



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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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 October 7, 2022, for a hearing on Defendants' Demurrer to Count I of negligence, Count II of negligent entrustment, and the request for punitive damages in Plaintiff's Complaint. Having taken the matter under advisement and after reviewing the memoranda of law and arguments submitted by Counsel, the Court issues the following opinion sustaining Defendants' Demurrer.

**BACKGROUND**

Plaintiff filed his Complaint as Administrator of the Estate of Buckley Fricker on June 15, 2021, alleging negligence and negligent entrustment against Michael and Marilyn Giampa ("Defendants") in relation to the deaths of Buckley and Scott Fricker ("Frickers"). The

**OPINION LETTER**

Complaint alleges Defendants are the parents of Nicholas Giampa, who was seventeen years old and lived with his parents when he dated Amelia Fricker, Buckley Fricker's daughter, until their breakup in December 2017. The breakup occurred at the behest of the Frickers due to their concern about Nicholas Giampa's white supremacist views and affiliation. At the time of the breakup, the Frickers demanded no further contact occur between their daughter and Defendants' son.

In the early morning of December 22, 2017, Nicholas Giampa took Defendant Marilyn Giampa's car keys and car, along with the Defendants' handgun and ammunition, and drove to the Frickers' household. Defendant Marilyn Giampa realized at some point in the morning her son and car were missing. Defendant Marilyn Giampa then called Buckley Fricker to inform her he may be going to their house. Nicholas Giampa was able to sneak into the Fricker home and made his way to Amelia Fricker's room. Scott Fricker found Nicholas Giampa in Amelia Fricker's room and demanded he leave the house immediately. Upon Scott Fricker's demand, Nicholas Giampa removed the gun from his backpack and shot both Buckley and Scott Fricker, who ultimately died from their injuries.

In stating causes of action for negligence and negligent entrustment against Defendants, the Complaint contains multiple allegations imputing knowledge of the risk posed by Nicholas Giampa to the Defendants. Plaintiff asserts the negligence claim based on Defendants negligent failure to appropriately supervise their son. Compl. ¶ 8. These allegations included his association with white supremacy; behavioral problems and mental health history, including an attempted hospitalization immediately before the incident at issue; pending charges related to pornography; and threats at a young age to blow up his school. Compl. ¶¶ 14, 21, 26, 31. The Complaint goes on to make general allegations about Defendants' son violent nature and mindset, along with his obsession with weapons. *See, e.g.*, Compl. ¶ 20. Further, the negligent entrustment claim in the Complaint is based on Defendants having unsecured firearms and ammunition in the household, which Plaintiff asserts the Defendants "made available and entrusted" to their son who they knew was "obsessed" and violent. Compl. ¶¶ 8, 14.

Subsequently, Defendants filed this instant Demurrer to Plaintiff's Complaint and Memorandum in Support on August 22, 2022, claiming Plaintiff's Complaint fails to state a claim upon which relief can be granted. Plaintiff filed a Reply on September 30, 2022. After hearing arguments on the Demurrer, the matter was taken under advisement to address the issues of whether there is sufficient evidence pled in the Complaint to satisfy the requirements of the claims of negligence, negligent entrustment, and request for punitive damages. The Court will discuss these issues in turn.

## 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 as well as 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 review of 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). 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).

Essentially, a demurrer tests the legal sufficiency of a pleading and should generally be sustained if the pleading fails to state a valid cause of action even taking all the factual allegations as true. VA. CODE ANN. § 8.01-273; see *Sanchez v. Medicorp Health Sys.*, 270 Va. 299, 303, 618 S.E.2d 331, 333 (2005). The court may only consider the legal grounds stated specifically in the demurrer. VA. CODE ANN. § 8.01-273. Unlike a motion for summary judgment, a demurrer cannot be used to decide the merits of a case, as demurrers are not intended to end litigation prematurely before the parties can reach a trial on the merits. See *Assurance Data, Inc. v. Malyevac*, 286 Va. 137, 139, 747 S.E.2d 804, 805 (2013).

## **II. Wrongful Death Negligence**

The four elements of a negligence action are a legal duty on the part of the defendant, a breach of the duty, and a showing that the breach proximately caused injury, resulting in damages to the plaintiff. *Blue Ridge Serv. Corp. of Virginia v. Saxon Shoes, Inc.*, 271 Va. 206, 218, 624 S.E.2d 55, 62 (2006). When a negligence claim against one party is based on the alleged criminal conduct of a third person, there must be some special relationship or assumed duty between the defendant and either the plaintiff or the third person which would allow them to foresee the need to act to prevent harm. *Terry v. Irish Fleet Inc.*, 296 Va. 129, 135, 818 S.E.2d 788, 792 (2018). While a plaintiff is not required to specify the "particulars of . . . negligence . . . a plaintiff *must still allege facts sufficient to support each element.*" *Graves v. Mortg. Elec. Registration Sys.*, 96 Va. Cir. 457, 2011 WL 13294613, at \*14 (Fairfax Cnty. Cir. Ct. June 29, 2011) (emphasis added).

### **A. Third Party Negligence**

Liability for third party negligence is not common. *A.H. ex rel. C.H. v. Church of God in Christ, Inc.*, 297 Va. 604, 618, 831 S.E.2d 460, 468 (2019). As a general rule, there is no duty to warn or protect a party from acts of criminal assault by third parties because of the lack of foreseeability of the incident. *Terry*, 296 Va. at 135.

Plaintiff's claim simple negligence. However, the negligence claim is based on wrongful death. The actions of a third party, in this case Defendants' son, led to the shooting and death of the Frickers. The actions on which damages are claimed, therefore, is the death of the Frickers. This is not simple negligence as there is no claim the Defendants personally, independently of

their son, caused the death of the Frickers. But for Defendants' son, the Frickers would not have been shot that evening and succumbed to their injuries. Therefore, this claim is one of third party negligence, meaning by law there must be a special relationship and a legal duty.

To find an individual liable for the actions of a third party, there must be a special relationship between the defendant and the plaintiff or third person, or a voluntary assumption of a rescue. *Id.* at 136-37. Special relationships include those of an employer-employee, principal-agent, business proprietor-invitee, innkeeper-guest, and common carrier-passenger. *See, e.g., Church of God*, 297 Va. at 620-21. Even when a special relationship is applicable, it does not make the defendant "an insurer of the plaintiff's safety." *Taboada v. Daly Seven, Inc.*, 271 Va. 313, 323, 626 S.E.2d 428, 433 (2006).

In this case, there is no special relationship pled other than parent and child. Virginia adheres to the general rule that parentage does not make a parent liable for the torts of their child. *See, e.g., Bell v. Hudgins*, 232 Va. 491, 493, 352 S.E.2d 332, 333 (1987). The Supreme Court of Virginia in both *Bell v. Hudgins* and *Thompson ex rel. Thompson v. Skate of America* explicitly held parents were not liable for the tortious acts of their children. *Bell*, 232 Va. at 495; *Thompson*, 261 Va. 121, 132; 540 S.E.2d 123, 129 (2011).<sup>1</sup>

Notably, Plaintiff asserts the cause of action for negligence is not based on a theory of liability based on Defendants' status as parents of Nicholas Giampa. Plaintiff instead asserts a claim of negligence based on Defendants' own independent negligence in failing to supervise their son and failing to secure their firearms within the house knowing of their son's troubles.

### **B. Independent Negligence for Third Party Acts**

At its core, negligence is the violation of a legal duty one owes to another. *Veale v. Norfolk & W. Ry. Co.*, 205 Va. 822, 825, 139 S.E.2d 797, 799 (1965). An action for negligence exists when there is a failure to perform some legal duty owed by the defendant to the party injured. *RGR, LLC v. Settle*, 288 Va. 260, 275, 764 S.E.2d 8, 16 (2014). Where there is no legal duty, there is no actionable negligence claim. *Id.* (citing *Veale*, 205 Va. at 825).

The Supreme Court of Virginia in *Bell v. Hudgins* declined to hold the parents liable for their own individual negligence resulting "in injury or damage intentionally inflicted by their minor child to third parties." 232 Va. at 493. There, the plaintiff alleged the parents should be held independently liable for negligence for failing to heed warning signs of violence in the child and allowing the child to roam freely in the community. *Id.* at 492-93. Similarly here, Plaintiff argues the Defendants were aware of various instances of troubled behavior by their son and had a duty to warn and protect the community. The Court in *Bell* explained the decision to hold an

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<sup>1</sup> The Supreme Court of Virginia in *Bell* affirmed the trial court's sustaining of the defendants' demurrer to a claim of negligence after their troubled teen son attacked plaintiff in an attempted rape, finding the parents could not be liable for the intentional acts of their child based on a theory of independent negligence of the parents in failing to control the child. 232 Va. at 493. The Court upheld their reasoning in *Thompson* by holding the trial court did not err in sustaining another defendant's demurrer to a claim of negligence arising from their son's attack on the plaintiff at a skating rink when the son had an established record of violence at the rink. *Thompson*, 261 Va. at 125, 129.

individual parent liable for their negligent supervision of a child belonged to the General Assembly rather than the courts. *Id.* at 494. The imposition of a legal duty onto a parent to control an unstable child generated endless policy questions, which the Court explained could not be answered by the judiciary. *Id.*<sup>2</sup>

This well settled precedence is why Plaintiff's allegations in the Complaint regarding Defendants failure to properly supervise Nicholas Giampa fail as a matter of law. Compl. ¶¶ 8, 42. Defendants cannot be held independently liable for failure to properly supervise their child in the absence of guidance from the General Assembly. *Bell*, 232 Va. at 493; *Thompson*, 261 Va. at 129.

At the hearing on the Demurrer and in a supplemental brief, Plaintiff alleged Defendants owed the Frickers a legal duty independent of their parenthood to properly secure their firearms knowing their son's issues. *See also* Compl. ¶¶ 34-35. Plaintiff acknowledged there are no cases in Virginia finding an individual negligent for failure to secure their firearm after the injury of another by a third party and no case finding independent liability for negligence for the tort of another person. If one extends Plaintiff's logic, the only legal duty would be Plaintiff's duty to the entire community, not to Plaintiff specifically, to secure their weapons with no access to their son. There is no legal duty in this situation. Under Plaintiff's theory, a gun owner would be liable for a stolen gun used by a third party or roommate. This novel theory of reasoning is clouded with conjecture and uncertainty.

The Court does not create laws or restrictions on Virginians; the Court interprets laws, and the Court cannot interpret a non-existing law nor maintain a negligence claim that does not allege a legal duty. This Court feels the weight of this case and the tragic facts surrounding it. However, the cause of action of independent negligence for the acts of third parties cannot be stretched to an unimaginable shape with no limitation on application. This issue cannot be cured, therefore Defendants' Demurrer to Plaintiff's claim of negligence is sustained with prejudice.

### **III. Negligent Entrustment**

The doctrine of negligent entrustment allows an owner of an instrumentality to be held liable to a third party who is injured for entrusting it to another who caused the injury. *Hack v. Nester*, 241 Va. 499, 503, 404 S.E.2d 42, 43 (1990). Negligent entrustment requires the owner of the instrumentality used to inflict injury must have known, or had reasonable cause to know, they were entrusting the instrumentality to a third person who was likely to use it in a manner that would cause injury to others. *Kingrey v. Hill*, 245 Va. 76, 78, 425 S.E.2d 798, 799-800 (1993).

To support a finding of entrustment, there must be evidence of express permission, evidence of a pattern of conduct supporting implied permission, or evidence of knowledge the

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<sup>2</sup> The Court reemphasized this in *Thompson ex rel. Thompson v. Skate America*, where the Court affirmed the trial court's ruling on the demurrer under *Bell* because of its central holding that a parent cannot be separately liable for the intentional acts of a child premised on the parent's own independent negligence in failing to control or supervise the child. 261 Va. at 128-29.

instrument would be used notwithstanding explicit instructions to the contrary to establish entrustment occurred. *Id.*<sup>3</sup> Negligent entrustment does not apply to unauthorized uses 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). As noted in *Bell v. Hudgins*, a theory of negligent entrustment can be a valid cause of action as to parents who entrust their children with instrumentalities. 232 Va. at 495.<sup>4</sup>

In the case at bar, Plaintiff has not alleged facts sufficient to support a claim of negligent entrustment of a firearm by the Defendants to their son. There is no allegation of express permission to use the firearms in the Complaint, nor one of any affirmative act or pattern establishing implied permission. The Complaint also lacks evidence sufficient to show Defendants knew or should have known their son would use the firearms, if given access, to harm others. In other words, there is no allegation of entrustment.

Plaintiff's Complaint alleges Defendants personally knew of their son's behavioral problems, obsession with firearms, and the threat he posed to others. Compl. ¶¶ 14, 20, 31-32. To support these contentions, Plaintiff cites to Defendants' son's views on white supremacy; pending charges related to pornography; threat at age seven to blow up his school; and Defendant Marilyn Giampa's attempted hospitalization of her son the day before the incident. Compl. ¶¶ 16, 21, 26, 31. Plaintiff generally contended at all relevant times, Defendants knew of the interest their son had in firearms and, despite the warning signs he displayed, did not take the necessary steps to prevent Nicholas from having access to the firearms in the home. Compl. ¶ 34. Plaintiff avers multiple firearms and ammunitions were unsecured and available to Defendants' son at his home and "by not securing their guns from Nicholas," the Defendants "wrongly entrusted them to him and recklessly endangered the lives of others," ultimately causing the death of the Frickers. Compl. ¶¶ 35, 50.

Taking all these allegations as true, Plaintiff has not shown the entrustment required for a negligent entrustment claim to survive. Plaintiff failed to allege any instance where Defendants gave Nicholas Giampa express permission to use their handgun nor any pattern of action or affirmative act establishing implied permission to use the handgun. While the Complaint makes general allegations about Nicholas Giampa's prior violent history, involvement with white supremacy and obsession with firearms, it did not allege any instance where he had used a firearm, or any other weapon for that matter, or any specific prior threat of violence. In fact, despite the seemingly unsecured nature of the firearms in the house and Nicholas Giampa's apparent obsession with them, the Complaint did not present any evidence he ever used any firearm prior to the morning of December 22. Prevention and availability are different than

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<sup>3</sup> The Court in *Kingrey* held the defendant did not negligently entrust a rifle to her husband when she left it unsecured in the house and knew of her husband's prior conviction involving discharge of a firearm as the evidence was insufficient to show entrustment. *Kingrey*, 245 Va. at 77-78.

<sup>4</sup> For example, Fairfax County Circuit Court recognized a cause of action in *Starr v. Ebbesen* for negligent entrustment by a parent to their child of an air rifle. 18 Va. Cir. 267, 269 (1989).

entrustment. Defendants, while aware of their son's problems, did not negligently entrust him with a firearm under the facts presented by the Complaint, therefore the Demurrer on the negligent entrustment claim is sustained with leave to amend.


#### IV. Punitive Damages

Punitive damages are 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 a result of misconduct or actual maliciousness. *Booth v. Robertson*, 236 Va. 269, 273, 374 S.E.2d 1, 3 (1988); *Condo. Servs., Inc. v. First Owners' Ass'n of Forty Six Hundred Condo., Inc.*, 281 Va. 561, 579, 709 S.E.2d 163, 174 (2011).<sup>5</sup>

However, because Plaintiff has not properly alleged a negligence or negligent entrustment claim against Defendants, the Demurrer on the request for punitive damages is sustained with leave to amend.

#### CONCLUSION

Taking all factual allegations in Plaintiff's Complaint as true, the facts remain insufficient to state a claim upon which Plaintiff may seek relief against Defendants. Defendants' Demurrer is sustained with prejudice as to Count I of negligence and is sustained with leave to amend as to Count II of negligent entrustment and the request for punitive damages. The Court requests Defendants' counsel to prepare an order reflecting the Court's ruling.



Penney S. Azcarate, Chief Judge  
Fairfax County Circuit Court

PSA/hcm

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<sup>5</sup> 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). In *Allstate*, the Supreme Court of Virginia found an award of punitive damages appropriate against an intoxicated car owner for negligent entrustment of a car to another intoxicated driver. *Id.*