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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF COOS

VIVIAN ENGLUND, a Washington resident,) Case No. 16CV00598
and Personal Representative for the ESTATE)
OF KIRSTEN ENGLUND,)

Plaintiff,)

vs.)

WORLD PAWN EXCHANGE, LLC, an)
Oregon for-profit corporation; J&G II, INC.)
d/b/a J&G Sales, Ltd., an Arizona for-profit)
corporation; RICHARD JAMES SINATRA,)
an Oregon resident, and DIANE BOYCE, an)
Oregon resident,)

Defendants.)

**ORDER ON PARTIES' MOTIONS FOR
SUMMARY JUDGMENT**

The Honorable Judge Martin E. Stone

The Court having reviewed Plaintiff's motion for partial summary judgment, Defendant J&G II Inc's ("J&G") motion for summary judgment, all briefing related thereto, and having heard oral arguments of the parties, issued its opinion on these motions on August 13, 2018. In accordance with that opinion, incorporated by reference and attached to this order as Exhibit A,

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IT IS HEREBY ORDERED:

Plaintiff's motion for partial summary judgment is **DENIED**.

Defendant J&G's motion for summary judgment is **DENIED**.

Signed: 9/1/2018 08:54 AM



Circuit Court Judge Martin E Stone

Submitted by:
Thomas D'Amore, OSB#922735
D'Amore Law Group
Of Attorneys for Plaintiff



CIRCUIT COURT OF OREGON

Fifteenth Judicial District

August 13, 2018

MARTIN E. STONE
Judge

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Re: Vivian Englund v. World Pawn Exchange, LLC, J&G II, Inc., Richard James Sinatra
and Diane Boyce; Coos Circuit Court No. 16CV00598

Counsel:

This case came before the court on July 6, 2018 for argument on (1) plaintiff's motion for partial summary judgment, and (2) defendant J&G II, Inc.'s motion for summary judgment. After hearing argument the court requested further briefing on several questions raised, including evidence in this record of proximate cause.

The court has reviewed the supplemental briefs and considered the argument and authorities presented.

BACKGROUND

This case involves on-line purchases of several firearms from an out-of-state seller J&G II, Inc. ("J&G"). The lawsuit arises out of the death of Kirsten Englund at the hands of Jeffrey Boyce. The murder weapon was a Makarov semiautomatic handgun sold by defendant J&G and shipped to defendant World Pawn in Coos County, Oregon.

In December 2011, Diane Boyce, the mother of Jeffrey Boyce, purchased on-line an AK 47 rifle from a non-party firearms dealer in Minnesota. The rifle was purchased in her name and shipped to World Pawn for ultimate transfer to Ms. Boyce. She appeared at World Pawn, completed the required paperwork and the rifle was delivered to her.

In January 2012, Ms. Boyce purchased a Makarov pistol on-line from J&G. J&G entered the order in its computer. Ms. Boyce used her credit card to purchase the firearm. The invoice identified her as the purchaser. J&G shipped the pistol to World Pawn for transfer. Ms. Boyce appeared at World Pawn, completed the required paperwork and the firearm was delivered to her.

In February 2012, Jeffrey Boyce purchased a Rock Island pistol on-line from J&G. The purchaser was identified as Jeffrey Boyce. He paid with his mother's credit card. Shortly after the order, Jeffrey Boyce sent an e-mail to J&G stating that he was the purchaser and that he had used his credit card. J&G prepared an invoice which identified both Jeffrey Boyce and Diane Boyce. J&G shipped the Rock Island pistol and invoice to World Pawn for transfer to the purchaser. Diane Boyce appeared at World Pawn on February 27, 2012, completed the paperwork and the firearm was delivered to her.

All three firearms were stored at the residence of Diane Boyce. Jeffrey Boyce lived with her at that residence. He did not have a credit card and was unemployed.

On April 28, 2013 Jeffrey Boyce left the residence in the morning, travelled North on Highway 101 and shot and killed Ms. Englund with the Makarov pistol at a scenic overlook area. There was no evidence of any other firearm used in the murder. There was no evidence that the Rock Island pistol was at the crime scene.

DISCUSSION

Summary judgment is appropriate when the “pleadings, depositions, affidavits, declarations and admissions on file show that there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law.” ORCP 47. No genuine issue of material fact exists, if, based upon the record before the court, “no objectively reasonable juror could return a verdict for the adverse party on the subject of the motion for summary judgment.” ORCP 47. The court views “the facts and the reasonable inferences that may be drawn from them in favor of the nonmoving party.” Scott v. State Farm Mut. Auto Ins. Co., 345 Or 146, 148 (2008).

There is evidence in this record from which a reasonable jury could find for plaintiff on claims not barred by the PLCAA.

The PLCAA is a federal statute that prohibits lawsuits brought by an individual against a manufacturer or seller of firearms unless the claims fit within one of six exceptions to the Act. Two of the exceptions may apply in this case:

“(ii) an action brought against a seller for negligent entrustment or negligence per se;

(iii) an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the qualified product, and the violation was a proximate cause of the harm for which relief is sought, including—

(I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or

(II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of title 18;”

The exception set forth in (iii) above, referred to as the “predicate exception”, requires plaintiff to establish a knowing violation of a statute applicable to sale of firearms, which was the proximate cause of the harm.

Plaintiff has identified at least one statute that applies to the sale or marketing of firearms and that a reasonable juror could find was violated by J&G in the sale and transfer of the Rock Island pistol. ORS 166.416 (1) provides: “A person commits the crime of providing false information in connection with a transfer of a firearm if the

person knowingly provides a false name or false information or presents false identification in connection with a purchase or transfer of a firearm”.

On this record a reasonable juror could find that J&G violated ORS 166.416 (1) by providing false information to World Pawn relating to the purchase and sale of the Rock Island pistol. Jeffrey Boyce placed the order for the pistol. He used his mother's credit card to purchase the firearm. The same credit card had been used several weeks earlier to purchase the Makarov pistol. J&G prepared an invoice which identified Jeffrey Boyce as the credit card owner. That invoice contained both the names of Jeffrey Boyce and Diane Boyce. Jeffrey Boyce sent an e-mail to J&G a day after the on-line order stating that he was the purchaser and had used his credit card (which was not true). J&G did not share this communication with World Pawn. Diane Boyce took possession of the Rock Island pistol from World Pawn.

A jury could find that J&G shipped the Rock Island pistol to World Pawn without knowing the actual purchaser, provided false information as to the person who paid for the firearm and included two names on the invoice. Further, a jury could find that J&G was aware of the suspicious circumstances surrounding the sale in that Boyce informed J&G that he was the purchaser and had used his credit card to acquire the firearm when in fact he had used his mother's credit card.

The predicate exception also requires proof that the violation of the statute was the proximate cause of damages. Defendant argues that there is no proof in the summary judgment record of proximate cause in that the firearm subject to the alleged straw purchase was the Rock Island pistol, but that the weapon used to murder Ms. Englund was a different weapon (the Makarov pistol) which had been purchased a month earlier under the name of Diane Boyce with her credit card, and delivered to her at World Pawn. Defendant points out that nothing in the information available to J&G at the time of the earlier sale indicated the existence of a straw sale. Furthermore, J&G argues that there is no direct evidence in the record showing that Jeffrey Boyce had the Rock Island pistol with him at the time of the murder, that it would be speculation to so conclude, and that it was not until the next day in California that the Rock Island pistol was found with Boyce. In fact, Boyce confessed that it was the Makarov that he brandished and used as the murder weapon.

The court agrees that there is missing from the summary judgment record direct evidence that Jeffrey Boyce had in his possession the Rock Island pistol when he murdered Ms Englund. Having said that however, plaintiff has filed an ORCP 47E affidavit stating that she has retained an expert prepared to testify to admissible facts or opinions which will create issues of fact. In a straw sale one individual buys a firearm with the purpose of transferring it to another. The stand-in, rather than the purchaser, completes the official forms and submits to any required background checks. As the court understands, plaintiff intends to offer evidence regarding policies and procedures that would be followed by ATF following a report of a straw sale by J&G or World Pawn: investigation of the incident, seizure of the firearm involved in the straw sale, investigation of a series of unlawful purchases by the individual and seizure of all

firearms in possession of the individual, in this case both the Rock Island and the Makarov. Defendant argues that this proffered testimony is pure speculation and contradicted by facts in the summary judgment record. That argument cannot be resolved at the summary judgment stage. Plaintiff will be required at trial to lay a foundation for the testimony of the witness, based on facts and not speculation.

The court agrees that if these facts were presented at trial a reasonable jury could find that a statutory violation was the cause of Ms. Englund's death. Had law enforcement been alerted to a potential straw sale by J&G or World Pawn in February 2012, it is foreseeable that neither the Rock Island or Makarov would have been in the possession of Jeffrey Boyce on the day of the murder in April 2013.

Plaintiff also argues an "embolden" theory as proof of proximate cause. This court does not find support for that theory in either the Thongsy or Gonzalez cases cited in plaintiff's memo, and as mentioned above it would be speculation to conclude that plaintiff had multiple weapons in his vehicle on the date of the murder. In fact he returned to his mother's residence after the murder.

If plaintiff proves a predicate exception, the lawsuit survives, including all claims such as negligence and public nuisance. This court is aware that Multnomah Circuit Court Judge Michael Greenlick has previously ruled in this case that all claims may proceed under the predicate exception. See Greenlick Opinion dated June 30, 2017. The wording of the predicate exception is broad: "an action" may be commenced. 15 USC section 7903 (5)(a)(iii). The term "action" can mean the case as a whole, rather than individual claims. Fed.R.Civ.P. 2. Nothing in the language restricts a plaintiff from asserting multiple claims as part of the action. Furthermore, this interpretation is consistent with cases where plaintiffs have litigated multiple claims against gun dealers after first proving a predicate exception under section 7903 (5)(A)(iii). See Williams v. Beemiller, Inc., 100 AD3d 143 (2012); Smith and Wesson Corp v. City of Gary, 875 NE2d 422 (2007) (public nuisance claim falls within predicate exception of PLCAA) ; Chiapperini v. Gander Mtn. Co., 48 Misc 3d 865, 13 N.Y.S.3d 777 (2014). In Williams defendants moved to dismiss a complaint which contained claims for negligence, public nuisance and intentional violations of statutes. The court denied the motion to dismiss and held that the "action" was not precluded because it fell within the PLCAA predicate exception. The court in Chiapperini reached a similar result. There the complaint contained a number of claims against the seller of firearms, including negligence and public nuisance. Defendant argued that the entire case should be dismissed because it was barred by the PLCAA. The court disagreed, relying on Williams, and concluded:

"Similar to Williams, this court finds two applicable PLCAA exceptions thereby permitting the entire complaint to proceed through litigation, without the need for a claim-by-claim PLCAA analysis."

Similarly, in Corporan v. Wal-Mart Store E, LP, 2016 US Dist LEXIS (2016), the US District Court in Kansas granted leave to file an amended complaint to include a

negligence claim under state law. A claim-by-claim analysis was not required under the predicate exception.

The cases identified by J&G in its original and supplemental briefs do not change this court's conclusion. Many of those cases do not involve a predicate violation of a law relating to firearms. See, e.g., Iletto v Glock, 565 F3d 1126 (2009) (plaintiff failed to identify a statute applicable to the sale and marketing of firearms); Delana v CED Sales, Inc., 486 SW3d 316 (2016) (no allegation of a predicate violation); Estate of Kim ex rel Alexander v Coxe et al, 295 P3d 380 (2013) (no violation of a state or federal law applicable to sale or marketing of firearms). Here, in contrast, plaintiff points to evidence that a fact finder may find satisfies the predicate exception, and because of that the negligence and public nuisance claims may go forward.

Plaintiff's Third Amended Complaint contains a negligence per se count in the first claim for relief. Plaintiff alleges that J&G violated one or more statutes in connection with sale of the Rock Island pistol and/or aided and abetted World Pawn in delivering the firearm to Diane Boyce, an individual who had not purchased the firearm. J&G argues that it did not knowingly violate either state or federal statutes relating to sales of firearms, and any violation, if proven, was not a proximate cause of the death of Ms. Englund.

On the summary judgment record there is evidence to support a negligence per se count, under either 15 USC Section 7903 (5)(A)(ii) or 7903 (5)(A)(iii). Negligence per se requires proof that a defendant violated a statute, that plaintiff was injured as a result of the violation, that plaintiff was a member of the class of individuals meant to be protected by the statute, and that the injury to plaintiff was the type of harm that the statute was enacted to protect. See McAlpine v. Multnomah County, 131 Or App 136, 144 (1994)

On this record there is evidence from which a reasonable jury could find the following : one or more statutes regulate the sale or transfer of firearms; J&G provided false information to World Pawn in connection with sale of the Rock Island pistol, thereby aiding or assisting World Pawn in the delivery of the firearm to an individual who was not the purchaser; the decedent was murdered as a result of the violation; and she was within the class of individuals intended to be protected by the statute. J&G denies that it knowingly violated any of the statutes identified by plaintiff, and that any violation, if proven, did not cause the death of Ms. Englund. These disputed issues of fact must be decided by a jury.

The Third Amended Complaint also contains a claim for negligent entrustment. Negligent entrustment is an identified exception to the PLCAA. 15 USC Section 7903 (5)(A)(ii). That exception has been narrowly construed. See Soto v Bushmaster Firearms Int'l, LLC, 2016 Conn Super LEXIS 2626 (2016). Notwithstanding the Connecticut court's construction, negligent entrustment is a common law claim for relief under Oregon law and may be more expansive than the exception under 15 USC

Section 7903 (5)(A)(ii). See generally Mathews v Federated Service Ins. Co., 122 Or App 124 (1993) (discussing elements of negligent entrustment) . If plaintiff proves a predicate exception, a claim for negligent entrustment under Oregon law may fit within that exception. 15 USC Section 7903(5)(A)(iii).

“A plaintiff in a negligent entrustment case must prove there was an entrustment and that the entrustment was negligent”. Mathews, supra at 133. There must be proof that the “entrustment was unreasonable under the circumstances, that it caused harm to plaintiff and that the risk of harm to plaintiff...was reasonably foreseeable”. Id at 133-134. The tort is based on the degree of knowledge a supplier of chattel had or should have concerning the trustee’s use of the item in an improper manner. Earsing v. Nelson, 212 A.D. 2d 66, 629 N.Y.S. 2d 563 (1995). The supplier is under a duty to entrust the chattel, in this case a firearm, to a responsible person whose use does not create an unreasonable risk of harm.

On this record there is evidence from which a reasonable jury could find negligent entrustment. The record contains indicators of a straw sale at the time the Rock Island pistol was shipped to World Pawn for transfer. Jeffrey Boyce had ordered the pistol on-line and used his mother’s credit card. That card had been used the previous month to purchase the Makarov by Diane Boyce. J&G had in its possession an e-mail from Jeffrey Boyce stating that he was the purchaser and had used his credit card. J&G listed Jeffrey Boyce as the credit card owner (which was incorrect) and also identified two names on the invoice, Jeffrey Boyce and Diane Boyce. That invoice was sent to World Pawn in connection with the transfer. J&G did not send the e-mail it received from Jeffrey Boyce. World Pawn delivered the firearm to a person other than the purchaser.

On this record a reasonable jury could find that J&G was aware or should have been aware that one person had purchased the Rock Island and another person had paid for it. J&G transferred the firearm to World Pawn when it knew or should have known that it would be delivered by World Pawn to a person other than the purchaser (a straw sale).

J&G argues that any claim for negligent entrustment is limited by the definition contained in 15 USC Section 7903 (5)(B):

“negligent entrustment” means the supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others.

This court does not believe that this definition necessarily precludes plaintiff’s claim, at least at this stage of the case. “Use” could include transfer of the weapon or discharge

of the weapon. Moreover, several cases across the country have allowed negligent entrustment claims in cases involving sales to straw purchasers. See Williams v. Beemiller, Inc., 100 A.D. 3d 143, 952 NYS2d 333 (2012); Shirley V. Glass, 44 Kan App 2d 688, 241 P.3d 134 (2010); Corporan v. Wal-Mart Stores, 2016 US Dist. LEXIS 93307 (2016); Chiapperini v. Gander Mtn. Co., 48 Misc 3d 865 (2014). There is evidence in the record that J&G furnished false information to World Pawn when it sent the firearm to Coos County, aware that World Pawn would use that information in the transfer of the item, and that J&G did not disclose the e-mail received from Jeffrey Boyce. World Pawn relied on the information from J&G and delivered the firearm to the alleged straw purchaser.

J&G denies the claim for negligent entrustment and argues that it legally transferred the Rock Island pistol to World Pawn. These are disputed issues of fact that must be decided by a jury.

CONCLUSION

1. Plaintiff's motion for partial summary judgment is denied.
2. Defendant J&G's motion for summary judgment is denied.
3. Plaintiff shall submit the order.

Sincerely,



Martin E. Stone
Circuit Court Judge

CERTIFICATE

I hereby certify that the foregoing proposed judgment or order is ready for judicial signature based on the following:

- 1. Each opposing party affected by this order or judgment has stipulated to the order or judgment, as shown by each opposing party’s signature on the document being submitted; or
- 2. Each opposing party affected by this order or judgment has approved the order or judgment, as shown by the signature on the document being submitted or by written confirmation of approval sent to me; or
- 3. I have served a copy of this order or judgment on all parties entitled to service pursuant to UTCR 5.100 and:
 - (a) No objection has been served on me.
 - (b) I received objections that I could not resolve with the opposing party despite reasonable efforts to do so. I have filed a copy of the objections I received and indicated which objections remain unresolved.
 - (c) After conferring about objections, [role and name of opposing party] agreed to independently file any remaining objection.
- 4. The relief sought is against an opposing party who has been found in default.
- 5. An order of default is being requested with this proposed judgment.
- 6. Service is not required pursuant to subsection (3) of this rule, or by statute, rule, or otherwise.
- 7. This is a proposed judgment that includes an award of punitive damages and notice has been served on the Director of the Crime Victims’ Assistance Section as required by subsection (4) of this rule.

DATED: August 31, 2018

D’AMORE LAW GROUP, P.C.

By: s/Thomas D’Amore
Thomas D’Amore, OSB #922735

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on the below date, I served a true and correct copy of the foregoing
3 **Order on Parties’s Motions For Summary Judgment** on:

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14 by the following indicated method(s):

- 15 By electronic mail function of the eFiling system to the above attorney, who is a
16 participant in this case, is a registered eFiler and has electronically appeared in
17 this action by filing a document through the eFile system that the court has
18 accepted.
- 19 By electronic service, as agreed to by the parties to the email address of said
20 attorneys as listed above.
- By first-class mail with postage pre-paid, deposited in the U.S. Post Office in
Portland, Oregon, to the attorney at his/her last known office address as listed
above.
- By hand delivery to the attorney at his/her last known office address as listed
above.

21 DATED this 31st day of August, 2018.

22 D’AMORE LAW GROUP, P.C.

23 By: s/ Daniel C. Doede
24 Daniel C. Doede