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Prod.Liab.Rep. (CCH) P 16,400
(Cite as: 2002 WL 1465762 (N.D.Ohio))

United States District Court, N.D. Ohio, Western Division.

Jameson G. FEE, et al., Plaintiffs,
v.
BRASS EAGLE, INC., Defendant.

No. 3:00CV7786.

June 3, 2002.

Daniel R. Michel, Arthur, O'Neil, Mertz & Bates, Eric A. Mertz, Arthur, O'Neil, Mertz & Bates, Defiance, for Jameson G. Fee, by and through his mother and next friend, Angela Fee, David J. Fee, Plaintiffs.

Edwin A. Coy, Robison, Curphey & O'Connell, Toledo, William M. Griffin, III, Friday, Eldredge & Clark, Little Rock, AK, for Brass Eagle, Inc., Defendants.

ORDER

CARR, District J.

***1** This is a diversity case between a child, Jameson Fee, and the manufacturer of a paintball gun. Plaintiffs allege that the child permanently injured his eye when his paintball gun spontaneously discharged while he was examining its barrel. Plaintiffs claim that the gun contains defects in both its cocking mechanism and its safety, which caused the injury.

Plaintiffs bring claims of negligence, product liability, breach of warranties, and loss of consortium, and seek compensatory and punitive damages, costs, attorney fees, and equitable relief. Pending are motions in limine filed by both parties. For the following reasons, plaintiffs' motion shall be granted and defendant's motion shall be denied.

I. Plaintiffs' Motion in Limine

Through their motion, plaintiffs challenge defendant's ability to raise contributory negligence and assumption of the risk as defenses to the products liability claim. Additionally, plaintiffs challenge the ability of defendant's two experts to testify.

A. Defenses to the Products Liability Claim

Plaintiffs challenge the defendant's ability to assert the defenses of contributory negligence and assumption of the risk, as these defenses relate to Count II of plaintiffs' complaint, a claim of products liability based on strict liability.

1. Comparative Negligence

Relying on the Ohio Supreme Court's decision in *Bowling v. Heil Co.*, 31 Ohio St.3d 277 (1987), plaintiffs assert that defendant is precluded from introducing any evidence of comparative negligence on the part of Jameson Fee, as it relates to the products liability claim. Defendant has failed to respond to this contention. In any event, plaintiffs' argument is well-taken.

In *Bowling*, the court held "that principles of comparative negligence or comparative fault have no application to a products liability case based upon strict liability in tort." 31 Ohio St.3d at 286. As such, defendant is precluded from asserting a comparative negligence defense insofar as plaintiffs' products liability claim rests on strict liability.

2. Assumption of the Risk

Plaintiffs also assert that defendant is precluded from raising assumption of the risk as a defense to Count II of plaintiffs' complaint. While both parties agree that assumption of the risk is a complete defense for a strictly liable defendant, *see* *Bowling*, 31 Ohio St.3d at 282, the parties disagree over the nature of the knowledge that Jameson Fee must have possessed in order to be deemed to have assumed the risk of injury resulting from the allegedly defective product.

Defendant claims that to assume the risk Jameson Fee need only have known that an accidental discharge could have occurred and caused an injury. Plaintiffs claim that for Jameson Fee to have assumed the risk defendants must show he knew of the alleged defect in the paintball gun, and acted with full knowledge of the risk posed by that defect. In resolving this issue, I find plaintiffs' argument more persuasive.

***2** The Ohio Supreme Court has stated:

> For the defense of assumption of the risk to act as a bar to recovery of damages [in a products liability case], the defendant must establish that the plaintiff

knew of the condition, that the condition was patently dangerous, and that the plaintiff voluntarily exposed himself or herself to the condition.

Carrel v. Allied Prods. Corp., 78 Ohio St.3d 284, 290 (1997).

Ohio appellate courts have elaborated, stating that in order for a plaintiff to assume the risk in a products liability case:

"The user or consumer must discover the defect, be aware of the danger and proceed to unreasonably make use of the product." ... However, a plaintiff's negligent "failure to discover a defect in a product or to guard against the possibility of the existence of the defect" is not a defense.

Westray v. Imperial Pools & Supplies, Inc., 133 Ohio App.3d 426, 432 (1999) (quoting *Sapp v. Stoney Ridge Truck Tire*, 86 Ohio App.3d 85, 97 (1993)) (citing R.C. § 2307.75(E)).

Additionally, I find instructive the Ohio appeals court opinion in *Durnell v. Raymond Corp.*, No. 98AP-1577, 1999 Ohio App. LEXIS 5373 (10th Dist. November 16, 1999) (unreported). That case involved a products liability claim involving a defective forklift, which caused a death. The decedent in the case had fallen after a coworker, operating a separate forklift, backed into the forklift the decedent was operating.

The parties agreed that the coworker's forklift was defective, lacking the proper mirrors, and such defect was the proximate cause of the decedent's fall. At the time of the accident, however, the decedent was not wearing the required safety belt, and the trial court dismissed the products liability claim, determining that the decedent had assumed the risk of falling by not wearing the safety belt.

On appeal, the plaintiff asserted that the trial court "should have focused on the forklift's defect, not the risk of falling, in assessing assumption of the risk." *Id.* at *6. Thus, the court addressed the following question: "of what condition must the [the decedent] have had knowledge, her risk of falling or the forklift's defect." *Id.* at *6-7. In resolving this issue, the court held that the issue in the case was "not whether [the decedent] assumed the risk of falling, but rather the risk of the defective forklift." *Id.* at *9. Because the record contained no evidence that the decedent had any knowledge that the forklift was defective, the court reversed the lower court's ruling.

Here, defendant has presented evidence indicating Jameson Fee knew that the paintball gun might accidentally discharge, but has failed to produce sufficient evidence indicating that he knew, or should have known, of any alleged defect in the product. In other words, defendant has failed to present evidence that, at the time he looked down the barrel of the paintball gun, Jameson Fee knew of the alleged defects in the "sear" and "trigger extension" and the risks associated with such defects.

***3** As such, defendant is precluded from asserting an assumption of the risk defense as it relates to Count II of plaintiffs' complaint.

B. Defendant's Experts

The remaining aspects of plaintiffs' motion relate to the ability of defendant's two experts to testify. Specifically, plaintiffs challenge the reliability of the experts' testimony as it relates to the broken trigger extension and cocking mechanism found in the gun at issue.

Federal Rule of Evidence Rule 702 governs the admissibility of expert testimony and provides:

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.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993), the Supreme Court held that Rule 702, along with Rule 104(a), directs trial judges to act as "gatekeepers," ensuring "that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *See also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999) (extending *Daubert* to all expert testimony, not just testimony based on scientific knowledge). The party offering the expert testimony bears the burden of proof in establishing its admissibility. *Daubert*, 509 U.S. at 592 n. 10.

In considering reliability, "the trial court must focus on the soundness of the expert's methodology." *Smelser v. Norfolk Southern Ry. Co.*, 105 F.3d 299, 303 (6th Cir.1997). To assist in this inquiry, the Court has identified several factors that a trial court might use in evaluating the admissibility of expert testimony:

(1) whether a theory or technique has been or can be

tested; (2) whether the technique has been subjected to peer review and publication; (3) the known or potential rate of error; and (4) whether the technique has been accepted by the "relevant scientific community," or "has been able to attract only minimal support within the community."

Gross v. Comm'r of Internal Revenue, 272 F.3d 333, 339 (6th Cir.2001) (quoting *Daubert*, 509 U.S. at 593-94).

These factors, however, are not dispositive in every case. *Id.* Rather, "the test of reliability is 'flexible,' and *Daubert* 's list of specific factors neither necessarily nor exclusively applies to all experts or in every case." *Kumho Tire*, 526 U.S. at 140. "[W]hether *Daubert* 's specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine." *Id.* at 153.

With these principles in mind, I now turn to plaintiffs' contentions regarding the ability of defendant's experts to testify.

1. Broken Trigger Extension

***4** Plaintiffs seek to preclude testimony of defendant's experts, Phillip Sis and Jess Galan, as it relates to defendant's claim that the trigger extension of the gun broke due to an excessive or abnormal amount of force applied to that component. Plaintiffs challenge the foundation on which both experts base their opinions and the reliability of such opinions.

Regarding Mr. Sis, an engineer employed by defendant, plaintiffs cite his deposition in which he opines that the trigger extension in this case broke because "someone intentionally pulled the trigger hard enough to break it." (Doc. 44, Sis Depo. at 72). Mr. Sis continues that "the only way to break that trigger, in my opinion is by having the gun on safe and pulling the trigger, ... at a force that exceeds 35 to 40 pounds, which is not your normal situation." *Id.*

It is unclear from the deposition testimony the basis on which Mr. Sis forms his opinion. He admits that he only had a "limited viewing" of the gun, and that he has never tested the trigger extension of the gun to determine the amount of force required to break such a safety mechanism. Moreover, the record does not contain his report or any other basis for his opinions. Thus, it seems that Mr. Sis's opinions are speculative and based on assumptions that are not supported in the record.

The defendant has failed to demonstrate otherwise. In its opposition, defendant merely cites Mr. Sis's qualifications. Mr. Sis's qualifications, however, are not at issue. Rather, it is the reliability of his opinion regarding the trigger extension that has been questioned by plaintiffs. Defendant simply fails to address this issue. I find, accordingly, that Mr. Sis's opinions relating to the manner in which the trigger extension broke are inadmissible because they are too speculative and otherwise unreliable.

Regarding Mr. Galan, plaintiffs also challenge the reliability of his opinion regarding the amount of force required to break the trigger extension. In his report, Mr. Galan opined that the trigger extension had broken "possibly as a direct result of extensive--and abusive--force being applied to the trigger while the safety was engaged." (Doc. 44, Galan Rpt. at 6). In his deposition, Mr. Galan testified that it would take an excess of forty pounds to break the trigger extension.

Mr. Galan, however, bases this opinion on the assumption that the designer of the trigger extension applied the American Society for Testing and Materials ("ASTM") standards and, therefore, a certain level of force had to be applied before the mechanism could break. There is no showing in the record that ASTM standards controlled the design of the mechanism. Absent such a showing, Mr. Galan's opinion is unreliable, and cannot be given, because it assumes a fact not in evidence.

Again, defendant fails to demonstrate otherwise, choosing instead to cite Mr. Galan's qualifications to testify as an expert. Such qualifications, however, do not guarantee the reliability of his testimony. As such, Mr. Galan is precluded from presenting his opinion as it relates to the amount of force required to break the trigger extension at issue in this case.

2. Tampering or Modification to Gun

***5** In addition to testimony regarding the broken trigger extension, plaintiffs seek to preclude any testimony by Mr. Galan regarding possible tampering or modification of the "sear," the component responsible for holding the gun in the cocked position. Plaintiffs challenge the methodology Mr. Galan employed to reach such a conclusion, and, thus, the overall reliability of his opinion regarding the sear.

According to Mr. Galan's report:

The tip of the sear at the point where it normally contacts the lip of the bolt appears slightly rounded,

with a small piece apparently missing. The contact area of the sear with the bolt lip exhibits apparent toolmarks of an undetermined origin.

(Doc. 44, Galan Rpt. at 4).

Mr. Galan concluded that "[t]he roundness present in the engagement area of the sear could be due to a combination of normal wear plus possible tampering in order to alter the trigger pull in the subject gun." *Id.* at 7.

The record reveals, however, that Mr. Galan's opinion lacks sufficient foundation and reliability in two respects. First, Mr. Galan failed to analyze the "toolmarks" he observed in a reliable manner to determine what caused them. Second, the only "modified" gun that Mr. Galan had seen in the past was of dubious origin, and Mr. Galan never confirmed whether that gun was actually modified.

Based on these reasons and the fact that there is no evidence that the owner ever disassembled the gun, I find that Mr. Galan's testimony regarding the altering of the sear too speculative to go the jury. [FN1] Accordingly, Mr. Galan shall be precluded from giving his opinion regarding the tampering or modification of the gun.

FN1. In response to plaintiffs' contentions, defendants cite Mr. Galan's qualifications. Again, Mr. Galan's qualifications are not at issue. Rather, it is the methodology he employed in reaching his conclusions that has been questioned. Additionally, I find the fact that one of plaintiffs' experts found nothing inappropriate about the video taped examination performed by Mr. Galan insufficient to establish the reliability of his opinions.

In sum, defendant has failed to carry its burden of proof in establishing the admissibility of the expert testimony challenged by plaintiffs' motion.

II. Defendant's Motion in Limine

Through its motion in limine, defendant seeks to preclude the testimony of plaintiffs' experts: David Townshend and John T. Butters. Plaintiffs retained Townshend to: 1) determine whether the defendant's paintball gun was capable of a spontaneous discharge; 2) if so, what was the cause of the spontaneous discharge; 3) determine why the safety would fail; and 4) to offer an opinion as to whether the foregoing conditions constitute a design and/or manufacturing defect under Ohio product liability law. Butters is offered as an expert in the design and manufacturing of paintball guns.

In its motion, defendant's principal objection is a lack of qualification on the part of each expert. [FN2] According to defendant, both experts lack the "qualifications of education, training and experience to qualify them as experts in any field relevant to this matter." (Doc. 43 at 1).

FN2. Defendant also argues that the testimony of each expert would not assist the jury. This contention, however, is premised on defendant's assertion that plaintiffs' experts are not qualified.

With regard to Townshend, defendant cites the fact that he lacks a degree in engineering, manufacturing, or metallurgy. Defendant notes that Townshend does not hold himself out as an expert in engineering, and that he testified in deposition that he is not an expert in design engineering, manufacturing engineering, or manufacturing processes. Additionally, defendant contends that Townshend has never designed a firearm, never invented anything, cannot read or prepare a blueprint, and is generally lacking as an expert with regards to product warnings.

***6** With regard to Butters, defendant cites two cases where courts excluded him as an expert on firearms or found his opinion of little weight. With regard to both experts, defendant contends that each lack the necessary training and expertise with paintball guns.

To qualify as an expert under Rule 702, a witness must establish his or her expertise by reference to "knowledge, skill, experience, training, or education." *Pride v. BIC Corp.*, 218 F.3d 566, 577 (6th Cir.2000). Here, each of plaintiffs' experts has the necessary background to qualify as an expert.

Mr. Townshend has worked with firearms extensively, beginning his career in 1969 in the Michigan State Police Firearms-Toolmark and Explosive Identification Unit. There, he conducted forensic analyses of firearms, firearms operation, tool mark identification, and firearm repair. Mr. Townshend has attended armorer training programs sponsored by firearm manufacturers, and has

learned assembly and testing procedures directly from these manufactures through visits to their facilities. He has taught courses on tool mark and firearm identification, and has qualified as an expert on firearms, pellet guns and paintball guns in the past.

Mr. Butters also has extensive experience with firearms. He has experience working with safety mechanisms for various firearms, and holds a patent for such a mechanism. For the past several years, he has been in private practice consulting on the issues of safety, technical practicability, and economic feasability of existing firearm designs. His experience with firearms is coupled with his general background and involvement in electrical design, mechanical design, electro-mechanical design, product troubleshooting and production engineering. Additionally, Mr. Butters has offered his expertise on firearms in previous cases.

Though the product in this case is not a firearm, and each expert has extensive experience with firearms, a paintball marker is like a firearm--a device for expelling a projectile at a high rate of speed. It appears from the record, and is uncontested by defendant, that the basic principles are the same for firearms and paintball guns.

Thus, in light of each expert's background and the similarity between firearms and paintball guns, I shall deny defendant's motion finding plaintiffs' experts qualify to testify as experts.

III. Conclusion

It is, therefore,

ORDERED THAT

1. Plaintiffs' motion in limine be, and hereby is, granted; and

2. Defendant's motion in limine be, and hereby is, denied.

So ordered.

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