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Office of the Clerk
Circuit Court for
Montgomery County
50 Courthouse Square
Rockville, Maryland 20850

January 2, 1991

Re: Forbes Coup v. Connecticut Valley Arms, Inc., et al.
Case No. 49704

Dear Sir/Madam:

Enclosed please find for filing in the above-captioned matter Defendant Connecticut Valley Arms, Inc.'s Motion for Partial Summary Judgment with Respect to Count IV of the Second Amended Complaint along with accompanying Memorandum of Points and Authorities in support of the Motion.

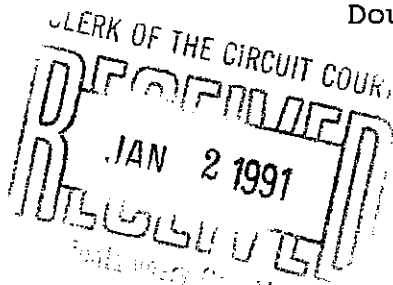
Thank you for your assistance.

Very truly yours,

Douglas A. Datt
Douglas A. Datt

DAD:bv

Enclosure



IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

FORBES COUP :
Plaintiff :
v. : C.A. No: 49704
CONNECTICUT VALLEY ARMS, INC. :
and :
SPORTING ANGLER, INC. d/b/a :
THE ROCKVILLE TRADING POST :
Defendants :

**DEFENDANT CONNECTICUT VALLEY ARMS, INC'S,
MOTION FOR PARTIAL SUMMARY JUDGMENT WITH
RESPECT TO COUNT IV OF THE SECOND AMENDED COMPLAINT**

The defendant, Connecticut Valley Arms, Inc., (hereafter "CVA"), through counsel, Gleason and Flynn, Chartered, hereby moves that this Court enter partial summary judgment in its favor, with respect to Count IV of the Second Amended Complaint, pursuant to Maryland Rules 2-501 and 2-602(b). In support of this Motion, the defendant, CVA, states:

1. There is no genuine issue as to any material fact and, therefore, the defendant is entitled to judgment in its favor as a matter of law with regard to Count IV of the Second Amended Complaint.

2. The defendant respectfully refers this Court to its attached Memorandum of Points and Authorities in support of this motion.

WHEREFORE, the defendant, CVA, requests this Honorable Court to enter partial summary judgment on its

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behalf in the above-captioned matter.

Request for Hearing

Pursuant to Maryland Rule 2-311(f), defendant requests that a hearing be held on this motion.

Respectfully submitted,

GLEASON AND FLYNN, CHARTERED



Douglas A. Datt
2275 Research Boulevard
Suite 200
Rockville, Maryland 20850
(301) 417-0099

Attorney for Defendant
Connecticut Valley Arms, Inc.

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

FORBES COUP :
Plaintiff :
v. : C.A. No: 49704
CONNECTICUT VALLEY ARMS, INC. :
and :
SPORTING ANGLER, INC. d/b/a :
THE ROCKVILLE TRADING POST :
Defendants :

ORDER

UPON CONSIDERATION of Defendant's Motion for Partial Summary Judgment, the opposition thereto, and the oral argument thereon, it is this ____ day of _____, 19____,

ORDERED, ADJUDGED AND DECREED that the Motion is hereby granted, and that Count IV of the Plaintiff's Second Amended Complaint is dismissed with prejudice.

Judge, Circuit Court for
Montgomery County

cc: Douglas A. Datt, Esquire
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Suite 200
Rockville, Maryland 20850

Robert D. Sokolove, Esq.
2 Wisconsin Circle, #1000
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Baltimore, Maryland 21202

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

FORBES COUP :
Plaintiff :
v. : C.A. No: 49704
CONNECTICUT VALLEY ARMS, INC. :
and :
SPORTING ANGLER, INC. d/b/a :
THE ROCKVILLE TRADING POST :
Defendants :

**DEFENDANT CONNECTICUT VALLEY ARMS, INC'S,
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT
OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT WITH
RESPECT TO COUNT IV OF THE SECOND AMENDED COMPLAINT**

The defendant, Connecticut Valley Arms, Inc. (hereafter "CVA"), respectfully submits this Memorandum of Points and Authorities in support of its Motion for partial summary judgment. The defendant will demonstrate that pursuant to Md. Rule 2-501, there is no genuine issue of material fact, and plaintiff is entitled to judgment as a matter of law.

I. STATEMENT OF UNDISPUTED MATERIAL FACTS

This case involves an incident which occurred on December 16, 1988. On that date, the Plaintiff was located in a cabin in West Virginia and he alleges that he poured a small amount of black powder from a Connecticut Valley Arms, Inc. (hereafter referred to as CVA) gunpowder flask on a cold fireplace in order to test the black powder. He further alleges that after pouring the black powder on the fireplace, that he placed the CVA flask behind him. Plaintiff alleges

that unknown to him, the lever on the flask remained in an open position and a stream of black powder was created between the fireplace and the flask. Plaintiff further alleges that when he lit the black powder on the fireplace, it created a fuse which caused the flask to explode and he sustained injuries to his left foot.

Plaintiff brought suit on or about November 2, 1989 against Defendants CVA and the Rockville Trading Post alleging strict liability, negligence and breach of implied warranty. The Complaint was amended in July of 1990 to insure the proper legal name of the Rockville Trading Post.

A Pre-Trial Order in this matter was entered on January 24, 1990 setting a trial date of January 3, 1991 and a Calendar Call on December 19, 1990.

On December 13, 1990, plaintiff filed a Second Amended Complaint in which he adds a count of punitive damages derived from the previous counts enumerated in the Complaint. Defendant CVA has filed a Motion for Partial Summary Judgment in connection with Count IV of the Second Amended Complaint.

II. LEGAL ARGUMENT

Plaintiff's Amended Complaint for punitive damages is derived from the counts previously alleged in the Complaint, namely, strict liability, negligence, and breach of implied warranty. Even if plaintiff were to prevail on any of these theories, plaintiff is not entitled to punitive damages.

A. Punitive Damages Are Not Recoverable on The Count for Strict Liability

The Maryland courts have never allowed recovery of punitive damages derived from a strict liability count. In Butcher v. Robertshaw Controls Co., 550 F. Supp. 692 (D. Md. 1981), an action against a manufacturer of an allegedly defective hot water heater, the United States District Court for the District of Maryland dismissed a punitive damages claim on a strict liability count. The Court noted that the theory of strict liability focuses on the character of the product and not the conduct of the manufacturer. Id. at 705 (citing Phipps v. General Motors Corp., 278 Md. 337, 344, 363 A.2d 955, 958 (1976)). The Court, therefore, held that the theory of strict liability is incompatible with the imposition of punitive damages. Id.

Similarly, in Doe v. Miles Laboratories, Inc., Cutter Laboratories Division, 675 F. Supp. 1466 (D. Md. 1987), the plaintiff patient, who contracted AIDS-related complex after a blood-coagulation-factor had been administered, had alleged claims for strict liability in tort and breach of warranties. The United States District Court for the District of Maryland granted defendant's Motion for Summary Judgment on plaintiff's count for punitive damages insofar as it was derivative of the strict liability count in that action. The Court noted that strict liability is imposed without regard to fault, and it is, therefore, inconsistent with damages predicated upon fault. Id. at 1481. The Court unequivocally

stated, "It is the rule in this district that punitive damages are incompatible with a recovery based on strict products liability." Id.

As such, it is clear that summary judgment should be granted to defendant with respect to the punitive damages claim as derived from the strict liability count.

B. Summary Judgment Should be Granted with respect to the Claim For Punitive Damages as Derived From the Negligence Count

Although the Maryland courts have held that punitive damages may, in certain limited circumstances, be recoverable in an action based on negligence, the specific conduct must demonstrate "actual malice" or "reckless disregard for the rights of others." American Laundry Machinery Industries v. Horan, 45 Md. App. 97, 115, 412 A.2d 407, 419 (1980). Plaintiff, in this action, can make no such showing.

American Laundry was a product liability suit that was brought against the manufacturer of an allegedly negligently designed clothes dryer that exploded when being used to dry a hot air balloon. The Court of Special Appeals of Maryland, for the first time, addressed the issue of whether punitive damages are allowed in a product liability case founded upon negligence. In that case, the manufacturer was found to have been negligent in its design of the clothes dryer. In addition, the evidence showed that the manufacturer knew of and could have used a relatively inexpensive safety device

that would have shut off the dryer when the load unbalanced, but the manufacturer never installed such a device. Therefore, the jury also found that absent the automatic cut-off switch, the machine would, under foreseeable circumstances, become a dangerous instrument. Further, the jury found appellant to be negligent in its failure to warn customers of that foreseeable danger. Id. at 106-108, 412 A.2d at 414-15.

Notwithstanding the above express findings of negligence, the Court of Special Appeals held that punitive damages were not recoverable under the circumstances. The Court noted that the only evidence offered in support of punitive damages was the same as that which established appellant's negligence -- failure to use the cut-off device and failure to warn. The Court held that such evidence does not suffice to show wanton and reckless disregard. In contrast, wanton and reckless disregard requires "direct evidence of substantial knowledge on the part of the manufacturer that the product is, or is likely to become, dangerous, and a gross indifference to the danger." Id. at 117, 412 A.2d at 420.

The Court specifically found that the machine was not inherently dangerous under normal use. The specific machine had been used for 18 years without mishap, there was no evidence that any similar types of machines had ever disintegrated in this way, nor was there any evidence that

the appellant had received any prior complaints about the machine or that it had in any way been declared unsafe. Further, the Court found that even though, for purposes of establishing negligence, the use was "foreseeable," the appellant never really expected the machine to be used as it was in that case." Id.

Similarly, in this case, even if a finding of negligence were to be made, the plaintiff has not alleged additional facts sufficient to meet the requisite showing of actual malice or reckless disregard of the rights of others to impose punitive damages. As in American Laundry, CVA did not anticipate or foresee plaintiff's misuse of the flask and intentional exposure of black powder to flammable material. To the contrary, CVA specifically stated in the instructions to the flask that the black powder should be poured into an intermediate container. In addition, in Count IV of Plaintiff's Second Amended Complaint, plaintiff maintains that CVA is aware of a previous accident involving leakage of a CVA gunpowder flask. During the deposition of Robert Hickey, President of CVA, he testified that the accident in question happened when a child on December 31st was using the flask and other items and effectively making firecrackers. (See page 7 of Hickey deposition, Exhibit No. 1). Mr. Hickey further testified that the design of the flask has been the same since the early 1700's and that the function of the flask has remained the same. (See page 13 of Hickey deposition, Exhibit

No. 2).

Mr. Hickey, during his deposition, testified that the flask could spill and/or leak powder. On page 45 of his deposition, he indicated that a very small amount of powder can come out of the end of the powder flask. He described these as very fine granules of powder, not much bigger than an air molecule. (See page 45 of Hickey deposition, Exhibit No. 3). Mr. Hickey further testified that leakage is not a problem in and of itself and that independent leakage of the flask does not create a dangerous situation. (See Hickey deposition, pages 20 and 39, Exhibits No. 4 and 5). He stated that the leakage of the flask is not a problem until the flask is introduced to a flammable material. (See Hickey deposition, pages 52 and 72, attached Exhibits No. 6 and 7). He further indicated that he has never been advised of a situation where the independent leakage has created a dangerous situation. In addition, the flask is tested by the individuals who use the product and by independent writers and there has never been a problem with the leakage of the flask reported to him. (See Hickey deposition, pages 53 and 54, Exhibits No. 8 and 9).

He also testified that he has never been aware of a problem with the gate sticking open and it has never been reported to him. (See Hickey deposition page 52, Exhibit No. 6). Mr. Hickey further testified that one never uses the flask around flame because it is unreasonable and dangerous.

(See Hickey deposition page 43, Exhibit No. 10).

Mr. Hickey's deposition indicates that CVA has no direct evidence that the product is, or is likely to become, dangerous in and of itself. Thus, there is no evidence that CVA has shown a gross indifference to that danger. In fact, Mr. Hickey has candidly testified that the flask may leak in certain situations, and that such is not a problem as long as the flask is not introduced to a flammable material. In fact, the instructions for the use of the flask specifically indicate that an intermediate device is to be utilized between the flask and the gun which is being fired so as to insure no flammable material can come into contact with the flask. (See Exhibit No. 11).

In addition, Mr. Hickey testified that the manner in which the plaintiff was testing his powder was unreasonable in that one never introduces a flame to black powder.

It is quite clear that the flask is not inherently dangerous under normal use. Punitive damages are certainly not applicable in a situation where the plaintiff misuses a product. Plaintiff has not alleged sufficient facts to meet the actual malice or reckless disregard standard and, thus, CVA is entitled to summary judgment.

This situation may be contrasted with the facts in PEPCO v. Smith, 79 Md. App. 591, 558 A.2d 768, cert. denied, 317 Md. 393, 564 A.2d 407 (1989), where the Court of Special Appeals affirmed an award of punitive damages in a wrongful

death action arising out of decedent's electrocution from a downed power line. In that case, the court held that in order to impose punitive damages, the conduct may be the legal equivalent of actual malice if the tortfeasor acted with implied malice, such as conduct which demonstrates that it was done with wanton or reckless disregard for human life. Id. at 616, 558 A.2d at 781. The Court noted that those terms were defined in Medina v. Meilhammer, 62 Md. App. 239, 249-250, 489 A.2d 35, cert. denied, 303 Md. 683, 496 A.2d 683 (1985), where the Court of Special Appeals stated, "[t]he result is that 'willful,' 'wanton,' or 'reckless' conduct tends to take on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent." PEPCO, 79 Md. App. at 617, 558 A.2d at 781. In PEPCO, the Court found that the evidence as to PEPCO's extraordinary conduct persisted over a period of twenty-four years in its failure to correct the particular hazardous condition that caused the accident, permitted the existence of other conditions that intensified the hazard, violated the National Electric Safety Code, and failed to respond to three separate citizens' complaints about the dangerous condition. Therefore, the Court found there was sufficient evidence to support a finding of implied malice.

In contrast, in the current case, the allegations do not come close to approaching implied malice.

This case is certainly distinguishable from the PEPCO case in that there is no evidence of CVA's failure to correct a particular hazardous condition. First of all, no hazardous condition exists unless and until the flask is introduced to a flammable material. As previously outlined, Mr. Hickey has testified that he has received no complaints about the independent leakage of the flask. There is no allegation or evidence that CVA has violated any form of regulation or code requirement.

The only situation in which any degree of danger would be present would be the introduction of the flask to a flammable material. The instructions on the flask preclude this from occurring because of the recommendation of the use of an intermediate measuring device. (See attached Exhibit No. 11).

There is no evidence that CVA has exhibited highly unreasonable conduct involving a departure from ordinary care. This is particularly so when there is no evidence that there is any danger with the flask when used properly.

There is insufficient evidence alleged in the Second Amended Complaint to meet even an implied malice standard. Therefore, summary judgment on the count for punitive damages, as derived from the negligence count, should be granted to defendant.

C. The Count for Punitive Damages Should be Dismissed as Derived From the Breach of Warranty Count

It is clear that punitive damages cannot be imposed in breach of contract actions, even if the breach is malicious. See, e.g., Sims v. Ryland Group, Inc., 37 Md. App. 470, 378 A.2d 1 (1977). Similarly, punitive damages are not recoverable in a breach of warranty action. Id. at 475, 378 A.2d at 4. Moreover, as to breaches of warranty under the Uniform Commercial Code, the Code provides only for "incidental and consequential" damages, and does not provide for punitive damages. Md. Com. Law Code Ann. §§ 2-714 and 2-715 (1975).

Although the courts have allowed punitive damages in tort actions arising out of contractual relationships, there must be a showing of actual malice. Miller v. Schaefer, 80 Md. App. 60, 559 A.2d 813, cert. granted, 317 Md. 609, 565 A.2d 1033 (1989); Sims v. Ryland, 37 Md. App. at 475, 378 A.2d at 4. In Miller, the Court of Special Appeals held that punitive damages could not be imposed against the defendant physician for the negligence committed because the appellee could not prove actual malice. Specifically, the court found that the appellee could not establish that appellant acted "with an evil or rancorous motive influenced by hate, the purpose being to deliberately and willfully injure" appellee. Miller v. Schaefer, 80 Md. App. at 77, 559 A.2d at 821. Similarly, in this case, plaintiffs can make no showing of

actual malice on the part of CVA. Therefore, summary judgment should be granted to defendant with respect to the punitive damages claim as derived from the implied warranty count.

CONCLUSION

Based on the foregoing, defendant, CVA, respectfully requests that partial summary judgment be entered in its behalf in the above-captioned matter.

Respectfully submitted,

GLEASON AND FLYNN, CHARTERED



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2275 Research Boulevard
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Rockville, Maryland 20850
(301) 417-0099

Attorney for Defendant
Connecticut Valley Arms, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Defendant CVA's Motion for Partial Summary Judgment With Respect to Count IV of the Second Amended Complaint and Defendant's Memorandum of Points and Authorities in Support of its Motion for Partial Summary Judgment was hand delivered on the 2nd day of January, 1991 to:

Robert D. Sokolove, Esq.
2 Wisconsin Circle, Suite 1000
Chevy Chase, Maryland 20815

Kevin H. Brown, Esq.
Law Offices of Harold A. MacLaughlin
120 East Baltimore Street, #2200
Baltimore, Maryland 21202



Douglas A. Datt

1 A The most recent one was cannon fuse, which we sell
2 as an accessory item. Several years ago we had a claim on a
3 patch, which is used as an accessory item, and we have had a
4 claim on the flask. We have had a claim on lead balls, and
5 we have had a claim on some guns.

6 Q Tell me about the claim on the flask. When did it
7 occur approximately; that is, when was the claim made
8 approximately?

9 A I think we had the claim sometime in the early
10 1980s.

11 Q To the best of your recollection, what was the
12 nature of that claim?

13 A I don't remember the specifics of the claim. I
14 remember what was wrong with the product. The accident
15 happened when a kid on December 31st was using the flask and
16 other items and effectively making fire crackers.

17 Q So, in other words, they were in some way lighting
18 the flask as if it was a fire cracker itself or attempting to?

19 A Other than just what I said, I don't recall any
20 specifics.

21 Q Sir, you are the president of the company?

22 A That is correct.

Exhibit #1

1 A We buy the flask from a company in Italy called
2 David Pedersoli.

3 Q Have you had any discussions with anybody from
4 David Pedersoli requesting, either as a result of before or
5 before this litigation, any information requested of them
6 regarding the design of the flask in question?

7 A No specific discussion, no.

8 Q Have you ever talked to anybody from that company
9 regarding the design of the flask in question?

10 A No.

11 Q Do you know anything about the design of the flask
12 in question?

13 A I know that the flask in principle is the same as
14 all other flasks that have been around since the 1700s, and
15 the only difference in the CVA flask, which I think is the
16 same one, the only difference in the CVA flask and the flasks
17 which have been around since the 1700s is the CVA flask
18 stands upright and most of the other flasks lay down. Other
19 than that, the function of the flask and the mechanics of the
20 CVA flask are the same as the flasks that have been around
21 since the early 1700s.

22 Q When you say the difference is that it stands up,

1 A It can leak powder anytime you have the pouring end
2 upright. It has the possibility to leak powder.

3 Q Let's talk about that a minute. Why is that?

4 A Because it is not airtight and very fine granules
5 of powder, while you described it as not much bigger than an
6 air molecule, are very, very small and can come out of the
7 end of the powder flask.

8 Q What would happen if that powder coming out of the
9 top of the powder flask was exposed to an open flame?

10 A It would burn.

11 Q What if it burned its way back to the cylinder,
12 what would happen?

13 A It would probably explode it.

14 Q Is that dangerous, in your opinion, such a situa-
15 tion or could it be?

16 A I would say very dangerous.

17 Q With the cylinder flask that you have in front of
18 you, sir, what is the spring mechanism supposed to do if
19 working properly?

20 A The function is to open and close the gate that
21 helps to contain the powder.

22 Q To open it you are supposed to apply pressure,

pab

1 leakage of black powder from a cylinder flask made by CVA
2 could create a dangerous situation.

3 A I go back to the times that I have worked with the
4 flask and used the flask, the independent leakage of the
5 powder can create no circumstances that would create a
6 problem.

7 Q When you say the independent leakage, you mean just
8 by itself, without, for example, the inclusion of a fire or a
9 flame nearby?

10 A That is correct.

11 Q Let's assume for a minute, for the purposes of
12 these questions, that a combustible is introduced into the
13 scenario. Can you then foresee of a situation by which the
14 leakage of gun powder from a CVA flask could create a
15 dangerous situation?

16 A I think any idiot who takes gunpowder around
17 flames, the gunpowder, is in for trouble.

18 Q In other words, a person would have to be an idiot
19 if somehow some flame, whether it is from a lit match or a
20 lighter, the person would by nature be an idiot if that kind
21 of combustible made its way to black powder that had been in
22 a CVA flask; is that your statement?

Exhibit #4

