FILED
JAN 03 2011
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

No. 29207- 0 - III

In The Court Of Appeals
The State Of Washington
Division Three

CHARLES E. SCHWARTZ and
SHANNA LEE SCHWARTZ, husband and wife,

Appellants/Plaintiffs,

v.

STEVEN C. ELERDING and LINDA J. ELERDING,

Respondents/Defendants.

REPLY BRIEF OF APPELLANTS

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A. REPLY TO RESPONDENT'S COUNTER STATEMENT OF FACTS

As pointed out by the Defendant-Respondents some of the facts of this case are "factually disputed". Br. of Resp't at 1

The Defendant-Respondents gave their minor son a gun, which he kept with him somewhere in the bed of his truck. On April 20, 2007, near the hour of midnight the gun given to him by his father and kept in the bed of the truck was retrieved by the son, and used by the son to cause serious injuries to the Plaintiff-Appellants. CP 58.

In a prior statement of the facts by the Defendant-Respondents they quoted Plaintiff-Appellants' allegations that the attack by Joseph Elerding on Charles Schwartz was "without just cause". CP 58. They offered no rebuttal to this assertion and seemingly adopted this assertion as a fact. CP 58. However in their current Brief, Defendant-Respondents seem to be arguing, for the first time, that the attack was provoked. Br. of Resp't at 8. The record does have some conflicting statements about who initiated first contact in the altercation. CP 97 & CP 101 (Joseph Elerding accused Charles Schwartz of hitting and attacking him, Charles Schwartz denied hitting Joseph and said he did not touch him). All the documented injuries of Joseph Elerding happened after the altercation began and almost all were a result of Joseph Elerding's own actions (i.e. a hurt fist

from punching the Plaintiff-Appellant). CP 98. None of the documented injuries showed that Charles Schwartz struck first. Furthermore, in a grant of a motion for summary judgment the facts are to be construed in a light most favorable to the non-moving party, in this case, a light most favorable to the Plaintiff-Appellants. Taken in such a light, the facts indicate that the attack by Joseph Elerding was without just cause or provocation. If this case hinges on disputed facts than the trial courts' granting of the motion for summary judgment was not proper and should be reversed and the case should be remanded for trial.

Another disputed fact, as pointed out by the Defendant-Respondents, is that "Joseph Elerding was restricted by his parents to not having firearms and ammunition kept in the same location". Br. of Resp't at 7. However, the record shows that there was an empty box of ammo in of the truck at the time of the incident (on the floor in front of the driver's seat). CP 101. This fact indicates that the previous statement by Defendant-Respondents is not correct and that ammo and guns were likely sometimes together in the truck. Another statement by the Defendant-Respondents indicated that the gun was kept in a locked location in the truck (CP 111), however, as pointed out by Defendant-Respondents, the facts show that the gun was kept in an unlocked location in a tool box in

the bed of the truck, where anyone (minor, school friend, or passerby) could have immediate access to the weapon. Br. of Resp't at 8.

These facts show that the Court erred by entering an order granting Steven C. Elerding's and Linda J. Elerding's Motion for Summary Judgment.

B. ARGUMENT IN REPLY

The Plaintiff-Appellants pled and argued three causes of action or theories of liability; general negligence, negligent entrustment, and negligent supervision. CP 70. The trial court dismissed all three for lack of foreseeablility. Verbatim Report of Proceedings, p.40, lines12-17.

It is important to re-iterate that Supreme Court of Washington has repeatedly held that the question of foreseeability is a question for the jury and is a question of fact, generally inappropriate for summary judgment. See, e.g., *Bell v. State*, 147 Wn.2d 166, 179, 52 P.3d 503 (2002); *Tyner v. Dep't of Soc. & Health Servs., Child Protective Servs.*, 141 Wn.2d 68, 82, 1 P.3d 1148 (2000); *Taggart v. State*, 118 Wn.2d 195, 224-25, 822 P.2d 243 (1992).

The Defendant-Respondents seem to be arguing that in all three theories of liability foreseeability can only be shown by a dangerous proclivity. Br. of Resp't at 8. This is not a correct statement of the law in Washington. All of the cases cited by Defendant-Respondents which

included a discussion of dangerous proclivity were cases involving a claim for Negligent Supervision. Dangerous proclivity is obviously not required to hold a person liable for their own negligence or for negligent entrustment. Also, as pointed out in prior briefs, recent Washington cases have indicated that actual knowledge of a particular proclivity is not required for liability under this theory of negligent supervision; foreseeability can be based on what the reasonable "parents should have known". *Sun Mountain Prods., Inc. v. Pierre*, 84 Wn.App. 608, 615-16, 929 P.2d 494 (1997).

I. GENERAL NEGLIGENCE

For liability under the general theory of negligence there must be duty, breach, and proximate cause. See *Berglund v. Spokane County*, 4 Wn.2d 309, 321, 103 P.2d 355 (1940). Under this theory of liability a person is held liable for their own actions.

In response to the general negligence claim, the Defendant-Respondents argue that they are not generally liable for the negligent or tortuous acts of another (their son). Br. of Resp't at 8. However, under the negligence claim it is not argued that the Defendant-Respondents are directly liable for another's negligence, but that they are liable for their own negligent actions. Washington has a long tradition of holding people liable for their own negligent actions. In the present case the Defendant-

Respondents' negligent act was to give a gun to a minor. It seems likely that a jury could find that this negligent act was the "but for" and "proximate cause" of the Plaintiff-Appellants injuries.

The Defendant-Respondents had a duty not to act in a manner that involves an unreasonable risk of harm to another, and they had a duty to exercise reasonable care to prevent the risk from taking effect. *Minahan v. W. Wash. Fair Ass'n*, 117 Wn. App. 881, 897, 73 P.3d 1019 (2003) (citing Restatement (Second) of Torts § 321 (1965)). Besides the reasonable person standard, Defendant-Respondents also had a duty created by both Washington and Federal law to not supply a minor with a gun. RCW 9.41.080, 18 U.S.C. §922(x)(1)(A), and *Mathis v. Ammons*, 84 Wn.App. 411, 416-19, 928 P.2d 431 (1996) (recognized that in Washington a duty can be created by statute).

Defendant-Respondents breached this reasonable person and statutory duty by giving their minor son the unsupervised use and control of not just one, but two guns. One of these guns was kept in an unsecure location in the bed of their son's pickup truck with the knowledge and consent of the parents.

II. FORESEEABILITY

For this cause of action, under the theory of general negligence, the Defendant-Respondents have put forth no arguments that they did not

have a duty as created by statute or by the reasonable person standard. Nor did they put forth any argument that they did not breach that duty. Their argument and the basis for dismissal by the trial court was based on a lack of foreseeability.

In Washington the question of foreseeability is generally not one that is decided by the trial court in summary judgment, but is a question for the jury. The threshold determination of whether a defendant owes a duty to the plaintiff is a question of law. *Pedroza v. Bryant*, 101 Wn.2d 226, 228, 236, 677 P.2d 166 (1984). However, once this initial determination of legal duty is made, it is the jury's function to decide the **foreseeable range of danger** thus limiting the scope of that duty. *See Wells v. Vancouver*, 77 Wn.2d 800, 467 P.2d 292 (1970); *Rikstad v. Holmberg*, 76 Wn.2d 265, 268, 456 P.2d 355 (1969).

Washington courts have often ruled that an occurrence is only unforeseeable when it "is so highly extraordinary or improbable as to be wholly beyond the range of expectability." *McLeod v. Grant County School Dist.*, 42 Wn.2d 316, 323, 255 P.2d 360 (1953). The court must ask whether the harm that occurred is within a 'general field of danger' that should have been anticipated. *Id.* at 321 (citing *Berglund v. Spokane County*, 4 Wn.2d 309, 103 P.2d 355 (1940); *Harper, Law of Torts* § 7, at 14; *Restatement (second) of Torts* § 435, at 1173).

In *McLeod*, the Washington Supreme Court said: "We have held that it is for the jury to decide whether the general field of danger should have been anticipated . . . ." *McLeod,* 42 Wn.2d at 324.

The question of foreseeability, as decided by the trial court, was whether the actual harm fall within a general field of danger which should have been anticipated? The Washington State Supreme Court has stated that this particular question is a question for the jury. *Id.*

The Defendant-Respondents have argued that because the weapon was not discharged, or the trigger was never pulled, that this particular use of the gun was unforeseeable. However, a gun is a dangerous weapon even if it is not discharged. Use of a gun as a blunt weapon is a very old and common use. In oral arguments Plaintiff-Appellants offered to brief the trial court on the use of a gun as a weapon other than for firing bullets. There are many examples of the use of a firearm as a blunt weapon, both for pistol-whipping and butt-stroking (striking with the butt stock of a firearm). In fact, the Wikipedia article "Firearm as a blunt weapon" shows that "[i]n armed robberies, beating the victims with firearms is a more common way to complete the robbery, rather than to shoot or stab them." See "Firearm as a blunt weapon", http://en.wikipedia.org/w/index.php?title=Firearm_as_a_blunt_weapon&oldid=404303010 (last visited Dec. 29,

2010), citing "Robbery and the Criminal Justice System", by John E. Conklin, 1972, ISBN 039747220X, p. 111.

The facts of this case are telling. When Joseph needed a weapon he thought of the gun, he took steps to open an unlocked toolbox and retrieve the gun (a tool box which likely containing many items that he could have used, such as a tire iron). CP 97. He wanted a weapon, and retrieved the gun his parents had given him. He was not looking for a club or a racquet but for a weapon, one built, at least in part, for the exact purpose that he was going to use it for. The trial court compared the use of the weapon to that of a racquet, however Joseph did not use a racquet or any other blunt object, he used a gun, the very gun his parents had given him. Upon retrieving the gun he did not use it to hit balls with, he used it as a weapon to beat the Plaintiff-Respondent until he feared for his life. It was a beating which continued until the gun broke and the police arrived at the scene. CP 97 and 101.

The use of a gun as this type of a weapon is common and foreseeable, and the misuse of a gun by any minor is so common and foreseeable that there are laws in almost every State (including Washington State) and Federal laws which limit or prohibit supplying a gun to a minor. Br. of Appl'ts at 12. The trial court was in error because the actions of the Defendants' son were foreseeable, and because

foreseeability, in the context of proximate cause, is a question that is typically decided by the jury. The trial court's granting of the motion for summary judgment should be reversed and this case should be remanded for trial.

III. NEGLIGENT ENTRUSTMENT

Under negligent entrustment, the Defendant-Respondents again argue that they are not liable for the negligent or tortuous actions of their son. However, the theory of negligent entrustment is about holding actors liable for their own actions. The Defendant-Respondents are liable for their own actions of entrusting a gun to a minor. They mistakenly refer to dangerous proclivity as an element of negligent entrustment, however, as noted above, dangerous proclivity is only an element of negligent supervision.

As in general negligence, under the theory of negligent entrustment there must be a duty, breach, and proximate cause. The duty under negligent entrustment comes both from the common law, statute, and from Restatement (Second) of Torts §390 as adopted by this court. See Restatement (Second) of Torts §390 (1965); *Mejia v. Erwin*, 45 Wn.App. 700, 704-05, 726 P.2d 1032 (1986); *Bernethy v. Walt Failor's*, 97 Wn.2d 929, 933-34, 653 P.2d 280 (1982). It is based on the foreseeability of harm when one knew or should have known that the person to whom

materials were entrusted was unable to safely handle the materials because of youth or inexperience. *Id.*

Contrary to assertions by the Defendant-Respondents, the *Bernethy* case strongly supports the Plaintiff-Appellants' case. The Defendant-Respondents have brought up two excellent points from *Bernethy* that further support Plaintiff-Appellants' case. First, in *Bernethy*, the intoxication of the third-party tortfeasor was a disputed fact, it was not certain that the individual was incompetent due to intoxication. Br. of Resp't at 20; *Bernethy*, 97 Wn.2d at 931. In the present case, the youth of Joseph Elerding is an uncontested fact. The second point, in *Bernethy* the court decided that foreseeability was a question for the jury and not for the judge in summary judgment. Br. of Resp't at 20; *Bernethy*, 97 Wn.2d at 932-33. Defendant-Respondents seem to be arguing in their brief that they, as parents, should have less responsibility and liability than a gun shop owner would have for supplying an underage or incompetent person with a gun.

In another Washington case dealing with negligent entrustment the court found that a drinking establishment is only liable for a subsequent assault by a patron they overserved alcohol to if there is a showing of foreseeability. *Christen v. Lee*, 113 Wn.2d 479, 499-500, 780 P.2d 1307 (1989). Defendant-Respondents argue that the facts in this case are

different from the facts in *Christen.* The court found that the assault was not foreseeable; however, if the facts were changed to align more with this case's facts, it seems likely that had the drinking establishment furnished not only alcohol but the weapon as well (the knife) the subsequent criminal assault would have been foreseeable. That is more comparable to what Defendant-Respondents did, they supplied a dangerous weapon to someone that they knew or should have know, because of his youth or inexperience, was not competent to handle the weapon.

The trial court erred in granting summary judgment because there was a duty not to entrust dangerous instrumentality to a youth, that duty was breached, and the breach was the cause of Plaintiff-Appellants' injuries. Further, as pointed out by Defendant-Respondents, Washington case law has repeatedly found that it is the role of the jury to decide if the actions of the son are within the foreseeable range of danger.

IV. NEGLIGENT SUPERVISION

As pointed out above, negligent supervision in Washington does not require actual knowledge of a dangerous proclivity, only that the parents "should have known" of the dangers posed by their child. *Sun Mountain Prods., Inc. v. Pierre*, 84 Wn.App. 608, 615-16, 929 P.2d 494 (1997).

The restatement of Torts § 316 states that "a parent is liable for the torts of his or her child when the parent '(a) knows or has reason to know that he has the ability to control the child, and (b) knows or should know of the necessity and opportunity for exercising such control." *Sun Mountain Prods., Inc.* at 615.

In the present case, the parents had the ability to control the child's use of the gun and had an opportunity and necessity to exercise such control. The necessity to control was established by the dangerous proclivity or likelihood of any child to misuse a gun.

In our society there is widespread knowledge that any and all minors have a dangerous proclivity when it comes to guns. This knowledge is so widespread and recognized that, as stated earlier, most States and the Federal Government have passed laws limiting or prohibiting giving a minor a gun.

The Defendant-Respondents point to *Barrett v. Pacheco* as a controlling case in Washington negligent supervision cases. Br. of Resp't at 15; *Barrett v. Pacheco,* 62 Wn.App. 717, 815 P.2d 835 (1991). However, *Sun Mountain Production, Inc.* clarified the rule of law in Washington, stating that actual parental knowledge of a particular dangerous proclivity is not required. *Sun Mountain Prods., Inc.* at 608, 615-16.

The Defendant-Respondents spend a considerable amount of time in their brief pointing out the differences in facts between the cited cases and the current case. No two cases are ever the same. Despite these factual differences, the rules of law from the case can often apply across a wide range of factual situations.

While the facts in *Barrett* have some factual differences from the case at hand, one very important difference which strengthens Plaintiff-Appellants' case is that in *Barrett* the parents did not supply the instrument that was used in the assault. *Id.*, at 720-721. In *Barrett*, the son had stolen the gun used to shoot the police officer; he was not given the unsupervised control or use of a gun by his parents. *Id.* In the present case, the parents did supply the weapon that was used in the assault of the Plaintiff-Appellants.

Defendant-Respondents failed to supervise their minor son's use of the weapon. They allowed the gun to be stored in the bed of their son's truck, in an unsecure location where anyone could have access to it. The empty ammo box in the truck would indicate that, contrary to Defendant-Respondents' claims, they allowed their son to have the ammo and the gun together in the truck. The son had constant and unhindered control and use of the weapon.

The trial court erred in granting summary judgment because Defendant-Respondents not only supplied their minor son with a gun but negligently supervised the control and use of the gun. Further, the trial court did not find a lack of duty or lack of breach of that duty, but a lack of foreseeability. In Washington it is generally the role of the jury to decide if the actions of the son were within the foreseeable range of danger.

C. CONCLUSION

The Defendant-Respondents stated that "parents are not liable for the tortuous acts of their children unless the parents are themselves negligent." Br. of Resp't at 22. While they didn't cite any case law to back up this general statement, they seemed to miss the point: **the parents in this case were themselves negligent**. They were negligent in not supervising their son after giving him a dangerous weapon, they were negligent in entrusting a gun to a minor child, and they were negligent in respect to a reasonable standard of care and by breaching a duty created by State and Federal statutes. The end result of their negligence was the foreseeable misuse of the supplied weapon, and severe injury to Plaintiff-Appellants. These results were the exact type of results that almost every legislature in the U.S., the public at large, and the Defendant-Respondents

in this case anticipated, or should have anticipated, as the likely result of giving a minor the unsupervised use and control of a gun.

Summary judgment was not appropriate in this case. Appellants respectfully request that this Court reverse the trial court and remand this case for trial.

Dated this 30 day of December, 2010.

Respectfully submitted,

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