

FILED

OCT 29 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 292070

**In The Court Of Appeals
The State Of Washington
Division III**

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

Appellants/Plaintiffs,

v.

STEVEN C. ELERDING and LINDA J. ELERDING,

Respondents/Defendants.

BRIEF OF APPELLANTS

Brian J. Anderson WSBA# 39061
7103 W. Clearwater Ave., Suite D
Kennewick, WA 99336
509-734-1345

Ned Stratton WSBA #42299
324 W Kennewick Ave.
Kennewick, WA 99336

Attorneys for Appellants

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Ned Stratton WSBA #42299
324 W Kennewick Ave.
Kennewick, WA 99336

Attorneys for Appellants

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A. ASSIGNMENT OF ERROR

Assignment of Error

The trial court erred by entering an order granting Steven C. Elerding's and Linda J. Elerding's Motion for Summary Judgment.

Issues Pertaining to Assignment of Error

For summary judgment purposes, and viewing the facts in the light most favorable to Plaintiffs as the non-moving party:

a) Defendants had a duty that was created by statute and common law not to give a minor a weapon and to allow the minor the unsupervised use and control of the weapon;

b) Defendants breached that duty by allowing their minor son to have unsupervised use and control of a gun given to him by the Defendants;

c) Defendants knew or should have known that giving a minor dangerous instrumentality such as a gun would result in the injuries to Plaintiffs.

B. STATEMENT OF THE CASE

Defendants Steven C. Elerding and Linda J. Elerding are the parents of Joseph Elerding, who was a minor, and who resided with them at their family residence. CP 69. Defendants purchased and delivered to Joseph Elerding a shotgun, and allowed Joseph to keep the gun with him

at all times in his truck. CP 111. Giving a minor a gun and allowing him to keep it unsupervised is in violation of both Washington State and Federal Law and if prosecuted and convicted would amount to a felony. RCW 9.41.080, 18 U.S.C. §922(x)(1)(A).

On or about April 20, 2007, near the hour of midnight, Plaintiffs were at their home in Outlook, Yakima County, Washington when Defendants' son stopped his truck in Plaintiffs' driveway. CP 99-102. Defendants' son had attended a party and been drinking that night. CP 100. Without just cause, Defendants' son stepped out of his car, retrieved a shotgun from a locked location in the bed of his truck, and attacked Plaintiff Charles E. Schwartz with the shotgun, causing severe trauma to the head, neck, and upper body. *Id.* As a result of the attack, Plaintiff Charles E. Schwartz suffered severe pain, post traumatic stress disorder, depression, embarrassment, memory loss and other injuries. CP 69. Plaintiff Shanna Lee Schwartz was a witness to the attack. CP 102.

Defendants were aware that their son had been involved in underage drinking and that he had been disciplined at school for prior underage drinking. CP 114. Defendants were also aware of the inherent dangers of giving any minor the unsupervised use of a dangerous weapon such as a gun.

Procedural History

The injured parties filed a claim against Defendants based on three separate causes of action: negligent supervision of a child, negligent entrustment of a firearm, and general theories of negligence.

After written and oral arguments the trial court granted the Defendants' Motion for Summary Judgment based on a lack of foreseeability. The judge stated "I don't find that there are any facts or reasonable inferences from the facts to establish that what happened here was known or should have been known by the parents and that it was foreseeable that he was going to do this. No one addressed it. So I'm granting the motion." Verbatim Report of Proceedings, p.40, lines 12-17.

C. SUMMARY OF ARGUMENT

The judge erred in dismissing all three causes of action for lack of foreseeability. While all three claims were based on the negligence of the Defendants, each claim has separate requirements for establishing duty, breach, and actual and proximate cause.

The judge listed four requirements for all negligence claims: Duty, Breach, Proximate Cause, and Foreseeability. Verbatim Report of Proceedings, p.36-37. Although foreseeability is a part of the proximate cause analysis, and is sometimes recognized as part of the duty analysis, it

is not recognized on its own as one of the elements of negligence. See *Berglund v. Spokane County*, 4 Wn.2d 309, 321, 103 P.2d 355 (1940).

Each cause of action alleged has a separate analysis and elements for establishing duty, and thus the question of foreseeability of the risk of harm is different for each.

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).

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.

D. ARGUMENT

I. The defendants had a duty under the general theory of negligence to protect the Plaintiffs from the foreseeable consequences of Defendants' own actions.

Duty under the common law theory of negligence is to exercise reasonable care under the circumstances. One Washington case stated it this way, "every actor whose conduct involves an unreasonable risk of harm to another 'is under 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) (quoting Restatement (Second) of Torts § 321 (1965)). Another recent case stated "that a duty to guard against a third party's foreseeable criminal conduct exists where an actor's own affirmative act has created or exposed another to a recognizable high degree of risk of harm through such misconduct, which a reasonable person would have taken into account." *Parrilla v. King County*, 138 Wn. App. 427, ¶ 26, 157 P.3d 879 (2007).

The *Parrilla* court recognized that a general negligence claim and a claim of negligent entrustment are two separate claims and two separate sources of duty. *Id* at ¶ 11-12 and ¶ 31-32 (finding that a bus driver who left a bus running with questionable passengers inside had a duty to those injured when a passenger tried to drive the bus under the theory of general negligence but not under negligent entrustment).

A duty under a general theory of negligence can also be statutory. The court in *Mathis* stated that "[n]otwithstanding these [common law negligence] elements, a statute may impose a duty that is additional to, and different from, the duty to exercise ordinary care. A statute has this effect when it meets a four part test drawn from the Restatement (Second) of Torts: The statute's purposes, exclusively or in part, must be (1) to protect a class of persons that includes the person whose interest is invaded; (2) to protect the particular interest invaded; (3) to protect that interest against the kind of harm that resulted; and (4) to protect that interest against the particular hazard from which the harm resulted." *Mathis v. Ammons*, 84 Wn.App. 411, 416-19, 928 P.2d 431 (1996).

Here, Defendants had a duty not to give a minor the unsupervised use and control of a gun. This duty is both based on the "reasonable person" standard and on the federal and state statutes prohibiting giving a minor a gun. RCW 9.41.080, 18 U.S.C. §922(x)(1)(A). The Plaintiffs

were the exact type of innocent bystanders which the statute was meant to protect. However, the trial court did not seem to rule that the appellants themselves were unforeseeable plaintiffs but focused on the son's actions as unforeseeable.

The trial court ruled that the son's acts were not foreseeable by the defendants. In Washington it is not the unusualness of the act that resulted in injury to plaintiff that is the test of foreseeability, but whether the result of the act is within the ambit of the hazards covered by the duty imposed upon defendant. The Washington Supreme Court approved this theory in *McLeod v. Grant County School Dist.*, 42 Wn.2d 316, 255 P.2d 360 (1953), in which the court said: "Whether foreseeability is being considered from the standpoint of negligence or proximate cause, the pertinent inquiry is not whether the actual harm was of a particular kind which was expectable. Rather, the question is whether the actual harm fell within a general field of danger which should have been anticipated." *Id.* (Citing *Berglund v. Spokane County*, *supra*; Harper, Law of Torts, 14, § 7; Restatement (Second) of Torts, 1173, § 435).

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.

Summary judgment is almost never appropriate on the issue of proximate causation or foreseeability. The Washington Supreme Court has repeatedly held that the questions of causation and foreseeability are for the jury. 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 general rule in Washington holds that the determination of proximate cause is a matter of fact, inappropriate for summary judgment.

Here, the defendants owed the plaintiffs a duty. This duty was that of a reasonable person, and was further defined and imposed by multiple statutes. Additionally, a minor misusing a gun is so foreseeable that almost every State Legislature has foreseen it and has limited the right of a minor to possess a gun. The duty imposed by the statutes and by the reasonable person standard was to not give their minor son a gun. The question of foreseeability, as decided by the trial court was, did the actual harm fall within a general field of danger which should have been anticipated, and the Washington Supreme Court has stated that this particular question is a question for the jury.

II. The defendants had a duty under the theory of negligent entrustment not to supply dangerous instrumentality to a

minor and Plaintiffs were foreseeably endangered by such entrustment.

Defendants had a duty under Restatement (Second) of Torts § 390, RCW 9.41.080, 18 U.S.C. §922(x)(1)(A) and common law not to entrust a gun to someone under age eighteen.

Negligent entrustment is a "well-established" common law doctrine in Washington. *Christen v. Lee*, 113 Wn.2d 479, 499, 780 P.2d 1307 (1989). 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. 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). In this case, this Court should find that summary judgment was improper under the theory of negligent entrustment pursuant to Restatement (Second) of Torts § 308 and § 390.

Washington law has, as a public policy concern, imposed a general duty upon defendants: one should not furnish a dangerous instrumentality such as a gun to an incompetent due to age or lack of maturity. As such, Washington has adopted Restatement (Second) of Torts § 390 which states the following: "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 to liability for physical harm resulting to them." *Bernethy*, 97 Wn.2d at 933 (adopting § 390, emphasis added). Section 390 specifically requires the entrustor of chattel to consider the characteristics of the trustee, such as "youth, inexperience, or otherwise" in evaluating whether the latter might use the chattel in a manner that would pose "an unreasonable risk of physical harm to himself and others." See *Martin v. Schroeder*, 105 P.3d 577, 579 n.1 (Ariz. Ct. App. 2005).

The Restatement of Torts recognizes that a reasonable person "...should realize that the inexperience and maturity of young children may lead them to act innocently in a way which an adult would recognize as culpably careless, and that **older children are peculiarly prone to conduct which they themselves recognize as careless or even reckless.**" Restatement (Second) of Torts, § 290, comment k. 25 (Emphasis added.)

Case law, including Washington State cases, is definitive in imposing a duty on defendants involving negligent entrustment of a firearm to a person who later harms others. For example, in *Bernethy*, the Washington Supreme Court held that the trial court erred when it dismissed plaintiff's claims by granting summary judgment to a defendant

who furnished a firearm to an incompetent person who then shot and killed plaintiff's decedent. *Bernethy*, 97 Wn.2d at 284. In that case, a gun shop owner agreed to sell a drunk man a rifle he said was for his son. *Id.* at 282. The gun shop owner laid the gun and ammunition on the counter, the man took the gun and left the shop, and the man entered a nearby tavern where he shot his estranged wife, plaintiff's decedent. *Id.* The court reasoned that the evidence, viewed in the light most favorable to the plaintiff, indicated that the defendant placed a gun and ammunition in the hands of an intoxicated person. *Id.* at 284.

Similarly, in this case, the evidence indicates that the defendants placed a gun in the hands of a "youth" who by law and by common sense does not have the experience or competence and thus poses a risk to himself and others. Again, Defendants had a duty not to entrust a gun to a minor, and the results of giving a minor a gun are foreseeable and known (or should be known) by everyone. The plaintiffs' injuries were the foreseeable result of entrusting a gun, unsupervised, to a minor.

III. The defendants had a duty under the theory of negligent supervision to exercise reasonable care and control over their minor son and Plaintiffs were foreseeably endangered by the lack of supervision.

When considering duty and foreseeability under the theory of negligent supervision the courts have required that a minor child have a dangerous proclivity. *Sun Mountain Prods., Inc. v. Pierre*, 84 Wash.App. 608, 615-16, 929 P.2d 494 (1997). There is no requirement that the parents have actual knowledge of such a proclivity, but "objective knowledge" or that the "parents should have known" of the proclivity. *Id.* at last paragraph.

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 mentioned above, most States and the Federal Government have passed laws limiting or prohibiting giving a minor a gun. For examples see: 430 Ill. Comp. Stat. 65/4(c); California Civil Code § 1714.3; Connecticut General Statutes § 52-571f; Idaho Code Ann. §§ 18-3302E, 18-3302F; Or. Rev. Stat. § 166.25; Utah Code Ann. § 76-10-509; RCW § 9.41.040(2)(a)(iii).

IV. Contrary to the trial court's ruling a minor misusing a gun is foreseeable by almost everyone.

The majority of states in the Union and the U.S. Congress have passed laws prohibiting or limiting the right of adults to supply minors with guns. They have passed these laws because of the dangers to self and others that are apparent when letting a minor have the unrestricted use and

control of a gun. Many states go so far as to mandate parental civil liability where the child was entrusted with or allowed access to a gun. For example, in Illinois when a minor under the age of 21 legally acquires a gun by obtaining the permission of a parent or guardian, that parent or guardian becomes liable for civil claims for damages resulting from the minor's use of the firearm or ammunition. 430 Ill. Comp. Stat. 65/4(c); see also California Civil Code § 1714.3; Connecticut General Statutes § 52-571f.

While the Washington statute does not impose strict liability, our State statute and many other State statutes across the nation show the strong local and national policy of holding parents liable for allowing their minor children unsupervised access to guns. Examples from surrounding States: California Civil Code section 1714.3; Idaho Code Ann. §§ 18-3302E, 18-3302F; Or. Rev. Stat. § 166.25; Utah Code Ann. § 76-10-509; RCW § 9.41.040(2)(a)(iii). With so many legislatures foreseeing the problem, the strong media publicity, the clear public stance on the issue, and the felony laws in place in Washington it is hard to understand how the trial court found that a minor misusing a gun given to him by his parents was not foreseeable. The court's statement in *Rikstad* applies equally to the present case:

It is the misuse of foreseeability – that is, discussion of the improbable nature of the accident in relation to proximate cause – that led the trial judge, in the instant case, to conclude that the challenge should be sustained.

It is not, however, the unusualness of the act that resulted in injury to plaintiff that is the test of foreseeability, but whether the result of the act is within the ambit of the hazards covered by the duty imposed upon defendant.

Rikstad, 76 Wn.2d at 269.

The trial court erred in deciding that the actions of the Defendants' son were unforeseeable. 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*, 42 Wn.2d at 323. 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*, 4 Wn.2d 309; Harper, Law of Torts sec. 7, at 14; 2 Restatement (Second) of Torts § 435, at 1173).

Using a gun as a weapon other than for shooting is very common now and throughout history. One only need do a search for the term "pistol whipping" to see that there are hundreds of recent cases involving using a gun as this type of weapon. This use is not "so highly extraordinary or improbable as to be wholly beyond the range of expectability". In this case it is telling that when the minor was confronted with an incident where he wanted a weapon he took steps to retrieve the gun from the tool box in the bed of his truck. He wanted a

weapon, he was looking for a weapon that his parents, against the laws and common sense and mores of society, had given him and he used it as a weapon. Considering this matter in a light most favorable to the plaintiffs, the minor's use of his gun as a weapon to cause serious injury to another, was or should have been foreseeable by the defendants.

E. CONCLUSION

In this case the minor wanted a weapon, given to him by Defendants, so he took extra steps to retrieve his gun which was kept in the tool box of his truck bed, and he used his gun as a weapon. The end results were the exact type of results that almost every legislature in the U.S., the public at large, and the defendants in this case should have anticipated as the likely, or at least foreseeable, results of giving a minor the unsupervised use and control of a gun.

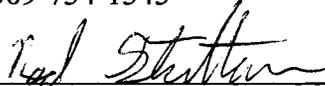
Summary judgment was not appropriate in this case. Appellants respectfully request that this Court reverse the trial court and remand this case for trial.

Dated this 28 day of October, 2010.

Respectfully submitted,



Brian J. Anderson WSBA# 39061
7103 W. Clearwater Ave., Suite D
Kennewick, WA 99336
509-734-1345



Ned Stratton WSBA #42299
324 W Kennewick Ave.
Kennewick, WA 99336

Attorneys for Appellants