STATE OF MICHIGAN
IN THE COURT OF APPEALS

Guy Boyd, *Plaintiff-Appellee*, v. Not An LLC, d/b/a/ JSD Supply, *Defendant-Appellant*, and Kyle Thueme, *Defendant*.	Court of Appeals No. 372372 Lower Court Case No: 24-000304-NP 22nd Judicial Circuit, Washtenaw County

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PLAINTIFF-APPELLEE GUY BOYD'S OPPOSITION TO DEFENDANT-APPELLANT NOT AN LLC d/b/a JSD SUPPLY'S APPLICATION FOR LEAVE TO APPEAL

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COUNTERSTATEMENT OF JURISDICTION

On September 6, 2024, Defendant Not An LLC d/b/a JSD Supply ("JSD") filed its Application for Leave to Appeal from the Washtenaw Circuit Court's August 19, 2024 Order denying its Motion for Reconsideration ("Application"). Plaintiff Guy Boyd ("Plaintiff" or "Mr. Boyd") agrees that JSD filed its Application within the time-period prescribed by Michigan Court Rule ("MCR") 7.205(A). Plaintiff Boyd agrees this Court has jurisdiction to consider this Motion for Leave to Appeal.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. Has JSD demonstrated that it stands to suffer substantial harm should its Application for Leave to Appeal be denied?

JSD answers "Yes"
This Court should answer "No."
Mr. Boyd answers "No"

II. Did the Circuit Court err by holding that Mr. Boyd sufficiently stated a claim that JSD marketed firearm kits to minors, which gave rise to a duty of care?

JSD answers "Yes."
The Circuit Court answered "No."
Mr. Boyd answers "No."

III. Did the Circuit Court err by applying *Moning*, which involved minors, rather than *Buczkowski*, which did not?

JSD answers "Yes."
The Circuit Court answered "No."
Mr. Boyd answers "No."

IV. Did the Circuit Court err in determining that a common law duty of care applied?

JSD answers "Yes."
The Circuit Court answered "No."
Mr. Boyd answers "No."

V. Did the Circuit Court err in finding that Mr. Boyd sufficiently stated a negligent entrustment claim?

JSD answers "Yes."
The Circuit Court answered "No."
Mr. Boyd answers "No."

VI. Did the Circuit Court err by allowing the case to proceed on the basis of the proximate cause allegations included in the Complaint?

JSD answers "Yes."
The Circuit Court answered "No."
Mr. Boyd answers "No."

COUNTERSTATEMENT OF FACT

This case concerns JSD's sale of ghost gun kits to a minor. Ghost guns are untraceable firearms sold in all-parts-included, easy-to-assemble kits. JSD's business model involves selling these kits, and it touts that it allows customers to obtain untraceable firearms "off-the-books" and "with absolutely no paperwork," "registration," "serialization," "government fee," or "background check." (Appellant's Appendix, Exhibit A, Complaint ¶¶ 48-49). Ghost guns are particularly dangerous because they can be easily obtained by people who are not lawfully entitled to possess firearms, such as criminals and minors, and who would otherwise be subject to background checks and other gun safety laws. (*Id.* ¶¶ 18-19).

Co-defendant Kyle Thueme, who was 17 years old at the time, was one of JSD's customers. State and federal law prohibit the sale of pistols to those under 18-years-old.[1] Nevertheless, on two separate occasions, JSD sold Mr. Thueme—and shipped to him—a combination of two companion kits, a Polymer 80 PF940c Completion Kit and a PF940c Full Build Kit, hereinafter "Ghost Gun Kits" or "Kits," that contained all the parts needed for Mr. Thueme to quickly and easily assemble a fully functioning firearm. (*Id.* ¶¶ 29-43, 63-67, 77). JSD did not utilize any age-gating mechanism, ask *any* questions whatsoever about Mr. Thueme's age, or ask Mr. Thueme to certify that he was legally entitled to possess a gun (he was not). (*Id.* ¶ 68-71). Instead, JSD encouraged customers to check out its YouTube page to "finish" their guns. (*Id.* ¶ 47 & n 13). Mr. Thueme assembled the guns within a matter of minutes using the instructions that Defendant JSD directed him to, even though he lacked prior specialized knowledge and training. (*Id.* ¶¶ 78-80).

Soon after building a second pistol from the Kits that JSD sold him, Mr. Thueme accidentally discharged the pistol, striking Mr. Boyd (also age 17) in the eye and wounding him critically. (*Id.* ¶¶

[1] See, e.g., MCL § 28.422(3)(b); 18 USC § 922 (x)(1)-(2) (prohibiting licensed firearms dealers from selling to those under 21 years old).

87-93). Miraculously, Mr. Boyd survived, but he continues to suffer from catastrophic injuries that will debilitate him for the rest of his life. (*Id.* ¶ 101).

COUNTERSTATEMENT OF PROCEDURAL POSTURE

On March 11, 2024, Mr. Boyd filed suit in the 22nd Judicial Circuit Court for the County of Washtenaw. Mr. Boyd's complaint states a negligence claim against Mr. Thueme, (*id.* ¶¶ 121-31), and negligence, negligent entrustment, and Michigan Consumer Protection Act ("MCPA") claims against JSD, (*id*. ¶¶ 105-20, 132-61). On May 8, JSD filed a motion for summary disposition seeking to dismiss all of Mr. Boyd's claims against it. (Appellant's Appendix, Exhibit B, Motion for Summary Disposition).[2]

On July 24, following briefing and oral argument, the Circuit Court issued its Order Denying in Part Defendant Not An LLC d/b/a JSD Supply's Motion for Summary Disposition Pursuant to MCR 2.116(C)(8). (Appellant's Appendix, Exhibit E, July 24, 2024 Order Regarding Summary Disposition).

On August 13, JSD filed a motion for reconsideration of the Circuit Court's denial of summary disposition with regard to its negligence and negligent entrustment claims only. (Appellant's Appendix, Exhibit F, JSD's Motion for Reconsideration). Significantly for this Application**,** JSD *did not* seek reconsideration of the MCPA claim—and accordingly that claim is proceeding regardless of the outcome of JSD's application for leave to appeal.

On August 19, the Circuit Court denied JSD's reconsideration motion. (Appellant's Appendix, Exhibit G, August 19, 2024 Order Denying Motion for Reconsideration). On September 6, JSD filed its application for leave to pursue an interlocutory appeal as to Mr. Boyd's negligence and negligent entrustment claims. (Application at 9).

[2] Mr. Thueme did not move for summary disposition and has answered the Complaint.

Around the same time, JSD filed a motion to stay proceedings in the Circuit Court, which was subsequently denied. (Ex. 1, September 18, 2024 Order Denying Motion for Stay). On September 16, JSD filed an answer to Plaintiff's Complaint. JSD also filed a Crossclaim against Mr. Thueme, a Third-Party Complaint against Hamati Dairy Mart, Inc., and Notices of Responsible Non-Parties at Fault against five other individuals. The case is now in discovery in the Circuit Court.

STANDARD OF REVIEW

Since no appeal as of right exists to file this Application, JSD must first seek leave of this Court to file an appeal. MCR 7.203(B). The decision to grant leave to file an interlocutory appeal is discretionary but generally disfavored. See *McCarthy & Assoc, Inc v Washburn*, 194 Mich App 676, 680; 488 NW2d 785 (1992) (explaining that appeals of nonfinal orders "leads to piecemeal appeals and an unnecessary waste of judicial resources"). Since JSD seeks an interlocutory appeal, it must demonstrate "facts showing how the appellant would suffer substantial harm by awaiting final judgment before taking an appeal." MCR 7.205(B)(1).

Should this Court exercise its discretion to consider the merits of JSD's appeal, it reviews a decision to grant or deny summary disposition de novo. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). "A motion seeking summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim," *Andary v USAA Cas Ins Co*, 512 Mich 207, 230; 1 NW3d 186 (2023), and all well-pleaded allegations must be "accepted as true and construed in a light most favorable to [Plaintiff]." *Johnson v Pastoriza*, 491 Mich 417, 435; 818 NW2d 279 (2012). On such a motion, "[o]nly the pleadings may be considered," MCR 2.116(G)(5), and relief "may be granted only 'when a claim is so clearly unenforceable that no factual development could possibly justify recovery.'" *Andary*, 512 Mich at 230, quoting *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160; 934 NW2d 665 (2019). Moreover, "Michigan is a notice-pleading jurisdiction, which means that a complaint is required to contain only enough information 'reasonably to inform the defendant of the

nature of the claim against which he must defend.'" *Veritas Auto Mach, LLC v FCA Int'l Operations, LLC*, 335 Mich App 602, 615; 968 NW2d 1 (2021), quoting *Iron Co v Sundberg, Carlson & Assoc, Inc,* 222 Mich App 120, 124; 564 NW2d 78 (1997).

ARGUMENT

I. JSD Cannot Show Substantial Harm Warranting Leave for Interlocutory Appeal.

As an applicant for leave to appeal, JSD must demonstrate "facts showing how [it] would suffer substantial harm by awaiting final judgment before taking an appeal." MCR 7.205(B)(1). JSD is unable to make that showing for at least two related reasons.

First, JSD can show no harm from awaiting final judgment prior to taking this appeal because it has elected to pursue a *non-dispositive* appeal. JSD's Application, like its Motion for Reconsideration, seeks review of the Circuit Court's denial of its motion for summary disposition as to Mr. Boyd's negligence and negligent entrustment claims but *not* as to Mr. Boyd's claim under the MCPA. Thus, JSD will not be prejudiced if this case moves forward without an interlocutory appeal because *this case will proceed against JSD in any event*, and discovery on those claims is likely to be largely coextensive with discovery on the claims as to which it does seek leave to appeal. Moreover, granting leave to appeal prior to entry of a final order in this case risks multiple appeals being taken in this matter and frustrates judicial economy. See *McCarthy & Assoc, Inc*, 194 Mich App at 680; *State Hwy Comm'n v L & L Concession Co*, 31 Mich App 222, 228 n 7; 187 NW2d 465 (1971) (noting "we abhor piecemeal appeals").

Second, and relatedly, there is no merit to JSD's suggestion that litigating this case without an interlocutory appeal will place its "entire business model at risk." (Application at iv). JSD contends that it has stopped selling the Ghost Gun Kits at issue. That may be true, but that decision has *nothing* to do with this case. As JSD's owner Jordan Vinroe acknowledged in a declaration in an unrelated case, JSD decided to stop selling the ghost gun kits at issue due to changes in federal

regulations that have nothing to do with this lawsuit,[3] and which happened roughly two years prior to the Circuit Court's decision denying JSD's Motion for Reconsideration.[4]

II. The Circuit Court Correctly Applied Binding Michigan Caselaw.

JSD's main argument is that it had no duty arising out of its sale of Ghost Gun Kits to a 17-year-old. The Circuit Court twice rejected this argument, explaining that the Michigan Supreme Court settled this issue in *Moning v Alfono*, 400 Mich 425; 254 NW2d 759 (1977). (Appellant App., Ex. E, July 24, 2024 Order at 1-2). (See also Appellant App., Ex. G, August 19, 2024 Order at 1). There, the Supreme Court confirmed that those who sell potentially dangerous products to minors "owe a legal obligation of due care to a *bystander* affected by use of the product." *Moning*, 400 Mich. at 432 (emphasis added). Whether a specific seller breached its duty of care under the particular facts and circumstances of the case is a jury question. *Id.* at 434.

In its Application, JSD attempts to distinguish this case from *Moning*, but its efforts are unavailing. JSD contends that *Moning* applies *only* in cases where the seller specifically promotes or directs its product towards minors. (See, e.g., Application at 2-4, 10-12, 14, 16.) And, according to JSD, it merely marketed its kits to a "general population including minors," without adopting a strategy in which "minors were especially targeted." (*Id.* at iv; see, e.g., *id.* at 6, 11, 14, 16, 18, 21-22). This submission is both factually untrue and predicated on a misunderstanding of the phrase "marketing directly to children" as used in the opinion. *Moning*, 400 Mich at 436. In *Moning*, the

[3] See Declaration of Jordan Vinroe ¶ 10, *VanDerStok v Garland*, unpublished filing in the United States District Court for the Northern District of Texas, filed January 5, 2023 (Case No. 4:22-CV-691-O) (". . . JSD Supply ceased selling ALL 80% receivers and Jigs on August 17/18, 2022 to give a clear break in when we stopped selling due to fear of the unclear 'new rule' regulations. We have not sold an 80% or jig since then. We have continued to sell other replacement parts such as triggers, barrels, slides, pins and springs.") (Ex. 2).

[4] To the extent that JSD argues that it will suffer substantial harm because the Court "ignored binding law" or "unilaterally expanded negligence law," these statements do not constitute substantial harm. Virtually all appellants argue that lower courts decided legal issues incorrectly. Moreover, as discussed below, JSD's assertions are without merit.

Supreme Court found that a manufacturer, distributor, and retailer of slingshots had a duty which arose from "marketing" in its traditional and primary sense of "placing a product on the market," thereby facilitating "ready" or "direct" "market access" to the product for the general public including minors. *Id.* at 434, 439, 453, 458. JSD "marketed directly to children" within the meaning of *Moning* by *selling* its dangerous products directly to minors and providing children with "ready-market access" to its Ghost Gun Kits—even though they could have been "marketed in a manner designed to confine sale to adults and to exclude purchases by children." *Id.* at 433-34, 456. Under *Moning*'s clear holding, that is sufficient to create a duty.

Because JSD's efforts to distinguish *Moning* fail, so too does every argument JSD raises in its Application:

1. JSD argues that "the trial court erred by imposing a duty of care in the absence of any relationship between Boyd and JSD." (Application at 9-12). However, as *Moning* made clear in the context of potentially dangerous products, "[i]t is well established that placing a product on the market creates the requisite relationship between a [seller] and persons affected by use of the product giving rise to a legal obligation or duty to the persons so affected." 400 Mich at 439. See Section A.

2. JSD argues that "the trial court erred by ignoring published binding authority"—namely *Buczkowski v McKay*, 441 Mich 96; 490 NW2d 330 (1992)—which it contends requires dismissal of Mr. Boyd's negligence claims. (Application at 4-9). But *Buczkowski* requires no such thing. In *Buczkowski,* the Supreme Court acknowledged *Moning* and found that it was distinguishable because it involved children. 441 Mich at 103 n 8. The Circuit Court therefore did not err by applying *Moning*, which concerns minors, rather than *Buczkowski*, which does not. See Section B.

3. JSD argues that "the trial court erred by imposing a duty of care despite the lack of any statute defining a class of persons who are prohibited from purchasing the kits." (Application at 13-14). But the existence of a statute is not determinative here. Assessing whether a defendant's sale of potentially dangerous products to a minor gives rise to a duty of care at common law is "unavoidably the Court's responsibility." *Moning*, 400 Mich at 436. At any rate, minors indisputably belong to a group that federal and state laws protect from potentially dangerous products, including firearms. See Section C.

4. JSD argues that "the trial court erred by allowing Boyd to proceed on a negligent entrustment theory" and by "improperly applying a 'willful blindness' standard to Plaintiff's negligent entrustment claim." (Application at 14-18). That too is incorrect. A negligent entrustment claim is cognizable when a retailer sells its products to a class of incompetent entrustees. *Moning*, 400 Mich at 444 & n 18. Like the defendants in *Moning*, JSD directly marketed its Kits without restriction to a class it knew or should have known included minors (and even had notice from law enforcement regarding this fact), who are incompetent as a class to possess potentially dangerous products. See Section D.

5. JSD argues that "the trial court erred by holding that Plaintiff sufficiently alleged JSD proximately caused Thueme to shoot plaintiff in the face merely by advertising its products to the general public." (Application at 18-24). That argument misstates Mr. Boyd's allegations as well as the proximate cause standard. Here, as in *Moning*, Plaintiff sufficiently alleged proximate cause by pleading that JSD sold potentially dangerous products directly to a minor, who foreseeably mishandled them, causing serious injury. See *Moning*, 400 at 441; see also Section E.

A. JSD Had a Duty of Care Arising from Its Marketing of Ghost Gun Kits to Minors.

The Supreme Court's decision in *Moning* confirmed that those who sell potentially dangerous products to minors "owe a legal obligation of due care to a bystander affected by use of the product." 400 Mich at 432. In fact, Michigan law specifically "recognize[s] a general duty to keep children from possessing firearms" in light of their "'inability to appreciate danger and . . . inclination to explore without regard to risk.'" *Lelito v Monroe*, 273 Mich App 416, 422-23; 729 NW2d 564 (2006), quoting *Moning*, 400 Mich at 445. Far from "ignoring, as a practical matter *Moning*," as JSD contends, the Circuit Court faithfully applied it when holding that JSD owed a duty to Mr. Boyd. (Application at iv).

Moning involved facts analogous to those here: A minor plaintiff lost sight in one eye when his friend, another minor, fired a slingshot pellet that accidentally ricocheted off a tree and struck the plaintiff in the face. 400 Mich at 432, 441-42. The injured minor brought negligence and negligent entrustment claims against the retailer, distributor, and manufacturer that made the slingshot available for purchase and use by minors. *Id.* at 432, 443. The trial court issued a directed verdict, reasoning that no defendant owed the plaintiff a legal duty of care, and the Court of Appeals affirmed. *Id.* at 432. The Supreme Court reversed, finding that "[i]t is well established that placing a product on the market creates the requisite relationship between [sellers] and persons affected by use of the product giving rise to a legal obligation or duty to the persons so affected." *Id.* at 439. This relationship, combined with the nature and foreseeability of the risks involved, gave rise to the particular duty at issue:

> A manufacturer, wholesaler and retailer of slingshots can be expected to foresee that they will be used to propel pellets and that a person within range may be struck. Moning, as a playmate of a child who purchased a slingshot marketed by the defendants, was within the foreseeable scope of the risk created by their conduct in marketing slingshots directly to children. Moning was a foreseeable plaintiff. The defendant[s] . . . were under an obligation for the safety of Moning.

Id. at 440.

So it is here: JSD sold Ghost Gun Kits to a minor. The minor then foreseeably mishandled JSD's product as a result of his "inability to appreciate [its] danger" and ended up injuring his friend, Mr. Boyd. See *id.* at 445. See also *id.* at 446 ("[O]lder children are peculiarly prone to conduct which they themselves recognize as careless or even reckless.").

JSD attempts to distinguish *Moning* by arguing that, unlike the defendants there, it did not "market its products directly to children." (See, e.g., Application at 2-4, 10-12, 14, 16). However, JSD *did* "market its products directly to children" within the meaning of *Moning*, where that phrase is used in its traditional and primary sense of "placing a product on the market" in a manner that gave minors unrestricted, "ready," and "direct" "market access" to the product. 400 Mich at 434, 439, 453, 458. Here, JSD marketed its Ghost Gun Kits (its dangerous products) directly to minors by placing them on the market, by making them directly available to the general public *including* minors (i.e., without any age-based restrictions), and by selling and shipping them directly to a minor.

Both the facts and the text of *Moning* confirm this reading: The Supreme Court found that the manufacturer, wholesaler, and retailer of slingshots all owed a duty to plaintiff because they had made slingshots directly available to a minor, plaintiff's friend. See *id.* at 433, 440. The minor purchased the slingshot at issue at a discount jewelry store (the retailer defendant)—where it would have been offered for sale *to the general public including minors* and without restriction. See *id.* at 432. This is the conduct that the Court describes as giving rise to a duty of care: selling, distributing, and exposing for sale slingshots in the market. See, e.g., *id.* at 439 ("*placing a product on the market* creates the requisite relationship between a manufacturer, wholesaler and retailer and persons affected by use of the product giving rise to a legal obligation or duty to the persons so affected") (emphasis added); *id.* at 453 ("The view that slingshots should not be *sold* or used by children is widely held . . . .") (emphasis added).

Like the retailer in *Moning,* JSD "*marketed*" its products "directly to children" by offering its Ghost Gun Kits without restriction to all purchasers, including minors, and *selling* those products directly to a minor. JSD misunderstands the phrase "marketing directly to children" in *Moning* as requiring that the seller promote or advertise its products for sale specifically or exclusively at children. (See, e.g., Application at 10-11). However, *Moning* contains no discussion of promotion, advertisements, or appeals directed exclusively or even specifically at minors. In fact, this meaning (i.e., strategically promoting a product for sale to a particular set of consumers, as today's corporate marketing departments do) had not even accrued to the term in 1977 when *Moning* was decided. *See Webster's New Collegiate Dictionary* (3d ed 1977) ("*market* . . . *vt.* 1: to expose for sale in a market 2: SELL"); *id.* (**"***marketing*, *n.* 1: the act or process of selling or purchasing in a market 2: an aggregate of functions involved in moving goods from producer to consumer").[5]

As Plaintiff has alleged, JSD *did* market its Ghost Gun Kits directly to a minor—Mr. Thueme—by generally making its products available to anyone and everyone on the internet, including minors and other prohibited purchasers, and by specifically selling and shipping them to Mr. Thueme without any restriction or verification of his age or identity. (Appellant App., Ex. A, Compl. ¶¶ 58, 63, 67-76). That is sufficient under *Moning*.

And Mr. Boyd has alleged more than that, including:

- JSD designed, advertised, and distributed its ghost gun kits in a manner calculated to profit from minors and other prohibited purchasers who could not have acquired

[5] See also *Oxford English Dictionary* (2d ed. 1989) ("*market*, . . . *v*. . . . 1. *intr.* To deal in a market, buy and sell . . . 2. *trans.* To dispose of in a market, to sell; also, to bring or send to market"). This meaning is also consistent with how the Supreme Court was uniformly using the term around the same time. See, e.g., *Mich Canners & Freezers Ass'n, Inc v Agricultural Mktg & Bargaining Bd*, 416 Mich 706, 718-20; 332 NW2d 134 (1982) (discussing agricultural "marketing" in the context of farmers' collective bargaining with producers and processors), rev'd 467 US 461 (1984) (same).

firearms while complying with legal requirements like background checks. (*Id.* ¶¶ 48-50).

- Ghost guns (and the kits used to make them)—especially those sold online without age verification like JSD's—are favored by teenagers and have fueled an epidemic of increased gun violence and firearm accidents among minors. (*Id.* ¶¶ 18-19).[6]
- Two weeks prior to the sale, JSD was on notice from the Pennsylvania Attorney General's Office that its products were reaching prohibited possessors like minors. (*Id*. ¶¶ 56-58).
- Nevertheless, JSD continued to tout that its Kits allow customers to possess firearms "off-the-books" and "with absolutely no paperwork," "registration," "serialization," "background check," or "government fee." (*Id*. ¶ 49).
- JSD specifically and misleadingly omitted minors from its list of prohibited possessors on its website. (*Id*. ¶¶ 73-75).
- JSD twice shipped and sold ghost gun Kits to co-Defendant Kyle Thueme, a minor, without any age verification, and profited from these sales. (*Id.* ¶¶ 62-72).

In totality, Mr. Boyd's allegations also provide a sufficient basis for his claim that JSD *did* structure its business practices to target and profit directly from minors along with other unauthorized purchasers, and it *did* profit from its sale directly to the 17-year-old Thueme.[7] The Circuit Court

[6] Gutierrez, *Girl, 14, dies after getting shot in the head: Arvin PD*, KGET (September 16, 2022) <https://perma.cc/GUH3-BCAA>; Wirtz & Dolan, *Father speaks out on Andrew Byrd punishment involving ghost gun*, WINK (August 10, 2022) <https://perma.cc/YL78-VYAU>; Steinbuch, *Georgia boy, 13, accused of accidentally killing sister with 'ghost gun'*, New York Post (December 3, 2021) <https://perma.cc/R4CV-VTES>; Figueroa, *Probation for man who supplied gun in fatal Carlsbad shooting then hid it from police*, San Diego Union-Tribune (October 7, 2020) <https://perma.cc/3X4U-6B6J>.

[7] Cf. *Estados Unidos Mexicanos v Smith & Wesson Brands*, *Inc*, 91 F4th 511, 516-18, 530-32 (CA 1 2024) (accepting plaintiff's allegations that gun industry defendants targeted unlawful purchasers by

agreed, observing that Plaintiff had sufficiently alleged that JSD targeted its marketing towards a "group of people who want to avoid requirements of gun registration" and "seeking to circumvent gun laws," because its Kits were "meant to be sold to . . . folks that are not eligible" to purchase firearms, such as minors, felons, or domestic violence perpetrators. (Ex. 3 at 6-7, Transcript of July 24, 2024 Hearing on Summary Disposition p 40-41).

Under JSD's logic, its sales of Ghost Gun Kits to a minor does *not* give rise to a duty because it *also* sold the kits to the general population. It would be odd indeed if a retailer selling potentially dangerous products directly to minors could exempt itself from a duty under *Moning* by *also* offering its products for sale to adults. For good reason, that is not the common law in Michigan. Instead, when an entity places potentially dangerous products on the market for purchase by the general public *including* minors, despite the fact that those products "*could be* marketed in a manner designed to confine sale to adults and to exclude purchases by children," it can be sued for negligence. *Moning*, 400 Mich at 456 (emphasis added); see also *id.* at 448-49 (explaining that under Michigan law of negligent entrustment, the "supplier can be expected in marketing a product to take precautions for the safety of children and others").

To be sure, there likely will be fact questions as to whether JSD *actually breached* its duty of care and the extent of its marketing to minors, questions that will be explored in discovery. Factual development could, for instance, identify other sales to minors and the degree to which JSD's business engaged in such marketing (in addition to the Pennsylvania Attorney General's investigation referenced in the Complaint). Discovery is also likely to shed light on the adequacy of the policies and procedures, if any, JSD had in place to prevent such sales. Ultimately, evaluating such facts implicates "the determination of the reasonableness of that risk and of the defendants'

making "deliberate design, marketing, and distribution choices to retain and grow [an] illegal market and the substantial profits that it produces"), cert docketed No. 23-1141 (US April 22, 2024).

conduct, and should be decided by a jury." *Id.* at 434. But even if JSD might ultimately be able to conjure up factual arguments to counter that it breached its duty not to provide minors with access to potentially dangerous products, it cannot credibly contend that it did not even have that duty *at all*.

B. The Circuit Court Properly Applied *Moning*, Which Involved Minors, Rather Than *Buczkowski*, Which Did Not.

JSD argues that the Circuit Court erred by failing to follow *Buczkowski v McKay*, which it describes as "binding precedent." (See, e.g., Application at 4, 7). *Buczkowski* held that the sale of ammunition to an intoxicated customer did not give rise to a duty of care by the retailer. 441 Mich at 97-98. What JSD neglects to mention is that *Buczkowski* is inapplicable by its own terms when a retailer sells potentially dangerous products to minors. In fact, the Supreme Court specifically recognized that "*Moning* is distinguishable" from *Buczkowski* because "it involved children." *Buczkowski*, 441 Mich at 103 n 8.

In this case, the Circuit Court correctly applied *Moning*, not *Buczkowski*, because the potentially dangerous product was sold to a minor. Here, JSD sold to and contributed to the injury of minors, a class of persons whom the Legislature has identified as "incompetent to possess weapons" and whom courts have "historically protected under the law of torts." *Buczkowski*, 441 Mich at 103 n 8, 107. That differentiates it from the facts of *Buczkowski*, where the sale was made to an adult—a person not within "a class of purchasers who" was deemed "legally incompetent to buy ammunition." *Id.* at 98.

The reason for the difference is foreseeability. In *Buczkowski*, the Supreme Court declined to recognize an underlying obligation because "foreseeability fail[ed] as an adequate template for the existence of a duty" in circumstances where the legislature had not restricted weapon access to the class of persons at issue (intoxicated persons). *Id.* at 102, 105-06. Conversely, "where a legislature identifies certain classes of persons as incompetent to possess weapons"—such as minors—"*it is*

foreseeable that such persons will commit crimes if allowed access to weapons in violation of the statute." *Id.* at 107 (emphasis added).

Here, it was foreseeable that JSD's sale of ghost gun kits to minors would lead to misuse and injury. See *Moning*, 400 Mich at 440 (Slingshot sellers "can be expected to foresee that [slingshots] will be used to propel pellets and that a person within range may be struck. Moning, as a playmate of a child who purchased a slingshot marketed by the defendants, was within the foreseeable scope of the risk created by their conduct in marketing slingshots directly to children."). That is the very reason that Michigan law specifically "recognize[s] a general duty to keep children from possessing firearms" in various contexts. *Lelito*, 273 Mich App at 422; see also *id.* (discussing *Gilbert v Sabin*, 76 Mich App 137; 256 NW2d 54 (1977),[8] and explaining that "[t]he law thus does impose on a gun owner a special obligation to keep his or her firearms from a child's—even a trespassing one's—ready access").

JSD's reliance on *Resteiner v Sturm, Ruger & Co*, 223 Mich App 374; 566 NW2d 53 (1997) is also unavailing. *Resteiner* concerned a gun sold to a legally competent adult, then stolen from him by an unknown third party. *Id.* at 378 (WHITE, J., concurring in part and dissenting in part). Like *Buczkowski* (and the vast majority of cases that JSD cites in support of summary disposition), *Resteiner* did not involve minors.

JSD also highlights discussions of "inherent dangerousness" in both *Buczkowski* and *Resteiner* to argue that ghost gun kits should not be classified as inherently dangerous. (Application

[8] In *Gilbert*, the Court of Appeals found that homeowners who stored a loaded firearm tucked away in their garage owed a duty to wandering children who discovered the firearm. See *Gilbert*, 76 Mich App at 139, 148. One child mishandled the gun while playing with it and accidentally shot another child, causing permanent and debilitating injuries. *Id*. at 140. The court held that a duty arose because it was foreseeable that the children, as licensees onto the larger property, might wander into an open garage and discover the firearm, even though the homeowner had no specific warning that the children might enter the garage. *Id.* at 144, 148.

at 5-8). But that is not the relevant inquiry. As discussed in *Moning*, negligence claims are not "restricted to chattels classified as latently defective or inherently dangerous." *Moning*, 400 Mich at 445 n 24. Instead, as the majority repeatedly explained, what mattered was that slingshots were "potentially dangerous" in the hands of minors. *Id*. 441 n 15, 444, 447, 452, 456.

As Mr. Boyd has alleged, and can personally attest to, Ghost Gun Kits sold by JSD are, at minimum, "potentially dangerous" in the hands of minors. (Appellant App., Ex. A, Compl. ¶¶ 18-19, 51-54, 85-102). Mr. Thueme, with no previous training or gunsmithing experience, was twice able to convert these Kits into an operable pistol within a matter of minutes. (*Id.* ¶¶ 2, 78, 80, 110). As alleged, he was aided by the instructions that JSD directed him to. (*Id.* ¶ 79). If JSD wishes to argue that its Ghost Gun Kits are not "potentially dangerous" in the hands of minors, it can do so after the parties have engaged in discovery, including expert disclosures.[9]

Finally, application of the framework laid out in *Buczkowski* illustrates the logic of imposing a duty in these circumstances and underscores that the Supreme Court reached the right conclusion in *Moning*. As the court explained, "'[d]uty' is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection." *Buczkowski,* 441 Mich at 100-01, citing Prosser & Keeton, Torts (5th ed), § 53, p 358. These considerations include "(1) foreseeability of the harm, (2) degree of certainty of injury, (3) closeness of connection between the conduct and injury, (4) moral blame attached to the conduct, (5) policy of preventing future harm, and (6) the burdens and consequences of imposing a duty and the resulting liability for breach"—in addition to the relationship between the parties as recognized by *Moning. Kandil-Elsayed v F & E Oil, Inc.*, 512 Mich 95, 110; 1 NW3d 44 (2023) (citation omitted).

[9] Cf. *Moning*, 400 Mich at 452. ("Slingshots are potentially dangerous. An expert witness, called by Moning, testified that the slingshots Alfono purchased were capable of launching projectiles at speeds exceeding 350 miles per hour. Slingshots cause hundreds of serious injuries each year to school age children.").

Those factors uniformly support recognition of a duty running from JSD to Mr. Boyd. Specifically here:

1. Harm was foreseeable because entities selling "potentially dangerous articles" to minors either know or should be aware that children "may not appreciate the risk or may not have the skill to use the article safely . . . [or] may recklessly ignore the risk and use the article frivolously due to immaturity of judgment, exuberance of spirit, or sheer bravado." *Moning*, 400 Mich at 447.

2. Misuse of guns was likely to, and did, result in critical injury. See, e.g., *Ross v Glaser*, 220 Mich App 183, 187-89; 559 NW2d 331 (1996) ("The likelihood of injury" that resulted in the plaintiff's death was "high" when the defendant handed a gun to someone who was "chronically mentally unstable").

3. The connection between conduct and injury was close, as JSD directly sold its Kits to a minor who could not legally purchase or possess firearms but was enabled by JSD's irresponsible business practices. The minor then foreseeably mishandled the firearm—injuring Mr. Boyd—mere weeks after JSD sold the minor the Kits.[10] (Appellant App., Ex. A, Compl. ¶¶ 2, 4, 63, 67-80, 87, 93).

4. JSD's conduct was morally blameworthy. Refusing to take any steps to prevent sales of gun-building kits to minors and putting guns in the hands of those seeking to circumvent background checks and gun safety laws was its "entire business model." (*Id.* ¶ 28).

[10] As Mr. Thueme admitted, he purchased and assembled JSD's kits as a result of its deceptive marketing, which suggested that the Kits allowed him to legally possess firearms without registration or supervision. (Ex. 4, Thueme Answer, ¶¶ 149, 156, 159); cf. *Eason v Coggins Mem Christian Methodist Episcopal Church*, 210 Mich App 261, 266; 532 NW2d 882 (1995) ("While plaintiff went beyond the four corners of the complaint to explain her specific theory . . . , her comments merely showed that further factual development of the allegations in the complaint could establish a theory of recovery, which is a relevant inquiry in deciding a motion under MCR 2.116(C)(8).").

5. The policy of preventing future harm is best served by placing a duty of reasonable care on JSD. See *Kirk v Hanes Corp of NC*, 16 F3d 705, 710 (CA 6 1994) (finding "a clear statement of the public policy of the state of Michigan" that a seller "who bypasses adults, upon whom the law ordinarily places responsibility, and markets a simple, but dangerous, tool directly to children may not avoid liability on the ground that the child 'should have known better'").

6. Imposing the relevant duty on JSD is potentially life-saving while creating only minimal burdens. JSD could have easily and affordably chosen not to give minors access to firearm kits by verifying the age or identity of its purchasers, as numerous other retailers that sell age-restricted products over the internet do. (Appellant App., Ex. A, Compl. ¶ 69).

In short, imposing a duty of care on JSD accords with the underlying considerations identified by the Supreme Court when considering whether a duty exists. But of course, this Court need not reinvent the wheel here: The Supreme Court *has* already weighed each factor and decided that those who sell potentially dangerous products directly to minors possess a duty of reasonable care that extends to individuals injured when minors misuse those products. See *Moning*, 400 Mich at 451-57.[11] The Circuit Court's decision to follow this well-established rule does not amount to a "gross miscarriage of justice" or disregard of *Buczkowski*, as JSD argues. (Application at 7, 9).

C. JSD Had a Common Law Duty of Care Independent of Its Statutory Obligations.

JSD also argues that it "did not have a duty to protect a member of the general public (like Mr. Boyd) from Thueme's criminal acts because there was no statute restricting Thueme's right to

[11] Plaintiff also notes that neither *Moning* nor *Buczkowski* was decided on summary disposition. Each proceeded to discovery, and appellate courts had the benefit of a full factual record in their multi-factor, fact-intensive consideration of whether the defendant had a duty. See, e.g., *Moning*, 400 Mich at 452; *Buczkowski,* 441 Mich at 99, 108 n 16.

purchase the Kits." (Application at 13 (relying on *Buczkowski*)). This argument fails for two, independently sufficient reasons.

First, as explained in Section A, the Supreme Court has recognized a *common law rule* that entities that sell potentially dangerous products to minors owe a duty to those foreseeably injured by the minor's mishandling of those products. See also *King v RG Indus, Inc*, 182 Mich App 343, 346; 451 NW2d 874 (1990) ("[I]n *Moning* the issue was a manufacturer's liability for intentionally marketing sling shots directly to children, thereby creating an unreasonable risk of harm."). No legislative scheme relieves JSD of that common law duty. *Moning* implicated no statutory violations, and the Supreme Court specifically held that, absent a legislative command authorizing or prohibiting the sale of slingshots to minors, the Court, together with the jury, had to define the contours of the common law duty. See *Moning*, 400 Mich at 436 ("The Legislature has not approved or disapproved the manufacture of slingshots and their marketing directly to children; the Court perforce must decide what the common law rule shall be.").

Common law rules like those recognized by *Moning* "remain[] in force until 'changed, amended or repealed.'" *Murphy v Inman*, 509 Mich 132, 153; 983 NW2d 354 (2022), quoting *Velez v Tuma*, 492 Mich 1, 11; 821 NW2d 432 (2012), and Const. 1963, art. 3, § 7.[12] And there is not even a hint that the Legislature intended to abolish this traditional common law rule, much less the clear statement of abrogative intent that the Supreme Court requires. See, e.g., *McMaster v DTE Energy Co,* 509 Mich 423, 432-38; 984 NW2d 91 (2022) (common law duty of care owed by

[12] As JSD acknowledges, see Application at 12, Michigan law continues to reaffirm the holding of *Moning* that a duty will attach "where a protected class of persons, such as children, is involved." *Rookus v Randy Merren Auto Sales, Inc*, unpublished per curiam opinion of the Court of Appeals, issued February 13, 2018 (Docket No. 336766), p 3 (citing *Moning* and *Buczkowski*) (Appellant App., Ex. F, at 39-42).

shippers not abrogated by the Michigan Motor Carrier Safety Act absent an "unequivocal statement" to that effect).

Second, the statutory scheme applicable to firearms is consistent with imposing a duty on JSD. An underlying purpose of those laws is to keep firearms away from minors and individuals likely to mishandle them. See *Buczkowski,* 441 Mich at 103 n 8, 107 (recognizing that heightened common law duties arise when dealing with minors because they belong to a class of persons whom the legislature has identified as "incompetent to possess weapons" and courts have "historically protected under the law of torts."). So, for example, the Legislature has prohibited the issuance of permits to purchase firearms to persons under 18 years old and permits to purchase pistols from a federally licensed dealer to persons under 21 years old. MCL § 28.422(3)(b). See also 18 USC § 922 (x)(1)-(2) (prohibiting the sale to and possession by minors of handgun or handgun ammunition).

JSD should not be *exempt* from common law liability because it sought to evade applicable gun safety laws by selling gun kits instead of fully operable firearms. By design, the only conceivable use of JSD's kits is conversion into pistols. (See Appellant App., Ex. A, Compl. ¶¶ 15, 29, 32, 41-43). Whether a Michigan law specifically prohibited JSD's sale of ghost gun kits does not absolve it of liability.

Looking ahead, Mr. Boyd expects that discovery will shed light on the fact that Mr. Thueme *was* prohibited from purchasing these Kits as a minor and that JSD *did* violate state and federal law in selling them to him, as is clearly alleged in the Complaint and which JSD has challenged in its Answer and Affirmative Defenses.[13] As Plaintiffs have alleged, JSD's Ghost Gun Kits *are*

[13] The Circuit Court determined below that—as a matter of pleading—Plaintiff had not adequately stated a negligence per se claim because "[t]here has been no showing that Defendant, JSD, violated any federal or state law or aided and abetted in any violation of law." (Appellant App., Ex. E, July 24, 2024 Order at 2). See also *Randall v Mich High Sch Athletic Ass'n,* 334 Mich App 697, 721; 965

firearms under Michigan and federal law because they are "designed to or may readily be converted to expel a projectile by the action of an explosive[.]" 18 USC § 921(a)(3); MCL 750.222(e). (See also Appellant App., Ex. A, Compl. ¶¶ 40-42, 45-47 (alleging the same)). JSD does not (and cannot) seriously dispute that its ghost gun kits are "designed to" be finished into completed frames and firearms. (Appellant App., Ex. A, Compl. ¶¶ 25-29). Below, the Circuit Court observed that JSD could not "sit with a straight face and argue that the purpose of this" Kit was not to create a product that a "lay person, who is not a gunsmith, who is not a gun expert, can convert . . . into a gun." (Ex. 3 at 3, Transcript p 14). See also *People v Peals*, 476 Mich 636, 638, 644-45; 720 NW2d 196 (2006) (holding that a gun snapped in two beyond repair was still a "firearm" within the meaning of Michigan law, because the Legislature's choice of words "may" and "design" made it "apparent that the design—and not the current operability—of a weapon was of paramount importance to the Legislature in defining what constitutes a 'firearm.'").

Courts around the country have largely recognized that kits like the one JSD sold to Mr. Thueme fit comfortably within the plain language definition of "firearms" and have allowed suits against ghost gun manufacturers and sellers to proceed. See *New York v Arm or Ally, LLC*, unpublished order of the United States District Court for the Southern District of New York, issued February 23, 2024 (Case No. 22-CV-6124), p 13 (finding that Plaintiff had sufficiently alleged that "Defendants' unfinished frames and receivers are 'frame[s] and receiver[s] of [ ] such weapon[s]'

NW2d 690 (2020) (explaining that Michigan law does not treat negligence per se as a standalone cause of action but a doctrine of negligence under which a statutory violation may serve as evidence for breach of duty). While Plaintiff respectfully disagrees with this finding, Plaintiff believes that further discovery will shed light on facts that may allow him to later demonstrate the statutory violations that he alleged—including the design and easy convertibility of JSD's Ghost Gun Kits into functioning pistols, the deceptiveness of JSD's advertising that its products were legal to buy online and possess, and the extent to which JSD sold their products to minors and other prohibited possessors. At a minimum, all of these facts may bear on the reasonableness of JSD's conduct. See *id.* (explaining that a violation of a statute "creates a rebuttable presumption of negligence") (internal quotation marks and citation omitted).

[under the federal Gun Control Act (GCA)] and, thus, are 'firearms' subject to federal restrictions") (Ex. 5), appeal filed March 27, 2024 to the United States Court of Appeals for the Second Circuit; *District of Columbia v Polymer80, Inc*, unpublished opinion of the District of Columbia Superior Court, issued August 10, 2022 (Case No. 2020 CA 002878B), p 5 ("[T]he Court finds Polymer80's frames, semi-automatic receivers, and Buy, Build, Shoot Kits are firearms.") (Ex. 6); *Tretta v Osman*, unpublished order of the California Superior Court, issued June 28, 2021 (Case No. 20STCV48910), p 6 ("The gun as described, fits the statute definition for a firearm, as either a 'starter gun' to be converted into a fully operational gun, or a frame. Plaintiff additionally and specifically alleges the sale of 'kits' requiring 'only 4 operations' to utilize a 'fully functioning firearm.') (Ex. 7); *People v Polymer80*, *Inc*, unpublished order of the California Superior Court, issued June 7, 2021 (Case No. 21STCV06257) pp 3-5 (rejecting Polymer80's demurrer argument that their kits did not constitute firearms under federal law and allowing the case to proceed) (Ex. 8); *United States v Wick*, unpublished opinion of the United States Court of Appeals for the Ninth Circuit, issued September 7, 2017 (Case No. 16-30176), p 1 (holding that "kits contain[ing] all the necessary components to assemble a fully functioning firearm with relative ease" were firearms under the GCA, given their easy convertibility) (Ex. 9);[14] see also *People v Hill*, 433 Mich 464, 479-80; 446 NW2d 140 (1989) ("[T]he presence of two different components of the same firearm in the possession of two persons in proximity, when the two components comprise the essential parts of one proscribed firearm, provides a sufficient basis for . . . constructive and joint possession of the assembled firearm in each person.").

At this early stage of the case, it is unnecessary to decide whether and to what extent JSD violated state and federal statutes in connection with its sale of Ghost Gun Kits to Mr. Thueme. What

[14] These cases, though unpublished, are directly relevant for the proposition that ghost gun kits like the Kits that JSD sold are firearms. See MCR 7.215(C)(1).

matters for the purposes of this appeal is that JSD owed a common law duty of ordinary care, arising from its sale of potentially dangerous products to minors. See *Moning*, 400 Mich at 439-41.

D. Mr. Boyd Sufficiently Alleged Negligent Entrustment.

In upholding Mr. Boyd's negligent entrustment claim, the Circuit Court held that "JSD had a duty to not entrust chattel to a group of consumers including minors that it knew or should have known was likely to use it in a manner involving an unreasonable risk of physical harm." (Appellant App., Ex. E, July 24, 2024 Order at 2). It also recognized that "[t]he *Moning* case is also analogous in this claim." (*Id.*). JSD attacks this decision by rehashing the same arguments it makes regarding Mr. Boyd's negligence claim—regarding *Moning*'s applicability, whether its Kits qualify as firearms, and whether JSD violated any state or federal statutes[15]—and additionally contends that it lacked the requisite "special notice of the peculiarities of the entrustee." (Application at 17 (emphasis omitted)). None of these arguments justifies overturning the Circuit Court's decision.

The doctrine of negligent entrustment recognizes that "[a] person who supplies an article to a child which may pose a reasonable risk of harm in the hands of an adult but which poses an unreasonable risk of harm in the hands of a child is subject to liability for resulting harm." *Moning*, 400 Mich at 443. Due to "the immaturity, inexperience and carelessness of children," merchants know or should know that they create a "risk of physical harm to the child and others in marketing [potentially dangerous products] directly to them." *Id.* at 446-47. Thus, under Michigan law, liability for negligent entrustment can arise from entrusting such chattel to children as a class.

JSD disputes this and instead argues that the seller must know the specific identity and underage status of an individual purchaser. (Application at 16 (criticizing the Circuit Court for holding that JSD entrusted its Kits "*to a group of consumers including minors that it knew or should have known* was likely to use it in a manner involving an unreasonable risk of physical harm" without

[15] These arguments are addressed in Sections A through C.

finding that "JSD entrusted its products *specifically to Thueme*")). But *Moning* rejected that argument. In Michigan, the negligent entrustment "doctrine is not limited to plaintiffs whose 'individual' propensities are known to the supplier . . . [but] also applies to classes of persons," such as minors. *Moning*, 400 Mich at 444 n 18, citing Restatement Torts, 2d, § 390, comment *b*. See also *Buczkowski*, 441 Mich at 103 n 8 (describing minors as belonging to "a class historically protected under the law of torts"). It is sufficient that JSD knew or should have known that it was selling its products directly to minors, thereby entrusting potentially dangerous chattel to minors as a class, regardless of whether it was also selling its products to adults.

Next, JSD argues that the Circuit Court erred when it credited Plaintiff's allegation that JSD "was 'willfully blind' and 'therefore knew or reasonably should have known'" that its products were likely be used in a manner involving an unreasonable risk of physical harm by minors such as Mr. Thueme. (Application at 17). That was not erroneous. Plaintiff can establish a claim for negligent entrustment by alleging that JSD had constructive knowledge of the entrustee's incompetence.[16] See *Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192, 197; 694 NW2d 544 (2005) (explaining that "constructive knowledge" assigns a "should have known" standard) (emphasis added).

According to the Supreme Court, "[t]o prove an entrustor *should have known* an entrustee was likely to use the entrusted chattel in an unsafe manner, peculiarities of the entrustee sufficient to

[16] JSD's reliance on cases like *Fredericks v General Motors Corp*, 411 Mich 712; 311 NW2d 725 (1981), and *Buschlen v Ford Motor Co*, 121 Mich App 113; 328 NW2d 592 (1982), aff'd sub nom *White v Chrysler Corp*, 421 Mich 192; 364 NW2d 619 (1984), for the proposition that "a seller's failure to inquire cannot give rise to a negligent entrustment claim" is misplaced. (Application at 17 (emphasis omitted)). For one, those cases did not involve the sale of products to minors but the defendants' entrustment of dies to component manufacturers whose employees were later injured by the dies. See *Fredericks*, 411 Mich at 717; *Buschlen*, 121 Mich App at 115. Plaintiffs in those cases failed in part because their claims of constructive knowledge were not supported by proof of relevant notice at discovery, *Fredericks*, 411 Mich at 720-21, and the defendants reasonably relied on the plaintiffs' employers on whom the Michigan Occupational Safety and Health Act placed the responsibility of maintaining workplace safety, *White*, 421 Mich at 198-99.

put the entrustor on notice of that likelihood must be demonstrated." *Fredericks v Gen Motors Corp*, 411 Mich 712, 719; 311 NW2d 725 (1981) (emphasis added). It is sufficient for a plaintiff to allege that the defendant was on notice of information regarding its classes of purchasers, from which it "should have known of the unreasonable risk propensities of the entrustee." *Id.* (citing *Moning*, 400 Mich 425); see also *Buschlen v Ford Motor Co*, 121 Mich App 113, 118; 328 NW2d 592 (1982) ("[T]he entrustor must first have special notice of the peculiarities of the entrustee sufficient to put the entrustor on notice before the entrustor is under any further duty to ensure an entrusted chattel's safe use."), aff'd sub nom *White v Chrysler Corp*, 421 Mich 192; 364 NW2d 619 (1984). Mr. Boyd alleged that JSD had this level of knowledge when it entrusted its dangerous products to Mr. Thueme. (Appellant App., Ex. A, Compl. ¶ 138).[17]

The Court of Appeals has previously ruled that a case involving the negligent entrustment of a firearm could proceed past summary disposition because "based on [the entrustee's] youth, defendant was placed on notice requiring either the *taking of sufficient precautions* before entrusting the handgun or the *necessity of further investigation* regarding [the entrustee's] competency to possess the weapon." *Haddad v Tsoukalas*, unpublished per curiam opinion of the Court of Appeals, issued January 12, 2006 (Docket No. 256659), p 3 (emphasis added) (Ex. 10).[18] As Mr. Boyd has alleged, and as the Circuit Court agreed, JSD courted "persons looking to circumvent gun laws,"

[17] See also *Deputy Comm'r of Agriculture v O&A Electric Coop, Inc*, 332 Mich 713, 716; 52 NW2d 565 (1952) ("If he has knowledge of such facts as would lead any honest man, using ordinary caution, to make further inquiries and does not make, but studiously avoids making, the obvious inquiries, he must be taken to have notice of those facts which, had he used ordinary diligence, would have been readily ascertained."). By alleging that JSD had knowledge of Mr. Thueme's youth by willfully blinding itself to his age, Plaintiff pleads another form of constructive knowledge. See *Willful Blindness*, *Black's Law Dictionary* (12th ed) ("Deliberate avoidance of knowledge . . . , esp[ecially] by failing to make a reasonable inquiry about suspected wrongdoing despite being aware that it is highly probable.").

[18] Plaintiff cites this case because, although unpublished, it is relevant as it deals with a negligent entrustment claim against a defendant who entrusted a firearm to a minor. MCR 7.215(C)(1).

including minors, by promoting the ease with which its products can be converted into operable pistols and their ability to be possessed "off-the-books." (Appellant App., Ex. A, Compl. ¶¶ 45-50, 56, 73-75; Ex. 3 at 9, Transcript p 43). Implicit in its business model was that that JSD knew or should have known that it was entrusting its products to prohibited possessors like minors, particularly after the Pennsylvania Attorney General's Office investigated such practices. (*Id.* ¶¶ 18-19, 56, 73-75). As the Complaint alleges and discovery will further reveal, there is a sound basis to conclude that although JSD was on notice requiring the "taking of sufficient precautions" or "further investigation," it failed to do either. (*Id.* ¶¶ 68-72).

E. Mr. Boyd Sufficiently Alleged Proximate Cause.

JSD's last challenge to the Circuit Court's decision is on the issue of proximate cause. For starters, JSD makes the erroneous claim that Mr. Boyd failed to include *any* proximate cause allegation in his negligence count (Count 1). (Application at 19). That is false. In that Count, Mr. Boyd alleges that "Defendant JSD's negligent, reckless, and intentional sale of the Kits to Defendant Thueme *foreseeably resulted in and was a proximate cause of Mr. Boyd's injuries*." (Appellant App., Ex. A, Compl. ¶ 119 (emphasis added)).[19] In addition, the Complaint contains numerous allegations, summarized below, explaining that Mr. Boyd's injuries were the foreseeable result of JSD's conduct.

Next, JSD cites an out-of-state, out-of-circuit case as grounds for reversal on proximate cause, an issue that is governed by Michigan law. (Application at 19-21 (citing *Lowy v Daniel Defense*, unpublished decision of the United States District Court for the Eastern District of Virginia, issued July 24, 2024 (Case No. 23-CV-1338), appeal filed August 28, 2024 to the United States Court of Appeals for the Fourth Circuit)). In light of the significant differences between this case and *Lowy*,

[19] At any rate, Michigan is a notice-pleading state, and no recitations of specific words are necessary. See *Veritas Auto Mach, LLC*, 335 Mich App at 615.

and the fact that the decision is not controlling, JSD's heavy reliance on it is unpersuasive.[20] In any event, JSD's argument that proximate cause would only exist if Mr. Boyd alleged that "JSD coerced or encouraged Thueme to *shoot* Boyd" is not consistent with Michigan law. (Application at 21 (citing *Lowy*) (emphasis added)).

Under Michigan law, proximate cause typically involves an assessment of the "foreseeability of consequences" of a defendant's conduct. See, e.g., *Ray v Swager*, 501 Mich 52, 63; 903 NW2d 366 (2017) (explaining that proximate cause "involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences"), quoting *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994). Thus, courts assess whether the injury "was within the 'recognizable risk of harm' created by" a defendant's conduct. *Moning*, 400 Mich at 442. Applying this test, the Supreme Court found that proximate cause exists when a merchant directly sells potentially dangerous products to a minor, who foreseeably mishandles them in a way that results in injury to the plaintiff. See *id.* at 440-42.

Mr. Boyd's proximate cause allegations meet the requirements under Michigan law. The Complaint contains allegations sufficient to establish, at the pleading stage, that the shooting was a "natural and probable consequence" of JSD's negligent business practices. See *Nielsen v Henry H Stevens, Inc*, 368 Mich 216, 220-21; 118 NW2d 397 (1962). See also *Ross*, 220 Mich App at 192 (explaining that proximate cause "involves a determination that the connection between the wrongful conduct and the injury is of such a nature that it is socially and economically desirable to hold the wrongdoer liable"). For example, Mr. Boyd has alleged:

[20] *Lowy* concerned unfair advertising directed at an adult, whereas this case involves sales to a minor. Mr. Thueme's status as a minor affects the causal chain for two reasons: first, because JSD gave him access to a firearm that he could not legally have, and second, because it is foreseeable that an impressionable 17-year-old would rely on JSD's misleading advertising. (See Ex. 4, Thueme Answer ¶¶ 149, 155-56, 159 (Mr. Thueme admitting that he relied on representations made in JSD's marketing concerning the legality of its products and his ability to own firearms assembled from them)).

- "Defendant JSD's uniquely dangerous method of marketing and distributing its ghost gun kits placed the public at risk of harm from the foreseeable misuse of guns by prohibited users, including minors." (Appellant App., Ex. A, Compl. ¶ 50; see also *id.* ¶¶ 46, 48, 49)

- "Defendant JSD at all times knew or should have known, and it was reasonably foreseeable to it, that providing a prohibited minor the means to easily possess a gun could result in an unintentional gun death or injury." (*Id.* ¶ 61; see also *id.* ¶¶ 51-60 (alleging that JSD knew the risks guns pose to children and the risk that its products were winding up in the hands of prohibited persons, including minors)).

- "Defendant JSD never used an age verification program; such programs are ubiquitous, easily available, and widely used by companies across numerous industries that sell age-restricted products, including other companies that sell firearms, firearm parts, and firearms accessories." (*Id.* ¶ 69).

These business practices—making easy-to-assemble firearms available to prohibited purchasers like minors—naturally and foreseeably result in the misuse of a firearm by a minor and consequential injury; indeed, that is why minors are restricted under Michigan and federal law from purchasing or possessing such weapons. Mr. Boyd lives with the lasting effects of that foreseeable act and resulting injury every day. See *Moning*, 400 Mich at 441 n 15 ("If a gun is entrusted to a child, it suggests at once to anyone with imagination at all that someone, the child or another, is likely to be shot."), quoting Prosser, The Law of Torts (4th ed), § 44 at 273.

JSD disregards cases in which Michigan courts have recognized that proximate cause exists where a defendant has made it more likely for the foreseeable tortious conduct by another to occur. See, e.g., *Ross*, 220 Mich App at 193 ("When a defendant's negligence enhances the likelihood that the intervening act will occur, the act is reasonably foreseeably, and the defendant remains liable."). And it is particularly clear under Michigan law that proximate cause will be found where one has made such tortious conduct by a *minor* more likely to occur. See *Moning*, 400 Mich at 441-42 (a child's "conduct in using the slingshot to propel pellets was to be anticipated" by defendant and his "shooting pellets toward a tree and a ricochet into [plaintiff's] eye was within the 'recognizable risk

of harm' created by marketing slingshots directly to children"); *Gilbert*, 76 Mich App at 148 (holding that "[u]nder all of the circumstances of this case it was foreseeable that [the children], in the course of wandering at large on defendants' premises, would enter the open garage, if indeed it was open, and there find the weapon that [defendant] had negligently left loaded and within their reach").[21] That is because:

> One has no right to demand of a child, or of any other person known to be wanting in ordinary judgment or discretion, a prudence beyond his years or capacity, and therefore in his own conduct, where it may possibly result in injury, a degree of care is required commensurate to the apparent immaturity or imbecility that exposes the other to peril.

Moning, 400 Mich at 447-48, quoting 3 Cooley, Law of Torts (4th ed), § 490, pp 433-34.

As discovery proceeds, Mr. Boyd expects to obtain additional information relevant to proximate cause, for example by illustrating JSD's level of awareness regarding minors' access to and misuse of its products and its knowledge of minors' suffering injuries with guns made from easy-to-assemble firearm kits. And Michigan law makes clear that proximate cause is typically a question for the jury. See, e.g., *N Oil Co v Vandervort*, 228 Mich 516, 518; 200 NW 145 (1924) ("[W]here, as here, the question turns on whether the injurious result should have been foreseen by a person of ordinary prudence, it must be submitted to the jury."); *Dawe v Bar-Levav & Assoc* (On Remand),

[21] JSD cites *Black v Shafer*, 499 Mich 950; 879 NW2d 642 (2016) as support for the proposition that "a plaintiff cannot simply allege a retailer is the proximate cause of injury or death merely because it offered its products for sale to the general public." Application at 22. But that case does not involve a seller or a minor shooter. Instead, it held that an adult's actions attempting to render a shotgun safe were not a proximate cause of another adult's later accidental shooting. *Black*, 499 Mich at 951; see also *Black v Shafer*, unpublished per curiam opinion of the Court of Appeals, issued March 25, 2014 (Docket No. 312379), p 1 (Ex. 11), rev'd 499 Mich 940. That conduct is dissimilar to the conduct at issue here. Mr. Boyd has alleged that JSD marketed its products to prohibited purchasers and minors, groups whom it was foreseeable would negligently use and misuse its products. Intervention by a third party is not considered an "intervening cause" where it is "reasonably foreseeable." See *Black*, 499 Mich at 951, quoting *McMillian v Vliet*, 422 Mich 570, 576; 374 NW2d 679 (1985). The Court of Appeals case on *Black v Shafer* includes factual information that the Supreme Court case omits. See MCR 7.215(C)(1).

289 Mich App 380, 393; 808 NW2d 240 (2010) ("Proximate cause is usually a factual issue to be decided by the trier of fact.").

CONCLUSION

Mr. Boyd therefore respectfully requests that this Court deny JSD's Application for Leave to Appeal or alternatively grant the Application for Leave to Appeal and affirm the trial court's denial of JSD's Motion for Reconsideration, and award Mr. Boyd any other relief this Court deems appropriate.

Dated: September 30, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, David Santacroce, certify that this brief has been prepared in proportionally spaced typeface using Microsoft Word in Times New Roman 12-point font and complies with the word limitation of MCR 7.212(B). According to the word processing software used to prepare this brief, the total word count under MCR 7.212(B) is 10,360.

/s/ *David A. Santacroce*
David Santacroce
Dated: September 30, 2024