

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
03-CV-2872 (JMR/FLN)

Rolf Rohwer)
)
 v.) ORDER
)
Federal Cartridge Co. et al.)

Plaintiff hunts big game. Defendant Federal Cartridge Company¹ manufactures bullets. While on safari, plaintiff shot a charging lion at close range with a bullet manufactured by defendant. The lion died of its wounds moments thereafter, but not before it reached and mauled plaintiff. Plaintiff claims the bullet was defective and inadequate for the purposes for which it was sold, and as a result, defendant is liable for his injuries. This matter is before the Court on defendant's motion for summary judgment. The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332.

For the following reasons, the Court finds plaintiff has failed to present a question of material fact on essential elements of his claim. Summary judgment is therefore granted.

I. Background

The following facts are either undisputed or viewed in the

¹The parties agree the only remaining defendant in this lawsuit is Federal Cartridge Co. Defendant Trophy Bonded Bullets, Inc., no longer exists, and its liabilities relevant to this case are assumed by Federal Cartridge.

light most favorable to plaintiff.

On August 11, 2000, plaintiff led a Tanzanian lion-hunting safari, during which a participant shot a lion wounding its paw. Being a professional big game hunter, plaintiff knew a wounded animal presented a serious threat. Beyond this, allowing an injured animal to suffer a non-lethal wound is inhumane and violates the tenets of the profession. To keep faith with his professional and humane obligations, plaintiff tracked the beast for three hours, intending to kill it. He chose a Federal Premium 500 grain Trophy Bonded Bear Claw ("Bear Claw") bullet manufactured by defendant to dispatch the animal. Plaintiff avers that in nearly 40 years of hunting, he has personally killed more than 100 lions, including four charging him at close range. According to plaintiff, this was the first time he used a Bear Claw bullet to do so.

Plaintiff located the injured lion at sixty meters' distance in tall grass. When confronted, the lion charged toward plaintiff along a winding path. Plaintiff held his fire and waited until the lion was seven meters away before firing a single shot. He claims he aimed at, fired at, and hit the lion's clavicle, a small area near the lion's left shoulder. To plaintiff's surprise, the lion absorbed the impact and continued to charge. The lion pounced less than a second later, mauled plaintiff, walked away, lay down, and

died of its wounds. Plaintiff was airlifted to a hospital.

Three members of plaintiff's hunting party examined the lion's carcass. Each avers that the shoulder entrance and abdominal exit wound appeared to be the same size. These statements notwithstanding, the wounds were neither measured nor photographed. The lethal bullet was not recovered, and the carcass was not preserved. The lion's skin - apparently taken for a trophy - is unavailable.² Plaintiff testified that the lethal shot struck the lion's left shoulder. Witnesses swear the shot entered the lion's right shoulder.

Plaintiff contends the Bear Claw bullet was defective because it was manufactured with a hard casing. Plaintiff further claims a hard cased bullet properly expands after striking a thick-skinned animal such as an elephant or rhinoceros. But, according to plaintiff, such a casing does not expand when used on thin-skinned animals, of which cats are prominent members. The Bear Claw bullet has been in use since 1985 and has been manufactured by defendant since the 1990s. Prior to this litigation, defendant received no reports of a Bear Claw bullet's failure to expand. The bullet has expanded in all tests conducted for this litigation.

As part of this testing, and in an effort to approximate a

²It appears that the skin is in possession of a European family which claims sovereign immunity concerning any legal process.

lion's thin skin, defendant's expert fired bullets from the same batch into a box of wet newspapers covered with saturated elk skin. The bullets uniformly expanded according to their design, and the entrance and exit wounds were of the same size. Defendant's expert also testified that even a properly expanded bullet may not knock down a running animal. Both parties' experts agree many variables affect animal knock-down, including shot placement and the bullet's path. They further agree the only sure way to stop a charging lion is a shot to the brain, spinal cord, or heart, but these shots are difficult, thereby making them a poor choice in this situation.

II. Analysis

Summary judgment is appropriate when the evidence, viewed in the light most favorable to the nonmoving party, presents no genuine issue of material fact. Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 246 (1986). The party opposing summary judgment may not rest upon the allegations set forth in its pleadings, but must produce significant probative evidence demonstrating a genuine issue for trial. See Anderson, 477 U.S. at 248-49; see also Hartnagel v. Norman, 953 F.2d 394, 395-96 (8th Cir. 1992). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no

genuine issue of material fact.” Anderson, 477 U.S. at 247-48. If the opposing party fails to carry that burden, or fails to establish the existence of an essential element of its case on which that party will bear the burden of proof at trial, summary judgment should be granted. See Celotex, 477 U.S. at 322.

Plaintiff claims defendant is liable under theories of negligence, design defect, breach of warranty, and failure-to-warn. Because the parties are diverse, the Court applies Minnesota law, which merges negligence, design defect, and breach of warranty claims under a single theory of strict product liability. Bilotta v. Kelley Co., 346 N.W.2d 616, 623 (Minn. 1984). To survive summary judgment under this theory, plaintiff must establish a genuine issue of material fact that (1) defendant’s product was in a defective condition unreasonably dangerous for its intended use; (2) the defect existed when the product left defendant’s control; and (3) the defect was the proximate cause of the injury. Bilotta, 346 N.W.2d at 623 n. 3, citing Lee v. Crookston Coca-Cola Bottling Co., 188 N.W.2d 426, 432 (Minn. 1971). Because plaintiff claims the bullet was improperly designed, and no party suggests the projectile was either modified or mishandled, the Court assumes plaintiff can establish the second element. Nonetheless, the Court finds plaintiff has failed to establish any issue of fact on the rest of his prima facie case.

Where, as here, no direct evidence is available, plaintiff may prove a product defect by circumstantial evidence, see Daleiden v. Carborundum Co., 438 F.2d 1017, 1021-22 (8th Cir. 1971) (applying Minnesota law), but plaintiff may do so only if the jury would not need to engage in speculation. Western Sur. & Cas. Co. v. General Elec. Co., 433 N.W.2d 444, 447-48 (Minn. Ct. App. 1988) (where injuries caused by exploding headlight, no jury question where plaintiff's expert could not link glass defects to the origin of the explosion).

Plaintiff attempts to prove the bullet was defective through testimony concerning lion behavior and the size and location of the animal's wounds. His evidence misses the mark. Plaintiff's experts state that, when other types of expanding bullets are used on African dangerous game, they usually produce an exit wound that is larger than the entrance wound. As bullets expand, they transfer their energy to the animal. This knocks down the charging animal or spins it around. This lion neither spun nor fell to the ground, and the exit wound was not larger than the entrance wound. Plaintiff's experts suggest these facts allow a jury to infer the Bear Claw bullet failed to expand.

Such evidence is arguably consistent with plaintiff's theory. However, plaintiff's evidence must be more than merely consistent with his theory; it must go further and support it. See Peterson

v. Crown Zellerbach Corp., 209 N.W.2d 922, 923-24 (Minn. 1973). In Minnesota, plaintiff cannot establish a products liability case through *res ipsa loquitur*, and must introduce "something more" than evidence that the accident occurred to prove defect and causation. Trost v. Trek Bicycle Corp., 162 F.3d 1004, 1009 (8th Cir. 1998), citing Cerepak v. Revlon, Inc., 200 N.W.2d 33, 35-37 (Minn. 1972) and Peterson, 209 N.W.2d at 924. The "something more" may be expert testimony, provided the expert's opinion has sufficient factual support. Patton v. Newmar Corp., 538 N.W.2d 116, 120 (Minn. 1995). "[I]t is never enough that [the evidence] suggests a possibility. The evidence in proof must justify sound and honest inferences.'" Peterson, 209 N.W.2d at 924.

The Court finds, as a matter of law, that plaintiff's proffered evidence is insufficient to create a triable issue as to whether the Bear Claw bullet failed to expand. First, there is no evidence of any history of problems with the bullet. Contrast Kallio v. Ford Motor Co., 407 N.W.2d 92, 98 (Minn. 1987) (manufacturer received numerous prior complaints that transmission automatically shifted from park into reverse). Second, the bullet has expanded in all tests conducted by both sides. While the Court cannot gainsay the possibility that in some cases exit wounds are larger than entry wounds, there is an entire paucity of proof that a mushroomed Bear Claw bullet must cause a larger exit hole. As

such, same-sized entry and exit wounds are fully consistent with proper expansion and will not allow a jury to infer a defect.

Evidence concerning wounded-lion behavior, and particularly behavior after a paw shot when the animal is in full charge, is sheer conjecture.³ The lion's behavior could conceivably be attributable to a bullet defect only if there were precise evidence of the bullet's path in a manner which eliminated variables associated with shot placement. See Collings v. Northwestern Hospital, 277 N.W. 910, 913 (Minn. 1938) ("An inference of negligence based on an inferred fact of which there is neither evidence nor predominating probability cannot be safely made.")

This evidence is absent here. The only evidence of the bullet's path, all of which is offered by plaintiff's side, is completely contradictory: plaintiff says the bullet entered the lion's body on the left side; all of his witnesses say the bullet entered the lion's body on the right. Both cannot be correct.

³It almost goes without saying that there is no empirical evidence, conducted under controlled circumstances, concerning such an event. Scientists simply do not kill wild animals to prove differing theories of bullet performance, or best-wounded-animal-killing methods. Even if a jury would credit plaintiff's reports of his own experiences at close range with three other wounded and charging lions, his statements cannot suffice. His statements are nothing more than his own anecdotal observations. There is no replicable evidence concerning the state of these other animals' wounds, their condition, how long after the injury they charged, or any other way to correlate their behavior - even if it could be fully articulated - with the lion in the present circumstance.

On this evidence, a jury can only speculate as to plaintiff's experts' theories on the subject of bullet expansion.⁴ Plaintiff cannot show either defect or causation.

In addition, plaintiff claims defendant breached a duty to warn that the Bear Claw bullet was unsuitable for the task of stopping a charging lion at close range. Defendant acknowledges its bullets carried no such warnings. To survive summary judgment, however, plaintiff must establish that defendant had a duty to warn, and must present evidence creating an issue of fact as to whether the lack of adequate warning caused his injuries. See Donovan v. Bioject, 2001 WL 243096, *3 (Minn. Ct. App. 2001) (unpublished). Plaintiff's claim fails because he cannot show any legal duty to warn.

Whether or not there is any duty to warn is a question of law. Germann v. F. L. Smithe Mach. Co., 395 N.W.2d 922, 924 (Minn. 1986). "A manufacturer who has actual knowledge of dangers to users of his product has the duty to give warning of such dangers." Westerberg v. School Dist. No. 792, 148 N.W.2d 312, 316 (Minn.

⁴The Court does not doubt plaintiff's sincere belief that his shot was perfect and entered the lion's body through its left shoulder. But plaintiff's observation is based on his own perception of a shot at a charging animal which would maul him in the next split-second. His testimony and beliefs must be balanced against the testimony of three witnesses who examined the beast's body, each of whom did so post-the animal's-mortem, while the plaintiff was receiving medical care or recuperating from his wounds.

1967). However, "there is no duty to warn with respect to a product that is not in fact dangerous," nor is there a duty to warn of dangers that are obvious to the user. Id.

Here, plaintiff has failed to demonstrate that either the product was dangerous or that defendant had superior knowledge of any danger. Plaintiff has offered no studies, tests, field reports, or evidence of any bullet-failure incidents other than his complaint in this litigation.

His duty to warn argument devolves into a simple, "I say the Bear Claw bullet failed to expand. Therefore, ipso facto I should have been warned that it would fail to do so." But this proposition is not self-evident. Plaintiff offers no evidence showing defendant knew or should have known of such a risk. Contrast Kallio, 407 N.W.2d at 98-99 (defendant manufacturer received numerous complaints of problem years before plaintiff's accident); Gray v. Badger Mining Corp., 676 N.W.2d 268, 271 (Minn. 2004) (defendant supplier conducted studies and changed its own employee policies because it knew of danger to users); Erickson v. Am. Honda Motor Co., 455 N.W.2d 74, 78 (Minn. Ct. App. 1990) (defendant retailer informed by manufacturer about increasing number of accidents with new design).

Plaintiff's only suggestion concerning defendant's knowledge consists of a textual change in defendant's 2004 product catalog. In prior editions, the text said the Bear Claw bullet was suitable

for big game. The 2004 emendation lists animals on which the bullet might be used, with lions being absent from the list. Plaintiff argues that is an admission that the Bear Claw bullet is unsuitable for hunting lion.

This evidence, too, is wide of the mark. Rule 56 of the Federal Rules of Civil Procedure requires that admissible evidence be offered in summary judgment proceedings. Plaintiff's proffer fails because evidence of such a textual change is not admissible; its introduction is barred by Rule 407 of the Federal Rules of Evidence. As such, even if the textual change showed a recognition that the Bear Claw is not to be used on lions -- a very generous reading in this Court's view -- this type of change is inadmissible as proof that the Bear Claw bullet was either defective or unreasonably dangerous. See Kallio, 407 N.W.2d at 98 (holding evidence of subsequent remedial measures inadmissible under Minnesota R. Evid. 407); DeLuryea v. Winthrop Laboratories, 697 F.2d 222, 229 (8th Cir. 1983) (same, under Fed. R. Evid. 407). While plaintiff correctly noted at oral argument that such material might be admitted to prove the feasibility of a warning, the question to be proven is not whether a warning was feasible. It is, rather, whether a duty to warn exists at all.

Defendant had no duty to warn as a matter of law, and based on the evidence adduced by plaintiff, no reasonable jury could find defendant's bullet was defective or caused plaintiff's injuries.

Accordingly, the complaint must be dismissed. Because of the Court's ruling on summary judgment, the parties' motions concerning expert reports are denied as moot.

III. Conclusion

For all the foregoing reasons, defendant's motion for summary judgment [Docket No. 11] is granted. Plaintiff's motion to strike [Docket No. 43] is denied as moot.

Dated: November 18, 2004

s/ James M. Rosenbaum
JAMES M. ROSENBAUM
U.S. Chief District Judge