

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

CAROLEE NOBLE, et al, and JO ANN K. NILGES, et al.,

Appellants,

v.

SHAWNEE GUN SHOP, INC.,

Respondent.

DOCKET NUMBER WD75536 Consolidated with WD75537

Date: July 16, 2013

Appeal from:
Jackson County Circuit Court
The Honorable David M. Byrn, Judge

Appellate Judges:
Division Two: Alok Ahuja, P.J., and Karen King Mitchell and Anthony Rex Gabbert, JJ.

Attorneys:
Randy W. James, Lee's Summit, MO, for appellant.
Kelly A. Ricke, Overland Park, KS, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

COURT OF APPEALS -- WESTERN DISTRICT

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Shawnee Gun Shop, Inc. d/b/a/ The Bullet Hole operates a retail store selling firearms, ammunition, and related merchandise in Overland Park, Kansas. According to Appellants' petitions, David W. Logsdon purchased firearm magazines and/or ammunition from the Gun Shop on April 24, 2007, using a stolen credit card belonging to his female neighbor, whom he is suspected of murdering. On April 29, 2007, it is believed that Logsdon used the items he purchased from the Gun Shop in a shooting spree in the parking lot of the Ward Parkway Shopping Center in Kansas City, during which he shot and killed Luke Nilges and Leslie Noble Ballew. Logsdon was later shot and killed by police inside the shopping center.

Nilges' and Ballew's parents filed separate wrongful-death actions against the Gun Shop, alleging that it was negligent in its sale of the magazines and/or ammunition to Logsdon, because his use of a stolen credit card to purchase the articles should have alerted the Gun Shop that Logsdon's purchase presented a risk of serious injury. The circuit court dismissed Appellants' lawsuits for failure to state a claim on which relief could be granted. Appellants appealed the dismissals in each case; we consolidated the two appeals for disposition.

AFFIRMED.

Division Two holds:

The Protection of Lawful Commerce in Arms Act (the "Act"), 15 U.S.C. §§ 7901-7903, generally prohibits lawsuits against a manufacturer or seller of firearms and related products based on the criminal misuse of such items, unless the suit falls within one of six enumerated exceptions. One of those exceptions is for "an action brought against a seller for negligent entrustment." 15 U.S.C. § 7903(5)(A)(ii). Appellants argue that their claims fall within the Act's "negligent entrustment" exception.

Appellants acknowledge that, under current Missouri law, they cannot assert a "negligent entrustment" claim against the Gun Shop, because Missouri caselaw holds that a product seller

cannot be liable for negligent entrustment, because the seller maintains no control over the article sold after the sale. Appellants instead argue that this Court should recognize a claim against the Gun Shop based on general negligence principles, for its “negligent sale” of the ammunition and/or magazines to Logsdon.

Although Appellants’ claims are not denominated as “negligent entrustment” claims, they may nevertheless fall within the Act’s “negligent entrustment” exception if the claims fall within the Act’s definition of an excepted “negligent entrustment” claim. Here, Appellants’ claims fall within the definition of a “negligent entrustment” claim in 15 U.S.C. § 7903(5)(B), because the petitions allege that the Gun Shop knew or should have known that Logsdon was likely to use the articles he purchased in a manner involving unreasonable risk of physical injury to others, based on his use of a stolen credit card.

Even if the Appellants’ allegations fall within the Act’s “negligent entrustment” exception, however, we must still determine whether those allegations state a viable cause of action under the governing substantive law.

The Act does not itself create a private right of action for claims falling within the “negligent entrustment” exception. Appellants argue that they have stated viable negligence claims under Missouri’s general negligence principles. We refuse to rely on general negligence principles to overcome the limitations on negligent entrustment claims in Missouri, however. When Missouri has refused to recognize a tort duty in the circumstances of this specific case, it would be inappropriate to rely on general principles of negligence law to overcome the caselaw addressing the specific issue.

In addition, we are not aware of any Missouri decision which has recognized a cause of action against the seller of a non-defective, lawful product, for injuries caused by the unlawful use of that product by a third party away from the seller’s premises. Appellants argue that their cases are analogous to “dram shop” cases, in which the sellers of liquor-by-the-drink are held liable when a patron becomes intoxicated and then injures a third party. The Gun Shop’s conduct was not analogous to the sale of liquor-by-the-drink, however. Unlike the sale of liquor-by-the-drink, the products the Gun Shop sold to Logsdon could be used whenever, wherever, and however Logsdon chose, with no input from, or oversight by, the Gun Shop. Our independent research has not discovered a single Missouri case in which liability was imposed on the retail seller of a non-defective lawful product, for injuries resulting from the misuse of that product . away from the seller’s establishment.

Even though Appellants’ claims may not have been precluded by the Protection of Lawful Commerce in Arms Act, they have failed to allege a viable cause of action under Missouri law. The circuit court did not err in dismissing their claims.

Before: Division Two: Alok Ahuja, P.J., Karen King Mitchell and Anthony Rex Gabbert, JJ.

Opinion by: Alok Ahuja, Judge

July 16, 2013

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