IN THE CIRCUIT COURT OF LITTLE RIVER COUNTY, ARKANSAS

CORY HODGE — PLAINTIFF

VS. — CIV. NO. 2000-27

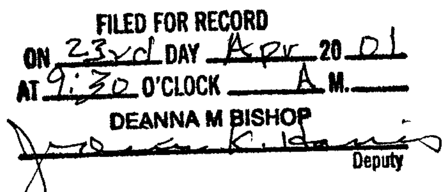
CONNECTICUT VALLEY ARMS,
WAL-MART STORES, INC., DIKAR S.
COOP. LTDA and GENE SEARS
SUPPLY COMPANY — DEFENDANTS

BRIEF IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT
OF SEPARATE DEFENDANT GENE SEARS SUPPLY COMPANY

Rule 56 of the Arkansas Rules of Civil Procedure provides that summary judgment is appropriate if there are no material issues of fact in dispute and a party is, otherwise, entitled to a judgment as a matter of law. The purpose of summary judgment is to avoid unnecessary trials where the law can be applied summarily to the undisputed facts. See, for example, *Wolner v. Bogaev*, 290 Ark. 299, 718 S.W.2d 942 (1986); *Rowland v. Gastroenterology Associates*, 280 Ark. 278, 657 S.W.2d 536 (1983); *Bourland v. Title Insurance Company of Minnesota,* 4 Ark. App. 68 627 S.W.2d 567 (1982). There are no material issues of fact in dispute in this cause in regards to Plaintiff's claim for injury which he allegedly suffered due to the alleged defective firearm, and separate Defendant Gene Sears Supply Company is entitled to judgment as a matter of law.

I. FACTUAL SUMMARY.

The Complaint of Plaintiff Cory Hodge Contends that, on an undisclosed date, he purchased a 50 caliber muzzle loading rifle at a Wal-Mart Store. He contends that the



weapon was made by Connecticut Valley Arms and was wholesaled by Gene Sears Supply Company. He contends that he suffered physical injury when the weapon burst upon discharge. He contends that failure to manufacture, design, and test the weapon led to his injury, and that there was also a failure to warn him, as a consumer, of its hazards.

The affidavit of Gene Sears, attached to the Motion as Exhibit I, shows that Gene Sears Supply Company is a mere conduit, which received a sealed package containing a firearm and which reshipped this sealed package to the retailer. Gene Sears Supply Company played no role whatsoever in the design, testing, or manufacture of the weapon, nor did it give any warranties or warnings connected with the weapon. Gene Sears Supply Company has no knowledge of any dangerous propensities connected with Connecticut Valley Arms, who is a reputable manufacturer, and Gene Sears Supply Company does not market the weapon to the public as if it was its own product.

Gene Sears Supply Company, in its Answer, prayed for judgment over against Connecticut Valley Arms.

II. NO CAUSE OF ACTION LIES AGAINST GENE SEARS SUPPLY COMPANY FOR ANY DEFECT IN THE FIREARM, SINCE GENE SEARS IS A MERE CONDUIT.

It is well established that a mere distributor of a product, who merely transfers sealed packages and plays no role in the design or manufacture of the product, is not liable for defects in the product. The leading Arkansas case is *Dildine v. Clark Equipment Co.*, 282 Ark. 130, 666 S.W.2d 692 (1984). In *Dildine*, the injured party

sued both the manufacturer and the distributor of a front-end loader for injuries allegedly resulting from the defective condition of the loader. The trial court directed a verdict for both defendants.

On appeal, the Arkansas Supreme Court sustained the directed verdict in favor of the distributor, Town & Country. The Court held:

> We agree with counsel for Town & Country that no evidence was introduced or tendered on which to predicate liability by Town & Country. Dildine relies on the principle that one who puts out a product as his own which is manufactured by another is subject to the same liability as the manufacturer. This doctrine was followed in *Chapman Chemical Co. v.Taylor*, 215 Ark. 630, 222 S.W.2d 820 (1949) and is stated and analyzed in Restatement of Torts, 2d, §400, p. 339. The argument overlooks the fact that here there is no proof that the 632 Bobcat was distributed by Town & Country as its own product. The owners manual, the warranty, the operators handbook, a document called "Delivery Inspection", perhaps the machine itself, all show the Bobcat to be the product of Clark Equipment Company. . . .Nor do we find evidence that would sustain a finding that Town & Country knew or had reason to know the 632 Bobcat was likely to be dangerous when used in the manner intended."
>
> *Dildine v. Clark Equipment Co., supra* at 695.

Therefore, the Court affirmed a directed verdict in favor of the distributor. The Restatement of Torts, 2d, sets forth several criteria for liability for a chattel manufactured by another. These provisions, including §400, referenced by the Arkansas Supreme Court above, can be summarized as follows:

§399 One who sells a chattel manufactured by another and knows it is, or is likely to be, dangerous, is subject to liability.

§400 One who puts out as his own product a chattel manufactured by another is subject to the same liability as if he were its manufacturer.

§401 One who knows a chattel manufactured by another is or is likely to be dangerous

when used is subject to liability.

§402 One who does not know or have reason to know that a product manufactured by a third person is, or is likely to be, dangerous, has no liability for failure to inspect or test the chattel.

These principles have been embraced by other courts, who have recognized that a distributor who is a mere conduit has no liability for the manufacturer's failures. In *Vandelune v. 4B Elevator Components*, 148 F.3d 943 (8TH Cir. 1998), for example, it was held that a distributor cannot be held liable for negligent product design, by the manufacturer, nor for any negligent failure to test or inspect the product. Likewise, in *In Re TMJ Implants Liability Litigation*, 97 F.3d 1050, at 1059 (8th Cir. 1996), it was held tat "A distributor who acts as a mere conduit of a product is only liable for known dangers".

Applying these legal maxims to the facts, the affidavit of Gene Sears shows that Gene Sears Supply Company was a mere conduit, who had no role whatsoever in the design, testing, or manufacturing of the firearm. Gene Sears Supply Company merely receives firearms in sealed packages and (after removing an outer container called an overpack), ships the individually packaged firearms to various retailers. The Restatement, and the case law cited above, provide that a distributor is liable for known dangers associated with the product. However, as shown by the affidavit of Mr. Sears, Gene Sears Supply Company was unaware of any dangerous propensities connected with this weapon, and considers Connecticut Valley Arms to be a reputable supplier.

Therefore, Gene Sears Supply Company is entitled to summary judgment.

III. NO CAUSE OF ACTION LIES AGAINST GENE SEARS SUPPLY COMPANY FOR BREACH OF WARRANTY.

The applicable statute (Ark. Code Ann. §4-86-101) provides that one can bring suit for breach of warranty against the *manufacturer* or the *seller* of a product. Gene Sears Supply Company, as a mere middleman, is neither a manufacturer nor a seller. Therefore, it has no legally recognized obligation to warrant that the firearm was safe or merchantable, and it is entitled to summary judgment.

Moreover, it is well established that a plaintiff must give notice of breach of warranty as a condition precedent to filing a lawsuit. See *Ark. Code Ann*. §4-2-607. The complaint cannot constitute the notice, although the complaint must allege that notice was properly given. See *Williams v. Mozark Fire Extinguisher Co.*, 318 Ark. 792, 888 S.W.2d 303 (1994). If notice is not given, a seller is entitled to a directed verdict. *Greenfield Seed Co. v. Bland*, 18 Ark. App. 48, 710 S.W.2d 833 (1986). The U.S. District Court has noted that the failure to give proper notice of breach of warranty did not entitle a movant to for a summary judgment where material issues of fact existed concerning the giving of notice. *Jackson v. Swift-Eckrich*, 830 F. Supp. 486 (W.D. Ark. 1993) aff'd 53 F. 3d 1452 (8th Cir. 1995). By logical extension, where there is no material issue of fact concerning the failure of the required notice, summary judgment is appropriate.

There is no allegation in the complaint that notice was given to Gene Sears Supply Company, nor was any such notice actually given. Therefore, assuming arguendo that Gene Sears Supply Company, as a wholesaler, is an entity obligated under the statute to warrant the product's safety and merchantability, Gene Sears

Supply Company is still entitled to summary judgment on this claim.

IV. NO CAUSE OF ACTION LIES AGAINST GENE SEARS SUPPLY COMPANY FOR BREACH OF A DUTY TO WARN.

The duty to warn arises out of the superior knowledge of the person obligated to give the warning. *Sanders v. Neuman Drilling Co.,* 273 Ark. 416, 619 S.W.2d 674 (1981). It arises where one knows or reasonably should know of a danger which the user cannot be expected to discover for himself. *Jenkins v. Hestand's Grocery Inc.*, 320 Ark. 485, 898 S.W.2d 30 (1995). In *Browning v. Browning*, 319 Ark. 205, 890 S.W.2d 273 (1995), the Supreme Court held that one who supplied an allegedly defective rope could not be held liable for a failure to warn unless it was shown that the supplier had a superior knowledge of the rope's condition. Without such knowledge, the Court held, there is no duty to warn.

No Arkansas decision has been located which held or even suggested that a mere middleman has any duty to warn. This is consistent with the requirement that the person having the duty to warn must have superior knowledge. The manufacturer of a product would be presumed to be familiar with its characteristics, and able to give warnings based on this in-depth knowledge. The middleman, however, who merely conveys the product in sealed packages to various retailers, is not learned in the characteristics and potential hazards of the product, and so has no duty to warn.

The affidavit of Gene Sears illustrates this point. Sears has affirmed that he and his company played no role in the design or manufacture of the product, hence they cannot be expected to possess the knowledge that a designer or manufacturer would

have. Further, Gene Sears stated in his deposition that he was unaware of any dangers connected with Connecticut Valley Arms, and that, in particular, he was unaware of any tendency of these weapons to burst. His lack of knowledge results in Gene Sears Supply Company having no duty to warn, and Gene Sears Supply Company is entitled to summary judgment on this claim, as well.

V. GENE SEARS SUPPLY CO. IS ENTITLED TO JUDGMENT OVER AGAINST CONNECTICUT VALLEY ARMS FOR INDEMNITY

Defendant Gene Sears Supply Company anticipates that Plaintiff will argue that, as a mere "supplier" of the chattel, Gene Sears Supply Company is liable to Cory Hodge for any defect in the weapon. See Ark. Code Ann. §4-86-102 and §16-116-101 et seq.

However, under §16-116-107, it is provided that a supplier of a product who was not the manufacturer shall have a cause of action for indemnity against the manufacturer of the product. In *Caplener v. Bluebonnet Milling Co.*, 322 Ark. 751, 911 S.W.2d 586 (1995), the Arkansas Supreme Court recognized that a supplier of a defective product was entitled to indemnity over and against the manufacturer, pursuant to this statutory provision, where the defective product claim was found to be meritorious. The affidavit of Gene Sears establishes that Gene Sears Supply Company was a mere conduit, and that any defect found to exist in the weapon was the result of the acts or omissions of the manufacturer, Connecticut Valley Arms. Under such circumstances, Gene Sears Supply Company submits that it is entitled to

judgment over and against Connecticut Valley Arms for indemnity for any judgment that might be entered against it.

Respectfully submitted,

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BY:
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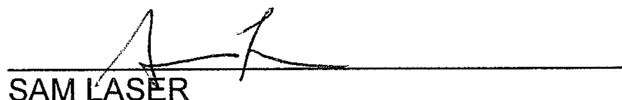
CERTIFICATE OF SERVICE

I, Sam Laser, hereby certify that a copy of the foregoing pleading was mailed to all attorneys of record as listed below this 30th day of April, 2001.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