No. 21-7916

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES H. FETZER

Petitioner

v.

LEONARD POZNER

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO

THE WISCONSIN FOURTH COURT OF APPEALS

PETITIONER'S MOTION TO TAKE JUDICIAL NOTICE

Now comes Petitioner, James H. Fetzer, with his motion for this court to take judicial notice of the following facts which are a matter of record that were misused by the Wisconsin Fourth Court of Appeals against him in their opinion.

1. Please take note of the following quote from the opinion of the Wisconsin 4th Court of Appeals (Petition for Certiorari, page 12; Appendix A, ¶4):

"There is no reasonable dispute regarding the following facts.

> On December 14, 2012, a mass shooting occurred at Sandy Hook Elementary School in Newtown, Connecticut. Tragically, twenty-six people were killed, including six staff members and twenty children who were aged six and seven. See, e.g., Jones v. Heslin, No. 03-19-00811-CV, 2020 WL 1452025, at *1, *4 (Tex. Ct. App. Mar. 25, 2020) (stating "Neil Heslin's son ... was killed in the Sandy Hook Elementary School Shooting in December 2012" and rejecting the substantial truth doctrine as a basis to dismiss Heslin's defamation claim related to statements disputing Heslin's assertion that he held his deceased son in his arms); Soto v. Bushmaster Firearms Int'l, LLC, 202 A.3d 262, 272 (Conn. 2019) ("On December 14, 2012, twenty year old Adam Lanza forced his way into Sandy Hook Elementary School in Newtown and, during the course of 264 seconds, fatally shot twenty first grade children and six staff members, and wounded two other staff members."). Pozner's six-year- old son, N., was one of the children killed during the Sandy Hook shooting."

2. Please take notice of the following quote from Jones v. Heslin, No. 03-19-00811-CV, 2020 WL 1452025, at *1, (Tex. Ct. App. Mar. 25, 2020):

> "The district court then held a hearing on Appellants' still-pending TCPA motion to dismiss and Heslin's motion for sanctions. At the hearing, Appellants acknowledged that they never responded to discovery and confirmed their agreement to stipulate, for purposes of the TCPA motion, that all of the factual allegations in Heslin's pleadings are true. Appellants' counsel further explained that "it really comes down to whether or not the Court finds that what the defendants are alleged to have done is protected expressions of opinion or alleged statements of fact."" (Exhibit 1 attached hereto)

It is a fact that Jones agreed to stipulate to the truth of all Heslin's allegations of fact. Nothing about the "Sandy Hook Shooting" was determined on the merits of evidence in the Jones v. Heslin case quoted above by the Wisconsin 4th Court of Appeals.

3. Please take judicial notice of the following quote from Soto v. Bushmaster Firearms Int'l, LLC, 202 A.3d 262, 272 (Conn. 2019):

"ALLEGED FACTS

> Because we are reviewing the judgment of the trial court rendered on a motion to strike, we must assume the truth of the following facts, as alleged by the plaintiffs. Lanza carried out the Sandy Hook massacre using a Bushmaster XM15-E2S rifle." (Exhibit 2 attached hereto)

This fact shows the Connecticut Supreme Court took all the allegations of the non-movant, Soto, as true in a motion to strike. Soto went into great detail about the "Sandy Hook Shooting" and all of it was taken as true for the purpose of reviewing a motion to strike. But no fact about Sandy Hook was actually found on the merits before a fact finder. The same should have been afforded Dr. Fetzer, as a non-movant, assuming to be true all his allegations of fact and evidence that the "Sandy Hook Shooting" never happened.

Please take judicial notice that both cases cited by the Wisconsin 4th Court of Appeals as the only reasonable facts in the Pozner v. Fetzer case were never found on their merits but were either stipulated or assumed.

Respectfully Submitted,

James H. Fetzer, Ph.D., 23 May 2022

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Exhibit 1

Alex E. Jones; Infowars, LLC; Free Speech Systems, LLC; and Owen Shroyer, Appellants
v.
Neil Heslin, Appellee

NO. 03-19-00811-CV

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

March 25, 2020

FROM THE 53RD DISTRICT COURT OF TRAVIS COUNTY NO. D-1-GN-18-001835, THE HONORABLE SCOTT H. JENKINS, JUDGE PRESIDING

MEMORANDUM OPINION

Appellants Alex E. Jones; Infowars, LLC; Free Speech Systems, LLC; and Owen Shroyer appeal from the district court's order denying their motion to dismiss under section 27.003 of the Texas Citizens Participation Act (TCPA). *See* Tex. Civ. Prac. & Rem. Code § 27.003.[1] We will affirm the district court's denial of Appellants' motion to dismiss.

BACKGROUND

Neil Heslin's son, Jesse, was killed in the Sandy Hook Elementary School shooting in December 2012. In June 2017, Heslin participated in a television interview during which he responded to claims by Jones that the shooting at Sandy Hook was "a giant hoax."

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Shortly thereafter, Appellants aired broadcasts disputing Heslin's account of how he lost his son. In response, Heslin sued Appellants for defamation and defamation per se related to Appellants' statements disputing Heslin's claim that he held his deceased son in his arms. On July 13, 2018, Appellants filed a motion to dismiss Heslin's claims under the TCPA. In August 2018, Heslin filed a motion for expedited discovery. Heslin also responded to the motion to dismiss. On August 30, 2018, the district court held a hearing to consider the pending motions. At that hearing, the court determined that it would grant limited discovery relevant to the motion to dismiss. *See* Tex. Civ. Prac. & Rem. Code § 27.006(b). Because Appellants did not respond to any discovery requests, Heslin filed a motion for contempt, seeking sanctions under Rule 215. *See* Tex. R. Civ. P. 215. The day Heslin filed his contempt motion, Appellants filed a notice of appeal, asserting that their TCPA motion had been dismissed by operation of law. *See* Tex. Civ. Prac. & Rem. Code § 27.008(a) (providing for denial by operation of law if a trial court does not rule within the time limits prescribed by the TCPA). This Court dismissed that premature appeal for want of jurisdiction because the district court had not yet ruled on the motion at issue. *Jones v. Heslin*, 587 S.W.3d 134, 136-37 (Tex. App.—Austin 2019, no pet.).

The district court then held a hearing on Appellants' still-pending TCPA motion to dismiss and Heslin's motion for sanctions. At the hearing, Appellants acknowledged that they never responded to discovery and confirmed their agreement to stipulate, for purposes of the TCPA motion, that all of the factual allegations in Heslin's pleadings are true. Appellants' counsel further explained that "it really comes down to whether or not the Court finds that what the defendants are alleged to have done is protected expressions of opinion or alleged statements of fact." The district court granted Heslin's motion for sanctions and ordered that "pursuant to Rule 215.2(b)(3), the matters regarding which the August 31, 2018 order was made (Plaintiff's

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burdens in responding to Defendants' TCPA Motion) shall be taken to be established in favor of Plaintiff for the purposes of the TCPA Motion." That is, under the district court's order, Heslin has met his burden to establish a prima facie case for defamation under the TCPA. In the same order, the district court denied the TCPA motion, specifying that the motion would have been

Exhibit 2

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202 A.3d 262

Donna L. SOTO, Administratrix (Estate of Victoria L. Soto), et al.
v.
BUSHMASTER FIREARMS INTERNATIONAL, LLC, et al.

SC 19832, (SC 19833)

Supreme Court of Connecticut.

Argued November 14, 2017
Officially released March 19, 2019

Opinion

PALMER, J.

[202 A.3d 271]

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On December 14, 2012, twenty year old Adam Lanza forced his way into Sandy Hook Elementary School in Newtown and, during the course of 264 seconds, fatally shot twenty first grade children and six staff members, and wounded two other staff members.

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Lanza carried out this massacre using a Bushmaster XM15-E2S semiautomatic rifle that

was allegedly manufactured, distributed, and ultimately sold to Lanza's mother by the various defendants' in this case. There is no doubt that Lanza was directly and primarily responsible for this appalling series of crimes. In this action, however, the plaintiffs—administrators of the estates of nine of the decedents—contend that the defendants' also bear some of the blame. The plaintiffs assert a number of different legal theories as to why the defendants' should be held partly responsible for the tragedy. The defendants' counter that all of the plaintiffs' legal theories are not only barred under Connecticut law, but also precluded by a federal statute, the Protection of Lawful Commerce in Arms Act (PLCAA), Pub. L. No. 109-92, 119 Stat. 2095 (2005), codified at 15 U.S.C. §§ 7901 through 7903 (2012), which, with limited exceptions, immunizes firearms manufacturers, distributors, and dealers from civil liability for crimes committed by third parties using their weapons. See 15 U.S.C. §§ 7902 (a) and 7903 (5) (2012).

For the reasons set forth in this opinion, we agree with the defendants' that most of the plaintiffs' claims and legal theories are precluded by established Connecticut law and/or PLCAA. For example, we expressly reject the plaintiffs' theory that, merely by selling semiautomatic rifles—which were legal at the time[1] —to the civilian population, the defendants' became responsible for any crimes committed with those weapons.

The plaintiffs have offered one narrow legal theory, however, that is recognized under established Connecticut law. Specifically, they allege that the defendants' knowingly marketed, advertised, and promoted the XM15-E2S for civilians to use to carry out offensive,

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military style combat missions against their perceived enemies. Such use of the XM15-E2S, or any weapon for that matter, would be illegal, and Connecticut law does not permit advertisements that promote or encourage violent, criminal behavior. Following a scrupulous review of the text and legislative history of PLCAA, we also conclude that Congress has not clearly manifested an intent to extinguish the traditional authority of our legislature and our courts to protect the people of Connecticut from the pernicious practices alleged in the present case. The

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regulation of advertising that threatens the public's health, safety, and morals has long been considered a core exercise of the states' police powers. Accordingly, on the basis of that limited theory, we conclude that the plaintiffs have pleaded allegations sufficient to survive a motion to strike and are entitled to have the opportunity to prove their wrongful marketing allegations. We affirm the trial court's judgment insofar as that court struck the plaintiffs' claims predicated on all other legal theories.

I

PROCEDURAL HISTORY

The plaintiffs brought the present action in 2014, seeking damages and unspecified injunctive relief.[2] The

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defendants' include the Bushmaster defendants' (Remington),[3] one or more of which is alleged to have manufactured the Bushmaster XM15-E2S semiautomatic rifle that was used in the crimes; the Camfour defendants',[4] distributors that allegedly purchased the rifle from Remington and resold it to the Riverview defendants'; and the Riverview defendants',[5] retailers that allegedly sold the rifle to Adam Lanza's mother, Nancy Lanza, in March, 2010.[6] The gravamen of the plaintiffs' claims, which are brought pursuant to this state's wrongful death statute, General Statutes § 52-555,[7] is that the defendants' (1) negligently entrusted to civilian consumers an AR-15 style assault rifle[8] that is suitable

[202 A.3d 274]

for use only by military and law enforcement personnel, and (2) violated the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq.,[9] through the sale or wrongful marketing of the rifle.

The defendants' moved to strike the plaintiffs' complaint, contending that all of the plaintiffs' claims are

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barred by PLCAA. The defendants' also argued that, to the extent that the plaintiffs' claims sound in negligent entrustment, the plaintiffs failed to state a legally valid negligent entrustment claim under Connecticut common law, and, to the extent that their claims are predicated on alleged CUTPA violations, they are legally insufficient because, among other things, (1) the plaintiffs lack standing to bring a CUTPA action, (2) the plaintiffs' claims are time barred by CUTPA's three year statute of limitations; see General Statutes § 42-110g (f) ; (3) personal injuries and death are not cognizable CUTPA damages, and (4) the plaintiffs' CUTPA claims are simply veiled product liability claims and, therefore, are barred by General Statutes § 52-572n (a), the exclusivity provision of the Connecticut Product Liability Act (Product Liability Act).[10]

In response, the plaintiffs argued that PLCAA does not confer immunity on the defendants' for purposes of this case because two statutory exceptions to PLCAA immunity—for claims alleging negligent entrustment (negligent entrustment exception)[11] and for claims alleging a violation of a statute applicable to the sale or marketing of firearms (predicate exception)[12] — apply to their claims. The plaintiffs further argued that, for various reasons, the defendants' state law negligent entrustment and CUTPA arguments were ill founded.

Although the trial court rejected most of the defendants' arguments, the court concluded that (1) the plaintiffs' allegations do not fit within the common-law tort of negligent entrustment, (2) PLCAA bars the plaintiffs' claims insofar as those claims sound in negligent

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entrustment, and (3) the plaintiffs lack standing to bring wrongful death claims predicated on CUTPA violations because they never entered into a business relationship with the defendants'. Accordingly, the court granted in their entirety the defendants' motions to strike the plaintiffs' amended complaint.

On appeal, the plaintiffs challenge each of those conclusions.[13] For their part, the

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defendants' contend, as alternative grounds for affirmance, that the trial court improperly rejected their other CUTPA arguments. We conclude that the majority of the plaintiffs' claims were properly struck insofar as those claims are predicated on the theory that the sale of the XM15-E2S rifle to Lanza's mother or to the civilian market generally constituted either negligent entrustment; see part III of this opinion; or an unfair trade practice. See part IV B of this opinion. We also conclude, however, that the plaintiffs have standing to prosecute their CUTPA claims under

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Connecticut law. See part IV A of this opinion. We further conclude that PLCAA does not bar the plaintiffs from proceeding on the single, limited theory that the defendants' violated CUTPA by marketing the XM15-E2S to civilians for criminal purposes, and that those wrongful marketing tactics caused or contributed to the Sandy Hook massacre.[14] See part V of this opinion. Accordingly, we affirm in part and reverse in part the judgment of the trial court and remand the case for further proceedings.

II

ALLEGED FACTS

Because we are reviewing the judgment of the trial court rendered on a motion to strike, we must assume the truth of the following facts, as alleged by the plaintiffs.[15] Lanza carried out the Sandy Hook massacre using a Bushmaster XM15-E2S rifle. That rifle is Remington's version of the AR-15 assault rifle, which is substantially similar to the standard issue M16 military service rifle used by the United States Army and other nations' armed forces, but fires only in semiautomatic mode.

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The AR-15 and M16 are highly lethal weapons that are engineered to deliver maximum carnage with extreme efficiency. Several features make these rifles especially well suited for combat and enable a shooter to inflict unparalleled carnage. Rapid semiautomatic fire "unleashes a torrent of bullets in a matter of seconds." The ability to accommodate large capacity magazines allows for prolonged assaults. Exceptional muzzle velocity makes each hit catastrophic. Indeed, the plaintiffs contend, bullets fired from these rifles travel at such a high velocity that they cause a shockwave to pass through the body upon impact, resulting in catastrophic injuries even in areas remote to the direct wound. Finally, the fact that the AR-15 and M16 are lightweight, air-cooled, gas-operated, and magazine fed, enabling rapid fire with limited recoil, means that their lethality is not dependent on good aim or ideal combat conditions.

These features endow the AR-15 with a lethality that surpasses even that of other semiautomatic weapons. "The net effect is more wounds, of greater severity, in more victims, in less time." That lethality, combined with the ease with which criminals and mentally unstable individuals can acquire an AR-15, has made the rifle the weapon of choice for mass shootings, including school shootings.

The particular weapon at issue in this case was manufactured and sold by the Bushmaster defendants'. Sometime prior to March, 2010, the Bushmaster defendants' sold the rifle to the Camfour defendants'. The Camfour defendants' subsequently sold the rifle to the Riverview defendants', who operate a retail gun store located in the town of East Windsor.

In March, 2010, Lanza's mother purchased the rifle from the Riverview defendants'. Lanza, who was seventeen years old at the time, had expressed a desire to join the elite United States Army Rangers unit. His mother

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bought the rifle to give to or share with him in order to connect with him. However, when Lanza turned eighteen on April 22, 2010, he did not enlist in the military. Still, he gained unfettered access to a military style assault rifle.

Eight months later, on the morning of December 14, 2012, Lanza retrieved the rifle and ten 30 round magazines. Using a technique taught in the first person shooter video games that he played, he taped several of those magazines together to allow for faster reloading. He then drove to Sandy Hook Elementary School.

Just before 9:30 a.m., Lanza shot his way into the locked school using the XM15-E2S. He immediately shot and killed Mary Joy Sherlach as well as the school's principal. He subsequently shot and wounded two staff members.

Lanza next entered Classroom 8, where he used the rifle to kill two adults and fifteen first grade children, including five of the plaintiffs. Finally, he entered Classroom 10, where he used the rifle to kill two adults and five first grade children, including three of the plaintiffs. Nine children from Classroom 10 were able to escape when Lanza paused to reload with another magazine.

In total, the attack lasted less than four and one-half minutes, during which Lanza fired at least 154 rounds from the XM15-E2S, killing twenty-six and wounding two others.[16]