ramps shifted, causing the lawnmower to come off the ramps. (Doc. 21 at ¶ 22; Doc. 28 at ¶ 22). Both the lawnmower and Green, who was riding the lawnmower, fell to the ground, and the lawnmower fell on top of Green. (Doc. 21 at ¶ 22; Doc. 28 at ¶ 22). Green claims to have sustained physical injuries as a result. (Doc. 21 at ¶ 22; Doc. 28 at ¶ 22). He commenced this action against Five Star, stating a claim under the Alabama Extended Manufacturer's Liability Doctrine ("AEMLD"), as well as claims for negligent and wanton design and failure to warn, breach of express warranty, and breach of implied warranty. (Doc. 1). Also included in the complaint is a claim for loss of consortium asserted by Green's wife. (*Id.*).

When deposed, Green initially testified he either never read the on-product warning that the "safety cable must be present and **[*5]** hooked" or could not remember whether he had read the warning. (Doc. 22-1 at 13-14, 21). Later, when questioned by his own attorney, Green testified he did read the warning and believed he had complied with it because the cables were present and hooked—albeit to the ramps themselves—when he purchased the ramps. (*Id.* at 34-35). Green also testified he believed the purpose of the steel cables was to support the weight of equipment being loaded via the ramps or increase the structural stability of the ramps. (Doc. 22-1 at 22-23). During his deposition, Green was shown the depiction of the steel safety cables connecting the ramps to a truck that is included in the safety manual and asked whether he would have understood from the depiction that the cables should have been connected to the bumper of his truck. (*Id.* at pp. 23-24). Green stated, "From the work that I have done with steel, no, it would not be run to the bumper." (*Id.*). He also was shown the verbiage in the safety manual instructing the user to "[a]ttach the safety cables to the bumper or frame of the truck or trailer." (*Id.* at 24). When asked whether he would have understood from the verbiage that the cables were supposed to connect the ramps to his truck, the following **[*6]** exchange ensued:

A. Well, that all depends. No, I wouldn't

agree with that.
Q. So, even if you had received this brochure and read it, would you have still set the ramps up the way you did on the day of the accident?
A. Well, I didn't get this.
Q. I know.
A. And to be honest with you, I don't know.

(*Id.*).

To support his claims, he has submitted the expert report of Peter J. Leiss, a licensed professional engineer employed by Robson Forensic, Inc. (Doc. 28-4). In the report, Leiss offers the following opinions regarding the ramps: (1) Five Star failed to conduct a proper hazard analysis of the ramps and, thereby, breached the standard of care applicable to a product manufacturer; (2) the ramps are unsafe as designed because (a) the diameter and material of the safety cables render the cables structural in appearance, (b) tools are required to adjust the safety cables, and (c) the warnings affixed directly to the ramps are incomplete and misleading because they do not indicate to what the cables should be attached; and (3) easily adjustable nylon safety straps are a technologically and economically feasible safer design alternative. (*Id.* at 9-15). Dr. William Vigilante, the head of Robson's human factors **[*7]** group, peer-reviewed Leiss's report. (Doc. 19-5 at 11).

II. Discussion

A. Motion to Strike

1. Green's Affidavit

In his affidavit submitted in opposition to Five Star's motion to preclude and motion for summary judgment, Green states (1) he was not asked any hypothetical questions about nylon straps during his deposition, (2) he has now seen photographs of the nylon straps Five Star substituted for steel cables not long after he purchased the ramps in question, and (3) he would have used nylon straps to secure the ramps to his truck because unlike the steel cables, they do not appear to be part of the structure of the ramps. (Doc. 27-5 at 2-3). Five Star argues Green's statement he would have used nylon straps to secure the ramps to his truck is speculative and conclusory. (Doc. 29 at 2-4). It further argues the statement contradicts Green's deposition testimony, which it characterizes as demonstrating Green did not contemplate a need for securing the ramps to his truck and would not have done so even if he had read the owner's manual. (*Id.* at 4-6).

"When a party has given clear answers to unambiguous questions which negate the existence of any issue of material fact, that party cannot thereafter **[*8]** create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony." *Van T. Junkins & Assoc. v. U.S. Indus., Inc.*, 736 F.2d 656, 657 (11th Cir.1984). A court must '"find some inherent inconsistency between an affidavit and a deposition before disregarding an affidavit' and state that if no such inherent inconsistency exists, 'any conflict or discrepancy between the two documents can be brought out at trial and considered by the trier of fact.'" *Santhuff v. Seitz*, 385 Fed. App'x 939, 944-45 (11th Cir. 2010) (quoting *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1530 (11th Cir. 1987)). Moreover, speculation and conclusory statements in an affidavit are inadmissible. *See Reliance Nat'l Indem. Co. v. Pinnacle Cas. Assur. Corp.*, 160 F. Supp. 2d 1327, 1332 (M.D. Ala. 2001) (speculation inadmissible); *Ojeda v. Louisville Ladder, Inc.*, 410 Fed. App'x 213, 215 (11th Cir. 2010) (evidence presented in opposition to summary judgment motion cannot consist of conclusory allegations). The affidavit

statement Five Star challenges, which addresses nylon safety straps, is not necessarily inherently inconsistent with Green's deposition testimony, which addresses steel safety cables. However, that statement is both speculative and conclusory. What Green believes he would have done if his ramp had been equipped with nylon straps, as opposed to steel cables, is not rooted in fact. It is pure conjecture. Therefore, Green's affidavit is inadmissible.

2. Leiss's Affidavit

Leiss's affidavit submitted in opposition to Five Star's motion **[*9]** to preclude and motion for summary judgment contains 69 paragraphs addressing Leiss's education and professional experience, as well as the report he submitted in connection with this action and Five Star's criticism of that report. (*See* Doc. 27-1). Five Star argues Leiss's affidavit is an untimely disclosure under Rule 26 of the *Federal Rules of Civil Procedure*, contradicts his deposition testimony, relies on Green's inadmissible affidavit, and contains statements inadmissible for a variety of reasons. (Doc. 29).

Rule 26 of the *Federal Rules of Civil Procedure* requires a party to submit and appropriately supplement an expert report that contains "a complete statement of all opinions the witness will express and the basis and reason for them" within the time prescribed by the trial court, FED R. CIV. P. 26(a)(2)(B), (D) & (E), and Rule 37 of those same rules precludes a party from using information not provided in accordance with Rule 26 absent substantial justification or harmless error, FED. R. CIV. P. 37(c)(1). While the Eleventh Circuit has held a supplemental expert report may be excluded pursuant to Rule 37(c) if not timely filed, *see Corwin v. Walt Disney Co.*, 475 F.3d 1239, 1252 (11th Cir. 2007), courts also have denied motions seeking to preclude consideration of expert affidavits on untimeliness grounds where the affidavits did not offer new opinions. *See Rockhill-Anderson v. Deere & Co.*, 994 F. Supp. 2d 1224, 1239 (M.D. Ala. 2014) (denying motion to strike experts' affidavits as **[*10]** untimely where "[t]he overall opinions expressed in the affidavits [were] consistent with previously disclosed reports and deposition testimonies"); *Lidle ex rel. Lidle v. Cirrus Design Corp.*, 2010 U.S. Dist. LEXIS 67031, 2010 WL 2674584, at *7 (S.D.N.Y. July 6, 2010) ("Courts in this district have held that where an expert affidavit expounded a wholly new and complex approach, as opposed to merely supporting an initial position, the expert's affidavit should be stricken. However, where an expert's affidavit provides evidentiary details for an opinion expressed in his expert report, those portions of his or her affidavit can be considered." (internal quotation marks and alterations omitted)). Review of Leiss's affidavit reveals that, contrary to Five Star's assertion, Leiss does not offer any new opinions. Rather, he provides greater detail regarding his qualifications to testify as an expert witness in this action and the methodology he claims to have applied in forming the opinions contained in his report. Accordingly, it is appropriate to consider the affidavit to the extent it is otherwise admissible.

Five Star makes a number of arguments regarding the admissibility of specific statements contained in Leiss's affidavit. Some are meritorious, while others are not: Given Green's affidavit is inadmissible, **[*11]** those paragraphs of Leiss's affidavit referencing and relying on Green's affidavit (Doc. 27-1 at ¶¶ 67-69) are inadmissible. Furthermore, Leiss's statements that Five Star was "negligent" in designing and testing the ramps and created a "defective" and "unreasonably dangerous" product (Doc. 27-1 at ¶ 41) are inadmissible legal conclusions. *See Strickland v. Royal Lubricant Co.*, 911 F. Supp. 1460, 1469 (M.D.

Ala. 1995) (holding affiant's purported opinion regarding adequacy of product warning was inadmissible to extent intended as statement warning was "inadequate," as that term is defined under Alabama law); *Griffin v. City of Clanton, Ala.*, 932 F. Supp. 1357, 1358-59 (M.D. Ala. 1996) (holding affiant's purported opinions officers acted carelessly, recklessly, unreasonably, and with deliberate indifference were inadmissible legal conclusions).

What remains does not inherently contradict Leiss's deposition testimony. Five Star's contention that Leiss's report and deposition testimony indicate his opinions are based on a single authoritative source at the same time his affidavit indicates he relied on several sources and methods (Doc. 29 at 8-9) is a mischaracterization. While Leiss specifically cited only one authoritative source in his report and deposition testimony, he indicated additional sources, similar in substance to the source **[*12]** identified, support his opinions. (Doc. 19-3 at 11-12; Doc. 19-5 at 23). Accordingly, his identification of those additional sources in his affidavit does not contradict his prior statements. Furthermore, rather than identify new methodologies relied on to form his opinions, Leiss expands on the hazard analysis identified in his report and deposition as the basis of his opinions.

Five Star argues the statements in Leiss's affidavit as to his qualifications are irrelevant, argumentative, conclusory, and self-serving. (Doc. 29 at 12). On the contrary, the additional details the affidavit provides about Leiss's education and professional experience are relevant to Five Star's argument Leiss is not qualified to offer expert testimony in this case, even if their inclusion in the affidavit is "self-serving" in the sense they lend support to the plaintiffs' position. Moreover, because as discussed below, Leiss's report and deposition testimony provide a sufficient basis for determining he is qualified to offer the opinions expressed, this argument is of no consequence. Likewise, while Five Star moves to strike those portions of the affidavit reciting and commenting on the deposition testimony **[*13]** of Jim Woodward, Five Star's corporative representative, on the grounds they are argumentative and contain improper hearsay (*id.* at 12-13), their propriety is irrelevant because they are not dispositive to any party's position regarding the motion to preclude or motion for summary judgment.

Five Star also seeks to strike those portions of the affidavit regarding Leiss's experience as a product engineer on the grounds the opinion for which that experience provides a foundation—that Five Star breached the standard of care applicable to a product manufacturer—is irrelevant to this case. (*Id.* at 10-11). This argument implicates the merits of Five Star's motion to preclude Leiss's expert report. Five Star's argument that those portions of the affidavit addressing Leiss's experience with human factors analysis are due to be struck because Leiss is not qualified to offer a human factors analysis of the ramp (*id.* at 13) also goes to the merits of that motion. Consideration of the motion, undertaken below, is the most logical and efficient way of addressing, albeit indirectly, these arguments.

B. Motion to Preclude

Rule 702 of the *Federal Rules of Evidence* governs the admission of expert testimony. It was amended in 2000 in response to *Daubert v. Merrell Dow Pharms., Inc.* , 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and the cases applying *Daubert* ***[*14]*** , including *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1990). *See* FED. R. EVID. 702 advisory committee's note to 2000 amendment. In *Daubert*, the Supreme Court held a trial court

must ensure scientific expert testimony is both reliable and relevant. 509 U.S. at 589-95. In *Kumho Tire*, the Supreme Court held the "gatekeeping" obligation imposed on trial courts by *Daubert* applies not only to testimony based on scientific knowledge, but also to testimony based on technical and other specialized knowledge. 526 U.S. at 141. In its current version, Rule 702 provides:

> [a] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

FED. R. EVID. 702. To fulfill its gatekeeping obligation under *Daubert*, a trial court must undertake a "rigorous inquiry" to determine whether:

> (1) the expert is qualified to testify competently regarding the matters he intends to **[*15]** address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

Rink v. Cheminova, Inc., 400 F.3d 1286, 1291-92 (11th Cir. 2005) (internal quotation marks omitted). The party offering the expert has the burden of proving each of the foregoing elements by a preponderance of the evidence. *Id.* at 1292.

Five Star argues the court should preclude Leiss's testimony because he is not qualified to offer the proffered opinions, which, in any event, are unreliable and irrelevant. (Doc. 19-1). It argues Leiss is unqualified because he has no experience with the design of lawnmower loading ramps or experiential knowledge of the industry and because his opinions essentially are the product of a human factors analysis with which he has no experience, either. (*Id.* at 9-14). It argues Leiss's proffered opinions regarding the ramps' design defects and a safer alternative design are unreliable because they are based on speculation, rather than any reliable methodology. (*Id.* at 14-21). Finally, it argues Leiss's opinion Five Star **[*16]** breached the standard of care for a product manufacturer by failing to conduct a proper hazard analysis is irrelevant because the sale of a defective product establishes liability under the AEMLD, regardless of a defendant's conduct in designing or manufacturing the product. (*Id.* at 21-23).[2]

1. Leiss's Qualification

Various considerations may qualify an individual to offer expert testimony on a subject. *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004) (citing plain language of Rule 702). "While scientific training or education may provide possible means to qualify, experience in a field may

[2] Although the plaintiffs request oral argument on Five Star's motion to preclude, the undersigned concludes a hearing is not necessary, given Leiss has had the opportunity to explain his opinions in his report, during his deposition, and through his affidavit. *See Cook ex rel. Estate of Tessier v. Sheriff of Monroe Cty., Fla.*, 402 F.3d 1092, 1113 (11th Cir. 2005) ("*Daubert* hearings are not required, but may be helpful in complicated cases involving multiple expert witnesses." (internal quotation marks omitted)); *United States v. Junkins*, 537 F. Supp. 2d 1257, 1259 (S.D. Ala. 2008) ("It is well established that a hearing is not required every time a party invokes a *Daubert*-type objection.").

offer another path to expert status." *Id.* at 1260-61. Leiss is a licensed professional engineer employed by Robson Forensic, Inc. (Doc. 19-3 at 3). He has a bachelor's **[*17]** of science degree in mechanical engineering and 15 years of experience in the design, development, and manufacturing of vehicles, including as a plant vehicle engineer, vehicle development engineer, and product engineer with Chrysler, LLC, and a test support engineer with General Motors Corporation. (*Id.* at 3, 17-18). His experience includes the design and implementation of vehicle safeguards intended to benefit consumers, as well as the preparation of warnings and instructions that accompany those safeguards. (*Id.* at 3). This experience qualifies him to offer opinions as to the design of the ramp and its on-product warnings from a consumer safety perspective.

Five Star's emphasis on Leiss's lack of experience with the design of ramps, specifically, relies on *Beam v. McNeilus Truck and Mfg., Inc.*, in which this court held a mechanical engineer could not offer expert testimony regarding the design of a garbage truck because he had little or no experience with the design of garbage trucks, 697 F. Supp. 2d 1267, 1275-78 (N.D. Ala 2010). However, this court also has noted:

> it is an abuse of discretion for a trial court to exclude expert testimony solely on the ground that the witness is not qualified to render an opinion because the witness lacks expertise **[*18]** in specialized areas that are directly pertinent to the issues in question, if the witness has educational and experiential qualifications in a general field related to the subject matter of the issue in question.

Thomas v. Evenflo Co., 2005 U.S. Dist. LEXIS 46512, 2005 WL 6133409, at *6 (N.D. Ala. Aug. 11, 2005) (citing *Maiz v. Virani*, 253 F.3d 641, 665 (11th Cir. 2001), *aff'd*, 205 Fed. App'x 768 (11th Cir. 2006). *See also United States v. Wen Chyu Liu*, 716 F.3d 159, 168-69 (5th Cir. 2013) (holding trial court erred in excluding chemical engineer's interpretation of engineering documents for manufacturing chlorinated polyethylene because "[a] lack of specialization should generally go to the weight of the evidence rather than its admissibility"). In this case, the undersigned is satisfied Leiss's experience assessing vehicle product designs for consumer safety and implementing protections against design hazards qualifies him to offer testimony regarding the design of a relatively simple product intended to be used in connection with a vehicle from a consumer safety perspective.

2. Reliability & Relevance of Leiss's Opinions

In assessing reliability, it is "[n]ot the role of the district court to make ultimate conclusions as to the persuasiveness of the proffered evidence," *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1341 (11th Cir. 2003), but "[t]o see if how [an expert] got to where he ended up makes reasoned, scientific sense," *McCreless v. Global Upholstery Co., Inc.*, 500 F. Supp. 2d 1350, 1353 (N.D. Ala. 2007). In doing so, a court may consider whether the methodology employed by the **[*19]** expert (1) can be tested, (2) has been subjected to peer review, (3) has a known or potential rate of error, and (4) is generally accepted by the relevant expert community. *Daubert*, 509 U.S. at 593-94. "These factors are illustrative, not exhaustive; not all of them will apply in every case, and in some cases other factors will be equally important in evaluating the reliability of proffered expert opinion." *Frazier*, 387 F.3d at 1262. Although an expert's experience may support his opinions, experience alone does not necessarily "render[] reliable *any*

conceivable opinion the expert may express." *Id.* at 1261 (emphasis in original). An expert who relies solely or primarily on experience "'must explain *how* that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts.'" *Frazier*, 387 F.3d at 1265 (quoting FED. R. EVID. 702 advisory committee's note to 2000 amendment) (emphasis added in *Frazier*). The *ipse dixit* of a qualified expert is insufficient to establish reliability. *Frazier*, 387 F.3d at 1261. The trial court must do more than '"tak[e] the expert's word for it.'" *Id.* (quoting FED. R. EVID. 702 advisory committee's note to 2000 amendment).

In assessing relevance, a trial court should determine whether the expert testimony reflects **[*20]** specialized knowledge that will help the jury understand the evidence or determine a fact in issue. *See* FED. R. EVID. 702. Expert testimony is not helpful to the jury if it does not concern "matters that are beyond the understanding of the average lay person" or "offers nothing more than what lawyers for the parties can argue in closing arguments." *Frazier*, 387 F.3d at 1262-63. Nor is it helpful if it does not relate to any issue in the case. *Daubert*, 509 U.S. at 591.

a. Opinion Five Star Failed to Conduct Proper Hazard Analysis

The basis of Leiss's first opinion is his application of principles of product design, which he contends require a product manufacturer to undertake an engineering analysis to ensure the design of a reasonably safe product, to Woodward's testimony regarding the extent of testing Five Star conducted on the ramps. (Doc. 19-3 at 10-12). Although in his report, Leiss cites a single treatise on human factors and engineering to support his opinion Five Star should have tested the ramp more rigorously (*id.* at 11-12), Leiss testified during his deposition that other texts espouse the same principles as the treatise identified (Doc. 19-5 at 23). Leiss's application of general principles governing the development of a safe product to Woodward's testimony **[*21]** regarding the extent of testing conducted on the ramps constitutes a reliable application of reliable principles to sufficient facts.

Moreover, the opinion he reached as a result is relevant to this action. Five Star argues the statements in Leiss's affidavit regarding the standard of care applicable to a product manufacturer are irrelevant because the gravamen of a products liability case is whether a product is defective or unreasonably dangerous, not whether the manufacturer was negligent. (Doc. 27 at 21-23; Doc. 29 at 10-11). This argument ignores the additional tort claims, including ones for negligence and wantonness, asserted in this action that do involve a determination whether Five Star breached the standard of care for a product manufacturer. For these reasons, Leiss may opine as to Five Star's compliance with the standard of care applicable to product manufacturers in developing and testing the ramps.[3]

b. Opinion Ramp [*22] is Unsafe as Designed

It is clear the basis of Leiss's opinion the ramp is unsafe as designed is what he refers to interchangeably as a "hazard analysis," the Engineering Triad, the Safety Triad, and the Safety Hierarchy. (*See* Doc. 19-5 at 28; Doc. 27-1 at 5). According to Leiss, this

[3] However, because as discussed below, Green has failed to produce sufficient evidence to support other elements of his negligent and wanton design and failure-to-warn claims, Leiss's opinion Five Star did not test the ramp sufficiently is ultimately irrelevant.

methodology instructs that if a hazard is detected, it should be designed out; if it cannot be designed out, it should be guarded against; and if it cannot be guarded against, persons subjected to the hazard should be warned about it. (Doc. 19-5 at 28; Doc. 27-1 at 5). Leiss states this methodology has been described in authoritative texts and articles since at least 1955, when its general principles were cited in the National Safety Council's Accident Prevention Manual for Industrial Operations as three of four general rules. (Doc. 27-1 at 5). In addition to this methodology, Leiss cites a paper presented at a meeting of human factors engineers, which found the rate of compliance decreased as the cost of compliance increased, to support his opinion that the necessity of tools to adjust the safety cables renders the ramps unsafe. (*Id.* at 10). He further notes it is widely accepted in product engineering that concise, **[*23]** on-product instructions and warnings are necessary to support his opinion the ramps' on-product warnings are incomplete and misleading. (*Id.*). Leiss researched regulations, standards, and authoritative works applicable to ramps, specifically (Doc. 27-1 at 8), but found none (Doc. 19-5 at 14).

With the foregoing methodology and principles as his guide, Leiss reviewed certain deposition testimony and pleadings, as well as photographs of the ramps, the ramps' on-product warnings, and Green's truck, at which point he claims the ramps' defects became obvious to him. (Doc. 27-1 at 9). Leiss did not inspect the ramps before forming his opinions (Doc. 19-5 at 14), although he claims his inspection of the ramps after completing his report confirmed the conclusions he reached (Doc. 27-1 at 9-10). Leiss did not conduct any tests or calculations before completing his report. (Doc. 19-5 at 14). Although Leiss reviewed third-party testing performed on the ramps (Doc. 19-3 at 23), the plaintiffs concede the testing was of no significant value to Leiss's analysis (Doc. 27 at 4). Moreover, while Leiss investigated competitors' products (Doc. 27-1 at 9), he himself acknowledged that he did not use that **[*24]** research to form any of his opinions (Doc. 19-5 at 14).

The undersigned is willing to accept the so-called Safety Triad as a reliable methodology. However, Leiss has failed to reliably apply this methodology to sufficient facts or data. Nowhere in his report or affidavit or during his deposition did Leiss explain how or why the Safety Triad led to his conclusion the structural appearance of the steel safety cables, necessity of tools to adjust the safety cables, or substance of the on-product warnings renders the ramps unsafe. Moreover, he does not apply the purported inverse relationship between the cost of compliance and the rate of compliance to any objective facts or data in this case. He did not undertake a study to determine whether consumers found the safety cables confusing or too costly (in terms of time or energy) to use. (*See* Doc. 19-5 at 28).[4] Likewise, Leiss has failed to explain how or why the obvious necessity of concise, on-product instructions and warnings led to his conclusion the warnings on the ramps are incomplete and misleading. *See Graves v. Mazda Motor Corp.*, 675 F. Supp. 2d 1082, 1102-03 (W.D. Okla. 2009), *aff'd*, 405 Fed. App'x 296 (10th Cir. 2010) (holding expert witness's opinion uncommon design of gear shifter made it unreasonably dangerous was not reliable because **[*25]** expert did not conduct any tests to confirm or quantify driver confusion, identify specifically applicable

[4] Both the plaintiffs and Leiss emphasize that Five Star produced limited information regarding the development and **[*26]** testing of the ramp design. (Doc. 27 at 21 n. 1; Doc. 27-1 at 7-9). To the extent the plaintiffs argue this excuses the gaps in Leiss's report, this argument must be rejected. Any lack of records or testing on Five Star's part does not permit Leiss to assert opinions without sufficiently explaining how or why he applied a hazard analysis to the facts and data he did have at his disposal to reach those opinions.

engineering standards, or apply engineering principles on which he purported to rely, including Safety Triad and hazard analysis considerations, to objective data). Finally, Leiss has explained neither how nor why his experience led to his conclusions, despite having had several opportunities to do so. In sum, there is an analytical gap in Leiss's report. *See General Elec. Co v. Joiner*, 522 U.S. 136, 146, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997) (noting trial court "may conclude that there is simply too great an analytical gap between the data and the opinion proffered"); FED. R. EVID. 702 advisory committee's note to 2000 amendment (identifying factor relevant to determining reliability of expert testimony as whether expert "has unjustifiably extrapolated from an accepted premise to an unfounded conclusion"); *McGee v. Evenflo Co., Inc.*, 2003 U.S. Dist. LEXIS 25039, 2003 WL 23350439, at *14 (M.D. Ga. Dec. 11, 2003) (holding that while engineer's expert opinions may have been accurate, he had done nothing to show that they were), *aff'd*, 143 Fed. Appx. 299 (11th Cir. 2005). With nothing to breach the gap, Leiss's opinions regarding aspects of the ramps that render them unsafe are nothing more than *ipse dixit*.

Moreover, his opinions include *ipse dixit* regarding matters that are within a jury's common experience and knowledge. The structural appearance of the steel safety cables and unclear and ambiguous nature of the substance of the on-product warnings are commonsense observations a jury may make. *See Snoznik v. Jeld-Wen, Inc.*, 2010 U.S. Dist. LEXIS 46814, 2010 WL 1924483, at *19 (W.D.N.C. May 12, 2010) (holding human factors expert's opinion instructions for operation of window were unclear and ambiguous were commonsense observations within realm of common experience and knowledge of jurors); *Jaquillard v. Home Depot U.S.A., Inc.*, 2012 U.S. Dist. LEXIS 19889, 2012 WL 527421, at *5 (S.D. Ga. Feb. 16, 2012) (holding court could not allow witness to attach "expert" conclusion to opinion merely based on commonsense observation that water makes walking surfaces slippery). For these reasons, Leiss is precluded from offering his opinion the ramps are unsafe as designed.

c. Opinion as to Safer Alternative [*27] Design

In support of his third opinion, Leiss's report notes nylon straps have been used as tie-downs for objects and tarping for decades and that the proposed design alternative provides equipment similar to what most competitive products use. (Doc. 19-3 at 13). Leiss states this design alternative was technologically and economically feasible when Green bought the ramps. (*Id.*). It appears Leiss arrived at this opinion by noting some other ramp manufacturers use nylon safety straps and Five Star began using nylon safety straps not long after Green bought the ramps. These mere observations do not constitute a reliable methodology from which an expert opinion as to a safer alternative design could be formed. Leiss did not test the design he proposes against the design in question, nor did he cite testing anyone else undertook. He has wholly failed to explain how he reached the conclusion ramps incorporating nylon safety straps are a safer design than ramps using steel safety cables. Likewise, his assertion the design alternative he proposes was technologically and economically feasible when Green bought the ramps is no more just that—an assertion not grounded in any actual facts or data. **[*28]** *See McCreless*, 500 F. Supp. 2d at 1357-58 (holding expert's opinion as to safer alternative chair design was inadmissible because expert failed to test proposed alternative design against design used by defendant). Accordingly, Leiss is precluded from offering this opinion, as well.

C. Motion for Summary Judgment

1. Standard of Review

Under Rule 56 of the Federal Rules of Civil Procedure, "[t]he [district] court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "The district court should resolve all reasonable doubts about the facts in favor of the non-movant, and draw all justifiable inferences in [the non-movant's] favor." *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993) (internal quotation marks omitted).

The party seeking summary judgment bears the initial burden of informing the district court of the basis for its motion and identifying those portions of the pleadings or filings the party believes demonstrate the absence of a genuine issue of material fact. *Id.* For an issue on which the non-movant bears the burden of proof, the movant may meet its initial burden on summary judgment by demonstrating an "absence of evidence to support the non-moving party's case." *Id.* at 1115-16. The burden then shifts to the non-movant **[*29]** to "show that the record in fact contains supporting evidence, sufficient to withstand a directed verdict motion, which was 'overlooked or ignored' by the moving party," or to "come forward with additional evidence sufficient to withstand a directed verdict motion at trial based on the alleged evidentiary deficiency." *Id.* at 1116-17. "[M]ere conclusions and unsupported factual allegations are legally insufficient to defeat a summary judgment motion." *Ellis v. England*, 432 F.3d 1321, 1326 (11th Cir. 2005).

> [T]he plain language of [Rule 56] mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses." *Id.* at 323-34.

2. AEMLD, Negligence & Wantonness Claims

To establish an AEMLD claim, a plaintiff must show the product **[*30]** in question was defective. *Goree v. Winnebago Indus., Inc.*, 958 F.2d 1537, 1541 (11th Cir. 1992) (citing *Sears, Roebuck & Co., Inc. v. Haven Hills Farm, Inc.*, 395 So. 2d 991, 994 (Ala. 1981)). A defective product is one that '"does not meet the reasonable expectations of an ordinary consumer as to its safety."' *Goree*, 958 F.2d at 1541 (quoting *Casrell v. Altec Indus., Inc.*, 335 So. 2d 128, 133 (Ala. 1976)). Otherwise put, a defect is '"that which renders a product "unreasonably dangerous," i.e., not fit for its intended purpose . . . ."' *Goree*, 958 F.2d at 1541 (quoting *Casrell*, 335 So. 2d at 133). Three types of defects may give rise to liability under the AEMLD: (1) manufacturing defects, (2) design defects, and (3) failures to warn. ALABAMA LAW OF DAMAGES § 32:10 (6th ed.). Green alleges both a design defect—essentially, that the appearance of the steel safety cables makes it unclear the cables are intended to secure the ramps to a truck—and

a warning defect—that the on-product warning that the "safety cables must be present and hooked" is incomplete and misleading. It appears he may assert the warning defect only through the common law torts of negligence and wantonness. (*See* Doc. 28 at 16). However, in the interest of thoroughness, it will be addressed under the AEMLD, as well.

a. Design Defect

To prove a design defect under the AEMLD or through the common law torts of negligence or wantonness, a plaintiff must show '"a safer, practical, alternative design was available **[*31]** to the manufacturer at the time it manufactured the [product],"' by in turn showing '"[t]he plaintiff's injuries would have been eliminated or in some way reduced by use of the alternative design"' and '"the utility of the alternative design outweighed the utility of the design actually used."' *Beam*, 697 F. Supp. 2d at 1275 (quoting *General Motors Corp. v. Jernigan*, 883 So. 2d 646, 662 (Ala. 2003)). The utility prong requires consideration of such factors as '"the intended use of the [product], its styling, cost, and desirability, its safety aspects, the foreseeability of the particular accident, the likelihood of injury, and the probable seriousness of the injury if that accident occurred, the obviousness of the defect, and the manufacturer's ability to eliminate the defect."' *Beam*, 697 F. Supp. 2d at 1275 (quoting *Jernigan*, 883 So. 2d at 662).

Whether Green has demonstrated the other requirements for maintenance of a design defect claim under the AEMLD and through the common law torts of negligence and wantonness—including that the appearance of the steel safety cables renders the ramps unreasonably dangerous or otherwise deficient and that Five Star did not undertake sufficient testing to design a safe product—he has failed to come forth with substantial evidence of a safer, practical, alternative design. Absent Leiss's opinion that **[*32]** nylon safety straps were a safer, feasible alternative to steel safety cables, which is precluded by *Daubert* and its progeny, and Green's affidavit testimony he would have used nylon straps to secure the ramps to his truck, which is inadmissible speculation, the only evidence to support Green's proposed alternative design is the fact that Five Star substituted nylon safety straps for the steel safety cables not long after Green bought the ramps in question. However, the mere existence of an alternative design does not demonstrate the utility of the alternative design outweighed the utility of the allegedly defective design (i.e., that the alternative design was of greater overall safety). *See Richards*, 21 F.3d at 1056-58 (holding plaintiff's contention proposed alternative tire design was safer than tire design in question because other tire manufacturers used proposed alternative design was insufficient to maintain negligent or wanton design defect claim); *Brest v. Chrysler Corp.*, 939 F. Supp. 843, 847-48 (M.D. Ala. 1996) (granting summary judgment in defendant's favor on negligence, wantonness, and AEMLD claims where plaintiff failed to present any evidence as to whether safe, practical, alternative design to vehicle's soft top existed beyond expert's statement "alternative **[*33]** designs existed"). Because Green has failed to come forth with sufficient evidence to support an element of his design defect claims asserted under the AEMLD and through the common law torts of negligence and wantonness, those claims must fail.

b. Warning Defect

A critical element of a failure-to-warn claim brought under the AEMLD or through the common law torts of negligence or wantonness is proximate cause. *Bodie v. Purdue Pharma Co.*, 236 Fed. App'x 511, 518

(11th Cir. 2007) (AEMLD and negligence) (citing *Clarke Indus., Inc. v. Home Indem. Co.*, 591 So. 2d 458, 461 (Ala. 1991)); *Sears, Roebuck and Co. v. Harris*, 630 So. 2d 1018, 1030 (Ala. 1993) (negligence and wantonness). To prove an inadequate warning was the proximate cause of his injuries, a plaintiff must demonstrate he would have read and heeded an adequate warning and that by doing so, the accident would have been prevented. *Rodgers v. Shave Mfg. Co., Inc.*, 993 F. Supp. 1428, 1437 (M.D. Ala. 1998) (citing *Deere & Co. v. Grose*, 586 So. 2d 196, 198 (Ala. 1991)). A failure-to-warn claim should not be submitted to the jury absent substantial evidence supporting proximate causation. *Barnhill v. Teva Pharms. USA, Inc.*, 819 F. Supp. 2d 1254, 1262 (S.D. Ala. 2011) (citing *Deere*, 586 So. 2d at 198). The mere existence of an inadequate warning does not create a presumption the plaintiff would have heeded an adequate warning. *Barnhill*, 819 F. Supp. 2d at 1262 (rejecting plaintiff's argument to the contrary). Moreover, there is insufficient evidence to support a jury question on proximate cause where it is undisputed that a plaintiff failed to read the warning he alleges is inadequate: If a plaintiff **[*34]** did not read the alleged inadequate warning, there is no evidence from which a reasonable juror could infer the plaintiff would have read and heeded an adequate warning and, thus, no evidence from which a reasonable juror could infer an adequate warning would have prevented the plaintiff's injury. *Bishop v. Bombardier, Inc.*, 399 F. Supp. 2d 1372, 1385 (M.D. Ga. 2005) (citing *E.R. Squibb & Sons, Inc. v. Cox*, 477 So. 2d 963, 971 (Ala. 1985); *Gurley v. American Honda Motor Co.*, 505 So. 2d 358, 361 (Ala. 1987)). On the other hand, where a plaintiff read relevant, existing warnings, there is sufficient evidence for a jury to reasonably infer the plaintiff would have read additional warnings; and where a plaintiff followed the instructions given, there is sufficient evidence for a jury to reasonably infer the plaintiff would have followed additional instructions. *Harris*, 630 So. 2d at 1030; *Clarke Indus., Inc. v. Home Indem. Co.*, 591 So. 2d 458, 461 (Ala. 1991).

Here, there is a question of fact whether Green read the warning he alleges was inadequate. When deposed, Green initially testified he either never read the warning or could not remember whether he had read the warning. (Doc. 22-1 at 13-14, 21). Later, when questioned by his own attorney, Green testified he did read the warning and believed he had complied with it because the cables were hooked. (*Id.* at 34-35). However, while creating a question of fact as to whether he read the warning in question and, thus, whether he would have read **[*35]** a more precise warning, Green's deposition testimony also demonstrates there is no question of fact as to whether Green would have heeded the more precise warning for which he advocates—one that includes a verbal or visual instruction as to what the cables should be attached and how, as well as the consequences of failure, to use the cables. When shown the language in the safety manual instructing the user to "[a]ttach the safety cables to the bumper or frame of the truck or trailer," Green indicated he would not have understood the verbiage to require the safety cables to connect the ramps to his truck or, at least, that he did not know whether he would have reached that understanding. (Doc. 22-1 at 24). Moreover, when shown the depiction of the steel safety cables connecting the ramps to a truck that is included in the safety manual and asked whether he would have understood from the depiction that the cables should have been connected to the bumper of his truck, Green stated, "From the work that I have done with steel, no, [they] would not be run to the bumper." (*Id.* at 23-24). In light of this testimony, there is not substantial evidence from which a jury

reasonably could infer Green would have heeded **[*36]** the more precise warning for which he advocates. Without sufficient evidence to demonstrate the alleged inadequate warning was the proximate cause of his injuries, Green's failure-to-warn claims asserted under the AEMLD and through the common law torts of negligence and wantonness must fail. *See Yarbrough v. Sears, Roebuck and Co.*, 628 So. 2d 478, 482-83 (Ala. 1993) (holding that where plaintiff read but failed to heed clear, specific warnings and instructions, there was no evidence any other warning or instruction would have been heeded and prevented accident).

3. Warranty Claims

Green concedes his breach-of-express-warranty claim is due to be dismissed. (Doc. 28 at 22). Five Star argues Green cannot maintain a breach-of-implied-warranty claim against it because the parties have no privity. (Doc. 21 at 27-28). Green disputes that privity is required to maintain a breach-of-implied-warranty claim against an entity that manufactured but did not actually sell a product, at least in the case of personal injury and not pure economic damage. (Doc. 28 at 22-23). Each party relies on cases from this district court to support its position (*see id.*; Doc. 21 at 27-28), although Five Star notes the case on which Green relies is unpublished (Doc. 30-1 at 23-24). Even **[*37]** assuming a consumer may bring a breach-of-implied-warranty claim against a manufacturer with which he has no privity, Green has failed to come forth with evidence to support such a claim against Five Star.

Alabama law implies a warranty of merchantability into the contract for a sale of goods if the seller is a merchant with respect to the goods in question. *See* Ala. Code § 7-2-314(1). To be merchantable, goods must be, amongst other things, fit for the ordinary purposes for which they are used. *See* Ala. Code § 7-2-314(2). Attempting to reconcile Alabama case law addressing the viability of breach-of-implied warranty claims in light of the development of the AEMLD, federal courts have held that where evidence shows a product is fit for its intended use, the AEMLD subsumes the warranty claim, even though the product may contain inherent dangers, but that where evidence shows the product was not fit for its intended use, both the warranty claim and the AEMLD claim are viable. *See Wilson v. Kidde Products Ltd., Co.*, 2012 U.S. Dist. LEXIS 114405, 2012 WL 3542210, at *10 (N.D. Ala. Aug. 14, 2012) (reconciling *Shell v. Union Oil Co.*, 489 So. 2d 569, 571 (Ala. 1986) with *Spain v. Brown & Williamson Tobacco Corp.*, 872 So. 2d 101 (Ala. 2003) and *Allen v. Delchamps, Inc.*, 624 So. 2d 1065 (Ala. 1993)). *See also Barnhill*, 819 F. Supp. 2d at 1263 ("In general, Alabama law does not recognize a cause of action for breach of implied warranty of merchantability for inherently dangerous products."); *Bodie*, 236 Fed. App'x at 523-24 ("[C]ourts applying Alabama law have seen fit to subsume U.C.C.-based breach **[*38]** of implied warranty claims into tort and product liability claims, where the product is fit for its intended use and there is no evidence of 'non-merchantability' other than a general allegation that the product contains inherent dangers.").

The ramps were intended to be used to load riding equipment onto the flat bed of a vehicle after being secured to the bumper of the vehicle with steel safety cables. There is no evidence the ramps were not fit for that use or were otherwise commercially unsuitable. Green's warranty claim is simply a re-statement of his AEMLD and negligent and wanton failure to warn claims. Accordingly, Green's breach-of-implied-warranty claim is not viable.

4. Loss-of-Consortium Claim

"In Alabama, a loss of consortium claim 'is derivative of the claims of the injured spouse . . . [whereby the] loss-of-consortium claim must fail if [the direct] claims fail.'" *Rhoton v. 3M Company*, 2015 U.S. Dist. LEXIS 162114, 2015 WL 7770234, at *3 (N.D. Ala. Dec. 3, 2015) (quoting *Flying J Fish Farm v. Peoples Bank of Greensboro*, 12 So. 3d 1185, 1196 (Ala. 2008)). Given no claim remains from which Green's wife's loss-of-consortium claim may derivate, that claim fails, as well.

III. Conclusion

For the foregoing reasons, Five Star's motion for leave to file a reply brief in support of its motion **[*39]** for summary judgment that exceeds the page limitation established by the initial order governing this case (Doc. 30) is **GRANTED**. Five Star's motion to strike the affidavits of Bert Green and Leiss submitted in opposition to its motion to preclude and motion for summary judgment (Doc. 29) is **GRANTED** in part and **DENIED** in part, consistent with this memorandum opinion. Five Star's motion to preclude Leiss's expert testimony (Doc. 19) is **GRANTED** in part and **DENIED** in part, consistent with this memorandum opinion. Finally, Five Star's motion for summary judgment in its favor as to all claims (Doc. 20) is **GRANTED**. A separate final order will be entered.

DONE this 30th day of March, 2016.

/s/ Staci G. Cornelius

STACI G. CORNELIUS

U.S. MAGISTRATE JUDGE

FINAL JUDGMENT

In accordance with the memorandum opinion entered contemporaneously herewith, it is **ORDERED** that the defendant's motion for summary judgment (Doc. 20) is **GRANTED**. Judgment is **ENTERED** in favor of the defendant, and the plaintiffs' claims are **DISMISSED WITH PREJUDICE**. Costs taxed as paid.

DONE this 30th day of March, 2016.

/s/ Staci G. Cornelius

STACI G. CORNELIUS

U.S. MAGISTRATE JUDGE

End of Document

Magoffe v. JLG Indus.

United States District Court for the District of New Mexico

May 7, 2008, Decided

No. CIV 06-0973 MCA/ACT

Reporter

2008 U.S. Dist. LEXIS 99080 *; CCH Prod. Liab. Rep. P18,026

INGRID MAGOFFE, as Personal Representative of the ESTATE OF ANTHONY MAGOFFE, deceased, Individually, and as Next Friend of her minor children, ANTHONY JAMES MAGOFFE, and JIMMY MAGOFFE; and AZUCENA MICHEL, as Personal Representative of the ESTATE OF CAMERINO MICHEL RAMIREZ, deceased, Individually, and as Next Friend of her minor children, MELISSA ORNELAS MICHEL, ANTHONY ORNELAS MICHEL, and MELANIE ORNELAS MICHEL; and JAMES MAGOFFE, Individually, Plaintiffs, vs. JLG INDUSTRIES, INC., a Pennsylvania corporation; and UNITED RENTALS NORTHWEST, INC., an Oregon corporation, Defendants.

Subsequent History: Related proceeding at United Rentals Northwest, Inc. v. Yearout Mech., Inc., 2008 U.S. Dist. LEXIS 117290 (D.N.M., Aug. 9, 2008)

Affirmed by, Request denied by Magoffe v. JLG Indus., 2010 U.S. App. LEXIS 7182 (10th Cir. N.M., Apr. 7, 2010)

Prior History: Magoffe v. JLG Indus., 2008 U.S. Dist. LEXIS 99072 (D.N.M., May 7, 2008)

Counsel: [*1] For Ingrid Magoffe, as Personal Representative of the Estate of Anthony Magoffe, deceased, individually and as Next Friend of her minor children, estate of Anthony Magoffe, next friend Anthony James Magoffe, next friend Jimmy Magoffe, Azucena Michel, as Personal Representative of the Estate of Camerino Michel Ramirez, deceased, Individually and as Next Friend of her minor children, estate of Camerino Michel Ramirez, next friend Melissa Ornelas Michel, next friend Anthony Ornelas Michel, next friend Melanie Ornelas Michel, James Magoffe, Individually, Plaintiffs: Kurt Wihl, LEAD ATTORNEY, Albuquerque, NM; Mariposa Padilla Sivage, Thomas C. Bird, LEAD ATTORNEYS, Keleher & McLeod, Albuquerque, NM.

For JLG Industries, Inc, a Pennsylvania corporation, Defendant: Clifford K. Atkinson, John S. Thal, LEAD ATTORNEYS, Atkinson & Thal, PC, Albuquerque, NM; Kyle Rowley, LEAD ATTORNEY, Holloway & Rowley, P.C., Houston, TX.

For United Rentals Northwest, Inc, an Oregon corporation, Defendant: Charles J. Vigil, Paul Koller, LEAD ATTORNEYS, Rodey Dickson Sloan Akin & Robb, P.A., Albuquerque, NM.

Judges: M. CHRISTINA ARMIJO, UNITED STATES DISTRICT JUDGE.

Opinion by: M. CHRISTINA ARMIJO

Opinion

MEMORANDUM OPINION AND ORDER

THIS MATTER [*2] comes before the Court on the following motions: (1) *Defendant JLG*

Industries, Inc.'s Motion for Summary Judgment [Doc. 149] filed on February 1, 2008; (2) Defendant *JLG's Motion to Exclude Opinions of Charles Proctor* [Doc. 154] filed on February 1, 2008; (3) Defendant *JLG's Motion to Exclude Opinions of Vincent Gallagher* [Doc. 155] filed on February 1, 2008; (4) *JLG's Motion to Strike Affidavit of James Magoffe* [Doc. 184] filed on March 10, 2008; (5) Defendant *JLG's Motion to Strike Affidavit of Vincent Gallagher* [Doc. 186] filed on March 10, 2008; and (5) Defendant *JLG's Motion to Strike Affidavit of Charles Proctor* [Doc. 187] filed on March 10, 2008. Having considered the parties' submissions, the relevant law, and otherwise being fully advised in the premises, the Court finds that Defendant JLG Industries, Inc. is entitled to summary judgment on all of Plaintiff's claims for the reasons set forth below. The Court also grants Defendant JLG's motions to strike the affidavit of Plaintiff James Magoffe and to exclude the testimony of Plaintiffs' experts, Charles Proctor and Vincent Gallagher. [1]

I. BACKGROUND

On September 8, 2006, Plaintiffs filed a civil action in the Second Judicial District Court for the County of Bernalillo, State of New Mexico, asserting the following claims against Defendants JLG Industries, Inc. ("JLG"), and United Rentals Northwest, Inc. ("United Rentals"): (1) strict liability for defective design and manufacture; (2) negligence; (3) negligent infliction of emotional distress; and (4) loss of consortium. Each of these claims arises from a fatal accident in which two workers fell to their deaths when an "500 RTS" scissor lift manufactured by Defendant JLG and owned by Defendant United Rentals tipped over in an aircraft hanger in Albuquerque, New Mexico, on or about April 1, 2006. Plaintiffs in this case are the brother of one of the deceased workers, their personal representatives, and the next friends of their minor children.

The "500 RTS" scissor lift involved in the fatal accident can be described as a portable elevator on wheels with a retractable work platform on which the two workers were standing when the lift **[*4]** started tipping over on its side. In order to prevent such tip-over accidents, the scissor lift is equipped with four outriggers or leveling jacks which are designed to hold the lift in a stable, level, and immobile position while the work platform is elevated. In this case, however, the scissor lift became unstable and tipped over because one of its leveling jacks was improperly raised while the work platform was approximately 45 to 50 feet above the concrete floor of the aircraft hangar. With one of its leveling jacks raised, the scissor lift allegedly tipped over in a manner similar to the way a chair would tip over if it suddenly lost one of its legs.

On October 10, 2006, Defendants JLG and United Rentals removed this action to the United States District Court for the District of New Mexico pursuant to 28 U.S.C. § 1441 based on diversity of citizenship under 28 U.S.C. § 1332. [Doc. 1.] On October 16, 2006, Defendant JLG filed an *Answer* which asserted, among other things, that "the product in question had been modified and/or altered by third parties over whom this Defendant had no control." [Doc. 3, at 7.] Defendant United Rentals also filed its *Answer* on that date. [Doc. 5.]

On **[*5]** January 16, 2007, the Court entered an *Initial Pretrial Report* [Doc. 18] setting a number of case management deadlines leading up to a pretrial conference scheduled for March 4, 2008, and a jury trial scheduled to commence

[1] By letter dated May 7, 2008, counsel informed that Court that all of Plaintiffs claims **[*3]** against Defendant United Rentals Northwest, Inc., were settled and that all motions pertaining to Defendant United Rentals were withdrawn.

on a trailing docket beginning April 8, 2008. [Doc. 18.] In the *Initial Pretrial Report*, the parties indicated that they did not intend to file any amended pleadings, but that such amendments might be necessary if discovery reveals new claims or defendants. [Doc. 18, at 2-3.] The *Initial Pretrial Report* also set a deadline of September 10, 2007, for the completion of all discovery, with earlier deadlines for the disclosure of expert reports pursuant to Fed. R. Civ. P. 26. [Doc. 18, at 7-8.] An *Order* filed on December 18, 2006, by the assigned Magistrate Judge set a deadline of March 16, 2007, for Plaintiffs to amend their pleadings or add additional parties. [Doc. 16.]

On March 15, 2007, the parties filed a *Joint Motion to Extend Pre-Trial Deadlines* [Doc. 33] based on their assertion that testing the equipment at issue in the accident had been delayed until the first week of May 2007, and that the proposed extensions would not affect the scheduled trial date of April **[*6]** 8, 2008. The assigned Magistrate Judge granted the joint motion, thereby extending the deadline for amending pleadings until May 16, 2007, with discovery to be completed by November 9, 2007. [Doc. 34.]

On the deadline of May 16, 2007, Plaintiffs filed an *Unopposed Motion to File First Amended Complaint* [Doc. 41], which the assigned Magistrate Judge granted the same day in a text-only *Order* [Doc. 42]. The next day, Plaintiffs filed their *First Amended Complaint* [Doc. 43] which added two new counts against each Defendant for failure to warn or provide directions for use. Both Defendants filed answers to the *First Amended Complaint*, with Defendant JLG again asserting a modification defense. [Doc. 45, 46.]

On June 15, 2007, the parties filed a second *Joint Motion to Extend Case Management Deadlines* on the grounds that the testing of the equipment, which previously had been extended until the first week of May 2007, still had not been completed as of that date and could not resume until August 7, 2007, "because of the schedules of the experts." [Doc. 47, at 1-2.] In their *Joint Motion*, the parties specifically requested an extension of the discovery deadline until January 9, 2008, and an **[*7]** extension of the pretrial motions deadline until February 1, 2008; they did not, however, request an extension of the deadline for amending pleadings. [Doc. 47.]

On June 15, 2007, the assigned Magistrate Judge entered an *Agreed Order* [Doc. 48] granting the parties' second *Joint Motion to Extend Case Management Deadlines* [Doc. 47], which this Court set aside in a subsequent *Order* noting that the requested extensions fail "to properly address the need for a continuance of the scheduled pretrial conference and trial dates, because the parties' proposed deadline for dispositive motions and Daubert motions of February 1, 2008, will mean that such motions will not be fully briefed until the scheduled pretrial conference date, leaving the Court with insufficient time to make informed rulings on those motions in advance of the pretrial conference and trial dates." [Doc. 50.] After a subsequent status conference with the parties, the Court entered additional orders granting the requested extensions of the case-management deadlines, but also setting a new pretrial conference date of May 6, 2008, and a new trial date of June 5, 2008. [Doc. 56, 57.] Again, there was no mention of extending the **[*8]** previously established deadline of May 16, 2007, for amending pleadings.

On September 25, 2007, Plaintiffs filed a *Motion for Partial Summary Judgment and Supporting Memorandum Brief* [Doc. 65] regarding the Defendants' alleged duty to warn and provide directions for use, and the alleged breach of that duty. In support of this motion, Plaintiffs submitted a copy of portions of Defendant JLG's "Operators and Safety Manual," along with an

affidavit dated September 21, 2007, and a Rule 26 expert report dated August 27, 2007, both of which were authored by of one of Plaintiffs' expert witnesses, Dr. Charles L. Proctor. [Doc. 65-2.]

In that affidavit and expert report, Dr. Proctor focused on a component of the scissor lift which he labeled the "drive speed cut-out switch." This component is designed to serve as an interlock device which disables the controls for raising the four leveling jacks on the JLG 500 RTS Scissor Lift when the work platform is above its fully lowered position, and thereby prevents the lift from becoming unstable and tipping over. If this cut-out switch fails to operate as designed, however, then Dr. Proctor opined that "the leveling jacks can be operated through unintentional **[*9]** activation of the leveling jack switches on the platform control station" while the work platform is in a raised position. [Proctor Aff. 9-21-07, at 3.] Plaintiffs further allege that the "JLG Operators and Safety Manual" does not contain specific instructions or warnings explaining how the operation of the leveling jacks is related to the circuitry for the "drive speed cut-out switch." [Proctor Aff. 9-21-07, at 3.]

Defendants requested additional time to respond to Plaintiffs' motion on the grounds that they had not yet had a fair opportunity to depose Plaintiffs' liability experts (including Dr. Proctor) and to obtain reports from their own liability experts, which were not due to be disclosed until October 10, 2007. [Doc. 56, 68.] After conducting a hearing and receiving affidavits pursuant to Fed. R. Civ. P. 56(f) [Doc. 73, 74, 77], the Court granted the requested extension. [Doc. 147.] Accordingly, Defendant JLG's subsequent response brief [Doc. 132] filed on January 9, 2008, as well as Defendant United Rentals' subsequent response brief [Doc. 138] filed on January 15, 2008, were accepted as timely filed.

In their response briefs [Doc. 132, 138], Defendants asserted that Plaintiffs' **[*10]** motion was improper because it only concerns two elements of Plaintiffs' failure-to-warn claims (duty and breach), and therefore cannot provide a basis for summary judgment on either of those claims under Fed. R. Civ. P. 56. Defendants further asserted that facts concerning the alleged breach of a duty to issue more specific warnings about the "drive speed cut-out switch" are not material in this case because the results of discovery completed after the filing of Plaintiffs' motion (including Dr. Proctor's deposition transcript) show that the raising of the leveling jack which led to the accident was not caused by a failure of the component which Dr. Proctor referred to as the "drive speed cut-out switch." Rather, Defendant JLG asserted that the raising of the leveling jack was made possible by a subsequent modification to the wiring of the scissor lift which caused the cut-out switch's interlock mechanism to be bypassed. In the alternative, Defendant JLG asserted that even if facts pertaining to the "drive speed cut-out switch" were material to Plaintiffs' failure-to-warn claims, then those facts were disputed. [Doc. 132.]

By the time Defendants had completed discovery and filed their **[*11]** responses to Plaintiff's motion for partial summary judgment, a number of other disputes concerning discovery and case-management issues had arisen. First, on October 26, 2007, Plaintiffs filed an opposed *Motion for Leave to File Second Amended Complaint* [Doc. 83] asserting new claims for punitive damages against both Defendants. Defendants opposed Plaintiffs' second motion to amend on the grounds that the proposed amendment adding claims for punitive damages would be untimely, unfairly prejudicial, and futile. [Doc. 91, 95.]

On October 31, 2007, while the above motions were still in the process of being briefed,

Defendant United Rentals filed a *Motion for Partial Summary Judgment* asserting that Plaintiffs could not succeed on their negligence claim against Defendant United Rentals because, as of that date, Plaintiffs had "not identified or disclosed an expert witness to testify as to the standard of care, or the breach thereof, to inspect, repair or maintain the subject lift." [Doc. 87, at 3.] Defendant United Rentals also submitted an unsworn statement by their own expert witness, George Saunders, Jr., as evidence that the required standard of care had in fact been met. [Ex. A to **[*12]** Doc. 87-2.]

In response to a subsequent motion filed by Defendant United Rentals, Plaintiffs attached an additional report from their own expert, Dr. Proctor, dated November 8, 2007, and served on November 9, 2007. [Doc. 93, Ex. F to Doc. 106-2.] On November 21, 2007, Defendant United Rentals moved to strike that additional report by Dr. Proctor on the grounds that it was untimely and did not comply with the Court's case-management deadlines. [Doc. 103.] In response to Defendant United Rentals' motion, Plaintiffs submitted a third report by Dr. Proctor dated December 7, 2007, which opines on the results of additional testing ordered by the Magistrate Judge. [Ex. B to Doc. 109.]

That additional testing was ordered in response to Plaintiffs' *Motion to Compel Additional Inspection and Testing of the Accident Lift and Request for Expedited Hearing* [Doc. 98] filed on November 12, 2007. As a basis for the latter motion, Plaintiffs asserted that Dr. Proctor needed to conduct additional testing and inspection of the scissor lift involved in the fatal accident in order to respond to information regarding the modification defense that was disclosed in Defendant JLG's expert reports of October **[*13]** 10, 2007. On November 16, 2007, the assigned Magistrate Judge entered an order which granted that motion and further extended the discovery deadline until January 18, 2008, in order to accommodate the additional testing and inspection by Plaintiffs' expert.

On January 18, 2008, when the discovery deadline finally passed after repeated extensions, Defendant JLG filed a *Motion to Assess Costs* associated with the additional testing conducted by Dr. Proctor on December 6, 2007. [Doc. 145.] Defendant United Rentals joined in Defendant JLG's motion. [Doc. 146.] As grounds for imposing sanctions, both Defendants asserted that Plaintiffs' earlier motion for additional inspection and testing of the scissor lift was based on misrepresentations by Plaintiffs' counsel which Defendants never had a fair opportunity to rebut. According to Defendants, Plaintiffs' counsel were untruthful to the Court when they stated that the additional inspection and testing they requested on November 12, 2007, was necessitated by their lack of information about Defendant JLG's modification defense and Defendants' failure to disclose adequate information about the facts relevant to that defense, *i.e.*, the modifications **[*14]** to the scissor lift's wiring that Defendant United Rentals allegedly performed.

To support the contention that these statements by Plaintiffs' counsel were untruthful, Defendant JLG cited the deposition testimony of Plaintiff's expert witness, Dr. Proctor, which was taken on December 11, 2007. In that deposition testimony, Dr. Proctor admitted that he observed and recognized the modification of the scissor lift's wiring during his initial inspection on May 1, 2007; he also admitted that he advised Plaintiffs' counsel of those modifications and the need to test them before he returned for the second round of testing and inspections on August 7, 2007. Dr. Proctor further admitted in his deposition testimony that he intended to perform additional testing on August 7, 2007, in relation to the wiring modifications he had earlier observed, but that

he simply forgot to do so. Dr. Proctor also did not disclose his knowledge of the wiring modifications or opine on their significance in his initial expert report dated August 27, 2007. [Proctor Dep., Ex. A to Doc. 145-2, at 6-13, 18-25, 30-65, 86-89.]

Plaintiffs' response to the *Motion to Assess Costs* [Doc. 156] repeats their earlier assertions **[*15]** that prior to the deadline for disclosing Defendant's expert reports on October 10, 2007, Defendants withheld information about the wiring changes that were relevant to Defendant JLG's modification defense and to the protocol for testing and inspecting the scissor lift involved in the accident. Thus, according to Plaintiffs, Dr. Proctor did not realize the significance of the wiring modifications he had previously observed, nor did he recognize the omission in the prior testing as it relates to those modifications, until after he had received and reviewed the expert reports supplied by Defendants' experts.

On April 1, 2008, the assigned Magistrate Judge entered an *Order* [Doc. 198] granting in part and denying in part the Defendants' *Motion to Assess Costs*. The Magistrate Judge found that Plaintiffs' counsel failed to fully advise the Court regarding the circumstances surrounding the inspection at issue and awarded Defendant JLG sanctions in the amount of $ 5,120 in order to shift some of the costs of conducting the additional inspection. [2]

On the dispositive-motions deadline of February 1, 2008, the parties filed a number of additional motions seeking summary judgment and/or the exclusion of expert testimony under Fed. R. Evid. 702. Defendant JLG moved for summary judgment on all of Plaintiff's claims based on the modification defense discussed above and the alleged inadmissibility of the opinions of Plaintiff's experts (Dr. Proctor and Vincent Gallagher), which JLG challenged in separate motions. [Doc. 149, 154, 155.

In response to the motions to strike or exclude their experts' testimony, Plaintiffs submitted another affidavit by Dr. Proctor (this one dated February 18, 2008), as well as a supplemental affidavit by Mr. Gallagher. [Ex. A to Doc. 164-2.] Defendant JLG then moved to strike these opinions from Plaintiffs' experts, as well as the affidavit of lay witness James Magoffe. [Doc. 184, 186, 187.] Briefing on these motions was completed on April 15, 2008, only three weeks before the pretrial conference date of May 9, 2008.

II. APPLICABLE LAW

Before turning to the merits of the parties' motions, the Court first must determine the extent to which this litigation is governed **[*17]** by state or federal law. Federal courts generally apply state substantive law and federal procedural law in a diversity action. See Hanna v. Plumer, 380 U.S. 460, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965). "For example, state law defines the elements and defenses of a cause of action in a diversity case." Sims v. Great Am. Life Ins. Co., 469 F.3d 870, 882 (10th Cir. 2006). And the Court applies the Federal Rules of Evidence and the Federal Rules of Civil Procedure, taken in the context provided by the substantive state law. See id. at 879-83; Blanke v. Alexander, 152 F.3d 1224, 1231 (10th Cir. 1998).

The process for litigating the parties' motions for summary judgment is governed by Federal Rule of Civil Procedure 56, see Justofin v. Metropolitan Life Ins. Co., 372 F.3d 517, 522-23 (3d Cir. 2004), and the admissibility of expert

[2] The Magistrate Judge awarded an additional $ 756.80 in costs in a subsequent *Order* [Doc. 206] after receiving documentation regarding the airfare **[*16]** costs for one of Defendant JLG's experts.

testimony is governed by Federal Rule of Evidence 702, see Stutzman v. CRST, Inc., 997 F.2d 291, 295 (7th Cir. 1993). Both of these rules are concerned with promoting '"accuracy, efficiency, and fair play in litigation.'" Sims, 469 F.3d at 882 (quoting Michael Lewis Wells, The Impact of Substantive Interests on the Law of Federal Courts, 30 Wm. & Mary L. Rev. 499, 504 (1989)). Thus, they fall **[*18]** within the scope of the federal procedural law that remains applicable in a diversity action.

III. STANDARD OF REVIEW

Under Fed. R. Civ. P. 56(c), the Court may enter summary judgment when the motion papers, affidavits, and other evidence submitted by the parties show that no genuine issue exists as to any material fact, and that the moving party is entitled to judgment as a matter of law. A "genuine issue" exists where the evidence before the Court is of such a nature that a reasonable jury could return a verdict in favor of the non-moving party as to that issue. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-52, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A fact is "material" if it might affect the outcome of the case. See id. at 248.

When the movant is also the party bearing the burden of persuasion on the claim for which he or she is seeking summary judgment, the movant must show that the record as a whole satisfies each essential element of his or her case and negates any affirmative defenses in such a way that no rational trier of fact could find for the non-moving party. See 19 Solid Waste Dep't Mechanics v. City of Albuquerque, 156 F.3d 1068, 1071 (10th Cir. 1998); Newell v. Oxford Mgmt., Inc., 912 F.2d 793, 795 (5th Cir. 1990); **[*19]** United Missouri Bank of Kansas City, N.A. v. Gagel, 815 F. Supp. 387, 391 (D. Kan. 1993). But when the movant does not bear the burden of proof as to the claim or defense at issue in the motion, then judgment is appropriate "as a matter of law" if the nonmoving party has failed to make an adequate showing on an essential element of its case, as to which it has the burden of proof at trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 670-71 (10th Cir. 1998).

In order to warrant consideration by the Court, the factual materials accompanying a motion for summary judgment must be admissible or usable at trial (although they do not necessarily need to be presented in a form admissible at trial). See Celotex, 477 U.S. at 324. "To survive summary judgment, 'nonmovant's affidavits must be based upon personal knowledge and set forth facts that would be admissible in evidence; conclusory and self-serving affidavits are not sufficient.'" Murray v. City of Sapulpa, 45 F.3d 1417, 1422 (10th Cir. 1995) (quoting Hall v. Bellmon, 935 F.2d 1106, 1111 (10th Cir. 1991)). Thus, "[h]earsay testimony cannot be considered" in ruling on a summary-judgment **[*20]** motion. Gross v. Burggraf Constr. Co., 53 F.3d 1531, 1541 (10th Cir. 1995); see also Starr v. Pearle Vision, Inc., 54 F.3d 1548, 1555 (10th Cir. 1995) (applying this rule to inadmissible hearsay testimony in depositions).

In addition, the Court may disregard an affidavit that contradicts the affiant's own sworn deposition testimony if the Court finds that such an affidavit constitutes an attempt to create a "sham fact issue." Burns v. Bd. of County Comm'rs., 330 F.3d 1275, 1282 (10th Cir. 2003); Kendrick v. Penske Transp. Servs., Inc., 220 F.3d 1220, 1223 n.2 (10th Cir. 2000); Franks v. Nimmo, 796 F.2d 1230, 1237 (10th Cir. 1986). In determining whether an affidavit constitutes an attempt to create a sham fact issue, the Court considers (1) whether the affiant was cross-examined during his earlier testimony, (2) whether the affiant had access to the pertinent evidence at the time of his earlier

testimony or whether the affidavit was based on newly discovered evidence, and (3) whether the earlier testimony reflects confusion which the affidavit attempts to explain. See Franks, 796 F.2d at 1237; Burns, 330 F.3d at 1282.

In this case, the parties have submitted exhibits and testimony that **[*21]** contain hearsay. In reviewing these materials to determine whether a party is entitled to summary judgment, the Court does not consider statements that affiants or deponents attribute to others for the purpose of proving the truth of the matters asserted therein, except for admissions by a party opponent (or agent thereof) which the affiant or deponent witnessed. See Fed. R. Evid. 801(d)(2); Pastran v. K-Mart Corp., 210 F.3d 1201, 1203 n.1 (10th Cir. 2000). The Court does, however, consider statements attributed to third parties for other admissible purposes. In particular, such statements may be considered for the limited purpose of showing their effect on the listener or the declarant's state of mind. See Faulkner v. Super Valu Stores, Inc., 3 F.3d 1419, 1434 (10th Cir. 1993) (effect on the listener); Wright v. Southland Corp., 187 F.3d 1287, 1304 n.21 (11th Cir. 1999) (declarant's state of mind); Pastran, 210 F.3d at 1203 n.1 (similar). They also may be considered as verbal acts or operative facts when legal consequences flow from the utterance of the statements. See generally Echo Acceptance Corp. v. Household Retail Servs., Inc., 267 F.3d 1068, 1087 (10th Cir. 2001).

Apart from **[*22]** such limitations imposed by the Federal Rules of Evidence, it is not the Court's role to weigh the evidence, assess the credibility of witnesses, or make factual findings in ruling on a motion for summary judgment. Rather, the court assumes the evidence of the non-moving party to be true, resolves all doubts against the moving party, construes all evidence in the light most favorable to the non-moving party, and draws all reasonable inferences in the non-moving party's favor. See Hunt v. Cromartie, 526 U.S. 541, 551-52, 119 S. Ct. 1545, 143 L. Ed. 2d 731 (1999).

IV. DEFENDANT JLG'S MOTION FOR SUMMARY JUDGMENT

On February 1, 2008, Defendant JLG moved for summary judgment on all of Plaintiffs' claims. Central to Defendant JLG's motion is a "substantial modification" defense premised on evidence that Defendant United Rentals' employees disobeyed Defendant JLG's warnings and directions by modifying the wiring of the scissor lift without Defendant JLG's knowledge or consent in a manner that caused the "drive speed cut-out switch" or interlock device to be bypassed, thereby allowing the scissor lift's leveling jacks to be retracted while the work platform was elevated approximately 50 feet off the ground. Plaintiffs assert that **[*23]** this defense does not apply to failure-to-warn or failure-to-instruct claims, and that there are disputed issues of material fact concerning the element of causation.

As a procedural matter, the Court notes that Defendant JLG's motion attaches expert reports containing unsworn statements which "'do[ ] not meet the requirements of Fed. Rule Civ. Proc. 56(e)' and cannot be considered by a district court in ruling on a summary judgment motion." Carr v. Tatangelo, 338 F.3d 1259, 1273 n.26 (11th Cir. 2003) (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 158 n.17, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970)); accord Fowle v. C & C Cola, 868 F.2d 59, 67 (3d Cir. 1989); see Sofford v. Schindler Elevator Corp., 954 F. Supp. 1459, 1462-63 (D. Colo. 1997) (collecting cases). In this instance, however, the inadmissibility of these unsworn statements is not dispositive because Plaintiffs have admitted most of the undisputed facts listed in Defendant JLG's motion pursuant to the procedure stated in D.N.M. LR-Civ. 56.1(b), which provides that: "All material facts set forth in the statement of

the movant will be deemed admitted unless specifically controverted." [Doc. 168, at 2; see also Doc. 106, at 6-9.] Plaintiffs' liability expert, **[*24]** Dr. Proctor, also has admitted many of the same or similar facts in his deposition testimony. [Doc. 154-2.]

Apart from these procedural and evidentiary considerations, the Court applies the substantive law of the State of New Mexico to Defendant JLG's motion, as reflected in the New Mexico Uniform Jury Instructions (NMUJI) and reported case law from the State's appellate courts. New Mexico adopted the principle of strict products liability based on the Restatement (Second) of Torts § 402A (1965) in Stang v. Hertz Corp., 83 N.M. 730, 732, 497 P.2d 732, 734 (1972). See Smith ex rel. Smith v. Bryco Arms, 2001 NMCA 90, P 12, 131 N.M. 87, 33 P.3d 638; Martin v. Unit Rig & Equip. Co., 715 F.2d 1434, 1439 (10th Cir. 1983) (collecting cases). This principle has been further developed in the Restatement (Third) of Torts: Products Liability § 1 (1997). See, e.g., Spectron Development Laboratory v. American Hollow Boring Co., 1997 NMCA 25, P 13, 123 N.M. 170, 936 P.2d 852.

The introduction to Chapter 14 of New Mexico's Uniform Jury Instructions also explains how such a strict products liability theory can be paired with a negligence claim. A negligence claim is premised on the notion that "[t]he **[*25]** supplier of a product has a duty to use ordinary care to avoid a foreseeable risk of injury caused by a condition of the product or manner in which it is used." NMUJI 13-1402. This duty continues after the product has left the supplier's possession, and thus "[a] supplier who later learns, or in the exercise of ordinary care should know, of a risk of injury caused by a condition of the product or manner in which it could be used must then use ordinary care to avoid the risk." Id.

In contrast, a strict products-liability theory does not depend on the degree of care exercised by the supplier. The focus is instead on the risk of injury that the product itself presents. Thus, "[u]nder the strict products liability theory, a supplier of products is liable for harm proximately caused by an unreasonable risk of injury resulting from a condition of the product or from a manner of its use." Smith, 2001 NMCA 90, P 13 (citing NMUJI 13-1406). "An unreasonable risk of injury is a risk which a reasonably prudent person having full knowledge of the risk would find unacceptable." Id. (citing NMUJI 13-1407). Such a risk of injury may arise from a feature of the product itself (*e.g.*, the absence of a reasonable **[*26]** alternative design), as well as a failure to provide adequate warnings or directions for its use. See NMUJI 13-1415 (duty to provide adequate warnings), 13-1416 (duty to provide adequate directions for use).

The fact that a third party made post-sale modifications to a product which affected its safety does not provide a discrete, stand-alone defense to a products-liability theory. See Restatement (Third) of Torts, supra §17, cmt. c, at 258. Rather, such post-sale modifications may be relevant to determining whether a product was defective at the time of sale, whether such a defect was a proximate cause of the claimed injury, and whether damages should be apportioned according to principles of comparative responsibility. [3] See id. § 2, cmt. p, at 38.

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[3] Because Defendant JLG's motion for summary judgment focuses on issues of liability (such as duty, breach, and causation), the Court does not further discuss the how the substantial-modification defense may affect the issue of apportioning damages according to principles of comparative responsibility. Viewing the evidence in the light most favorable to Plaintiffs, the Court assumes for purposes of analysis that such apportionment of damages **[*27]** would not be dispositive of Defendant JLG's motion for summary judgment, regardless of what percentage of responsibility for the accident is attributed to Plaintiffs or their employer.

Post-sale modifications may be relevant to determining whether the product was defective at the time of sale, because "[s]uppliers are responsible for risks arising from foreseeable uses of the product, including reasonably foreseeable unintended uses and misuses." Smith, 2001 NMCA 90, P 17 (citing UJI 13-1403). If the post-sale modifications were reasonably foreseeable to the product's supplier, then the supplier's failure to adequately protect against the risks entailed by those modifications, through an alternative design or warning, may support a finding that the product was defective or posed an unreasonable risk of injury at the time of the sale. See id.

Under New Mexico's summary-judgment procedure, the State's courts usually leave questions about the foreseeability of unintended post-sale misuse of a product for the jury to decide at trial. [4] See, e.g., Smith, 2001 NMCA 90, P 14. On the other hand, there are cases where the post-sale use or modification of a product is so unforeseeable that the **[*28]** matter can be taken from the jury. See id. P 17. "'In retrospect, almost nothing is entirely unforeseeable. A test of foreseeability, however, does not bring within the scope of a defendant's liability every injury that might possibly occur. Foreseeability has been defined . . . as that which is *objectively reasonable* to expect, not merely what might conceivably occur.'" Van de Valde v. Volvo of Am. Corp., 106 N.M. 457, 459, 744 P.2d 930, 932 (Ct. App. 1987) (quoting Mata v. Clark Equip. Co., 58 Ill. App. 3d 418, 374 N.E.2d 763, 766, 15 Ill. Dec. 980 (Ill. 1978)). This requirement of objective reasonableness provides a basis for the Court to conclude, as a matter of law, that certain risks entailed by post-sale modifications are too unforeseeable to establish a defect or unreasonable risk of injury in the product itself or in the existing warnings and directions that accompany it at the time of sale.

Post-sale modifications of a product also can affect the issue of causation insofar as such modifications may constitute an independent intervening cause of a plaintiff's injuries. See Restatement (Third) of Torts, supra, § 15 cmt. b (citing Dugan ex rel. Dugan v. Sears, Roebuck & Co., 113 Ill. App. 3d 740, 454 N.E. 2d 64, 67, 73 Ill. Dec. 320 (Ill. App. 1983)). New Mexico law defines "independent intervening cause" as "that which interrupts the natural sequence of events which could reasonably be expected to result from the condition in which a product was sold or from a foreseeable manner of use. An independent intervening cause unforeseeably turns aside the course of events and produces a result which could not reasonably have been expected." NMUJI 13-1424. Thus, the definition of independent intervening cause incorporates the notion of foreseeability discussed above.

New Mexico's Uniform Jury Instructions provide specific guidance on how the issue of causation is to be treated when there is evidence that a product was changed or altered **[*30]** and that such change or alteration was a cause of the claimed injury:

> In order for a supplier . . . to be liable, the injury must have been caused by a condition of the product which was not substantially changed from the condition in which the . . . supplier placed the product on the market or in which the supplier could have reasonably expected it to be used.
>
> For a substantial change in the product to relieve a supplier of liability, the change itself must be a cause of the harm done.

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[4] The Court notes that New Mexico's summary-judgment procedure differs from Fed. R. Civ. P. 56 in some respects. For example, New Mexico's procedure only requires non-movants to show a disputed factual issue concerning a single element of their claim. See Bartlett v. Mirabal, 2000 NMCA 36, P 17, 128 N.M. 830, 999 P.2d 1062. **[*29]** Accordingly, opinions from state courts that resolve products-liability claims based on differences between federal and state procedure may be inapposite in the context presented here.

NMUJI 13-1422. The directions for use of this instruction indicate that it must be given only when a defendant meets its burden of producing sufficient evidence that there was a change or alteration of the product which was a cause of the plaintiff's injury. See id. But in this case, there is no question that Defendant JLG has met its burden of producing such evidence in light of Plaintiffs' admissions in response to the statement of undisputed facts in Defendant JLG's motion for summary judgment. Thus, under New Mexico's products-liability instructions, and particularly the committee comment regarding the definition of "independent intervening cause," Plaintiffs still bear the ultimate burden of persuasion **[*31]** as to the element of causation. See NMUJI 13-1424; State Farm Fire & Cas. Co. v. Miller Metal Co., 83 N.M. 516, 518, 494 P.2d 178, 180 (Ct. App. 1971).

New Mexico's Uniform Jury Instructions also provide specific guidance on how the absence of adequate warnings or directions affects the issue of causation: "If, in light of all the circumstances of this case, [an adequate warning] [adequate directions for use] would have been noticed and acted upon to guard against the danger, a failure to give [an adequate warning] [adequate directions for use] is a cause of injury." NMUJI 13-1425. An adequate warning or direction is defined as one having the following characteristics:

> (1) It must be in a form that can reasonably be expected to catch the attention of the reasonably foreseeable user of the product;
> (2) It must be understandable to the reasonably foreseeable user of the product; and
>
> (3) It must disclose the nature and extent of the danger. In this regard, there must be specified any harmful consequence which a reasonably foreseeable user would not understand from a general warning of the product's danger [or] from a simple directive to use or not to use the product for a certain purpose **[*32]** or in a certain way.

NMUJI 13-1418. The Directions for Use of NMUJI 13-1425 indicate that, when supported by the evidence, the failure-to-warn instructions are to be given in addition to, and not as a replacement for, the general instruction on causation stated in NMUJI 13-1424.

There are circumstances in which a substantial modification may preclude a plaintiff from proving the elements of a design-defect theory without precluding a failure-to-warn theory. A classic example is provided in Liriano v. Hobart Corp., 92 N.Y.2d 232, 700 N.E.2d 303, 305, 677 N.Y.S.2d 764 (N.Y. Ct. App. 1998), where the defendant provided a safety guard to prevent users from getting their hands caught in a meat grinder, but did not provide any warning "to indicate that it was dangerous to operate the machine without the safety guard in place." On these facts, a third party's removal of the safety guard constituted a substantial modification that precluded the defendant's liability on a design-defect theory. See id. at 305-06. But since there was evidence that the defendant knew a significant number of users were removing the safety guard, the Liriano court concluded that such removal was a foreseeable modification or misuse of the product **[*33]** that the defendant had a duty to warn against. See id. at 307-08.

The Liriano court also emphasized, however, that there may be different circumstances in which a substantial modification would preclude a defendant's liability on *both* a design-defect theory *and* a failure-to-warn theory. See id. at 308. If, for example, the defendant had provided *both* a safety guard on its product *and* a warning directing users not to remove the safety guard, then at some point it would become superfluous and counter-productive to require additional warnings. "Requiring too many warnings trivializes and undermines the entire purpose of the rule, drowning out cautions against latent dangers of which a user might not otherwise be

aware. Such a requirement would neutralize the effectiveness of warnings as an inexpensive way to allow consumers to adjust their behavior based on knowledge of a product's inherent dangers." Id. at 308; accord Restatement (Third) of Torts, supra § 2, cmt. i.

In my view, the present case involves a similar relationship between the safety features of the product at issue and the warnings or directions provided with it. It is undisputed that Defendant JLG designed, manufactured, and **[*34]** sold the scissor lift at issue here with an interlock device called a "drive speed cut-out switch" that interrupts the electrical circuit to the leveling-jack controls so that they cannot cause the jacks to extend or retract when the platform had been raised from its fully lowered position. This interlock device is analogous to the safety guard at issue in Liriano, the purpose and function of which was defeated through substantial modifications to the product made by a third party.

But unlike the defendant in Liriano, there is evidence that Defendant JLG took the additional step of providing warnings or directions telling buyers or users of the scissor lift not to modify it without the manufacturer's written permission, and not to operate it if the "high drive speed, high engine speed, and high pump speed functions operate when [the] platform is raised above the stowed position." [Doc. 132-4.] Thus, Defendant JLG provided *both* a safety feature on the scissor lift itself *and* an integrated set of warnings or directions telling buyers or users not to make unauthorized modifications. As discussed in the *Memorandum Opinion and Order* filed concurrently herewith concerning Plaintiffs' negligence **[*35]** claim against Defendant United Rentals, there is evidence that the safety features and warnings provided by Defendant JLG were integrated so that the "high drive speed, high engine speed, and high pump speed functions" could serve as the proverbial "canary in the coalmine" by signaling to users that something was amiss with the equipment without requiring users to risk putting themselves in danger by physically manipulating the leveling-jack controls in order to confirm whether or not they were operational while the work platform was elevated. [Doc. 132-4.]

The question then becomes whether it was reasonably foreseeable to Defendant JLG that someone would disobey the manufacturer's directions, extensively modify the scissor lift without its knowledge or consent so as to bypass the interlock device, and then use the lift in such a modified condition without any warning that the equipment had been modified. The Liriano court concluded that a duty to warn against such a possibility "will generally arise where a defect or danger is revealed by user operation and brought to the attention of the manufacturer." Id. at 307. But in this case, there is no evidence in the record to support a reasonable **[*36]** inference that Defendant JLG knew or should have known the buyers or users of its scissor lifts were modifying the wiring so as to bypass the interlock device and then operating the lift without this important safety feature. See Scardefield v. Telsmith, Inc., 267 A.D.2d 560, 699 N.Y.S.2d 235, 237-38 (N.Y. App. Div. 1999) (distinguishing Liriano where the manufacturer did not have reason to know of the modifications).

Moreover, the type of modifications at issue in the case at bar are much more extensive than the simple act of removing the guard or shield on the outside of the meat grinder at issue in Liriano. In this regard, the undisputed facts reflect that those responsible for the post-sale modifications at issue in this case had to make a series of deliberate additions to several components of the scissor lift in order to defeat the interlock device and cause the leveling-jack controls to become operational while the work platform was elevated.

First, the wiring in the ground terminal was cut and spliced to make Terminal No. 24 "hot" or energized any time the ignition was on. Then a pin was added to the platform control box at Location W, and a brown wire with blue markings was added to connect **[*37]** this modified pin with the now-energized Terminal No. 24. Finally, the wiring inside the platform control box was modified so as to connect the newly spliced pin at Location W with the toggle switches that controlled the leveling jacks. [Doc. 149, at 5-6.]

The inspection of the scissor lift involved in the accident also revealed other anomalous modifications. For example, the cable connectors running from the ground terminal also were altered so as to have two female connectors attached to two male connectors at the platform control box, rather than one male and one female as originally designed. [Doc. 149, at 6.] In addition, a green light on the platform control box that is designed to switch on when the leveling jacks are set was disconnected. [Doc. 106, at 8-9.]

These facts concerning the modifications described above are admitted pursuant to D.N.M. LR-Civ. 56.1 in Plaintiffs' response to the statement of undisputed facts on pages 3 through 6 of Defendant JLG's motion for summary judgment. [Doc. 149.] Many of them also are asserted in Plaintiffs' response to Defendant United Rentals' motion for partial summary judgment on Plaintiffs' negligence claim [Doc. 106] and admitted in Dr. **[*38]** Proctor's deposition testimony. [Doc. 154-2.] Plaintiffs have not identified any evidence in the record to suggest that the above modifications were made with Defendant JLG's written permission as directed in the manuals for the scissor lift. On the contrary, Plaintiffs have cited the relevant ANSI standard and pointed to the *absence* of such evidence concerning Defendant United Rentals' compliance with Defendant JLG's existing warnings and directions. [Doc. 106, at 10.]

The undisputed facts concerning the extent of the post-sale modifications to the scissor lift and the disregard of existing warnings and directions supplied by Defendant JLG support the inference that the risks entailed by these post-sale modifications were not reasonably foreseeable to Defendant JLG as a matter of law. See Van de Valde, 106 N.M. at 459, 744 P.2d at 932; Scardefield, 699 N.Y.S.2d at 237-38. Insofar as Defendant JLG could not have reasonably expected its scissor lift to be used in this extensively modified condition, such modifications also may relieve Defendant JLG of liability under the principles of causation expressed in NMUJI 13-1422 and the illustrations to the **[*39]** Restatement (Third) of Torts, supra § 2, at 232.

Under the first of these illustrations, the manufacturer of a defective product is not liable for injuries "which would have occurred even if the defect had not been present." Id. Thus, even if the interlock device for the scissor lift involved in the accident was defective, such that it did not prevent the leveling jacks from operating when the work platform was elevated, Defendant JLG is not liable under the undisputed facts presented here because the leveling jacks would have operated anyway due to the extensive post-sale modifications which bypassed the interlock device, regardless of whether it was in an open or closed position.

Under the second illustration in the Restatement, the manufacturer of a defective product is not liable for injuries where another party's "modification and subsequent failure to effect adequate repair were sufficiently unforeseeable that the defect was not a substantial factor in causing the . . . injury," even though the defect was "a necessary condition to the occurrence of the accident." Id. Thus, even if Defendant United Rentals had recognized a manufacturer's defect in the scissor lift's

interlock device and attempted to repair it, Defendant **[*40]** United Rentals' failure to perform an adequate repair and failure to warn subsequent users of the inadequacy of its repair would be sufficiently unforeseeable to Defendant JLG that Plaintiffs could not meet their burden of proof as to the element of causation with respect to their claims against Defendant JLG.

V. ADMISSIBILITY OF OPINION EVIDENCE CITED IN RESPONSE TO DEFENDANT JLG'S MOTION FOR SUMMARY JUDGMENT

To overcome the dearth of evidence concerning the foreseeability of the scenario that led to the fatal accident at issue in this case, Plaintiffs rely on the opinions of their expert witnesses, Dr. Proctor and Mr. Gallagher, as well as the opinion of Plaintiff James Magoffe and certain statements taken from Defendants' witnesses. On a number of procedural and evidentiary grounds, Defendant JLG has moved to strike or exclude such opinions. [Doc. 154, 155, 186, 187.] The Court is required to address such motions as part of its gatekeeping function under Goebel v. Denver and Rio Grande Western R. Co., 346 F.3d 987, 991-92 (10th Cir. 2003). Accordingly, the focus of the Court's analysis shifts at this juncture from the substantive law of the State of New Mexico to the requirements **[*41]** of federal procedural law regarding the admissibility of opinion evidence submitted in the context of a response to a motion for summary judgment.

For purposes of determining whether Defendant JLG is entitled to summary judgment, several of Defendants' objections are moot because, as the Court has previously noted, unsworn statements in an expert's report do not meet the requirements of Fed. Rule Civ. Proc. 56(e) and cannot form the evidentiary basis for a district court's ruling on a summary judgment motion. See Carr, 338 F.3d at 1273 n.26. Therefore, even if they are not stricken on other grounds, the following documents authored by Plaintiffs' experts cannot independently serve to provide admissible evidence in support of Plaintiffs' arguments against Defendant JLG's motion for summary judgment:

1. Dr. Proctor's initial expert report disclosed on August 29, 2007, [Doc. 63] and subsequently attached to the briefing on the parties' motions [Doc. 65-2; Doc. 98-2; Ex. D to Doc. 158-2; Ex. A to Doc. 163-2; Ex. B to Doc. 164-2; Ex. A to Doc. 192-2];

2. Dr. Proctor's "rebuttal report" disclosed on November 9, 2007, [Doc. 93], and subsequently attached to the briefing on the parties' motions **[*42]** [Ex. F to Doc. 106-2; Doc. 109; Ex. 3 to Doc. 160-2; Ex. E to Doc. 163-2; Ex. B to Doc. 192-3];

3. Dr. Proctor's "supplemental report" concerning additional testing dated December 7, 2007, and subsequently attached to the briefing on the parties' motions [Ex. H to Doc. 164-3; Ex. C to Doc. 192-4];

4. Mr. Gallagher's initial expert report disclosed on August 29, 2007, [Doc. 63] and subsequently attached to the briefing on the parties' motions [Doc. 155-2; Ex. 5 to Doc. 161-2; Ex. 2 to Doc. 193-3];

5. Mr. Gallagher's "supplemental report" disclosed on November 9, 2007, [Doc. 92] and referenced in Defendant JLG's motion to exclude Mr. Gallagher's testimony [Doc. 155-3].

The Court will, however, occasionally refer to the above documents in its analysis insofar as they contain facts or data which form a basis under Fed. R. Evid. 703 for opinions expressed elsewhere in sworn affidavits or deposition testimony. Under Fed. R. Evid. 104(a), the Court's preliminary rulings on the admissibility

of the opinions contained in such affidavits or deposition testimony may take into account the facts or data on which those opinions are based, even if the documents containing those facts or data are not **[*43]** independently admissible.

The evidence of record contains the following affidavits and deposition transcripts pertaining to Plaintiffs' liability experts which are not subject to the same hearsay objection that applies to their unsworn expert reports:

1. Dr. Proctor's first affidavit dated September 21, 2007, that is attached to Plaintiffs' motion for partial summary judgment [Doc. 65-2];
2. Dr. Proctor's deposition transcript dated December 11, 2007, excerpts of which are attached to the briefing on the parties' motions [Doc. 132-2, Doc. 145-2; Ex. A to Doc. 150-2; Doc. 152-2; Doc. 154-2; Ex. D Doc. 156-2; Ex. 1 to Doc. 160-2; Ex. C to Doc. 164-2; Doc. 187-3];
3. Dr. Proctor's second affidavit dated February 18, 2008, [Ex. A to Doc. 164-2] that is attached to Plaintiffs' *Response in Opposition to JLG's Motion to Exclude Opinions of Charles Proctor* [Doc. 164];
4. Mr. Gallagher's deposition transcript dated November 30, 2007, excerpts of which are attached to the briefing on the parties' motions [Doc. 132-3; Doc. 155-5; Ex. 3 to Doc. 161-2; Ex. 1 to Doc. 193-2; Ex. A to Doc. 202-2]; and
5. Mr. Gallagher's affidavit dated February 18, 2008, [Ex. 1 to Doc. 161-2] that is attached to to Plaintiffs' **[*44]** *Response in Opposition to Defendant JLG Industries, Inc.'s Motion to Exclude Testimony of Vincent Gallagher*. [Doc. 161.]

The Court will first address Dr. Proctor's affidavits and deposition testimony in chronological order, and then turn to the sworn testimony of Mr. Gallagher and the other witnesses referenced in Plaintiffs' response to Defendant JLG's motion for summary judgment.

A. Dr. Proctor's First Affidavit Dated September 21, 2007

Dr. Proctor's affidavit dated September 21, 2007, is based on the facts or data set forth in his initial expert report disclosed on August 29, 2007, which was submitted by the date required under the Court's most recent *Order* [Doc. 56] extending case-management deadlines. Therefore, the Court will not exclude this affidavit on grounds that it is untimely.

I nevertheless conclude that the expert opinions set forth in Dr. Proctor's affidavit dated September 21, 2007, do not meet the requirements for admission under Fed. R. Evid. 702 as articulated in Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 141, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999), and Daubert v. Merrell-Dow Pharm., Inc., 509 U.S. 579, 592-93, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). The purpose of this rule is "to ensure that the evidence is both 'reliable' **[*45]** and 'relevant.'" Truck Ins. Exchange v. MagneTek, Inc., 360 F.3d 1206, 1210 (10th Cir. 2004) (quoting Daubert, 509 U.S. at 589). Factors to be considered in assessing the reliability of an expert opinion include, but are not limited to: "(1) whether the opinion has been subjected to testing or is susceptible of such testing; (2) whether the opinion has been subjected to publication and peer review; (3) whether the methodology used has standards controlling its use and known rate of error; (4) whether the theory has been accepted in the scientific community." Id. (citing Daubert, 509 U.S. at 590).

Rule 702 was amended in 2000 to state as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a

> fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702. The 2000 amendments **[*46]** more explicitly state that to be admissible in federal court, expert opinions require not only a reliable methodology but also a sufficient factual basis and a reliable application of the methodology to the facts. See Johnson v. Manitowoc Boom Trucks, Inc., 484 F.3d 426, 429 (6th Cir. 2007); United States v. Mamah, 332 F.3d 475, 477-78 (7th Cir. 2003).

A "sufficient factual basis" under Fed. R. Evid. 702 does not necessarily require the facts or data upon which an expert bases his or her opinion to be independently admissible, so long as they are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Fed. R. Evid. 703. In this case, the Court finds that an expert's affidavit or deposition testimony may reasonably rely on facts or data set forth in an expert report that was previously disclosed in accordance with the requirements of Fed. R. Civ. P. 26(a)(2)(B). Thus, it is permissible for Dr. Proctor's affidavit dated September 21, 2007, to cite or refer to facts or data contained in his initial expert report that was previously disclosed on August 29, 2007, even though the unsworn statements in that expert report are **[*47]** not independently admissible.

The basic methodology or technique behind Dr. Proctor's affidavit of September 21, 2007, as well as his initial expert report disclosed on August 29, 2007, may be "characterized as a process of reasoning to the best inference," *i.e.*, "a process of eliminating possible causes as improbable until the most likely one is identified." Bitler v. A.O. Smith Corp., 400 F.3d 1227, 1237 (10th Cir. 2004). The Tenth Circuit has recognized the reliability of this methodology in an engineering context so long as the following requirements are met. To begin with, "the inference to the best explanation must first be in the range of possible causes," meaning that "there must be some independent evidence that the cause identified is of the type that could have been the cause." Id. Next, the expert "must provide objective reasons for eliminating alternative causes." Id. Finally, "an inference to the best explanation for the cause of an accident must eliminate other possible sources as highly improbable, and must demonstrate that the cause identified is highly probable." Id. at 1238.

The problem with the reasoning in Dr. Proctor's first affidavit is that it does not reliably **[*48]** apply these principles and methods to the facts of this case and is not based upon sufficient facts or data, as required by Rule 702. This affidavit also fails under the Daubert analysis because the opinions expressed therein were not subject to a sufficient degree of testing. See Johnson, 484 F.3d at 429-33.

As noted in Dr. Proctor's subsequent deposition testimony of December 11, 2007 [Proctor Dep. at 8-24, 30-63], and in the briefing on the parties' motions regarding the additional testing performed on December 6, 2007 [Doc. 98, 145, 146], Dr. Proctor omitted an important element of his testing of the scissor lift involved in the accident during the first two rounds of inspection that occurred in May 2007 and August 2007. Thus, he was under the mistaken impression that functional testing of the circuitry associated with the interlock device or "drive speed cut-out switch" had been performed prior to the disclosure of his first initial expert report in August 2007, when in fact such testing had not yet occurred.

This mistake or omission is critical to the reliable application of Dr. Proctor's methodology, because it means that he has failed to eliminate, through additional testing, **[*49]** the probability that the retraction of the leveling jack which caused the accident was enabled by other possible sources (such as the extensive modifications to the wiring of the ground terminal, cable connectors, and platform control box), rather than a failure of the "drive speed cut-out switch assembly" as designed by Defendant JLG. Indeed, Dr. Proctor's first affidavit and initial expert report omit any discussion of these modifications. His initial expert report also affirmatively states that "[a]ll systems related to the operation of the leveling jacks were examined" and that "all operational systems for the leveling jacks were shown to operate correctly with the exception of the Drive Speed Cut-Out Switch assembly." [Doc. 65-2, at 25.] And while Dr. Proctor's initial expert report acknowledges his review of a maintenance work order indicating that Defendant United Rentals had performed repairs on the scissor lift's wiring, it does not identify any modifications to that wiring or call for any additional investigation of Defendant United Rentals' repair work. [Doc. 65-2, at 25.]

Dr. Proctor subsequently admitted in his deposition testimony that the wiring on the scissor lift involved **[*50]** in the accident has been extensively modified so as to bypass the "drive speed cut-out switch" and make the leveling-jack controls operational even when the work platform is raised. [Proctor Dep. at 30-63.] In addition, he subsequently opined that Defendant United Rentals was responsible for making these modifications and did so without Defendant JLG's written permission. [Ex. F to Doc. 106-2.] Apart from the extensive modifications to the scissor lift's wiring, Dr. Proctor provided no basis in his deposition testimony for concluding that there was any failure or defect in the "drive speed cut-off switch" itself. [Proctor Dep. at 60-63.] These admissions undermine the reliability of Dr. Proctor's affidavit of September 21, 2007, and the initial expert report on which that affidavit is based.

These subsequent developments also render Dr. Proctor's initial expert report and affidavit largely irrelevant and unhelpful to the trier of fact. '"When an expert's opinion is based on assumed facts that vary materially from the actual, undisputed facts, the opinion is without probative value and cannot support a verdict or judgment."' General Motors Corp. v. Harper, 61 S.W. 3d 118, 130 (Tex. Ct. App. 2001) **[*51]** (quoting Burroughs Wellcome Co. v. Crye, 907 S.W.2d 497, 499 (Tex. 1995)). In this case, Dr. Proctor's initial expert report and affidavit are based on the assumption that all operational systems (including "electrical control circuits") for the leveling jacks were "shown to operate correctly." [Doc. 65-2, at 25.] Additional testing of the scissor lift has proven this assumption to be false, as it is now undisputed that there were numerous modifications to the ground terminal, the cable connectors, and the platform control box which were not operating in the manner designed by Defendant JLG.

It follows that the opinions stated in Dr. Proctor's affidavit of September 21, 2007, are irrelevant insofar as they were based on the undisputably false assumptions stated in his initial expert report disclosed on August 29, 2007. Having failed to meet either the relevance or reliability components of the Court's Daubert analysis, these documents are inadmissible and therefore cannot be relied upon to support Plaintiffs' response to Defendant JLG's motion for summary judgment.

B. Dr. Proctor's Deposition Testimony of December 11, 2007

I next turn to the question whether any of the opinions stated **[*52]** in Dr. Proctor's deposition testimony of December 11, 2007, are

admissible for the purpose of supporting Plaintiffs' response to Defendant JLG's motion for summary judgment. As noted above, the portions of Dr. Proctor's deposition testimony that are excerpted and attached to Defendant JLG's motion papers do little to advance Plaintiffs' claims against Defendant JLG insofar as they consist of admissions to the effect that the factual basis for the prior opinions stated in his first affidavit and initial expert report were unfounded or incomplete.

Nevertheless, when asked at his deposition whether "there are any changes that need to be made in those reports that you've produced," Dr. Proctor stated that:

> The only change that would be made would be on the original report where I referred to "the switch," and it should be referred to as "the switch assembly," and then that would clarify the misunderstanding that I had from the original testing in August regarding whether the functional test was correct.
>
> And so the fundamental theory of circuit analysis still holds, but it's not just the switch. It would be the switch circuit which we now know was bypassed. Other than that, no, there wouldn't **[*53]** be any other changes.

[Proctor Dep. at 136.] Specifically, Dr. Proctor's deposition testimony maintains the position that a "single point failure design and the bypass of the drive speed cut-out [switch] resulted in the deaths of Mr. Magoffe and Mr. Michel." He explained that the "single point failure design" was revealed by the "circuit analysis on the interlock system" which "creates an environment where a single component failure can create a single point critical condition." He identified the "single component" as the "drive speed cut-out switch assembly," even though he didn't have "any evidence that the drive speed cut-out switch failed." [Proctor Dep. at 143.]

The explanation of Dr. Proctor's theory of "circuit analysis" or "single point failure design" provided in his deposition testimony does not meet the requirements for admissibility under Fed. R. Evid. 702 or Daubert. "Although it is not always a straightforward exercise to disaggregate method and conclusion, when the conclusion simply does not follow from the data, a district court is free to determine that an impermissible analytical gap exists between premises and conclusion." Bitler, 400 F.3d at 1233 (citing General Elec. Co. v. Joiner, 522 U.S. 136, 146, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997)). **[*54]** Such a gap is present in the deposition testimony cited above because it does not lay out the intermediate steps in Dr. Proctor's reasoning that lead him to conclude that his theory of "circuit analysis" or "single point failure design" can be reliably applied to the design of Defendant JLG's scissor lift notwithstanding the extensive post-sale modifications' to the scissor-lift's wiring.

According to Dr. Proctor's theory, a "Failure Modes, Effects and Criticality Analysis (FMECA)" of Defendant JLG's scissor lift would have revealed "the safety consequences of the failure of components or systems," including "design flaws, such as single point failure risks in life critical components and systems." [Ex. A to Doc. 65-2, at 26.] But his deposition testimony fails to set forth the steps in his reasoning which lead him to conclude that extensive post-sale modifications to *multiple* components of the scissor lift (including the addition of splices, wires, and/or pins to the ground terminal, the cable connectors, and the platform control box) can be considered a *single point* **[*55]** failure that Defendant JLG could have reasonably foreseen and guarded against with additional, redundant safety features.

Dr. Proctor's reasoning also omits any discussion of other existing safety features which are designed to prevent improper retraction of the leveling jacks and tip-over

accidents. For example, Plaintiffs have cited deposition testimony from one of Defendant JLG's experts, Dr. Francis Wells, which explains the existing warnings and testing protocol for determining whether the "high drive speed," "high engine speed," and "high pump speed" functions" continue to operate when the work platform is raised. According to the cited portion of Dr. Well's testimony, the post-sale wiring modifications had the effect of defeating the existing warning and testing protocol for the "high drive speed" function, but the "high engine speed" function still could provide an indication that the equipment was not functioning correctly. [Wells Dep. at 117-20, Ex. I to Doc. 164-3.]

One of Defendant JLG's employees, Stephen Forgas, testified at his deposition on September 12, 2007, that the scissor lift in question is equipped with a "lift cutout switch" as well as a "drive cutout switch" **[*56]** and a "high drive speed cutout switch." The "lift cut-out switch" functions independently to keep the work platform from being elevated above 22 feet unless the leveling jacks are properly set. [Forgas Dep. 9-12-07, at 35-37, Ex. F to Doc. 164-3.] The platform control box also contains a green light to indicate when the leveling jacks are extended and set, and there is a "tilt alarm" to warn users when the chassis of the scissor lift is on a severe slope with the work platform raised. [Proctor Dep. at 183-85; Blotter Dep. at 28-32, Ex. E to Doc. 164-3.]

The evidence of record further indicates that the scissor lift contains a number of features designed to reduce the risk that the leveling-jack controls will be moved inadvertently. For example, the toggle switches for the leveling jacks are placed in a recessed area on the side of the platform control box, rather than on the exposed top of the platform control box. In addition, the toggle switches are designed to automatically return to their center or "off" position when not in use, and there is a specific warning directing users not to operate the machine if these toggle switches do not return to the "off" position when released. **[*57]** [Ex. A to Wihl Aff. 9-24-07, Doc. 65-2.] Finally, there is an emergency shut-off switch as well as a number of existing warnings and directions which pictorially depict the danger of tip-over accidents and warn against modifying the scissor lift without the manufacturer's written permission. [Doc. 132-4.]

Dr. Proctor's deposition testimony fails to reliably explain how the retraction of the leveling jack that led to the tip-over accident in this case can be properly characterized as a "single-point failure" in light of the multiple safety features which had to be disabled, disregarded, or bypassed in order for this accident to occur. Without accounting for these features, Dr. Proctor's testimony does not meet the requirements that the Tenth Circuit has articulated for reliably applying the methodology of "reasoning to the best inference." Bitler, 400 F.3d at 1237-38.

The record also reflects a number of analytical gaps in Dr. Proctor's reasoning with respect to his proposals for a reasonable alternative design to overcome the alleged "single point failure" he purports to identify. In his initial expert report, Dr. Proctor provides a brief description of six possible design modifications. **[*58]** [Ex. A to Proctor Aff. 9-21-07, Doc. 65-2, at 32.] Assuming for purposes of argument that Dr. Proctor's deposition testimony can be construed as adopting these proposed design modifications under his revised analysis, there is still no reliable explanation of how they are impacted by the substantial modifications to the scissor lift's wiring.

If, for example, it is possible for Defendant United Rentals' mechanics to disregard the manufacturer's existing instructions and warnings by altering the scissor lift's wiring so

as to bypass the existing interlock device, then is it not equally possible that these mechanics could disregard any additional warnings and alter the scissor lift so as to bypass the alternative safety features that Dr. Proctor recommended? And if Defendant United Rentals' mechanics or other users already were confused by the level of detail or complexity in the existing wiring and instructions for the scissor lift, then what are the chances that they would become even more confused by the addition of further switches, devices, systems, or instructions on the equipment? '"[T]he proper methodology for proposing alternative designs includes more than just conceptualizing **[*59]** [such] possibilities.'" Guy v. Crown Equipment Corp., 394 F.3d 320, 327 (5th Cir. 2004) (quoting Watkins v. Telsmith, Inc., 121 F.3d 984, 992 (5th Cir. 1992)).

Neither Dr. Proctor's deposition testimony nor any of the reports which he appears to adopt in that testimony show that he actually tested his theory that the addition of one or more of the redundant safety features he has conceptualized would have remedied the "single point failure" he purports to identify. "[C]ourts interpreting Daubert have considered testability of the expert's theory to be the most important of the four factors [identified in that opinion], and this is especially true in cases involving allegations of defect in product design." Berry v. Crown Equipment Corp., 108 F. Supp. 2d 743, 754 (E.D. Mich. 2000). In particular, "[c]ourts have consistently recognized the importance of testing the alternative design proposed by a witness," 3 Louis R. Frumer & Melvin I. Friedman, Products Liability, § 18A.04[6][g], at 18A-80.13 (2008), especially where the expert has not utilized any other method of research to compensate for the lack of alternative testing, Winters v. Fru-Con Inc., 498 F.3d 734, 742-43 (7th Cir. 2007). **[*60]** See Johnson v. Manitowoc Boom Trucks, Inc., 406 F. Supp. 2d 852, 861-62 (M.D. Tenn. 2005) (applying this principle to a proposed alternative design involving "a boom-outrigger interlock system"), aff'd, 484 F.3d 426 (6th Cir. 2007).

> Testing an alternative design can assist a proposed expert in considering: (1) the alternative's compatibility with existing systems, (2) relative efficiency of the current versus alternative design, (3) short and long term maintenance costs for the alternative design, (4) ability of the proposed purchaser to service and maintain the alternative design, (5) cost of installing the alternative design, and (6) change in cost to the machine.

Winters, 498 F.3d at 742. These factors are relevant to an expert's task of assisting the trier of fact because under New Mexico's products-liability law, "the design of a product need not necessarily adopt features which represent the ultimate in safety." NMUJI 13-1407. Rather, the trier of fact "should consider the ability to eliminate the risk without seriously impairing the usefulness of the product or making it unduly expensive." Id.

Dr. Proctor's methodology in the present case contains no analysis of the above factors, **[*61]** through testing or otherwise. He does not even provide a schematic drawing showing how the scissor lift would function with his proposed alternative design, see Johnson, 406 F. Supp. 2d at 862, or a reference to other comparable scissor lifts on the market which already contain the alternative safety features that he proposes, see Sappington v. Skyjack, Inc., 512 F.3d 440, 449 (8th Cir. 2008). [Proctor Dep. at 150-51, 206-20.] He further admits in his deposition testimony that he has not done any research to collect accident data on scissor lifts [Proctor Dep. at 93-96], and he has never been involved in the design of a scissor lift or any other piece of equipment that has gone into production for sale to the public [Proctor Dep. at 106-07].

Thus, the Court is left to rely on Dr. Proctor's ultimate conclusion without any analysis of the relevant factors identified above. This is legally insufficient to meet Plaintiffs' burden of showing that Dr. Proctor's opinions are admissible under Fed. R. Evid. 702. "'An expert must substantiate his opinion; providing only an ultimate conclusion with no analysis is meaningless,'" Winters, 498 F.3d at 743 (quoting Clark v. Takata Corp., 192 F.3d 750, 757 (7th Cir.1999)), **[*62]** because it leaves "an impermissible analytical gap . . . between premises and conclusion." Bitler, 400 F.3d at 1233.

A similar problem arises with respect to Dr. Proctor's opinions about the effect of providing additional warnings or directions about the link between the "drive-speed cut-out switch" circuitry and the controls for the leveling jacks. In order to make the extensive modifications to the wiring that are undisputably present in the scissor lift at issue in this case, and in order to send the machine into operation with other noticeable modifications such as the disconnected green light on the platform control box and the two female cable connectors, users of this product necessarily must have ignored, disregarded, or failed to notice the existing warnings and directions which told them not to modify or operate the scissor lift under these circumstances. Dr. Proctor's methodology fails to reliably explain, through testing or other research, how it is reasonable to infer that a user of the scissor lift would notice and comply with the additional warning or direction that Dr. Proctor suggests, when that same user's conduct evinces that he or she already failed to notice, or **[*63]** elected to disregard, the existing warnings or directions which prohibit the same conduct.

As noted previously, it is not enough to simply conceive of an additional warning or direction that could be added to a thick manual that is already replete with numerous other warnings and directions, because "[r]equiring too many warnings trivializes and undermines the entire purpose of the rule, drowning out cautions against latent dangers of which a user might not otherwise be aware. Such a requirement would neutralize the effectiveness of warnings as an inexpensive way to allow consumers to adjust their behavior based on knowledge of a product's inherent dangers." Liriano, 700 N.E.2d at 308. "Product warnings and instructions can rarely communicate all potentially relevant information, and the ability of a plaintiff to imagine a hypothetical better warning in the aftermath of an accident does not establish that the warning actually accompanying the product was inadequate." Restatement (Third) of Torts, supra § 2, cmt. i, at 29.

It follows that to assist the trier of fact within the meaning of Fed. R. Evid. 702, an expert opinion in this case should not only identify an additional warning or **[*64]** direction, but also provide a reliable explanation of how this additional warning or direction would be read and understood by users in the context presented by the existing warnings and directions. Under New Mexico's Uniform Jury Instructions, the adequacy of warnings or directions may depend not only on the engineering principles which identify the risks to be warned against, but also upon the linguistic principles necessary to communicate that risk in an effective manner. See NMUJI 13-1418; cf. Victor E. Schwartz & Russell W. Driver, Warnings in the Workplace: The Need for a Synthesis of Law and Communication Theory, 52 U. Cin. L. Rev. 38, 43-44 (1983) (explaining for need for scientific study of the relationship between identifying a risk and effectively communicating a warning of that risk). It is for this reason that, in certain contexts, courts have determined that a witness' general credentials as an engineer do not qualify him or her to offer expert opinions about the adequacy of warnings or directions for a product, unless he or she can

demonstrate other specialized knowledge regarding the communication of warnings. See Robertson v. Norton Co., 148 F.3d 905, 907-08 (8th Cir. 1998); **[*65]** Miller v. Pfizer, 196 F. Supp. 2d 1062, 1088 (D. Kan. 2002), aff'd 356 F.3d 1326, 1335 (10th Cir. 2004). The exclusion of expert testimony that lacks such specialized knowledge is consistent with the Tenth Circuit's reasoning in Ralston v. Smith & Nephew Richards, Inc., 275 F.3d 965, 969-70 (10th Cir. 2001), which recognized that a medical degree is insufficient to qualify a physician to give expert testimony about the adequacy of a warning for a specialized product.

Dr. Proctor admitted in his deposition testimony that he has never designed or drafted warnings or instructions for use of a scissor lift, boom lift, or any other type of aerial work platform. [Proctor Dep. at 108.] He also admitted that he has not done any research or testing to support the inference or hypothesis that employees of Defendant United Rentals, or the company to which it rented the scissor lift, would have done anything differently if the wording in Defendant JLG's manuals had been amended to include his suggested warnings or instructions. [Proctor Dep. at 181-83; 201-06.] For the above reasons, I conclude that Dr. Proctor's deposition testimony about the adequacy of Defendant JLG's warnings or directions **[*66]** for the scissor lift also is inadmissible under Fed. R. Evid. 702.

C. Dr. Proctor's Second Affidavit Dated February 18, 2008

In an attempt to overcome the deficiencies in Dr. Proctor's first affidavit dated September 21, 2007, and his deposition testimony dated December 11, 2007, Plaintiffs submitted a second affidavit by Dr. Proctor dated February 18, 2008. [Ex. A to Doc. 164-2.] Defendants object to this second affidavit on the grounds that it is both untimely under Fed. R. Civ. P. 26 and inadmissible under Fed. R. Evid. 702.

I first consider the timeliness arguments relating to Dr. Proctor's second affidavit dated February 18, 2008. Federal Rule of Civil Procedure 26(a)(2) generally requires the timely disclosure of detailed information regarding expert witnesses whom a party specially retains for the purpose of testifying at trial. Unless otherwise stipulated or directed by the Court, this rule requires the disclosure of the retained expert's identity and a written report containing:

> (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
> (ii) the data or other information considered by the witness in forming them;
>
> (iii) any exhibits that **[*67]** will be used to summarize or support them;
> (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
> (v) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and
> (vi) a statement of the compensation to be paid for the study and testimony in the case.

Fed. R. Civ. P. 26(a)(2)(B). These requirements are enforceable through Fed. R. Civ. P. 37(c)(1), which provides for sanctions, including the exclusion of evidence that is not timely disclosed in a party's expert reports. See Gutierrez v. Hackett, 131 Fed. Appx. 621, 625-26 (10th Cir. 2005) (unpublished disposition citing Jacobsen v. Deseret Book Co., 287 F.3d 936, 953 (10th Cir.2002)).

Pursuant to Fed. R. Civ. P. 16(b) and 26(a)(2)(C), the Court entered an *Order* [Doc. 56] setting a deadline of August 29, 2007, for the disclosure of Plaintiffs' expert reports, and a deadline of October 10, 2007, for the disclosure of Defendants' expert reports. The Court's *Order* [Doc. 56] did not provide for supplemental reports or rebuttal reports

pursuant to Fed. R. Civ. P. 26(a)(2)(C)(ii) or 26(e)(1)(B), and no such provision was **[*68]** sought by the parties in the joint motion which led to that *Order*. [Doc. 47.]

Nevertheless, the parties were required to supplement their expert-witness disclosures as necessary pursuant to Fed. R. Civ. P. 26(a)(2)(D) and 26(e)(2). Supplementation is generally required "if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Fed. R. Civ. P. 26(e)(1)(A). This requirement applies to both expert reports and expert deposition testimony. See Fed. R. Civ. P. 26(e)(2); Miller v. Pfizer, Inc., 356 F.3d 1326, 1332 (10th Cir. 2004). Courts have noted, however, that supplementation of an expert report under Fed. R. Civ. P. 26(a)(2)(D) cannot be used as a pretext to avoid sanctions under Fed. R. Civ. P. 37(c)(1), especially when the purported "supplementation" is based on evidence that was available before the deadline for filing the initial expert reports. See Salgado v. General Motors Corp., 150 F.3d 735, 738-43 (7th Cir. 1998).

In this case, the Magistrate Judge's *Order* [Doc. 99] permitting additional **[*69]** testing of the scissor lift on December 6, 2007, provided grounds for Dr. Proctor to supplement his initial expert report in order to account for the results of that testing. The opportunity to present such supplementation in an admissible form occurred when Dr. Proctor was deposed on December 11, 2007. But when specifically asked at his deposition whether "there are any corrections or changes that need to be made in those reports," Dr. Proctor responded that "[t]he only change that would be made would be on the original report where I referred to 'the switch,' and it should be referred to as the 'switch assembly,' and then that would clarify the misunderstanding that I had from the original testing in August regarding whether the functional test was correct." [Proctor Dep. at 136.] Dr. Proctor then stated that "there wouldn't be any other changes." [Proctor Dep. at 136.]

In light of the record summarized above, I find that Dr. Proctor's second affidavit dated February 18, 2008, is untimely and does not constitute proper supplementation or rebuttal under Fed. R. Civ. P. 26(a)(2)(C)(ii), 26(a)(2)(D), or 26(e)(1)(B), or 26(e)(2). I further find that the untimely disclosure of Dr. Proctor's **[*70]** second affidavit after the close of discovery is not substantially justified or harmless under Fed. R. Civ. P. 37(c)(1), because such untimely disclosure interferes with the Court's case-management deadlines in a way that unfairly prejudices the Defendants' ability to brief dispositive motions and prepare for trial, and because the timing of Dr. Proctor's affidavit is not premised on any exigency such as the discovery of new evidence or a recent change in the law. Rather, Dr. Proctor's second affidavit relies on various materials that were available to him at the time of his deposition and should have been disclosed pursuant to subpoena at that time.

I also find that Dr. Proctor's second affidavit dated February 18, 2008, is a "sham affidavit" that must be disregarded insofar as it contradicts his sworn deposition testimony. See Ralston, 275 F.3d at 973-74. The contradiction at issue here could not be more glaring, as Dr. Proctor's attempt to supplement his deposition testimony with an eighteen-page affidavit disclosed more than two months after his deposition was completed [Ex. A to Doc. 164-2] cannot be reconciled with his sworn deposition testimony that the only change he wanted **[*71]** to make to his previous reports was to add a clarification regarding his use of the words "the switch" and the "switch assembly." With that clarification, he specifically

stated that "there wouldn't be any other changes." [Proctor Dep. at 136.] There are further contradictions between the explanation given in Dr. Proctor's deposition testimony regarding his failure to recognize the need for additional testing during the August 2007 inspection of the scissor lift, and the subsequent explanation for the omission of this additional testing given in his second affidavit. [Compare Proctor Dep. at 6-24, 30-65, with Ex. A to Doc. 164-2, at 8-13.]

Dr. Proctor was cross-examined extensively regarding all of these topics at his deposition. He had access to the pertinent evidence at the time of his earlier deposition testimony and was acting under a subpoena which directed him to bring that evidence to the deposition. Finally, his earlier deposition testimony does not reflect confusion which calls for clarification in his subsequent affidavit. Far from expressing confusion, doubt, or uncertainty about his testimony or the completeness of his expert reports, Dr. Proctor plainly stated during his **[*72]** deposition that "there wouldn't be any other changes." [Proctor Dep. at 186.] The changes expressed in his subsequent affidavit did not arise until Plaintiffs' response to Defendant JLG's motion for summary judgment became due, thereby creating the need to manufacture a "sham fact issue" under Franks, 796 F.2d at 1237. Accordingly, Dr. Proctor's affidavit meets all the criteria for exclusion under the "sham affidavit" rule articulated in Ralston, 275 F.3d at 973.

In the alternative, I determine that to the extent Dr. Proctor's second affidavit dated February 18, 2008, was disclosed in a timely manner, the opinions expressed therein are nevertheless inadmissible under Fed. R. Evid. 702. Without repeating all of the foregoing analysis of the factors bearing on the reliability and relevance of Dr. Proctor's opinions under Daubert and its progeny, I note that there is one additional factor which is particularly applicable to his second affidavit dated February 18, 2008. Courts have "recognized for some time that expert testimony prepared solely for purposes of litigation, as opposed to testimony flowing naturally from an expert's line of scientific research or technical work, should be **[*73]** viewed with some caution." Johnson, 484 F.3d at 434 (citations omitted). While this principle should not be construed so narrowly as to limit plaintiffs in products-liability cases to the pool of experts who are already employed by or financially dependent on manufacturers and industry groups, it nevertheless applies with special force to the exceptional circumstances of Dr. Proctor's second affidavit in this case. This second affidavit does not flow naturally from some ongoing line of scientific research or technical work that Dr. Proctor is performing apart from this litigation. Rather, the second affidavit evinces the great extent to which his testimony is being molded to meet the particular demands of this litigation.

When Plaintiffs decided to move for summary judgment on their failure-to-warn claims, Dr. Proctor prepared his initial expert report and first affidavit to emphasize certain facts or theories in support of those claims. When Defendant United Rentals moved for summary judgment on Plaintiffs' negligence claim, Dr. Proctor responded with a supplemental report and a request for additional testing that relied on different facts and theories which had more relevance to Defendant **[*74]** United Rentals' liability. And when Defendant JLG moved for summary judgment, Dr. Proctor again responded with a third variation in his testimony to tailor his data and theories to Plaintiffs' claims against Defendant JLG. Such extreme dependence on the context supplied by a particular phase of the litigation suggests that the evolution of Dr. Proctor's opinions in this case does not rest on the reliable application of a consistent set of theories and data, but is instead based on mere rhetoric clothed in technical or scientific jargon.

Accordingly, I determine that all of the iterations of Dr. Proctor's evolving opinions about Defendant JLG's liability in this case are inadmissible under Fed. R. Evid. 702 and cannot be used to establish a genuine issue of material fact in response to Defendant JLG's motion for summary judgment. I express no opinion about Dr. Proctor's professional reputation as an engineer or the prospect that his testimony might be admissible in any other case.

D. Mr. Gallagher's Deposition Testimony of November 30, 2007

In addition to Dr. Proctor, Plaintiffs have proffered the testimony of a second liability expert, Mr. Vincent Gallagher. I next consider the admissibility **[*75]** and timeliness of Mr. Gallagher's deposition testimony taken on November 30, 2007. This testimony indicates that Mr. Gallagher's work is entirely related to litigation. [Gallagher Dep. at 80.] He has written articles on how to be an artful expert witness [Gallagher Dep. at 131-37], and this skill is evident in his non-responsive or evasive answers to defense counsel's questions during his deposition. [Gallagher Dep. at 107-09, 144-54, 224-231, 243-45, 254-57, 261-62.] Accordingly, for the same reasons previously stated with respect to Dr. Proctor's second affidavit, the Court views the testimony of Mr. Gallagher with some caution when performing its gatekeeping role under Daubert. See Johnson, 484 F.3d at 434.

Mr. Gallagher's deposition testimony further indicates that he has not performed any testing of the equipment at issue in this case. Rather, his testimony is based on his review of documents and photographs, including Dr. Proctor's initial expert report dated September 21, 2007. [Gallagher Dep. at 42-43, 261-62.] Mr. Gallagher's own initial expert report dated August 28, 2007, describes his methodology as a process of comparing the conduct of Defendant JLG in this case to "the **[*76]** principles and practices of product safety management established by industry safety authorities." [Ex. 5 to Doc. 161-3, at 3.] While Plaintiffs correctly point out that Fed. R. Evid. 703 does not necessarily preclude an expert from basing an opinion on hearsay statements contained in documents authored by another witness rather than firsthand knowledge, the fact remains that Mr. Gallagher's methodology is heavily dependent on the documents that he relied upon to ascertain the facts concerning Defendant JLG's conduct.

As noted above, Dr. Proctor's first affidavit, and the initial expert report on which it is based, do not meet the requirements for admission under Fed. R. Evid. 702 because they lack a sufficient factual basis and a reliable application of the methodology to the facts. See Johnson, 484 F.3d at 429; Mamah, 332 F.3d at 477-78. In particular, Dr. Proctor's first affidavit and initial expert report are based on the undisputably false premise that "[a]ll systems related to the operation of the leveling jacks were examined" and that "all operational systems for the leveling jacks were shown to operate correctly with the exception of the Drive Speed Cut-Out Switch assembly." **[*77]** [Doc. 65-2, at 25.] Dr. Proctor subsequently testified that he was under the mistaken impression that functional testing of the circuitry associated with the interlock device or "drive speed cut-out switch" had been performed prior to the disclosure of his first initial expert report in August 2007, when in fact such testing had not yet occurred.

Insofar as Mr. Gallagher relies on Dr. Proctor's initial expert report as the basis for his assertion that the accident can be attributed to a "single point failure," [Gallagher Dep. at 261-62,] his opinions are inadmissible under Fed. R. Evid. 702 for the same reasons that the Court previously articulated with respect to Dr. Proctor's first affidavit and initial expert report.

Because Dr. Proctor failed to test or otherwise account for the extensive post-sale modifications to the scissor lift involved in the accident, the documents authored by Dr. Proctor on which Mr. Gallagher relies for his comparative methodology do not contain an accurate or complete description of Defendant JLG's conduct. Without such a description of Defendant JLG's conduct, Mr. Gallagher lacks a relevant or reliable basis on which to compare that conduct to the principles **[*78]** and practices of product safety management that he purports to identify in his testimony.

In addition to the "single point failure" theory relating to the "drive speed cut-out switch" that was previously disclosed in Plaintiffs' initial expert reports, Mr. Gallagher's deposition testimony opines about the leveling-jack controls on the platform control box. Specifically, Mr. Gallagher opines that these controls were not adequately protected against inadvertent actuation because: (1) the ANSI standard requires "protection" [Gallagher Dep. at 144-45, 150-54], and (2) he viewed a photograph of the controls on the platform control box which led him to believe that a user of the controls could inadvertently bump his or her leg against the controls. [Gallagher Dep. at 270-71.]

Defendant JLG correctly points out that Mr. Gallagher's deposition testimony concerning the application of the ANSI standard to the leveling-jack controls is untimely under Fed. R. Civ. P. 26, because his opinion on that topic was not previously disclosed in his initial expert report disclosed on August 28, 2007. Both the ANSI standard and the photographs of the platform control box that Mr. Gallagher relied upon in forming **[*79]** his opinion were available to him before that deadline; they are not the product of any additional testing that Dr. Proctor performed on the scissor lift at a later date.

For these reasons, I find that Mr. Gallagher's opinion about the application of the ANSI standard to the leveling-jack controls is not proper supplementation under Fed. R. Civ. P. 26(e), and that Plaintiffs' delay in disclosing this opinion is not substantially justified under Fed. R. Civ. P. 37(c)(1). I further find that this delay is not harmless, as it unfairly prejudices Defendants' ability to comply with the case-management deadlines which are necessary for a fair and orderly disposition of this case. Accordingly, Mr. Gallagher's deposition testimony about the application of the ANSI standard to the leveling-jack controls must be excluded under Fed. R. Civ. P. 37(c)(1).

In the alternative, I also find that Mr. Gallagher's deposition testimony concerning the leveling-jack controls does not meet the reliability and relevance requirements for admission under Fed. R. Evid. 702 and will not assist the trier of fact. In this regard, I view Mr. Gallagher's testimony on this subject in the context of the equivocal and **[*80]** non-responsive statements he made when first asked at his deposition about the completeness of the reports he had previously submitted in this case.

When first asked whether his "reports contain all of your opinions in this case," Mr. Gallagher said "no" and identified two specific opinions pertaining to whether Plaintiffs were the cause of their own injury and whether Plaintiffs' employer violated any OSHA standards. [5] Mr.

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[5] As noted above, the comparative negligence of Plaintiffs or their employer may be relevant to the issue of apportioning damages but is not directly relevant to the pending motion for summary judgment concerning Defendant JLG's liability for the accident. Viewing the evidence in the light most favorable to Plaintiffs, the Court assumes for purposes of analysis that apportionment of damages under principles of comparative responsibility would not be dispositive of Defendant JLG's motion for summary judgment, regardless of what percentage of responsibility for the accident is attributed to Plaintiffs or their employer.

Gallagher then equivocated on whether he had any other opinions that are not contained in his reports, stating that: "I have done this quite frequently and it's invariable that you will ask questions or [another] attorney will ask questions that will lead me to an answer that somebody else could say [is] a different opinion." [Gallagher Dep. at 106.] About 40 pages later in his deposition, when defense counsel was attempting to confirm or clarify that Mr. Gallagher was "not testifying that any ANSI standards were violated in the design or manufacture of the JLG 500 RTS" scissor lift, Mr. Gallagher stated: "Only the one related to the lack of cover over the controls. That's an opinion that, I'm sorry, I didn't express to you earlier. I meant to tell you." [Gallagher **[*81]** Dep. at 144-45.]

The fact that this opinion arose for the first time in such an inadvertent manner during the course of Mr. Gallagher's deposition--and then only several minutes after counsel had specifically asked whether his previous reports contained all his opinions in this case-further emphasizes the great extent to which Mr. Gallagher's opinions are developed in an *ad hoc* manner to suit the needs of his clients' position in each particular phase of this litigation, rather than through the consistent application of an objective, independent, and reliable methodology. **[*82]** See Johnson, 484 F.3d at 434.

I also find that Mr. Gallagher's deposition testimony about the possibility of mounting some type of additional guard, cover, or protection over the leveling-jack controls on the platform control box is inadmissible for the same reasons previously expressed with respect to Dr. Proctor's alternative design concepts. Mr. Gallagher's conception of how such an alternative guard, cover, or other protection would operate is even more sketchy than that of Dr. Proctor. In his deposition testimony, Mr. Gallagher first refers to "the lack of cover over the controls." [Gallagher Dep. at 144.] He then equivocates over whether the ANSI standard requires "guards" or just "protection," eventually settling on the answer that "[g]uards would be one of the ways you could protect it. You could have other types of designs to protect." [Gallagher Dep. at 147.] Later in his deposition testimony, Mr. Gallagher adds that: "The standard doesn't require that only a physical barrier guard can be used. You could recess controls so you can't brush up against them." [Gallagher Dep. at 154.] Ignoring the fact that the leveling-jack controls depicted in the manuals and photographs cited **[*83]** in the parties' briefs and expert reports *are* contained in a recessed area on the side of the platform control box, Mr. Gallagher nevertheless opines that: "When I looked at the photo, I was performing sort of a test," because "[i]t's a toggle switch right in the area where the worker's leg is." [Gallagher Dep. at 271.]

Mr. Gallagher's deposition testimony does not reflect the type of reliable methodology for testing or researching an alternative design that courts have required as a precondition for admitting expert opinions on this subject. See Guy, 394 F.3d at 327; Winters, 498 F.3d at 742-43; Johnson, 406 F. Supp. 2d at 861-62. Further, if the "test" for determining whether a particular design meets an ANSI standard is simply to look at a photograph, then that is a test which a jury can perform without the aid of an expert witness. It is not the role of an expert witness to "unduly invade the province of the jury when assistance of the witness is unnecessary" and "'merely tell the jury what result to reach,'" Sims, 469 F.3d at 889 (quoting Fed.R.Evid. 704 advisory committee notes), nor is it the role of an expert to usurp the jury's task of determining which factual scenarios are **[*84]** more believable. See United States v. Adams, 271 F.3d 1236, 1245-46 (10th Cir. 2001). It follows from the analysis provided above that the opinions expressed in Mr. Gallagher's deposition testimony are

inadmissible for purposes of supporting Plaintiffs' response to Defendant JLG's motion for summary judgment.

E. Mr. Gallagher's Affidavit Dated February 18, 2008

Having concluded that Mr. Gallagher's deposition testimony contains no admissible expert opinions to support Plaintiffs' response to Defendant JLG's motion for summary judgment, I next turn to his affidavit dated February 18, 2008. A large portion of Mr. Gallagher's affidavit is devoted to expanding upon his qualifications and citing articles he has published and cases in which courts have permitted him to testify as an expert. To the extent these portions of Mr. Gallagher's affidavit are relevant, I determine that they are untimely attempts to change his sworn deposition testimony in violation of Fed. R. Civ. P. 26 and the "sham affidavit" rule articulated in Ralston, 275 F.3d at 973. At the time of his deposition testimony, Mr. Gallagher had access to the articles and cases he cites in support of his qualifications. Rather than **[*85]** reflecting confusion or a lack of understanding about the questions he was asked, Mr. Gallagher's deposition testimony reflects non-responsiveness and perhaps a deliberate effort to avoiding committing to an answer.

I reach a different conclusion with respect to Paragraph 8 of Mr. Gallagher's affidavit, in which he states that:

> one of the design defects as identified by Dr. Proctor, even with the modifications to the lift, is that the 500 RTS scissor lift had a single point failure design in a life critical safety device. Dr. Proctor's opinion is that if the life critical safety device failed or was bypassed, the lift was designed in such a manner that no other safety device was present to prevent retraction of the leveling jacks when the lift was elevated. It is my opinion, as provided in my reports, that JLG's violations of the principles and practices of product safety management and hazard control in the design of 500 RTS scissor lift were one of the causes of the accident that led to the deaths of Mr. Magoffe and Mr. Michel.

[Ex. 1 to Doc. 161-2, at 4.] Because Mr. Gallagher's deposition was taken before Dr. Proctor completed his additional testing of the scissor lift on December **[*86]** 6, 2007, as permitted by the Magistrate Judge's *Order*, I determine that this paragraph of Mr. Gallagher's affidavit meets the criteria for timely supplementation of an expert report under Fed. R. Civ. P. 26(e). In this paragraph, Mr. Gallagher is simply clarifying that he maintains the opinions he expressed earlier notwithstanding the results of Dr. Proctor's additional testing, which confirmed the existence of modifications to the lift.

This paragraph of Mr. Gallagher's affidavit is nevertheless too vague and conclusory to form a reliable basis for admitting an expert opinion under Fed. R. Evid. 702. The "single point failure" theory on which both of Plaintiffs' experts rely is contrary to the undisputed facts admitted in Plaintiffs' response to Defendant JLG's motion for summary judgment, which identify several components of the scissor lift which were modified in order to effect the bypass of its interlock device. The "single point failure" theory also is inconsistent with the assertion that the accident had *multiple* causes due to the presence of extensive modifications to *several* components.

In order to explain this gap between the "single point failure" theory and the undisputed **[*87]** facts concerning the multiple modifications or intervening causes that preceded the accident, it is not enough for Mr. Gallagher to simply restate his qualifications and cite other cases in which courts have allowed him to testify. Rather, Mr. Gallagher

must set forth the intermediate steps in his reasoning in a more coherent and timely manner. See Joiner, 522 U.S. at 146. Because he has not done so, I conclude that the expert opinions stated in his affidavit are inadmissible under Fed. R. Evid. 702 for the purpose of supporting Plaintiffs' response to Defendant JLG's motion for summary judgment.

F. Opinions Expressed by Defendants' Experts

The next category of evidence that Plaintiffs seek to marshal in opposition to Defendant JLG's motion for summary judgment consists of various excerpts from the reports and testimony of Defendants' experts. Specifically, Plaintiffs' response to Defendant JLG's motion for summary judgment [Doc. 168] cites the following: (1) the deposition testimony of Steve Forgas, Defendant JLG's Product Safety and Reliability Manager [Forgas Dep. 9-12-07, Ex. C to Doc. 83-2, Ex. F to Doc. 164-3]; (2) the deposition testimony of Dr. Francis Wells, an expert retained **[*88]** by Defendant JLG in this litigation [Ex. I to Doc. 164-3]; and (3) the deposition testimony of Dr. Scott Kritschke, a witness for Defendant United Rentals [Ex. J to Doc. 164-3.]

The basic problem with Plaintiffs' reliance on these materials is that they are taken out of context and are premised on the existence of the hypothetical scenarios previously referenced in the testimony of Dr. Proctor and Mr. Gallagher, which do not correspond to the undisputed facts. These hypothetical scenarios simply do not find support in the record because there is no admissible evidence that the scissor lift's "drive speed cut out switch" or "interlock device" failed or malfunctioned, nor is there any evidence of a simple failure (such as a loose connection or crossed wire) in the circuitry immediately associated with this switch or device. Rather, Plaintiffs have admitted to undisputed facts which show that the switch or device which otherwise would have disabled the leveling-jack controls was bypassed--not through some basic failure of the interlock device itself or the circuit directly attached to it--but instead through extensive, post-sale modifications to the wiring in the scissor lift's ground **[*89]** terminal, cable connectors, and platform control box.

In this regard, Dr. Wells deposition testimony describes the "drive speed cut-out switch assembly" as a circuit "that controls -- that goes to the brown wire and controls the bank of limit switches and also the drive speed switch." [Wells Dep. at 94, Ex. I to Doc. 164-3.] Notably, he does not include in his definition of "drive speed cut-out assembly" the additional wiring and other modifications to the ground terminal, cable connectors, and leveling-jack controls in the platform control box. And when taken in context, his testimony is that the "drive speed cut-out switch assembly did not perform properly" because it was bypassed, not because of some failure in the switch or circuit itself (such as a loose connection). [Wells Dep. at 94-97.] Thus, the need for the hypothetical warnings that Dr. Wells and Mr. Forgas discuss in their deposition testimony arises from the modifications to the scissor lift, not from its original design.

The deposition testimony of Mr. Forgas that is cited in Plaintiffs' response was taken on September 12, 2007, at which time Plaintiffs and Dr. Proctor were proceeding on the incorrect assumption that the **[*90]** scissor lift's wiring had not been modified in any material way and that the "drive speed cut out switch" or "interlock device" had failed. Mr. Forgas' hypothetical testimony that the "switch may or may not work properly" is not material because the undisputed facts and evidence of record show that the switch was bypassed such that it could not have prevented the accident regardless of whether the switch itself was working properly in this case. [Forgas Dep. at

93, Ex. C to Doc. 83-2.]

Mr. Forgas' testimony regarding the possibility of extending the "lip" around the bottom of the platform control box did not change his opinion that the existing guarding and safety features for the leveling-jack controls were adequate to protect against foreseeable hazards. On this point, he testified that: "We felt the guarding that we had on there was adequate to protect the switch from the things I said earlier." [Forgas Dep. at 102-105, Ex. F to Doc. 164-3.] Plaintiffs have not pointed to any admissible evidence showing that the accident was caused by a failure to place a lip around the bottom of the recessed area on the platform control box. For the reasons previously stated with respect to the **[*91]** alternative-design theories of Dr. Proctor and Mr. Gallagher, the mere possibility that such a lip could be feasible does not support a reasonable inference that the existing guarding around the leveling-jack controls was inadequate or had any foreseeable causal relationship to the accident.

Finally, the cursory reference to Mr. Kritschke's deposition testimony [Ex. J to Doc. 164-3] in Plaintiffs' response to Defendant JLG's motion for summary judgment [Doc. 168, at 6] does not provide an adequate foundation for opining about the adequacy of warnings or who bears the responsibility for providing additional warnings regarding the new hazards created by the post-sale modifications to the scissor lift involved in the accident. For these reasons, none of the excerpted statements from Defendants' experts or employees that Plaintiff cites in its response to Defendant JLG's motion for summary judgment provide relevant and reliable opinions which are admissible under Fed. R. Evid. 702 in this context.

G. Mr. Magoffe's Affidavit Dated February 18, 2008

The last item that Plaintiffs cite and attach with their response to Defendant JLG's motion for summary judgment is an affidavit by Plaintiff James **[*92]** Magoffe dated February 18, 2008. [6] [Doc. 168-2.] Plaintiff Magoffe was present at the scene of the accident when it occurred, and part of his affidavit consists of factual testimony about his background and what he perceived or felt on the date of the accident. [Magoffe Aff. 2-18-08, P 1-4.] Another portion of his affidavit consists of hypothetical answers explaining what Plaintiff Magoffe believes he would have done if he "had known that the high speed cut out switch also controlled the interlock device for the leveling jacks" [Magoffe Aff. 2-18-08, P 5], if "the directions and warnings for the RTS500 had communicated the relationship between the drive speed cut out switch and the safe and stable operation of the leveling jacks" [Magoffe Aff. 2-18-08, P 6], and "if the directions and warnings had provided a test or a warning to confirm that the interlock for the leveling jacks was operating properly" [Magoffe Aff. 2-18-08, P 7]. In the final portion of his affidavit, Plaintiff Magoffe opines that "the lack of such a warning or instruction to test caused the accident which injured me and which killed my brother and my friend." [Magoffe Aff. 2-18-08, P 7.]

Defendant JLG moves to strike the hypothetical answers contained in Plaintiff Magoffe's affidavit and his opinion about what caused the accident on the grounds that they are not proper lay opinion testimony under Fed. R. Evid. 701. [Doc. 184.] In support of its motion, Defendant JLG correctly cites the proposition that lay opinion testimony must be "rationally based on the perception of the witness" and not based on either "scientific, technical, or other specialized knowledge," Fed. R. Evid. 701, or speculation concerning a scenario that the witness did not, in fact, perceive, see Armistead v. Allstate Ins. Co., No. CIV 06-0017 MCA/DJS, 2007 U.S.

[6] The Court refers to Mr. James **[*93]** Magoffe as "Plaintiff Magoffe" in order to distinguish him from his brother who died in the accident.

Dist. LEXIS 96158, 2007 WL 4618467, at *4 (D.N.M. Apr. 5, 2007) (unpublished memorandum opinion and order collecting cases). Courts have held that this rule does not permit a lay witness to speculate about whether he or she would have followed a hypothetical warning or what the hypothetical effect of that warning would be. See, e.g., Kloepfer v. Honda Motor Co., Ltd., 898 F.2d 1452, 1459 (10th Cir. 1990); Washington v. Dep't of Transp., 8 F.3d 296, 300 (5th Cir. 1993). **[*94]** Even assuming for purposes of argument that the additional warnings suggested by Plaintiff Magoffe's hypothetical scenarios should have been given and would have been effective, his affidavit lacks a rational basis for opining about who was responsible for providing these warnings because he states no personal knowledge of what modifications, if any, had been made to the scissor lift before it came into the possession of his employer.

Accordingly, I conclude that Fed. R. Evid. 701 does not permit Plaintiff Magoffe to offer opinions about (1) what he *would have done* in a hypothetical scenario that he never actually perceived, or (2) the effectiveness of a particular warning or test that was never actually provided to him, or (3) who was responsible for particular acts or omissions that preceded his experience with the scissor lift. Testimony about these topics goes too far into the realm of speculation for a lay witness and requires additional foundation in the form of scientific, technical, or other specialized knowledge of an expert who has been timely identified pursuant to Fed. R. Civ. P. 26.

I also note that Plaintiffs have not come forward with admissible evidence that the "high **[*95]** speed cut out switch," "drive speed cut out switch," or "interlock" referenced in Plaintiff Magoffe's affidavit were not operating properly at the time of the accident due to some act or omission by Defendant JLG. Rather, the undisputed facts indicate that these components of the scissor lift could not have caused or prevented the accident because they had been *bypassed* as a result of the extensive post-sale modifications to the scissor lift's ground terminal, cable connectors, and platform control box. Plaintiff Magoffe's affidavit does not support a reasonable inference that such extensive post-sale modifications were performed by, or otherwise foreseeable to, Defendant JLG.

On the contrary, Plaintiff Magoffe's affidavit only adds further support to the inference that such post-sale modifications were *not* reasonably foreseeable to Defendant JLG. As noted in the Committee comment to NMUJI 13-1425, the notion that warnings are presumed to be heeded by those who read them may apply to both actual, existing warnings and hypothetical warnings that could have been given. See id. (citing Technical Chem. Co. v. Jacobs, 480 S.W.2d 602, 606 (Tex. 1972), for the principle that "where a warning **[*96]** is given, the seller may reasonably assume that it will be read and heeded"). In this case, Plaintiff Magoffe's statements regarding his past training and experience support an inference that he was familiar with the existing warnings and directions for the scissor lift, and that he was inclined to follow these existing warnings and directions. If the trier of fact were to make such an inference, then it would not be reasonably foreseeable to Defendant JLG that the existing, integrated set of warnings, directions, and safety features would be disregarded and bypassed so as to allow the scissor lift to be operated in the condition that existed at the time of the accident.

For all of the reasons cited above, Plaintiffs have failed to produce admissible evidence in support of their contention that there remains a genuine issue of material fact as to any of their theories of liability as to Defendant JLG. It follows that Defendant JLG is entitled to summary judgment as a matter of law.

VI. CONCLUSION

For the foregoing reasons, the Court grants summary judgment in favor of Defendant JLG and dismisses all of Plaintiffs' claims against Defendant JLG with prejudice, taking into account the inadmissibility **[*97]** and untimeliness of the opinion testimony on which Plaintiffs rely to support their claims against Defendant JLG. All other pending motions are addressed in separate rulings filed concurrently herewith, and the Court will enter a separate final order pursuant to Fed. R. Civ. P. 58 upon receipt of closing documents regarding the settlement between Plaintiffs and Defendant United Rentals.

IT IS THEREFORE ORDERED that *Defendant JLG Industries, Inc.'s Motion for Summary Judgment* [Doc. 149] is **GRANTED**.

IT IS FURTHER ORDERED that Defendant *JLG's Motion to Exclude Opinions of Charles Proctor* [Doc. 154] is **GRANTED**.

IT IS FURTHER ORDERED that Defendant *JLG's Motion to Exclude Opinions of Vincent Gallagher* [Doc. 155] is **GRANTED**.

IT IS FURTHER ORDERED that Defendant *JLG's Motion to Strike Affidavit of James Magoffe* [Doc. 184] is **GRANTED**.

IT IS FURTHER ORDERED that Defendant *JLG's Motion to Strike Affidavit of Vincent Gallagher* [Doc. 186] is **GRANTED**.

IT IS FURTHER ORDERED that Defendant *JLG's Motion to Strike Affidavit of Charles Proctor* [Doc. 187] is **GRANTED**.

IT IS FURTHER ORDERED that all of Plaintiffs' claims against Defendant JLG Industries, Inc. are **DISMISSED WITH PREJUDICE** and Defendant JLG Industries, **[*98]** Inc. is dismissed as a party to this action.

SO ORDERED this 7th day of May, 2008, in Albuquerque, New Mexico.

/s/ M. Christina Armijo

M. CHRISTINA ARMIJO

UNITED STATES DISTRICT JUDGE

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Alfano v. BRP Inc.

United States District Court for the Eastern District of California

June 3, 2010, Decided; June 4, 2010, Filed

Case No. 2:08-cv-1704-JAM-DAD

Reporter
2010 U.S. Dist. LEXIS 64182 *; 2010 WL 2292265

NICOLE ALFANO and MICHAEL ALFANO, Plaintiffs, v. BRP Inc. and BRP US Inc., and DOES 1 through 50 inclusive, Defendants.

Counsel: **[*1]** For Nicole Alfano, Michael Alfano, Plaintiffs: Don Bauermeister, PHV, LEAD ATTORNEY, PRO HAC VICE, Bueke & Bauermeister, Anchorage, AK; Henry Jones, PHV, LEAD ATTORNEY, PRO HAC VICE, Friedman Rubin, Bremerton, WA; Kenneth R. Friedman, Richard H. Friedman, Friedman Rubin & White, Bremerton, WA; Ross Bozarth, Guenard & Bozarth, Llp, Elk Grove, CA; William S. Cummings, PHV, PRO HAC VICE, Friedman Rubin and White, Anchorage, AK.

For BRP Inc., a Canadian company, BRP US Inc., Defendants: Christina M. Paul, PHV, Scott M. Sarason, PHV, LEAD ATTORNEYS, PRO HAC VICE, Rumberger Kirk and Caldwell, PA, Miami, FL; William O. Martin, Jr., LEAD ATTORNEY, Haight Brown et al LLP, Los Angeles, CA.

Judges: JOHN A. MENDEZ, UNITED STATES DISTRICT JUDGE.

Opinion by: JOHN A. MENDEZ

Opinion

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY ADJUDICATION

This matter comes before the Court on Defendants BRP Inc. and BRP US Inc.'s ("BRP" or "Defendants") motion for summary adjudication pursuant to Federal Rule of Civil Procedure 56. (Doc. # 75). Plaintiffs Nicole and Michael Alfano ("Plaintiffs") oppose the motion. (Doc. # 101). A hearing on this motion was held on June 2, 2010.

I. FACTUAL AND PROCEDURAL BACKGROUND

This is a products liability action **[*2]** arising from a personal watercraft incident that occurred on September 15, 2007 on New Bullards Bar Reservoir in Yuba County, California. Plaintiff, Nicole Alfano, was riding as a passenger on-board a 2005 BRP Sea-Doo GXT personal watercraft (the "PWC") operated by the PWC owner, Jill Smith. After Jill Smith accelerated the PWC, Plaintiff lost her grip on the seat strap, fell off the rear of the PWC and into the water at or near the location of the PWC's propulsion jet nozzle ("jet nozzle") and sustained severe internal injuries. Plaintiffs' claims against BRP are for strict and negligent product liability based on the design of the subject PWC and failure to warn.

In the instant motion, Defendants BRP Inc. and BRP US Inc. seek summary adjudication on Plaintiffs' claims of strict and negligent product liability based on failure to warn. (Doc. # 75). Plaintiffs oppose the motion. (Doc. # 101).

II. OPINION

A. *Legal Standard*

Summary judgment or summary adjudication is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). **[*3]** Because the purpose of summary judgment "is to isolate and dispose of factually unsupported claims or defenses," *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986), "[i]f summary judgment is not rendered on the whole action, the court should, to the extent practicable, determine what material facts are not genuinely at issue." Fed. R. Civ. P. 56(d).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact for trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248-49, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). If the moving party meets its burden, the burden of production then shifts so that "the non-moving party must set forth, by affidavit or as otherwise provided in Rule 56, 'specific facts showing that there is a genuine issue for trial.'" *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir. 1987) (quoting Fed. R. Civ. P. 56(e)). The Court must view the facts and draw inferences in the manner most favorable to the non-moving party. *United States v. Diebold, Inc.,* 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962).

A "scintilla of evidence" is insufficient to support the non-moving party's position; "there must be evidence on which the jury could reasonably **[*4]** find for the [non-moving party]." *Anderson,* 477 U.S. at 252. Accordingly, this Court applies to either a defendant's or plaintiff's motion for summary judgment essentially the same standard as for a motion for directed verdict, which is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52.

B. *Failure to Warn*

To find a manufacturer liable for failing to warn, a plaintiff must prove the manufacturer's failure to warn was the proximate cause of the plaintiff's injuries. *Conte v. Wyeth Inc.,* 168 Cal.App.4th 89, 112, 85 Cal. Rptr. 3d 299 (Cal. 1st DCA 2009). A manufacturer of a product can only be liable for those injuries proximately caused by breach of its duty to communicate adequate product warnings. *Carlin v. Superior Court,* 13 Cal. 4th 1104, 1110, 56 Cal. Rptr. 2d 162, 920 P.2d 1347 (Cal. 4th 1996).

Defendants argue that Plaintiffs have not and cannot put forth admissible evidence to satisfy their burden of proof on the essential element of causation to their strict and negligent product liability failure to warn claims. The PWC involved in this case contains warnings, both on-board the subject PWC and within the Operator's **[*5]** Guide, that all users must wear protective clothing, namely a wet suit or equivalent clothing, to prevent severe internal injuries resulting from falling in to the water at or near the location of the jet nozzle. Plaintiff testified in her deposition that she noticed, but did not read, BRP's on-product warning label.

Defendants contend that Nicole Alfano's ("Nicole") testimony that she would have acted a certain way or heeded to the warning had the warning label been adequate is inadmissible as it is too speculative and self-serving pursuant to Federal Rules of Evidence Sections 602 and 701. *See Nevada Power Co. v. Monsanto Company,* 891 F.Supp. 1406 (9th Cir. 1995). Also, BRP argues that the fact that Nicole Alfano saw the warning label and did not read it, even though she admitted that "nothing prevented her from reading it," precludes a finding of proximate cause as Nicole did not intend to read or rely on the warning.

Plaintiffs contend that the very nature of the label's inadequacy is what caused Nicole to ignore the warning. Had the warning label been adequate, Nicole would have looked at it. Plaintiffs assert that BRP knows that users do not heed its warning to wear protective **[*6]** clothing and therefore BRP had a duty to provide a short and plain warning to consumers. Plaintiffs assert it is unreasonable to expect consumers to read and process such a lengthy message as was containing on the subject PWC. Thus, Plaintiffs argue a genuine issue of fact exists as to whether the label's inadequacy is what caused Nicole to ignore it. *Herrera v. Louisville Ladder Group, LLC,* 2009 U.S. Dist. LEXIS 107384, 2009 WL 3849705 at *3-4. The *Herrera* case however, does not address whether the Plaintiff can testify as to whether a different warning would have altered her conduct. Rather, the only issue before the Court in *Herrera* was the adequacy of the warning.

Here, it is undisputed that Nicole Alfano did not read the PWC warning. Although Plaintiffs argue that the label's inadequacy is what caused Nicole Alfano to ignore the warning, Plaintiffs have offered no admissible evidence which creates the existence of a material factual dispute concerning causation. Normally, undisputed evidence that a plaintiff failed to read instructions or warnings which were provided with the product is sufficient to entitle the defendant to judgment as a matter of law. *See Motus v. Pfizer, Inc.,* 358 F.3d 659, 661 (9th Cir.2004). **[*7]** California law requires proof that "the inadequacy or absence of the warning was a substantial cause of the plaintiff's injury." *Plummer v. Lederle Laboratories, Div. of American Cyanamid Co.,* 819 F.2d 349, 358 (2d Cir. N.Y. 1987); *see Ramirez v. Plough, Inc.,* 6 Cal. 4th 539, 25 Cal. Rptr. 2d 97, 863 P.2d 167 (Cal.1993)(requiring "causal connection between the representations or omissions that accompanied the product and plaintiff's injury"). California, unlike some other states, has not adopted a rebuttable presumption that a person would have heeded an adequate warning. *See Motus,* 196 F.Supp.2d at 991-95. As such, the Plaintiff bears the burden of proving through affirmative evidence that the inadequate warning was the proximate cause of her injuries.

Here, even assuming Plaintiffs' argument that a jury could find inadequacy of the warning, Plaintiffs are unable to establish that an adequate warning would have altered Nicole Alfano's conduct. The Court finds that Nicole's testimony that she would have acted a certain way or heeded to the warning had it been adequate is inadmissible as it is too speculative and self-serving pursuant to Federal Rules of Evidence Sections 602 and 701. *See Nevada Power Co. v. Monsanto Company,* 891 F. Supp. 1406 (9th Cir. 1995)(the **[*8]** court held that plaintiff's testimony that he would have not have used the equipment at all had he known more fully of the dangers was too speculative and self-serving). In the absence of any other supporting evidence or facts on the issue of causation, the Court concludes that Plaintiffs have failed to demonstrate there exists a genuine issue of material fact on the causation issue, which is an essential element to their claims for both strict and negligent product liability for failure to warn. Accordingly, Plaintiffs' strict and negligent failure to warn claims fail as a matter of law.

III. ORDER

For the above reasons, Defendants BRP Inc. and BRP US Inc.'s motion for summary adjudication on Plaintiffs' strict and negligent product liability failure to warn claims is hereby GRANTED.

IT IS SO ORDERED.

Dated: June 3, 2010

/s/ John A Mendez

JOHN A. MENDEZ,

UNITED STATES DISTRICT JUDGE

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