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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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STEVEN RAYMOND,

Appellant,

v.

DAVID LEE CRAIG, JR. and GEORGIANNA CRAIG, and the
marital community comprised thereof,

Respondents.

BRIEF OF RESPONDENTS

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I. SUMMARY OF ARGUMENT

This case arises from a bizarre incident that started with appellant Steven Raymond picking up a stranger – David J. Craig (hereinafter “David Jay”) – standing on the side of the road late at night. At David Jay’s request, Raymond drove to various places in Kent before driving to what David Jay identified as his house. Even though it was 3:00 a.m. and Raymond had never met David Jay before that night, he followed David Jay inside. There is conflicting evidence about what happened next, but after a scuffle David Jay ended up shooting Raymond. (See *generally* CP 11-17).

Rather than suing David Jay, Raymond filed suit against David Lee Craig and Georgianna Craig, David Jay’s parents. (CP 1). Raymond alleged that the Craigs were liable because the shooting occurred in their home (where David Jay was staying temporarily) and the Craigs owned the gun involved in the shooting. (CP 2).

Although Raymond suggested a number of theories of liability in the trial court, he eventually argued below and in this appeal that the Craigs were liable under three theories: (1) failing to “secure” the gun they kept in their home,

(2) creating an unreasonable risk that David Jay would injure Raymond, based on Restatement (Second) of Torts § 302B, and (3) negligently entrusting of the gun to David Jay. All three theories are inapplicable as a matter of law.

First, this Court expressly held in *McGrane v. Cline*, 94 Wn. App. 925, 973 P.2d 1092 (1999), that a gun owner does not have a duty to prevent the theft of a gun from his/her home. The rationale of *McGrane* applies equally to the unauthorized use of a gun by a house guest.

Second, Restatement § 302B is inapplicable because the Craigs did not engage in any affirmative act that created a “high degree of risk of harm” of criminal misconduct. The Craigs did not affirmatively put the gun in a place where it was likely to be used or misused, and there is no evidence that David Jay had any prior issues with guns or any propensity to use a gun for criminal purposes that would create a risk of harm.

Third, there can be no negligent entrustment liability because the Craigs did not “entrust” the gun to David Jay and David Jay was not “incompetent” to use the gun.

The trial court properly granted the Craigs’ motion for summary judgment. This Court should affirm.

II. COUNTERSTATEMENT OF CASE

Raymond's recitation of the facts is argumentative and often confuses speculation with reasonable inferences. Nevertheless, the key facts are undisputed. The following are the undisputed material facts underlying this appeal.

David Jay Craig

David Jay was 39 years old at the time of this incident (CP 162) – an adult, not a child. He left home when he was 18, and visited his parents only occasionally over the next 21 years (CP 42-43). There is nothing in the record suggesting that the Craigs knew the specific details of David Jay's life. David Jay had stayed with his parents for over two months before the incident because he was recuperating from knee surgery. (CP 68).

The Craigs learned after the incident that David Jay had a long history of mostly minor criminal convictions. However, before the incident they were only aware of the following convictions: (1) stolen vehicle as a minor (CP 50), (2) 1995 domestic violence/assault (CP 49, 80), (3) 1997 felony for burglary (CP 45-46, 75), (4) 1998 DUI in Idaho (CP 48), and (5) 2004 misdemeanor for a controlled substance

(CP 47). The Craigs had no knowledge of any other criminal convictions. (CP 48-50, 78-81).

None of David Jay's convictions – even the ones of which the Craigs had no knowledge – involved violence or an assault on another person. The domestic violence conviction related to a situation where David Jay came to the Craigs' home while intoxicated, and during an argument and some “pushing” his young sister became concerned and called 911. (CP 49,80, 105). He did not actually “assault” anyone. (CP 80). And none of David Jay's criminal matters involved guns or any other weapons. (CP 159).

The Craigs had no knowledge that David Jay had any psychological problems. He went to counseling when he was 12 years old for attention deficit issues. (CP 69). After that, the Craigs did not know that David Jay had been seen by a few counselors or was taking any medication for psychological conditions. (CP 54, 58, 70-71). They denied any knowledge before the incident that he was “off” mentally (CP 56), or suffered from paranoia, had delusions or heard voices. (CP 56, 71-72, 86). The Craigs did know that David Jay had struggled in past years with drugs and alcohol, but were not aware of any drug use in the several years leading

up to the incident. (CP 84). In fact, in the years before the accident his life seemed to be going in the right direction. (CP 82, 87).

Use of the Craigs' Gun

Raymond presented no evidence in the trial court that David Jay had a propensity to misuse firearms, had ever misused a gun, had ever used a gun for criminal purposes, or even had ever used a gun. The Craigs had no knowledge of any weapons problems. (CP 76-77). Guns were never an issue with David Jay. (CP 77). Mrs. Craig testified that they never dreamed that he would have an issue with their gun. (CP 87). Even in hindsight she did not see any problem with leaving a gun in their house while David Jay stayed there. (CP 87).

David Jay did not have permission to use the Craigs' gun. They did not "leave the gun" with him. (CP 87). In fact, the Craigs did not even tell him where the gun was located – he happened to discover it while looking in the closet for a pair of pants. (CP 140, 146). The Craigs did not give David Jay a key to the trigger lock – he had to search around and locate that on his own. (CP 145-146). As a result, it is

undisputed that David Jay's taking and using the gun was unauthorized.

Gun Precautions

The Craigs did make an effort to "secure" the shotgun David Jay used to shoot Raymond. They only kept the gun in their house on the advice of the police after a series of break-ins in their neighborhood. (CP 61). The gun was kept on hooks in the back of a closet near the ceiling. (CP 61, 74, 146-147, 169). The Craigs normally kept a trigger lock on the gun (CP 59-60, 62, 171), and although Mr. Craig was not 100% sure he thought the lock was on the gun when they left for vacation shortly before the incident. (CP 62). David Jay testified that he had to remove the lock from the gun before he could use it. (CP 145).

III. ARGUMENT

A. A GUN OWNER OWES NO DUTY TO A THIRD PERSON TO PREVENT THE UNAUTHORIZED USE OF A GUN KEPT IN HIS/HER HOME.

1. Under *McGrane*, the Craigs Had No Duty to “Secure” Their Gun.

Raymond argues that under general principles of negligence a gun owner owes a duty to the public to “safely store and secure” a gun kept in his/her home. However, no Washington court has ever imposed such a duty, nor has the Legislature. And this Court in the *McGrane* case expressly refused to impose a duty on gun owners keeping guns in their homes to protect the public at large.

A defendant cannot be held liable for negligence unless he/she owed the plaintiff a duty of care. The existence of a duty is a question of law. *E.g., Folsom v. Burger King*, 135 Wn.2d 658, 671, 958 P.2d 301 (1998). Whether a duty exists “depends upon mixed considerations of ‘logic, common sense, justice, policy, and precedent’”. *Christensen v. Royal School District No. 160*, 156 Wn.2d 62, 67, 124 P.3d 283 (2005). Questions of law are reviewed de novo. *E.g., Wilson Court Limited Partnership v. Tony Moreni’s, Inc.*, 134 Wn.2d 692, 698, 952 P.2d 590 (1998).

In this case, a key factor in the duty determination is precedent, and specifically this Court's decision in *McGrane v. Cline*, 94 Wn. App. 925, 973 P.2d 1092 (1999). In *McGrane* this Court refused to impose a duty on a gun owner to secure a gun kept in his/her home, and indicated that the proper arena to evaluate any such duty was legislative rather than judicial. *Id.* at 929.

In *McGrane*, the gun owner went away for the weekend and left his 16-year old daughter at home. He also left a gun in the master bedroom, apparently unlocked and easily accessible to anyone coming into the room. While her parents were away the daughter invited some people into the house, and one of them took the gun. Several weeks later he used the gun to kill someone during the course of a robbery. *Id.* at 927.

The plaintiff argued that the gun owner "owed a legal duty to the general public to secure his firearm". This Court disagreed:

The issues concerning responsible firearm ownership are the subject of much debate, in legislative halls and in society in general. The issues involved in this case implicate a narrow range of those issues: should the courts recognize a duty on the part of a firearm owner to

prevent the theft of that firearm from his or her residence, such that liability may be imposed against the owner for subsequent criminal use of that weapon? Under the facts of this case, we decline to impose such a duty.

Id. at 928-29.

The Court went on to explain that whether or not a duty should be imposed regarding the ownership and storage and firearms was for the Legislature to decide.

[T]here are too many issues of legitimate public debate concerning the private ownership and storage of firearms for this court to impose potential liability upon firearm owners based solely upon factors of ownership, theft, and subsequent criminal use of a firearm. We believe that the proper arena to resolve issues of such competing societal interests is legislative rather than judicial.

Id. at 929.

The facts in our case fall within the *McGrane* ruling. As in *McGrane*, the Craigs' gun was in their home. Although David Jay was their adult son rather than a stranger, as in *McGrane* their gun was taken and used without authorization. Under *McGrane*, no basis exists for imposing a duty on the Craigs in this case.

2. Raymond's Arguments that *McGrane* Should Be Ignored Have No Merit.

Raymond makes a number of arguments in an attempt to avoid the clear holding in *McGrane*. None of these arguments have merit.

First, Raymond invokes *Smith v. Nealey*, 162 Wash. 160, 298 P. 345 (1931), to support a general duty to secure firearms. However, that case involved leaving a loaded shotgun in a car (not a home) and then turning over control of the car to a 13-year-old boy. *Id.* at 161-62. The court indicated that there was a duty to not “leave highly dangerous instrumentalities where young children may come in contact with them” *Id.* at 165. The court’s holding clearly was limited to making guns available to children, and the decision stated “[w]hat would constitute reasonable care with respect to adults might be gross negligence as applied to a young child.” *Id.* at 165-66. See *Edgar v. Brandvold*, 9 Wn. App. 899, 902, 515 P.2d 991 (1973) (*Smith* addressed liability for negligently using, possessing or controlling dangerous instrumentalities in relation to children).

Consistent with *Smith*, this Court in *McGrane* distinguished cases involving “accidental injury to children

who foreseeably may have unsupervised access to a firearm”. 94 Wn. App. at 929. But our case involves a 39-year-old adult, not a child. And in our case the gun was inside a home, not in a car. *Smith* is inapplicable.

Second, Raymond points out that the Court in *McGrane* stated that the case before it did not “involve facts which arguably might alert a reasonable firearm owner that unauthorized entry and theft were likely or even reasonably foreseeable occurrences.” 94 Wn. App. at 929. Although Raymond does not really pursue this argument, he implies that this language might support a duty under the facts of our case. However, the Court in *McGrane* did not indicate that it would find a duty if unauthorized use was foreseeable, only that different considerations might be involved as a court evaluated the existence of a duty.

More significantly, as with the comment about minors, the reference to reasonable foreseeable unauthorized use has no application to the facts in our case. It was not even remotely foreseeable that David Jay would use the Craigs’ gun to shoot someone. Raymond presented no evidence in the trial court that David Jay had ever misused a gun, used a gun for criminal purposes, or even used a gun at all. The

mere fact that David Jay was a “convicted felon” – based on an unarmed burglary – and “had a history of poor decision-making” (Brief of Appellant at 15) is hardly enough to disregard *McGrane* and impose a duty on the Craigs to secure their gun.

Third, Raymond cites to a handful of cases in other jurisdictions that apparently impose a duty on gun owners to secure their guns. However, Raymond does not explain why this Court should ignore one of its own decisions and follow a few cases from other jurisdictions. Further, none of these cases provide any compelling rationale for imposing a judicial-created duty instead of letting the Legislature deal with this issue as this Court decided in *McGrane*.

In addition, two of the five cases Raymond cites involve different facts than our case. *Estate of Strever v. Cline*, 278 Mont. 165, 924 P.2d 666 (1996), involved a gun left in a car. *Kuhns v. Brugger*, 390 Pa. 331, 135 A.2d 395 (1957), involved having guns accessible to children. Those types of cases present different issues.

Fourth, Raymond argues that in enacting RCW 9.41.080 (making it a felony to deliver a firearm to any person ineligible to possess a firearm) the Legislature

somehow imposed a duty to secure firearms. Although he is not claiming that the statute actually creates a duty (Brief of Appellant at 18), Raymond argues that the public policy behind the statute supports a duty for gun owners to prevent access to guns by known felons. However, nothing in *McGrane* suggests that there is a “felon” exception to the absence of a duty to secure firearms. In addition, it would make no sense to impose a duty simply because the person using the gun without authorization had been convicted of a felony when that felony did not involve firearms or even violence.

3. Raymond’s Foreseeability Discussion is Immaterial Because No Duty Exists.

Raymond spends several pages discussing foreseeability. Raymond points out that once a duty exists, liability applies only if the injury was within the scope of the duty, which is governed by foreseeability. And he argues that foreseeability generally is a question of fact for the jury.

As discussed above, in fact this injury was not even remotely foreseeable. The Craigs had no indication that David Jay would find the gun, locate the key to unlock the trigger, and use it to shoot somebody. David Jay had never

used a gun to injure someone or commit a crime, and there was no evidence suggesting that David Jay might use this gun. Foreseeability can be decided as a matter of law if “the circumstances of the injury ‘are so highly extraordinary or improbable as to be wholly beyond the range of expectability.’” *Estate of Jones v. State*, 107 Wn. App. 510, 523, 15 P.3d 180 (2000), quoting *Seeberger v. Burlington Northern R.R. Co.*, 138 Wn.2d 815, 823, 982 P.2d 1149 (1999).

In any event, the foreseeability discussion is completely immaterial. Under *McGrane* there is no duty in this case as a matter of law. Accordingly, it makes no sense to discuss the scope of that non-existent duty.

4. Summary

McGrane was properly decided, and this Court should resist Raymond’s invitation to overrule or explain away the decision. As this Court noted in *McGrane*, the obligations of gun owners – particularly in the home – is a complicated issue. There certainly are Constitutional implications involving the right of citizens to bear arms. Whether or not a gun owner can be liable for the unauthorized use of a gun stored in the family home should be left to the Legislature,

as this Court ruled in *McGrane*. And the Legislature's silence in the 12 years since *McGrane* was decided suggests that there is general agreement with this Court's refusal to impose a duty to "safely secure" guns kept in homes. *1000 Friends of Washington v. McFarland*, 159 Wn.2d 165, 181, 149 P.3d 616 (2006) ("if the legislature does not register its disapproval of a court opinion, at some point that silence itself is evidence of legislative approval").

B. A HOMEOWNER HAS NO LIABILITY UNDER RESTATEMENT OF TORTS § 302B FOR FAILING TO PREVENT ACCESS OF AN ADULT GUEST TO HIS/HER GUN WHEN THE GUEST HAD NO PROPENSITY TO MISUSE GUNS.

Recognizing the difficulty of establishing a duty to secure firearms under general negligence principles, Raymond also argues that the Craigs had a duty to protect him against the criminal acts of David Jay. This argument is not based on some "special relationship" between the Craigs and their son. (See RP 7; Brief of Appellant at 25). Instead, Raymond argues that liability exists under § 302B of the Restatement (Second) of Torts, which allows for liability when a defendant's affirmative act has exposed the plaintiff to a recognizable high degree of risk of harm through

criminal misconduct. However, § 302B clearly is inapplicable under the facts of this case.

1. Restatement § 302B Comment e Governs Potential Liability for the Criminal Conduct of a Third Person.

The general rule under the common law is that a person does not have a duty to protect others from the criminal acts of third parties. *E.g., Kim v. Budget Rent A Car Systems, Inc.*, 143 Wn.2d 190, 195, 15 P.3d 1283 (2001). An exception to that rule is set forth in § 302B, which provides as follows:

An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.

Restatement (Second) of Torts § 302B (1965). Comment e to § 302B clarifies that a duty to protect against criminal conduct arises if there is a special relationship (not present in this case) or “where the actor’s own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such [criminal] misconduct, which a

reasonable man would take into account.” Restatement (Second) of Torts § 302B, comment e.

The Supreme Court first acknowledged § 302B in *Hutchins v. 1001 Fourth Avenue Associates*, 116 Wn.2d 217, 230, 802 P.2d 1360 (1991). The court noted that a defendant could be liable for harm caused by a third party absent a special relationship only in “exceptional” circumstances. The court held that the duty existed only if (1) the defendant’s property afforded a special or peculiar temptation or opportunity for crime, (2) the plaintiff was exposed to a “recognizable high degree of risk of harm”, and (3) the defendant affirmatively created or exposed the plaintiff to that harm. *Id.* at 232, citing § 302B, comment e.

The Supreme Court and subsequent Court of Appeals decisions have reaffirmed that comment e of § 302B governs a defendant’s duty to prevent the criminal conduct of a third person. *Kim*, 143 Wn.2d at 196; *Robb v. City of Seattle*, 159 Wn. App. 133, 139-144, 245 P.3d 242, rev. granted, 171 Wn.2d 1024 (2011); *Cameron v. Murray*, 151 Wn. App. 646, 652-56, 214 P.3d 150 (2009) , rev. denied, 168 Wn.2d 1018 (2010); *Parrilla v. King County*, 138 Wn. App. 327, 433-39, 157 P.3d 879 (2007).

Raymond seems to suggest that whether § 302B applies is a question of fact. However, § 302B addresses duty, and as with general negligence principles the existence of duty under § 302B is a question of law for the Court. See *Kim*, 143 Wn.2d at 195.

2. None of the Requirements for a § 302B Duty Are Present in this Case.

As noted above, the case law and § 302B comment e together suggest four elements that must be satisfied for a § 302B duty to apply. None of these elements are present in this case and therefore there are no “exceptional” circumstances that would support imposition of a duty.

First, the defendant’s conduct must offer “a special (or peculiar) temptation or opportunity for crime.” *Hutchins*, 116 Wn.2d at 232. In this case, storing a gun in the owner’s home does not create some special temptation or opportunity for crime. This is not a situation where a defendant left a gun in a public area. Numerous people keep guns in their homes, and that fact alone cannot be enough to impose § 302B liability. Further, in this case the Craigs took affirmative steps to reduce any opportunity for

misuse of the gun. They hid the gun in a closet in a place that was difficult to reach and used a trigger lock on the gun.

Second, the defendant's conduct must create a high degree of risk of harm. Section § 302B "does not mean that any risk of harm gives rise to a duty. Instead, an unusual risk of harm, a 'high degree of risk of harm', is required." *Kim*, 143 Wn.2d at 196, quoting § 302B, comment e. *Kim* is illustrative. In that case, Budget left the keys in the ignition of rental cars in its parking facility, which would seem to create a risk of stolen cars. But there had never been a prior car theft from that facility. *Id.* at 194. The court held as a matter of law that Budget had no duty when someone stole a car and injured the plaintiff in an accident. *Id.* at 196-198, 202.

As in *Kim*, in this case there clearly was no "high degree of risk of harm". Raymond repeatedly argues that David Jay had a criminal record, had seen two mental health professionals, had at one unknown time engaged in "erratic behavior", and had made some "poor choices" in his life. None of these facts are material because the alleged negligence was failure to remove a gun from the home. The only question is whether allowing access to a gun created a

high degree of risk of harm. This inquiry necessarily focuses on whether there was any known risk that given his history, David Jay would use a gun to injure someone.

As noted above, David Jay had no propensity to misuse or even use guns, and had never used a gun to injure someone or commit a crime. Section 302B comment e(E) discusses an example involving dangerous instrumentalities. The example states that a duty exists “[w]here the actor entrusts an instrumentality capable of doing serious harm if misused, to one whom he knows, or has strong reason to believe, to intend or to be likely to misuse it to inflict intentional harm.” The Craigs certainly had no “strong reason to believe” that David Jay was likely to misuse their gun. There was no “unusual” or “high degree” of risk of harm as required in § 302B comment e.

Third, § 302B applies only when the defendant has acted affirmatively to create a high degree of risk of harm. Restatement (Second) of Torts § 302B, comment e. Raymond tries to argue that the Craigs committed an affirmative act by leaving the gun in their home while they were away. However, this is word play. Raymond’s real complaint is that the Craigs should have done more to

prevent someone from using their gun. At worst they failed to act by not placing the gun in a safe or removing it from the home. This clearly is an omission, not an affirmative act. The Craigs' affirmative acts – hiding the gun in a closet and using a trigger lock – actually reduced the risk of harm.

Fourth, comment e to § 302B provides a potential for liability only if a high degree of harm is “recognizable” and a reasonable person “would take into account” the risk of harm. *E.g.*, Robb, 159 Wn. App. at 143. There is no reason that a reasonable person standing in the Craigs' shoes would recognize or take into account a high degree of risk of harm. Under the facts of this case, there is nothing in the record that would create any expectation or even suspicion that David Jay might find the gun and use it to shoot someone. The events that led up to Raymond's injury were so unforeseeable that § 302B cannot apply.

3. Summary

The facts of this case simply do not fit the requirements of a § 302B duty. The Craigs did not engage in any affirmative act that created a recognizable high degree of risk of harm by a third person. The trial court correctly ruled that § 302B is inapplicable.

C. A GUN OWNER CANNOT BE LIABLE FOR NEGLIGENT ENTRUSTMENT OF A GUN WHEN HE/SHE DOES NOT “ENTRUST” THE GUN TO THE ACTOR AND THE ACTOR IS NOT INCOMPETENT TO USE IT.

Raymond argues that the Craigs can be liable under a negligent entrustment theory. The court in *Bernethy v. Walt Failor’s, Inc.*, 97 Wn.2d 929, 653 P.2d 280 (1982), held that a person could be liable for negligent entrustment for furnishing a gun to an “incompetent”. The court noted that most gun cases involve sales to children, but the principle also applied to furnishing a gun to a person who is incompetent due to intoxication. *Id.* at 933.

In its decision the court in *Bernethy* adopted the Restatement (Second) of Torts § 390, which states as follows:

One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject of liability for physical harm resulting to them.

97 Wn.2d at 933, quoting Restatement (Second) of Torts § 390 (1965).

In this case, the Craigs cannot be subject to negligent entrustment liability under § 390 because they did not “entrust” the gun to David Jay, and because even if they did they had no reason to know that David Jay would use the gun in a manner involving unreasonable risk of physical harm to others.

1. The Craigs Did Not “Entrust” the Gun to David Jay.

The threshold requirement for negligent entrustment liability is the “entrustment” of the injury-causing instrumentality. Section 390 states that the defendant must “supply” the instrumentality. Washington courts have refused to impose liability based on this requirement. *Parrilla v. King County*, 138 Wn. App. 427, 441-42, 157 P.3d 879 (2007); *Mejia v. Erwin*, 45 Wn. App. 700, 703, 726 P.2d 1032 (1986).

Parrilla is the key case. In that case, a Metro bus driver exited his bus, leaving the engine running and a visibly erratic passenger alone on board. The passenger then moved into the driver’s seat and drove the bus down the road before crashing into several vehicles. 138 Wn. App. at 430-31. A person injured by the bus alleged that King

County (through its employee bus driver) was liable for negligently entrusting the bus to the passenger. *Id.* at 441.

This Court rejected a negligent entrustment theory.

The Court stated:

[P]ursuant to the plain meaning of the word, “entrustment” requires some kind of agreement or consent, either express or implied, to relinquish control of the instrumentality in question. (Citations omitted). Moreover, each Washington case that has imposed of [sic] a duty of care based on a theory of negligent entrustment has involved a situation where there existed such consent to relinquish control. (Citations omitted). Accordingly, such consent is a necessary element of a negligent entrustment claim.

Id.

The plaintiff in *Parrilla* argued that the court in *Bernethy* allowed negligent entrustment even though the customer technically stole the gun by walking out of the store before the sales transaction had been completed. However, this Court pointed out that the court in *Bernethy* “specifically relied on facts indicating that the owner intended to relinquish control of the gun to the intoxicated patron” and was processing the customer’s credit card when

the customer left with the gun. Therefore, the store owner had consented to relinquish control. 138 Wn. App. at 442.

In *Parrilla*, the bus driver left the bus running with a single passenger inside. However, this Court held as a matter of law that this conduct was not enough to impose negligent entrustment liability. The facts asserted gave “no indication that the bus driver affirmatively agreed to relinquish control of the bus” to the passenger. Therefore, the trial court’s dismissal of this cause of action was affirmed. *Id.*

The trial court’s grant of summary judgment on negligent entrustment in our case is supported by *Parrilla*. There is no evidence or even an implication that the Craigs affirmatively agreed to relinquish control of the gun to David Jay. They did not tell him that there was a gun in the house, where the gun was, or the location of the key to the trigger lock. David Jay found the gun and the key, and used the gun without authorization. Under these facts, as a matter of law the Craigs did not “entrust” the gun to David Jay and they cannot be liable under a negligent entrustment theory.

2. There is No Evidence that David Jay Was “Incompetent” to Use a Gun.

The second requirement for negligent entrustment liability is that the person receiving the instrumentality be “incompetent” to use it. See *Bernethy*, 97 Wn.2d at 933 (“[t]he basis for our imposing this general duty is that one should not furnish a dangerous instrumentality such as a gun to an incompetent”); *Cameron v. Downs*, 32 Wn. App. 875, 878, 650 P.2d 260 (1982) (theory applies if the owner of a vehicle entrusts it to someone whom he/she knows to be “reckless, heedless, or incompetent”).

Most negligent entrustment cases involve vehicles, and in that context the courts have found a driver to be incompetent when he/she (1) was intoxicated, *Hulse v. Driver*, 11 Wn. App. 509, 515, 524 P.2d 255 (1974); (2) had a reputation in the community as a reckless, dangerous and incompetent driver, *Cameron*, 32 Wn. App. at 879; or (3) was a minor under the age required to obtain a driver’s license, *Atkins v. Churchill*, 30 Wn.2d 859, 865, 194 P.2d 364 (1948). The plaintiff must present affirmative evidence that the person using the instrumentality was incompetent. See *Mele v. Turner*, 106 Wn.2d 73, 77-78, 720 P.2d 787

(1986) (no liability under § 390 for allowing an 18-year-old to use a rotary lawn mower in the absence of evidence of incompetency).

Raymond states that David Jay was “reckless or incompetent” to safely handle a gun. (Brief of Appellant at 32). However, Raymond can point to no evidence supporting this allegation. There is nothing in the record one way or the other regarding David Jay’s experience with guns or competence with guns. There also is nothing in the record suggesting that David Jay was “reckless” with guns. On the contrary, the only evidence is that David Jay never had a problem with guns and that the Craigs never dreamed that there would be an issue with their gun. Raymond has failed to satisfy his burden of proof on this issue.

Raymond may argue that David Jay was “incompetent” because as a convicted felon it was unlawful for him to possess a firearm under RCW 9.41.040(2)(a)(i). However, this type of legal/technical incompetence is insufficient to impose negligent entrustment liability. The cases all focus on a person’s actual skill (or diminished skill) in using the instrumentality. Just because a person legally is not allowed to possess a firearm does not mean that he/she is unskilled

in handling one. And the Legislature has not enacted any law that imposes liability if a gun is given to a felon. The same concept would apply to an automobile. For instance, just because an adult has a suspended driver's license and cannot legally drive does not mean that he/she is incompetent to drive a vehicle.

The meaning of "incompetent" for purposes of negligent entrustment liability is clarified by the language of Restatement § 390. Section 390 does not even mention incompetence, but instead focuses on whether the actor because of "youth, inexperience, or otherwise" is likely to "use it in a manner involving unreasonable risk of physical harm to himself and others". See *Hickle v. Whitney Farms, Inc.*, 148 Wn.2d 911, 925, 64 P.3d 1244 (2003) (negligent entrustment is based on the foreseeability of harm when the person to whom materials were entrusted is unable to safely handle the materials).

In this case, the fact that David Jay was not legally allowed to possess a gun has nothing to do with whether he was likely to use it in a manner "involving unreasonable risk of physical harm". And there is no evidence in the record

indicating or even hinting that entrusting a gun to David Jay would involve a risk of harm.

3. Summary

The Craigs did not “entrust” the gun to David Jay. The gun was in the house, and David Jay happened to find it and use it without authorization. The absence of the Craigs’ intent to relinquish control of the gun to David Jay precludes negligent entrustment liability.

Raymond’s negligent entrustment theory also fails because he has presented no evidence that David Jay was incompetent to use the gun, in the sense that using the gun was likely to involve an unreasonable risk of physical harm. And there is no evidence that the Craigs knew or should have known that David Jay’s use of the gun would involve an unreasonable risk of harm.

IV. CONCLUSION

There is no legal or factual basis for imposing liability on the Craigs for David Jay’s conduct. As a matter of law, a gun owner has no duty to take steps to prevent a guest from taking and using without authorization a gun kept in the owner’s home. As a matter of law, keeping a gun in the

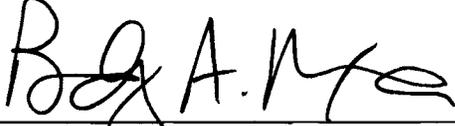
owner's home does not create a duty under § 302B of the Restatement (Second) of Torts with regard to a house guest with no propensity to misuse guns. As a matter of law, there can be no negligent entrustment liability when the owner did not "entrust" a gun to anyone but it is used without authorization, and there is no evidence that the actor is incompetent to use a gun.

The trial court granted summary judgment on all three of Raymond's liability theories based on the applicable law and the evidence in the record. The trial court was correct.

Respondents David Lee Craig and Georgianna Craig respectfully request that this Court affirm the trial court's grant of summary judgment, and rule that they have no liability to Raymond as a matter of law.

DATED this 12 day of January, 2012.

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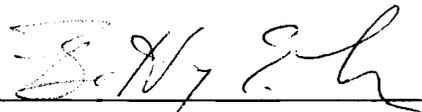
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CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury, that on the 12th day of January, 2012, I caused to be delivered vial legal messenger to all counsel of record as noted below, a copy of the document to which this certification is attached.

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