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Parsons v. Colt's Manufacturing Company, LLC (NRAP 5), 137 Nev. Adv. Op. 72 (Dec. 2, 2021)¹

CIVIL LIABILITY: ARE GUN COMPANIES LIABLE FOR THIRD PARTY USE OF FIREARMS?

Summary

In an opinion drafted by Justice Pickering, the Court advised Nevada's federal district court that NRS 41.131 provided immunity to gun manufacturers and distributors from claims brought against them where a firearm or ammunition caused serious injury, damage, or death. The Court used statutory canons of construction, legislative history, persuasive authority, and past precedent to analyze NRS 41.131's protections. The court found that NRS 41.131 provided gun companies immunity from third party use of illegal firearms.

Background

Carrie Parsons was a victim of the Route 91 Harvest Festival mass shooting in 2017. The shooter brought high-capacity magazines, bump stocks, and twelve AR-15 semi-automatic rifles to a hotel room on the 32nd floor. Bump stocks are tools that enable semi-automatic rifles to fire more quickly. The shooter fired 1,049 rounds in 10 minutes and killed 58 people.

James and Ann-Marie Parsons filed suit against the gun companies in Nevada state court. They brought three claims: (1) A wrongful death claim under 18 U.S.C. § 922(b)(4) (2019), which prohibited the sale or delivery of machineguns, and under NRS 202.350(1)(b), a similar Nevada statute prohibiting the sale or delivery of machineguns; (2) a negligence per se claim under the same statutes; (3) and a negligent entrustment claim. The gun companies removed the case to Nevada federal district court and filed a 12(b)(6) motion to dismiss. The gun companies argued

¹ By Alix Goldstein.

that the federal Protection of Lawful Commerce in Arms Act (PLCAA) and NRS 41.131 provided immunity to gun manufactures. NRS 41.131(1) does not allow a party to sue the manufacturer or distributor of firearms or ammunition merely because the firearm caused injury, damage, or death. The PLCAA is similar.²

Federal district court dismissed the negligent entrustment and negligence per se claims. But the court found that the wrongful death claim fell under the predicate exception to the PLCAA. The predicate exception allows a party to bring suit against gun companies if the companies knowingly violated state or federal law when selling or marketing the product, and that violation was a proximate cause of the injury or death.³ The Parsons argue that the predicate exception is warranted because the AR-15 could be modified easily with the bump stocks to bring them under the federal and state definition of a machinegun, which violates federal and state machinegun prohibitions.⁴ The federal court found that the Parsons' argument supported a plausible claim for relief and that the PLCAA did not preclude the wrongful death claim.⁵

But there was still the question of whether NRS 41.131 was broader than the PLCAA and provided immunity to the gun companies. The federal district court declined to answer this state law question. Instead, the federal district court certified two questions about the scope of NRS 41.131 under the Nevada Rules of Appellate Procedure (NRAP). NRAP 5 allows the Nevada Supreme Court to accept and answer certified questions about Nevada law. The federal district court certified three questions: (1) Does a plaintiff bringing a wrongful death claim where the gun companies knowingly violated federal and state law machinegun prohibitions have a cause of

² 15 U.S.C. § 7901(b)(1) (2019); see also id. §§ 7902(a)-(b), 7903(5)(A).

³ 15 U.S.C. § 7903(5)(A)(iii).

⁴ See 26 U.S.C. § 5845(b) (2019); NEV. REV. STAT 202.350(8)(c) (2015) (recodified as NEV. REV. STAT 202.253(6) (2021)).

⁵ Parsons v. Coles Mfg. Co., LLC, No. 2:19-cv-01189-APG-EJY, 2020 WL 1821306, at *6 (D. Nev. April 10, 2020).

action under NRS 41.131? (2) Does NRS 41.131 allow a wrongful death claim where the gun companies knowingly violated federal and state law machinegun prohibitions? (3) Can a plaintiff bring a negligence per se claim where the gun companies knowingly violated federal and state law machinegun prohibitions absent any legislative intent to impose civil liability?

Discussion

The first question required the Court to interpret NRS 41.131. The Court used the whole-text canon and construed the text of the statute.⁶ The court also looked at the history of NRS 41.131, which was enacted twenty years before the PLCAA. Despite the length in between the two laws, NRS 41.131 and the PLCAA have a similar purpose. The state and federal statute both protect firearm manufactures from lawsuits premised on the fact that a gun can properly shoot. The plain language of the statute includes the following:

No person has a cause of action against the manufacturer or distributor of any firearm or ammunition *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. This subsection is declaratory and not in derogation of the common law.⁷

The Parsonses agreed and argued that the statute shields gun companies from frivolous lawsuits that allege fault based merely on the inherent dangers of the firearm. However, the Parsonses believed the words “merely because” constituted a no-fault statute and would not protect gun companies from lawsuits if the companies acted unlawfully when manufacturing or distributing the firearms. The gun companies disagreed and argued that the statute shields them from all lawsuits except products liability cases where the firearm malfunctioned.

⁶ ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 167 (2012); *Orion Portfolio Servs. 2 LLC v. Cty. of Clark ex rel. Univ. Med. Ctr. of S. Nev.*, 126 Nev. 397, 403, 245 P.3d 527, 531 (2010).

⁷ NEV. REV. STAT 41.131(1) (emphasis added).

A

The court analyzed the words “merely because” and concluded that the phrase arguably allows the present action where fault extends beyond the firearm’s inherent ability to cause harm. But the court also noted that NRS 41.131’s immunity does not solely cover legal firearm. The statute reads that “[n]o person has a cause of action against the manufacturer or distributor of *any firearm* or ammunition.”⁸ So the statute protects gun companies in situations where a firearm is sold illegally. Conversely, the PLCAA and its predicate exception condition immunity for gun manufactures on the firearm being legal.⁹

The court analogized Nevada’s statute to Indiana code section 34-12-3-3(2) (2021). The Indiana Supreme Court held that Indiana’s statute protected gun companies from liability when the company acted unlawfully because the Indiana Legislature did not include the term “lawful” in the statute.¹⁰ Similarly, NRS 41.131 does not predicate immunity on lawful conduct. Because the manufacture and sale of legal firearms is immaterial to acquire the protections of the statute, the alleged illegality of the AR-15 rifles is irrelevant.

This interpretation of NRS 41.131 does not make the words “merely because” meaningless. NRS 41.131(2) limits the protections granted in NRS 41.131(1) and excludes product design or production defects of firearms. The statute also does not completely immunize gun companies for acts of negligence. If the acts of gun companies create an unreasonable risk of harm beyond the inherent dangers of a firearm, gun companies may still be held liable.

⁸ *Id.* (emphasis added).

⁹ 15 U.S.C. §§ 7902(a), 7903(5)(A)(iii).

¹⁰ *See* *KS&E Sports v. Runnels*, 72 N.E.3d 892 (2017).

B

The legislative history of NRS 41.131 supports this interpretation. The statute was enacted in 1985. The possession and use of machineguns was not prohibited by law until 1989.¹¹ And the manufacture and sale of machineguns in Nevada was not prohibited until 2003.¹² So NRS 41.131 was not enacted with the purpose of barring protection for machinegun manufacture or use. Additionally, there were guns and ammunition that were illegal in 1985. Yet, the Nevada legislature still included “any firearm or ammunition” in the statute. Despite subsequent laws banning certain firearms or ammunition, the Nevada legislature left NRS 41.131 unchanged.

C

Lastly, the Court analyzed the last sentence of NRS 41.131(1): “This subsection is declaratory and not in derogation of the common law.” The court used two canons of construction. First, declaratory statutes should be read as coextensive with the common law. And the court presumes that the statute does not change the meaning of the common law. Second, a statute that is in derogation of the common law will be narrowly construed. The court used the last sentence of the statute as an interpretive guide to mean that the statute should be construed alongside the common law. The statute should not be narrowly construed like statutes that are in derogation of the common law.

So NRS 41.131(1) pointed the court to the common law to interpret the protections of the statute. At the time the statute was enacted, Nevada common law did not address the liability of gun companies for injuries or death caused by the illegal use of a firearm. Moreover, there was persuasive authority from outside Nevada that found the common law did not establish gun

¹¹ 1989 Nev. Stat., ch. 309, § 1, at 653-54.

¹² 2003 Nev. Stat., ch. 256, § 6, at 1351.

company liability when firearms were misused.¹³ But no authority addressed whether the legality of a weapon changed this rule.

The court referenced its decision in *Hamm v. Carson City Nugget, Inc.*¹⁴ The issue in Hamm was whether a tavern keeper who unlawfully sold liquor to an individual could be held liable for the actions of that individual after they killed a pedestrian with their car. The court found that the tavern keeper could not be held liable under Nevada law. Similarly, in this case, the Nevada legislature has not imposed civil liability on gun companies for the use of illegal firearms. This is a decision that should be left to the legislature and not the court. And because the court held that the gun companies are protected from civil liability under NRS 41.131, the court found it was unnecessary to address the negligence per se question.

Conclusion

The court held that NRS 41.131 provides immunity to gun companies for the negligence per se and wrongful death actions in this case. The court acknowledged the tragedy of the 91 Harvest Festival mass shooting. But the Nevada legislature has made the law clear. And under Nevada law, the Parsons' claims cannot continue. Changing civil liability imposed on gun companies is a decision for the legislature.

¹³ *Riordan v. Intl Armament Corp.*, 477 N.E.2d 1293, 1295 (III. App. Ct. 1985); *see also Cassisi v. Maytag Co.*, 396 So. 2d 1140, 1143 (Fla. Dist. Ct. App. 1981).

¹⁴ 85 Nev. 99, 450 P.2d 358 (1969).