Products Liability Law Daily Wrap Up, DESIGN AND MANUFACTURING DEFECTS—WEAPONS AND FIREARMS—D. Nev.: Nevada high court asked to clarify whether gun manufacturers and dealers can be liable for mass shootings, (May 11, 2020)

Products Liability Law Daily Wrap Up

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By Sandra J. Stoll, J.D.

Nevada's federal court seeks direction regarding the civil liability of the companies that made and sold the AR-15 rifles used in the mass shooting in Las Vegas on October 1, 2017.

In an action brought by a victim's parents against the manufacturers and dealers that had sold the AR-15 rifles used in the Las Vegas mass shooting, Nevada's federal district court certified questions to the state's highest court seeking answers that could be determinative of matters raised by the suit. The lawsuit alleged claims for wrongful death, negligence per se, and negligent entrustment (*Parsons v. Colt's Manufacturing Co.*, May 8. 2020, Gordon, A.).

In considering the claims, the federal court found no clearly controlling precedent for the following questions:

.1. Under Nevada law, can a plaintiff assert a negligence per se claim predicated on violations of criminal federal and state machine gun prohibitions absent evidence of legislative intent to impose civil liability?

.2. Does a plaintiff asserting a wrongful death claim premised on allegations that firearms manufacturers and dealers knowingly violated federal and state machine gun prohibitions have "a cause of action against the manufacturer or distributor of any firearm … merely because the firearm or ammunition was capable of causing serious injury, damage or death, was discharged [,] and proximately caused serious injury, damage or death" under Nevada Revised Statutes §41.131?

.3. Does Nevada Revised Statutes §41.131 allow a wrongful death claim premised on allegations that firearms manufacturers and dealers knowingly violated federal and state machine gun prohibitions because the statute is "declaratory and not in derogation of the common law?"

Negligence claims. The federal court originally dismissed the negligent entrustment and negligence per se claims, without leave to amend, upon finding that they failed to state a cognizable claim under the Protection of Lawful Commerce in Arms Act (PLCAA), Nevada Revised Statutes (NRS) §41.131, and common-law causation principles [see *Products Liability Law Daily*'s April 13, 2020 analysis]. The court reconsidered its dismissal of the negligence per se claims. In certifying the first question, the court was asking under what circumstances a violation of a penal statute constitutes negligence per se.

The court's original dismissal of the negligence per se claims was because federal courts sitting in Nevada have applied a rule announced in two Nevada Supreme Court decisions that the violation of a penal statute is not negligence per se absent evidence of legislative intent to impose civil liability. However, the federal court determined that certifying the question was warranted because, alternatively, those pertinent state supreme court decisions could be read to support a presumption that a violation of a penal statute is negligence per se absent legislative intent to the contrary. Moreover, those prior decisions did not address the issue outside the context of alcohol laws.

Wrongful death claim. The federal court next considered the wrongful death claim. The court had denied the motion to dismiss that claim, concluding that, as pleaded, it was not barred by the PLCAA or common-law causation principles. Explaining its decision, and asking for certification, the court observed that the statute was enacted in 1985 but that Nevada courts had yet to interpret it. No party had identified, nor had the court found, a

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federal or state decision that has even cited it. Moreover, the court was particularly concerned by the defendants' concession in oral argument that under their interpretation, §41.131 would immunize even a defendant that manufactured and sold Tommy guns or M-16 rifles to civilians. Therefore, the court reasoned, in denying the motion to dismiss, that Nevada's highest court should be allowed to interpret §41.131 on first impression.

The case is No. 2:19-cv-01189-APG-EJY.

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