

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

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| 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 |

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**ORDER**

Before the Court is Defendants Smitty’s Supply, Inc.’s (“Smitty’s”) and CAM2 International, LLC’s (“CAM2”) (collectively, “Defendants”) Partial Motion for Summary Judgment on the Claims of Plaintiff Adam Sevy. ([Doc. #800](#).) For the reasons discussed below, the motion is GRANTED IN PART and DENIED IN PART.

**I. BACKGROUND**

This MDL arises from Defendants’ 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 Adam Sevy**

Plaintiff Adam Sevy (“Sevy”) is a Missouri resident who purchased various unidentified brands of 303 THF in Kansas beginning in 2009. Between 2009 and 2013, Sevy does not recall

what brand of 303 THF he purchased, and he purchased both 303 THF and non-303 THF. From 2015 to 2018, Sevy purchased and used various brands of 303 THF, including but not limited to Orscheln Premium 303, O'Reilly 303, and Smitty's Super Trac 303. Sevy purchased more than twice as much of O'Reilly 303 than any other brand.

Sevy used Smitty's Super Trac 303 in the following equipment: (1) a 1950s or 1960s Ford tractor; (2) a 2002 John Deere 240 Skid Steer; (3) a 2000s Hinowa Concrete Buggy; (4) a 1970s Allis Chalmers wheel loader; and (5) a 1992 Ford L800 dump truck ("the Equipment"). Sevy is claiming physical damages as to the 1970s Allis Chalmers wheel loader (out-of-pocket repair and flush costs) and the 1992 Ford L800 dump truck (flush costs).

As to the Allis Chalmers wheel loader and Ford L800 dump truck, Sevy was not the first owner and is unaware of their maintenance and repair history. The Allis Chalmers wheel loader leaked from the bottom of the hydraulic reservoir when Sevy purchased it, he never repaired the leak, and he is unaware of the cause of the leak. As to the Ford L800 dump truck, Sevy changed its hydraulic fluid once in 2014. Sevy has not experienced performance issues with the Ford L800 dump truck.

#### **B. Other Actions Involving Sevy**

Sevy was a class representative in a lawsuit involving O'Reilly 303, another brand of 303 THF ("the O'Reilly Action"). In that lawsuit, the plaintiffs alleged that O'Reilly 303 "was of uncertain quality, lacked adequate viscosity and additives, had a value much less than the price offered for sale, and was likely to expose equipment to increased risk of wear and damage it." ([Doc. #801-1, p. 13.](#))

Sevy was also a class representative in a lawsuit involving Citgo 303, Orscheln Premium 303, and Mile Master 303, other brands of 303 THF manufactured by Citgo Petroleum Corporation ("the Citgo Action"). In that lawsuit, Sevy alleged that Orscheln Premium 303 and

Mile Master 303 “was of uncertain quality, lacked adequate viscosity and additives, had a value much less than the price offered for sale, and exposed equipment to increased wear and damage.”

([Doc. #801-3, p. 16.](#))

### 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.<sup>1</sup> *See In re: Smitty's/CAM2 303 Tractor Hydraulic Fluid Mktg., Sales Practices & Prod. Liab. 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 and allowed direct joinder of new claims through the Consolidated Amended Complaint.

On September 24, 2021, Plaintiffs filed a Fourth Amended Consolidated Complaint (“FACC”). On October 25, 2021, Defendants filed a motion to dismiss the FACC, which the

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<sup>1</sup> 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 (E. D. Cal.); *Blackmore v. Smitty's Supply, Inc.*, No. 19-cv-04052 (N.D. Iowa); *Zornes v. Smitty's Supply, Inc.*, No. 19-cv-02257 (D. Kan.); *Wurth v. Smitty's Supply, Inc.*, No. 19-cv-00092 (W.D. Ky.); *Mabie v. Smitty's Supply, Inc.*, No. 19-cv-03308 (S.D. Tx.); *Klingenberg v. Smitty's Supply, Inc.*, No. 19-cv-02684 (D. Minn.); and *Graves v. Cam2 Int'l, LLC*, No. 19-cv-05089 (W.D. Mo.).

Court granted in part and denied in part on March 9, 2022. *See* ([Doc. #451](#)).<sup>2</sup> On April 21, 2023, Plaintiffs filed a Fifth Amended Consolidated Complaint (“5ACC”).<sup>3</sup>

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

On March 17, 2023, Defendants filed the instant motion for summary judgment on Sevy’s Counts V, XLVI, and XLVII pursuant to [Federal Rule of Civil Procedure 56](#). Sevy 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

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<sup>2</sup> 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.

<sup>3</sup> The instant motion was filed before the 5ACC. Although an amended complaint supersedes the original complaint, the Court finds that the amended 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).

<sup>4</sup> 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](#).)

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 and citation 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 and citations omitted).

### III. DISCUSSION

Defendants argue that they are entitled to summary judgment as to Sevy’s Counts V, XLVI, and XLVII insofar as Sevy seeks property damages because “Sevy has not provided sufficient evidence to prove that a Smitty’s product caused his alleged equipment injuries – an essential element of his claim[s].” ([Doc. #801, p. 10.](#)) Sevy disagrees, arguing genuine issues of material fact preclude summary judgment. The Court will address the parties’ arguments as to Count V and Counts XLVI–XLVII separately below.

#### A. Count V, Unjust Enrichment

While Defendants argue they were entitled to summary judgment on Sevy’s unjust enrichment claim because “Sevy . . . [needs] sufficient proof of causation,” the Court ordered supplemental briefing on whether Sevy could recover property damages on his unjust enrichment claim.<sup>5</sup> ([Doc. #801, p. 13.](#)) Sevy argues that he can recover property damages under Kansas law because “restoring Plaintiff Sevy to the position he would have occupied absent the unjust conduct includes not only amounts conferred on Defendants via purchase but inequitable retention of savings in not remedying what Defendants’ product brought about.” ([Doc. #935, pp. 2–3.](#))

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<sup>5</sup> Pursuant to Rule 56(f), the Court may grant summary judgment “on grounds not raised by a party” only if the Court gives “notice and reasonable time to respond[.]” *See Am. Red Cross v. Comm’y Blood Center of the Ozarks*, 257 F.3d 859, 863 (8th Cir. 2001) (“[A] district court may not grant summary judgment *sua sponte* unless the non-movant has been notified and afforded an opportunity to respond.”). Sevy submitted a brief on June 9, 2023. CAM2 submitted a brief on June 13, 2023.

Under Kansas law,

The basic elements on a claim based on a theory of unjust enrichment are threefold: (1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge of the benefit by the defendant; and (3) the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value.

*J.W. Thompson Co. v. Welles Prods. Corp.*, [758 P.2d 738, 745](#) (Kan. 1988). “The substance of an action for unjust enrichment lies in a promise implied in law that one will restore to the person entitled thereto that which in equity and good conscience belongs to that person.” *Univ. of Kansas Hosp. Auth. v. Bd. of Com’rs of County of Wabaunsee*, [327 P.3d 430, 441](#) (Kan. 2014) (internal citation and quotations omitted). “The proper measure of damages for unjust enrichment is restitution of the value of the benefit conferred upon the defendant.” *Estate of Hetrick v. Cessna Aircraft Co.*, No. 99,987, [2009 WL 1692025](#), at \*6 (Kan. Ct. App. 2009) (citing *Peterson v. Midland Nat’l Bank*, [747 P.2d 159, 166](#) (1987)).

The Court finds that property damages is not a proper measure of damage for unjust enrichment such that summary judgment is warranted. For purposes of Sevy’s unjust enrichment claim, any damages resulting from Sevy’s use of Smitty’s Super Trac 303 is not recoverable. *See Hurtig v. Mattox*, No. 117,544, [2017 WL 6542803](#), at \*8 (Kan. Ct. App. 2017) (“In determining the measure of damages in a claim of unjust enrichment the court focuses upon the amount of benefit which the defendant received which would be unjustly retained[.]”); *see also Brown v. K&L Tank Truck Serv., Inc.*, No. 15-9587-JWL, [2017 WL 3839414](#), at \*6 (D. Kan. Sept. 1, 2017) (“The proper measure of damages on this claim is not the damages incurred by the [plaintiffs] from the [defendant] not performing under the alleged contract (in other words, the benefit of the bargain) but the value of the benefit [the defendant] conferred.”).

Sevy does not cite any relevant case law to support his contention that he is entitled to property damages. For example, Sevy cites *Ice Corp. v. Hamilton Sundstrand Corp.*, [615 F.](#)

[Supp. 2d 1256, 1260](#) (D. Kan. 2009), which discusses the proper measure of damages under the Kansas Uniform Trade Secrets Act. Although Sevy attempts to characterize his cited case law differently, “[t]he proper measure of damages for unjust enrichment is restitution of the value of the benefit conferred upon the defendant.” *Walsh v. Weber*, No. 113,972, [2016 WL 4750102](#), at \*23 (Kan. Ct. App. Sept. 9, 2016) (quoting *Cessna Aircraft Co.*, [2009 WL 1692025](#), at \*6) (emphasis omitted). Under Kansas law, the proper measure of damages would be the purchase price of the Smitty’s Super Trac 303. Therefore, summary judgment is proper on Sevy’s Count V, unjust enrichment, insofar as Sevy seeks property damages.

#### **B. Counts XLVI–XLVII, Kansas Product Liability Act**

Defendants argue that they are entitled to summary judgment on Sevy’s KPLA claims because Sevy testified “that he did not, and could not, distinguish between the harm he alleged was caused by the O’Reilly, Citgo, or Smitty’s 303 products” and he does not “offer any evidence from which a jury could infer that causal nexus.” ([Doc. #801, p. 13.](#)) Sevy argues that there is evidence of property damage creating a genuine dispute of material fact that precludes summary judgment.

To prove a claim under the KPLA, “a plaintiff must demonstrate that: (1) his injury resulted from a condition of the product; (2) the condition was unreasonably dangerous; and (3) the condition existed at the time the product left the defendant’s control.” *Kernke v. The Menninger Clinic, Inc.*, [173 F. Supp. 2d 1117, 1122](#) (D. Kan. 2001) (citation omitted). A “plaintiff may not recover absent proof that the allegedly defective product caused the injuries asserted by plaintiff.” *Samarah v. Danek Med., Inc.*, [70 F. Supp. 2d 1196, 1206](#) (D. Kan. 1999) (citation omitted). “The mere fact that a person suffered injury while using a product is insufficient in itself to satisfy the requirement of proof that a defect in the product was a

proximate cause of the injury.” *Wilcheck v. Doonan Truck & Equip., Inc.*, [552 P.2d 938, 943](#) (Kan. 1976).

First, Defendants argue that “Sevy used Smitty’s 303 THF [P]roduct[s] in multiple pieces of equipment in which he claims absolutely no damages[,] . . . [so] Sevy cannot rely on a theory of uniform . . . damage[.]” ([Doc. #801, p. 11.](#)) Sevy disagrees, arguing that “[he] *claims and has evidence of* damage to every piece of equipment,” and that “[n]ot seeking repair costs does not equate to not *claiming* property damage.” ([Doc. #879, pp. 18–19](#)) (emphasis in original). The Court agrees with Sevy and finds that this does not bear on the merits of Sevy’s claims.

Second, Defendants argue that Sevy cannot show causation as to the Ford L800 dump truck because he cannot prove that he used Smitty’s Super Trac 303 in the Ford L800 dump truck. Sevy argues that, although he cannot “recall[] the specific timing,” the parties agree that he used Smitty’s Super Trac 303 in the Ford L800 dump truck. ([Doc. #879, p. 20.](#)) The Court agrees with Sevy. Defendants produced evidence showing Sevy testified in the underlying lawsuit<sup>6</sup> that he did not recall whether he used Smitty’s Super Trac 303 in the Ford L800 dump truck. However, in Defendants’ statement of facts, Defendants state that “Sevy used [Smitty’s] Super[ ]Trac 303 in . . . a 1992 Ford L800 Dump Truck.” ([Doc. #801, p. 8.](#)) As the record presents conflicting evidence, the Court finds there are genuine disputes of material fact as to if and/or when Sevy used Smitty’s Super Trac 303 in his Ford L800 dump truck such that summary judgment is not warranted.

Third, Defendants argue that Sevy cannot show causation because the Allis Chalmers wheel loader had pre-existing damage to its hydraulic system, and Sevy used other brands of 303 THF in the Equipment. Sevy disagrees, arguing that “[d]irect evidence of a defect through

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<sup>6</sup> *Zornes v. Smitty’s Supply, Inc.*, 19-cv-2257 (D. Kan.).

expert testimony and an expert's identification of that defect and how it causes harm is enough to defeat summary judgment[.]” ([Doc. #879, pp. 20–21.](#))

The Court agrees that a grant of summary judgment is improper where the plaintiff presents “direct evidence of [a] defect, and circumstantial evidence which tends to negate other reasonable causes of the” injury. *McCoy v. Whirlpool Corp.*, No. Civ.A. 02-2064-KHV, [2003 WL 21554950](#), at \*7 (D. Kan. July 8, 2003) (citing *Rone v. Sharp Elecs. Corp., Inc.*, No. Civ.A. 98-2560-GTV, [2000 WL 133822](#), at \*2 (D. Kan. Jan. 14, 2000)).

In order to show direct evidence of uniform damage, Sevy presents Dr. Werder Dahm's (“Dahm”) expert report. Defendants filed a *Daubert* motion to exclude Dahm's opinions, arguing that they are unreliable and inadmissible. Plaintiffs argue, and the Court agrees that:

Using [his] experience, . . . [h]e applied science to reliable formulation data, component materials, test results, and Defendants' testimony, including testimony as to whether Defendants' 303 fluid harmed equipment. He also examined the chemical composition of Defendants' 303 fluid using accepted science to provide an opinion as to whether it was in fact a tractor hydraulic fluid[.]

([Doc. #1039, p. 5.](#)) For these reasons, and the other reasons stated in Plaintiffs' opposition brief, the Court finds that Dahm's opinions are admissible.

Dr. Dahm opines that the 303 THF Products “[were] uniformly harmful” and that they damaged equipment “immediately upon the first use[.]” ([Doc. #891-1, p. 63.](#)) Dahm also opines that such “damage is unavoidable and predictable” such that “it is not necessary to inspect each tractor individually to be certain that such damage has occurred and will continue to occur until such time as the Smitty's 303 THF is adequately removed and flushed[.]” ([Doc. #891-1, p. 64.](#)) The parties agree that Sevy used Smitty's Super Trac 303 in the Equipment, and Dahm's opinion creates a genuine dispute of material fact of if, and to what extent, his equipment was damaged. Thus, the Court finds that genuine disputes of material fact preclude summary judgment.

#### **IV. CONCLUSION**

Accordingly, Defendants Partial Motion for Summary Judgment on the Claims of Plaintiff Adam Sevy ([Doc. #800](#)) is GRANTED IN PART and DENIED IN PART. The motion is GRANTED insofar as Count V is DISMISSED as to property damages. The motion is DENIED in all other respects. It is FURTHER ORDERED that Defendants' Motion to Exclude the Opinions of Plaintiffs' Expert Dr. Werner J.A. Dahm ([Doc. #972](#)) is DENIED.

**IT IS SO ORDERED.**

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

Dated: September 21, 2022