

Case No. 23-6136

IN THE COURT OF APPEALS FOR THE TENTH CIRCUIT

TYLER HERMAN,

Plaintiff/Appellant

v.

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
D.C. No. CIV-21-1038-R

APPELLANT’S BRIEF IN CHIEF
DIGITALLY SUBMITTED
ORAL ARGUMENT IS REQUESTED

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STATEMENT OF PRIOR OR RELATED APPEALS

There are no prior or related appeals regarding this case.

JURISDICTIONAL STATEMENT

The United States District Court for the Western District of Oklahoma had diversity jurisdiction in this case under 28 U.S.C. § 1332: the amount in controversy exceeds \$75,000; and there is complete diversity between Plaintiff John Tyler Herman, a citizen of Oklahoma, and Sig Sauer, Inc., a corporate “citizen” of New Hampshire. The Order on appeal was entered on September 8, 2023, disposing of all claims against Sig Sauer. Judgment was entered in favor of Sig Sauer, Inc. on the same date. Herman timely filed his notice of appeal on September 15, 2023, within the thirty days permitted under Fed. R. App. P. 4(a)(1)(A). Appellate jurisdiction derives from 28 U.S.C. § 1291, because this appeal derives from a final decision of the district court.

INTRODUCTION

Plaintiff Herman brought this suit because he was severely injured when his P320 pistol manufactured by Sig Sauer, Inc. (the “Sig P320”) fired when it should not have, and seriously wounded him. Herman alleges this incident happened because the P320 was defectively designed by Sig Sauer. His expert witnesses (James Tertin and William Vigilante) explained why this pistol was dangerous to its owners and how easy and inexpensive it would have been for Sig Sauer to have

incorporated simple safety devices utilizing existing technology that all of its competitors use as standard-equipped features on similar pistols. The experts also opined that, because of the P320's design and because Sig Sauer did not utilize these available safety devices, it was reasonably foreseeable to the company that its pistol would lead to highly dangerous unintended discharges.

The trial court issued summary judgment against Herman even though he had produced evidence from himself and his experts that a rational jury could accept, showing that had Sig Sauer incorporated appropriate safety devices on the P320, he more likely than not would not have been seriously wounded by his own Sig P320 discharging without intent.

The trial court reached this result by making significant legal errors. First, the court incorrectly refused to credit the conclusions of Herman's experts because the court stated those experts could not pinpoint exactly why the Sig P320 discharged. However, the Court's criticism should not have been a decisive factor because the experts determined that Sig Sauer's failure to incorporate either of two available safety devices meant that the defects in the pistol's design more likely than not caused Herman's injury. Because a rational jury could have accepted that conclusion, the trial court was barred as a matter of law from excluding the testimony of Herman's experts. For this same reason, the trial court could not appropriately grant summary judgment to Sig Sauer.

Moreover, the trial court compounded its legal errors by accepting inferences drawn from the facts in favor of Sig Sauer. But the law required that any such inferences had to be made in favor of Herman at this stage because Sig Sauer was the moving party asking the court to preclude a trial. Under these circumstances, the summary judgment entered for Sig Sauer must be overturned so that Herman can present his case to a jury.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the district court committed reversible error by excluding the evidence provided by Herman's experts, even though the experts had a reliable factual foundation on which to base their opinions?

Answer: Yes

2. Whether the district court independently committed reversible error by granting summary judgment to Sig Sauer after excluding the conclusions of his experts and making inferences in favor of Sig Sauer, when governing law required the court to do exactly the opposite?

Answer: Yes

STATEMENT OF FACTS

The Sig Sauer P320

A. As part of the development of his case, Herman retained two expert witnesses, James Tertin and William Vigilante Ph.D.

Tertin has been a professional gunsmith since graduating in 1972, from the Gunsmithing School at Trinidad State College in Colorado. He has designed guns for a living for his entire adult life. Over the past fifty years, he has been awarded seven firearm design patents. He is currently the director of research and development for Magnum Research, a firearms manufacturer based in Minnesota. He is currently responsible for designing and developing new firearms. (V4, p. 730, Tertin Report).

Tertin physically examined and tested the Sig P320 and other competitor pistols, and reviewed discovery materials, depositions, expert reports, videos, and product literature for the P320 and competitor manufacturers. (V4, p. 730, Tertin Report; V. 7, p. 1288, Tertin Test Videos).

Dr. Vigilante is a human factors and ergonomics expert in this matter. He has more than 25 years of experience in psychological and human factors research, with a focus on product design, hazard identification and mitigation, risk perception, situational awareness, perception-reaction time, and the design and testing of warning systems. (V4, p. 752-3, Vigilante Report). Dr. Vigilante is also a National

Rifle Association certified firearms instructor and Range Safety Officer with instructor ratings and experience in teaching. Dr. Vigilante works with, teaches and trains members of law enforcement, the military and civilians in the use and safety of handguns. (V4, p. 752-3, Vigilante Report).

The purpose of Dr. Vigilante’s “investigation was to determine if the Sig P320 has an elevated risk of unintentional discharge; if the elevated risk of unintentional discharge was foreseeable to Sig Sauer; [if] Sig Sauer should have included a manual external safety on its Sig P320; [and if] Sig Sauer’s failure to include a manual external safety was the cause of the subject unintentional discharge.” (V4, p. 752, Vigilante Report).

In connection with his evaluation, Vigilante reviewed and relied upon several depositions, Sig Sauer’s document production, records of other P320 unintended discharges, photographs and video of inspections of Herman’s Sig P320, examination and inspection of P320s and competitor pistols including the Glock 19, and photographs of the holster used by Herman. (V4, p. 822-4, Vigilante Deposition 8:13-13:19; V4, p. 754-5, Vigilante Report; V7, p. 1429, Vigilante Test Videos).

The trial court accepted the qualifications of Tertin and Vigilante as experts. (Trial Court Opinion, p. 5).

B. Herman’s experts reported that the Sig P320 is designed differently from any other pistol that has been placed on the market by responsible gun

manufacturers. The P320 is the world's first "single-action" or pre-cocked gun ever produced without an external manual safety. Every other gun manufacturer that has ever sold a single-action gun commercially has included at least one external safety to prevent unintended discharges. (V4, p. 735, Tertin Report).

In a single-action pistol, the firing mechanism is cocked prior to the trigger being pulled. The trigger serves the sole purpose of releasing the fully cocked firing mechanism. A single-action trigger thus requires significantly less effort to pull than a double-action trigger. (V4, p. 733, Tertin Report).

As a result of their review and examinations, both of Herman's experts concluded that the P320 is unreasonably dangerous without the use of any external safety. (V4, p. 748-9, Tertin Report; V4, p. 781-2, Vigilante Report).

There are three primary types of external safeties that can be equipped on a striker-fired pistol: thumb safeties, grip safeties, and tabbed trigger safeties.¹ These mechanisms are included in gun designs in order to prevent unintended discharges by manually blocking the trigger from being pulled until the user decides to actually fire. "Any of the three could have been designed into the P320 with minimal added cost or disruption to the pistol's functionality...." (V4, p. 742, Tertin Report). The

¹ The U.S. Army only agreed to purchase the P320 after a manual thumb safety was included in the design made specifically for the Army. (V4, p. 768, Vigilante Report).

two widely-used and industry-accepted safeties that are the focus of this case are the tabbed trigger safety and the thumb safety.

“A trigger safety, 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. Trigger safeties are able to effectively and efficiently prevent accidental discharges because they require a user’s finger to be placed squarely on the center of the trigger prior to the pistol being discharged. Therefore, the user is required to more deliberately place their finger on the trigger to fire the weapon.” (V4, p. 744, Tertin Report).

An example of a common tabbed trigger safety, which is widely used in the industry, but not used or offered by Sig Sauer, is depicted below to illustrate how a finger must be squarely across the trigger face to actuate the trigger. Image from Ex. C, p. 15.



Glock tabbed trigger safety

This type of safety is not restrained by patents and is used by the majority of gun manufacturers. Herman's experts performed testing on a tabbed trigger and the P320 non-tabbed trigger to determine if the tabbed trigger could be actuated by a graze or "side-pull" of the trigger – a pull of the trigger without placing a finger or object flush across the trigger face. (V4, p. 744, Tertin Report; V4, p. 779-80, Vigilante Reports; V7, p. 1288 Tertin Testing Video; V7, p. 1429, Vigilante Testing Video). These experts tested the triggers by repeatedly performing side-pull analyses of the triggers at different areas- the top side, the middle side and the bottom side, and the upper, middle and lower face- to simulate real life possible scenarios. *Id.*

Significantly for this case, this testing demonstrated that a pistol with a tabbed trigger could not discharge with merely a graze or side-pull, regardless of what side area of the trigger was contacted. Of the ten areas that a trigger could be pulled, a discharge could only occur on a pistol with a tabbed-trigger if a user's finger or an object was placed through the trigger guard and flush across the tabbed-trigger face. Several rounds of testing revealed the trigger on a P320 could easily be actuated by a graze or side-pull on the side of the trigger. (V7, p. 1288 Tertin Testing Video; V7, p. 1429, Vigilante Testing Video). As explained by Dr. Vigilante, the tabbed trigger has no downside and does not hinder or slow a user from being able to deliberately pull the trigger. (V4, p. 779-80, Vigilante Report).

Tertin also explained how a different safety device – a “thumb safety” – would have prevented the injury to Herman. “A thumb safety is a switch on the side of the pistol that can be flipped on or off with the user’s thumb. Typically, the thumb safety is flipped up to put the gun in “safe mode,” and down to place it in “fire mode.” (V4, p. 742, Tertin Report). Significantly for this case, the trigger cannot be pulled to fire the gun when the thumb safety is in “safe mode”. *Id.* Thus, if a thumb safety had been included on the Sig P320, as long as Herman engaged that safety, he could not have been shot by an unintended discharge from the gun, unless the safety were first disengaged.

A thumb safety was not provided as a standard safety component on the Sig P320. Although it was an option, it was offered only on approximately 3 of the 24 P320 models. Additionally, the thumb safety was only offered as an option beginning just weeks or months before Herman purchased his pistol. Until then, the P320 was not offered with even the option of a thumb safety. Herman was not aware that a thumb safety was an option on a P320.

Sig Sauer employee Matt Farkas testified that the company has seen more reports of unintended discharges from its P320 model than any other gun sold by Sig Sauer. (V6, p. 1168, Deposition of Matt Farkas 73:10-17). In well over 150 incidents known to Herman, and in dozens of incidents known to Sig Sauer, the P320 has discharged when the user either did not pull the trigger, or where the trigger was not

knowingly and intentionally depressed. (V4, p. 834, Incident Videos; V4, p. 835 Other Similar Incident Affidavits; V5, p. 841, *Bevacqua v. Sig Sauer*, 1:23-cv-00290, Complaint ¶ 80-315 (cataloging other substantially similar incidents)).

Several incidents of P320s discharging without the user touching the trigger with their finger have been caught on video; and many more have been attested to under penalty of perjury. (V4, p. 834, Other Similar Incident Videos). Many responsible gun owners and gun users who have had unintended discharges as a result of the P320's design were not struck, and have provided Affidavits and/or sworn testimony regarding their similar experiences purely to prevent future and current gun owners from becoming unexpectedly injured. (V4, p. 835 Other Similar Incident Affidavits).

Herman and the P320 Incident

Herman's experience with firearms began as a child. (V4, p. 693, Herman deposition 21:23-22:5). Herman testified that he was taught the principles of firearm safety. One of those principles was to "always have your safety on until you're ready to shoot." (V4, p. 693, Herman Deposition 23:2-19). In approximately 2015, Herman obtained a concealed carry permit. (V4, p. 693-4, Herman Deposition 24:20-14, 26:6-23).

On February 2, 2018, Herman attached a leather appendix-style holster to his pants with his loaded Sig P320 handgun² in the holster. (Trial Court Opinion, p. 2). Appendix-style holsters are a common alternative to side-carry holsters, because they allow for a gun to be carried in a more concealed manner. Herman purchased the appendix-style holster to conceal carry his Sig P320 within his community, where his wife worked as an Oklahoma City police officer and where Herman felt that his conceal carry pistol would offer him defensive personal protection.

When Herman attempted to remove the holster from his pants with the gun in the holster, the Sig P320 discharged and struck him in his groin area. (Trial Court Opinion, p. 2). Herman described the incident during his deposition:

So that morning I got up, took the holster out of the pouch, and then put the gun in the holster. Then I unbuttoned my pants, put the holster with the gun already in it on my waistband, then I just buttoned my pants. Very quickly I decided I didn't like it in the front. It was uncomfortable, and I wasn't comfortable with a gun with a chamber -- a chambered gun just in the front, in general.

So then I went to -- reached over the gun to grab the holster, and I pulled, and it kind of got caught up, so I pulled a little harder on the holster, and just when I pulled up, that's when -- all I remember, it just went off, and then I remember falling on the ground and yelling or kind of screaming a little bit. (Trial Court Opinion, p. 2; V4, p. 702-3, Herman Deposition, 60:12-61:2.)

² Herman's Sig P320 was a "pre-upgrade" model. (V4, p. 731, Tertin Report). This model was ultimately subject to a "voluntary upgrade" when Sig Sauer learned of the gun's susceptibility to unintended discharges when dropped or impacted. (V4, p. 773, Vigilante Report).

In describing how he was removing the holster from his pants and where his finger was placed, Herman explained:

“I reached over the gun, grabbed the whole holster to take it out as one unit.... So my hand was only on the holster on this side, and then my finger, the pointer finger, I just kind of lifted up on that clip a little bit for the holster, and I pulled like that. (Indicating).” (V4, p. 705, Herman Deposition, 71:21-72:14).

He testified that he had his hand on the side of the gun closer to the button on his jeans. (V4, p. 705, Herman Deposition, 72:24-73:2). He was trying to pull the holster out and up with his index finger. (V4, p. 706, Herman Deposition 73:3-10).

Herman expressed confusion about how the gun discharged, and stated that he did not believe that he pulled the trigger. (V4, p. 725, Herman Deposition, 149:20 – 150:17). (As discussed below, Sig Sauer contends that Herman’s Sig P320 came out of the holster and his finger entered the trigger guard, went flush across the minimally exposed full trigger face, and pulled the trigger.)

Herman’s wife at the time, Oklahoma City Police Officer Elizabeth Herman, was the only person present, but she did not witness the discharge. (V4, p. 787, Elizabeth Deposition, 13:24-14-4). Immediately after the discharge, Elizabeth Herman exclaimed to the 911 dispatcher: “My husband accidentally shot himself.” (V3, 604, 911 Recording Place Holder). In the audio recording, Mrs. Herman can be heard asking Mr. Herman: “Did your finger slip.” Id. Mr. Herman responds:

“No. I thought I had the case in my hand. I was pulling it out of my pants....and when I went to pull the clip off...[inaudible].” Id.

Herman was interviewed by responding police officer, Sergeant Jonathan Hurd following the incident. Officer Hurd included the following description in his report:

“[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.” (Trial Court Opinion, p. 2).

Herman does not have a recollection of speaking with Sergeant Hurd. (V4, p. 707, Herman Deposition, 78:14-20, 83:18-20). It is Herman’s position that the discrepancy between his account and Sergeant Hurd’s account of the incident is a genuine issue of material fact that makes summary judgment improper.

Notwithstanding Herman’s belief that he did not pull on the trigger, he accepts that there must have been some contact with the trigger, albeit unintentional and inadvertent, to result in the unintended discharge. Though there is no evidence establishing the exact way in which the trigger was contacted, Herman’s experts (Vigilante and Tertin) agree that there must have been some form of contact with the Sig P320’s trigger in order for it to discharge. (V4, p. 748-9, Tertin Report; V4, p. 781-2, Vigilante Report).

The facts currently in the record support Herman's experts' conclusions that the Sig P320 is defectively designed and that Herman would more likely than not have escaped injury from this defective pistol because 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.

The Expert Opinions of Tertin and Vigilante

Based on the known facts, Tertin opined the following: "The fact that nearly every Sig Sauer P320 sold to law enforcement and the general public is sold without any type of manual safety makes the P320 unique among single-action pistols; and uniquely dangerous." (V4, p. 745, Tertin Report). In addition, the P320 is singularly capable of an unintentional discharge "because of its short, lightweight trigger pull along with its complete lack of any sort of safety which can block the trigger from being inadvertently depressed." (V4, p. 746, Tertin Report).

Tertin stated the following conclusions:

The Sig P320 is unreasonably dangerous and defectively designed because the combination of its extremely short single-action trigger-pull and lack of external safeties makes it far too easy for the trigger to be accidentally actuated.

Single-action pistols must have an external safety that blocks the trigger from being inadvertently discharged because the extremely short distance the trigger must travel to release the firing mechanism creates a high risk of accidental discharge.

Sig Sauer could have easily included a manual thumb safety, grip safety, or tabbed trigger safety on the P320.

An ordinary user of the Sig P320, without detailed knowledge of the internal mechanics of the pistol, would likely not recognize how dangerously defective and out of the ordinary this pistol's design is.

In the event Herman's trigger was touched by his finger or a foreign object, the firearm most likely would not have discharged if it was equipped with a manual safety. (V4, p. 748-9, Tartin Report).

Vigilante reached the following conclusions: "[t]he Sig P320 trigger is significantly more sensitive than competitor striker-fired guns because of the substantially reduced movement required to fire the gun, and as a result is more prone and susceptible to unintentional discharge than other striker-fired guns." (V4, p. 765, Vigilante Report).

Moreover, "[t]he combination of the [single action] type action in conjunction with the relatively short trigger pull helps the Sig P320 have a "short, crisp trigger pull" and "match trigger" compared to other striker fired guns. However, it also means the trigger is significantly more sensitive than competitor double action only (DAO) striker fire guns in that less movement of the trigger is needed to fire the gun." (V4, p. 766, Vigilante Report).

Vigilante testified:

"unintentional discharge could occur for multiple reasons....there could be – an inanimate object that is pressuring the trigger, be it a piece of clothing, a button a zipper, the size of a holster can move the trigger inadvertently...in addition to a drop and in addition to the user's finger inadvertently coming into contact with it I

think are the three recognized ways in which unintentional discharge could occur with this firearm.

(V7, p. 1366, Vigilante Deposition in *Slatowski v. Sig Sauer*, 12:2-20).

With regard to Herman's incident, Vigilante stated:

- Q. Do you have any opinion one way or another as to whether his finger got fully on the face of the trigger in this case?
- A. There's no evidence that it did.
- Q. Is there any evidence that it didn't?
- A. Mr. Herman's testimony.
- Q. Which defers (*sic*) from the police report; correct?
- A. It is different. There's nothing in the police report that says his finger got on the full face of the trigger and pulled back.
- Q. You're just taking Mr. Herman's word for it, for what happened?
- A. And the lack of any other evidence. (V7, p. 1356, Vigilante 13:13-14:5).

Vigilante further noted that “[t]he risk of unintended discharge associated with an object inadvertently and/or unknowingly contacting the trigger was reasonably foreseeable to Sig Sauer. Given its intended use and user population, the increased risk of an object inadvertently contacting the trigger of a Sig P320 was reasonably foreseeable to Sig Sauer.” (V4, p. 771, Vigilante Report).

Vigilante also definitively stated that “[t]he design safety hierarchy dictates that if the hazard can be reasonably designed-out or eliminated from the product, the manufacturer has the responsibility to do so and not rely upon a lower step. Similarly, if the hazard cannot be eliminated through design but can be controlled through

guarding (e.g., manual external safeties), warnings and/or training should not be relied upon as the sole hazard mitigation strategy... Product warnings, instructions, and training should only be used as a means of mitigating hazards that cannot be eliminated by design or mitigated through the use of safeguards.” (V4, p. 776, Vigilante Report).

Vigilante further explained that, “[g]iven the increased risk of unintentional discharge associated with the design of the Sig P320 trigger.... Sig Sauer should have integrated an external manual safety (e.g., a tab trigger safety and/or manual thumb safety) into the design of the handgun.” (V4, p. 782, Vigilante Report).

Finally, Vigilante concluded with his overarching expert view that “[h]ad Sig Sauer integrated an external manual safety into the design of the Sig P320 it would have significantly reduced the risk of an unintentional discharge without adversely affecting the utility of the handgun. The time, money, and effort to integrate an external manual safety into the Sig P320 was not cost prohibited.” (V4, p. 782, Vigilante Report). Had Sig Sauer integrated a tab trigger safety or thumb safety into the design of the Sig P320, the unintentional discharge that seriously injured Herman would most likely not have occurred and Herman would not have been injured. (V4, p. 782, Vigilante Report).

The District Court's Ruling

Sig Sauer moved to exclude the testimony of Herman's experts and for summary judgment.

In response, the trial court first addressed the issue of expert testimony. Order at 5-9. It must initially be noted that the trial court agreed that Herman provided sufficient evidence that the P320 was defectively designed such that expert preclusion and/or summary judgment was not appropriate on that issue. As noted in *Herman*, and based upon that court's analysis of Plaintiffs' expert opinions, "Plaintiff has provided evidence that the P320 is defectively designed because it lacks a manual safety." (Trial Court Opinion, p. 12).

However, the trial court adopted its own judgment on the issue of causation, and thereby gave a jury no ability to make this determination, as the law requires. With respect to Vigilante, the trial court found that he did "not identify any factual basis for his conclusion that a manual safety would have most likely prevented this incident." (Trial Court Opinion, p. 7). Thus, the court held that Vigilante's "causation opinion [wa]s not sufficiently reliable as applied to the facts of this case." *Id.* Similarly, the trial court found that "[i]f Mr. Tertin does not know where the trigger was pulled, whether a thumb safety would have been engaged, or even whether tabbed triggers reduce the rate of unintentional discharges, his conclusion that a

manual safety would likely have prevented the accident is simply speculation.” (Trial Court Opinion, p. 8).

The trial court further ruled that, because neither of Herman’s expert witnesses knew whether the Sig P320 discharged as a result of a grazing pass or bump, nor whether a thumb safety would have been engaged, “their respective opinions that a manual safety most likely would have prevented the accident are speculative and inadmissible.” (Trial Court Opinion, p. 8-9). Thus, the trial court excluded the testimony of both of Herman’s experts in relation to causation.

The trial court next considered whether summary judgment was proper based on Herman’s lack of admissible evidence to establish causation. (Trial Court Opinion, p. 10-11). The court noted that the parties did not dispute that causation was necessary for all of Herman’s claims, including negligence and product defect. With respect to product defect, the court found that “[i]t is not enough to merely contend that a defect existed, show that an accident occurred, and assume the two are necessarily related,” but “there must also be some admissible evidence from which a reasonable jury could conclude that this incident was more probably than not caused by the defective product.” (Trial Court Opinion, p. 12).

Significantly, the trial court recognized that Herman could prevail if a rational jury could conclude, based on the facts in the record, that the defect in the Sig P320

more likely than not caused Herman's injury. Yet, the court rejected Herman's argument that the factual record demonstrates exactly that.

The trial court first refused to credit any testimony from Herman's experts regarding causation from the Sig P320's safety defects because those experts could not know for certain what caused Herman's pistol to unintendedly discharge. *Id.* Next, the court rejected Herman's argument that causation could be established through circumstantial evidence. (Trial Court Opinion, p. 13). With respect to the thumb safety device that Sig Sauer could have included, the court held that "the limited evidence on this topic suggests [the inference that a thumb safety would not have been engaged]" because Herman testified that he was not thinking of a manual safety when he purchased the Sig P320, and there was no evidence that Herman preferred a manual safety, wanted a manual safety, or always used a thumb safety. *Id.* Thus, the court found that, without evidence permitting an inference that a thumb safety would have been engaged by Herman, the finding that it would have prevented the accident is speculation. *Id.*

The court similarly found Herman's evidence insufficient to establish a genuine factual dispute as to causation with respect to the tabbed trigger device. *Id.* The court noted that "[f]rom 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." (Trial Court Opinion, p. 14). The trial court held that

Herman only presented a theory of possible causation and there was therefore insufficient evidence to allow a jury to rationally conclude that the Sig P320's defect caused the unintended discharge. *Id.* Based on these rulings, the trial court granted Sig Sauer's motion for summary judgment as to all of Herman's claims. (Trial Court Opinion, p. 15).

SUMMARY OF THE ARGUMENT

The trial court erred in granting Sig Sauer's motion to exclude the opinions of Herman's proposed experts as to the issue of causation. That court erred by: (1) improperly dismissing the factual basis on which the experts relied; and (2) stepping into the role of the fact finder to resolve conflicting testimony and weigh the evidence.

In determining whether Herman's experts based their opinions on a reliable basis, the trial court improperly neglected to consider all the testimony and evidence in the record. Instead, the court pointed to isolated statements in testimony to support its conclusion that there was no factual basis for the expert opinions. However, a review of the full record shows that the experts both had reliable factual bases for their opinions, and to the extent there were any questions of credibility or conflicting testimony, the governing law provides that these questions had to be left for the jury to determine. This ruling thus constituted an abuse of discretion, and the trial court's judgment must be reversed.

The trial court further erred in subsequently granting Sig Sauer's motion for summary judgment. A full review of the record demonstrates that there were unresolved genuine issues of material fact as to the cause of the Sig P320's discharge, and whether or not it would have been prevented by the presence of an external safety. In determining whether or not to grant summary judgment, the court must make all reasonable inferences in favor of the non-moving party (here, Herman). Instead, the trial court made key inferences in favor of Sig Sauer, in contravention of the governing law.

Specifically, in order to negate the presence of any material question of fact that a tabbed trigger (which indisputably would have stopped a side pull if present) could have prevented this accident, the judge accepted the inference (urged by Sig Sauer) that a direct pull occurred. He did so, acknowledging that it was, in his view, "equally" likely a side pull occurred. As we will explain, the evidence actually makes it much more reasonable to infer that a side pull occurred. However, if two opposing inferences are equally reasonable, the summary judgment standard requires a judge to accept the inference favorable to the *non-movant* (here, Herman), not the one favorable to the movant (Sig Sauer).

Second, in order to negate the presence of any material question of fact that a thumb safety (which, if engaged, would indisputably have stopped both a side pull or a direct pull) could have prevented this accident, the judge -- without any

foundation -- inferred that Herman would not have engaged a thumb safety if present. The judge further denied the existence of evidence in the record from which a jury could have inferred that Herman would have engaged such a thumb safety. By ignoring evidence enabling an inference in Herman's favor and drawing an adverse inference, the judge again contravened the summary judgment standard.

Since there is a reasonable basis from which a jury could infer both (1) that a side pull (not a direct pull) caused the discharge, and (2) that Herman would have engaged a thumb safety if present, a reasonable jury could (and likely would) find that Sig Sauer's failure to include either a tabbed or thumb safety caused the accident and rendered the gun defective. Accordingly, the summary judgment on behalf of Sig Sauer must be reversed.

STANDARD OF REVIEW

A. Standard of Review for Exclusion of Expert Opinions

This Court reviews de novo “whether the district court applied the proper standard in determining whether to admit or exclude expert testimony.” *Dow Chem. Co. v. Seegott Holdings, Inc. (In re Urethane Antitrust Litig.)*, 768 F.3d 1245, 1260 (10th Cir. 2014). “If the proper standard was applied, [the Court] will reverse only for abuse of discretion.” *Id.* “An abuse of discretion occurs when a ruling is “arbitrary, capricious, whimsical or manifestly unreasonable or when [the Court] is

convinced that the district court made a clear error in judgment or exceeded the bounds of permissible choice in the circumstances.” *Id.*

Expert testimony is admissible when it is relevant and reliable. *Id.* “To ensure reliability, district courts play an essential ‘gatekeeping’ role.” *Id.* “This role requires assessment of the expert witness’s qualifications and the reliability of the opinions.” *Id.* The emphasis that an expert opinion be based on “‘sufficient facts or data’ is not intended to authorize a trial court to exclude an expert’s testimony on the ground that the court believes one version of the facts and not the other.” *Vox Mktg. Grp., LLC v. Prodigy Promos L.C.*, 521 F. Supp.3d 1135, 1143 (Utah Dist. Ct. 2021). Rather than determining “whether the fact finder will give the expert evidence any weight,” the trial court may only focus “on which side of the ‘Reliable/Unreliable’ line the expert evidence falls.” *Id.* at 1142.

B. Standard of Review of an Order Granting Summary Judgment

An order granting summary judgment is reviewed “de novo...to determine whether any disputed material facts exist...”. *Leone v. Owsley*, 810 F.3d 1149, 1153 (10th Cir. 2015). “Summary judgment is appropriate *only when* the moving party has established there is no genuine issue of material fact, and that he is entitled to judgment as a matter of law.” *Maughan v. Sw Servicing*, 758 F.2d 1381, 1387 (10th Cir. 1985)(emphasis added).

“A fact is ‘material’ if, under the governing law, it could have an effect on the outcome of the lawsuit.” *Leone*, 810 F.3d at 1153. “A dispute over a material fact is ‘genuine’ if a rational jury could find in favor of the nonmoving party on the evidence presented.” *Id.* This Court must “view facts in the light most favorable to the non-moving party and ‘draw all reasonable inferences in [his] favor.’” *Id.* “Summary judgment in favor of the party with the burden of persuasion...is inappropriate when the evidence is susceptible of different interpretations or inferences by the trier of fact.” *Id.*

ARGUMENT

A. The District Court Abused its Discretion in Excluding Herman’s Expert Witness Testimony as to Causation

The testimony of Herman’s expert witnesses, as it related to the cause of the unintended discharge by the Sig P320, was sufficiently reliable to be admissible, and thus, the trial court erred in excluding this testimony. A complete review of the record demonstrates that there was sufficient evidence on which Herman’s experts could rely in forming their opinions, and that the trial court erred in making its own competing determinations as to credibility of witnesses and conflicting testimony. Thus, the experts’ conclusions that the failure by Sig Sauer to include either a tabbed trigger or a thumb safety made the P320 defective and dangerous to owners, and more likely than not caused Herman’s injury should have compelled denial of summary judgment to Sig Sauer.

1. Exclusion of Testimony Relating to a Tabbed Trigger Safety

The trial court incorrectly found that the opinions by Tertin and Vigilante that a tabbed trigger safety would have prevented Herman's Sig P320 from unintentionally discharging were speculative and lacked a reliable factual foundation. (Trial Court Opinion, p. 7). In reaching this conclusion, the trial court cited to testimony that neither expert knew what part of the trigger had been contacted by Herman as he tried to remove his appendix holster. *Id.* The court believed this to be a "critical fact", without which, the assertion that a tabbed trigger would have prevented Herman's injury was speculative. (Trial Court Opinion, p. 7). However, the evidence and the applicable law establish why this is incorrect.

The evidence in this case demonstrates that there are only three ways a Sig P320 can discharge, through: (1) inertia (i.e., if the firearm is dropped); (2) contact between the trigger and a foreign object; and (3) contact between the trigger and a body part. (V4, p. 824, Vigilante Deposition, 15:6-24; V4, p. 767-71 (citing testimony of Sig Sauer engineer Sean Toner)). There is no evidence that Herman's Sig P320 was dropped, and this is not in dispute between the parties. Thus, because the evidence shows that the Sig P320 discharged, the trigger of the Sig P320 was necessarily either contacted by a foreign object or by a body part. The inability of either expert to demonstrate definitively which part of the trigger was contacted is not thus a critical fact.

a. Vigilante's Testimony

The trial court decision to exclude Vigilante's testimony with relation to the utility of a tabbed trigger essentially boils down to the following: because Vigilante could not say with certainty where the pistol's trigger had been contacted, it is possible Herman got his own finger into the holster and onto the full face of the trigger and pulled straight back, which would have made a tabbed trigger safety ineffective, and thus, Vigilante's opinion that a tabbed trigger would have prevented the injury to Herman is speculative. (Trial Court Opinion, 7-9). The trial court recognized that Herman's evidence showed that the P320 could discharge if grazed or bumped, but the court discounted the effect of this fact because Herman's experts did not know if that was what happened here. (Trial Court Opinion, p. 14).

Contrary to the trial court's approach, the governing law does **not** require Vigilante to be able to say with certainty how the trigger of Herman's Sig P320 was actuated. *Kieffer v. Weston Land, Inc.*, 90 F.3d 1496, 1499 (10th Cir. 1996). Instead, Vigilante's opinion must be based on facts that enable him to express a reasonably accurate conclusion. *Id.* Vigilante testified that his understanding of the Sig P320's discharge, based on Herman's testimony, was that the latter was attempting to remove his holster with the Sig P320 holstered and "as he pulled up, the gun discharged from within the holster." (V4, p. 822-23, Vigilante Deposition, 8:13-9-1). Based on this evidence, and his knowledge of how a tabbed trigger functions,

Vigilante concluded that the evidence indicated that Herman did not in fact get his finger on the full face of the trigger and pull. (V4, p. 824, Vigilante Deposition, 15:19-24, 16:1-9).

Although Vigilante conceded that, had Herman gotten his finger full on the front of the face of the trigger and pulled the trigger, the tabbed trigger would not have made a difference, Vigilante immediately followed this by stating there was no evidence to suggest that that was what happened here. (V4, p. 824, Vigilante Deposition, 13:4-24, 14:1-5).

Importantly, the trial court did concede in a footnote that Vigilante testified that although he did not know if the trigger was contacted, he “do[es] know that it wasn’t a full finger pressed on the front of the trigger.” (Trial Court Opinion, p. 7 n.3). But the court discounted this testimony because at other times Vigilante said that he was not asked to determine how the trigger was pulled and had no opinion as to whether Herman’s description of the unintended discharge was actually what happened. *Id.* In deciding which parts of Vigilante’s testimony to credit, the trial court further erred, because the law commands that “[i]t is for the jury, as the fact finder, to resolve conflicting testimony, weigh the evidence, and draw inferences from the facts presented.” *United States v. Dewberry*, 790 F. 3d 1022, 1028 (10th Cir. 2015). The trial court provided no explanation about why it chose to disregard this controlling legal principle.

Thus, because there was evidence providing a factual basis on which Vigilante relied when forming his expert view that Herman did not contact the trigger full on the face, and thus, a tabbed trigger would have prevented the unintended discharge, the trial court simply had no legal authority to exclude Vigilante's testimony and should have left all issues of conflicting testimony or credibility in the hands of the jury, where they belong. See, *Id.*

b. Tertin's Testimony

The trial court's similar finding that Tertin's testimony was speculative was equally flawed because it disregarded governing law. The court found that Tertin's opinion that a tabbed trigger would have prevented the Sig P320 from firing was speculative because Tertin did not know where the trigger was pulled, 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. (Trial Court Opinion, p. 8).

In arriving at this conclusion, the trial court overlooked or disregarded much of Tertin's testimony. Tertin testified that in order for a tabbed trigger to disengage "you gotta push it straight back...It only moves in one direction, forward and back." (V4, p. 815, Tertin Deposition, 109:4-16). Explaining the improbability of unintentionally pulling a tabbed trigger, Tertin testified "you'd really have to fool around with [the firearm]." (V4, p. 815, Tertin Deposition, 109:24-110:1-22). The gravamen of his testimony is that it is tremendously improbable that a user's finger

would unintentionally hit the side of the trigger's tab and the trigger while also pulling straight back causing the weapon to fire. Based on Herman's testimony of how the discharge occurred, which creates no inference that Herman was "fooling around" with the Sig P320 so as to allow an inadvertent full face trigger pull, Tertin was able to conclude this was likely not what happened.

The fact that Tertin did not say with certainty that Herman did not make a full face trigger pull with his finger in no way negated the reliability of Tertin's expert opinion. *Kieffer*, 90 F.3d at 1499 (10th Cir. 1996)(finding an expert opinion does not require absolute certainty). A full review of Tertin's testimony regarding his opinion that a tabbed trigger would have prevented the Sig P320 unintended discharge, shows Tertin was not being speculative; his opinion is instead based on his knowledge and examination of the Sig P320 and the difficulty that would need to be overcome for a person to unintentionally place their finger flush on the front face of the trigger so as to disable the tabbed trigger safety.

Tertin's decision not to perform an analysis as to what may have caused a trigger pull is not relevant to the reliability of his causation testimony. Such an analysis was unnecessary based on the underlying facts here. As discussed above, the evidence establishes that in order for the unintended discharge to have occurred, the Sig P320 was necessarily either contacted by a foreign object or by a body part.

(V4, p. 824, 827, Vigilante Deposition, 15:16-24, 28:5-16; V4, p. 767-71(citing testimony of Sig Sauer engineer Sean Toner)). In either of these scenarios, a tabbed trigger safety would have prevented the discharge, so long as Herman did not place his finger into the holster, into the trigger guard, flush onto the face of the trigger and pull straight back. (V4, p. 824, Vigilante Deposition, 13:9-12; V4, p. 777 Vigilante Report). Any analysis as to the specific method by which the trigger was contacted was not necessary for Tertin to reach this conclusion.

Tertin's opinion does not rule out that there can be unintentional discharges of firearms when a tabbed trigger is built in. Instead, Tertin's testimony is based upon the facts of this case and his understanding of the unintended discharge, combined with his knowledge of the mechanics of the Sig P320. It is this basis upon which Tertin relies in concluding that a tabbed trigger safety would have been effective **in this** incident.

Because the evidence in the record demonstrates that both Vigilante and Tertin had a reliable factual basis for their causation opinions with respect to the use of a tabbed trigger safety, the district court abused its discretion in excluding this evidence. Therefore, the trial court's decision excluding the expert testimony as it relates to causation must be reversed, and this means that the summary judgment in favor of Sig Sauer cannot be maintained.

2. Exclusion of Expert Testimony Relating to a Manual Thumb Safety

The trial court similarly erred in finding that the opinions of Vigilante and Tertin that a thumb safety would have prevented the unintended discharge were unreliable. The court based its conclusion on its finding that both experts acknowledged that “a thumb safety will not prevent an unintentional discharge if it is not engaged” and neither expert knew “whether a thumb safety would have been engaged.” (Trial Court Opinion, p. 6). To support this conclusion, the trial court relied on Vigilante’s testimony that he had no memory of Herman’s testimony as to his use of a manual safety, (Trial Court Opinion, p. 7), and the trial court’s own conclusory statement that “Mr. Tertin does not know...whether a thumb safety would have been engaged.” (Trial Court Opinion, p. 8). The court does not cite to anything in the record to support this second assertion.

However, a full review of the record reveals that there is credible evidence that Herman would have engaged a thumb safety had it been incorporated, thus giving the experts a reliable basis to form their opinions. Herman testified that he was trained by his father in gun safety, and that one of the things he was taught was to “always have your safety on until you’re ready to shoot.” (V4, p. 693, Herman Deposition, 23:2-6). This testimony provides a clear basis for the inference that, had Herman’s Sig P320 come equipped with a thumb safety, it likely would have been engaged.

Thus, 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. When considering the record in full, it is clear that the trial court abused its discretion in choosing to discount or ignore the evidence that provided a reliable factual basis for the experts' opinions, and the court's ruling must be reversed.

The bottom line here is that the trial court recognized (Trial Court Opinion, p. 12) that in order to prevail in this case, Herman need only show that it is more likely than not that the defect in the Sig 320 pistol caused the unintended discharge here. The record here shows that, and Herman's experts therefore rendered their appropriate opinions. The trial court had no legally valid ground to reject these opinions and exclude them from the case. The judgment for Sig Sauer must therefore be overturned on this ground.

B. The District Court Independently Erred in Granting Summary Judgment in Favor of Sig Sauer

Summary judgment is only proper where the trial court, drawing all reasonable inferences in favor of the non-moving party (here, Herman), finds that there are no genuine issues of material fact. *Leone*, 810 F.3d at 1153.

It is not disputed that the issue of causation here is material to Herman's claims. Thus, the issue arises over whether the dispute over the material fact (whether the lack of an external safety allowed the unintended discharge to occur) is

‘genuine.’ When making all reasonable inferences in favor of Herman, it is without question that a rational jury could find in his favor. Thus, the trial court erred in granting summary judgment on behalf of Sig Sauer, and the trial court’s ruling must be reversed on this separate ground too.

1. The Question of Material Fact as to Whether Herman Pulled the Trigger in Such a Way That a Tabbed Trigger Safety Would Have Disengaged is Genuine, and Therefore Summary Judgment on This Issue was Improper

The error in the trial court’s decision as to Herman’s evidence establishing a genuine issue of material fact that a tabbed trigger would have prevented the Sig P320 from firing is stunningly clear. The trial court does not disagree that if Herman can establish that a tabbed trigger would not have been disengaged, causation can reasonably be established. Instead, the trial court concluded that Herman was unable to establish that the Sig P320 was discharged as a result of a graze rather than a full face trigger pull. (Trial Court Opinion, p. 14).

In open defiance of the summary judgment review standard, the trial court admitted that there is a valid inference that the Sig P320 trigger was grazed (meaning a tabbed trigger would have prevented the unintended discharge), but chose to discount this reasonable inference in favor of the “equally” valid inference “that [Herman] inadvertently caused something to push back on the trigger face.” Ord. at 14. However, the summary judgment standard does not allow the court to determine all possible valid inferences from the evidence, and then choose which inference it

prefers. Instead, the law instructs courts to resolve all reasonable inferences and doubts in favor of the plaintiff (here, Herman). *Hartnett v. Papa John's Pizza U.S.A., Inc.*, 921 F. Supp. 2d 1066, 1091 (N.M. Dist. Ct. 2012). Had the trial court here done so, it would have correctly denied Sig Sauer's motion for summary judgment.

Even if the court were permitted to weigh inferences in favor of both parties (which it is not), the evidence clearly establishes that it was more likely that the Sig P320 discharged because of accidental contact with the trigger (meaning the tabbed trigger would have likely prevented the unintended discharge), than that the discharge was caused by a direct pull on the face of the trigger, which would have resulted in the tabbed trigger safety being disengaged. As discussed above, there was no evidence to support the view that Herman "got his finger fully on the face of the trigger." (V4, p. 824, Vigilante Deposition, 13:13-16). Further, even though Herman's statement as transcribed in the police report stated that he accidentally pulled the trigger, there was nothing in the report to indicate that his finger "fully got on the full face of the trigger and pulled back." *Id.*

Further, Tertin testified that it was highly unlikely that the Sig P320 trigger could have been fully depressed so as to disengage a tabbed trigger safety. (V4, p. 815, Tertin Deposition, 107:1-8). Specifically, Tertin testified that in order for a

tabbed trigger to disengage, “you gotta push it straight back...It only moves in one direction, forward and back.”³ (V4, p. 816, Tertin Deposition 109:4-16.)

Herman has fired pistols hundreds if not thousands of times in his adult life. He is aware of the feeling of pulling a trigger flush on its face and firing. Finally, Herman himself testified that he believed his pistol fired without the trigger being pulled (V4, p. 725, Herman Deposition, 149:22-23), making the inference that it was grazed by an object or body part a reasonable one as opposed to the act of placing his finger into the holster, through the trigger guard, and pulling on the trigger in a flush manner. Although the initial reports indicated that Herman reported he accidentally pulled the trigger, he clarified at his deposition that he and his wife assumed he must have pulled the trigger because it was their belief a gun could not discharge without a trigger pull. (V4, p. 708-9, Herman Deposition, 84:21-25, 85:1-7. Even if the jury were to believe Herman’s initial account, that he did in fact accidentally pull the trigger, as Tertin stated, there was nothing in these initial statements to indicate that he fully placed his finger on the face of the trigger and pulled back.

³ The trial court only excluded the experts’ testimony as to causation. Thus, even if this Court were to agree with the trial court and affirm the exclusion of the experts’ opinions as to causation, the testimony relating to the mechanics of a tabbed trigger would still be admissible.

Thus, there is fully sufficient evidence on which a rational jury could rely in determining that it was more likely than not that the trigger was pulled in a way that would not have disengaged a tabbed trigger safety. In contrast, the trial court points to nothing in the record to support the opposing inference that the trigger was fully actuated. This is likely because nothing in the record exists to support this inference. Once the proper standard is applied, and the inference is properly made that the tabbed trigger safety likely would not have disengaged, the view that a tabbed trigger safety would have prevented Herman's injuries is reasonable, and thus, causation is established.

When making all reasonable inferences in favor of Herman, the only permissible outcome was to deny Sig Sauer's motion for summary judgment on the causation question as it related to a tabbed trigger safety. Therefore, the trial court's decision must be reversed.

2. The Question of Material Fact as to Whether Herman Would Have Engaged a Thumb Safety Had it Been Available is Genuine, and Therefore Summary Judgment on This Issue was Improper

Based on the evidence in the record, a rational jury could find in favor of Herman as to whether or not he would have engaged a thumb safety had it been available. In so finding, the jury could logically conclude that the thumb safety would have prevented the unintended discharge, thus establishing causation.

The trial court did not disagree that if Herman could establish that a thumb safety would have been engaged had it been available at the time of the firing, the jury could infer that the lack of thumb safety was a cause of the unintended discharge. Instead, the trial court based its decision on the erroneous conclusion that there was “no evidence in the summary judgment record which would permit the inference that a thumb safety would have been engaged.” (Trial Court Opinion, p. 13). This claim is incorrect.

Herman testified that when he was taught firearm safety, he was taught to “always have your safety on until you’re ready to shoot.” (V4, p. 693, Herman Deposition, 23:2-6). The trial court made no mention of this testimony. Instead, the trial court concluded that the evidence compelled the opposite conclusion because Herman had not been thinking about a manual safety even though a P320 with a manual safety was available, and there was no evidence that Herman preferred a manual safety, wanted a manual safety, or always used a thumb safety. (Trial Court Opinion, p. 13). But none of this “evidence” or lack of evidence negates Herman’s testimony that he was trained to always keep his safety on until he was ready to shoot.

The fact that Herman was not thinking of a manual safety when he purchased his Sig P320 even though a P320 with a manual safety was allegedly available in the market does not negate Herman’s testimony, which allows the inference that he

always used a safety **when a safety was available** on the gun he was using. Further, in basing its opinion on the alleged lack of evidence referenced above, the trial court incorrectly drew inferences in favor of the moving party, because one could equally argue that there is no evidence that Herman did not prefer a manual safety or did not want a manual safety. With respect to the lack of evidence that Herman did not always use a safety, we have already demonstrated that Herman's testimony tends to show that this is incorrect.

In short, there is no testimony or other evidence in the record here that Herman would **not** have engaged a thumb safety had it been incorporated. The only evidence directly addressing this point is the statement by Herman that he was taught to always keep his safety engaged until he was ready to shoot. If the trial court had made all reasonable inferences in favor of Herman, as required by the applicable law, it would have properly found that, based on the record, a rational trier of fact could find that Herman likely would have engaged the thumb safety had it been incorporated in his Sig P320. Once Herman's likely use of the thumb safety is established, a fact finder could easily infer causation based on the testimony of the Herman's experts that thumb safeties prevent a firearm from discharging when they are engaged.⁴

⁴ The district court granted exclusion of Herman's experts' opinions only as they relate to causation. Thus, whether or not this Court agrees with Plaintiff that exclusion was improper, the above-referenced testimony relating to the mechanics

Because the trial court contravened the summary judgment standard and drew inferences in favor of the moving party, specifically, that Herman would not have engaged a thumb safety had it been available to him, summary judgment as to causation with respect to the thumb safety was improper.

3. Even if This Court Finds the Exclusion of the Experts' Causation Testimony was Proper, Summary Judgment Would Still be Improper

The trial court's ruling excluding the experts' testimony was confined solely to the experts' opinions as to causation. Even without these causation opinions, there is sufficient evidence in the record to establish a genuine issue of material fact on the causation question.

As explained above, the evidence clearly establishes that the Sig P320 was discharged as a result of contact with the trigger by either a body part or an object. Without the causation evidence, the jury will still hear Herman's explanation of how the unintended discharge occurred. The jury will also hear evidence as to how a single-action firearm functions, how a tabbed trigger functions, and how a thumb safety functions.

After hearing Herman's testimony, in combination with Tertin's testimony describing the difficulty one must overcome to accidentally disengage a tabbed trigger

of the Sig P320 and how different types of external safeties function would be admissible.

safety (V4, p. 715, Tertin Deposition, 110:13-22), a jury could reasonably infer that it was more likely that the trigger was grazed by an object or body part in such a way that did not amount to a full-face trigger pull.

Similarly, after hearing Herman's testimony that he was taught to always keep his safety engaged until he was ready to fire, in combination with his description of the unintended discharge and the experts' testimony as to how a thumb safety functions, the jury could reasonably infer that Herman would have had a thumb safety engaged at the time of the shooting.

After making both or either of these reasonable inferences, the jury could then reach the logical conclusion that had either of these external safeties been incorporated into Herman's Sig P320, the unintended discharge would not have occurred.

Therefore, even without the causation testimony of Herman's experts, summary judgment was plainly improper.

CONCLUSION

This Court should reverse the trial court's rulings: (1) excluding the testimony of Herman's experts as to the issue of causation, and (2) granting summary judgment on behalf of Sig Sauer because the trial court abused its discretion in determining whether the experts' opinions were reliable and failed to properly apply the summary judgment review standard.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

This case is one of many similar cases against Sig Sauer related to the unintended discharge of the P320. This lawsuit and appeal are factually intensive. The outcome is important not only to Appellant, but civilians, law enforcement and military personnel across the nation who carry the P320. Information gleaned from counsel's experience in this litigation is lost in the voluminous record, and some further explanation beyond that contained in the written briefs would benefit the Court in these proceedings through oral argument.

Appellant respectfully suggests that the Court will benefit from hearing counsel explain certain details that may shed further light upon the evidence that Appellant should be permitted to and would have presented at trial.

BY: /s/ Ryan D. Hurd
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