

IN THE DISTRICT COURT OF RICE COUNTY, KANSAS

THOMAS W. MADDEN, as heir at law of)
THOMAS T. MADDEN, deceased and)
as the Executor of the Estate of THOMAS)
T. MADDEN, deceased, and JULIE)
BOECKMAN, heir at law of THOMAS T.)
MADDEN, deceased,)

Plaintiffs,)

v.)

P & S ELECTRIC AND ROUSTABOUT)
SERVICE, INC., d/b/a P & S SECURITY,)

and)

SHIRLEY LYNN LODER,)

Defendants.)

Case No. _____

Pursuant to K.S.A. Chap. 60

PETITION

COME NOW the plaintiffs, by and through their counsel, David R. Morantz and Ashley E. Billam of Shamberg, Johnson & Bergman, Chartered, and E. Thomas Pyle, III of Pyle Law, and for their causes of action against the defendants allege and state as follows:

SUMMARY OF THE ACTION

1. These wrongful death and survival causes of action stem from a negligent and illegal transfer of a firearm that was then used in the assault and fatal shooting of Thomas T. Madden on April 29, 2019, at his home in Rice County, Kansas. The perpetrator in the shooting, David L. Madden, was a convicted felon who was prohibited by law from purchasing and possessing firearms. On or about July 3, 2017, defendant Shirley Lynn Loder purchased a firearm or firearms, including a .45 caliber handgun, from defendant P & S Electric and

Roustabout Service, Inc., doing business as P & S Security in Great Bend, Barton County, Kansas. As discussed below, defendant P & S should not have transferred any firearms to defendant Loder, and it should have taken affirmative steps to determine whether defendant Loder was the actual purchaser and intended user of the firearm(s); and it should have known that the transfer of the firearm(s) to defendant Loder was an illegal straw sale.

2. This Petition does not challenge the right of law-abiding citizens to bear arms. This petition also does not challenge the right of responsible gun dealers to properly sell guns to law-abiding citizens. Rather, this petition focuses on the foreseeable dangers that arise when gun dealers negligently transfer guns, and thereby enable dangerous people to injure and kill innocent people. Under Kansas law, gun dealers, including defendant P & S, owe a duty to use the highest degree of care in transferring firearms.

PARTIES

3. Plaintiffs Thomas W. Madden and Julie Boeckman are the surviving adult children of Thomas T. Madden, deceased. They bring a wrongful death cause of action pursuant to K.S.A. § 60-1901 *et seq.*

4. Plaintiff Thomas W. Madden is also the Executor of the Estate of Thomas T. Madden, Deceased, Rice County, Kansas, District Court Case No. 2019 PR 21. As the Executor of the Estate of Thomas T. Madden, deceased, he brings a survival action on behalf of the Estate of Thomas T. Madden, deceased, pursuant to K.S.A. § 60-1801.

5. Defendant P & S Electric and Roustabout Service, Inc., (hereinafter “P & S”) is a Kansas company authorized to do business in the State of Kansas and was actively transacting

business in the State of Kansas as P & S Security at all relevant times.

6. Defendant P & S can be served through its registered agent, Paul Pack, 255 W. Barton County Road, Great Bend, Kansas.

7. Defendant Shirley Lynn Loder is a citizen and resident of Rice County, Kansas. She can be served personally or by certified mail.

8. At all relevant times herein, defendant owned and operated a firearms store called “P & S Security” in Great Bend, Barton County, Kansas. At all relevant times herein, P & S transacted firearms.

JURISDICTION AND VENUE

9. Pursuant to the Kansas Constitution, Art. III, §§1 and 6 and K.S.A. § 20-301, this Court has jurisdiction over the subject matter of this cause of action. This Court has personal jurisdiction over defendants as defendants are Kansas residents and/or entities doing business in Kansas. Venue is proper in Rice County, Kansas, pursuant to K.S.A. § 60-603 and 60-604.

AGENCY

10. All actions and failures to act of the employees, agents, and servants of defendant P & S including but not limited to store managers, salespeople, clerks and cashiers, were performed within the scope of their employment or agency with defendant P & S, and defendant P & S is vicariously liable for the actions and failures to act of said persons.

BACKGROUND REGARDING LAWS AND POLICIES TO PREVENT THE TRANSFER OF GUNS TO STRAW PURCHASERS

11. Under Kansas law, “a firearms dealer must exercise the highest standard of care in order to avoid selling guns to such felons” and other dangerous individuals. *Shirley v. Glass*, 297 Kan. 888, 901 (2013).

12. Defendant P & S is in the business of selling firearms for profit. Pursuant to federal law, gun dealers such as defendant P & S, are required to obtain a Federal Firearms License. In exchange for being granted a Federal Firearms License (“FFL”), defendant P & S agreed to accept and assume certain responsibilities.

13. Among others, the responsibility of all Federal Firearms Licensees, including defendant P & S, includes at all times relevant the obligation to follow all federal and state firearms laws and regulations.

14. The laws, regulations and industry standards that defendant P & S is required to follow are designed to protect members of the public from the risk of being shot or killed by a dangerous person armed with gun.

15. One of the most important duties of a gun dealer is to not complete any firearm sale when it has reason to know that a “straw” or otherwise illegal sale is occurring. A “straw sale” is a transaction in which one person is buying the gun for someone else despite falsely representing that he or she is the actual purchaser of the firearm.

16. Defendant P & S knew or should have known that “straw purchasers” are inherently likely to divert firearms to other criminals and dangerous people, because “straw purchases” are one of the primary mechanisms through which criminals and other dangerous people obtain firearms.

17. Federal law – including, but not limited to, 18 U.S.C. §§ 922(a)(6), 922(d), 922(m), 924(a)(1), 924(a)(2) and 924(a)(3) – bars the transfer of firearms or ammunition to straw purchasers. Federal law also requires gun dealers such as defendant P & S to keep and maintain

accurate records of firearm transactions. See 18 U.S.C. § 922(m); 27 C.F.R. § 478.125.

18. Among other things, it is illegal for any person in connection with the acquisition of a firearm from a licensed dealer to knowingly make any false oral or written statements or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive a firearms dealer with respect to any fact material to the lawfulness of the sale or other disposition of a firearm. 18 U.S.C. § 922(a)(6). Firearms dealers have an obligation to determine the lawfulness of a transfer, and to certify the accuracy of the information provided to them, and they are prohibited from aiding and abetting the making of false statements or providing false documents.

19. The United States Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) requires that for each over-the-counter gun sale, purchasers and dealers complete its Firearms Transaction Record (“Form 4473”). The purpose of Form 4473 is explained on the form itself:

The information and certification on this form are designed so that a person licensed under 18 U.S.C. § 923 [a gun dealer] may determine if he or she may lawfully sell or deliver a firearm to the person identified [on the form] in Section A, and to alert the buyer of certain restrictions on the receipt and possession of firearms. ... The seller of a firearm must determine the lawfulness of the transaction and maintain proper records of the transaction. Consequently, the seller must be familiar with the provisions of 18 U.S.C. §§ 921-931 and the regulations in 27 CFR Part 478. ...

Section A, Question 11.a. of Form 4473 asks, “Are you the actual transferee/buyer of the firearm(s) listed on this form?” It also contains in bold the following warning:

Warning: You are not the actual buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actual buyer, the dealer cannot transfer the firearm(s) to you.

20. In order to sell or transfer a firearm over-the-counter, a dealer must certify that its answers on the Form 4473 are correct, that it has verified the identification of the purchaser and that it has no reason to believe that it is unlawful to sell or transfer the firearm to the person identified on the Form 4473. A dealer violates the law if the dealer transfers a firearm based on information in Form 4473 that the dealer knows or has reason to believe is false.

21. Federally licensed firearms dealers are “the ‘principal agent[s] of federal enforcement’ in ‘restricting [criminals]’ access to firearms” and have “the responsibility to ‘[e]nsure that, in the course of sales or other dispositions ..., weapons [are not] obtained by individuals whose possession of them would be contrary to the public interest.’” *Abramski v. United States*, 134 S. Ct. 2259, 2273 (2014) (quoting *Huddleston v. United States*, 94 S. Ct. 1262, 1268 (1974)).

22. Because federal firearms licensees play a critical role in identifying straw purchasers, the ATF encourages dealers to call law enforcement or the nearest ATF office to report suspicious or illegal transactions.

23. Industry standards, such as those communicated by the National Shooting Sports Foundation (“NSSF”) through a campaign in conjunction with the ATF called “Don’t Lie For the Other Guy,” have advised firearms dealers, including defendant P & S, to not rely on the veracity of prospective purchasers’ written answers to questions on federally-required Form 4473s, as a person willing to act as a straw purchaser is by definition willing to misrepresent his or her intention on Form 4473 and falsely represent that he or she is the actual buyer of the gun being sold, as defendant Loder did here.

24. Those same industry standards recommend sales protocols under which firearms dealers, including defendant P & S should screen suspicious purchasers with a set of questions, beyond those on the Form 4473 itself, and not sell a firearm to a person unless the dealer has no doubts about the legitimacy of the sale.

25. Firearms dealers, including defendant P & S, are obligated to pay attention to all circumstances of a transfer to determine its legality or dangerousness. Those circumstances also include the type of firearm, whether that firearm is appropriate for the purported purchaser, and whether the purported purchaser is knowledgeable about the type of firearm they are considering.

26. Firearms dealers, including defendant P & S, are obligated to deny a sale or transfer of a firearm based on customer behavior or characteristics including but not limited to 1) behavior exhibiting a potential straw sale, 2) nervous or suspicious behavior, 3) behavior exhibiting an ignorance of the type or model of firearm the customer wants to purchase, or 4) physical characteristics inconsistent with the type of firearm being purchased.

FACTUAL ALLEGATIONS

27. At all times relevant hereto, David L. Madden was a convicted felon and was prohibited from possessing firearms.

28. Based on information and belief, on or about July 3, 2017, defendant Loder purchased a .45 caliber handgun from defendant P & S; in the presence of at least one defendant P & S employee or agent, defendant Loder completed a Bureau of Alcohol, Tobacco, Firearms and Explosives Firearms Transaction Record (“Form 4473”); and, defendant Loder identified herself as the actual buyer of the weapon on the Form 4473.

29. Form 4473 required defendant P & S, as an FFL, to sign the form and certify that defendant P & S believed, based on the information disclosed in the form, that it was lawful for defendant P & S to transfer the .45 caliber handgun to defendant Loder. Importantly, the instructions accompanying Form 4473 state that the transferor, defendant P & S, must determine the lawfulness of a firearm transaction.

30. Upon information and belief, defendant P & S knew or should have known from all the circumstances of the transaction, including but not limited to an ignorance of firearms, and specifically, of the subject .45 caliber handgun, nervous and erratic behavior displayed by defendant Loder, and physical characteristics of defendant Loder that were inconsistent with the use of a .45 caliber handgun that defendant Loder was not the actual buyer of the .45 caliber handgun who would take possession of the weapon; and, defendant P & S knew or should have known that defendant Loder was not the actual buyer but merely a straw purchaser, who would only possess the gun for a short while until the intended transfer to a prohibited person.

31. Despite indicators that should have informed defendant P & S that defendant Loder was not the actual and legal purchaser of the .45 caliber handgun, and despite defendant P & S's actual knowledge of such, defendant P & S, upon information and belief, by and through its agents, servants and employees, assisted defendant Loder in completing the required firearms paperwork and transferred the .45 caliber handgun to defendant Loder without making any reasonable attempt to determine whether defendant Loder was an illegal straw purchaser.

32. Upon information and belief, defendant P & S's assistance in completing the required firearms paperwork included a defendant P & S salesperson who knew or had reason to

know that defendant Loder was not the actual buyer of the .45 caliber handgun and that the subject transaction was an illegal straw sale.

33. Upon information and belief, defendant P & S, through its agents, servants and employees, signed the Form 4473 for the subject transaction, falsely certifying that the sale was lawful and that defendant P & S could transfer the .45 caliber handgun to defendant Loder despite knowing or having reason to know that the transaction was suspicious, that defendant Loder was not the actual purchaser of the weapon, and/or that transaction was an illegal straw purchase.

34. Upon information and belief, defendant Loder later transferred the .45 caliber handgun to David L. Madden.

35. Upon information and belief, on April 29, 2019, David L. Madden used the subject .45 caliber handgun to shoot and kill Thomas T. Madden in Rice County, Kansas, before killing himself.

36. As a result of the transfer to David L. Madden, defendant Loder has been charged with criminal distribution of a firearm, in violation of K.S.A. § 21-6303(a)(1). *State v. Loder*, District Court of Rice County, Kan., Case No. 2021-CR-000006.

37. Defendant P & S owed the highest degree of care in selling and in transacting firearms at all relevant times.

38. Defendant P & S's failure to exercise reasonable care and the highest degree of care in its transfer of the .45 caliber handgun to defendant Loder as a straw purchaser for David L. Madden caused or contributed to cause the April 29, 2019, shooting of, injuries to and death

of Thomas T. Madden.

39. By transferring the .45 caliber handgun under the aforementioned circumstances, defendant P & S knowingly violated state and federal firearms laws, including but not limited to 18 U.S.C. §§ 922(a)(6), 922(d), 922(m), 924(a)(1), 924(a)(2), and 924(a)(3), and negligently entrusted the .45 caliber handgun to defendant Loder.

40. Further, defendant P & S violated 18 U.S.C. § 4 by failing to timely inform authorities of the crimes related to the straw transfer.

COUNT I – NEGLIGENCE (defendant P & S)

41. Plaintiffs incorporate by reference the allegations in paragraphs 1 through 40 of this Petition as though fully set forth below.

42. Defendant P & S had a duty to exercise the highest degree of care in selling guns and to refrain from engaging in any activity that would create reasonably foreseeable risks of injury to or death of others. This duty included following federal and state gun laws concerning the sale of firearms and ammunition to straw purchasers.

43. Federal and state gun laws, including, but not limited to 18 U.S.C. §§ 922(a)(6), 922(d), 922(m), 924(a)(1), 924(a)(2), and 924(a)(3) bar the transfer of firearms or ammunition to straw purchasers who acquire firearms from a gun dealer on behalf of another person by providing false information in connection with the purchase of firearms. Firearms dealers are also prohibited from aiding and abetting the making of false statements or providing false documents.

44. On or about July 3, 2017, defendant P & S, through its employees, agents and/or

servants, illegally and negligently transferred the .45 caliber handgun to defendant Loder and David L. Madden, with defendant Loder acting as an illegal straw purchaser.

45. Based on the facts described herein defendant P & S knew or should have known that:

- a. Defendant Loder was not purchasing the .45 caliber handgun for her personal use;
- b. Defendant Loder was a straw purchaser; and
- c. Transferring the .45 caliber handgun to defendant Loder as a straw purchaser for David L. Madden violated various federal and state laws, including but not limited to 18 U.S.C. §§ 922(a)(6), 922(d), 922(m), 924(a)(1)(A), 924(a)(2), and 924(a)(3).

46. A reasonable and law-abiding gun seller would have screened and/or questioned defendant Loder, by asking whether she was purchasing the gun for someone else, the intended use of the gun, and other inquiries to determine whether defendant Loder was the actual, intended transferee of the firearm.

47. A reasonable and law-abiding gun seller would have had doubts about the legality of the sale.

48. A reasonable and law-abiding gun seller would not have transferred the .45 caliber handgun to defendant Loder if it had doubts about the sale.

49. A reasonable and law-abiding gun seller would not have transferred the .45 caliber handgun to defendant Loder.

50. Based on the nature of the transaction, as described above, defendant P & S knew or should have known that it was reasonably foreseeable that the .45 caliber handgun would be obtained by a dangerous or prohibited person, such as David L Madden, for use in crimes, and that innocent persons, such as Thomas T. Madden, would be shot and injured or killed.

51. Specifically, defendant P & S knew or should have known that:
- a. Criminals and other dangerous persons seek to obtain guns from gun sellers to use in crimes, including those that result in injury or death;
 - b. Federal and state firearms laws exist to prohibit and/or hinder criminals and other dangerous persons from obtaining guns through illegitimate channels, including through straw purchases; and
 - c. Firearms dealers, as agents of enforcement of federal firearms laws, are tasked as gatekeepers to prevent criminals and other dangerous or prohibited persons from acquiring guns.

52. Defendant P & S knew or should have known that the gun industry's trade association, the NSSF, had issued a recommended sales protocol prior to July 3, 2017, pursuant to which gun dealers should screen suspicious purchasers with a battery of questions and not sell firearms to a person unless the dealer has no doubts about the legitimacy of the sale.

53. Defendant P & S knew or should have known that unless it used reasonable and/or the highest degree of care and followed the law to prevent straw or suspicious purchases, criminals would obtain firearms and use them to injure or kill innocent persons.

54. Defendant P & S acted unlawfully, negligently, recklessly and with a wanton disregard for the safety of others when it sold the .45 caliber handgun to defendant Loder because, at the time, defendant P & S and its employees, agents and/or servants knew or should have known of circumstances that indicated an unlawful sale.

55. Defendant P & S further acted unlawfully, negligently, recklessly and with a wanton disregard for the safety of others when it failed to timely inform authorities of the crimes related to the straw transfer.

56. Defendant P & S was further negligent and reckless in failing to adopt, implement or enforce policies, procedures, or protocols that would have enabled its employees and agents to

spot a potential straw purchase and to prevent such a purchase, and/or in failing to train and supervise its employees, agents and/or servants concerning such policies, procedures or protocols.

57. Defendant P & S's negligent and reckless failure to exercise reasonable and/or the highest degree of care, and its violations of federal and state laws in the sale of the .45 caliber handgun, either directly or through its employees, agents and/or servants, caused or contributed to cause the April 29, 2019, shooting of, injuries to and death of Thomas T. Madden.

58. As a direct and proximate result of the negligence, recklessness and unlawful conduct of defendant P & S, Thomas T. Madden suffered severe and devastating injuries that led to his death on April 29, 2019.

59. As a direct and proximate result of Thomas T. Madden's death, plaintiffs have sustained and will continue to sustain pecuniary and non-pecuniary damages, including, but not limited to, mental anguish, suffering, bereavement, loss of society, loss of companionship, loss of services, loss of comfort, loss of protection, loss of care, loss of attention, loss of advice, loss of counsel, loss of a complete family, loss of financial support and funeral expenses.

60. The death of Thomas T. Madden on April 29, 2019, and the resulting pecuniary and non-pecuniary damages sustained by plaintiffs were directly and proximately caused by the negligence, carelessness and unlawful conduct of defendant P & S.

61. Plaintiff Thomas W. Madden, as the Executor of the Estate of Thomas T. Madden, incorporates by reference the allegations in paragraphs 1 through 60 of this Petition as though fully set forth below.

62. As a direct and proximate result of the negligence of defendant P & S, Thomas T. Madden sustained severe and debilitating injuries that led to his death on April 29, 2019.

63. As a direct and proximate result of the negligence of defendant P & S, Thomas T. Madden sustained fear, anxiety of imminent danger and harm, pain, suffering, mental anguish, and loss of enjoyment of life until his death on April 29, 2019. As a result of the injuries and damages sustained by Thomas T. Madden, the Estate of Thomas T. Madden, deceased, is entitled to recover those damages which Thomas T. Madden could have recovered if he would have survived.

COUNT II – NEGLIGENT ENTRUSTMENT (defendant P & S)

64. Plaintiffs incorporate by reference the allegations in paragraphs 1 through 63 of this Petition as though fully set forth below.

65. At all relevant times, defendant P & S had control of the .45 caliber handgun it transferred to defendant Loder.

66. Defendant P & S had a duty to exercise the highest degree of care in transferring guns and in refraining from engaging in any activity that would create reasonably foreseeable risks of injury to or death of others. This duty included following federal and state gun laws concerning the sale of firearms and ammunition to straw purchasers.

67. Based on the facts described herein, defendant P & S knew or should have known that defendant Loder was not the intended recipient of the transferred firearm(s) but that she was acting as a straw purchaser, and as such she was likely to supply the firearm(s) to someone such as David L. Madden who was prohibited from purchasing a firearm by virtue of either dangerous

propensities, incompetence or criminal conviction or sought to evade legal purchasing procedures because of his criminal intentions, and that providing the .45 caliber handgun was likely to result in unreasonable risk of physical injury to others.

68. Further, based on the facts described herein, defendant P & S knew or had reasonable cause to believe that defendant Loder was not the actual purchaser or redeemer of the .45 caliber handgun, but that she was making a straw purchase of the .45 caliber handgun, and, thus, that she was an incompetent entrustee based on her status as a straw purchaser.

69. At the time of the sale, it was reasonably foreseeable to defendant P & S that supplying defendant Loder with the .45 caliber handgun would result in defendant Loder aiding, abetting and conspiring to unreasonably use and/or unlawfully transfer the .45 caliber handgun to a person such as David L. Madden in violation of federal and state laws, including 18 U.S.C. §§ 2, 371, 922(a)(6), 922(d)(1), 922(m), 924(a)(1)(A), 924(a)(2), and 924(a)(3).

70. In turn, it was reasonably foreseeable to defendant P & S that the criminal use of a firearm by a person who sought to obtain a firearm through an illegal straw purchase would cause innocent individuals, such as Thomas T. Madden, to be injured or killed.

71. Defendant P & S's negligent entrustment of the .45 caliber handgun to defendant Loder caused or contributed to cause the April 29, 2019, shooting of, injuries to and death of Thomas T. Madden.

72. As a direct and proximate result of defendant P & S's negligent entrustment, Thomas T. Madden suffered severe and devastating injuries that led to his death on April 29, 2019.

73. As a direct and proximate result of Thomas T. Madden's death, plaintiffs have sustained and will continue to sustain pecuniary and non-pecuniary damages, including, but not limited to, mental anguish, suffering, bereavement, loss of society, loss of companionship, loss of services, loss of comfort, loss of protection, loss of care, loss of attention, loss of advice, loss of counsel, loss of a complete family, loss of financial support and funeral expenses.

74. The death of Thomas T. Madden on April 29, 2019, and the resulting pecuniary and non-pecuniary damages sustained by plaintiffs were directly and proximately caused by defendant P & S's negligent entrustment.

75. Plaintiff Thomas W. Madden, as the Executor of the Estate of Thomas T. Madden, incorporates by reference the allegations in paragraphs 1 through 74 of this Petition as though fully set forth below.

76. As a direct and proximate result of the defendant P & S's negligent entrustment, Thomas T. Madden sustained severe and debilitating injuries that led to his death on April 29, 2019.

77. As a direct and proximate result of the defendant P & S's negligent entrustment, Thomas T. Madden sustained fear, anxiety of imminent danger and harm, pain, suffering, mental anguish, and loss of enjoyment of life until his death on April 29, 2019. As a result of the injuries and damages sustained by Thomas T. Madden, the Estate of Thomas T. Madden is entitled to recover those damages which Thomas T. Madden could have recovered if he would have survived.

COUNT III – NEGLIGENCE PER SE (defendant P & S)

78. Plaintiffs incorporate by reference the allegations in paragraphs 1 through 77 of this Petition as though fully set forth below.

79. Defendant P & S had a duty to exercise the highest degree of care in selling and transferring guns and in refraining from engaging in any activity that would create reasonably foreseeable risks of injury to or death of others. This duty included following federal and state gun laws concerning the sale of firearms and ammunition to straw purchasers.

80. By engaging in an illegal straw sale to an unlawful purchaser, defendant P & S negligently and knowingly violated various federal and state laws governing the sale and marketing of firearms, including but not limited to 18 U.S.C. §§ 2, 371, 922(a)(6), 922(d)(1), 922(m), 924(a)(1)(A), 924(a)(2), and 924(a)(3).

81. By failing to timely inform authorities of the crimes related to the straw transfer, defendant P & S negligently and knowingly violated 18 U.S.C. § 4.

82. These laws are intended to protect public safety, specifically, to protect citizens from violent crimes committed by felons with firearms, by preventing unlicensed and dangerous sales of guns and by preventing the acquisition and misuse of guns by criminals, children and other irresponsible individuals.

83. Thomas T. Madden was within the class of persons meant to be protected by these laws.

84. Defendant P & S knew or should have known that violations of these laws would result in the criminal acquisition of firearms, the misuse of such firearms, and danger to persons

such as Thomas T. Madden.

85. The violations of law by defendant P & S caused or contributed to cause the April 29, 2019, shooting of, injuries to and death of Thomas T. Madden.

86. In the alternative, the violations of law by defendant P & S provide evidence of the negligence that caused or contributed to cause the April 29, 2019, shooting of, injuries to and death of Thomas T. Madden.

87. As a direct and proximate result of defendant P & S's violations of law, Thomas T. Madden suffered severe and devastating injuries that led to his death on April 29, 2019.

88. As a direct and proximate result of Thomas T. Madden's death, plaintiffs have sustained and will continue to sustain pecuniary and non-pecuniary damages, including, but not limited to, mental anguish, suffering, bereavement, loss of society, loss of companionship, loss of services, loss of comfort, loss of protection, loss of care, loss of attention, loss of advice, loss of counsel, loss of a complete family, loss of financial support and funeral expenses.

89. The death of Thomas T. Madden on April 29, 2019, and the resulting pecuniary and non-pecuniary damages sustained by plaintiffs were directly and proximately caused by defendant P & S's violations of law.

90. Thomas W. Madden, as the Special Administrator of the Estate of Thomas T. Madden, incorporates by reference the allegations in paragraphs 1 through 89 of this Petition as though fully set forth below.

91. As a direct and proximate result of the defendant P & S's violations of law, Thomas T. Madden sustained severe and debilitating injuries that led to his death on April 29,

2019.

92. As a direct and proximate result of the defendant P & S's violations of law, Thomas T. Madden sustained fear, anxiety of imminent danger, and harm, pain, suffering, mental anguish, and loss of enjoyment of life until his death on April 29, 2019. As a result of the injuries and damages sustained by Thomas T. Madden, the Estate of Thomas T. Madden is entitled to recover those damages which Thomas T. Madden could have recovered if he would have survived.

COUNT IV – AIDING AND ABETTING (defendant P & S)

93. Plaintiffs incorporate by reference the allegations in paragraphs 1 through 92 of this Petition as though fully set forth below.

94. As a transferor of firearms, defendant P & S had a duty to Thomas T. Madden and other members of the public to exercise the highest degree of care in the conduct of its business on or about July 3, 2017.

95. Defendant P & S, by and through its employees, agents or servants, knew or should have known that defendant Loder was purchasing the .45 caliber handgun for someone else and breaching her duty to prevent harm to others, as discussed further below.

96. Defendant P & S, by and through its employees, agents or servants, knew or should have known that defendant Loder was purchasing the .45 caliber handgun for a prohibited buyer.

97. As set forth above, by assisting, aiding and abetting the straw purchase of .45 caliber handgun to defendant Loder, defendant P & S gave substantial assistance and

encouragement to defendant Loder in engaging in a straw purchase, and to David L Madden in obtaining a firearm that was used to shoot and kill Thomas T. Madden on April 29, 2019. Defendant P & S thereby breached its duty to Thomas T. Madden and other members of the public, pursuant to Restatement (Second) of Torts § 876.

98. Defendant P & S's assisting, aiding and abetting the straw purchase of the .45 caliber handgun to defendant Loder caused or contributed to cause the April 29, 2019, shootings of, injuries to and death of Thomas T. Madden.

99. As a direct and proximate result of defendant P & S's assisting, aiding and abetting the straw purchase of the .45 caliber handgun, Thomas T. Madden suffered severe and devastating injuries that led to his death on April 29, 2019.

100. As a direct and proximate result of Thomas T. Madden's death, plaintiffs have sustained and will continue to sustain pecuniary and non-pecuniary damages, including, but not limited to, mental anguish, suffering, bereavement, loss of society, loss of companionship, loss of services, loss of comfort, loss of protection, loss of care, loss of attention, loss of advice, loss of counsel, loss of a complete family, loss of financial support and funeral expenses.

101. The death of Thomas T. Madden on April 29, 2019, and the resulting pecuniary and non-pecuniary damages sustained by plaintiffs were directly and proximately caused by defendant P & S's assisting, aiding and abetting the straw purchase of the .45 caliber handgun.

102. Plaintiff Thomas W. Madden, as the Special Administrator of the Estate of Thomas T. Madden, incorporates by reference the allegations in paragraphs 1 through 101 of this Petition as though fully set forth below.

103. As a direct and proximate result of defendant P & S's assisting, aiding and abetting the straw purchase of the .45 caliber handgun, Thomas T. Madden sustained severe and debilitating injuries that led to his death on April 29, 2019.

104. As a direct and proximate result of the defendant P & S's allowing, assisting, aiding and abetting the straw purchase of the .45 caliber handgun, Thomas T. Madden sustained fear, anxiety of imminent danger and harm, pain, suffering, mental anguish, and loss of enjoyment of life until his death on April 29, 2019. As a result of the injuries and damages sustained by Thomas T. Madden, the Estate of Thomas T. Madden is entitled to recover those damages which Thomas T. Madden could have recovered if he would have survived.

COUNT V – NEGLIGENCE (defendant Loder)

105. Plaintiffs incorporate by reference the allegations in paragraphs 1 through 104 of this Petition as though fully set forth below.

106. Defendant Loder had a duty to prevent harm to Thomas T. Madden and other members of the public.

107. Defendant Loder violated that duty by negligently and illegally transferring the subject .45 caliber handgun to David L. Madden, whom she knew or should have known was prohibited from possessing firearms by virtue of being convicted of a felony and had dangerous propensities.

108. Defendant Loder violated federal and state law, including but not limited to 18 U.S.C. § 922(a)(6) by falsely telling an FFL that she was the actual purchaser of the .45 caliber handgun on or about July 3, 2017.

109. Defendant Loder violated federal and state law, including but not limited to K.S.A. § 21-6304(a)(1), by transferring the subject .45 caliber handgun to David L. Madden on or after July 3, 2017.

110. Based on defendant Loder's knowledge of and relationships with David L. Madden and Thomas T. Madden, it was reasonably foreseeable to defendant Loder at all times relevant that David L. Madden would use a firearm to injure and/or kill Thomas T. Madden.

111. Defendant Loder's negligence caused or contributed to cause the April 29, 2019, shooting of, injuries to and death of Thomas T. Madden.

112. As a direct and proximate result of defendant Loder's negligence, Thomas T. Madden suffered severe and devastating injuries that led to his death on April 29, 2019.

113. As a direct and proximate result of Thomas T. Madden's death, plaintiffs have sustained and will continue to sustain pecuniary and non-pecuniary damages, including, but not limited to, mental anguish, suffering, bereavement, loss of society, loss of companionship, loss of services, loss of comfort, loss of protection, loss of care, loss of attention, loss of advice, loss of counsel, loss of a complete family, loss of financial support and funeral expenses.

114. The death of Thomas T. Madden on April 29, 2019, and the resulting pecuniary and non-pecuniary damages sustained by plaintiffs were directly and proximately caused by defendant Loder's negligence.

115. Plaintiff Thomas W. Madden, as the Executor of the Estate of Thomas T. Madden, incorporates by reference the allegations in paragraphs 1 through 114 of this Petition as though fully set forth below.

116. As a direct and proximate result of the defendant Loder's negligence, Thomas T. Madden sustained severe and debilitating injuries that led to his death on April 29, 2019.

117. As a direct and proximate result of defendant Loder's negligence, Thomas T. Madden sustained fear, anxiety of imminent danger and harm, pain, suffering, mental anguish, and loss of enjoyment of life until his death on April 29, 2019. As a result of the injuries and damages sustained by Thomas T. Madden, the Estate of Thomas T. Madden is entitled to recover those damages which Thomas T. Madden could have recovered if he would have survived.

COUNT VI – NEGLIGENT ENTRUSTMENT (defendant Loder)

118. Plaintiffs incorporate by reference the allegations in paragraphs 1 through 117 of this Petition as though fully set forth below.

119. Defendant Loder had a duty to prevent harm to Thomas T. Madden and other members of the public.

120. A person who supplies a dangerous and deadly instrument, here a firearm, directly or through a third party, to an individual the person knows or has reason to know is likely, because of his youth, inexperience, or criminal propensity to use it in a manner involving unreasonable risk of physical harm to others, is liable for the physical harm the individual inflicts on those other parties.

121. Based on defendant Loder's knowledge of and relationships with David L. Madden and Thomas T. Madden, including but not limited to David L. Madden's violent propensity, it was reasonably foreseeable to defendant Loder at all times relevant that David L. Madden might use a firearm to injure and/or kill Thomas T. Madden.

122. Defendant Loder transferred the .45 caliber handgun to David L. Madden despite knowing and/or having reason to know that David L. Madden was prohibited from owning firearms due to a past felony conviction.

123. Defendant Loder had control of the subject .45 caliber handgun at all material times prior to providing it to David L. Madden and could have and should have halted this transfer.

124. Instead, defendant Loder entrusted the .45 caliber handgun to David L. Madden, and Thomas T. Madden was severely injured and died on April 29, 2019, as a direct and proximate result of this negligent entrustment.

125. As a direct and proximate result of Thomas T. Madden's death, plaintiffs have sustained and will continue to sustain pecuniary and non-pecuniary damages, including, but not limited to, mental anguish, suffering, bereavement, loss of society, loss of companionship, loss of services, loss of comfort, loss of protection, loss of care, loss of attention, loss of advice, loss of counsel, loss of a complete family, loss of financial support and funeral expenses.

126. The death of Thomas T. Madden on April 29, 2019, and the resulting pecuniary and non-pecuniary damages sustained by plaintiffs were directly and proximately caused by defendant Loder's negligent entrustment.

127. Plaintiff Thomas W. Madden, as the Executor of the Estate of Thomas T. Madden, incorporates by reference the allegations in paragraphs 1 through 126 of this Petition as though fully set forth below.

128. As a direct and proximate result of the defendant Loder's negligent entrustment,

Thomas T. Madden sustained severe and debilitating injuries that led to his death on April 29, 2019.

129. As a direct and proximate result of defendant Loder's negligent entrustment, Thomas T. Madden sustained fear, anxiety of imminent danger and harm, pain, suffering, mental anguish, and loss of enjoyment of life until his death on April 29, 2019. As a result of the injuries and damages sustained by Thomas T. Madden, the Estate of Thomas T. Madden is entitled to recover those damages which Thomas T. Madden could have recovered if he would have survived.

COUNT VII – NEGLIGENCE PER SE (defendant Loder)

130. Plaintiffs incorporate by reference the allegations in paragraphs 1 through 129 of this Petition as though fully set forth below.

131. Defendant Loder violated state and local gun laws in purchasing the subject .45 caliber handgun and in supplying it to David L. Madden, including but not limited to 18 U.S.C. § 922(a)(6) and K.S.A. § 21-6304(a)(1).

132. The laws defendant Loder violated are intended to protect persons including Thomas T. Madden from harm such as the April 29, 2019, shootings that resulted in injuries to and the death of Thomas T. Madden.

133. Based on defendant Loder's knowledge of and relationships with David L. Madden and Thomas T. Madden, including but not limited to David L. Madden's violent propensity, it was reasonably foreseeable to defendant Loder at all times relevant that David L. Madden would use a firearm to injure and/or kill Thomas T. Madden.

134. In the alternative, the violations of law by defendant Loder provide evidence of defendant Loder's negligence that caused or contributed to cause the April 29, 2019, shooting of, injuries to and death of Thomas T. Madden.

135. As a direct and proximate result of defendant Loder's violations of law, Thomas T. Madden suffered severe and devastating injuries that led to his death on April 29, 2019.

136. As a direct and proximate result of Thomas T. Madden's death, plaintiffs have sustained and will continue to sustain pecuniary and non-pecuniary damages, including, but not limited to, mental anguish, suffering, bereavement, loss of society, loss of companionship, loss of services, loss of comfort, loss of protection, loss of care, loss of attention, loss of advice, loss of counsel, loss of a complete family, loss of financial support and funeral expenses.

137. The death of Thomas T. Madden on April 29, 2019, and the resulting pecuniary and non-pecuniary damages sustained by plaintiffs were directly and proximately caused by defendant Loder's violations of law.

138. Plaintiff Thomas W. Madden, as the Executor of the Estate of Thomas T. Madden, incorporates by reference the allegations in paragraphs 1 through 137 of this Petition as though fully set forth below.

139. As a direct and proximate result of the defendant Loder's violations of law, Thomas T. Madden sustained severe and debilitating injuries that led to his death on April 29, 2019.

140. As a direct and proximate result of defendant Loder's violations of law, Thomas T. Madden sustained fear, anxiety of imminent danger and harm, pain, suffering, mental anguish, and loss of enjoyment of life until his death on April 29, 2019. As a result of the injuries and

damages sustained by Thomas T. Madden, the Estate of Thomas T. Madden is entitled to recover those damages which Thomas T. Madden could have recovered if he would have survived.

COUNT VIII – AIDING AND ABETTING (defendant Loder)

141. Plaintiffs incorporate by reference the allegations in paragraphs 1 through 140 of this Petition as though fully set forth below.

142. Defendant Loder had a duty to prevent harm to Thomas T. Madden and other members of the public.

143. As set forth above, by transferring the .45 caliber handgun to David L. Madden, defendant Loder gave substantial assistance and encouragement to David L. Madden to shoot and kill Thomas T. Madden on April 29, 2019. Defendant Loder thereby breached her duty to Thomas T. Madden and other members of the public, pursuant to Restatement (Second) of Torts § 876.

144. Based on defendant Loder's knowledge of and relationships with David L. Madden and Thomas T. Madden, including but not limited to David L. Madden's violent propensity, it was reasonably foreseeable to defendant Loder at all times relevant that David L. Madden might use a firearm to injure and/or kill Thomas T. Madden.

145. Defendant Loder's assisting, aiding and abetting the straw purchase of the .45 caliber handgun and subsequent transfer to David L. Madden caused or contributed to cause the April 29, 2019, shootings of, injuries to and death of Thomas T. Madden.

146. As a direct and proximate result of defendant Loder's assisting, aiding and abetting the straw purchase of the .45 caliber handgun and subsequent transfer to David L. Madden, Thomas T. Madden suffered severe and devastating injuries that led to his death on April 29, 2019.

147. As a direct and proximate result of Thomas T. Madden's death, plaintiffs have sustained and will continue to sustain pecuniary and non-pecuniary damages, including, but not limited to, mental anguish, suffering, bereavement, loss of society, loss of companionship, loss of services, loss of comfort, loss of protection, loss of care, loss of attention, loss of advice, loss of counsel, loss of a complete family, loss of financial support and funeral expenses.

148. The death of Thomas T. Madden on April 29, 2019, and the resulting pecuniary and non-pecuniary damages sustained by plaintiffs were directly and proximately caused by defendant Loder's assisting, aiding and abetting the straw purchase of the .45 caliber handgun and subsequent transfer to David L. Madden.

149. Plaintiff Thomas W. Madden, as the Special Administrator of the Estate of Thomas T. Madden, incorporates by reference the allegations in paragraphs 1 through 148 of this Petition as though fully set forth below.

150. As a direct and proximate result of defendant Loder's assisting, aiding and abetting the straw purchase of the .45 caliber handgun and subsequent transfer to David L. Madden, Thomas T. Madden sustained severe and debilitating injuries that led to his death on April 29, 2019.

151. As a direct and proximate result of defendant Loder's assisting, aiding and abetting the straw purchase of the .45 caliber handgun and subsequent transfer to David L. Madden, Thomas T. Madden sustained fear, anxiety of imminent danger and harm, pain, suffering, mental anguish, and loss of enjoyment of life until his death on April 29, 2019. As a result of the injuries and damages sustained by Thomas T. Madden, the Estate of Thomas T. Madden is entitled to recover those damages which Thomas T. Madden could have recovered if he would have survived.

INAPPLICABILITY OF LIMITATIONS ON DAMAGES

152. The non-economic damages claimed and recoverable in these wrongful death and survival causes of action are not limited by K.S.A. § 60-1903 or by K.S.A § 60-19a02.

153. K.S.A. § 60-1903 violates §§ 1, 5 and 18 of the Bill of Rights of the Kansas Constitution in that it deprives plaintiffs, as heirs-at-law of Thomas T. Madden, of their right to equal protection, trial by jury and their right to remedy by due course of law.

154. K.S.A. § 60-19a02 has been abrogated and ruled as facially unconstitutional by the Supreme Court of Kansas and does not limit the recovery of the Estate of Thomas T. Madden for non-economic damages sustained by Thomas T. Madden which he could have recovered if he would have survived. *Hilburn v. Enerpipe, Ltd.*, 442 P.3d 509 (Kan. 2019).

WHEREFORE, plaintiffs pray for judgment for compensatory damages against defendants in an amount in excess of seventy-five thousand dollars (\$75,000.00), together with the costs of this action, interest, and other such relief as plaintiffs are entitled pursuant to Kansas law and that the Court may deem appropriate.

Respectfully submitted,

**SHAMBERG, JOHNSON & BERGMAN
CHARTERED**

By /s/ David R. Morantz

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ATTORNEYS FOR PLAINTIFFS

DEMAND FOR JURY TRIAL

COME NOW plaintiffs and hereby demand a trial by jury on all issues in the above-captioned case.

Respectfully submitted,

**SHAMBERG, JOHNSON & BERGMAN
CHARTERED**

By /s/ David R. Morantz

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