



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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April 13, 2023

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**Re: Reed Calvert Kuhn v. Michael Troy Giampa et al.
CL-2021-8745**

Dear Counsel:

This case came before the Court on March 24, 2023, for a hearing on Defendants' Demurrer to the claim of negligent entrustment and the request for punitive damages in Plaintiff's Amended Complaint. After taking the matter under advisement, reviewing the memoranda of law, and considering Counsels' oral argument, the Court issues the following opinion overruling Defendants' Demurrer.

BACKGROUND

This Court has already delved into the underlying facts of this case at length in *Kuhn v. Giampa*, No. CL-2021-8745, 2022 WL 16855532, at *1 (Fairfax Cnty. Cir. Ct. Nov. 10, 2022), which are hereby incorporated into this opinion.

OPINION LETTER

To briefly summarize, Plaintiff, as the Administrator of the Estate of Buckley Fricker, filed suit in June 2021 against Defendants Michael and Marilyn Giampa (“Defendants”), requesting punitive and compensatory damages for negligence and negligent entrustment in relation to the deaths of Buckley and Scott Fricker (“Frickers”). Defendants are the parents of Nicholas Giampa (“Nicholas”), a seventeen-year-old who previously dated Buckley Fricker’s daughter Amelia until she ended the relationship at the Frickers’ behest. After the breakup, early in the morning on December 22, 2017, Nicholas took Defendant Marilyn Giampa’s car and Defendants’ handgun and ammunition to the Frickers’ home in Reston. Defendant Marilyn Giampa realized her son was gone sometime in the night and had taken the keys she attempted to hide from him, so she called Buckley Fricker and warned her Nicholas may be on his way to the Fricker house. When he was discovered in the house by Scott Fricker, he shot Buckley and Scott Fricker, who ultimately died from their injuries.

On October 7, 2022, the Court heard Defendants’ Demurrer to Plaintiff’s Complaint and took the matter under advisement. On November 10, 2022, the Court issued an opinion letter in *Kuhn v. Giampa* sustaining Defendants’ Demurrer to Count I of negligence with prejudice and to Count II of negligent entrustment and the request for punitive damages with leave to amend.

Plaintiff filed an Amended Complaint against Defendants on January 3, 2023, alleging Defendants negligently entrusted their firearms to Nicholas, resulting in the death of the Frickers, and requesting an award of punitive damages. In addition to the facts discussed in *Kuhn v. Giampa*, the Amended Complaint alleges the following new facts to state a cause of action for negligent entrustment ensuing from Nicholas’ access to Defendants’ firearms and his deterioration prior to the tragic events of December 22, 2017.

Rather than making general allegations about Nicholas’ obsession with firearms, the Amended Complaint sets forth his unrestricted access to the family firearms. Am. Compl. ¶¶ 15-16. Defendants left their firearms unsecured and unlocked in the basement, giving Nicholas unlimited access to the firearms. Am. Compl. ¶ 82. Defendants trained their son how to shoot, including how to make head shots, and gave Nicholas the freedom to hunt on the family property in Lorton. Am. Compl. ¶¶ 16, 39, 69. Nicholas was skilled; Defendant Marilyn Giampa even told others her son “shot and killed a coyote from 200 yards away.” Am. Compl. ¶ 35. Defendants also had various photographs of Nicholas using their firearms. *Id.*

Further, the Amended Complaint alleges Defendants gave Nicholas this access despite their knowledge of his numerous mental health and behavioral issues as well as his need for treatment. Am. Compl. ¶¶ 9, 28, 32. Defendants were aware of Nicholas’ addiction to viewing violent imagery, including videos of animal torture, murders, beheadings, and bomb-making, as well as white supremacist and neo-Nazi materials. Am. Compl. ¶¶ 32, 44, 49. As part of the disposition of a felony case involving child pornography against Nicholas, a forensic mental health evaluation was done in October 2017. Am. Compl. ¶ 32. The evaluation recommended he receive residential treatment for individuals “with mental health issues and who engage in child

pornography and animal torture viewing” to allow him to work on his “paranoid ideation” and “anger management skills.” Am. Compl. ¶¶ 32-33.

After the breakup, his mental state worsened as he felt particularly angry with the Frickers for ending his relationship with Amelia. Am. Compl. ¶ 61. Buckley Fricker confirmed with Defendant Marilyn Giampa only a day or two before the shooting there would be no contact between Amelia and Nicholas. Am. Compl. ¶ 57. Defendant Marilyn Giampa informed Nicholas he was not to have any contact with Amelia or her family, increasing his anger about the breakup. *Id.* Defendant Marilyn Giampa, without success, even attempted to hospitalize Nicholas at an inpatient mental health facility the night before the shooting on December 21. Am. Compl. ¶ 59. Plaintiff’s negligent entrustment claim, and by extension, request for punitive damages, as set forth in the Amended Complaint is based on Defendants’ knowledge of these issues their son faced and their choice to not remove or secure the firearms in the home despite allowing him free access previously.

Subsequently, Defendants filed this Demurrer to Plaintiff’s Amended Complaint on March 17, 2023, claiming Plaintiff’s Amended Complaint still failed to state a claim upon which relief could be granted as to negligent entrustment and punitive damages. Plaintiff filed a response on the same day. After hearing arguments on the Demurrer, the matter was taken under advisement to address whether there are sufficient facts pled in the Amended Complaint to support the claim of negligent entrustment and the request for punitive damages.

ANALYSIS

I. Demurrer Standard

The purpose of a demurrer is to determine whether a complaint states a cause of action upon which relief may be granted. *Bell v. Saunders*, 278 Va. 49, 53, 677 S.E.2d 39, 40-41 (2009). A demurrer admits the truth of the facts contained in the pleading and any facts that may be reasonably and fairly implied and inferred from those allegations. *Yuzefovsky v. St. John's Wood Apartments*, 261 Va. 97, 102, 540 S.E.2d 134, 136 (2001). In considering a demurrer, the court is limited to reviewing the complaint and any attachments to the complaint. *TC MidAtlantic Dev., Inc. v. Commonwealth*, 280 Va. 204, 212, 695 S.E.2d 543, 548 (2010). The court’s ruling on a demurrer is confined to the legal sufficiency of the pleading and does not involve consideration of disputed facts. *Hop-Inn Food Stores, Inc. v. Serv-N-Save, Inc.*, 237 Va. 206, 209, 375 S.E.2d 753, 755 (1989). To withstand demurrer, a complaint need only contain “sufficient allegations of material facts to inform a defendant of the nature and character of the claim,” and need not “descend into statements giving details of proof.” *CaterCorp, Inc. v. Catering Concepts, Inc.*, 246 Va. 22, 24, 431 S.E.2d 277, 279 (1993).

Therefore, a demurrer tests the legal sufficiency of a pleading and should be sustained if the pleading fails to state a valid cause of action when viewed in the light most favorable to the plaintiff. VA. CODE ANN. § 8.01-273; *see Sanchez v. Medicorp Health Sys.*, 270 Va. 299, 303, 618 S.E.2d 331, 333 (2005). A demurrer cannot be used to decide the merits of a case, lest a trial

court may incorrectly short-circuit litigation pretrial and determine a dispute without permitting the parties to reach a trial on the merits. *See Assurance Data, Inc. v. Malyevac*, 286 Va. 137, 139, 747 S.E.2d 804, 805 (2013).

II. Negligent Entrustment

Virginia recognizes the doctrine of negligent entrustment in cases where an owner negligently entrusted another with an instrumentality which causes injury to a third party. *See, e.g., Starr v. Ebbesen*, 18 Va. Cir. 267, 268 (1989). First, there must be evidence sufficient to support a finding of entrustment of the instrumentality, which can be found through evidence of (1) express permission, (2) a pattern of conduct supporting implied permission, or (3) knowledge the instrumentality would be used unless explicit instructions were given to the contrary. *Kingrey v. Hill*, 245 Va. 76, 78, 425 S.E.2d 798, 799-800 (1993). Further, the entrustment must also be negligent, which requires the owner of the instrumentality to have known or had reasonable cause to know they were entrusting the instrumentality to a third person likely to use it in a manner which would cause injury to others. *Id.*

While parents generally cannot be held liable for the torts of their children, a theory of negligent entrustment is still a valid cause of action for parents who entrust their children with instrumentalities. *Bell v. Hudgins*, 232 Va. 491, 495, 352 S.E.2d 332, 334-35 (1987). Liability under a theory of negligent entrustment does not flow from the parent-child relationship, but rather arises out of the duty owed by the owner of an instrumentality to third parties who may be foreseeably injured by negligent entrustment of the instrumentality to another. *See Starr*, 18 Va. Cir. at 268-69.

A. Entrustment

Evidence of entrustment of the instrumentality can be proven in one of three ways. First, an individual can be given express permission to use the instrumentality by the owner. *Denby v. Davis*, 212 Va. 836, 838, 188 S.E.2d 226, 229 (1972). Alternatively, if no express permission is given, entrustment may be implied from a pattern of conduct supporting implied permission from the owner to use the instrumentality. *Id.* If there is neither express nor implied permission, the owner of an instrumentality may still be held liable for negligent entrustment if the owner knew the instrumentality would be used notwithstanding explicit instructions to the contrary. *Kingrey*, 245 Va. at 78. Negligent entrustment does not apply to unauthorized use of a firearm where there is no evidence the defendant ever permitted or prohibited the third party from using the firearm. *Est. of Kim ex rel. Alexander v. Coxe*, 295 P.3d 380, 394-95 (citing *Kingrey*, 245 Va. at 76).

Most negligent entrustment cases relate to the operation of motor vehicles.¹ However, the Virginia Supreme Court applied the doctrine of negligent entrustment to a rifle in *Kingrey v. Hill*. The Court in *Kingrey* held the defendant did not negligently entrust her husband with a rifle when the defendant's husband shot the plaintiff. 245 Va. at 78. Although the defendant's

¹ *See, e.g., Denby*, 212 Va. at 838 (holding the owner of a car impliedly entrusted the vehicle to an employee when the employee had driven the car on at least twenty occasions for his own benefit without objection from the owner).

husband was previously convicted of a felony involving the discharge of a firearm, which defendant was aware of, there was no evidence of entrustment of the rifle by the defendant to her husband. *Id.* The plaintiff failed to show the defendant ever permitted her husband to use the rifle, and the defendant's knowledge "of a single incident a decade ago" involving her husband's use of a firearm was insufficient to support a finding of entrustment. *Id.* at 78-79.

The fatal defect in Plaintiff's initial Complaint regarding negligent entrustment was the lack of any allegations regarding entrustment, whether express or implied. By contrast, Plaintiff's Amended Complaint sets forth Nicholas' access to Defendants' firearms before the December 22 incident in far more detail. Plaintiff elaborates on pertinent facts, including how Defendants taught their son to shoot and make a head shot while giving him the freedom to hunt with their firearms on their property. Am. Compl. ¶¶ 16, 39, 69. Defendants had a variety of photos of their son using their firearms. Am. Compl. ¶ 35. The family firearms were kept unsecured in the basement, always easily accessible. Am. Compl. ¶ 82.

Entrustment may be implied from an affirmative act or pattern establishing implied permission. *Kingrey*, 245 Va. at 78. Unlike the defendant in *Kingrey*, Defendants allowed their son to use the family firearms, both supervised and unsupervised, while imposing no limitations on his use before the morning of the December 22 incident.² This pattern of conduct establishes Defendants impliedly entrusted their firearms to Nicholas for his use. While a jury could ultimately find, as Defendants argue, Defendants only entrusted their firearms to Nicholas for the limited purpose of hunting on the Lorton property, a demurrer simply tests the legal sufficiency of a pleading. Taking all of Plaintiff's allegations in the Amended Complaint as true and viewing all the facts in the light most favorable to the Plaintiff, Plaintiff's Amended Complaint properly alleges entrustment of the family firearms to Nicholas by Defendants.

B. Whether the Entrustment was Negligent

Liability for negligent entrustment requires the owner knew, or had reasonable cause to know, they were entrusting the instrumentality to a third person likely to use it in a manner that would cause injury to others. *Kingrey*, 245 Va. at 78. An owner who negligently entrusts an instrumentality to another is responsible "for the natural and probable consequences of his act of entrustment to any person injured." *Keophumihae v. Brewer*, 6 Va. Cir. 80, 82-83 (1985).

While Nicholas had not previously used a firearm in a criminal manner, illegal activity of an individual is not the only basis to find a party negligent in entrusting them with their firearm. Defendants still had reasonable cause to know their entrustment of a firearm to Nicholas may result in its use to cause injury to another. Defendants were aware of Nicholas' longstanding mental health and behavioral issues, including his threats at an early age to blow up his school. Am. Compl. ¶ 9. Defendants knew Nicholas viewed violent videos of animal torture, murder,

² By contrast, in *Hughes v. Brown*, the Grayson County Circuit Court explained the defendant did not negligently entrust his shotgun to his minor child. 36 Va. Cir. 444, 448 (1995). The defendant had taken his son to a firearms safety course and, in addition to emphasizing those safety rules, the defendant told his son to never touch the pistol unless he was present. *Id.* at 445. Therefore, there was no evidence of express or implied entrustment. *Id.* at 448, n.3.

and beheadings, and downloaded 157 files with instructions on how to make a bomb. Am. Compl. ¶ 44. Defendants also were aware of the results of a forensic mental health evaluation, completed as part of his felony charges related to child pornography, only two months before the events of December 22, 2017. Am. Compl. ¶ 32. The evaluation noted he was in need of residential treatment for individuals with “mental health issues and who engage in child pornography and animal torture viewing” to allow him to work on his “paranoid ideation” and “anger management skills.” Am. Compl. ¶¶ 32-33. The evaluation also emphasized Nicholas need for help “in understanding his internet pornography addiction as well as his addiction for viewing violent imagery.” Am. Compl. ¶ 33.

Plaintiff alleges Nicholas’ state of mind deteriorated after the breakup, and he became increasingly angry and uncontrolled. Am. Compl. ¶¶ 10, 12-13. Defendants knew his anger was focused on Amelia and her family, specifically Buckley Fricker, after the no-contact rule was made clear. Am. Compl. ¶¶ 12, 57. At one point in December, Nicholas punched holes so deep in the wall it exposed the studs. Am. Compl. ¶ 34. Defendant Marilyn Giampa, recognizing the severity of Nicholas’ state, unsuccessfully tried to have him hospitalized the day before the shooting at an inpatient mental health facility. Am. Compl. ¶ 59. Recognizing his increasing instability, she fell asleep with her car keys in an attempt to prevent her son from going to the Fricker residence. Am. Compl. ¶ 60. Despite hiding the keys to the car, Defendants did not secure the weapons or ammunition in the household. After Defendant Marilyn Giampa woke up and realized the keys were gone, she even called Buckley Fricker to warn her Nicholas may be on his way. Am. Compl. ¶ 73.

There is an inherent responsibility in ownership and access to instrumentalities which can cause harm. A vehicle and a firearm, two potentially fatal instrumentalities; one standard for negligent entrustment. Looking at the evidence in the light most favorable to the movant, if the owner hid the keys knowing Nicholas may try to take the car without permission, it can be implied Defendants knew Nicholas would take it against explicit instructions. From the Amended Complaint, there are sufficient facts alleged that if Defendants knew Nicholas would take the car, the Defendants knew or had reasonable cause to know Nicholas would take the unsecured weapon. Despite recognizing Nicholas’ deteriorating fragile state and knowing his prior interest in violent materials, Defendants failed to do anything to secure the weapons in the household. When coupled with the allegations of entrustment of the firearms by Defendants to their son, these allegations are sufficient to state a cause of action for negligent entrustment. Therefore, Defendants’ Demurrer is overruled as to Plaintiff’s claim for negligent entrustment.

III. Punitive Damages

Mere negligence does not support an award of punitive damages.³ *Askew v. Doe*, No. 03-2753, 2004 WL 516233, at *2 (Portsmouth Cir. Ct. Mar. 8, 2004). Punitive damages are

³ A claim of negligent entrustment can support an award of punitive damages. *Allstate Ins. Co. v. Wade*, 265 Va. 383, 396-97, 579 S.E.2d 180, 187 (2003). For example, in *Allstate*, the Supreme Court of Virginia affirmed a jury’s award of punitive damages appropriate against a car owner for negligent entrustment of a car to an impaired driver.

recoverable in a personal injury case when the conduct at issue is “so willful or wanton as to evince a conscious disregard of the rights of others” or when the conduct was malicious. *Booth v. Robertson*, 236 Va. 269, 273 (1988). Willful and wanton negligence can be an action taken with “reckless indifference to consequences” when “the defendant is aware, from his knowledge of existing circumstances and conditions, that his conduct probably would cause injury to another.” *Askew*, 2004 WL 516233, at *3 (citing *Doe v. Isaac*, 265 Va. 531, 535, 579 S.E.2d 174, 176 (2003)). Where an act is “free from fraud, malice, oppression, or other special motives of aggravation,” punitive damages are impermissible. *Cocoli v. Children’s World Learning Cntrs., Inc.*, 41 Va. Cir. 589, 591 (1994).

The Amended Complaint sets forth a sufficiently egregious set of facts supporting Plaintiff’s request for punitive damages. While Defendants did not, from the facts alleged, act with any actual malice, Plaintiff pled enough facts to show Defendants acted with recklessness as to “evince a conscious disregard of the rights of others.” *Booth*, 236 Va. at 273. Defendants knew of their son’s behavioral and mental health problems, and the recommendations for residential treatment, but still gave him access to the weapons in the household freely and without restriction. Am. Compl. ¶¶ 9, 32, 71. More concerning, Defendants were also aware of his anger about the breakup with Amelia and her family’s role, evidenced in part by Nicholas’ punching of the wall in Defendants’ home in December. Am. Compl. ¶¶ 34, 71.

Defendants knew Nicholas was struggling even more than usual, with Defendant Marilyn Giampa trying to get him into an inpatient mental health facility mere hours before the shooting. Am. Compl. ¶¶ 59, 60. She tried to take away his access to the family car that evening, knowing Nicholas may be a risk, yet Defendants still did not remove his access to the family firearms. Am. Compl. ¶ 60. When she woke up the night Nicholas left for the Fricker home and called Buckley Fricker to warn her he may be coming, she failed to check to see if any of the Defendants’ guns were missing or warn Buckley about the possibility of a weapon. *Id.* Defendants’ role in and knowledge of the series of events leading up to the morning of December 22, 2017, and continued failure to act to secure the weapons in their home from their son, could constitute a reckless indifference to consequences which may support an award of punitive damages. As a result, Defendants’ Demurrer is overruled as to the request for punitive damages.

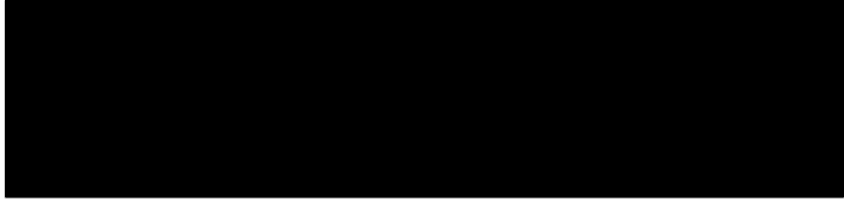
CONCLUSION

Taking all the factual allegations in Plaintiff’s Amended Complaint as true and viewing all facts in the light most favorable to Plaintiff, Plaintiff has averred sufficient allegations of facts to support the claim of negligent entrustment and the request for punitive damages. Defendants’

Id. The owner drank with the driver for hours and, while the driver was driving, the owner instructed the driver to speed up along curvy roads. *Id.* The Court concluded a jury could properly find the owner’s conduct reflected a conscious disregard for the safety of others. *Id.*

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Demurrer is overruled, and Defendants are to file an answer within twenty-one days. The Court requests Plaintiff's counsel prepare an order reflecting the Court's ruling.



Penney S. Azcarate, Chief Judge
Fairfax County Circuit Court

PSA/hcm

OPINION LETTER