

STATE OF MICHIGAN  
COURT OF APPEALS

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LEONA J. WYNN, as Conservator of the Estate of  
ZACHARY I. BURNS, a Minor,

UNPUBLISHED  
October 10, 1997

Plaintiff-Appellant,

v

No. 196429  
Berrien Circuit Court  
LC No. 95-003518-NO

SANDRA A. CAGAMPANG, as Next Friend of  
JACOB CAGAMPANG, a Minor,

Defendant-Appellee.

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Before: Markey, P.J., and Neff and Smolenski, JJ.

MEMORANDUM.

Plaintiff appeals by right summary disposition, under MCR 2.116(C)(10), in this negligence action. This appeal is being decided without oral argument pursuant to MCR 7.214(E). We affirm.

Zachary Burns was tragically blinded in one eye when a pellet gun owned by his friend Richard Pickens accidentally discharged. The gun had been loaded by Jacob Cagampang, who then handed the loaded weapon to Richard Pickens at Pickens' request. Plaintiff does not argue that the handing of the pistol to Pickens by Cagampang was itself a negligent act. No claim is made, for example, that Pickens was then in an agitated mental state or foreseeably threatening harm to plaintiff or any other third person. *Cf. Ross v Glaser*, 220 Mich App 183; 559 NW2d 331 (1996). Likewise, it is not claimed that the loading of the pistol was itself negligence; although plaintiff claims that Cagampang did not advise Pickens that he had loaded the pistol, the loading occurred in Pickens' presence and view, and Pickens testified at deposition that, from habit, he treated the pistol as loaded at all times, so lack of warning was not a proximate cause of any injury.

Plaintiff relies on a concert of action or "alternative liability" theory, a procedural device which shifts the burden of proof on the element of causation in fact to the defendants once an innocent plaintiff demonstrates that all defendants acted tortiously, but only one unidentifiable defendant caused the actual injury. If the defendants cannot then meet the shifted burden and exculpate themselves, joint and several liability is imposed. *Abel v Eli Lilly & Co*, 418 Mich 311, 325; 343 NW2d 164 (1984). Key to

invoking this theory is to first show, as a threshold matter, that all defendants acted tortiously. *Cousineau v Ford Motor Co*, 140 Mich App 19, 29; 363 NW2d 721 (1985). As plaintiff has identified no negligent act by Jacob Cagampang which proximately caused his injury, he cannot rely on the alternative liability theory. Even assuming that it was negligent not to warn Pickens that the pistol was loaded, Pickens treated the pistol as loaded and the accident cannot be attributed to any lack of knowledge of the gun's loaded condition.

Plaintiff asserts that the actions of Cagampang and Pickens violated Buchanan City Ordinance 58-192, which prohibits, inter alia, use, operation or discharge of any type of device capable of releasing a projectile which might damage or destroy life or property within the City limits. Although prior to plaintiff's injury Cagampang had been using and discharging the pellet gun, he was not doing so at the time of injury, nor for that matter was Richard Pickens. Rather, at the time of injury Pickens was only owning and displaying the pellet gun. On this record it could not possibly be found that any alleged violation of the ordinance was a proximate cause of plaintiff's injury. *Berry v J & D Auto Dismantlers, Inc*, 195 Mich App 476, 484-485; 491 NW2d 585 (1992). Further, violation of an ordinance is evidence of negligence only when the purpose of the ordinance is to prevent the type of injury and harm actually suffered. *Ward v Frank's Nursery & Crafts*, 186 Mich App 120, 135; 463 NW2d 442 (1990); *Autry v Allstate Ins Co*, 130 Mich App 585, 592-593; 344 NW2d 588 (1983). An ordinance of this type appears designed to protect innocent third persons on their own premises or within areas accessible to the public from projectile injuries; there is no evidence that the purpose of the ordinance is to protect the owner of such a device or social guests within the owner's home. *Trager v Thor*, 445 Mich 95, 106 n 12; 516 NW2d 69 (1994). Accordingly, the ordinance fails to supply the missing elements of plaintiff's cause of action in negligence, and summary disposition was properly granted.

Affirmed.

/s/ Jane E. Markey

/s/ Janet T. Neff

/s/ Michael R. Smolenski