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11-16-2001

## Camden County Bd v. Beretta, USA Corp.

Precedential or Non-Precedential:

Docket 01-1051

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Filed November 16, 2001

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

No. 01-1051

CAMDEN COUNTY BOARD OF CHOSEN FREEHOLDERS,  
Appellant

v.

\*BERETTA, U.S.A. CORP.; PIETRO BERETTA; BROWNING  
ARMS CO.; BRYCO ARMS, INC.; COLT'S MFG CO., INC.;  
DAVIS INDUSTRIES, INC.; GLOCK, INC.; HI-POINT  
FIREARMS; H&R 1871 INC.; CARL WALTHER GMBH;  
LORCIN ENGINEERING CO., INC.; NAVEGAR, INC.;  
PHOENIX ARMS; RAVEN ARMS, INC.; SMITH & WESSON  
CORP.; STURM, RUGER AND CO., INC.; FORJAS  
TAURUS, S.A.; REPUBLIC ARMS; JOHN DOE  
MANUFACTURERS (1-100); JOHN DOE DEALERS (1-100);  
JOHN DOE DISTRIBUTORS (1-100)

(\*Amended in accordance with Clerk's Order dated  
1/26/01)

ON APPEAL FROM THE  
UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF NEW JERSEY

(Dist. Court No. 99-CV-2518 (JBS))  
District Court Judge: Jerome B. Simandle

Argued: September 5, 2001

Before: SCIRICA, ALITO, and BARRY, Circuit Judges.

(Filed: November 16, 2001)

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#### OPINION OF THE COURT

#### PER CURIAM:

The Camden County Board of Chosen Freeholders (hereinafter "Camden County") contends that handgun manufacturers, because of their marketing and distribution policies and practices, are liable under a public nuisance theory for the governmental costs associated with the criminal use of handguns in Camden County. The District Court, in a 53-page opinion, dismissed the complaint. See

Camden County Board of Chosen Freeholders v. Beretta U.S.A., Corp., 123 F. Supp. 2d. 245 (D.N.J. 2000). We affirm the order of the District Court.

I.

In its Second Amended Complaint, Camden County alleged that Defendants' conduct -- the marketing and distribution of handguns -- created and contributed to the widespread criminal use of handguns in the County. See *Camden County v. Beretta*, 123 F. Supp. 2d. at 250. The County invoked three theories of liability: negligence, negligent entrustment, and public nuisance. The County requested several forms of relief, including compensation for the additional costs incurred by the County to abate the alleged public nuisance (costs borne by the County's prosecutor, sheriff, medical examiner, park police, correctional facility, and courts); an injunction requiring the manufacturers to change their marketing and distribution practices; and other compensatory and punitive damages. The manufacturers countered that the County had failed to state claims on which relief could be granted and that, in any event, damages were barred by the municipal cost recovery rule. Moreover, the manufacturers contended that the claims were barred by New Jersey's product liability statute, the Dormant Commerce Clause, and the Due Process Clause.

The District Court rejected all three of Camden County's theories of liability and granted the defendants' motion to dismiss the complaint. It dismissed the two negligence claims after its thorough six-factor analysis found proximate cause lacking. See *Camden County v. Beretta*, 123 F. Supp. 2d. at 259-64. It also found that the public nuisance claim was defective because the County had not alleged "the required element that the defendants exercised control over the nuisance to be abated." *Id.* at 266.

On appeal, Camden County has dropped the two negligence claims and pursues only the public nuisance claim. The County alleges that the manufacturers' conduct endangered public safety, health, and peace, and imposed inordinate financial burdens on the County's fisc. It argues

that the defendants "knowingly facilitated, participated in, and maintain a handgun distribution system that provides criminals and youth easy access to handguns." Appellant's Brief at 2. Relying on general data about the marketing and distribution of handguns, the County argues that Defendants knowingly created the public nuisance of "criminals and youth with handguns." Appellant's Brief at 3 (emphasis in original).

The County makes the following pertinent factual allegations: the manufacturers release into the market substantially more handguns than they expect to sell to law-abiding purchasers; the manufacturers continue to use certain distribution channels, despite knowing (often from specific crime-gun trace reports produced by the federal Bureau of Alcohol, Tobacco, and Firearms) that those channels regularly yield criminal end-users; the manufacturers do not limit the number, purpose, or frequency of handgun purchases and do not supervise these sales or require their distributors to do so; the manufacturers' contracts with distributors do not penalize distributor practices that facilitate criminal access to handguns; the manufacturers design, produce, and advertise handguns in ways that facilitate sales to and use by criminals; the manufacturers receive significant revenue from the crime market, which in turn generates more sales to law-abiding persons wishing to protect themselves; and the manufacturers fail to take reasonable measures to mitigate the harm to Camden County. Appellant's Brief at 4-5. The County makes no allegation that any manufacturer violated any federal or state statute or regulation governing the manufacture and distribution of firearms, and no direct link is alleged between any manufacturer and any specific criminal act.

The manufacturers respond that the County's factual allegations amount to the following attenuated chain of events: (1) the manufacturers produce firearms at their places of business; (2) they sell the firearms to federally licensed distributors; (3) those distributors sell them to federally licensed dealers; (4) some of the firearms are later diverted by unnamed third parties into an illegal gun market, which spills into Camden County; (5) the diverted

firearms are obtained by unnamed third parties who are not entitled to own or possess them; (6) these firearms are then used in criminal acts that kill and wound County residents; and (7) this harm causes the County to expend resources to prevent or respond to those crimes. Appellees' Brief at 3. The manufacturers note that in this chain, they are six steps removed from the criminal end-users. Moreover, the fourth link in this chain consists of acts committed by intervening third parties who divert some handguns into an illegal market.

## II.

Because this appeal presents a question of state law, we do not find it necessary to write at length. In brief, we agree with the District Court that the County has failed to state a valid public nuisance claim under New Jersey law.

### A.

A public nuisance is " `an unreasonable interference with a right common to the general public.' " Philadelphia Elec. Co. v. Hercules, Inc. 762 F.2d 303, 315 (3d Cir. 1985) (quoting Restatement (Second) of Torts S 821B(1) (1979)); see also Mayor & Council of Borough of Alpine v. Brewster, 80 A.2d 297, 300 (N.J. 1951). For the interference to be actionable, the defendant must exert a certain degree of control over its source. See New Jersey Dept. of Env't'l Prot. v. Exxon Corp., 376 A.2d 1339, 1349 (N.J. Super. Ct. 1977).

Traditionally, the scope of nuisance claims has been limited to interference connected with real property or infringement of public rights. See W. Page Keeton et al., Prosser and Keeton on Torts S 86 at 617-18 (5th ed. 1984). In this 1984 edition of the hornbook, the authors lamented that "[t]here is perhaps no more impenetrable jungle in the entire law than that which surrounds the word `nuisance.' It has meant all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie." Id. at 616. They recommended dismissal of nuisance claims "not connected with land or with any public right, as mere aberration, adding to the vagueness of an already uncertain



word. Unless the facts can be brought within one of the two categories mentioned, there is not, with any accurate use of the term, a nuisance." *Id.* at 618-19. Since that edition, the scope of nuisance law appears to have returned to its more narrow focus on these two traditional areas, as courts "across the nation have begun to refine the types of cases amenable to a nuisance theory." *City of Philadelphia v. Beretta*, 126 F. Supp. 2d at 909.

Whatever the precise scope of public nuisance law in New Jersey may be, no New Jersey court has ever allowed a public nuisance claim to proceed against manufacturers for lawful products that are lawfully placed in the stream of commerce. On the contrary, the courts have enforced the boundary between the well-developed body of product liability law and public nuisance law. Otherwise, if public nuisance law were permitted to encompass product liability, nuisance law "would become a monster that would devour in one gulp the entire law of tort." *Tioga Public Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993). If defective products are not a public nuisance as a matter of law, then the non-defective, lawful products at issue in this case cannot be a nuisance without straining the law to absurdity.

B.

Within the narrower context of similar tort actions against handgun manufacturers around the country, a majority of courts have rejected these claims as a matter of law.<sup>1</sup> In a few other courts, the claim was not dismissed

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1. See, e.g., *Ganim v. Smith & Wesson Corp.*, 1999 Conn. Super. LEXIS 3330 (Conn. Super. Ct. 1999), *aff'd* 258 Conn. 313 (2001); *Merrill v. Navegar, Inc.*, 28 P.3d 116 (Cal. 2001); *Sills v. Smith & Wesson Corp.*, 2000 Del. Super. LEXIS 444 (2000), *cert. denied*, 768 A.2d 471 (Del. 2001); *City of Gary, Indiana v. Smith & Wesson Corp.*, 2001 WL 333111 (Ind. Super. Ct. 2001); *Hamilton v. Beretta U.S.A. Corp., et al.*, 96 N.Y.2d 222 (N.Y. 2001) (answering questions certified from the Second Circuit, which then entered judgment accordingly in *Hamilton v. Beretta U.S.A. Corp., et al.*, 264 F.3d 21 (2d Cir. 2001)); *City of Cincinnati v. Beretta U.S.A. Corp.*, 1999 Ohio Misc. LEXIS 27 (Ohio Com. Pl. 1999), *aff'd*, 2000 Ohio App. LEXIS 3601 (Ohio Ct. App. 2000); *Penelas v. Arms Tech.*,

outright, but each such case is distinguishable from the instant case.<sup>2</sup> To extend public nuisance law to embrace the manufacture of handguns would be unprecedented under New Jersey state law and unprecedented nationwide for an appellate court. See *City of Philadelphia v. Beretta*, 126 F. Supp. 2d at 910.

Even if public nuisance law could be stretched far enough to encompass the lawful distribution of lawful products, the County has failed to allege that the manufacturers exercise sufficient control over the source of the interference with the public right. The District Court found this to be the "fatal defect" of the County's claim. *Camden County v. Beretta*, 123 F. Supp. 2d at 266. The County argues that proximate cause, remoteness, and control are not essential to a public nuisance claim, i.e., that conduct that merely contributes to the source of the interference can be sufficient. But the relevant case law shows that, even if the requisite element is not always termed "control," the New Jersey courts in fact require a degree of control by the defendant over the source of the interference that is absent here.<sup>3</sup>

To connect the manufacture of handguns with municipal crime-fighting costs requires, as noted above, a chain of seven links. This causal chain is simply too attenuated to attribute sufficient control to the manufacturers to make out a public nuisance claim. In the initial steps, the manufacturers produce lawful handguns and make lawful

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*Inc.*, 1999 WL 1204353 (Fla. Cir. Ct. 1999), *aff'd*, 778 So. 2d 1042 (Fla. Dist. Ct. App. 2001); *Morial v. Smith & Wesson Corp.*, 2000 WL 248364 (La. Civ. Dist. Ct. 2000), *rev'd*, 785 So. 2d 1 (La. 2001); *City of Philadelphia v. Beretta U.S.A. Corp.*, 126 F. Supp. 2d 882 (E.D. Pa. 2000).

2. See *White v. Smith & Wesson Corp.*, 97 F. Supp. 2d 816 (N.D. Ohio 2000) (contradicting the state court's ruling in *City of Cincinnati v. Beretta*, which was subsequently affirmed on appeal); *City of Boston v. Smith & Wesson Corp.*, 2000 Mass. Super. LEXIS 352 (Mass. Super. Ct. 2000) (characterizing the plaintiffs' legal theory as "extreme" and "unique in the Commonwealth," *id.* at \*14).

3. See, e.g., *Cogliati v. Ecco High Frequency Corp.*, 456 A.2d 524, 530 (N.J. 1983); *Milstrey v. City of Hackensack*, 79 A.2d 37 (N.J. 1951).

sales to federally licensed gun distributors, who in turn lawfully sell those handguns to federally licensed dealers. Further down the chain, independent third parties, over whom the manufacturers have no control, divert handguns to unauthorized owners and criminal use. The manufacturers may not be held responsible "without a more tangible showing that the defendants were a direct link the causal chain that resulted in the plaintiffs' injuries, and that the defendants were realistically in a position to prevent the wrongs." *Hamilton v. Beretta U.S.A. Corp. et al.*, 96 N.Y.2d 222, 234 (2001) (finding no duty because gun manufacturers did not control criminals with guns, and injuries were too remote).

A public-nuisance defendant can bring its own conduct or activities at a particular physical site under control. But the limited ability of a defendant to exercise control beyond its sphere of immediate activity may explain why public nuisance law has traditionally been confined to real property and violations of public rights. In the negligence context, this Court recently held that a defendant has no duty to control the misconduct of third parties. See *Port Authority v. Arcadian Corp.*, 189 F.3d 305, 312-17 (3d. Cir. 1999). We agree with the District Court that this logic is equally compelling when applied in the public nuisance context. See *Camden County v. Beretta*, 123 F. Supp. at 266. If independent third parties cause the nuisance, parties that have not controlled or created the nuisance are not liable. See *New Jersey Dept. of Env't'l Prot. v. Exxon Corp.*, 376 A.2d 1339, 1349 (N.J. Super. Ct. 1977).

Public nuisance is a matter of state law, and the role of a federal court ruling on a matter of state law in a diversity case is to follow the precedents of the state's highest court and predict how that court would decide the issue presented. It is not the role of a federal court to expand or narrow state law in ways not foreshadowed by state precedent. Here, no New Jersey precedents support the County's public nuisance claim or provide a sound basis for predicting that the Supreme Court of New Jersey would find that claim to be valid. While it is of course conceivable that the Supreme Court of New Jersey may someday choose to expand state public nuisance law in the manner that the

County urges, we cannot predict at this time that it will do so.

III

Because Camden County failed to state a cognizable public nuisance claim against the gun manufacturers under New Jersey law, the District Court's order dismissing the County's complaint is AFFIRMED.

A True Copy:

Teste:

Clerk of the United States Court of Appeals  
for the Third Circuit