STATE OF MICHIGAN

COURT OF APPEALS

LYNN I. WALTON and PAULA WALTON,

Plaintiffs-Appellants-Cross-Appellees,

v

LARRY MILLER, MIDWAY ARMS, INC., d/b/a MIDWAY USA,

Defendants-Appellees-Cross-Appellants,

and

PACIFIC TOOL & GAUGE, INC.,

Defendant.

UNPUBLISHED
October 4, 2011

No. 293526
Lapeer Circuit Court
LC No. 07-039070-NP

Before: MURPHY, C.J., and FITZGERALD and TALBOT, JJ.

PER CURIAM.

This case is a products liability and negligence action, and plaintiffs Lynn and Paula Walton appeal as of right the trial court's order dismissing their lawsuit against defendants Larry Miller (hereafter "Miller") and Midway Arms, Inc. (hereafter "Midway"). The trial court dismissed the action on the basis of spoliation of evidence. Plaintiffs challenge that ruling on appeal, and Miller and Midway have both filed cross-appeals, contending that the trial court erred in failing to grant summary disposition in their favor on the basis of arguments other than spoliation. We find it unnecessary to address the spoliation issue, given that plaintiffs' suit fails as a matter of law with respect to Midway because of misuse, the absence of a legal duty, and the failure of legal or proximate cause, and, with respect to Miller, the suit fails because of a lack of evidence showing that he knew or should have known about the potential hazard at issue. Accordingly, we affirm.

On January 9, 2005, plaintiff Lynn Walton (hereafter "Walton") was test-firing Miller's Remington 700 rifle in preparation for hunting when it exploded, ejecting metal fragments that peppered Walton's face and penetrated his right eye, which permanently blinded him in that eye. Miller stored his firearms on plaintiffs' property and allowed Walton to use the weapons,

including the rifle at issue. Walton and Miller were gun enthusiasts. Miller, a tool and die maker but not a gunsmith, had modified the rifle by replacing the original factory-installed extractor with a Sako-style extractor allegedly sold by Midway. Defendant Pacific Tool & Gauge, Inc., allegedly manufactured the Sako-style extractor. Midway's catalog warned purchasers that installation of the extractor in the Remington 700 "should be performed by a qualified gunsmith," as the extractor was not a "drop-in part." Miller, however, installed the extractor himself. In order to install the extractor, it was necessary for Miller to cut a slot in the perimeter of the rifle's bolt face so that it could accommodate the extractor. Plaintiffs alleged that the slot removed lateral support in the area, which had been a full 360 degrees with the original extractor and uncut bolt, and when the round was fired by Walton, pressure went backwards into the slot, causing part of the extractor to disintegrate and debris to fly into Walton's eye. As a broad overview, plaintiffs placed the blame for Walton's injuries on the Sako-style extractor, given the fact that installation of the extractor required modification of the bolt. Defendants' position, on the other hand, was that the explosion was caused by Walton's unforeseeable practice of reloading cartridges in a manner that created unreasonably high-pressured ammunition. Among other various defenses, Midway argued that installation of the extractor could only have been accomplished by modifying the extractor itself.

Count I of plaintiffs' complaint alleged negligence on Miller's part for installing the extractor when "he knew or should have known that cutting the bolt would cause the bolt to be unable to withstand the high pressure created by the cartridges that . . . Walton used." Count II alleged that Midway was negligent in selling the extractor when it knew or should have known that the extractor "would compromise the Remington factory installed bolt face and cause the rifle to fail during reasonable and foreseeable use[.]" This particular count asserted that Midway breached its duty to warn of the dangers associated with installing the extractor. Count III alleged that Midway was negligent for failing to properly test the extractor for use in the Remington rifle and failing to disseminate results that would have been obtained had the testing been performed. Count IV alleged breach of implied warranty against Midway. Plaintiffs maintained that Midway breached the implied warranty of fitness where the extractor "was not reasonably fit for the uses or purposes anticipated or reasonably foreseen by . . . Midway when it left [Midway's] control." Count V alleged breach of express warranty against Midway. Plaintiffs asserted that Midway warranted and represented in its "catalog, by innuendo, that the [e]xtractor was reasonably fit for the purposes intended or reasonably foreseen" and that Midway breached said express warranty. After motions for summary disposition were filed by Miller and Midway and denied by the trial court, the court granted summary disposition in favor of both Midway and Miller on reconsideration, finding that they were entitled to the sanction of dismissal on the basis of spoliation of evidence. The trial court concluded that Walton failed to preserve and intentionally destroyed the extractor after the incident occurred, thereby depriving Miller and Midway of various substantial defenses.

With respect to spoliation of evidence, plaintiffs argue that the trial court erred in reaching the factual conclusion that they had intentionally destroyed the extractor, that the trial court erred because the court failed to consider that Miller had an opportunity to take the rifle shortly after the accident and to take bullet and powder samples, and that the trial court erred in imposing too harsh a sanction under the circumstances. We find it unnecessary to address these arguments, considering that, even if the trial court erred in dismissing the action as a sanction for

destroying evidence, Miller and Midway are entitled to summary disposition on the basis of arguments presented in the cross-appeals.

We review de novo a trial court's ruling on a motion for summary disposition. *Greene v A P Products, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006). Questions of law are likewise reviewed de novo on appeal. *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; __ NW2d __ (2011). Under MCR 2.116(C)(10), the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties are viewed in a light most favorable to the nonmoving party. *Greene*, 475 Mich at 507. Summary disposition is properly granted under MCR 2.116(C)(10) when there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id.*

As part of a prima facie case in a products liability action, a plaintiff must show that the defendant's conduct was the proximate cause of the plaintiff's injuries. *Skinner v Square D Co*, 445 Mich 153, 162; 516 NW2d 475 (1994). Proving proximate cause actually entails establishing two elements: (1) cause in fact; and (2) legal cause, which is also referred to as proximate cause. *Id.* at 162-163. With respect to legal cause (hereafter "proximate cause"), the focus is on the foreseeability of consequences. *Id.* at 163. A proximate cause is a foreseeable, natural, and probable cause of a plaintiff's injury and damages. *Kaiser v Allen*, 480 Mich 31, 37-38; 746 NW2d 92 (2008). The question of proximate cause is intertwined with and related to the issue of legal duty "because the question whether there is the requisite relationship, giving rise to a duty, and the question whether the cause is so significant and important to be regarded a proximate cause both depend in part on foreseeability – whether it is foreseeable that the actor's conduct may create a risk of harm to the victim, and whether the result of that conduct and intervening causes were foreseeable." *Moning v Alfono*, 400 Mich 425, 439; 254 NW2d 759 (1977). The existence of a legal duty constitutes a question of law, and in determining whether a legal duty exists, courts examine various factors, including the foreseeability of harm. *Valcaniant v Detroit Edison Co*, 470 Mich 82, 90; 679 NW2d 689 (2004). A defendant is not liable to a plaintiff unless the defendant owed a legal duty to the plaintiff. *Loweke*, 489 Mich at 162. Generally, there is a legal duty to use ordinary care in order to avoid physical harm to foreseeable persons and property in the execution of an undertaking. *Id.* at 172. Furthermore, MCL 600.2947(2) provides that a "seller is not liable in a product liability action for harm caused by misuse of a product unless the misuse was reasonably foreseeable."

Here, plaintiffs rely on their expert Lester W. Roane. Roane opined in his deposition that "the cause of the incident, the blown up gun, was an over-pressured cartridge." His second opinion was "that given the over-pressured cartridge was fired, the reason an injury could have occurred was because of the installation of the extractor." Roane observed that, in this case, "there is an area that's unsupported where the cutout [on the bolt] is for the extractor and that's an area that potentially can blow out. If it blows out, it will blow out brass and it will blow out whatever else might be in there, burning particles or whatever." In a report, Roane stated:

> The incident clearly occurred as a result of firing a single extremely high-pressure cartridge. The pressure was sufficient to rupture the case head at the extractor, to blow out the extractor, and to extrude the brass into the bolt face annulus so that the case and bolt are bonded together. When the extractor was blown out, it deformed a small area at the rear of the chamber.

Roane did not opine that the installation of the extractor itself caused problems with firing the rifle; rather, he was of the opinion that the high-pressure cartridge caused the explosion, but it was the installation of the extractor, and particularly the cutting of the bolt, that resulted in an explosion where materials were blown out of the rifle and struck Walton. Roane testified as follows:

> *Q.* Just so I understand the whole scheme of things, and maybe I'm simplifying it, but if there's no single extremely high pressure cartridge, then there's no injury to Mr. Walton, correct?
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> *A.* That certainly seems logical.
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> * * *
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> *Q.* And despite the questions that [plaintiffs' counsel] asked you, you're not offering any opinions and you don't intend to offer any opinions that the modification of this Remington bolt somehow caused the accident, is that true?
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> *A.* That's correct.

Roane indicated in his deposition and report that he tested two new Remington 700 rifles, with one of the rifles being left in its original state and the second rifle being modified through installation of a Sako-style extractor. Testing involved firing both rifles using cartridges producing various pressure levels of pounds per square inch (psi).[1] Roane's report provided, "The first set of firings, with cartridges estimated to be producing pressures of 110,000 – 120,000 psi, resulted in no damage to either rifle. Both were difficult to open, but were fully functional." A second set of firings was conducted using cartridges producing estimated pressures of between 120,000 and 150,000 psi. According to Roane's report, the second round of testing "resulted in the unmodified rifle remaining stiff and with some minor bolt face damage but functional, while the modified one had the extractor blown out of the bolt, leaving the cartridge case bonded to the bolt, just as with the incident rifle." Roane's deposition testimony was consistent with the report, and he indicated that it was very likely that the cartridge fired by Walton had a pressure of over 120,000 psi. We note that, as clarified by Roane at his deposition, when he spoke of the extractor being blown out, he meant blown out of the bolt, not out of and away from the rifle. In his deposition, Roane observed that a cartridge pressure of 100,000 psi was above what would be considered a "proof pressure." When asked to define the meaning of proof pressure, Roane explained:

> Proof pressure is a deliberately high pressure load that is – in some countries must be fired by a law officer – not in the United States – in a gun to prove that it is able to handle the highest pressures it's likely to see in normal use without damage.

[1] Roane stated that, in the context of his testing, pressures were manipulated by adding gunpowder to the cartridges.

Roane indicated that a proof load or pressure is typically a 25 to 30 percent overload of the maximum average cartridge pressure. Roane stated that when he spoke of extremely high pressure, such as existed here, he meant "way up there above proof pressures."[2] James C. Hutton, a defense expert, testified that maximum average pressure for cartridges relevant to this case was 65,000 psi, so the proof pressure would be in the 90,000 psi range. According to Hutton, and consistent with Roane's testimony, proof pressure is approximately 130 percent of the maximum average cartridge pressure (30 percent overload).[3] As gleaned by examination of the expert testimony, gun manufacturers conduct testing to make sure a gun can still be fired safely even with, and in anticipation of, a cartridge producing excessive pressure, which can occur for a variety of reasons. In Roane's deposition, the following colloquy occurred:

> *Q.* Now, when you say an over – likely guns will see an overload, how high an overload over normal maximum pressure do you throw into that category of rifles [that] may see an overload? . . .
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> * * *
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> *A.* It is very likely that any commercially produced . . . rifle . . . that gets used very much is going to see an excess pressure load. That's partially the reason that proof testing is done because even from the very best manufacturers using the very best quality control techniques and the best materials there will be an occasional outlier, statistical outlier and so you're likely to see it. If it is a firearm that lends itself readily to hand loading, then – or commercial reloading, then the chances of an excess pressure load go up and the magnitude of that excess pressure goes up. I can't attach numbers to that, but as long as you stick with factory ammunition, it's very, very, very unlikely, almost an improbability that you're going to see pressures above proof pressures.
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> *Q.* So a manufacturer can expect and they, in fact, design and test for overloads of the proof pressures. Would that be accurate?
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> *A.* If they're smart they do, yes.

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[2] Roane testified that the extractor or the installation of the extractor would not have caused the excessive pressure in the cartridge.

[3] Hutton testified as follows:

> Firearms are proof tested primarily to assure that there is an established margin of safety in that specific single firearm for use with commercial pressures. There are maximum average pressures established for every commercial round of ammunition, and when a firearms manufacturer tests the gun with an excess overload as we mentioned a while ago, about 130 percent of the anticipated pressure in the gun, the manufacturer is actually testing the integrity of the component parts of that specific rifle that he made.

Q. Now, in this case we don't know how high the pressure was involved in this incident, we just know it was, based on your testing, over a hundred and twenty thousand psi?

A. That's very likely, yes.

Q. And a hundred and twenty thousand psi figuring on, let's say, a sixty thousand psi cartridge casing is something like forty to fifty thousand in excess of proof, right?

A. Yes sir.

Q. And that's not foreseeable, fifty thousand psi in excess of a proof cartridge is not a foreseeable event, is it?

A. I'm not comfortable with guessing at what's foreseeable. [Emphasis added.]

Thus, plaintiffs' own expert was not prepared to opine that the cartridge pressure in this particular case was foreseeable. It was vital to plaintiffs' lawsuit to establish that the pressure in the cartridge used by Walton was at a psi level that was foreseeable for purposes of issues concerning legal duty, proximate cause, and misuse. Roane's testimony certainly does not support a finding of foreseeability in regard to a psi pressure measurement of over 120,000 psi. Although not entirely clear from his testimony, assuming that Roane, in the quoted language above, opined that a gun manufacturer should expect a pressure that exceeds even the proof pressure as to reloaders such as Walton, he still was not prepared to opine that the extent of the psi pressure actually involved in the case at bar, which greatly exceeded the proof pressure, was foreseeable. Even Roane's quip that gun manufacturers expect and test for overloads of proof pressures if "they're smart" did not answer the question whether existing gun manufacturers actually do expect and test for overloads of proof pressures as part of standard safety practices.

Indeed, defense expert Dr. Frederick E. Schmidt, who agreed with Roane's opinion that pressure in excess of 120,000 psi was necessary to cause the kind of damage that was done to the rifle, opined that the pressure in the cartridge used by Walton "was well above foreseeable levels that a firearm manufacturer could reasonably expect for design and manufacturing purposes." This conclusion was emphatically made by Hutton as reflected in the following passages from his deposition:

> The hand loading data that is handwritten on this sheet that I understand to be the hand loading records that Mr. Walton used in creating ammunition for his . . . rifle, the kindest thing I can say about the amount of pressure that he's using here is that it is extremely adventuresome. Mr. Walton is just off the charts. The powder and the bullets and these velocities that result, and particularly the pressures that must result from this are not the result of any established recipe by anybody that I'm aware of, by the powder makers themselves, . . . and this is just pure recklessness on Mr. Walton's part.
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> * * *

> Velocities. Well, when he's talking about 55 grains of Accurate 2700 powder, behind a 55 grain bullet, holy cow, that's madness. I'm sorry. That, he's got to be prying the cases out of that breach face. He's reaching pressures here – although he has zero instrumentation for pressures, he's got to be reaching pressures that are literally causing the head of that case to flow. He's got to be piercing primers, flattening primers, have all the signs of extremely high pressure, and he's ignoring them. He's working – he's working loads up in an area here that are extremely dangerous.
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> * * *
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> These loads that he's creating are unknown by anyone else but him, and he has no pressure instrumentation. He's way out as a pioneer here, because he's beyond the scope of any rationale hand loading.
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> * * *
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> [I]n my opinion, Mr. Walton's eye injury is the result of extremely high pressure gas propelling atomized and solidified atomized brass rearward from the rifle at the time of the incident.

Walton testified that he had no idea how high the pressures were in the cartridges that he reloaded and fired. He did not have any information regarding the type of pressures generated in standard cartridges. Walton, however, later noted his belief that a pressure level of 100,000 psi in a cartridge was a little high and that 70,000 to 80,000 psi was closer to a normal expected pressure. But then he added, "I don't know. I'm no expert at none of that stuff, knowing the pressure."

On consideration of all of the testimony reviewed above, we conclude as a matter of law that it was not foreseeable that sale and installation of the extractor, even with the necessary cutting of the bolt, would create a risk of harm or cause injury to a purchaser or user, nor was Walton's misuse of the rifle by using an excessively high-pressured cartridge foreseeable. The foreseeability of a risk of harm or the foreseeability that installation of the extractor would cause an injury was not shown because there is no indication in the documentary evidence that it was foreseeable that a cartridge would be used that produced the pressure exhibited in the incident, i.e., over 120,000 psi. Therefore, plaintiffs' suit against Midway fails on the elements of legal duty and proximate (legal) cause, and it fails for purposes of the misuse analysis under MCL 600.2947(2), where the misuse was not reasonably foreseeable.[4]

[4] Our underlying analysis also provides an additional basis for rejecting plaintiffs' implied and express warranty theories, where plaintiffs needed to prove their allegations that the extractor was not reasonably fit for the purposes anticipated and reasonably foreseen, and where Roane's testimony did not show that firing a cartridge with a pressure of over 120,000 psi was foreseeable or anticipated.

With respect to Miller, the premise of plaintiffs' negligence claim against Miller was that "he knew or should have known that cutting the bolt would cause the bolt to be unable to withstand the high pressure created by the cartridges that . . . Walton used." Plaintiffs have also maintained that their allegations gave rise to a duty to warn. There is no evidence, however, that Miller had knowledge of any risks associated with modifying the bolt on the Remington 700, nor does the record support a conclusion that Miller should have known of any danger, even when the modification is considered in conjunction with Walton's reloading practices.[5] As known by Walton, Miller was a tool and die maker and not a gunsmith. Walton and Miller jointly consulted a gunsmith who recommended installing the Sako-style extractor. Miller testified that he and Walton were told that it would be a good idea to install the extractor, and Miller stated that "it seemed like a good idea at the time." There is no indication that Miller knew anything more than Walton himself with respect to dangers posed by the extractor, the pressure produced in cartridges when reloading, and any interrelationship between the two. Indeed, Miller fired the rifle 20 to 25 times after the new extractor was installed, which tends to negate any claim that Miller knew of a potential hazard. Miller testified that he only learned of the danger after Walton was injured in the blast. Plaintiffs' claims against Miller cannot survive summary disposition.

Affirmed. Miller and Midway, having prevailed in full on appeal, are awarded taxable costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot

[5] We note that, in connection with questioning regarding Walton's practice of reloading his cartridges, Miller testified, "If he's loaded them, I don't know what he's doing[.]" This testimony also raises the same problem with the issue of foreseeability in the context of legal duty and proximate cause relative to the claims against Miller.