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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Jason Lou Peralta,

Plaintiff, v. Worthington Industries Incorporated, et al.,

Defendants.

No. CV-17-03195-PHX-JJT ORDER

At issue is Plaintiff Jason Judgment (Doc. 278, Pl. Mot.), to which Defendants Worthington Industries Incorporated,

et al. a Response (Doc. 298, Def. Resp.), and Plaintiff filed a Reply (Doc. 302, Pl. Reply). 283-1, Def. Mot.), to which Plaintiff filed a Response (Doc. 293, Pl. Resp.), and

Defendants filed a Reply (Doc. 303, Def. Reply). The Court finds these matters appropriate for resolution without oral argument. LRCiv 7.2(f). I. FACTUAL BACKGROUND

Mr. Peralta alleges he suffered serious burns while using a torch and cylinder unit manufactured by Defendant to light his fireplace. (Doc. 204 ¶¶ Amended Complaint (SAC).) Mr. Peralta claims he purchased the cylinder and torch in

question a few months prior to the incident, and never subjected either misuse, abuse, alteration, or modification. (SAC ¶ 46; Doc. 284 ¶ 1, Defendants

Statement of Facts (DSOF); see also Doc. 294 ¶ avening Statement of Facts (PSOF).)

Before ever using the cylinder, Mr. Peralta visually inspected the torch and cylinder, and seeing nothing wrong with it, threaded the torch onto the cylinder and ignited it to ensure that it worked. (DSOF ¶¶ 3-4, Deposition of Jason Peralta 17:3-18:12 (Peralta Dep.); see also PSOF ¶¶ 3-4). He did not

smell propane at this time. (DSOF ¶ 5, Peralta Dep. 18:17-19:4; see also PSOF ¶ 5.) Mr. Peralta stored the cylinder in his home and used it as often as ten times per week to light his fireplace and his barbecue during the months leading it up to the incident. (DSOF ¶ 7, Peralta Dep. 19:21-20:13; see also PSOF ¶ 7.)

On the day of the incident, Mr. Peralta arrived home from work around 4:00pm and shortly thereafter prepared his fireplace for lighting. (DSOF ¶¶ 8-9, Peralta Dep. 25:2-4, 27:2-4; see also PSOF ¶¶ 8-9.) To do so, he crumpled up newspaper, placed wood on top of it, and then used the torch to light it. (DSOF ¶ 9, Peralta Dep. 27:2-4; see also PSOF ¶ 9.) Before he ignited the torch, he did not smell any propane or notice anything unusual about the torch or the canister. (DSOF ¶ 10, Peralta Dep. 32:14-21; see also PSOF ¶¶ 10.)

After using the torch to ignite the paper in the fireplace, while his arm was still in the fireplace, Mr. Peralta felt his hand burning. (PSOF ¶ 11, Peralta Dep. 34:11-22, 32:12- 15, 29:18-22). Mr. Peralta believed that he felt his hand burning due to a gas leak in the cylinder, so he threw it to the ground, turned his back from the fireplace, and attempted to run away. (PSOF ¶ 12, Peralta Dep. 34:23-35:15; see also DSOF ¶ 12.) Mr. Peralta believes the cylinder did not f ¶¶ 13, 14, Peralta

Dep. 30:18-25, 92: 7-17.) Nor did Mr. Peralta hear anything out of the ordinary before ¶ 15, Peralta Dep. 79:23-24). Mr. Peralta testified that as soon as the cylinder voice. (DSOF ¶ 16, Peralta Dep. 36: 11-21; see also PSOF ¶ 16.) Mr. Peralta does not recall

whether he saw the cylinder strike the floor. (DSOF ¶ 16, Peralta Dep. 35:13-24; see also PSOF ¶ 16.) After the incident, Mr. Peralta got in a cold shower, and his girlfriend went to purchase burn care supplies. (DSOF ¶ 17, Peralta Dep. 42:7-12; see also PSOF ¶ 17.) That night, Mr. Peralta dressed the wounds, assisted by a friend who runs a wound care facility. (DSOF ¶ 18, Peralta Dep. 42:13-19; see also PSOF ¶18.)

Mr. Peralta brought the present action in September 2017. (See Doc. 1.) In Mr. Second Amended Complaint he claims Defendants are liable for his injuries under both a product liability negligence and a civil battery theory. (SAC ¶¶ 45-65.) Mr. Peralta now moves for summary judgment on a strict liability theory, which he did not plead in either his initial complaint or Second Amended Complaint, and Defendants move

II. LEGAL STANDARD

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate when: (1) the movant shows that there is no genuine dispute as to any material fact; and (2) after viewing the evidence most favorably to the non-moving party, the movant is entitled to prevail as a matter of law. Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th affect the outcome of the suit under governing [substantive] law will

properly preclude the entry of summary Anderson v. Liberty Lobby, Inc. a reasonable jury could return a

Id.

In considering a motion for summary judgment, the court must regard as true the non- Celotex, 477 U.S. at 324; Eisenberg, 815 F.2d at 1289. However, the non-moving party

may not merely rest on its pleadings; it must produce some significant probative evidence

of fact. Anderson, 477 U.S. at 256-57 (holding that the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment); Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 289 (1968).

gment motion cannot be defeated by relying solely on conclusory Taylor v. List, 880 F.2d 1040, 1045 (9th Cir.

sufficient to esta United States v. Carter, 906 F.2d 1375, 1376 (9th Cir. 1990) (quoting Celotex, 477 U.S. at 322). III. ANALYSIS

A. Motion for Partial Summary Judgment Plaintiff moves the Court for partial summary judgment, arguing that Defendants are liable for his injuries as a matter of law, due to a manufacturing defect in the cylinder. (See generally Pl. Mot.) Plainti on a theory of strict liability. (See, e.g., Pl. Mot. at 1.)

As Defendants correctly observe, Plaintiff has never pleaded a strict liability claim in this action before the instant motion, and previously alleged only negligence and civil battery. (Def. Resp. at 1; see also SAC ¶¶ 45-58.) Defendants are also correct that Federal

Pickern v. Pier 1 Imports (U.S.), Inc., 457 F.3d 963, 968 (9th Cir. 2006) (quoting

Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002)). Courts may not grant summary Hasan v. E. Washington State Univ., . 2012).

Because Plaintiff brings a new claim for the first time at summary judgment, his motion is denied. (Doc. 278.)

B. Defendants Motion for Summary Judgment

1. Claim One: Negligence District courts apply state law to products liability claims brought in federal court pursuant to diversity jurisdiction. Adams v. Synthes Spine Co., 298 F.3d 1114, 1117 (9th Cir. 2002). To establish a prima facie negligence case in Arizona, a plaintiff must show: by the

defendant of that standard; (3) a causal connection between the defendant's conduct

Gipson v. Kasey, 150 P.2d 228, 230 (Ariz. 2007). Expert testimony is required whenever proof of an element of a claim calls See Claar v. Burlington N. R.R., 29 F.3d 499, 504 (9th Cir. 1994) (holding that a plaintiff must proffer admissible expert testimony when special expertise is necessary for a fact-finder to draw a causal inference).

In Dart, the Arizona Supreme Court articulated the test for negligent design or manufacture, which Plaintiff alleges in its Second Amended Complaint (SAC ¶ 56). See Dart v. Wiebe Mfg., Inc. 709 P.2d 876, 880- negligence he must prove that the designer or manufacturer acted unreasonably at the time of manufacture or design of the product. This test is nothing more than the familiar Id. (internal quotations omitted). In evaluating a negligence claim, evidence of a defect alone is not sufficient there must also be evidence of unreasonable conduct on the part of the defendant. See Phila. Indem. Ins. Co. v. BMW of N. Am., LLC, No. CV-13-01228-PHX-JZB, 2015 WL 5693525, at *16 (D. Ariz. Sept. 29, 2015).

At summary judgment, the moving party bears the initial burden of identifying the portions of the record, including pleadings, depositions, answers to interrogatories, admissions, and affidavits, that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Defendants argue that Plaintiff has not demonstrated Worthington failed to take reasonable precautions in designing a safe product or failed to act reasonably at the time of design or manufacture.

(Def. Mot. at 8.) y nothing in the record regarding conduct

If the moving party meets its initial burden, the opposing party must establish the existence of a genuine dispute as to any material fact. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585 86 (1986). for Summary Judgment, Plaintiff argues that he h negligence based on the consumer expectation test, because he has shown that the cylinder

was unreasonably dangerous. (Pl. Resp. at 2-3.)

In short, the consumer expectation test asks whether the product has failed to perform as safely as an ordinary customer would expect when used in an intended or Dart, 709 P.2d at 879. However, even the case Plaintiff relies on to advance his argument that the consumer expectation test is applicable here suggests the opposite. See id. at 880. The Dart Court, drawing a distinction between strict liability and negligence analysis for product liability cases, noted that negligence cases are more concerned with the conduct of the defendant, while strict lability cases are more concerned with whether a product is unreasonably dangerous. Id. As the Court articulated in its analysis of Plai supra, this is not a strict liability case, and therefore the consumer expectation test is ill-suited for application to these facts. he

Golonka v. General Motors Corp., 65 P.3d 956, 962 (Ariz. 2003).

Absent any evidence of unreasonable conduct from which a juror could conclude tha otherwise failed to act unreasonably at the time of design or manufacture in light of the

foreseeable risk of injury from use of the product trate that there is a genuine dispute of this material fact. See Phila. Indem. Ins. Co., 2015 WL 5693525, at *16 (granting summary judgment for defendants on claim where the plaintiffs did not disclose evidence of the design process or any other

negligence claim is appropriate.

2. Claim Two: Civil Battery In Arizona, a battery claim requires a plaintiff to prove that the defendant intentionally caused a harmful or offensive contact with the plaintiff to occur. Johnson v. Pankratz, 2 P.3d 1266, 1268 (Ariz. Ct. App. 2000). 1

In his Complaint, Plaintiff alleges that Defendants committed civil battery when they produced and sold the subject torch and cylinder with actual knowledge that the products were defective (SAC ¶ 56). Not only do Defendants contend that Plaintiff cannot prove they acted with actual knowledge, but without expert testimony, they argue that he cannot prove the presence of a defect either. (Def. Mot. at 14-15, 8-11.) In his response, Plaintiff argues that he has established that there was a defect, and this is sufficient to sustain the civil battery claim. (Pl. Resp. at 9-10.)

Both Defendants and Plaintiff gloss over the fact that battery is an intentional tort, and therefore requires the requisite level of legal intent.

Under Ari conduct only if the actor desired to cause the consequences and not merely the act itself or if he was certain or substantially certain that the consequences this respect, Arizona law follows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired

A.G. v. Paradise Valley Unified Sch. Dist. No. 69, 815 F. 3d 1195, 1210 (9th Cir. 2016) (quoting Mein ex rel. Mein v. Cook, 193 P.3d 790, 794 (Ariz. Ct. App. 2008)) (emphasis in original). In their arguments chall conduct

1 Despite its independent research, the Court was unable to find a case in either the District of Arizona or Arizona state court where a civil battery claim was brought in the context of a products liability action. Although no Arizona court has recognized such a claim in this context, the Court nonetheless proceeds with its analysis.

9; see supra genuine issue of material f civil battery claim is proper.

Moreover, even if proof of a defect were sufficient on its own to sustain the civil battery claim, there is still insufficient evidence to create a genuine issue of material fact. See Anderson, 477 U.S. at 249 (holding that there is no issue for trial unless there is sufficient evidence favoring the non-moving party). Where able or is not significantly probative, summary judgment may be Id. at 249-250 (citations omitted). A plaintiff cannot create a genuine issue for trial based solely upon subjective belief. Bradley v. Harcourt, Brace & Co., 104 F.3d 267, 270 (9th Cir. 1996). for several reasons. First, Plaintiff claims that the fact that Mr. Peralta felt his hand burn

after igniting the torch must have been due to fuel leak establishes a defect. (Pl. Resp. at 5.) Second, Plaintiff argues that a defect is proven by the fact that the cylinder ruptured Third, Plaintiff asserts that because the was defective. (Pl. Resp. at 8.) Finally, Plaintiff argues that the cylinder was over-

pressurized, which indicates a defect. (Pl. Resp. at 8.) Plaintiff also argues that expert testimony is not necessary in this case, because these issues are within the common understanding of jurors. (Pl. Resp. at 9, citing Johnson v. Costco Wholesale Corp., 827 F.

belt was high enough to hold a wine bottle was within the common understanding of jurors).) However, none of the evidence Plaintiff cites is sufficient to warrant a denial of summary judgment. pressu Daubert Motion to Exclude

Dr. Pfaendtner. (Doc. 307, Order.) This theory was introduced for the first time in

Daubert . The Court excluded . (See Doc. 276 at 16-17, Motion to Exclude Dr. Pfaendtner; Doc. 307 at 9, Order.) Thus, the Court does not consider

-pressurization argument.

go to causation a defect existed, which in turn in support of the presence of a defect are highly technical, but the evidence on which he relies is circumstantial. In Arizona, courts limit reliance on circumstantial evidence to prove a defect to situations where the product in question is unavailable or otherwise incapable of inspection. Phila. Indem. Ins. Co., 2015 WL 5693525, at *15 (holding that although a vehicle was available for inspection, the elements at issue had been destroyed by a fire, so plaintiffs could rely on circumstantial evidence). Plaintiffs must proffer admissible expert testimony when special expertise is necessary for a fact-finder to draw a causal inference. Claar, 29 F.3d at 504.

Here, the torch and cylinder were available for inspection, so this is not the kind of case where Plaintiff may rely on circumstantial evidence to prove a defect. In fact, the torch thony Pfaendtner. Additionally, this is not the kind of case where the issues are within the common understanding of the jurors. For their part, Defendants y. Dr. Pfaendtner not only opined that there was no defect, but his proffered testimony on the cylinder also directly contradicts each of that purport to establish the presence of a defect. (Def. Mot. at 13, Def. Reply at 6-8.) Although the Court has sympathy for Mr.

Peralta, the fact that he was injured does not speak for itself. Plaintiff must be able to produce some reliable evidence of a defect that caused his injury for the Court to send this case to a jury. See Cox v. Yamaha Motor Corp., No. CV-06-519-TUC-DCB, 2008 WL 2328356 (D. Ariz. June 4, 2008) (granting summary judgment for defendant manufacturer where all experts testified that there was no defect). Without supporting evidence,

Defendants are thus entitled to summary judgment them.

IT IS THERFORE ORDERED Judgment (Doc. 278).

IT IS FURTHER ORDERED Judgment. (Doc. 283).

IT IS FURTHER ORDERED directing the Clerk of Court to enter final judgment in favor of Defendants and close this case. Dated this 13th day of January, 2022.

Honorable John J. Tuchi United States District Judge