

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

IN RE: SMITTY’S/CAM2 303 TRACTOR)	
HYDRAULIC FLUID MARKETING, SALES)	MDL No. 2936
PRACTICES, AND PRODUCTS LIABILITY)	
LITIGATION)	Master Case No. 4:20-MD-02936-SRB

ORDER

Before the Court is Defendants Smitty’s Supply, Inc. (“Smitty’s”) and CAM2 International, LLC (“CAM2”) (collectively, “Defendants”) Partial Motion for Summary Judgment on the Claims of Plaintiff Terry Zornes. ([Doc. #802.](#)) For the reasons discussed below, the motion is GRANTED IN PART AND DENIED IN PART.

I. BACKGROUND

This MDL arises from Defendant’s manufacture, sale, and marketing of tractor hydraulic fluid (“THF”), a multifunctional lubricant designed to offer certain protective benefits when used in tractors and heavy equipment as a hydraulic fluid, transmission fluid, and gear oil. Plaintiffs represent a putative class of consumers who purchased at least one of four allegedly defective products at issue in this case: Smitty’s Super S Super Trac 303 Tractor Hydraulic Fluid (“Smitty’s Super Trac 303”), Smitty’s Super S 303 Tractor Hydraulic Fluid (“Smitty’s Super S 303”), Cam2’s Promax 303 Tractor Hydraulic Oil (“Cam 2 Promax 303”), and Cam2’s 303 Tractor Hydraulic Oil (“Cam2 303”) (collectively, the “303 THF Products”). Defendants Smitty’s and CAM2 manufactured the 303 THF Products, which were sold nationwide by multiple retailers under various label names.

A. Plaintiff Terry Zornes

Plaintiff Terry Zornes (“Zornes”) is a Kansas resident who purchased Smitty’s 303 THF Products in Kansas. Zornes began purchasing Smitty’s 303 THF Products in March 2018. In an

interrogatory, Zornes states that he purchased at least 11 buckets of Super S 303 in 2018. Zornes did not clarify which Smitty's 303 THF Product he used. Zornes used Super S 303 in his Caterpillar Traxcavator.

B. Missouri Stop Sale Order

On October 12, 2017, the Missouri Department of Agriculture issued a Notice of Misbranded Product (“the Missouri Stop Sale Order”), that stated:

On April 21, 2017, the Division of Weights, Measures and Consumer Protection purchased and tested a sample of Super S Super Trac 303 Tractor Hydraulic Fluid. This product claims to meet John Deere 303 specifications. . . . This product is misbranded because the product did not meet the specification limits. Additionally, the reported performance additive content is lower than a typical J20C. . . . You are hereby ordered to remove this product from sale until changes are made to correct the labeling or the product.

([Doc. #803-4, pp. 2–3.](#))

Zornes testified that he was “vaguely” aware of the Missouri Stop Sale Order because a friend had told him about it at some point between 2017 and 2018, but continued to buy Super S 303 “[b]ecause it was in Kansas and that’s what [he] could get.” ([Doc. #803-2, p. 21.](#))

C. The Instant Action

Plaintiffs initiated suit against Defendants in multiple federal district courts where the 303 THF products were sold. On February 11, 2020, Defendants requested all pending actions be consolidated and transferred pursuant to [28 U.S.C. § 1407](#). On June 2, 2020, the J.P.M.L. consolidated and transferred the eight then-pending actions to the Western District of Missouri.¹ *See In re: Smitty's/CAM2 303 Tractor Hydraulic Fluid Mktg., Sales Practices & Prod. Liab.*

¹ The pending actions consolidated before the undersigned are as follows: *Buford v. Smitty's Supply Inc.*, No. 19-cv-00082 (E. D. Ark.); *Fosdick v. Smitty's Supply Inc.*, No. 19-cv-01850 (N. D. Iowa); *Blackmore v. Smitty's Supply Inc.*, No. 19-cv-04052 (N.D. Iowa); *Zornes v. Smitty's Supply, Inc.*, No. 19-cv-0257 (D. Kan.); *Wurth v. Smitty's Supply Inc.*, No. 19-cv-00092 (W.D. Ky.); *Mabie v. Smitty's Supply, Inc.*, No. 19-cv-3008 (S.D. Tx.); *Klingenberg v. Smitty's Supply, Inc.*, No. 19-cv-2684 (D. Minn.); and *Graves v. Smitty's Supply, Inc.*, No. 19-cv-5089 (W.D. Mo.).

Litig., No. 2936, [2020 WL 2848377](#), at *1 (J.M.P.L. June 2, 2020). Following the creation of this MDL, Plaintiffs filed another lawsuit, *Feldkamp v. Smitty's Supply, Inc.*, No. 20-cv-02177, in the U.S. District Court for the Central District of Illinois, which was subsequently transferred to this Court. Pursuant to this Court's order dated August 3, 2020, Plaintiffs were permitted to file a Consolidated Amended Complaint that would serve to supersede all prior pleadings in the individual cases that were consolidated. Further, this Court's August 3, 2020 Order permitted direct joinder of new claims through the Consolidated Amended Complaint.

On September 24, 2021, Plaintiffs filed the Fourth Amended Consolidated Complaint ("FACC"). On October 25, 2021, Defendants filed a motion to dismiss the FACC, which the Court granted in part and denied in part on March 9, 2022. *See* ([Doc. #451](#)).² On April 21, 2023, Plaintiffs filed a Fifth Amended Consolidated Complaint ("5ACC").³ On July 14, 2023, the Court granted CAM2's motion for summary judgment and dismissed Zornes's claims against CAM2. *See* ([Doc. #985](#).)

Zornes seeks to represent a class of Kansas purchasers and asserts the following claims: Count I, negligence; Count II, breach of express warranty; Count III, breach of implied warranty of merchantability; Count IV, breach of implied warranty of fitness for a particular purpose; Count V, unjust enrichment, Count VI, fraudulent misrepresentation; Count VII, negligent misrepresentation; Count XVIII, Kansas Consumer Protection Act, [K.S.A. § 50-623](#); Count

² Relevant to this motion, the Court dismissed the Kansas Plaintiffs' Counts I, II, III, IV, VI, VII, and XVIII to the extent they seek property damages.

³ The instant motion was filed before the 5ACC. Although an amended complaint supersedes the original complaint, the Court finds that the amended complaint did not affect the substance of this motion and treats the instant motion for summary judgment as a motion for summary judgment on the 5ACC. *See Cartier v. Wells Fargo Bank, N.A.*, [547 Fed. Appx. 800, 804](#) (8th Cir. 2013) (finding a district court did not abuse its discretion in treating a motion to dismiss an original complaint as a motion to dismiss an amended complaint).

XLVI, Kansas Product Liability Act (“KPLA”)–Design Defect, [K.S.A. § 60-3301](#);⁴ and Count XLVII, KPLA–Failure to Warn, [K.S.A. § 60-3301](#).

On March 17, 2023, Smitty’s filed the instant motion for summary judgment on Zornes’s Counts IV and VI–VII, pursuant to [Federal Rule of Civil Procedure 56](#).⁵ Zornes opposes the motion.

II. LEGAL STANDARD

Under Rule 56, summary judgment is warranted “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” [Fed. R. Civ. P. 56\(a\)](#). The moving party has the burden of identifying “the basis for its motion, and must identify those portions of the record which it believes demonstrate the absence of a genuine issue of material fact.” *Torgerson v. City of Rochester*, [643 F.3d 1031, 1042](#) (8th Cir. 2011) (en banc) (cleaned up). If the moving party makes this showing, “the nonmovant must respond by submitting evidentiary materials that set out specific facts showing that there is a genuine issue for trial.” *Id.* (quotation marks omitted). “Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.” *Id.* (quotation marks omitted).

III. DISCUSSION

Smitty’s argues it is entitled to summary judgment on (1) Count IV because Zornes cannot show he used the THF 303 Products for anything other than their ordinary purpose; and (2) on Counts VI and VII because the Missouri Stop Sale Order negates any justifiable reliance.

⁴ In the 5ACC, Plaintiffs refer to “Kansas Product Liability Act” which the Court construes as a claim brought under [K.S.A. § 60-3301](#), *et seq.* ([Doc. #834](#), p. 104.)

⁵ Although Defendants jointly filed the instant motion, the Court will only refer to Smitty’s because it previously dismissed Zornes’s claims against CAM2. *See* ([Doc. #985](#).)

Zornes disagrees. The Court will address the parties' arguments as to each count separately below.

A. Count IV, Breach of Implied Warranty of Fitness for a Particular Purpose

Smitty's argues it is entitled to summary judgment on Count IV, alleging breach of an implied warranty of fitness for a particular purpose, because "Zornes has not produced evidence that he used the product in a particular way outside of its ordinary use, much less that Defendants knew of any such particular use." ([Doc. #803, p. 10.](#)) Zornes argues that implied warranty of fitness for a particular purpose and implied warranty of merchantability are not mutually exclusive, and the claim should be allowed to proceed.

Kansas law provides that an implied warranty of fitness for a particular purpose exists "[w]here the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish goods[.]" [Kan. Stat. Ann. § 84-2-315](#). "'Particular purpose' means an unusual, nonordinary purpose" and "[§] 84-2-315 is inapplicable when [products] are used for their ordinary purpose." *Jackson v. Thomas*, 28 Kan.App.2d, 738–39, [21 P.3d 1007, 1011](#) (2001) (citations omitted).

The Court agrees with Smitty's and finds that summary judgment is warranted on Count IV. In his opposition brief, Zornes "agree[s] that use of 303 THF for hydraulics is an ordinary purpose of tractor hydraulic fluid[.]" and that "Defendants unquestionably knew that 303 THF would be so used." ([Doc. #877, p. 25.](#)) As Zornes agrees that his use of the 303 THF Products was in a way consistent with its ordinary purpose, Zornes cannot prove his claim for implied

warranty of fitness for a particular purpose.⁶ Accordingly, the Court finds that summary judgment is warranted as to Count IV.

B. Counts VI and VII, Fraudulent and Negligent Misrepresentation

Smitty's argues it is entitled to summary judgment on Zornes's fraudulent and negligent misrepresentation claims because Zornes's knowledge of the Missouri Stop Sale Order precludes reliance on any alleged misrepresentation from being reasonable. Zornes disagrees, arguing that his reliance on the 303 THF Products' labels was reasonable.

To prevail on his fraudulent and negligent misrepresentation claims, Zornes must show that he reasonably relied on the alleged false marketing of the 303 THF Products.⁷ “[U]nder Kansas law[,] a plaintiff's reliance on a misrepresentation must be reasonable, justifiable, and detrimental.” *DeBoer v. Am. Appraisal Assoc., Inc.*, 503 F.Supp.2d 1160, 1169 (D. Kan. 2007) (citations omitted). “A recipient of a fraudulent misrepresentation is justified in relying upon its truth without investigation, unless he knows or has reason to know of facts which make his reliance unreasonable.” *Goff v. Am. Sav. Ass'n of Kansas*, 1 Kan.App.2d 75, 82, 561 P.2d 897, 903 (Kan. App. 1977) (quoting Restatement (Second), Torts § 540, p. 10)). Reliance is not reasonable where “the recipient has ‘information which would serve as a danger signal and a red light to any normal person of his intelligence and experience.’” *Id.* (quoting Restatement (Second), Torts § 540, p. 12).

⁶ Zornes argues at length regarding Count III, implied warranty of merchantability. Because Smitty's does not move for summary judgment on Count III, the Court will not discuss these arguments.

⁷ *Kelly v. VinZant*, 287 Kan. 509, 515, 197 P.3d 803, 808 (Kan. 2008) (holding that, in order to prove fraudulent misrepresentation, a plaintiff must show that he “reasonably relied and acted upon the representations made”); *Evolution, Inc. v. SunTrust Bank*, 342 F.Supp.2d 964, 971 (D. Kan. 2004) (holding that, in order to prove negligent misrepresentation, a plaintiff must show that he “justifiably relied upon the [false] statement”). The Court finds that the elements of these two claims are similar enough such that they may be analyzed together. *See Katzenmeier v. Oppenlander*, 39 Kan.App.2d 259, 263, 178 P.3d 66, 70 (Kan. App. 2008) (“Although a claim for negligent misrepresentation has different elements than a claim for intentional misrepresentation, both torts require a plaintiff to have relied on a misrepresentation.”).

Here, the Court finds genuine issues of material fact exist as to whether Zornes reasonably relied on the 303 THF Products' promises as to quality and performance such that summary judgment is not warranted. The record is clear that Zornes knew of the existence of the Missouri Stop Sale Order. However, the record does not speak to what Zornes knew about the Missouri Stop Sale Order – there is no evidence that Zornes read or understood its contents. Further, after the issuance of the Missouri Stop Sale Order, the 303 THF Products continued to be sold in Kansas. There is no evidence that Zornes believed the Missouri Stop Sale Order was relevant to or affected the sale of the 303 THF Products in Kansas, giving rise to a genuine dispute of material fact regarding reasonable reliance. Accordingly, Smitty's argument is rejected.

IV. CONCLUSION

Accordingly, Defendants Partial Motion for Summary Judgment on the Claims of Plaintiff Terry Zornes ([Doc. #802](#)) is GRANTED IN PART and DENIED IN PART. The motion is GRANTED insofar as Zornes's Count IV is DISMISSED, and DENIED in all other respects.

IT IS SO ORDERED.

/s/ Stephen R. Bough
STEPHEN R. BOUGH
UNITED STATES DISTRICT JUDGE

Dated: July 31, 2023