

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION**

IN RE: 3M COMBAT ARMS
EARPLUG PRODUCTS
LIABILITY LITIGATION

Case No. 3:19md2885

This Document Relates to:
Estes, 7:20cv137
Keefer, 7:20cv104
Hacker, 7:20cv131

Judge M. Casey Rodgers
Magistrate Judge Gary R. Jones

ORDER

This matter is before the Court on Defendants’ Motion for Judgment as a Matter of Law (“JMOL”) under Federal Rule of Civil Procedure 50(a). Oral argument was heard on April 26, 2021. Having now fully considered the parties’ arguments and the applicable law, the Court concludes Defendants’ motion is due to be denied.

I. Legal Standard

JMOL is appropriate where a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for the party on that issue. *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 421 F.3d 1169, 1177 (11th Cir. 2005) (citing Fed. R. Civ. P. 50(a)). When considering such a motion, a court must “review the entire record, examining all the evidence, by whomever presented, in the light most favorable to the nonmoving party, and drawing all

reasonable inferences in the nonmovant's favor." *Id.* In doing so, the court may not make credibility determinations or weigh the evidence, as those are solely functions of the jury. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000). A motion for JMOL should be granted "only if the facts and inferences point so overwhelmingly in favor of the [moving party] that [a] reasonable [jury] could not arrive at a contrary verdict." *Bogle v. Orange County Bd. of County Comm'rs*, 162 F.3d 653, 656 (11th Cir. 1998).

II. Discussion

Defendants move for JMOL on (1) each of Plaintiffs' claims on the element of causation; (2) Plaintiffs' "unpled" manufacturing defect claim; (3) Plaintiffs' misrepresentation claims; (4) Plaintiffs' fraud claims; (5) Plaintiff Luke Estes' and Plaintiff Lewis Keefer's negligence *per se* claims;¹ (6) Keefer's claims based on the applicable Georgia statute of repose; and (7) Estes' claims based on the applicable Georgia statute of limitations. The Court addresses each motion in turn.

1. Causation

Defendants contend that there is insufficient evidence to prove causation because "there's not been a single bit of evidence from anybody that [the CAEv2] did not fit these three Plaintiffs." Trial Tr. (4/26/2021) at 348. In support, Defendants

¹ The Court granted summary judgment for Defendants on Plaintiff Stephen Hacker's negligence *per se* claim.

repeat the same argument the Court previously considered on summary judgment that “[n]one of the [P]laintiffs’ experts tried to fit these plugs” and instead “simply assumed that the [CAEv2] did not fit these [P]laintiffs properly because they allegedly suffer from hearing loss.” *See* Trial Tr. (4/26/2021) at 351, 354. And, as in its orders denying Defendants’ motions for summary judgment on this issue, the Court again rejects this argument. There is a sufficient evidentiary basis for a reasonable jury to find that the CAEv2’s alleged defects caused Plaintiffs’ injuries, particularly in light of the “imperceptible loosening problem” identified by Defendants in connection with attenuation testing. Plaintiffs’ experts testified, to a reasonable degree of medical and scientific certainty based on reliable differential etiology analyses, that the alleged defects in the CAEv2 caused Plaintiffs’ injuries. Accordingly, Defendants’ motion for JMOL on the element of causation is **DENIED**.

2. Manufacturing Defect Claim

Plaintiffs do not raise a manufacturing defect claim. *See* Trial Tr. (4/26/2021) at 374. Defendants nonetheless move for JMOL on this “unpled claim that is being tried without consent” and argue that the jury “should be instructed to ignore” evidence of Defendants’ quality control issues relating to the CAEv2. *See* Trial Tr. (4/26/2021) at 355. The Court disagrees. The evidence of Defendants’ quality control issues is relevant to Plaintiffs’ product liability claims based on negligence

and to their punitive damages claims. *See Prather v. Abbott Lab 'ys*, 960 F. Supp. 2d 700, 713 (W.D. Ky. 2013) (“A failure to conduct adequate safety tests tends to show that a manufacturer did not exercise reasonable care in its production of the product.”); O.C.G.A. § 51-12-5.1(b) (“Punitive damages may be awarded only in such tort actions in which it is proven by clear and convincing evidence that the defendant’s actions showed . . . that entire want of care which would raise the presumption of conscious indifference to consequences.”). Accordingly, Defendants’ motion for JMOL on this issue is **DENIED**.

3. Misrepresentation Claims

Defendants move for JMOL on Plaintiffs’ fraudulent and negligent misrepresentation claims on the basis that Plaintiffs “had virtually no discussion of any affirmative statements that were made to these three individuals that they could have conceivably relied upon.” Trial Tr. (4/26/2021) at 360. Defendants argue that the affirmative representations identified by Estes and Keefer are “pure commercial puffery,” Trial Tr. (4/26/2021) at 361, and that Hacker could not have relied on the CAEv2’s represented Noise Reduction Rating (“NRR”) of 22 because “he didn’t know what it meant,” Trial Tr. (4/26/2021) at 363. The Court disagrees. Even accepting Defendants’ argument that the representations identified by Estes and Keefer are nonactionable “puffery” and that Hacker could not have relied on the 22 NRR displayed on the CAEv2’s label, Georgia and Kentucky courts permit plaintiffs

to recover for injuries resulting from misrepresentations made to or intended for third parties on which the plaintiff relied. *See Ky. Laborers Dist. Council Health & Welfare Tr. Fund v. Hill & Knowlton, Inc.*, 24 F. Supp. 2d 755, 771 (W.D. Ky. 1998) (“Kentucky courts have long held that a third party not the target of an alleged tortfeasor’s deceptions may state a claim for deceit so long as it was reasonably foreseeable that he would receive and potentially act on them.”); *Fla. Rock & Tank Lines, Inc. v. Moore*, 365 S.E.2d 836, 837 (Ga. 1988) (“[T]he requirement of reliance is satisfied where (as in this case) A, having his objective to defraud C, and knowing that C will rely upon B, fraudulently induces B to act in some manner on which C relies, whereby A’s purpose of defrauding C is accomplished.”). There is a sufficient evidentiary basis for a reasonable jury to find that Defendants made affirmative misrepresentations to the United States military regarding the CAEv2, that Defendants’ affirmative misrepresentations induced the military to purchase the CAEv2 for use by soldiers, and that Plaintiffs reasonably and foreseeably relied on the military’s purchase of the CAEv2 in choosing to use the CAEv2 during their military service. Accordingly, Defendants’ motion for JMOL on Plaintiffs’ misrepresentation claims is **DENIED**.

4. Fraud Claims

Defendants move for JMOL on Plaintiffs’ fraudulent concealment and fraud and deceit claims, repeating their unsuccessful summary judgment argument that

Defendants did not owe Plaintiffs a duty to disclose. The Court again disagrees. Plaintiffs have introduced evidence regarding the intrinsic quality of the alleged defects in the CAEv2, the alleged issues with the CAEv2's design as revealed by Defendants' initial labeling tests and documented in the Flange Memo, and Defendants' alleged intentional concealment of those defects and test results from members of the military, including Plaintiffs. There is therefore a sufficient evidentiary basis for a reasonable jury to find Defendants owed Plaintiffs a duty to disclose. *See* O.C.G.A. § 23-2-53 ("The obligation to communicate may arise . . . from the particular circumstances of the case."); *Morris Aviation, LLC v. Diamond Aircraft Indus., Inc.*, 536 F. App'x 558, 568 (6th Cir. 2013) ("Kentucky recognizes four situations that may create a duty to disclose: 1) fiduciary relationship; 2) statutory requirement; 3) '*when a defendant has partially disclosed material facts to the plaintiff but created the impression of full disclosure*'; and 4) '*where one party to a contract has superior knowledge and is relied upon to disclose same.*' " (emphasis added and citation omitted)). Accordingly, Defendants' motion for JMOL on Plaintiffs' fraud claims is **DENIED**.

5. Negligence *Per Se*

Defendants argue that Estes' and Keefer's negligence *per se* claims fail because "they cannot link [Defendants' alleged violation of EPA regulations] to their conduct." Trial Tr. (4/26/2021) at 368. The Court disagrees. There is a sufficient

evidentiary basis for a reasonable jury to find that Defendants' alleged violation of EPA regulations caused Estes' and Keefer's injuries. For example, based on Defendants' internal documents admitted at trial, there is a sufficient evidentiary basis from which a reasonable jury could find that Defendants would not have sold the product to the military if they had properly labeled the product based on the NRR that would have resulted if test 213015 had been completed. Based on this evidence, a reasonable jury could find that therefore Plaintiffs would not have used the CAEv2 during their military service but for Defendants' violation of the EPA regulations. *See, e.g., Patton v. Bickford*, 529 S.W.3d 717, 730 (Ky. 2016) ("But-for causation is a factual question to be answered in an individual case by the factfinder deciding if the defendant's conduct was a 'substantial factor' in causing [the plaintiff's injuries]."); *Cowart v. Widener*, 697 S.E.2d 779, 784 (Ga. 2010) ("In the tort context, proximate causation includes all of the natural and probable consequences of the tortfeasor's negligence, unless there is a sufficient and independent intervening cause."). Accordingly, Defendants' motion for JMOL on Estes' and Keefer's negligence *per se* claims is **DENIED**.

6. Statute of Repose

Defendants move for JMOL on all but three of Keefer's claims on the basis that the claims are barred by Georgia's ten-year statute of repose. *See* O.C.G.A.

§ 51-1-11(b)(2).² The Court rejected this argument in denying Defendants’ motion for summary judgment on this basis because the Servicemembers’ Civil Relief Act (“SCRA”) tolled the statute of repose until Keefer’s period of military service ended in April 2015. Defendants seem to argue that the SCRA does not apply to Georgia’s statute of repose. *See* Trial Tr. (4/26/2021) at 368–69. Defendants are incorrect. By its plain language, the SCRA excludes “[t]he period of a servicemember’s military service” from the computation of “*any period* limited by law . . . for the bringing of any action or proceeding in a court.” 50 U.S.C. § 3963(a); *see DeTemple v. Leico Geosystems, Inc.*, 576 F. App’x 889, 892 (11th Cir. 2014) (“The SCRA’s tolling command is ‘unambiguous, unequivocal, and unlimited.’ ” (quoting *Conroy v. Aniskoff*, 507 U.S. 511, 513–14 (1993))); *see also Ross v. Waters*, 774 S.E.2d 195, 196 (Ga. Ct. App. 2015) (noting that the trial court “found that the plain and unambiguous text of . . . the SCRA tolled [Georgia’s] five-year statute of repose for medical malpractice suits”). Defendants’ motion for JMOL on Keefer’s claims based on Georgia’s statute of repose is therefore **DENIED**.

² Keefer’s failure to warn claims (Counts III and IV) and gross negligence claim (Count XI) are exempt from the statute. *See* O.C.G.A. § 51-1-11(c).

7. Statute of Limitations

Finally, Defendants move for JMOL on Estes' claims on the basis that the claims are barred by the applicable Georgia statutes of limitations. Because the parties agree that Estes' claims are deemed to have been filed as of June 20, 2019, Estes' personal injury claims are timely if they accrued after June 20, 2017, and his fraud claims are timely if they accrued after June 20, 2015. *See* O.C.G.A. §§ 9-3-31, 9-3-33. Defendants again repeat the same argument the Court previously considered on summary judgment that Estes' claims accrued in 2014 based on his recollection of experiencing tinnitus after having issue with the fit of his CAEv2 on an M4 firing range. *See* Trial Tr. (4/26/2021) at 370–71. Defendants' argument is premised on a misunderstanding of Georgia law. As the Court explained in denying Defendants' motion for summary judgment on this basis, Estes' claims did not accrue when he subjectively perceived his hearing-related injuries. Rather, his claims did not accrue until he knew or should have known that his alleged injuries were caused by Defendants' alleged wrongful conduct. *See In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 7:20cv137, 2021 WL 753563, at *2–4 (N.D. Fla. Feb. 2, 2021). Based on the evidence of the intrinsic quality of the alleged defects in the CAEv2 and Estes' testimony that he did not know that there might be a defect in the CAEv2 until 2019, the Court concludes that there is a sufficient evidentiary basis from which a reasonable jury could find that Estes' claims are timely because the applicable

statutes of limitations were tolled until 2019. Accordingly, Defendants' motion for JMOL on Estes' claims on statute of limitations grounds is **DENIED**.

SO ORDERED on this 28th day of April 2021.

M. Casey Rodgers

M. CASEY RODGERS
UNITED STATES DISTRICT JUDGE