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No. 67339-4-1

COURT OF APPEALS,  
DIVISION 1  
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.

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COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
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REPLY BRIEF OF APPELLANT

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ORIGINAL

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**A. REPLY ARGUMENT**

**I. GENUINE ISSUES OF MATERIAL FACT  
PRECLUDE SUMMARY JUDGMENT**

Although a Reply, it is necessary to briefly reiterate which facts are and which facts are not in dispute.

**a. Certain Facts are Undisputed**

It is undisputed that Mr. David Lee Craig and Mrs. Georgianna Craig (“the Craigs”) owned and kept a shotgun in their home; and this weapon was used by the Craigs’ adult son, David Jay Craig (“David Jay”), to shoot the appellant, Steven Raymond on September 18, 2009.<sup>1</sup> At the time of the shooting, David Jay was staying at the family home and the Craigs were out of town. *See* generally clerk’s papers (CP) at 174 – 77; Brief of Respondents (hereinafter Respondents’ Brief) at 1.

It is further undisputed, that the Craigs were aware of David Jay’s prior criminal history. The Craigs acknowledge their awareness of David Jay’s juvenile and adult felonies. CP at 210 – 11; Respondents’ Brief at 3 – 4. The juvenile felony was for auto theft and the adult felony was for burglary. *Id.* They were also aware of a domestic violence assault in the

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<sup>1</sup> The date of the shooting was September 18, 2009, and Appellant apologizes for any confusion as the date was stated as September 19, 2009, in his opening brief.

family home involving David Lee Craig (“David Lee”), as well as controlled substance convictions (VUCSA) and a conviction for aggravated driving while intoxicated. *Id.* It is also undisputed that the Craigs were aware that David Jay struggled with alcohol and drug abuse. CP at 220 – 21; Respondents’ Brief at 4. Certain instances of David Jay’s erratic behavior are also undisputed; on one occasion David Jay cut up the family furniture with a knife, and on another occasion he broke a lattice fence and was yelling in the street. CP at 277.

While the above facts are undisputed, additional material facts remain in dispute.

**b. Material Facts Remain in Dispute**

**1. There is evidence that the Craigs knew David Jay struggled with mental and emotional health issues**

Firstly, it is disputed whether the Craigs knew or believed that David Jay suffered from paranoia, had delusions, heard voices, or otherwise struggled with mental or emotional health issues. The Craigs denied knowledge that David Jay struggled with mental or emotional issues as an adult. Respondents’ Brief at 4. However, to assist in David Jay’s criminal defense against charges stemming from this shooting, the

Craigs wrote letters that stressed his emotional and behavior health issues in an attempt to secure a psychological evaluation for his defense. CP at 220 – 21.<sup>4</sup>

At her deposition, Mrs. Craig was asked, whether anything said in her deposition was inconsistent with what she had told Mr. Dolan, David Jay’s criminal defense attorney. In response, Mrs. Craig stated, “As far as the paranoia and the victimization and whatnot those are the things that we were told that we needed to consider and put in this letter [to the defense attorney] in order to get Dave [David Jay] any kind of assistance at all.” CP at 221. The Court did grant an evaluation. *Id.*

**2. There is evidence that the gun was stored unlocked and loaded**

Secondly, it is also disputed whether the Craigs’ shotgun was unlocked and loaded at the time of the shooting. David Lee testified that he generally kept the gun locked, but was unsure whether the lock was on when he left for vacation. CP at 204; Respondents’ Brief at 6. Moreover, David Jay and David Lee gave conflicting statements about the location of the keys, the operation of the lock, and the description of the lock that the Craigs claim was or would have been used. CP at 203 – 6, 221 (Exhibit

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<sup>4</sup> The specific contents of the letters are unknown, as the Craigs claim attorney-client privilege and the issue had yet to be addressed prior to Summary Judgment.

23 to David Lee Deposition), 229 – 230, 234 (Exhibit 18 to David Jay Deposition).

Further, upon police interrogation, David Jay was asked by the officer, “[w]hen did you put the two rounds in it?” CP at 255 – 56. David Jay responded, “Ah around March.” *Id.* David Jay further stated that, “ever since then um we’ve we’ve kept it loaded or we’ve kept bullets close to it to load it so.” *Id.* When asked, “you knew it was ready and rarin’ to go right?” David Jay stated, “[a]lways ready yes.” *Id.* Indeed, as stated during his police interrogation after being asked whether the gun was loaded when he went to grab it from the closet, David Jay told the police, “[t]here had been two shells in it.” CP at 250.

**3. There is evidence that the Craigs informed David Jay of the gun’s location and authorized its use**

Finally, it is disputed whether the Craigs informed David Jay of the shotgun’s location or whether the Craigs were aware that David Jay knew of the shotgun’s location. In their brief, the Craigs state that David Jay happened upon the shotgun while looking for a pair of pants in the closet. Respondents’ Brief at 5. However, there is evidence that the Craigs purposefully left the gun with David Jay. *See* CP at 207 – 8, where this exchange took place at David Lee’s deposition:

Q: If you weren't going to tell David [Jay] that it was up there when you left for vacation why didn't you disarm it and put it away?

A: Oh, well, we had been broke into in January. There was still burglaries going on. He was laid up with a bad knee in bed. What if this happened again? He's, you know, laying in bed. He can't defend himself.

Q: Right, but you didn't tell him it was there anyway.

A: No, I know, but if he - - I don't know. If he did get to searching around or something. I don't know. I just - -

Additionally, David Lee admitted to Officer Gee that he specifically advised David Jay to sleep in the master bedroom while the Craigs were out of town due to the recent break-in. CP at 277. Officer Gee was one of the responding officers to the shooting, in his sworn narrative report Officer Gee stated,

"I asked David [Lee] if it was unusual that his son would sleep in their bed. David [Lee] said when they left town he suggested to his son that he sleep in their bedroom because of an attempted break-in to their house which occurred sometime earlier this year. David [Lee] said ever since the break in he purchased the shotgun and had loaded it with birdshot."

CP at 277. Furthermore, David Jay, during his police interrogation, told the officer that on the night of the shooting he reached into the closed and grabbed the gun. CP at 249.

The Craigs' want the Court to believe that David Jay was advised to sleep in the master bedroom as a precaution against potential break-ins because then at least, as David Lee put it, David Jay might happen to find the gun, if he went looking for it. This strains logic. If the fear of the Craigs was that their son would be defenseless against an intruder, it would be logical that they would want him in their room so that he would have easy access to a defense – a loaded shotgun.

The Craigs desire for David Jay to defend himself combined with David Jay's admission that he loaded the shotgun, knew that the shotgun was "always ready," and that he reached in the closet for the shotgun creates a reasonable inference that (1) the Craigs informed David Jay of the shotgun's location and expressly authorized its use; or (2) the Craigs knew or should have known that David Jay was, in fact, aware of the shotgun's location and thus impliedly authorized its use.

In this case, there is enough evidence to support a finding of liability on any of Mr. Raymond's three alternative legal theories; (1) under common law negligence, the Craigs owed a duty to the public to safely store and secure their firearm; (2) under the rule articulated by Restatement of Torts, § 302 B comment e, the Craigs' affirmative acts exposed the public to a recognizable high degree of harm; and finally, (3) the Craigs negligently entrusted their firearm to David Jay.

## II. ***MCGRANE* NOR *SMITH* RELEASE THE CRAIGS OF THEIR DUTY TO SAFELY STORE AND SECURE THEIR FIREARM**

The issue at hand is the existence of a duty, which is a question of law. *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). *See also* Respondents' Brief at 7. Respondents argue that "[u]nder *McGrane* there is no duty in this case as a matter of law." Respondents' Brief at 14. However, such a conclusion requires a broad reading of the holding in *McGrane*. The holding in *McGrane* implicated a narrow range of issues regarding whether the Court should "recognize a duty on the part of a firearm owner to prevent the theft" of his or her firearm. *McGrane v. Cline*, 94 Wn. App. 925, 928 - 929, 973 P.2d 1092 (1999). The Court held it would not "impose potential liability upon firearm owners based *solely* upon factors of ownership, theft, and subsequent criminal use of a firearm." *Id.* (emphasis added).

As such, *McGrane* proposes a narrow holding which centers largely on an intervening theft. By contrast, the facts in the case at hand are entirely different than those in *McGrane*. That is, the firearm here was not stolen by David Jay. Nor was the gun used to injure someone several states away. Instead, David Jay was left in close proximity to a shotgun which was "always ready" and likely kept loaded and unlocked. The gun was then used by him to injure someone in the very home where the gun

was kept. The narrow holding in *McGrane* does not contemplate facts such as these. Instead, *McGrane* outlines the boundaries of when a duty will be found.

On Summary Judgment, with the facts and inferences viewed in the light most favorable to Mr. Raymond, the Craigs owed a duty to the public to safely store and secure their firearm. Whether these facts support a breach of the Craigs' duty is an issue for the jury.

Moreover, the longstanding duty established in *Smith* is not limited to cases involving injuries to minors. *Smith v. Nealey*, 162 Wash. 160, 298 P. 345 (1931). *Smith* outlines a "heightened level of care," or "utmost caution," in cases involving firearms and minor children. *Id.* at 165-166. One Court of Appeals decision has held that this heightened degree of care outlined in *Smith* only applies to cases involving minors. *See Edgar v. Brandvold*, 9 Wn. App. 899, 902-904, 515 P.2d 991 (1973) (Plaintiff injured in hunting accident requested a jury instruction that stated a person having possession and control of a firearm must exercise the highest degree of care and utmost caution; the Court held that it was proper to deny the instruction because the standard of care required for hunting was the same standard of care to be used in all other situations.)

However, the language in *Smith* regarding the existence of a duty is broad and not limited to cases involving minors, "anyone who is the

possessor of a dangerous instrument has a duty to the public, or at least to such members of the public as are reasonably likely to be injured by its misuse.” *Smith*, 162 Wash. at 166 (citations omitted). The Craigs’ argument against the application of *Smith* in the case at hand confuses the existence of a duty with the degree of care required once one a duty has been found to exist.

Finally, if the Court is persuaded that *Smith* applies only to cases involving minors, it applies in this case. Under RCW 9.41.040(2)(a)(i), due to David Jay’s prior felony, he is akin to a minor because the legislature determined that felons, without exception, are incompetent to possess a firearm. RCW 9.41.040(2)(a)(i). It is proper for the Court to find a person *per se* incompetent when so clearly established by a statutorily imposed bright line. *See Atkins v. Churchill*, 30 Wn.2d 859, 194 P.2d 364 (1948) (minor was *per se* incompetent to drive because he was under the statutory age required to obtain a license). Thus, David Jay should be treated as a minor for purposes of the establishment of a duty and the degree of care required in this case.

### III. LEAVING A FIREARM WITH A KNOWN FELON IS AN AFFIRMATIVE ACT

Where an actor's own affirmative act has created or exposed the other to a recognizable high degree of risk of harm, that actor may be held liable. *Robb v. City of Seattle*, 159 Wn. App. 133, 140, 245 P.3d 242 (2010), *order amended* January 14, 2011, *review granted*, 257 P.3d 664 (June 8, 2011); *See also* Restatement (Second) of Torts § 302 B comment e. Respondents argue that storing a gun in one's home does not offer "a special (or peculiar) temptation or opportunity for crime." Respondents' Brief at 18, quoting *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 232, 802 P.2d 1360 (1991). However, the Craigs' firearm was stored loaded and unlocked, in a bedroom occupied by a convicted felon with a history of erratic behavior, drug abuse, and poor decision making.

Further, the Respondents insist that there was no high degree of risk of harm because David Jay had no history of firearm misuse. The Respondents' base this reasoning on *Kim v. Budget Rent A Car Sys., Inc.*, 143 Wn.2d 190, 15 P.3d 1283 (2001). This reasoning is attenuated, chiefly because the legislature has recognized that all felons regardless of the type of felony are incompetent to use firearms. RCW 9.41.040(2)(a)(i). Moreover, *Kim* involved the theft of a vehicle at Budget Rent A Car's administrative offices which had no history of break-ins or

theft. *Kim*, 143 Wn.2d at 197-198. By contrast, and as discussed at length, David Jay had a history of poor decision making and erratic behavior. As Mrs. Craig put it, “I know that Dave [David Jay] was in jail at different times. Don’t know for what, don’t even know the time.” CP at 78.

Next, the Respondents’ argue that Restatement (Second) of Torts § 302 B comment e does not apply because the Craigs did not act affirmatively, stating that leaving the gun in their home is mere “word play . . . the real complaint being that the Craigs should have done more[.]” Respondents’ Brief at 20 – 21.

Nonetheless, leaving the instrument is an affirmative act. For example, the Court in *Parrilla* found that a bus driver committed an affirmative act under § 302B comment e, when the driver departed the bus and left the bus keys in the ignition while an erratic passenger was on board. *Parrilla v. King County*, 138 Wn. App. 427, 433, 157 P.3d 879 (2007). In *Parrilla*, as in this case, the danger may have been eliminated if the keys, or shotgun, had been removed; however, the ability to remove the danger did not negate the initial affirmative act of leaving the instrument with an erratic individual.

Finally, the Respondents argue that § 302B comment e does not apply because there is nothing that would “create any expectation or even

suspicion that David Jay might find the gun and use it[.]” Respondents’ Brief at 21. However, when viewing the facts in light most favorable to Mr. Raymond, as stated above, it is reasonably foreseeable that David Jay knew full well where the gun was located and that he had, in fact, been the one to load the weapon months earlier.

#### **IV. THE CRAIGS NEGLIGENTLY ENTRUSTED THEIR FIREARM TO DAVID JAY**

Entrustment requires some kind of agreement or consent, either express or implied to relinquish control of the instrumentality in question. *Parrilla*, 138 Wn. App. at 441. At this time, it remains disputed whether the Craigs authorized David Jay to use their shotgun. Moreover, it is disputed whether the Craigs informed David Jay of the shotgun’s location or knew that David Jay was aware of its location. When taken in the light most favorable to Mr. Raymond, these disputed facts indicate that the Craigs consented, either expressly or impliedly, to David Jay’s use of the gun. These are material facts on the issue of negligent entrustment and the ultimate determination of these facts should be left to the jury.

Furthermore, an actor may be held liable for damages resulting from the use of an instrumentality when it is supplied or entrusted to someone who is incompetent, because of his youth, inexperience, or otherwise, to use the instrument involving unreasonable risk of physical

harm to himself or others. *Bernethy v. Walt Failor's Inc.*, 97 Wn.2d 929, 933, 653 P.2d 280 (1982); Restatement (Second) of Torts § 390. As belabored already, David Jay had criminal, psychological, and erratic behavior issues. Additionally, as a felon, David Jay is legally incompetent to possess a firearm. Respondents contend that under negligent entrustment, incompetence is determined, not by statute, but by the actor's skills and abilities because "[t]he [negligent entrustment] cases all focus on a person's actual skill (or diminished skill) in using the instrumentality." Respondents' Brief at 27. This assertion, however, fails upon review of *Atkins v. Churchill*. See *Atkins*, 30 Wn.2d at 865.

In *Atkins*, the Court held that the defendant was liable under a negligent entrustment theory when he entrusted his car to a minor who was *per se* incompetent to drive because he was under the statutorily required age to obtain a license. *Id.*

In *Atkins*, Niles Churchill allowed his daughter and her friends (none of whom were of age to drive) to use his vehicle to attend a high school dance. *Id.* at 863-865. Returning from the dance, Roger Zorn (14 years old) took control of the vehicle and struck Atkins. *Id.* There was no evidence that Roger Zorn, or any of the teens for that matter, were either unskilled or had a history of negligent driving. The Court held that it was *per se* negligence to entrust a vehicle to a minor under the statutory age.

*Id.* at 865. “The prohibitory enactment itself constitutes a conclusive declaration that an individual younger than the age designated is incompetent to drive a motor vehicle.” *Id.* There is no distinction with that logic as applied in this case. The Craigs may be held liable under a negligent entrustment theory by entrusting their shotgun to David Jay because he is *per se* incompetent to possess a firearm under RCW 9.41.040(2)(a)(i).

**B. CONCLUSION**

For the reasons stated above, and in the Appellant’s Brief, there are material issues of fact in dispute and Mr. Raymond respectfully requests that the Court REVERSE the trial court’s grant of summary judgment and REMAND this case for trial. Based on the facts of this case, the evidence relied upon, and the arguments outlined by Mr. Raymond, the Craigs owed a duty to Mr. Raymond and there are material issues of fact remaining in this case making summary judgment inappropriate.

DATED this 13th day of February, 2012.

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STEVEN RAYMOND,

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Vs.

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No. 67339-4-1

**PROOF OF SERVICE**

On February 13, 2012, I caused to be served upon counsel of record, at the address stated below, by legal messenger, a true and correct copy of the following documents:

**Appellant's Reply Brief and Proof of Service**

|   |  |
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated at Kent, Washington, this 13th day of February, 2012.



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