

FILED

NOV 30 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By *[Signature]*

NO. 292070

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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

Appellants (Plaintiffs), -

v.

STEVEN C. ELERDING
and LINDA J. ELERDING,
and marital property thereof, if any,

Respondents (Defendants).

BRIEF OF RESPONDENTS

David A. Thorner WSBA 4783
Megan K. Murphy WSBA 31680
Thorner, Kenney & Gano P.S.
Attorneys for Respondents
101 S. 12th Ave.
Yakima, WA 98902
509-575-1400
Fax: 509-453-6874

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I. INTRODUCTION

Ruling from the bench on June 8, 2010, the Honorable F. James Gavin granted the Defendants' Motion to Dismiss all claims of negligence with prejudice. CP 142-143.

In their Complaint for Injuries and Damages, Plaintiffs made four claims against Steven and Linda Elerding, the parents of Joseph "Joey" Elerding:

- 1) statutory liability under RCW 4.24.190,
- 2) negligent supervision of a child,
- 3) negligent furnishing of a firearm, and
- 4) general negligence.

These four claims against Steven and Linda Elerding were based on an incident that occurred on April 20, 2007, involving Joseph Elerding, who was seventeen years old at the time, and Charles Schwartz. The incident involved a fight between Joseph Elerding and Charles Schwartz. *See*, CP 95 – 105 (police reports). The basis for why the fight occurred is factually disputed, but during the fight, Joseph Elerding did get an unloaded shotgun (there was no ammunition in the vehicle for the firearm) from the truck bed and after grabbing the shotgun by the barrel, hit

Charles Schwartz. *See*, CP 95 – 105. The firearm was not used as a firearm; it was used as a stick. *See*, CP 95 – 105.

As a result of this incident, Joseph Elerding was prosecuted through the criminal justice system. On June 30, 2008, a sentencing hearing was held under Yakima County Superior Court Cause Number 07-1-00955-3, at which time Joseph Elerding was found guilty, through a plea of guilty, to Second Degree Assault. *See*, CP 6 – 15 (Felony Judgment and Sentence with restitution ordered).

Prior to the entry of the above-referenced Felony Judgment and Sentence, Joseph Elerding had one prior contact with law enforcement for a traffic infraction, but he had no other prior contacts and no criminal history. CP 18 and 6.

Similarly, the discipline records from Sunnyside Christian Schools for Joseph Elerding, prior to the subject incident, include only the following as instances of discipline utilized against Joey:

- 10/1/2004: “Ms. Hedstrom gave Joey a detention for misbehavior in English 9; Joey threw paper wads. Detention One.”
- 5/4/2006: “Joey admitted to drinking at a party. Joey will serve his athletic code violation during the the [sic] ’06-’07 swimming season, if he swims. A second violation will result in a loss of all

athletics for a calendar year and no class trips, including Close-up.”

- 9/28/2006: “Joey squealed tires when leaving the parking lot after school-warning, next time will lose at least 2 weeks of off-campus privileges.”

CP 131 – 136. The school records from Sunnyside Christian Schools for Joseph Elerding showed that this was essentially a straight “A” student who attained high scores on achievement test. CP 26 – 33. Joseph Elerding’s only absences prior to April 20, 2007, were related to his participation in the USA Swimming Junior National Championship. CP 26 – 33.

The first claim made against Steven and Linda Elerding involved RCW 4.24.190, which states that:

The parent or parents of any minor child under the age of eighteen years who is living with the parent or parents and who shall willfully or maliciously destroy or deface property, real or personal or mixed, or who shall willfully and maliciously inflict personal injury on another person, shall be liable to the owner of such property or to the person injured in a civil action at law for damages in an amount not to exceed five thousand dollars.

Thus, RCW 4.24.190 provides statutory authority for a maximum award of damages of five thousand dollars (\$5,000) as a means through which an injured party can recover damages against the parents of a minor child

who has committed a tortious act. This statute does not create a new cause of action for parental responsibility. Rather, no negligence on behalf of the parents is needed for there to be liability under RCW 4.24.190 as long as the minor child's conduct was within the scope of the statutory language.

Prior to this lawsuit being filed in Yakima County Superior Court, the sum of \$5,000 was offered to the Plaintiffs in light of RCW 4.24.190. CP 37 – 40 (Letter of David Thorner to Brian Anderson dated October 19, 2009 extending the offer of the \$5,000). That offer was not accepted at that time. However, subsequent to the Court's Order Granting Defendants' Motion for Dismissal as to all claims of negligence, the Plaintiffs did accept the \$5,000 for the statutory claim made under RCW 4.24.190. A Stipulation and Order of Dismissal (Statutory Liability) and a Satisfaction of Judgment (Statutory Claim) were filed with the Court on July 9, 2010 and July 15, 2010, respectively. CP 144 – 145 and 146.

In any cause of action for negligence, the plaintiff must show that the defendant owed a duty of reasonable care to the plaintiff and that the defendant failed to exercise such care. In instances in which there is a claim of negligence against a parent or parents for the actions of a child, case law states that there must be a showing of foreseeability before liability under a negligence theory will be viable. *See, Barrett v. Pacheco,*

62, Wn.App. 717, 722, 815 P.2d 834 (1991). Foreseeability can be established by showing that the child had a dangerous proclivity that was known to the parents and that the dangerous proclivity was within the zone of behavior involved in the action that gave rise to the lawsuit.

In this case, there was no evidence presented that Joseph Elerding had a prior dangerous proclivities. Similarly, there was no evidence presented that Joseph Elerding had any violent proclivities, or that there was any knowledge on behalf of Steven or Linda Elerding of any violent proclivities of Joseph Elerding. In fact, the opposite is true in that Joey had never previously been in trouble with law enforcement, his school, or with his parents as to any dangerous or violent proclivities. Thus, no evidence was presented that Steven and Linda Elerding had any ability to foresee that harm could come to a third party based on parental knowledge from Joseph Elerding's previous activities. As a result, there was no showing by Plaintiffs-Appellants that the Defendants-Respondents owed a duty to Plaintiffs-Appellants because there was no previous conduct by Joseph Elerding that would have made his actions on April 20, 2007 foreseeable.

The actions of Joseph Elerding on April 20, 2007 involved extreme behavior that was very much out of character for Joey. The Defendants-Respondents are not endorsing the behavior that occurred, but simply

because the incident happened that alone does not make Steven and Linda Elerding, the mother and father of Joseph Elerding, liable to Plaintiffs-Appellants in an action claiming negligence.

On June 8, 2010, Judge F. James Gavin heard the Defendants' Motion for Judgment on the Pleadings and Alternatively Summary Judgment of Dismissal. The result was that Judge Gavin dismissed all claims of negligence with prejudice. CP 142-143. The Court agreed that in all actions for negligence, to find a party responsible, there must be a showing that there was a duty, that the duty was breached, that the breach was the proximate cause of injury, and that the incident was within the scope of foreseeability. For parents to be held liable for the actions of their child through a theory of negligence, it must be shown that the child had a dangerous proclivity of which the parents had knowledge such that the entrustment of the child with an instrument could be negligent. The Court agreed that there were no facts established in this case that gave notice to Steven and Linda Elerding, the parents of Joseph Elerding, that their son would use a firearm in the manner that it was used on April 20, 2007. Thus, there was no reasonable notice to Steven and Linda Elderding that Joseph Elerding would use the firearm to hit someone in the face and Joseph Elerding's actions were absolutely not foreseeable and Steven and

Linda Elerding did not owe a duty to Plaintiffs-Appellants in any claim of negligence.

II. COUNTER STATEMENT OF FACTS

Plaintiffs-Appellants Statement of the Case is rife with inaccuracies and conclusory statements that are not supported by the record or in fact.

With regard to the firearm, prior to the lawsuit being filed, Plaintiffs-Appellants were provided information that Joseph Elerding took and passed a firearm safety course and that he had his parents' permission to keep firearms in his truck for hunting purposes. CP 17 – 18 (Letter of David Thorner to Brian Anderson dated August 7, 2009), and 35 (Certificates and Hunting Permits). In addition, Plaintiffs-Appellants were provided with information that there were no previous incidents involving Joseph Elerding in which a firearm was improperly used in any manner. CP 17 – 18. Joseph Elerding was restricted by his parents to not having firearms and ammunition kept in the same location. CP 26 – 27.

With regard to the incident that occurred on April 20, 2007 between Joseph Elerding and Charles Schwartz, law enforcement officers documented that upon their arrival, it was apparent that the Toyota truck that had been driven by Joseph Elerding was stuck in the soft dirt of the

driveway of the Schwartz residence and that a full-sized Dodge pickup owned by Charles Schwartz was parked near the Toyota, facing the Toyota. CP 99 – 100. The Plaintiffs-Appellants misstate the facts in that Joseph Elerding had not been to a party. Brief of Appellants at page 2. Rather, Joseph Elerding was in the area looking for a friend's house, but became lost and his truck ended up stuck in the driveway of the Schwartz residence. CP 100. Similarly, the Brief of Appellants is not correct when it is stated that “[w]ithout 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.” Brief of Appellants at page 2. The law enforcement investigation showed that when Joseph Elerding’s truck became stuck in the soft dirt of the driveway, Charles Schwartz drove over and blocked Joseph Elerding’s vehicle. CP 97. Charles Schwartz then initiated contact with Joey, took Joey’s keys, and then punched Joey in the face and choked Joey by the neck. CP 97. Joey’s injuries were documented by law enforcement. CP 98. Fighting back, Joey was able to break the grasp of Charles Schwartz from his throat and got his shotgun from the truck bed tool box. CP 97. Holding the firearm by the barrel, Joey used it like a stick and hit Charles Schwartz. CP 97.

The facts of the incident between Joseph Elerding and Charles Schwartz on April 20, 2007 are important. However, these facts do not necessarily bear upon the question of whether or not parental liability under a theory of negligence exists against Steven and Linda Elerding. In that regard, the pertinent facts involve whether or not Steven and Linda Elerding had knowledge of a dangerous proclivity possessed by their son Joey such that they had a duty to protect third parties from that known dangerous proclivity. In this regard, there are no facts in the record to support any dangerous proclivity exhibited by Joseph Elerding. Similarly, there are not facts or evidence that Steven and Linda Elerding had any knowledge of any dangerous proclivity possessed by their son. In fact, the opposite is true. During police investigation, Linda Elerding was contacted by a law enforcement officer after Joey was arrested. CP 102. Linda Elerding stated to the law enforcement officer that her son Joey, “had never been in trouble before and has never missed his 2345 hrs curfew before.” CP 102. This statement was not factually disputed.

The Plaintiffs-Appellants failed to present the necessary evidence or factual proof to proceed forward with a *prima facie* case of negligence against Steven and Linda Elerding. Thus, the Trial Court properly dismissed all claims of negligence asserted against Steven and Linda Elerding.

III. ISSUES PRESENTED FOR REVIEW

1. Did the Trial Court properly dismiss all claims of negligence asserted against Steven and Linda Elerding as a result of the Plaintiffs-Appellants failure to present evidence that the actions of Joseph Elerding were foreseeable? To show foreseeability, Plaintiffs-Appellants would have needed to present evidence that Joseph Elerding had a dangerous proclivity that was known to Steven and Linda Elerding, that required Steven and Linda Elerding to exercise reasonable care in controlling that proclivity.

Defendants-Respondents argue that the Trial Court was correct in dismissing all claims of negligence asserted against Steven and Linda Elerding.

IV. ARGUMENT

1. Negligent Supervision

Parents are not civilly liable, as a general rule, for torts committed by their minor children. In this case, Plaintiffs-Appellants failed to establish that Steven and Linda Elerding owed a duty under a negligence theory to Plaintiffs-Appellants. Plaintiffs-Appellants did not set forth any fact or facts that would suggest Joseph Elerding, the minor son of Steven and Linda Elerding, had a prior dangerous proclivity of which Steven and

Linda Elerding had knowledge. Without any evidence of foreseeability of a potential harm, no duty was created such that Steven and Linda Elerding had to take reasonable steps to protect third parties from potential acts that may be committed by Joseph Elerding. Without the establishment of a duty owed, there is no establishment of liability based on a theory of negligence. Whether or not a duty exists is a matter of law.

The law with regard to a claim of negligence supervision is specifically described in *Barrett v. Pacheco*, 62 Wash.App. 717, 722, 815 P.2d 834 (1991). The *Barrett* Court held that the elements a plaintiff must show to make a *prime facie* case of parental negligence include:

- (1) that the child has a dangerous proclivity;
- (2) that the parents know of the child's dangerous proclivity; and
- (3) that the parents failed to exercise reasonable care in controlling that proclivity.

Id., at 722. Moreover, the *Barrett* Court held that with regard to the dangerous proclivity, the plaintiff must show that the dangerous proclivity known to the parents was also within the same zone of behavior that was involved in the action that gave rise to the lawsuit. *Id.*, at 727.

The *Barrett* opinion cited and discussed *Norton v. Payne*, 154 Wash. 241, 244-45, 281 P. 991 (1929) and *Eldredge v. Kamp Kachess Youth Services, Inc.*, 90 Wash.2d 402, 408, 583 P.2d 636 (1978) in

reaching its holding as to the necessary elements in a parental liability case through a theory of negligence. The facts in *Barrett*, involved a claim by Plaintiffs-Barrett that Defendants-Pachecos, who were the parents of 14-year-old Arthur Pacheco, knew or should have known about their son's "dangerous proclivity" and despite this knowledge, Defendants-Pachecos negligently supervised their son. *Id.*, at 719. The events of the lawsuit involved Arthur Pacheco shooting and injuring Robert Barrett, a police officer, while committing a burglary. *Id.* Through a separate criminal proceeding, Arthur Pacheco pled guilty to First Degree Assault and Second Degree Burglary. *Id.* A police search of Arthur Pacheco's room revealed a pipe bomb and other incendiary devices, ammunition and shotgun shells, as well as substances that could create explosives, along with Ninja weapons, and literature on how to make bombs and explosives, and literature on Ninjas and weaponry. *Id.*

Arthur Pacheco's parents both worked graveyard shifts. *Id.* On the night of the shooting, Arthur said goodnight to his father at approximately 10:00 p.m. and went to his bedroom. *Id.* Before leaving for work at 12:30 a.m., Arthur's father knocked on Arthur's door, but there was no answer. *Id.* Mr. Pacheco left for work. *Id.*

The police investigation revealed that in years prior to the shooting, when Arthur showed an interest in firearms, Mr. Pacheco

enrolled Arthur in a shooter's safety course. *Id.*, at 720. In addition, Arthur previously owned two .22 caliber rifles, a pellet gun, and BB rifles provided to him by his parents, but Arthur was only allowed to shoot firearms in his presence of his father while out in the country. *Id.*

In the six months preceding the shooting, Arthur had committed three burglaries and was convicted of attempted theft. *Id.* Arthur had also put a flammable substance down the household chimney causing a fire and explosion. *Id.* As a result of this behavior, the Pachecos imposed severe restrictions on Arthur including seeking psychological counseling. *Id.*, at 720 – 721. Of importance to the *Barrett* Court, the police investigations showed that neither of Arthur's parents had ever seen Arthur be violent towards another person. *Id.*, at 721.

The law as cited and analyzed in *Barrett* was the following:

Under the doctrine of negligent supervision, parents are liable for the intentional torts of their minor children when: (1) the child has a dangerous proclivity; (2) the parents know of the child's dangerous proclivity; and (3) they fail to exercise reasonable care in controlling that proclivity. *Norton v. Payne*, 154 Wash. 241, 244-45, 281 P. 991 (1929); *Eldredge v. Kamp Kachess Youth Servs., Inc.*, 90 Wash.2d 402, 408, 583 P.2d 636 (1978); *Carey v. Reeve*, 56 Wash.App. 18, 22, 781 P.2d 904 (1989). (Footnote 5: The Restatement of Torts (Second) § 316 (1965), provides 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 his child, and (b) knows or should know of the necessity and opportunity for exercising such control." In the two Washington

cases addressing the issue of parental knowledge, the court found that the parents had actual knowledge of the necessity to control their child. *See Norton*, 154 Wash. At 241, 281 P. 991; *Eldredge*, 90 Wash.2d at 402, 583 P.2d 626. *Norton* and *Eldredge* therefore did not reach the issue of whether parents could be held liable based on their constructive knowledge of their child's dangerous proclivity. As we indicate, *infra*, even if the parents here had known about their son's apparent obsession with the Ninja cult and what he kept in his room, that knowledge would not have been enough to put them on notice that he would shoot or otherwise assault someone. Therefore, while we do not foreclose adoption of the Restatement formulation in another case, we find it unnecessary to address on these facts Barrett's argument that, in the event the parents were unaware of their son's behavior, they should have known about it.)

Id., at 722.

The *Barrett* Court further discussed the quality of knowledge that had to be possessed by the parents regarding the minor child who committed a tortious act for parental liability to exist. In that regard, the *Barrett* Court held that the dangerous proclivity of the child had to be within the "same zone of behavior that would put a reasonable parent on notice that his or her child might commit the tort or crime that injured the victim." *Id.*, at 726. The *Barrett* Court reasoned that "although Arthur had committed prior delinquent acts, none of them was of the same or similar nature as the shooting of Barrett." *Id.* Thus,

[N]one of Arthur's prior criminal acts or delinquent behavior demonstrate a "dangerous proclivity" that is within the same zone of behavior as the shooting of

Barrett. We therefore hold that plaintiffs failed to establish the parental knowledge element of their negligent supervision claim.

Id., at 727.

In the Brief of Appellants, Plaintiffs-Appellant did not cite or even mention the *Barrett v. Pacheco* case although this is the case that sets forth the legal standard in the State of Washington for parental liability for the tortious acts of a minor child. The *Barrett* case is on point with the facts of this case. The facts in *Barrett* present an argument for parental liability under a negligence theory, and yet the *Barrett* Court found that there was no liability through a claim of negligence. There are no fact in the case presently before the Court that parental liability under a theory of negligence should attach to Steven and Linda Elerding.

In the present case, no facts or evidence has been presented that that supports Plaintiffs-Appellants contention that Joseph Elerding had a dangerous proclivity. In 2004, Joseph Elerding was given detention for throwing spit wads. CP 131-132. In 2006, Joseph Elerding self admitted to his school Principal that he drank alcohol at a party, which violated his athletic code. CP 133-134. Also in 2006, Joseph Elerding was warned not to squeal his tires when leaving the parking lot. CP 135-136. None of these actions show a dangerous proclivity similar to the zone of behavior involved in the actions that gave rise to the Plaintiffs-Appellants lawsuit in

this case. There are no other events presented with regard to potential behavior exhibited by Joseph Elerding that was improper. Thus, the negligent supervision cause of action asserted by Plaintiffs-Appellants fails as a matter of law.

With regard to their negligent supervision claim, Plaintiffs-Appellants rely exclusively on *Sun Mountain Productions, Inc. v. Pierre*, 84 Wash.App. 608, 929 P.2d 494 (1997). In *Sun Mountain*, an action was brought against the parents of a minor child for negligent supervision in a case involving a minor who was one of three individuals who committed a burglary of the plaintiff's business. *Id.*, at 610. The *Sun Mountain* Court adopted the objective standard for parental knowledge of a child's dangerous proclivities as defined in the Restatement of Torts. *Id.*, at 615. Thus,

a parent is liable for the torts of his or her child when the parent "(a) knows or has reason to know that he [or she] has the ability to control [the] child, and (b) knows or should know of the necessity and opportunity for exercising such control." Restatement of Torts (Second) § 316 (1965).

Id., at 615.

The plaintiff in *Sun Mountain* supplied the trial court with several declarations to factually support their claim of parental knowledge of the minor child's dangerous proclivities that were within the zone of behavior

involved in the case that gave rise to the lawsuit. *Id.*, at 616. The trial court in *Sun Mountain* struck many of the paragraphs from these declarations and then granted a dismissal of the action. *Id.* On appeal, the *Sun Mountain* Court held that disputed portions of the declarations should not have been stricken. *Id.*, at 617. Thereafter, in reviewing the declarations without the stricken paragraphs, the *Sun Mountain* Court held that there was sufficient information in the declarations to support “the inference that the Pierres [parents] knew or should have known of Shane’s [minor child’s] proclivity to steal.” *Id.* Thus, in looking at all of the admissible portions of the declarations, the *Sun Mountain* Court held that the plaintiff had “raised an inference that the Pierres should have known of Shane’s proclivity and that they failed to exercise reasonable care in controlling it.” *Id.*, at 620.

Based on the holdings in both *Barrett v. Pacheco* and *Sun Mountain*, a plaintiff must produce evidence that shows that the parents of a minor child knew or should have known of the child’s specific dangerous proclivity before there is any parental liability under a theory of negligence for acts committed by the child. No such evidence was presented or exists in this case.

For Steven and Linda Elerding to be liable for the actions of Joseph Elerding, Plaintiffs-Appellants must show that Steven and Linda

Elerding knew that Joseph Elerding had previously engaged in particular acts that would have given them knowledge of dangerous proclivities that Joey possessed that were within the same zone of the acts that led to the Plaintiffs-Appellants' claimed injuries. Again, such evidence was not presented. Thus, Plaintiffs-Appellants failed to present a *prima facie* case of negligence against Steven and Linda Elerding. There was no foreseeability of a risk of harm such that a duty under a theory of negligence was created. The Trial Court properly granted dismissal of all claims of negligence asserted against Steven and Linda Elerding in this matter.

2. Negligent Entrustment

The parent-child relationship alone does not create a duty owed by Steven and Linda Elerding to third parties such that they would be liable for the torts committed by their son, Joseph Elerding under a negligence theory. To prevail on a negligent entrustment claim, Plaintiffs-Appellants must show that a duty existed. In this case, there is no evidence that supports Plaintiffs-Appellants' assertion that Steven and Linda Elerding knew of a specific dangerous proclivity of Joseph Elerding, or that there was a foreseeable risk of harm such that Steven and Linda Elerding owed a duty to others to protect them from their child.

In the Brief of Appellants, Plaintiffs-Appellants cite *Christen v. Lee*, 113 Wash.2d 479, 780 P.2d 1307 (1989). The *Christen* holding is supportive of the Defendants-Respondents position that the Trial Court properly granted a dismissal of all claims of negligence in this case.

In *Christen*, the Washington Supreme Court held that the defendant-drinking establishment was not liable to the plaintiff for a stabbing that occurred. *Id.*, at 500. As explained in *Christen*,

The concept of foreseeability limits the scope of the duty owed. We have held that in order to establish foreseeability “the harm sustained must be reasonably perceived as being within the general field of danger covered by the specific duty owed by the defendant.” *Maltman v. Sauer*, 84 Wash.2d 975, 981, 530 P.2d 254 (1975). The limitation imposed thereby is important because, as this court has previously observed, “a negligent act should have some end to its legal consequences.” *Hunsley v. Giard*, 87 Wash.2d 424, 435, 553 P.2d 1096 (1976).

Id., at 492, citations omitted (emphasis added). Specifically, the *Christen* Court held

Accordingly, we hold that a criminal assault is not a foreseeable result of furnishing intoxicating liquor to an obviously intoxicated person, unless the drinking establishment which furnished the intoxicating liquor had some notice of the possibility of harm from prior actions of the person causing the injury, either on the occasion of the injury, or on previous occasions.

Id., at 498 (emphasis added). The *Christen* case dealt with a drinking establishment’s duty to third parties when serving alcohol to patrons. This

case arguably has nothing to do with allegation of parental liability for negligence, however, *Christen* does hold that a theory of negligence requires a showing of foreseeability on behalf of the defendant and that the defendant had to have notice of the possibility of harm from prior actions of the person who caused injury to a third person. *Id.*

Plaintiffs-Appellants next cite *Bernethy v. Walt Failor's, Inc.*, 97 Wash.2d 926, 653 P.2d 280 (1982). Again, the holding in *Bernethy* supports the Defendants-Respondents position that there was no duty owed by Steven and Linda Elerding to Plaintiffs-Appellants. In *Bernethy*, an individual named Robert Fleming was allegedly intoxicated and went into a gun shop and agreed to the purchase a firearm, but left without paying for the gun. *Id.*, at 931. Robert Fleming then used the gun to shoot and kill his wife. *Id.* A lawsuit was instituted against the gun shop for agreeing to sell the gun to an intoxicated person, although Robert Fleming's intoxication was a disputed fact. *Id.* The *Bernethy* Court reasoned that the state statute that made it illegal to deliver a pistol to an incompetent person could create a duty upon the gun shop and that it was the role of the jury to decide if the behavior was within the foreseeable range of danger, which would thus limit the scope of that duty. *Id.*, at 932-33. In this regard, the *Bernethy* Court held that:

In weighing the policy considerations, we hold that the duty owed by respondent is best summarized by Restatement (Second) of Torts § 390 (1965), which we now adopt:

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.

Id., at 933.

Unlike the facts presented in *Bernethy*, in this case there were no reasons for Steven and Linda Elerding to think that there would be an unreasonable risk of physical harm in allowing their son to possess a firearm for hunting purposes or that there would be any physical harm to other persons as a result of their child's actions. The use of the firearm by Joseph Elerding in this case was the equivalent to that of the use of a stick. There was no discharge or firing of the firearm. There is no evidence that Joseph Elerding had previously misused a firearm or that he had misused a stick. In its ruling, the Trial Court referenced that parental liability would not attach if a child was given a tennis racket that was later used as a stick. RP.

The establishment of a duty owed by Steven and Linda Elerding through a theory of negligent entrustment was never made by Plaintiffs-

Appellants. Thus, the Trial Court properly granted dismissal of all claims of negligence in this case as a matter of law.

3. General Negligence

Parents are not liable for the tortious acts of their children unless the parents are themselves independently negligent. No general duty to protect third parties from the independent criminal acts of a child exists unless the criminal conduct of the child was the foreseeable result of the parents' negligence. Steven and Linda Elerding can only be liable under a theory of negligence if they knew that their son had a dangerous proclivity that was within the same zone of behavior that led to the Plaintiffs-Appellants' claimed injuries. No such evidence exists.

Plaintiffs-Appellants cited *Minahan v. Western Washington Fair Association*, 117 Wn.App. 881, 73 P.3d 1019 (2003), for the following statement of law:

Minahan's claim correctly implies that 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." RESTATEMENT (SECOND) OF TORTS § 321 (1965).

Id., at 897. However, again, as with other cases cited by the Plaintiffs-Appellants in their Brief of Appellants, the *Minahan* case supports the arguments made by the Defendants-Respondents that the Trial Court

properly granted dismissal of all negligence claims asserted against Steven and Linda Elerding.

In *Minahan*, the plaintiff was severely injured when a car driven by an intoxicated driver struck the plaintiff multiple times. *Id.*, at 885. The plaintiff in *Minahan* worked at a high school dance and thereafter started to load equipment into her employer's car. *Id.* The employer's car was parked at a location as directed by an employee of the Western Washington Fair Association. *Id.* The plaintiff sued her employer and the Western Washington Fair Association after an intoxicated third party driver struck her multiple times. *Id.*

The *Minahan* Court held that summary judgment of dismissal should have been entered by the trial court because there was no duty under premises, lessor, or employer liability, and the claim alleging an unreasonably dangerous activity should have also been dismissed because the claimed dangerous activity was too remote and insubstantial to support a legal cause of action. *Id.* The *Minahan* Court held that

Where there is no evidence that the defendant knew of the dangerous propensities of the individual responsible for the crime and there is no history of such crimes on the premises, the criminal conduct is unforeseeable as a matter of law.

Id., at 895, citing, *Raider v. Greyhound Lines, Inc.*, 94 Wash.App. 816, 819, 975 P.2d 518, review denied, 138 Wash.2d 1011, 989 P.2d 1138

(1999) (emphasis added). Thus, the *Minahan* Court made the legal conclusion that the actions of the defendant upon which plaintiff-Minahan based her claim of negligence did not create a foreseeable risk of any danger. *Id.*, at 897. There was no duty owed to plaintiff-Minahan by the defendants because there was no evidence that the defendants knew of any dangerous proclivities of the individual responsible for the criminal conduct. *Id.* The crime committed was not foreseeable. *Id.*

Similarly, no duty on behalf of Steven and Linda Elerding exists as to Plaintiffs-Appellants in this case. There must be knowledge on the part of the defendant with regard to foreseeable actions of another before liability will be created. Because there are no facts that support a claim of negligence on behalf of Steven and Linda Elerding, Defendants-Respondents were entitled to a dismissal of all claims of negligence.

Plaintiffs-Appellants also cited *Parrilla v. King County*, 138 Wash.App. 427, 157 P.3d 879 (2007) in the Brief of Appellants. In *Parrilla*, a King County bus driver parked a bus, and then exited the bus with the engine still running even though there was a visibly erratic passenger left on board, alone. *Id.*, at 430. The erratic passenger drove the bus down the road and collided with several vehicles, including the vehicle of the plaintiff. *Id.* The *Parrilla* Court held that King County owed a duty to the plaintiff to guard against the criminal activity of the

erratic passenger because the bus driver took affirmative action by leaving the bus with the engine running with a visibly erratic passenger on board. *Id.*, at 433.

The *Parrilla* Court held that there was “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.” *Id.*, at 439 (emphasis added). In making this holding, the *Parrilla* Court stated that

It is true that an actor ordinarily owes no duty to protect an injured party from harm caused by the criminal acts of third parties. See, e.g., *Morehouse v. Goodnight Bros. Constr.*, 77 Wash.App. 568, 571, 892 P.2d 1112 (1995); *Kim [v. Budget Rent A Car Sys., Inc.]*, 143 Wash.2d [190,] at 194-95, 15 P.3d 1283 [(2001)]. See also *Tortes v. King County*, 119 Wash.App. 1, 7, 84 P.3d 252 (2003) (“[A] person is normally allowed to proceed on the basis that others will obey the law.”). The rationale for this rule is that criminal conduct is usually not reasonably foreseeable. *Bernethy [v. Walt Failor’s, Inc.]*, 97 Wash.2d [929,] at 934, 653 P.2d 280 [(1982)]; section 302 B cmt. D.

Id., at 436 (emphasis added). Again, the holding in *Parrilla* supports the arguments of the Defendants-Respondents. The *Parrilla* Court held that a duty is created if there is foreseeable criminal conduct and the person to whom the duty would be attributed, through his or her own affirmative action, created a recognizable high degree of risk of harm to a third party.

None of these facts exist in the instant case. Thus, the Plaintiffs-Appellants did not demonstrate a duty owed by Steven and Linda Elerding to the Plaintiffs-Appellants and the claims of negligence were properly dismissed by the Trial Court as a matter of law.

Plaintiffs-Appellants also cited *Mathis v. Ammons*, 84 Wash.App. 411, 928 431 (1997). In *Mathis*, the defendant was towing a hay rake on a roadway within his lane of travel. *Id.*, at 413. The defendant did not turn on flashing amber hazard lights, which is a violation of a state statute. *Id.* A collision occurred between the defendant and an on-coming motorist. *Id.*, at 414. At trial, the jury was instructed that “[t]he violation, if any, of a statute is not necessarily negligence, but may be considered by you as evidence in determining negligence.” *Id.*, at 415. The jury returned a verdict in favor of the defendant and plaintiff-Mathis moved for judgment as a matter of law claiming that a violation of the statute entitled her to a finding of negligence. *Id.*

On appeal, the *Mathis* Court held that RCW 5.40.050 changed the idea that a plaintiff could prove a breach of a duty in a case involving a claim of negligence by showing that there was a violation of a statute and that this was only evidence of a potential breach. *Id.*, at 418. Thus, the *Mathis* Court held that “a trial judge can no longer find negligence as a matter of law merely because a statutory duty was violated without excuse

or justification; rather, he or she must determine whether, in light of all the facts and circumstances of the case, reasonable minds could differ on whether the defendant used ordinary care.” *Id.*

Again, Plaintiffs-Appellants cited a case that is supportive of the arguments made by Defendants-Respondents that the claims of negligence asserted against Steven and Linda Elerding were properly dismissed by the Trial Court. The *Mathis* Court held that a statutory violation does not result in a *per se* finding of negligence. Instead, there must be a determination when there is an allegation of a statutory violation as to whether or not the defendant exercised ordinary care.

Plaintiffs-Appellants then cited *McLeod v. Grant County School Dist. No. 128*, 42 Wn.2d 316, 255 P.2d 360 (1953) for the premise that foreseeability is a question for a jury. Brief of Appellants at page 7. However, this is not an accurate statement of the holding of *McLeod*. The *McLeod* Court discussed the special relationship between a school district and a school child to supervise students on school premises during school hours exists and that a State statute that specifically authorizes lawsuits to be filed against school districts for injuries that arise out of acts or omissions of the school district. *Id.*, at 318-319.

In *McLeod*, a 12 year old girl was forcibly raped by fellow students during a noon recess in the school gymnasium. *Id.*, at 317. The school

district claimed that it was not liable because of the intervening criminal acts of the boys who raped the 12-year-old. *Id.*, at 320. Thus, the *McLeod* Court was asked to determine if a superseding intervening cause would relieve the school district from statutorily imposed liability. *Id.* The *McLeod* Court found that this was a question for the jury to determine because of the situation in which the rape occurred, which involved a dark room under the bleachers that possibly could be utilized for acts of indecency during periods of unsupervised play. *Id.*, at 322-323.

Obviously, the *McLeod* case is distinguishable from the present case. In the case before the Court, the question involves whether or not a duty was owed by Steven and Linda Elerding to the Plaintiffs-Appellants, not whether an intervening cause relieved Steven and Linda Elerding from liability. Because the acts of Joseph Elerding were not foreseeable and no evidence was presented that Joey's acts on April 20, 2007 were foreseeable by his parents, no duty was established on behalf of Steven and Linda Elerding.

Finally, Plaintiffs-Appellants cited *Bell v. State of Washington*, 147 Wn.2d 166, 52 P.3d 503 (2002); *Tyner v. State of Washington*, 141 Wn.2d 68, 1 P.3d 1148 (2000); and *Taggart v. State of Washington*, 118 Wn.2d 195, 822 P.2d 243 (1992), which are all distinguishable from the case

currently before the Court in that those cases all dealt with questions of immunity and statutory duties of the state.

In the case presented here, Plaintiffs-Appellants have failed to set forth a factual basis upon which Steven and Linda Elerding would be liable to Plaintiffs-Appellants under a theory of negligence. Plaintiffs-Appellants have not established that Steven and Linda Elerding had any knowledge that Joseph Elerding had a dangerous proclivity of which Steven and Linda Elerding knew, or should have known, that was within the same zone of acts that gave rise to the subject litigation.

In all negligence actions, to find a party responsible, the plaintiff must show that there was a duty, a breach of that duty, that the breach was the proximate cause of injury and that this was all within the scope of foreseeability. If parents are to be held responsible for the actions of their child, then it must be shown that the child had a dangerous proclivity that the parents knew about. No such facts exist in this case. The actions of Joseph Elerding were absolutely unforeseeable.

V. CONCLUSION

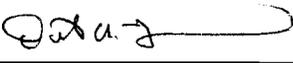
Plaintiffs-Appellants claim that Steven and Linda Elerding were negligent, but failed to allege any dangerous proclivity possessed by Joseph Elerding that was known to Steven and Linda Elerding, such that

Steven and Linda Elerding had a duty to exercise reasonable care to control the known dangerous proclivity and protect third parties from harm. Thus, Plaintiffs-Appellants failed to present a *prima facie* claim of negligence against Steven and Linda Elerding

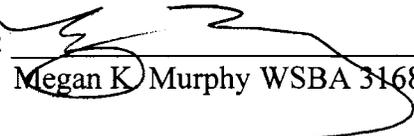
For the reasons cited above, the Trial Court properly granted dismissal of all claims of negligence asserted against Steven and Linda Elerding. The ruling of the Trial Court should be affirmed.

RESPECTFULLY SUBMITTED this 29th day of November 2010.

THORNER, KENNEDY & GANO P.S.
Attorneys for Defendants-Respondents
Elerding

By: 

David A. Thorner WSBA 4783

By: 

Megan K. Murphy WSBA 31680

PROOF OF SERVICE

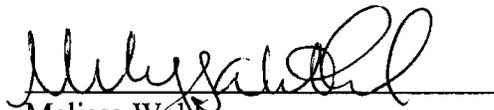
I certify that on the 29th day of November 2010, I caused a true and correct copy of the Brief of Respondents to be served on the following in the manner indicated below:

Counsel for Plaintiffs-Appellants
Mr. Brian J. Anderson
7103 W. Clearwater Ave. Suite D
Kennewick, WA 99336

U.S. Mail
 Hand Delivery
 Telecopy
(Facsimile)

Counsel for Plaintiffs-Appellants
Mr. Ned Stratton
324 W. Kennewick Ave
Kennewick, WA 99336

U.S. Mail
 Hand Delivery
 Telecopy
(Facsimile)


Melissa Wohl