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Superior Court of Washington.

Conrad JOHNSON, et al Plaintiff(s),
v.

BULLS EYE SHOOTER SUPPLY, Bushmaster
Firearms Inc. Brian D. Borgelt Charles N.
Carr John Allen Muhammad John Lee Malvo,
Defendant(s).

No. 03-2-03932-8.

June 27, 2003.

ORDER DENYING DEFENDANTS' MOTION TO
DISMISS

CUTHBERTSON, J.

*Defendants' Motions to Dismiss Plaintiffs' Claims
Under CR 12(b)(6) are
Denied*

*1 This Court having reviewed the files, pleadings and arguments of counsel, it is hereby ORDERED: that the motions of defendants, Bull's Eye Shooter Supply and **Bushmaster** Firearms, Inc., to dismiss plaintiffs' claims pursuant to CR 12(b)(6) are denied.

CR 12(b)(6) allows dismissal of a civil case for failure to state a claim upon which relief can be granted. However, a dismissal for failure to state a claim is considered a drastic remedy and is granted sparingly. For the purposes of deciding defendants' motions, all of the factual allegations in plaintiffs' complaint are accepted as true; the court may even consider hypothetical facts when deciding this motion. *Bravo v. Dolsen Companies*, 125 Wn.2d 746 (1995).

Bull's Eye Shooter Supply

Bull's Eye Shooter Supply's CR 12(b)(6) motion to dismiss is based upon the issues of duty and proximate cause. This Court finds that plaintiffs' claim of negligence and public nuisance are actionable in the State of Washington; accordingly, Bull's Eye Shooter Supply's motion to dismiss plaintiffs' claims under CR 12(b)(6) is denied.

Contrary to defendant's arguments, this Court finds that Knott v. Liberty Jewelry and Loan, Inc., 50

Wash.App. 267, 748 P.2d 661 (1988), is not dispositive. *Knott* does not preclude civil actions against retail dealers of firearms. Knott v. Liberty Jewelry and Loan, Inc., 50 Wash.App. 267, 748 P.2d 661 (1988), involved an individual who had legally purchased a "Saturday Night Special" handgun and then shot Douglas Knott in a hotel; the individual later returned to his room and committed suicide. Knott, 50 Wash.App. at 269, 748 P.2d 661. The plaintiff guardian ad litem for Douglas Knott, thereafter claimed negligence on the part of the hotel's proprietor and raised product liability and tort claims against the vendor, distributor, assembler, and manufacturer of the individual's handgun. *Id.*

First, the statutory preemption of RCW 9.41.290, et seq., actually applies to local governments' ability to regulate firearms. Therefore, the defendant's reliance upon RCW 9.41.290 is misplaced. In enacting this statute during the 1983 legislative session, Sen. Talmadge articulated that "the intent ... is to supersede all local governmental ordinances relating to firearms which are more restrictive than this act." 1 Senate Journal, 75th Leg., Reg. Sess. at 752 (Wash.1983). Furthermore, in Cherry v. Municipality of Metropolitan Seattle, 116 Wash.2d 794, 808 P.2d 746 (1991), the Washington State Supreme Court further eviscerated the scops of the statutory preemption of RCW 9.41.290. "The reasonable conclusion is that RCW 9.41.290 was enacted to reform that situation in which counties, cities, and towns could each enact conflicting local criminal codes regulating the general public's possession of firearms." *Cherry*, 116 Wn.2d 642, at 801. The Court went on to "hold that the Legislature, In amending RCW.41.290, sought to eliminate a multiplicity of local laws relating to firearms and to advance uniformity in criminal firearms regulation." *Id.*

*2 Second, the *Knott* court did not adopt the holding in *Riordan v. International Armament Corp.*, 132 Ill.App.3d, 477, N.E.2d 1293 (1985); the court merely cited it as persuasive authority.

Third, both the facts and issue distinguish *Knott* and the case at bar. *Knott* Involved an individual who had legally purchased a "Saturday Night Special" handgun after filing an application to purchase, after receiving authorization to purchase, and after completing the required federal forms. Knott, 50 Wash.App. at 269, 748 P.2d 661. Furthermore, in *Knott* the plaintiff's claim of negligence was predicated upon the general marketing and sale of "Saturday Night Specials." *Id.* The facts in the present case involve: (1) a stolen or Illegally sold **Bushmaster** XM-15 E2S .223 semi- automatic

assault rifle; (2) Bull's Eye Shooter Supply's failure to timely report the missing assault rifle; (3) Bull's Eye Shooter Supply's history of a large number of weapons for which it could not account, assumed to be true for the purposes of this motion; and (4) plaintiffs' claim of negligence in the marketing and sale of firearms to unfit persons (including John Allen Muhammad and Lee Boyd Maivo).

The issue in *Knott* involved whether or not a firearms dealer could be held liable for a licensed handgun buyer's tortious or criminal acts, which had been committed with a legally purchased firearm. Additionally, the plaintiff in *Knott* sought to: (1) impose liability under the Product Liability Act; (2) impose strict liability because the per se distribution and sale of "Saturday Night Specials" was an ultrahazardous activity; and (3) create a new common law cause of action. In the present case, none of these issues or theories of liability have been advanced by the plaintiffs.

Fourth, the Washington Supreme Court has specifically held that a common law cause of action can exist against firearms dealers. [Bernethy v. Walt Failor's, Inc.](#), 97 Wash.2d 929, 653 P.2d 280 (1982). Moreover, the holding in the *Bernethy* case recently has been affirmed by the Court. See, [Hickle v. Whitney Farms, Inc.](#), 148 Wash.2d 911, 64 P.3d 1244 (2003); [Christen v. Lee](#), 113 Wash.2d 479, 780 P.2d 1307 (1989). See also, [Gall v. McDonald Industries](#), 84 Wash.App. 194, 926 P.2d 934 (1996).

Bernethy involved an Intoxicated husband who, after agreeing to buy a rifle and waiting for the firearms dealer to fill out the necessary transaction records, picked up the rifle and ammunition and walked out. [Bernethy](#), 97 Wash.2d at 931, 653 P.2d 280. Thereafter, he sought out his wife at a tavern, where he fatally shot her. [Id.](#) at 932, 653 P.2d 280.

The Court in *Bernethy* explained that "duty may be predicated on violation of a statute or common law principles of negligence." [Id.](#) at 932, 653 P.2d 280. The Court went on to adopt the doctrine of negligent entrustment, summarized by [Restatement \(Second\) of Torts](#) § 390. [Id.](#) at 933, 653 P.2d 280. Thus, the Court made clear that firearms dealers (1) owe a common law duty not to provide weapons to unfit persons and (2) owe a common law duty to third parties injured by weapons made available to an unfit person by a firearms dealer. The Court's decision in *Bernethy* was based in part on the strong public policy in Washington that certain people should not be provided with dangerous weapons.

*3 In the present case, unfit persons, including John Allen Muhammad and Lee Boyd Malvo, allegedly obtained the **Bushmaster** assault rifle from the Bull's Eye Shooter Supply. At the time, Muhammad was barred from purchasing a firearm because he was the subject of a domestic violence restraining order; Malvo was barred from purchasing a firearm because he was a juvenile and an illegal alien. Moreover, the allegations in the complaint against Bull's Eye Shooter Supply appear far more egregious than the conduct of the firearms dealer in *Bernethy*.

This Court finds that plaintiffs' claims against Bull's Eye Shooter Supply survive defendant Bulls Eye Shooter Supply's [CR 12\(b\)\(6\)](#) motion based on a common law duty in Washington to use reasonable care in the sale and distribution of firearms.

Bull's Eye Shooter Supply's proximate cause argument fails as well. The legal causation prong of proximate cause is predicated on notions of common sense, morals, public policy, and social justice. [Id.](#) at 933-34, 653 P.2d 280. As articulated in *Bernethy*, there is a strong public policy in Washington "that certain people should not be provided with dangerous weapons" and "that one should not furnish a dangerous instrumentality such as a gun to an incompetent." *Id.* Thus, public policy in Washington is well established and supports the finding of legal causation between the alleged tortious acts of defendant Bull's Eye Shooter Supply and the ultimate injuries to plaintiffs.

The facts presented by plaintiffs, assumed to be true for the purposes of this motion, demonstrate an arguably unbroken nexus between the loss of the assault rifle and the injuries of the plaintiffs. Thus, this case can be allowed to reach a jury to determine whether or not there is an adequate causal link (cause in fact) between the plaintiffs' injuries and Bull's Eye Shooter Supply's conduct.

The cases cited by defendant Bull's Eye Shooter Supply in support of the proximate cause aspect of its [CR 12\(b\)\(6\)](#) motion, [Pratt v. Thomas](#), 80 Wash.2d 117, 491 P.2d 1285 (1971), and [Kim v. Budget Rent a Car Systems, Inc.](#), 143 Wash.2d 190, 15 P.3d 1283 (2001), can be distinguished, making them inapposite to this present case. *Pratt* and *Kim* both involve stolen automobiles, which subsequently were involved in accidents. The instant case, in contrast to *Pratt* and *Kim*, involves allegations of a failure by Bull's Eye Shooter Supply to properly secure the **Bushmaster** rifle and a failure by Bull's Eye Shooter Supply to report its disappearance, thus distinguishing this case. Also, in the instant case,

there is arguably a causal nexus or natural and continuous sequence of events between the alleged negligence of Bull's Eye Shooter Supply and plaintiffs' injuries. The facts in the present case indicate that a high degree of risk of harm to plaintiffs was created by Bull's Eye Shooter Supply's allegedly reckless or incompetent conduct in distributing firearms. Plaintiffs allege that over 230 firearms "disappeared" from the Bull's Eye Shooter Supply between 2000 and 2002; Bull's Eye Shooter Supply failed to report the missing firearms within 48 hours of discovery, as required by federal law; and that 99.73% of all nationwide firearms dealers have had fewer "disappearing" firearms than Bull's Eye Shooter Supply.

*4 Furthermore, intervening criminal acts, such as the sniper shootings in the case at bar, may be found to be foreseeable, and if so found, actionable negligence may be predicated thereon. [Bernethy, 97 Wash.2d at 834, 650 P.2d 1099](#) (quoting *MoLood v. Grant Cy. Sch. Dist.* 128, Wn.2d 316, 321 (1953)).

Finally, this Court is not persuaded by defendant's argument that there can be no proximate cause because some of the named plaintiffs may have been injured in geographic locations far from Pierce County and at an undetermined time after acquisition of the rifle. See, [Schooley v. Pinch's Dell Market, Inc.](#), 134 Wash.2d 468, 478-79, 951 P.2d 749 (1998).

Bushmaster Firearms, Inc.

Bushmaster Firearms, Inc.'s [CR 12\(b\)\(6\)](#) motion to dismiss is based upon the issue of duty.

This Court finds that plaintiffs' claim of negligence and public nuisance are actionable in the State of Washington; accordingly, **Bushmaster** Firearms, Inc.'s motion to dismiss plaintiffs' claims under [CR 12\(b\)\(6\)](#) is denied.

Defendant **Bushmaster** Firearms, Inc., argued that their motion to dismiss plaintiffs' claims would either survive or fail on *Knott*. This Court finds that contrary to defendant's argument, *Knott* does not preclude civil actions against retail dealers or manufacturers of firearms.

First, the statutory preemption of [RCW 9.41.290](#), et seq., applies to local governments' ability to regulate firearms.

Second, the *Knott* court did not adopt the holding in [Riordan v. International Armament Corp.](#), 132 Ill.App.3d 642, 87 Ill.Dec. 765, 477 N.E.2d 1293

[\(1985\)](#); they merely cited it as persuasive authority.

Third, both the facts and issue in *Knott* can be distinguished; therefore *Knott* is not the controlling authority in the present case. This Court has stated several reasons why *Knott* is not dispositive. (See Bull's Eye Shooter Supply, *supra*.) The facts in the present case involve: (1) a stolen or illegally sold **Bushmaster** XM-15 E2S .223 semi-automatic assault rifle; (2) Bull's Eye Shooter Supply's failure to timely report the missing assault rifle; (3) Bull's Eye Shooter Supply's history of a large number of weapons for which it could not account, assumed to be true for the purposes of this motion; and (4) plaintiffs' claim of negligence in the distribution and entrustment of firearms by **Bushmaster** Firearms, Inc., to Bull's Eye Shooter Supply. *Knott* by contrast involved otherwise legal sales to authorized persons.

Fourth, the Washington State Supreme Court has specifically held that a common law cause of action for negligent entrustment can exist against firearms dealers. [Bernethy v. Walt Failor's, Inc.](#), 97 Wash.2d 929, 653 P.2d 280 (1982). Moreover, the holding in *Bernethy* recently has been affirmed by the Court. See, [Hickle v. Whitney Farms, Inc.](#), 148 Wash.2d 911, 64 P.3d 1244 (2003); [Christen v. Lee](#), 113 Wash.2d 479, 780 P.2d 1307 (1989). See also, [Gall v. McDonald Industries](#), 84 Wash.App. 194, 926 P.2d 934 (1996).

In *Bernethy*, the Washington State Supreme Court stated that negligent entrustment is a "well established" common law doctrine in Washington. [Bernethy, 97 Wash.2d at 932, 653 P.2d 280](#). Negligent entrustment is a "well established" common law doctrine in Washington. The Court went on to cite the doctrine of negligent entrustment, summarized by [Restatement \(Second\) of Torts § 390](#). [Id. at 933, 653 P.2d 280](#).

*5 [Section 390 of the Restatement \(Second\) of Torts](#) states:

One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

In the present case, if plaintiffs can establish: (1) that **Bushmaster** Firearms, Inc., entrusted firearms to Bull's Eye Shooter Supply; (2) that Bull's Eye

Shooter Supply was reckless or incompetent to safely handle the firearms; (3) that **Bushmaster** Firearms, Inc., knew or should have known of Bull's Eye Shooter Supply's recklessness or incompetence; (4) that Bull's Eye Shooter Supply's recklessness or incompetence created an unreasonable risk of harm; and (5) that plaintiffs' injuries were proximately caused by the negligent entrustment of firearms to Bull's Eye Shooter Supply, then **Bushmaster** Firearms, Inc., may be liable for plaintiffs' injuries under the theory of negligent entrustment. [*Hickle*, 148 Wash.2d at 926, 64 P.3d 1244.](#)

Additionally, the *Bernethy* court made clear that firearms dealers (1) owe a common law duty not to provide weapons to unfit persons and (2) owe a common law duty to third parties injured by weapons made available to an unfit person by a firearms dealer.

In the present case, assuming the facts and hypothetical facts presented by plaintiffs as true for the purposes of this motion, **Bushmaster** Firearms, Inc., knew or should have known that Bull's Eye Shooter Supply was operating its store in a reckless or incompetent manner, creating an unreasonable risk of harm. Plaintiffs allege numerous warning signs of Bull's Eye Shooter Supply's reckless or incompetent manner, including: over 230 firearms "disappeared" from the Bull's Eye Shooter Supply between 2000 and 2002; Bull's Eye Shooter Supply's failure to report the missing firearms within 48 hours of discovery, as required by federal law, and the fact that 99.73% of all nationwide firearms dealers have had fewer "disappearing" firearms than Bull's Eye Shooter Supply. If it was foreseeable that plaintiffs and others were endangered by the entrustment of the **Bushmaster** XM-15 assault rifle to Bull's Eye Shooter Supply, this case should be allowed to reach a jury, that will decide whether or not **Bushmaster** is liable for the resulting physical harm to plaintiffs.

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