

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

11 JESSE JAMES DRAKE, ) 3:16-cv-00518-HDM-WGC  
12 Plaintiff, )  
13 vs. ) ORDER  
14 SCHEELS SPORTING GOODS, a )  
corporate entity, ALLIANT )  
15 TECHSYSTEMS OPERATIONS, LLC, a )  
subsidiary of ORBITAL ATK, INC., )  
16 FEDERAL CARTRIDGE CORPORATION dba )  
AMERICAN EAGLE, and DOES 1to 10,  
17 Defendant.

19 Before the court is defendants Alliant Techsystems Operations,  
20 LLC's and Federal Cartridge Corporation's ("A&F") motion for  
21 summary judgment (ECF No. 41). Plaintiff Jessie James Drake  
22 ("plaintiff") has opposed (ECF No. 43), and A&F have replied (ECF  
23 No. 45).

24 In February 2015 plaintiff visited one of Scheels sporting  
25 goods stores in Sparks, Nevada to purchase ammunition (ECF No. 1  
26 (Complaint)). During his visit, plaintiff picked up a box of  
27 American Eagle XM33C ammunition that contained .50 caliber BMG  
28 rifle cartridges (*Id.*). After plaintiff opened the box, one of the

1 cartridges became dislodged and discharged when it fell to the  
2 floor inside Scheels' store (*Id.*).

3 On August 31, 2017, plaintiff filed a complaint alleging  
4 several claims against A&F including: (1) strict liability for  
5 ultrahazardous activity; (2) strict liability for manufacturing  
6 defect; (3) strict liability for failure to warn; (4) negligence;  
7 and (5) breach of implied warranty of merchantability (ECF No. 1  
8 (complaint)). A&F moved for summary judgment on each of plaintiff's  
9 claims (ECF No. 41).

10 **I. Legal standard**

11 Summary judgment shall be granted "if the movant shows that  
12 there is no genuine issue as to any material fact and the movant is  
13 entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).  
14 The burden of demonstrating the absence of a genuine issue of  
15 material fact lies with the moving party, and for this purpose, the  
16 material lodged by the moving party must be viewed in the light  
17 most favorable to the nonmoving party. *Adickes v. S.H. Kress &*  
18 *Co.*, 398 U.S. 144, 157 (1970); *Martinez v. City of Los Angeles*, 141  
19 F.3d 1373, 1378 (9th Cir. 1998). A material issue of fact is one  
20 that affects the outcome of the litigation and requires a trial to  
21 resolve the differing versions of the truth. *Lynn v. Sheet Metal*  
22 *Workers Int'l Ass'n*, 804 F.2d 1472, 1483 (9th Cir. 1986); *S.E.C. v.*  
23 *Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982).

24 Once the moving party presents evidence that would call for  
25 judgment as a matter of law at trial if left uncontested, the  
26 respondent must show by specific facts the existence of a genuine  
27 issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,  
28 250 (1986). "[T]here is no issue for trial unless there is

1 sufficient evidence favoring the nonmoving party for a jury to  
2 return a verdict for that party. If the evidence is merely  
3 colorable, or is not significantly probative, summary judgment may  
4 be granted." *Id.* at 249-50 (citations omitted). "A mere scintilla  
5 of evidence will not do, for a jury is permitted to draw only those  
6 inferences of which the evidence is reasonably susceptible; it may  
7 not resort to speculation." *British Airways Bd. v. Boeing Co.*, 585  
8 F.2d 946, 952 (9th Cir. 1978).

9 **II. Analysis**

10 **A. Strict liability for ultrahazardous activity**

11 In his complaint, plaintiff claims that A&F were engaged in  
12 the ultrahazardous activity of manufacturing .50 caliber rifle  
13 cartridges, and plaintiff was injured as a direct and proximate  
14 result of that activity. A&F respond that they were not engaged in  
15 ultrahazardous activity and there is thus no issue of material fact  
16 for trial.

17 Manufacturing and assembling .50 caliber rifle cartridges can  
18 be accomplished safely with reasonable care, is commonplace, is  
19 appropriate when carried on in a manufacturing facility, and does  
20 not pose a high degree of risk when safety precautions are taken.

21 See *Valentine v. Pioneer Chlor Alkali Co.*, 864 P.2d 295, 297 (Nev.  
22 1993) (providing factors for determining whether an activity is  
23 ultrahazardous). Plaintiff has failed to present any evidence  
24 establishing that the manner in which A&F manufactured and  
25 assembled .50 caliber rifle cartridges constituted an  
ultrahazardous activity. Because plaintiff has failed to show by  
specific facts the existence of an issue of material fact for  
trial, A&F is entitled to summary judgment on plaintiff's strict

1 liability ultrahazardous activity claim.

2       **B. Strict liability for manufacturing defect**

3       Plaintiff claims that the cartridge was defective and was a  
4 substantial factor in causing plaintiff's injury. In support of  
5 their motion for summary judgment, A&F argue that the cartridge was  
6 not defective and, even if it was, any defect was not the legal  
7 cause of plaintiff's injury.

8       Under Nevada law, a plaintiff can successfully bring a strict  
9 products liability claim if he shows that "(1) the product had a  
10 defect which rendered it unreasonably dangerous, (2) the defect  
11 existed at the time the product left the manufacturer, and (3) the  
12 defect caused the plaintiff's injury." *Fyssakis v. Knight Equip.*  
13 *Corp.*, 826 P.2d 570, 571 (Nev. 1992). Also, "[t]he plaintiff must  
14 show that the design defect in the product was a substantial factor  
15 in causing his injury." *Price v. Blaine Kern Artista, Inc.*, 893  
16 P.2d 367, 370 (Nev. 1995). Finally, if the injury would have  
17 occurred "notwithstanding some abstract defect in the involved  
18 product, the manufacturer may be absolved of liability." *Id.*

19       In support of their motion for summary judgment, A&F filed  
20 affidavits from two experts who both opined that the cartridge was  
21 not defective and no defect caused plaintiff's injury (ECF No. 41  
22 (Def. Mot. Summ. J. Exs. C & D)). Steven Rodgers, product safety  
23 manager for Vista Outdoor, a parent company of A&F, reviewed the  
24 evidence in this case and determined that neither the fired  
25 cartridge nor the packaging that housed it was defective. (*Id.* Ex.  
26 C (Rodgers Aff. ¶ 17, 25)). Similarly, Kevin Vest, test engineer  
27 at Orbital ATK, reviewed the evidence and concluded that the fired  
28 cartridge was not defective and the primer in the cartridge

1 functioned as designed. (*Id. Ex. D* (Vest Aff. ¶ 12)). A&F have  
2 thus provided the court with evidence that the cartridge and  
3 packaging were not defective and that no defect in the cartridge or  
4 packaging caused plaintiff's injury.

5 Plaintiff has not produced any evidence or specific facts to  
6 refute this evidence other than his conclusory opinion that the  
7 product was defective and has therefore failed to establish a  
8 genuine issue of material fact for trial. Thus, A&F are entitled  
9 to summary judgment on plaintiff's strict product liability claims.

10 **C. Strict liability for failure to warn**

11 Plaintiff claims that A&F failed to adequately warn consumers  
12 of the potential risk that a cartridge could discharge if it were  
13 dropped and hit the ground. In their motion for summary judgment,  
14 A&F argue that plaintiff has failed to identify how A&F's purported  
15 failure to warn caused plaintiff's injury. Thus, A&F argue, they  
16 are entitled to summary judgment on plaintiff's strict liability  
17 for failure to warn claim.

18 "In Nevada, when bringing a strict product liability failure-  
19 to-warn case, the plaintiff carries the burden of proving, in part,  
20 that the inadequate warning caused his injuries." *Rivera v. Philip*  
21 *Morris, Inc.* 209 P.3d 271, 274 (Nev. 2009). In order to bring a  
22 successful failure to warn claim, "a plaintiff must produce  
23 evidence demonstrating the same elements as in other strict product  
24 liability cases: (1) the product had a defect which rendered it  
25 unreasonably dangerous, (2) the defect existed at the time the  
26 product left the manufacturer, and (3) the defect caused the  
27 plaintiff's injury." *Id.* at 275 (internal quotation marks  
28 omitted). In failure to warn cases, "[a] product may be found

1 unreasonably dangerous and defective if the manufacturer failed to  
2 provide an adequate warning." *Id.*

3 In support of their motion for summary judgment, A&F produced  
4 deposition testimony from plaintiff in which he testified that he  
5 had bought ammunition before and was familiar with warnings such as  
6 "handle with care," "live ammunition," and "don't drop." (ECF No.  
7 41 ((Def. Mot. Summ. J. Ex. A (Drake Dep. at 138))). The  
8 ammunition box that contained the fired cartridge contained clear,  
9 unambiguous warnings including "discharge may occur if primer is  
10 struck; handle with caution, do not drop." (*Id.* Ex. C (Rodgers  
11 Aff. Ex. C1)). A&F have therefore provided through discovery  
12 evidence that the ammunition was not defective for lack of an  
13 adequate warning. A&F have also produced evidence that a failure  
14 to warn was not the cause of plaintiff's injury.

15 Plaintiff has not shown by facts or evidence that A&F's  
16 failure to warn was the cause of his injuries or that A&F's product  
17 was otherwise defective. Thus, A&F are entitled to summary  
18 judgment on plaintiff's strict liability for failure to warn claim.

19 **D. Negligence**

20 Plaintiff alleges that A&F negligently assembled,  
21 manufactured, and distributed the fired cartridge and the box which  
22 housed the cartridge. Plaintiff also alleges that A&F negligently  
23 packaged the fired cartridge and negligently failed to warn  
24 plaintiff of the possible hazards associated with handling live  
25 ammunition. Finally, plaintiff claims that he is entitled to the  
26 presumption of negligence under the res ipsa loquitur doctrine.  
27 A&F respond that plaintiff cannot prevail on his negligence claims  
28 as a matter of law and defendants are thus entitled to summary

1 judgment.

2 "A claim for negligence in Nevada requires that the plaintiff  
3 satisfy four elements: (1) an existing duty of care, (2) breach,  
4 (3) legal causation, and (4) damages." *Turner v. Mandalay Sports*  
5 *Entm't, LLC*, 180 P.3d 1172, 1175 (Nev. 2008). Put differently,  
6 "[n]egligence is failure to exercise that degree of care in a given  
7 situation which a reasonable man under similar circumstances would  
8 exercise." *Driscoll v. Erreguible*, 482 P.2d 291, 294 (Nev. 1971).

9 In support of their motion for summary judgment, A&F again  
10 direct the court to the expert opinions of Mr. Rodgers and Mr. Vest  
11 (ECF No. 41 (Def. Mot. Summ. J. Exs. C & D)). As noted above, both  
12 of A&F's experts opined that neither the fired cartridge nor the  
13 packaging in which it was housed was defective or negligently  
14 manufactured, assembled, or distributed (*Id.*). A&F also point out  
15 that the warning label on the ammunition box was clear,  
16 conspicuous, and adequately warned the consumer that live  
17 ammunition is volatile and should be handled with care. (*Id.* Ex. C  
18 (Rodgers Aff. Ex. C1)).

19 A&F have presented evidence that they did not breach any duty  
20 of care to plaintiff. A&F have also presented the court with  
21 evidence that A&F's conduct was not the cause of plaintiff's  
22 injury. Plaintiff has failed to produce evidence in support of his  
23 negligence claim. Therefore, there is no issue of material fact  
24 for trial on this claim.

25 Alternatively, plaintiff argues that he is entitled to a  
26 presumption of negligence under the res ipsa loquitur doctrine.  
27 "Res ipsa loquitur is an exception to the general negligence rule,  
28 and it permits a party to infer negligence, as opposed to

1 affirmatively proving it, when certain elements are met." *Woosley*  
2 *v. State Farm Ins. Co.*, 18 P.3d 317, 321 (Nev. 2001). Those  
3 elements are:

4 (1) the event must be of a kind which ordinarily  
5 does not occur in the absence of someone's  
6 negligence; (2) the event must be caused by an  
7 agency or instrumentality within the exclusive  
8 control of the defendant; and (3) the event must  
9 not have been due to any voluntary action or  
10 contribution on the part of the plaintiff.

11 *Id.* Plaintiff argues that "a [.]50 caliber BMG rifle shell does  
12 not fall through the box's inner cardboard separator and explode on  
13 contact with carpet in the absence of negligence" (ECF No. 1  
14 (Complaint 11)).

15 In their motion for summary judgment, A&F again direct the  
16 court to Mr. Rodgers' affidavit wherein he opined that plaintiff's  
17 handling of the ammunition box caused the fired cartridge to fall.  
18 (ECF No. 41 (Def. Mot. Summ. J. Ex. C (Rodgers Aff. ¶ 20))). Mr.  
19 Rodgers also stated that the ammunition box was built to factory  
20 specifications and was damaged after it left defendant's control.  
21 (*Id.*) Thus, A&F have produced evidence that tends to show that the  
22 event leading to plaintiff's injuries was caused by an  
23 instrumentality outside A&F's control and plaintiff voluntarily  
24 contributed to the same event.

25 In opposing defendants' motion, plaintiff asserts "that the  
26 cartridge normally would not go off" but "did go off" resulting in  
27 bodily injury (ECF No. 43 (Pl. Opp. 2)). However, plaintiff has  
28 admitted that he handled the ammunition box and the ammunition

1 prior to discharge. Therefore, at the time the cartridge  
2 discharged, both the box and the cartridge were in the exclusive  
3 physical control of plaintiff and not A&F or Scheels. Accordingly,  
4 plaintiff has failed to establish the second element necessary for  
5 application of the res ipsa loquitur doctrine, to wit, the  
6 cartridge and box were not within the exclusive control of A&F.  
7 Thus, A&F are entitled to summary judgment on plaintiff's  
8 negligence claims.

9                   **E. Breach of implied warranty of merchantability**

10               Finally, plaintiff argues that A&F breached the implied  
11 warranty of merchantability because "[t]he subject [...]50 caliber  
12 BMG rifle cartridge was not fit for the ordinary purpose for which  
13 such goods are used." (ECF No. 1 (Complaint)). A&F argue that the  
14 cartridge was not defective and that plaintiff has failed to make  
15 out a claim for breach of implied warranty of merchantability. As  
16 noted above, A&F have presented evidence that the fired cartridge  
17 was not defective.

18               Again, plaintiff has presented no evidence to refute A&F's  
19 evidence that the cartridge was not defective. Furthermore,  
20 plaintiff has not produced facts or evidence tending to show that  
21 the cartridge was unfit for its ordinary purpose. Finally,  
22 plaintiff has not asserted that A&F otherwise breached the implied  
23 warranty of merchantability and A&F are thus entitled to summary  
24 judgment on that claim. See NRS 104.2314 (providing the standard  
25 goods must meet in order to be merchantable for purposes of the  
26 implied warranty of merchantability).

27

28

### 1 || III. Conclusion

2 In short, plaintiff has not presented any facts or evidence to  
3 refute A&F's motion for summary judgment and no genuine issue of  
4 material fact exists for trial. A&F are therefore entitled to  
5 summary judgment on all of plaintiff's claims. Accordingly, A&F's  
6 motion for summary judgment (ECF No. 41) is hereby **GRANTED**. Each  
7 party will bear its own costs and fees.

8 IT IS SO ORDERED.

9 DATED: This 13th day of February, 2018.

Howard D. McFallen  
UNITED STATES DISTRICT JUDGE