**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF FLORIDA**
**PENSACOLA DIVISION**

| | |
|---|---|
| IN RE: 3M COMBAT ARMS EARPLUG PRODUCTS LIABILITY LITIGATION | Case No. 3:19md2885 |
| This Document Relates to:<br>*Sloan*, 7:20-cv-001<br>*Wayman*, 7:20-cv-149 | Judge M. Casey Rodgers<br>Magistrate Judge Gary R. Jones |

**ORDER**

This matter is before the Court on Defendants' Motion for Judgment as a Matter of Law ("JMOL") under Federal Rule of Civil Procedure 50(a). Oral argument was heard on January 24, 2022. Having now fully considered the parties' arguments and the applicable law, the Court concludes Defendants' motion is due to be **DENIED**.

## I. Legal Standard

JMOL is appropriate where a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for the party on that issue. *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 421 F.3d 1169, 1177 (11th Cir. 2005) (citing Fed. R. Civ. P. 50(a)). When considering such a motion, a court must "review the entire record, examining all the evidence, by whomever presented, in the light most favorable to the nonmoving party, and drawing all

reasonable inferences in the nonmovant's favor." *Id*. In doing so, the court may not make credibility determinations or weigh the evidence, as those are solely functions of the jury. *Reeves v. Sanderson Plumbing Prods., Inc*., 530 U.S. 133, 150 (2000). A motion for JMOL should be granted "only if the facts and inferences point so overwhelmingly in favor of the [moving party] that [a] reasonable [jury] could not arrive at a contrary verdict." *Bogle v. Orange Cty. Bd. of Cty. Comm'rs*, 162 F.3d 653, 656 (11th Cir. 1998).

## II. Discussion

Defendants move for JMOL on (1) each of Plaintiffs' claims on the issue of causation; (2) Plaintiffs' misrepresentation claims; (3) Plaintiffs' fraudulent concealment claims; (4) Wayman's negligence *per se* claim; (5) Wayman's consumer protection claim; and (6) each of Sloan's claims based on the applicable Kentucky statute of limitations. The Court addresses each motion in turn.

### 1. Causation

Defendants argue that there is insufficient evidence to prove causation because Plaintiffs did not provide sufficient evidence that the CAEv2's alleged defects caused their hearing injuries. *See* Trial Tr. (1/24/2022) at 5.

Colorado and Kentucky law are substantially similar regarding causation in the tort context. To prevail on their claims, Plaintiffs must prove that the CAEv2 caused their hearing injuries. *See, e.g. Corder v. Ethicon*, 473 F. Supp. 3d 749, 757–

58 (E.D. Ky. 2020) (citing *Stewart v. Gen. Motors Corp.*, 102 F. App'x 961, 964 (6th Cir. 2004)); *Higel v. Gen. Motors Corp.*, 544 P.2d 983, 988 (Colo. 1975) (en banc). Unless causation can be established through general knowledge, Plaintiffs must present medical expert testimony that establishes causation to a reasonable degree of medical certainty. *Mathison v. U.S.*, 619 F. App'x 691, 694 (10th Cir. 2015) (citing *Truck Ins. Exch. v. MagneTek, Inc.*, 360 F.3d 1206, 1214–16 (10th Cir. 2004)) (applying Colorado law); *Fulcher v. United States*, 88 F. Supp. 3d 763, 771 (W.D. Ky. 2015) (citing *Brown-Forman Corp. v. Upchurch*, 127 S.W.2d 615, 621 (Ky. 2004)). Under both Kentucky and Colorado law, causation is generally a question of fact for the jury. *Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439, 443 (6th Cir. 2009) (applying Kentucky law); *Eggert v. Mosler Safe Co.*, 730 P.2d 895, 898 (Colo. App. 1986) (citing *Baird v. Power Rental Equip., Inc.*, 533 P.2d 941 (Colo. 1975)).

Accordingly, to prove causation Sloan and Wayman "must produce expert evidence that would allow a reasonable jury to find, to a reasonable degree of medical probability, both that (1) the CAEv2 had defects that could have caused his injuries, and (2) that one or more of those defects did in fact cause his injuries." *In re 3M Combat Arms Earplugs Prods. Liab. Litig.*, No. 7:20-cv-131, ECF No. 73, at 5 (N.D. Fla. Feb. 4, 2021) (citing *Hyman & Armstrong, P.S.C. v. Gunderson*, 279 S.W.3d 93, 106–107 (Ky. 2008)) (*Hacker*); *Norris v. Baxter Healthcare*, 397 F.3d

878, 881 (10th Cir. 2005) (applying Colorado law) (explaining that both general and specific causation is required to prove the element of causation in a products liability case).

Sloan has presented sufficient trial testimony to raise a triable issue of fact as to whether the CAEv2's defects caused his injuries. Sloan has presented expert testimony that the CAEv2 had design defects, *see, e.g.,* P-GEN-001 ("Flange Memo" detailing fitting and variability issues with the CAEv2); Trial Tr. (1/14/2022) at 54–55 (Richard McKinley providing expert testimony that the CAEv2 has "three primary design flaws" which include the plug being "too fat," "too short," and "too stiff"); and that the defects created an unreasonable risk of auditory injury, Trial Tr. (1/18/2022) at 77–78 (Dr. Marc Bennett testifying to a reasonable degree of medical certainty that the CAEv2's defects can cause hearing loss and tinnitus). Additionally, Dr. Bennett concluded with a reasonable degree of medical certainty that the CAEv2's design defects caused Sloan's hearing loss and tinnitus. Trial Tr. (1/18/2022) at 82 (concluding that Sloan "has both hearing loss and tinnitus and that they are directly due to the Combat Arms Earplug"). Dr. Bennett's conclusion is based on his reliable differential etiology analysis. *See* Trial Tr. (1/18/2022) at 141 (explaining that he conducted a differential diagnosis to form the basis for his specific causation opinion); *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 3:19md2885, 2021 WL 6327375, at * 12 (N.D. Fla. Sept. 2, 2021) (denying

Defendants' *Daubert* challenge to Dr. Bennett's differential etiology analysis as to Sloan's injuries). Furthermore, Dr. Bennett was able to get a measurement of Sloan's ear canal and visually examine the CAEv2 in Sloan's ears, bolstering his conclusion that the CAEv2 did not fit properly in Sloan's ears. *See* Trial Tr. (1/18/2022) at 176, 179; *see also* P-SLOAN-23058 (video documenting Dr. Bennett's examination of how the CAEv2 fit in Sloan's ear). Beyond just medical expert testimony, Sloan also testified that the CAEv2 slipped out of his ear on the gun range. Trial Tr. (1/13/2022) at 154.

Similarly, Wayman has presented sufficient trial testimony to raise a triable issue of fact as to whether the CAEv2's defects caused his injuries. Wayman presented the same evidence of the CAEv2's defects, *see, e.g.,* P-GEN-001; Trial Tr. (1/14/2022) at 54–55, and has presented evidence that the defects created an unreasonable risk of auditory injury. Trial Tran. (1/20/2022) at 273 (Dr. Lawrence Lustig concluding that the CAEv2's defects made it not safe for use). Additionally, Dr. Lustig concluded with a reasonable degree of medical certainty that the CAEv2's defects caused Wayman's hearing loss and tinnitus. Trial Tran. (1/20/2022) at 276 (concluding that the CAEv2's defects pertaining to variability and imperceptible loosening caused Wayman's auditory injuries and that "there's no other conclusion you can come to"). Dr. Lustig's conclusion is based on his reliable differential etiology analysis, and it is immaterial that Dr. Lustig did not perform an in-person

exam or measurement of Wayman's ear canal in light of the CAEv2's imperceptible loosening and fit variability. Trial Tr. (1/20/22) at 248 (explaining that he conducted a differential diagnosis to determine the cause of Wayman's injuries); *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 3:19md2885, 2021 WL 6327375, at * 14 (N.D. Fla. Sept. 2, 2021) (denying Defendants' *Daubert* challenge to Dr. Lustig's differential etiology analysis as to Wayman's injuries and finding that Dr. Lustig's specific causation opinions are reliable without an in person exam).

Accordingly, Defendants' motions for JMOL on the element of causation as to all of Sloan's and Wayman's claims are **DENIED**.

**2. Misrepresentation Claims**

Defendants move for JMOL on Sloan's and Wayman's fraudulent and negligent misrepresentation claims on the basis that Plaintiffs could not identify specific statements made by 3M. Trial Tr. (1/24/2022) at 9. The Court disagrees.

As the Court explained in denying Defendants' motions for summary judgment, both Kentucky and Colorado courts allow a plaintiff to recover for injuries resulting from misrepresentations made to third parties on which the plaintiff reasonably and foreseeably relied. *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 7:20-cv-001, ECF No. 96, at 9 (N.D. Fla. Dec. 15, 2021) (*Sloan*) (citing *Highland Motor Co. v. Heyburn Bldg. Co.*, 35 S.W.2d 521, 523–24 (Ky. 1931); *Ky. Laborers Dist. Council Health & Welfare Tr. Fund v. Hill & Knowlton, Inc.*, 24 F.

Supp. 2d 755, 771 (W.D. Ky. 1998)); *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 7:20-cv-149, ECF No. 152, at 3 (N.D. Fla. Jan. 9, 2022) (*Wayman*) (citing *Mehaffy, Rider, Windholz & Wilson v. Central Bank of Denver, N.A.*, 892 P.2d 230, 236 (Colo. 1995); *Schnell v. Gustafason*, 638 P.2d 850, 852 (Colo. App. 1981); *Mead & Mount Constr. Co. v. Fox Metal Indus., Inc.*, 511 P.2d 509, 511 (Colo. App. 1973)). At trial, both Plaintiffs presented sufficient testimony for a reasonable jury to conclude that Defendants made misrepresentations about the CAEv2 to the military, *see, e.g.*, P-GEN-1013 (marketing material explaining that the CAEv2 will protect soldiers hearing from impulse noise such as weapons fire and explosives); P-GEN-122 (email exchange explaining that the CAEv2 "will not reduce 190 db explosions to a safe level" and that "the CAE is not the optimal choice for the gun range"); P-GEN-2294 (email explaining that "[a] shooter should not go to the range and fire a box of shells with the yellow side"), and that the Plaintiffs reasonably relied on those misrepresentations in choosing to use the CAEv2 in their military service. *See, e.g.*, Trial Tr. (1/13/2022) at 313–14 (Sloan testifying that he used the yellow end of the CAEv2 on the range to have situational awareness and protection from weapons fire); Trial Tr. (1/19/2022) at 96 (Wayman testifying that he used the yellow end of the CAEv2 every time he went to the range). Accordingly, Defendants' motions for JMOL on Sloan's and Wayman's misrepresentation claims are **DENIED**.

**3. Fraudulent Concealment Claims**

Defendants move for JMOL on Sloan's and Wayman's fraudulent concealment claims on the basis that Defendants did not owe the Plaintiffs a duty to disclose because Defendants never had a business transaction with Plaintiffs. Trial Tr. (1/24/2022) at 10, 15. The Court disagrees because this exact argument has already been addressed in the Court's summary judgment Orders, denying Defendants' identical arguments. *See Sloan*, ECF No. 96 at 9–11; *Wayman*, ECF No. 155 at 5–8. As the Court has already explained, both Kentucky and Colorado law do not require a business transaction between the parties for a duty to disclose to arise. *Sloan*, ECF No. 96 at 10–11 (citing *Morris Aviation, LLC v. Diamond Aircraft Indus., Inc.*, 536 F. App'x 558, 568 (6th Cir. 2013); *Mitchell v. Gen. Motors LLC*, No. 3:13-cv-498, 2014 WL 1319519, at *13 (W.D. Ky. Mar. 31, 2014); *Wayman*, ECF No. 155, at 6–7 (citing *Mallon Oil Co. v. Bowen/Edwards Assocs., Inc.*, 965 P.2d 105, 111 (Colo. 1998); Restatement (Second) of Torts § 557A (Am. Law Inst. 1977)). Accordingly, Defendants motions for JMOL on Plaintiffs' fraudulent concealment claims are **DENIED**.

**4. Negligence *Per Se***

Defendants argue that Wayman's negligence *per se* claim fails as a matter of law because the Environmental Protection Agency's ("EPA") regulations governing labeling of hearing protection devices do not apply to the CAEv2. *See* Trial Tr.

(1/24/2022) at 9. The Court disagrees because this identical argument has already been addressed in a separate 3M trial. *See In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 3:19md2885, 2021 WL 753563, at *8 (N.D. Fla. Feb. 02, 2021) (*Estes*). Specifically, in *Estes*, the Court held that the EPA regulations governing labeling of hearing protection devices apply to the CAEv2 because it is a "product . . . which is sold wholly or in part on the basis of its effectiveness in reducing noise." *Id*. (quoting 42 U.S.C. § 4907(a)(2)). Additionally, the Court explained that the combat use exception, which exempts "military weapons or equipment which are designed for combat use" from the definition of "product," does not apply to the CAEv2 because that exception applies to equipment similar to military weapons rather than hearing protection devices such as the CAEv2. *Id*. (quoting 42 U.S.C. § 4902(3)(B)(i)). The Court's decision in *Estes* directly applies here. Accordingly, Defendants' motion for JMOL on Wayman's negligence *per se* claim is **DENIED**.

**5. Colorado Consumer Protection Act**

Defendants move for JMOL on Wayman's Colorado Consumer Protection Act ("CCPA") claim. Trial Tr. (1/24/2022) at 11. Defendants first argue that the CCPA does not provide a cause of action for personal injury claims. *Id*. at 11–13. However, Defendants fail to cite any Colorado authority for that proposition. *See* Trial Tr. (1/25/2022) at 11. The text of the CCPA very broadly allows recovery for "*any* claim against *any* person who has engaged in . . . *any* deceptive trade practice

listed in this article." C.R.S. § 6-1-113 (emphasis added). Furthermore, the Colorado Supreme Court has explained that the CCPA should be given a "liberal construction" to offer "broad remedial relief" consistent with the CCPA's purpose. *Hall v. Walter*, 969 P.2d 224, 230 (Colo. 1998) (citing *May Dep't Stores Co. v. State ex rel. Woodward*, 863 P.2d 967, 973–75 (Colo. 1993)). Thus, to read broad limitations into the CCPA absent clear guidance would "render the CCPA's damages provisions inoperable" and would be inconsistent the CCPA's purpose. *See id*. at 236. As such, the Court declines to recognize such a limitation. *See Schmaltz v. Smithkline Beecham Corp.*, No. 08-cv-0119, 2009 WL 1456723, at *2 (D. Colo. May 21, 2009) (citing *Hall*, 969 P.2d at 230) (holding that the CCPA did not bar personal injury claims).

Next, Defendants argue that Wayman's CCPA claim fails because he has not provided sufficient evidence of a significant public impact. Specifically, Defendants argue that the significant public impact element requires evidence of a significant present or future impact, which is impossible since the CAEv2 is no longer on the market. Trial Tr. (1/24/2022) at 12. The Court disagrees.

To prevail on his CCPA claim, Wayman must provide evidence that Defendants' allegedly deceptive trade practices significantly impact the public. *Hall*, 969 P.2d at 235. The purpose of this element is to ensure that the CCPA does not provide relief for purely private harms. *See Rhino Linings USA, Inc. v. Rocky*

*Mountain Rhino Lining, Inc.*, 62 P.3d 142, 149 (Colo. 2003) (explaining that the purpose of the public impact requirement is that "if a wrong is private in nature, and does not affect the public, a claim is not actionable under the CCPA"). Courts consider the following in determining whether a practice significantly impacts the public: "(1) the number of consumers directly affected by the challenged practice, (2) the relative sophistication and bargaining power of the consumers affected by the challenged practice, and (3) evidence that the challenged practiced has *previously impacted* other consumers or has the significant potential to do so in the future." *Id*. (emphasis added). Additionally, the issue of significant public impact is generally a question of fact for the jury. *One Creative Place, LLC v. Jet Center Partners, LLC*, 259 P.3d 1287, 1288 (Colo. App. 2011).

Here, Wayman has presented evidence showing that Defendants alleged deceptive trade practices were not purely private harms because the CAEv2 was distributed to tens of thousands of other soldiers beyond Wayman, *see, e.g.*, S-GEN-5 (U.S. Army special text), and was marketed directly to the general public. *See, e.g.*, P-GEN-1063 (packaging of the consumer version of the CAEv2). Moreover, the Colorado Supreme Court has made clear that prior public impact is a relevant consideration. *See Rhino Linings*, 62 P.3d at 149 (explaining that "evidence that the challenged practiced has *previously impacted* other consumers" is relevant to determine the public impact requirement); *see also* CJI-Civ. 29:1 (explaining that to

prevail on a CCPA claim a plaintiff must show that "[t]he deceptive trade practice significantly *impacted* the public") (emphasis added). As such, Wayman has provided sufficient evidence to create a triable issue of fact as to the significant public impact of Defendants' allegedly deceptive trade practices.

Accordingly, Defendants' motion for JMOL on Wayman's CCPA claim is **DENIED**.

**6. Kentucky Statute of Limitations**

Lastly, Defendants move for JMOL on all of Sloan's claims based on the applicable Kentucky statute of limitations. Trial Tr. (1/24/2022) at 15–16. Specifically, Defendants argue that Sloan's claims are untimely because the discovery rule does not apply to non-latent injuries such as hearing loss and tinnitus. *Id*. The Court disagrees.

As the Court has already explained in denying Defendants' motion for summary judgment, "Sloan's injuries are latent because his injuries and their cause were not immediately evident." *Sloan*, ECF No. 96 at 5–6 (citing *Fluke Corp. v. LeMaster*, 306 S.W.3d 55, 56 (Ky. 2010)). "Since Sloan's injuries are latent, the discovery rule applies," *id.* at 7 (citing *Cutter v. Ethicon, Inc.*, No. 20-6040, 2021 WL 3754245, at *3 (6th Cir. Aug. 25, 2021)), and there is a question of fact as to "when Sloan knew or should have known through the exercise of due diligence that his injuries were caused by the CAEv2." *Id*. at 7 (citing *Mark D. Dean, P.S.C. v.*

*Commonwealth Bank & Tr. Co.*, 434 S.W.3d 489, 503 (Ky. 2014)). Accordingly, Defendants' motion for JMOL on each of Sloan's claims based on the applicable Kentucky statute of limitations is **DENIED**.

**DONE AND ORDERED** this 27th day of January 2022.

*M. Casey Rodgers*

**M. CASEY RODGERS**
**UNITED STATES DISTRICT JUDGE**