

Case No. 23-6136

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

**TYLER HERMAN,
Plaintiff/Appellant**

vs.

**SIG SAUER, INC.,
Defendant/Appellee**

**On Appeal from the United States District Court
For the Western District of Oklahoma
The Honorable David L. Russell
United States District Judge**

Case No. CIV-21-1038-R

**CORRECTED
APPELLEE'S ANSWER BRIEF**

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ORAL ARGUMENT REQUESTED

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STATEMENT OF RELATED CASES

Pursuant to 10th Circuit Rule 28.2(c)(1), Appellee states that there are no prior or related appeals.

I. COUNTER-STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the district court properly excluded the Appellant John Tyler Herman's ("Herman") expert witness opinions that the absence of a manual thumb safety on Herman's P320 pistol, designed and manufactured by Appellee Sig Sauer, Inc. ("Sig Sauer"), likely would have prevented his pistol from discharging, when: (1) a manual thumb safety provides no protection from unintentional discharges unless it is engaged, (2) both experts simply assumed that a manual thumb safety would have been engaged at the time of the incident, and (3) the facts in the record support the opposite conclusion?

2. Whether the district court properly excluded Herman's expert witness opinions that the absence of a tabbed trigger on Herman's P320 likely would have prevented his pistol from discharging, when (1) both experts admit that a pistol with a tabbed trigger will discharge when the trigger is pulled squarely on its face, and (2) both experts admittedly have no knowledge of, nor did they analyze, critical facts surrounding how the discharge in this case occurred, including what contacted the trigger and where the contact was made?

3. Whether the district court was correct in granting summary judgment in favor of Sig Sauer where Herman had no admissible expert testimony on causation, an essential element of his claims, in a product defect case involving complex design issues?

4. Whether the district court was correct in granting summary judgment in favor of Sig Sauer when the record was devoid of evidence sufficient to create a factual dispute that the presence of a manual thumb safety or tabbed trigger on Herman's pistol would have prevented the pistol from discharging under the circumstances of the incident?

II. STATEMENT OF THE CASE

A. The Sig Sauer P320

Sig Sauer manufactures firearms for sale to the military, law enforcement agencies at the federal, state and municipal levels, and civilians. In 2014, Sig Sauer introduced the P320 model pistol, a striker-fired pistol with a modular design that allows users to modify the grip size and caliber of their pistol without purchasing a new firearm. (App. Vol. 2 at 214-16.) Since that date, the P320 pistol has become one of the most popular handguns on the market, with over 2.5 million units sold. (*See id.*)

B. The Incident

Herman claims he was injured on February 2, 2018, when his Sig Sauer P320 pistol discharged while seated in its holster, striking his groin area. (App. Vol. 1 at 15.) Herman claims the accident occurred when he tried to remove his holstered pistol from his waistband. (App. Vol. 2 at 71:2-72:2.) Specifically, Herman claims that on the morning of the incident, he was trying out a new soft leather holster he

had just received by mail for the first time. (*Id.* at 71:2-11.) He put the gun in the holster, unbuttoned his pants, and put the holster on his waistband to try the “appendix carry.” (*Id.* at 71:2-20.) He claims this positioning of the holstered gun immediately felt uncomfortable to him. (*Id.*) Therefore, he reached over the gun to grab the holster and pull up on it. Herman currently claims that upon initially pulling up, the holster “got caught up,” so he pulled harder, at which point the gun discharged. (*Id.* at 71:21-72:2.)

Contrary to Herman’s current account of the incident, however, immediately after the incident, Herman was interviewed by responding police officer, Sergeant Jonathan Hurd, who included Herman’s contemporaneous description of the occurrence in his report as follows:

[Herman] stated he was trying to pull the gun and holster out of his waistband and the holster got hung up. [Herman] stated he then pulled harder causing the pistol to come out of the holster and [his] finger accidentally to pull the trigger causing the firearm to discharge.

(App. Vol. 2 at 74; 94:1-95:2.) Herman’s wife at the time, who was present during the incident and called 911 immediately thereafter, also reported to a 911 dispatcher that Herman “thought he had the case, but he just pulled the gun out and accidentally pulled the trigger.” (App. Vol. 3 at 605.)

At the time Herman purchased his P320 pistol, Sig Sauer offered P320 models with and without a manual thumb safety; however, Herman elected to purchase a P320 without a manual safety. (App. Vol. 2 at 69:19-70:4.) Herman testified that

when he purchased his P320 pistol, he was “not even thinking about” whether it included a manual safety. (*Id.*)

C. Tertin’s Proffered Testimony

Despite Herman’s claims that his P320 pistol discharged without trigger actuation, Herman’s expert, James Tertin (“Tertin”), opines that his trigger must have been pulled for the gun to discharge. (App. Vol. 2 at 181 (p. 10:20-24).) Tertin opines that the design of the P320 model pistol is defective because it does not include an external manual thumb safety or passive tabbed trigger. (*See id.* at 182.) A thumb safety is a switch on the side of the pistol that can be flipped on or off with the user’s thumb and which requires the user to actively set the switch to “fire mode” for the gun to discharge. (App. Vol. 2 at 135.) A tabbed trigger, depicted in the photograph below, which Tertin asserts is the most widely used type of safety for striker-fired guns, is a small tab within the trigger that must be depressed for the trigger to be able to fully depress and fire the weapon. (*See id.* at 127.) A tabbed trigger prevents the trigger from being depressed if it is not disengaged through the normal action of pulling the trigger.



(App. Vol. 2 at 236-38.) Tabbed triggers are used on striker-fired pistols with unbalanced trigger mechanisms to prevent the trigger from being actuated by inertia when the pistol is dropped and impacts the ground, thereby allowing those pistols to satisfy drop fire requirements in various firearms testing standards. (*See id.* at 239-40.) The P320 does not need a tabbed trigger to pass industry standard drop tests because it was designed with a balanced trigger mechanism and is not susceptible to drop-fires in the same manner as are firearms with unbalanced trigger mechanisms. (*See id.* at 240.) Critically, a tabbed trigger does nothing to prevent an unintentional discharge if the trigger is depressed across the face of the trigger—thereby disengaging the tab—by a finger or foreign object. (*See id.*) Indeed, tabbed triggers are intentionally designed and the tab positioned to maximize the likelihood that the tabbed trigger *will* be disengaged if contact is made with the trigger. (*Id.* at p. 237-38.) The P320 is equipped with multiple internal safeties rather than external manual thumb safety or passive trigger safety. (*See id.* at 220-24.)

According to Tertin, the P320 model pistol is uniquely susceptible to unintended discharges caused by accidental trigger actuation, because it is a single-action pistol sold without a manual thumb safety or tabbed trigger. (App. Vol. 2 at 200 (p. 87:6-18).) However, Tertin's opinion that the P320 has an increased risk of unintentional discharges is not supported by any objective facts or data. In fact, Tertin compares the P320 to other pistols on the market, with a focus on Glock striker-fired pistols, which he describes as double-action pistols which are all equipped with a tabbed trigger (and are not equipped with a manual thumb safety). (*Id.* at 140.) Yet, prior to his deposition in this matter, Tertin did not even know about, nor did he bother to research or investigate, reports of unintended discharges with Glocks and other pistols *with* tabbed triggers, of which there is ample evidence.¹ Tertin further admitted he did not research *any* real-world data on unintentional discharges occurring with pistols equipped with these external safety features or the relative incidence rates of the P320 versus other striker-fire pistols that have tabbed triggers:

Q. And so we know unintentional discharges can happen with a tabbed trigger. You will agree with me on that; correct?

A. Yes.

Q. And you don't know the rate at which unintentional discharges happen with a tabbed trigger because you have not looked at that; correct?

¹ See App. Vol. 2 at 188-189; App. Vol. 7 at 1450-58; App. Vol. 7 at 1460-1518.

A. Correct.

Q. And you don't know whether there are more discharges – unintentional discharges with guns with tabbed triggers than with the P320, because you have not looked at that; correct?

A. I have not; correct.

(*Id.* at 206-207 (pp. 112:21-113:11).)

Based entirely on his unsupported assumption that the P320 is generally more susceptible to unintentional discharges than pistols equipped with tabbed triggers, Tertin leaps to the conclusion that the absence of a tabbed trigger was the cause of *this* discharge. Specifically, while he does not know what caused Herman's pistol to discharge or where the trigger was contacted, Tertin nevertheless opines that the discharge would have been "highly unlikely" if the pistol had a tabbed trigger safety like the Glock. (App. Vol. 2 at 204 (p. 103:12-16), 205 (pp. 106:23-107:5).) Tertin's opinion is so unmoored from reality, he testified that he does not care what real world information reveals as to relative discharge rates between the Glock and the P320—even if data showed there is a higher rate of accidental discharges with tabbed triggers than anyone has reported on the P320, he would still find that Herman's discharge would have been "highly improbable" if the pistol had a tabbed trigger simply because a tabbed trigger makes the pistol "inherently more safe." (*Id.* at 187-88 (pp. 36:20-37:17), 192 (pp. 54:22-55:21).)

Tertin admits, as he must, that a manual thumb safety could only have prevented Herman's unintentional discharge if it was engaged at the time of the incident but fails to provide any basis for or even address his apparent assumption that a manual thumb safety would have been engaged. (App. Vol. 2 at 204 (p. 104:4-15); *see also generally id.* at 122-42.) He also admits that if Herman's finger squarely contacted the trigger and pulled it back, the pistol would have discharged regardless of whether it was equipped with a tabbed trigger. (*Id.* at 185 (pp. 25:4-8, 27:4-16).) In other words, whether a tabbed trigger would have prevented Herman's accident depends entirely on the facts and circumstances surrounding the particular incident. Yet, Tertin's "causation" opinions are, admittedly, not based on any facts or analysis specific to Herman's incident other than the allegation that the discharge was unintentional:

Q. And how would it have made it more highly improbable that his pistol would have discharged if his finger accidentally pulled the trigger?

A. If that were true, and his finger accidentally pulled the trigger, a tabbed trigger requires that you pull on the center of the trigger straight back. He may have not fired that pistol.

Q. Okay. However, you don't know where on the pistol his finger would have contacted it, where on the trigger his finger would have contacted; correct?

A. That is correct.

Q. Okay. So how do you know that the trigger pull in Plaintiff's accident was different than the trigger pulls that have been documented in pistols that have a tabbed trigger?

A. I don't know.

(*Id.* at 184-85 (pp. 24:24-25:13); 200 (p. 85:5-10).)

Without any data or information on the incidence rates of unintentional discharges involving P320s and other pistols equipped with tabbed triggers, or any knowledge or analysis as to how and where Herman's trigger was actuated, Tertin admits that his "expert" opinion is limited to "just evaluating common sense of the SIG pistol and the common sense of tabbed or hinged triggers." (*See* App. Vol. 2 at 191 (p. 51:20-23).) Relying entirely on his "common sense," Tertin believes that a pistol with a tabbed trigger can only be actuated with intent or if a user really "fool[s] around" with it, despite substantial evidence to the contrary. (*Id.* at 206 (pp. 110:13-111:6).)

In sum, Tertin has no knowledge of any facts surrounding Herman's accident—other than Herman's own testimony that the gun discharged when he was trying to remove his holster from his waistband—he does not know what pulled the trigger or where the trigger contacted, nor did he do any analysis to attempt to answer these questions. (App. Vol. 2 at 185 (p. 25:9-13); 204 (p. 103:12-16 ("Q. As for Plaintiff's incident, am I correct that you did no analysis as to what may have pulled the trigger? A. That's correct. I don't have any idea what caused that"))).) Simply

put, Tertin has no reliable basis to opine that the P320 is generally more susceptible to unintentional discharges than other striker-fire pistols equipped with tabbed triggers, much less that the absence of a tabbed trigger on Herman's P320 caused this particular discharge. Thus, Tertin's "causation" opinion is textbook *ipse dixit*—an opinion without any underlying factual basis.

D. Vigilante's Proffered Testimony

Like Tertin, Herman's proffered human factors expert, William Vigilante, Jr. ("Vigilante"), does not support Herman's claim that the subject P320 pistol discharged without actuation of the trigger. (App. Vol. 4 at 824 (p. 14:5-15).) Instead, Vigilante opines that, "[h]ad Sig Sauer integrated a manual safety to prevent unintended trigger travel into the design of the Sig P320, the subject unintentional discharge would most likely not have occurred and John Tyler Herman would not have been injured." (App. Vol. 2 at 174.) Vigilante defers to Tertin for opinions about the subject P320 firearm and its design information, as Vigilante did not even inspect the subject pistol, much less take any measurements or otherwise analyze the pistol. (App. Vol. 4 at 825 (pp. 19:22-20:7).)

Like Tertin, Vigilante also concedes, as he must, that (1) a manual thumb safety will not prevent trigger movement if it is not engaged, (*see* App. Vol. 4 at 828-29 (pp. 32:17-33:2), and (2) if the object that pulls the trigger is across the face of the trigger, a tabbed trigger will not prevent the pistol from discharging. (*Id.* at

824 (p. 13:4-12).) Vigilante does not, however, have any opinion on what caused the trigger on Herman's pistol to be pulled. (*See id.* at 824 (pp. 14:16-15:4); 825 (p. 17:5-9).) Nor does he know what part of the trigger was contacted to cause the trigger pull. (*Id.*) Without these critical facts, there is no reliable basis upon which Vigilante can opine that the trigger was actuated in a way that would not have disengaged the tabbed trigger and allowed the pistol to fire as designed.

Despite acknowledging that Herman's current description of how the discharge occurred is contradicted by both the police report and the 911 call from Herman's wife immediately following the accident, Vigilante simply accepts Herman's version of events despite never inspecting, let alone performing physical testing on, Herman's pistol or holster. (App. Vol. 4 at 823 (pp. 10:22-13:3); 825 (pp. 18:20-19:4, 19:22-20:2).) Given his complete failure to analyze any of the physical evidence, it is unsurprising that Vigilante does not even have an opinion on whether the pistol was holstered or unholstered at the time of the discharge. To attempt to justify this failure, Vigilante claims that because, in his view, the lack of an external manual safety increased the risk of an unintended discharge *in general*, the facts and circumstances of Herman's specific accident do not matter:

Q. Does the position of the pistol either in or out of the holster make any difference to your opinions?

A. It does not.

Q. Does the fact of whether the trigger is accessible to being inadvertently pulled make any difference to any of your opinions?

A. It does not.

(*Id.* at 825 (p. 19:5-13).) In other words, Vigilante readily admits that he did nothing to examine, test, or confirm his theory of causation that the addition of an external safety on Herman's pistol most likely would have prevented his accident. Instead, his causation opinion is based entirely on his view that in general, external safeties are effective at preventing unintentional discharges.

Similar to Tertin, however, even Vigilante's general opinion that the P320 pistol is uniquely dangerous due to the lack of an external safety lacks any support in the form of data, studies, statistics, or other real-world evidence. When questioned about incident rates or data on unintentional discharges with the P320 in comparison to other pistols with tabbed triggers, Vigilante could point to only "anecdotal data." (App. Vol. 3 at 519:21-520:7, 521:7-23.)² The lack of support for Vigilante's opinion that the P320 is generally more susceptible to unintentional discharges is especially glaring given that Vigilante relies entirely on this opinion to conclude that the lack of an external safety must have been the cause of Herman's unintentional discharge,

² Vigilante has provided the same opinions in multiple cases. For efficiency purposes, his general background and the broad bases for his opinions were discussed in *Slatowski v. Sig Sauer, Inc.*, No. 2:21-cv-00729 (E.D. Pa.) but apply equally to his opinions in this case.

even though he did not examine and has no opinions on the manner in which that discharge occurred.

E. Derek Watkins' Incident-Specific Analysis

In contrast to Vigilante, who made no inspection of any physical evidence, and Tertin, who also failed to perform any incident-specific analysis, Sig Sauer's firearm design and engineering expert, Derek Watkins ("Watkins"), performed extensive testing of the subject pistol and holster. (App. Vol. 2 at 216-234.) Of particular relevance here, Watkins examined the markings on the interior surfaces of the holster, which revealed a ring of soot at the muzzle end of the holster, indicating a discharge with that portion of the holster in close proximity to the pistol's muzzle. (*Id.* at 231.) Watkins determined that fully seating the subject pistol in the subject holster placed the muzzle of the pistol at the end of the holster and well past the start of the soot marks, whereas partially removing the pistol from the holster aligns the soot marks with the end of the pistol's muzzle. (*Id.* at 231-32.) Moreover, gripping the pistol and placing an index finger on the trigger while pushing the pistol into the holster causes the finger to pull the trigger and align the muzzle with the soot marks. (*Id.* at 232.) Therefore, the physical evidence of the holster damage is inconsistent with Herman's account of the incident shooting. (*Id.* at 251.)

Watkins' report was served on January 27, 2023, shortly after Vigilante was deposed in this case and prior to Tertin's deposition, yet neither expert supplemented his opinions to address or respond to this evidence presented by Watkins.

F. The District Court's Opinion

On September 8, 2023, following extensive briefing and oral argument, Hon. David L. Russell issued an Order granting Sig Sauer's motions to exclude evidence and opinions of Tertin and Vigilante and its motion for summary judgment. The district court "agree[d] with [Sig Sauer] that neither Mr. Tertin nor Mr. Vigilante has a reliable factual basis" for their causation opinions. (App. Vol. 8 at 1751.) With those expert opinions excluded, the court held that "there is not sufficient evidence from which a jury could rationally conclude that the gun's alleged defect—the absence of a manual safety—caused the injuries in this case." (*Id.* at 1759.)

In reaching its conclusions, the district court emphasized that both experts "acknowledge that a tabbed trigger will not prevent an unintentional discharge if an object squarely contacts the face of the trigger, a thumb safety will not prevent an unintentional discharge if it is not engaged, and the gun will not discharge without the trigger being fully actuated." (*Id.* at 1751.) Yet, Tertin admitted that he did not know how the incident occurred, performed no analysis as to what may have pulled the trigger, and did not evaluate the rate of unintentional discharges for guns with tabbed triggers. (*Id.* at 1753.) Vigilante likewise did not have an opinion on what

part of the trigger was contacted, where it was pulled, what caused it to move, the position of the gun in the holster or whether the trigger was accessible at the time of the incident, nor did he recall the Herman's testimony concerning his use of a manual safety. (*Id.* at 1752.) In sum, the district court found that "[w]ithout these critical facts, the experts' conclusion that a tabbed trigger or thumb safety would have prevented the accident is speculative." (*Id.*)

Based on the exclusion of Vigilante and Tertin, the court held that summary judgment in favor of Sig Sauer was appropriate because (1) Herman was left with no expert witnesses to testify regarding causation, which is "typically necessary in cases that involve complex issues of design and function," and (2) Herman could not otherwise prove his claims through circumstantial evidence because (a) he failed to "point[] to any evidence in the summary judgment record which would permit the inference that a thumb safety would have been engaged," and (b) "an inference that [Herman] inadvertently caused something to push back on the trigger face [was] equally as valid as an inference that the trigger was grazed" in such a way that it would have been prevented by a tabbed trigger. (App. Vol. 8 at 1758-59.) Therefore, the court held that Herman did not meet his burden of demonstrating causation between the alleged defect and his injury, an essential element of his claims. (*Id.* at 1759-60.)

III. SUMMARY OF THE ARGUMENT

The district court thoroughly and carefully executed its gatekeeping function in excluding the opinions of Herman’s putative experts on the issue of causation and, consequently, correctly granted summary judgment dismissing Herman’s claims. Herman appeals the district court’s decision granting all three of Sig Sauer’s motions but points to no evidence whatsoever that alters that court’s sound determination that Herman did not, nor can he, raise a genuine factual dispute as to causation.

Herman does not dispute that he bears the burden of establishing causation as an essential element of each of his claims. He does not dispute that although the P320 pistol is available for sale with a manual thumb safety, he selected a pistol that was not equipped with this device. He does not dispute that, despite his “belief” that he did *not* pull the trigger, “there must have been some contact with the trigger” to result in the unintended discharge. Appellant’s Br. at 13.³ He even accepts, as he must, that if it his trigger was pulled back from the center, a tabbed trigger would not have prevented the pistol from discharging *and neither he nor either of his liability experts knows where or how the trigger was contacted*. With little left to

³ Herman alleges in his Complaint that his pistol discharged without a trigger pull, and all of his claims are premised on this allegation. (*See, e.g.*, App. Vol. 1 at 12, 13, 15.) However, Herman failed to disclose any expert who even attempted to support his claim that the P320 can, or in this instance did, discharge without a trigger pull, and, despite the conflict with his own operative pleading, has apparently sought to shift to an alternative theory of design defect that the P320 discharges too easily.

work with, Herman hangs his entire appeal on the bogus argument that the district court reached its decision by improperly making factual inferences in favor of Sig Sauer and baldly asserts that the facts in the record are sufficient to support the conclusion that “the unintentional firing would have been much less likely to occur if Sig Sauer had included an external manual safety on this model of gun.” Appellant’s Br. at 14. And yet, Herman points to nothing, because no such evidence exists, to transform his theory of “possible causation” into one of “probable causation” sufficient to reach the jury.

Tertin’s and Vigilante’s design defect opinions, although flawed and unreliable, were not the subject of the motions below, nor are they at issue on appeal. On causation, Tertin and Vigilante both opine in conclusory fashion that an external safety—which they define to include a manual thumb safety or a tabbed trigger—likely would have prevented Herman’s accident. First, both experts concede that a manual thumb safety would have made no difference to the outcome of Herman’s incident unless it was engaged at the time of the discharge. However, both experts simply assume that Herman would have had a manual thumb safety engaged without providing any grounds for that assumption. Neither expert so much as attempts to connect his “causation” opinion regarding the manual thumb safety to the facts in the record, which, in fact, support the opposite conclusion.

Any attempt by Herman to retroactively connect the dots for his experts must be rejected. He argues for the first time on appeal that he testified at his deposition that one tip his father taught him about gun safety as a teenager was to “always have your safety on until you’re ready to shoot” and that this testimony provides an adequate factual basis for Tertin and Vigilante’s opinion that a manual thumb safety likely would have prevented his injuries. Because Herman failed to raise this argument in the district court, it cannot be considered on appeal. Even had Herman identified the evidence below, there is no indication whatsoever that either Tertin or Vigilante were aware of, let alone relied upon, that testimony as a basis to render their opinions, nor does the testimony give rise to an inference that Herman, who had no interest in purchasing a pistol with a manual thumb safety, would have had one engaged at the time of his accident.

Second, the district court correctly found that Tertin’s and Vigilante’s opinions that a tabbed trigger likely would have prevented the discharge lack any reliable foundation. Both experts admit that they do not know how, where or with what the trigger was contacted, nor did they investigate those facts. Both also concede that the facts and circumstances surrounding the incident are not important to their opinions. Instead, they conclude with no analysis that because Herman did not indicate in his deposition testimony that he pulled the trigger intentionally or flush on its face, and because there is no evidence that Herman was “fooling around”

with the pistol, the pistol probably would not have discharged if it had a tabbed trigger. The district court correctly determined that both experts lacked critical facts necessary to render a reliable causation opinion and that their opinion that a tabbed trigger likely would have prevented Herman's incident was, therefore, speculative.

Finally, the district court correctly concluded that summary judgment was appropriate because Herman was left with no expert testimony on causation in this product defect case which involves complex design issues and, even if expert testimony were not required, Herman failed to adduce any evidence in the record which would (1) permit the inference that a thumb safety would have been engaged or, (2) support a theory that a tabbed trigger more likely than not would have prevented his pistol from discharging.

IV. ARGUMENT

A. Standards of Review

1. Exclusion of expert testimony

The district court's determination to exclude expert testimony, including its "assessment of reliability" of proposed expert testimony, is reviewed under an "abuse-of-discretion standard." *Harris v. Remington Arms Co., LLC*, 997 F.3d 1107, 1111 (10th Cir. 2021); *Hall v. Conoco Inc.*, 886 F.3d 1308, 1311 (10th Cir. 2018) ("The district court has 'wide latitude' in deciding whether to exclude expert testimony, and we review the manner in which the district court exercises this

gatekeeping function for an abuse of discretion.”). “In applying this standard, [this Court] consider[s] whether the district court ‘present[ed] an explanation for its choice sufficient to enable a reviewing court to determine that it did not act thoughtlessly, but instead considered the factors relevant to its decision and in fact exercised its discretion.’” *Harris*, 997 F.3d at 1111 (quoting *HCG Platinum, LLC v. Preferred Prod. Placement Corp.*, 873 F.3d 1191, 1203 (10th Cir. 2017)). “A court abuses its discretion when the ruling is arbitrary, capricious, whimsical, or manifestly unreasonable.” *Id.* at 1112 (internal quotation marks and citation omitted).

2. Grant of summary judgment

The Court conducts a *de novo* review of the district court’s grant of summary judgment, “applying the same legal standards that the district court should have applied.” *Butler v. Daimler Trucks N. Am., LLC*, 74 F.4th 1131, 1140 (10th Cir. 2023). The Court “can affirm on any ground supported by the record, so long as the appellant has had a fair opportunity to address that ground.” *Hamric v. Wilderness Expeditions, Inc.*, 6 F.4th 1108, 1121 (10th Cir. 2021) (quoting *Alpine Bank v. Hubbell*, 555 F.3d 1097, 1108 (10th Cir. 2009)).

B. The District Court’s Decision to Exclude Tertin’s and Vigilante’s Causation Opinions Was Not an Abuse of Discretion.

District courts “must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.” *Daubert v. Merrell Dow Pharm. Inc.*,

509 U.S. 579, 589 (1993). Rule 702, which was recently amended to clarify the plaintiff's burden of proof as to each admissibility requirement, provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. Rule 702 requires district courts to act as gatekeepers to “ensure that any and all scientific testimony or evidence is not only relevant, but reliable.”

Norris v. Baxter Healthcare Corp., 397 F.3d 878, 883 (10th Cir. 2005) (quoting *Daubert*, 509 U.S. at 589).

To be reliable “an expert's testimony must be based on scientific knowledge, which ‘implies a grounding in the methods and procedures of science’ based on actual knowledge, not ‘subjective belief or unsupported speculation.’” *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1222 (10th Cir. 2003) (quoting *Daubert*, 509 U.S. at 590). In other words, expert testimony is not reliable and admissible simply because the testifying expert says it is. *Norris*, 397 F.3d at 886. Expert testimony that is nothing more than “subjective belief and unsupported speculation” is not reliable and must be excluded; personal opinion is not science. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 140 (1997). Ultimately, “a district judge asked to admit scientific evidence

must determine whether the evidence is genuinely scientific, as distinct from being unscientific speculation offered by a genuine scientist.” *Mitchell v. Gencorp Inc.*, 165 F.3d 778, 783 (10th Cir. 1999) (quoting *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 318 (7th Cir. 1996)). Thus, the party offering expert testimony has the burden of demonstrating that the testimony is derived from the scientific method and that the testimony can be independently and objectively validated by something other than the expert's *ipse dixit*. *Dodge*, 328 F.3d at 1222-23.

When assessing the reliability of an expert's opinions, the court is not permitted to simply “tak[e] the expert's word for it.” Fed. R. Evid. 702 Advisory Committee's Notes to 2000 Amendments. An expert's opinion is unreliable and must be excluded if there is “too great an analytical gap between the data and the opinion offered.” *Hollander v. Sandoz Pharms. Corp.*, 289 F.3d 1193, 1205 (10th Cir. 2002) (quoting *Joiner*, 522 U.S. at 146). Likewise, an opinion must be excluded if it is “connected to existing data only by the *ipse dixit* of the expert.” *Id.* (quoting *Joiner*, 522 U.S. at 146). In short, when an expert opinion is based on data, a methodology, or studies that are simply inadequate to support the conclusions reached, *Daubert* and Rule 702 mandate the exclusion of that unreliable opinion testimony. *See Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1025 (10th Cir. 2002) (expert testimony is reliable only if it is based on sufficient facts, results from reliable principles, and the witness applied the principles reliably to the facts).

The district court thoroughly exercised its gatekeeping function and properly excluded Tertin's opinions and testimony regarding causation. Both experts' opinions are unreliable and speculative because they rely solely on their *ipse dixit* and are not corroborated by any reliable foundation, testing,⁴ data, or other support. Under these circumstances, the district court correctly found that Tertin's and Vigilante's causation opinions fail to meet the requirements for admissibility set forth by *Daubert* and Fed. R. Evid. 702.

Herman admits that neither Tertin nor Vigilante conducted any incident-specific analysis in this case to determine what caused Herman's pistol to discharge or what part of the trigger was contacted. *See* Appellant's Br. at 27-28, 30. Herman's primary argument on appeal is that the district court incorrectly concluded that these were "critical facts" without which neither expert could render a reliable opinion on causation. *See* Appellant's Br. at 26. To challenge the district court's obviously

⁴ Herman claims Tertin and Vigilante proffered testing showing that the P320 could be actuated by "a graze or side-pull" whereas a pistol with a tabbed trigger could not. Appellant's Br. at 8. Counsel's description of the experts' purported "testing" is misleading at best. Nowhere in their expert reports or deposition testimony did either Tertin or Vigilante proffer an opinion regarding "ten areas that a trigger could be pulled" as Herman asserts in his brief. *Id.* Generously, the experts' "testing" demonstrates only that if you contact a tabbed trigger on the sides in a manner that *deliberately avoids depressing the tab*, the pistol will not fire. Tertin's and Vigilante's "testing," therefore, does nothing to prove that tabbed triggers actually reduce the likelihood of unintended discharges in the real world or, critically, that the lack of a tabbed trigger was the cause of this incident.

correct conclusion that these core facts are critical to any expert opinion on causation, Herman bizarrely reasons that the inability to demonstrate which part of the trigger was contacted is not important because “the Sig P320 was necessarily either contacted by a foreign object or by a body part.” *Id.* Of course, the fact that Herman’s trigger was contacted is not in dispute. However, whether a tabbed trigger will disengage when contacted depends *not* on whether it is a body part or object that makes the contact, or whether the contact is intentional or unintentional (a trigger cannot tell the difference), but on the manner of the contact, including the force and placement. Thus, whether a tabbed trigger would have prevented Herman’s incident does in fact rest on “which part of the trigger was contacted,” (*see* Appellant’s Br. at 26), and Herman’s urging the Court to excuse his experts’ utter disregard for these facts is severely misplaced.

Watkins is the only expert who conducted an incident-specific analysis of the physical evidence to determine the cause of Herman’s discharge. Based on that analysis, Watkins concluded that Herman’s account of the incident was implausible, the pistol was partially unholstered at the time of the discharge, and the physical evidence is consistent with Herman gripping the pistol and pulling the trigger with his index finger while pushing the pistol into the holster. (App. Vol. 2 at 216-234.) Thus, Watkins’ unrefuted analysis supports the conclusion that Herman’s trigger was pulled back on its face by Herman’s finger in a manner that also would have

disengaged a tabbed trigger. Tertin and Vigilante ignore this evidence in favor of their bald assumption that the trigger was most likely “side-pulled.” The district court rightly found this “causation theory” to be based entirely on speculation and conjecture.

1. Exclusion of Herman’s experts’ testimony that a manual thumb safety would have prevented Herman’s incident

Tertin and Vigilante both acknowledge that a manual thumb safety provides no protection against an unintentional discharge unless it is engaged and therefore would not have prevented Herman’s accident unless it was engaged at the time of the discharge. (App. Vol. 2 at 204 (p. 104:7-15); App. Vol. 4 at 828-29 (pp. 32:17-33:2).) The district court correctly observed that neither Tertin nor Vigilante knew whether a thumb safety would have been engaged. (*See* App. Vol. 8 at 1752.) In fact, to render their causation opinions, both experts blindly assume, with zero supporting evidence referenced in either their expert reports or deposition testimony, that Herman would have had a manual thumb safety engaged at the time of the incident if the subject pistol had been equipped with one.

Herman argues for the first time on appeal that even though neither expert so much as attempted to provide any foundation for the opinion that a manual thumb safety most likely would have prevented Herman’s incident, these opinions are nevertheless reliable because Herman testified at his deposition that one of the tips his father gave him about gun safety as a teenager was to “always have your safety

on until you're ready to shoot." Appellant's Br. at 32. This, Herman says, means a "reliable factual foundation exists in the record on which the opinion of both experts that a thumb safety would have likely prevented the injury to Herman *could* be based." *Id.* at 33 (emphasis added).

Critically, this Court need not and should not consider this new argument because Herman failed to raise it in responding to Sig Sauer's motions in the trial court. It is well-established that, as a general rule, arguments raised for the first time on appeal are not considered by the appellate court. *Hicks v. Gates Rubber Co.*, 928 F.2d 966, 970 (10th Cir. 1991); *Miller v. Pfizer, Inc.*, 356 F.3d 1326, 1336 (10th Cir. 2004) ("We need not consider an argument made for the first time on appeal."); *Tesone v. Empire Mktg. Strategies*, 942 F.3d 979, 991 (10th Cir. 2019) ("we will reverse a district court's judgment on the basis of a forfeited theory only if failing to do so would entrench a plainly erroneous result"). "Exceptions to this rule are rare and generally limited to cases where the jurisdiction of a court to hear a case is questioned, sovereign immunity is raised, or when the appellate court feels it must resolve a question of law to prevent a miscarriage of justice." *Hicks*, 928 F.2d at 970. Therefore, "[t]he failure to raise the issue with the trial court precludes review except for the most manifest error." *Id.* Here, there can be no question that none of these rare exceptions to the general rule apply. Moreover, the district court's determination that both experts' causation opinions regarding the manual thumb safety lack

foundation is firmly supported by the record; thus, this Court need not consider Herman's new argument to prevent "manifest error."

Putting aside that Herman forfeited this argument by failing to raise it below, the argument fails on its merits for multiple reasons. First, the mere fact that Tertin's and Vigilante's opinions *could* have been based on certain deposition testimony does not mean those opinions *were* based on that testimony. Indeed, in this case, it is clear they were not, because neither expert identified the testimony Herman points to as a basis for their opinions, nor was that testimony referenced at all in the experts' reports or deposition testimony. (*See generally* App. Vol. 2 at 122-42, 144-177.) In short, this new argument is no more than an attempt by Herman to invent an *ex post facto*, hypothetical "foundation" to support his experts' baseless opinion when it is clear the experts did not rely on that "evidence" at all.

Moreover, even if Tertin or Vigilante had considered the snippet of testimony in rendering their causation opinions, this testimony still falls short of providing a reliable foundation for those opinions. In light of the undisputed facts considered by the district court—(1) models of the P320 with and without manual thumb safeties were offered for sale at the time Herman purchased the subject pistol, (2) Herman knowingly chose to purchase the P320 without a manual thumb safety, and (3) Herman was not seeking to purchase a pistol with a manual thumb safety—the additional testimony to which Herman grasps simply does not create a genuine issue

of fact. (*See* App. Vol. 8 at 1758.) Specifically, the court noted that “[t]here is no evidence in the record that Plaintiff preferred a manual safety, wanted a manual safety, or always used a thumb safety.” (*Id.*) The court’s reasoning remains equally applicable notwithstanding Herman’s testimony that one piece of advice his father gave him when becoming acquainted with firearms as a teenager was to “always have your safety on until you’re ready to shoot.” Appellant’s Br. at 32. Even with this testimony, there is still no evidence that Herman preferred a manual safety, wanted a manual safety, or always (or ever, for that matter) used a thumb safety. Therefore, even if this new argument were properly considered on appeal, which it is not, the testimony Herman points to would not alter the district court’s sound conclusion that “it is possible that [a manual thumb safety] would have prevented the discharge, but equally possible that it would not have prevented the discharge.” (App. Vol. 8 at 1758.)

2. Exclusion of Tertin’s testimony that a tabbed trigger would have prevented Herman’s incident

Tertin’s opinion that it is “more likely than not” that a tabbed trigger would have prevented Herman’s accident is based exclusively on his own *ipse dixit* and was properly excluded by the district court. Trial courts in the Tenth Circuit have expressly rejected expert causation theories, like Tertin’s, which are not supported by any scientific analysis or methodology but constitute merely unsupported speculation. In *Taber v. Allied Waste Sys., Inc.*, No. CIV-13-773-D, 2015 WL

1119750, at *10 (W.D. Okla. Mar. 11, 2015), for instance, the court excluded the testimony of two expert engineers who sought to opine that the plaintiff's injuries were caused by a defect in the ladder from which he fell. As to one of the experts, the court found that his causation opinions were "impermissibly based on his subjective beliefs and unsupported speculation," and as to the other, similarly reasoned that "[his] is conclusions as to the cause of Taber's fall are based on speculation and his 'say so' but not on any reliable methodology." *Id.* at *7. Significantly, neither expert in that case attempted reconstruction of the fall to determine its cause. *Id.* at *6, *9. Also lacking from the experts' opinions were "any underlying methodology, any statistical analysis related to ladder injuries, or any other supporting data." *Id.* at *7. Further, the experts acknowledged that people fall off ladders even when the ladders conform to safety standards. *See id.* at *6. For these reasons, among others, the court found that the proffered expert testimony was "too speculative to render it admissible." *Id.* at *10. *See also Roe v. FCA US LLC*, 42 F.4th 1175, 1180 (10th Cir. 2022) (affirming exclusion of expert testimony where "experts used unreliable methods due to an analytical gap in their theory about how the defective design caused the plaintiff's injury"); *Truck Ins. Exch. v. MagneTek, Inc.*, 360 F.3d 1206, 1212 (10th Cir. 2004) (affirming exclusion of expert's opinion that fluorescent light ballast caused fire based on finding that expert's causation theory unreliable).

Tertin did not take any steps to identify how the subject discharge occurred. (App. Vol. 2 at 204 (p. 103:12-16).) He did not review any peer-reviewed or scientific articles or studies, analyze real world data, perform any calculations, or conduct any testing to confirm whether a tabbed trigger would have prevented the discharge alleged by Herman. (*Id.* at 187 (p. 36:8-19), 188 (p. 40:6-20), 192 (pp. 55:22-56:2), 205 (p. 108:14-21).) Moreover, Tertin does not offer any opinion as to what actuated the trigger in this case—whether it was Herman’s finger or an object. (*Id.* at 184 (p. 23:7-14).) Critically, Tertin also does not know where the trigger was pulled. (*Id.* at 185 (p. 25:9-13).) However, Tertin acknowledged that had Herman’s finger squarely contacted the trigger and pulled it back, the pistol would have discharged regardless of whether it was equipped with a tabbed trigger. (*See id.* at 185 (pp. 25:4-8, 27:4-16).)

Beyond his failure to analyze the facts surround Herman’s incident, Tertin did not even research any real-world data on accidental discharges occurring with pistols equipped with tabbed triggers to support his assertion that tabbed triggers are *generally* effective at preventing unintentional discharges. (*See* App. Vol. 2 at 206-07 (pp. 112:21-113:11).) He has absolutely no information about the occurrence rate of accidental discharges with pistols equipped with tabbed triggers. (*See id.*) Tertin admits that even if he learned that unintentional discharges occur with a higher rate with other pistols that include a tabbed trigger, he would still opine that it was more

likely than not that Herman's accident would not have happened if the P320 had a tabbed trigger simply because, in his view, it is "inherently more safe" (*Id.* at 187-88 (pp. 36:20-37:17), 192 (pp. 54:22-55:21).) Unsurprisingly, then, Tertin not only failed to research real-world data on accidental discharges, but blatantly ignored evidence of real-world data reporting increases in the frequency of accidental discharges with law enforcement officers when moving to pistols equipped with tabbed triggers. (*See id.* at 188-89 (pp. 40:3-43:5).) In sum, although Tertin has no real-world evidence to support his general opinion that tabbed triggers prevent unintentional discharges, he relies entirely on this general opinion to conclude that a tabbed trigger would have prevented Herman's incident. *Davis v. Sig Sauer, Inc.*, No. 3:22-CV-00010-GFVT, 2024 WL 54595, at *3 (E.D. Ky. Jan. 4, 2024) (excluding Tertin's and Vigilante's causation opinions and reasoning "what this Court finds is broad conclusions regarding an alleged defect in Sig Sauer's P320 that are then applied generally to the facts of the case").

Herman argues that the district court abused its discretion in excluding Tertin's causation opinions because it "overlooked or disregarded much of Tertin's testimony." Appellant's Br. at 29. Yet, the supposedly "overlooked" testimony that Herman highlights only underscores the lack of foundation and reliability of Tertin's causation opinions which led the district court to rightfully conclude that such testimony did not meet the admissibility requirements of Rule 702. Specifically,

Herman points to Tertin’s flawed and exaggerated assertions as to how “difficult” it is in general to pull a tabbed trigger and claims that this testimony, combined with Tertin’s observation that, according to Herman’s testimony, he was not “fooling around” with his pistol at the time of the incident is sufficient to conclude that a tabbed trigger most likely would not have been actuated under the circumstances. *See* Appellant’s Br. at 29-30. In other words, Herman admits that Tertin’s “causation” opinion rests entirely on his unsubstantiated view that it is generally difficult to pull a tabbed trigger unintentionally and the supposed lack of evidence that Tertin was “fooling around” with his pistol at the time of the discharge.

It is clear from the district court’s opinion that it did not “overlook” or “disregard” Tertin’s testimony, but rather, correctly found that this testimony failed to establish that Tertin’s causation opinions were based on anything more than speculation without any basis in the facts of this matter. *See Joiner*, 522 U.S. at 146 (where there is “analytical gap between the data and the opinion proffered” the trial court must prohibit admission). Given Tertin’s failure to apply any degree of “intellectual rigor” to his “analysis” of the cause of Herman’s discharge, the district

court's exclusion of his causation opinions was anything but an abuse of discretion.

3. Exclusion of Vigilante's testimony that a tabbed trigger would have prevented Herman's incident

Vigilante relies solely on Herman's testimony as to how the accident occurred in rendering his causation opinion, including accepting Herman's assertion that his finger did not make contact with the trigger, while ignoring any evidence or testimony to the contrary. (App. Vol. 4 at 823-24.) However, Vigilante offers no opinion as to what caused the trigger to move, nor does he offer an opinion on where the trigger was contacted to cause the gun to discharge. (*Id.* at 824 (pp. 14:16-15:4); 825 (p. 17:5-9).) Like Tertin, he doesn't offer these opinions, because he doesn't know. Additionally, Vigilante did not do any testing to confirm whether the physical evidence is consistent with Herman's description of the location of the pistol in his holster at the time of the discharge. (*Id.* at 823-824 (pp. 10:22-13:3); 825 (pp. 18:20-19:4, 19:22-20:2).) In fact, as discussed above, he ignored the physical evidence that demonstrates the subject pistol was not fully holstered when it discharged based on the resulting markings on the holster. (App. Vol. 2 at 231-32, 251.)

Vigilante contends that under his theory of design defect, causation is established based entirely on Herman's assertion that the discharge was unintended and the fact that Herman did *not* testify that his finger pulled back on the face of the trigger. (App. Vol. 4 at 824 (pp. 13:4-14:4).) In other words, Vigilante admits that the particular facts and circumstances of the discharge do not matter and that he

performed no expert analysis at all as to this incident. (*Id.* at 825 (p. 19:9-19).) Vigilante's causation opinions are therefore devoid of any reliable foundation because he has no basis to conclude that Herman's finger or some object pulled the trigger in such a way that it would not also have pulled (and therefore disengaged) a tabbed trigger if one had been present. Like Tertin, Vigilante admitted that he does not know what pulled the trigger, nor does he know where on the trigger the contact that led to the discharge was made. (*Id.* at 824 (pp. 14:16-15:4); 825 (p. 17:5-9).) As a result, Vigilante's opinion that a tabbed trigger would have prevented the trigger from being pulled is based on a speculative assumption that has no basis in the evidence of record.

Moreover, as discussed above, Vigilante fails to support his causation opinions with any objective studies or data. He made no effort whatsoever to determine the rate of discharge of other model pistols that do include tabbed triggers to determine whether the tabbed trigger would prevent accidental discharges where the trigger is contacted. (App. Vol. 3 at 519:21-520:7, 521:7-23.) Had he performed this research, which he claims he attempted to do, he would have found numerous reports of accidental discharges through trigger contact on pistols that include tabbed triggers or other trigger safeties, as discussed above.⁵ Without any reliable data on the accidental discharge rate of other pistols that are equipped with tabbed triggers,

⁵ (See App. Vol. 7 at 1450-58; 1460-1518.)

Vigilante has no basis for even his general opinion that tabbed triggers are generally effective at preventing unintentional discharges, let alone his opinion that a tabbed trigger would have prevented *this* incident.

Herman argues that the district court erred in excluding Vigilante's testimony because Vigilante's "knowledge of how a tabbed trigger functions" combined with Herman's deposition testimony that the discharge occurred when he "pulled up" on his holster provides an adequate basis on which to opine that a tabbed trigger likely would have prevented the incident. *See* Appellant's Br. at 27-28. He further contends that even though Vigilante clearly testified that he did not concern himself with the specific circumstances around Herman's accident or form an opinion as to whether Herman's account of the incident was accurate, he *also* testified that there was no evidence to suggest that Vigilante got his finger on the face of the trigger and pulled it. *Id.* at 27-28. From there, Herman argues that the district court improperly chose to "credit" only some parts of Vigilante's testimony rather than allowing the jury to "resolve conflicting testimony" and issues of credibility. *Id.* at 28-29. Herman is wrong.

Far from making improper or arbitrary determinations about which testimony to credit, the district court carefully considered all of Vigilante's testimony in light of the evidence in the record when reaching its conclusion, as is characteristic of a

careful, thorough *Daubert* analysis:

The district court carefully followed *Daubert* in determining whether Dr. Healy's opinions were founded on scientific principles. What the Millers call nit-picking, we would call being thorough. “The analysis outlined in *Daubert* is extensive, requiring the district court to carefully and meticulously review the proffered scientific evidence.” *United States v. Call*, 129 F.3d 1402, 1405 (10th Cir. 1997) (internal quotation marks omitted). **The court did not exceed the scope of the Daubert inquiry by, for example, considering Dr. Healy's credibility or weighing the evidence.**

Miller v. Pfizer, Inc., 356 F.3d 1326, 1335 (10th Cir. 2004) (emphasis added).

Moreover, even if the district court had “credited” Vigilante’s testimony that he does not believe the trigger was contacted on its face, it is clear from the totality of Vigilante’s testimony that this “opinion” is merely an assumption without foundation and is also not admissible. Based on the above, there can be no question that the district court appropriately exercised its gatekeeping function to exclude Vigilante’s causation testimony.

C. The District Court Correctly Granted Summary Judgment.

Summary judgment should be granted if there is “no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” See Fed. R. Civ. P. 56(c). Once the movant makes a *prima facie* showing that no genuine issue of material fact exists, the burden shifts to the nonmovant. *Whitesel v. Sengenberger*, 222 F.3d 861, 867 (10th Cir. 2000). The nonmovant must go “beyond the pleadings” to establish a genuine issue of material fact “based on more than mere speculation,

conjecture, or surmise.” *Id.*; *Bones v. Honeywell Int’l, Inc.*, 366 F.3d 869, 875 (10th Cir. 2004). Accordingly, if the nonmovant fails to meet his burden, summary judgment must be entered in favor of the movant. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Oklahoma courts uniformly rule that competent, non-conclusory expert testimony is needed for a plaintiff to establish the *prima facie* elements of the case in cases involving complex design issues. *See Roe v. FCA US LLC*, No. CIV-19-167-SLP, 2021 WL 2640107, at *14 (W.D. Okla. May 28, 2021), *aff’d*, 42 F.4th 1175 (10th Cir. 2022) (“Expert evidence is necessary because this case involves the complex issue of the design and function of the Jeep’s shifter assembly.”) (collecting cases). The district court recognized that “[e]xpert testimony as to causation is typically necessary in cases that involve complex issues of design and function.” (App. Vol. 8 at 1758.) This is such a case. A reasonable juror cannot be expected to understand the intricacies of the functioning of the P320 pistol, including how it is designed, without expert evidence.⁶ As such, without admissible expert testimony on causation, Herman’s claims fail as a matter of law. *See Rodgers v. Beechcraft*

⁶ Five other U.S. District Courts deciding similar motions agreed. *See Davis v. Sig Sauer, Inc.*, No. 3:22-CV-00010-GFVT, 2024 WL 54595, at *5 (E.D. Ky. Jan. 4, 2024); *Jinn v. Sig Sauer, Inc.*, No. 20CV1122PGGRWL, 2023 WL 2919558, at *17 (S.D.N.Y. Apr. 12, 2023), *report and recommendation adopted sub nom. Jinn v. Sig Sauer, Inc.*, No. 20CIV1122PGGRWL, 2023 WL 5972507 (S.D.N.Y. Sept. 13, 2023); App. Vol. 2 at 257-271, 273-295, 321-339.

Corp., 759 F. App'x 646, 679 (10th Cir. 2018) (“Given the expert testimony exclusions affirmed above, Appellants either have no expert to testify to causation or no evidence to prove causation.”); *Roe*, 2021 WL 2640107, at *15 (“Given the Court’s decision on the admissibility of the experts’ opinions, Plaintiff fails to show a genuine dispute over whether the alleged defects (the Jeep’s self-shift into reverse and/or lack of an out-of-park alarm) caused Plaintiff’s injuries.”).

While the district court acknowledged that expert testimony may not be required on the specific question of whether an engaged manual thumb safety would have prevented Herman’s gun from accidentally discharging, it correctly found that the factual record does not “permit the inference that a thumb safety would have been engaged.” (App. Vol. 8 at 1758). Herman argues for the first time on appeal that the evidence does support such an inference because he testified at his deposition that his father’s early guidance to him on gun safety included advice to keep your safety on until you are ready to shoot. However, for the reasons discussed *supra*, at 26-27 (1) under well-established Tenth Circuit precedent, this argument should not be considered because Herman failed to raise it in the district court, and (2) even if this testimony were considered, it fails to create a genuine issue of fact as to whether the absence of a manual thumb safety on Herman’s pistol was a proximate cause of his injuries.

Finally, even assuming, *arguendo*, that expert testimony were not required to establish a causal link between the absence of a tabbed trigger and Herman’s injuries, the district court also correctly observed that without this testimony, “Plaintiff’s admissible evidence is...insufficient to create a genuine factual dispute as to causation...From Plaintiff’s testimony, an inference that he inadvertently caused something to push back on the trigger face is equally as valid as an inference that the trigger was grazed.”⁷ (App. Vol. 8 at 1758-59.) Herman argues that in reaching this conclusion, the district court improperly made key inferences in favor of Sig Sauer when it was required to view facts in the light most favorable to Herman as the non-movant. *See* Appellant’s Br. at 22, 35-36. Not so. “Even assuming all of [Herman’s] evidence was true and after indulging every reasonable inference in favor of [Herman], no evidence in the record before us causally connected [Herman’s] injuries to a defect in the [pistol].” *Nash v. Gen. Motors Corp.*, 2007 OK CIV APP 11, ¶ 12, 153 P.3d 73, 76 (rejecting appellant’s assertion that the trial court failed to apply the correct standard in granting summary judgment.).

Herman claims that the district court improperly inferred in Sig Sauer’s favor that Herman’s trigger was pushed back on its face when, according to him, his theory

⁷ Notably, the term “grazed” used to describe the contact which actuated the trigger on Herman’s P320 is misleading given the undisputed fact that the trigger pull weight—i.e., the force required to pull the trigger—as measured by Herman’s own expert was at least 7 pounds. (App. Vol. 2 at 197 (pp. 74:24-75:15).)

that the pistol was “side-pulled” is more convincing. On the contrary, the district court did not find or infer “in Sig Sauer’s favor” that Herman’s trigger was pulled across its face. Rather, it correctly determined, *based on the admissible evidence in the record*, that an inference that the trigger was side-pulled was *no more likely* than an inference that it was pulled across its face in a manner that would have disengaged a tabbed trigger. Herman points to nothing in the record on appeal to contradict or undermine this finding. In lieu of facts or evidence, he resorts to rank speculation and inflated, baseless claims about how “difficult” it is to pull a tabbed trigger to bolster the supposed improbability that a tabbed trigger would have been pulled here. *See Appellant’s Br. at 30, 40.*

For instance, Herman accepts that his perception that the trigger was not contacted at all is incorrect, but nevertheless argues that his perception that he did not pull back squarely on the trigger should be accepted as gospel because he has a lot of experience firing guns. *See Appellant’s Br. at 13, 36.* Herman also argues that the conflicting accounts of how the incident occurred, on their own, amount to a “genuine issue of material fact that makes summary judgment improper.” *Appellant’s Br. at 13.* Despite his attempt to muddy the waters, however, the question at hand is not whether there are conflicting accounts of how the incident occurred, but whether, in view of the entire record, there is sufficient evidence of

“probable causation” to reach the jury. The district court correctly determined that there was not.

While the summary judgment standard requires the district court to view facts in the light most favorable to the non-movant, it does not require or, indeed, permit the court to blindly accept the non-moving party’s unsupported *claims* which are not corroborated by admissible evidence. Herman must present at least some evidence beyond his or his proffered experts “say so” from which a jury could reasonably conclude that it was more likely than not that a tabbed trigger would have prevented his accidental discharge and therefore, that the accident was proximately caused by its absence. The district court correctly found that Herman failed to do so and properly granted summary judgment dismissing his claims.

V. CONCLUSION

For the foregoing reasons, Sig Sauer respectfully requests that the Court affirm in full the District Court’s decision (1) granting Sig Sauer’s motion to exclude the causation evidence and opinions of James Tertin, (2) granting Sig Sauer’s motion to exclude the causation evidence and opinions of William Vigilante, and (3) granting Sig Sauer’s motion for summary judgment.

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Respectfully submitted,

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