IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STEVEN RAYMOND, Appellant, v. DAVID LEE CRAIG, JR. and Georgianna Craig, and the marital community comprised thereof, Respondents.	)	No. 67339-4-I DIVISION ONE UNPUBLISHED OPINION FILED: November 26, 2012

Schindler, J. — While staying at his parents' house, 39-year-old David Jay Craig shot Steven Raymond in the leg with his father's shotgun. Raymond appeals summary judgment dismissal of his lawsuit against David Lee Craig and Georgianna Craig. We reject Raymond's argument that there is a duty to the public to safely store and secure firearms. However, because there are material issues of fact as to breach of the duty of care and negligent entrustment, we reverse and remand for trial.

David Jay has a lengthy criminal history, including a conviction for burglary in the second degree, two convictions for possession of marijuana, two convictions for assault in the fourth degree, and a domestic violence assault conviction.[1] The

[1] For clarity, we refer to David Jay Craig, David Lee Craig, and Georgianna Craig by their first names.

domestic violence assault conviction stemmed from the assault in 1995 of his father David Lee. David Jay also suffers from "bipolar disorder" and has a history of substance abuse, including long-term use of methamphetamines.

David Jay's parents live in Kent. After an attempted burglary in early 2009, David Lee stored his shotgun on hooks suspended from the ceiling of the master bedroom closet. On September 12, David Lee and Georgianna left to go on vacation and David Jay stayed at their house.

At about 2:00 a.m. on September 18, Raymond drove David Jay from downtown Kent to David Lee and Georgianna's house. When they arrived, Raymond went into the house with David Jay. Shortly thereafter, David Jay shot Raymond in the leg with his parents' shotgun. David Jay pleaded guilty to assault in the first degree.

On June 17, 2010, Raymond sued David Lee and Georgianna for personal injury damages. Raymond alleged breach of the duty to secure the shotgun and protect against foreseeable harm to the public, negligent supervision, and failure to warn of a dangerous condition.

David Lee and Georgianna filed a motion for summary judgment arguing they did not owe a duty to Raymond to prevent their adult son's criminal conduct, and did not breach a duty of reasonable care. In response, Raymond claimed David Lee and Georgianna owed a duty to the general public "to [p]rotect [a]gainst the [m]isuse of their [f]irearm." Raymond also asserted there were genuine issues of material fact as to whether David Lee and Georgianna breached the duty of care by leaving the shotgun with their son who had a history of substance abuse and mental illness. In support,

Raymond submitted excerpts from the depositions of David Lee, David Jay, and Georgianna, a copy of David Jay's criminal history, and a copy of the Kent Police Department "Case Report" of the shooting. The trial court granted the motion for summary judgment and dismissed the lawsuit against David Lee and Georgianna.

On appeal, Raymond contends the trial court erred in dismissing his lawsuit on summary judgment. Raymond asserts there are genuine issues of material fact as to (1) whether David Lee and Georgianna breached a duty to the public to safely store and secure the shotgun; (2) whether their affirmative acts exposed Raymond to a high degree of risk of harm that a reasonable person would have taken into account, giving rise to a duty under Restatement (Second) of Torts section 302B (1965); and (3) negligent entrustment.

Standard of Review

We review summary judgment de novo and engage in the same inquiry as the trial court. Kruse v. Hemp, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993). Summary judgment is appropriate if the pleadings, depositions, and affidavits show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). We consider all facts and reasonable inferences in the light most favorable to the nonmoving party. Michael v. Mosquera-Lacy, 165 Wn.2d 595, 601, 200 P.3d 695 (2009). Summary judgment is appropriate only if, from all the evidence, reasonable persons could reach but one conclusion. Vallandigham v. Clover Park Sch. Dist. No. 400, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

To prevail on a negligence claim, a plaintiff must prove (1) the existence of a

duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause. Degel v. Majestic Mobile Manor, Inc., 129 Wn.2d 43, 48, 914 P.2d 728 (1996). The existence of a legal duty is a question of law we review de novo. Degel, 129 Wn.2d at 48. However, "where duty depends on proof of certain facts that may be disputed, summary judgment is inappropriate." Afoa v. Port of Seattle, 160 Wn. App. 234, 238, 247 P.3d 482 (2011).

Common Law Duty

Raymond relies on Smith v. Nealey, 162 Wash. 160, 298 P. 345 (1931); and McGrane v. Cline, 94 Wn. App. 925, 973 P.2d 1092 (1999), to argue there is a common law duty to safely store and secure the shotgun. Neither case supports Raymond's argument.

In Smith, unbeknownst to his 13-year-old son, the father placed a loaded shotgun on the backseat of his car. The father told his son to drive the car and meet him approximately one mile away. Smith, 162 Wash. at 161. As he was driving to meet his father, the boy saw a house on fire. Smith, 162 Wash. at 162. A 14-year-old girl he knew rushed out of the house and got into the backseat of the car. Smith, 162 Wash. at 162. As the boy drove off, the gun discharged and shot the girl in the foot, seriously injuring her. Smith, 162 Wash. at 162. The trial court dismissed the case on "the theory that the evidence failed to establish the relation of principal and agent between the father and the son." Smith, 162 Wash. at 162. The supreme court reversed, and held that the question for the jury was whether the father negligently entrusted the car to his 13-year-old son. Smith, 162 Wash. at 162, 167. "Courts almost universally hold

that it is negligence per se for the owner to entrust his automobile to a minor under the age designated by statute for purposes of operation." Smith, 162 Wash. at 162.[2] The court stated that if the jury determined the father negligently entrusted the car to his son, "the next question to be determined is whether there was any causal connection between

[2] (Emphasis in original.)

this negligence and the injury complained of." Smith, 162 Wash. at 164.

> Persons who leave highly dangerous instrumentalities where young children may come in contact with them, and where mischief may result, should answer in damages for the mischief, if their want of care is the proximate cause of the wrong or damage done.

Smith, 162 Wash. at 165;[3] see also Edgar v. Brandvold, 9 Wn. App. 899, 903, 515 P.2d 991 (1973) (Smith "articulated the elements necessary for liability where a child was injured by a dangerous instrumentality")).[4]

In McGrane, when the Clines were out of town, their daughter invited friends over to the family home without their permission. McGrane, 94 Wn. App. at 927. One of the friends stole a gun from the house and used it to kill McGrane during a robbery. McGrane, 94 Wn. App. at 927. Because "there are too many issues of legitimate public debate concerning the private ownership and storage of firearms," the court declined to impose a duty "based solely upon factors of ownership, theft, and subsequent criminal use of a firearm." McGrane, 94 Wn. App. at 929.

Citing RCW 9.41.080 and Bernethy v. Walt Failor's, Inc., 97 Wn.2d 929, 653 P.2d 280 (1982), Raymond also argues public policy supports imposing a duty on firearm owners to "use reasonable efforts to protect against the misuse of their firearm."

Under RCW 9.41.080, "[n]o person may deliver a firearm to any person whom he or she has reasonable cause to believe is ineligible under RCW 9.41.040 to possess a firearm."[5] In Bernethy, the court addressed a former version of RCW 9.41.080. Former RCW 9.41.080 (1935) provided, in pertinent part: "No person shall deliver a pistol

[3] (Emphasis added.)

[4] (Emphasis added.)

[5] Under RCW 9.41.040(1)-(2), a person convicted of a felony may not possess a firearm.

to . . . one who he has reasonable cause to believe has been convicted of a crime of violence, or is a drug addict, an habitual drunkard, or of unsound mind."

The court in Bernethy recognized a duty under Restatement (Second) of Torts section 390, and held that a gun shop owner could be liable for negligent entrustment where a visibly intoxicated man obtained a rifle at the gun shop and shortly afterwards shot his wife at a nearby tavern. Bernethy, 97 Wn.2d at 931-32, 934.[6] But we decline to extend Bernethy to impose a duty with respect to safely securing and storing a firearm.

Amicus Curiae on behalf of The Brady Center to Prevent Gun Violence also argues that public policy supports adoption of a duty to safely store and secure firearms in order to address the "epidemic levels" of firearm violence in the United States and the recent "spate of gunshot victims in Seattle." It is well-established in Washington that "the proper arena to resolve issues of such competing societal interests [concerning the private ownership and storage of firearms] is legislative rather than judicial." McGrane, 94 Wn. App. at 929; see also Burkhart v. Harrod, 110 Wn.2d 381, 382, 755 P.2d 759 (1988).

Restatement (Second) of Torts Section 302B

In the alternative, Raymond argues there are genuine issues of material fact as to whether David Lee and Georgianna owed a duty under Restatement (Second) of Torts section 302B.

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[6] Restatement (Second) of Torts section 390 states:

> 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.

As a general rule, there is no duty to protect others from the criminal acts of third parties. Kim v. Budget Rent A Car Sys., Inc., 143 Wn.2d 190, 195, 15 P.3d 1283 (2001). However, in Kim, our supreme court recognized a duty under Restatement (Second) of Torts section 302B to guard against a third party's criminal conduct when the risk of harm is recognizable and a reasonable person would have taken the risk into account. Kim, 143 Wn.2d at 196-97. Restatement (Second) of Torts section 302B provides:

> An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.

In Kim, a Budget employee left the keys in the ignition of a car. A third party stole the rental car and committed vehicular assault. Kim, 143 Wn.2d at 194. Because no car had been stolen from the lot before, the court concluded "nothing in the facts of this case indicat[es] that a high degree of risk of harm to plaintiff was created by Budget's conduct." Kim, 143 Wn.2d at 194, 196.[7] In addressing the comment of Restatement (Second) of Torts section 302B, the court states:

> As comment e to the section explains, a duty to guard against third party conduct may exist . . . "where the actor's own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct, which a reasonable [person] would take into account."

Kim, 143 Wn.2d at 196 (quoting Restatement (Second) of Torts § 302B cmt. e).[8]

In Robb v. City of Seattle, 159 Wn. App. 133, 246 P.3d 242 (2010), review granted, 171 Wn.2d 1024, 257 P.3d 664 (2011), this court concluded evidence of a

[7] (Emphasis in original.)

[8] (Emphasis in original) (brackets in original).

high degree of risk of harm supported finding a duty under section 302B. Robb, 159 Wn. App. at 146-47. In Robb, police officers stopped Samson Berhe on suspicion of robbery. Robb, 159 Wn. App. at 137. During the stop, the officers noticed shotgun shells on the curb next to Berhe. Robb, 159 Wn. App. at 137. Although the police were familiar with Berhe as "a young man known to be mentally disturbed and in possession of a shotgun," the officers released him. Robb, 159 Wn. App. at 147, 137. Two hours later, Berhe shot and killed Robb. Robb, 159 Wn. App. at 138. The court held the officers owed Robb a duty under section 302B, and that a jury could find the "affirmative acts . . . in connection with the burglary stop created the risk of Berhe coming back for the shells and using them intentionally to harm someone, a risk that was recognizable and extremely high." Robb, 159 Wn. App. at 144, 147.

Likewise, in Parrilla, we concluded King County owed injured motorists a duty of care under section 302B where a bus passenger who had "exhibit[ed] bizarre behavior" stole a bus and crashed into several cars after the bus driver left the bus with the engine running and the passenger on board. Parrilla, 138 Wn. App. at 431, 440-41.

Here, the parties dispute whether there was an affirmative act that created or exposed another to a high degree of risk of harm that a reasonable person would take into account under Restatement (Second) of Torts section 302B.

Raymond argues the evidence shows an affirmative act because David Lee and Georgianna went on vacation without disarming and securely storing the shotgun. In response, David Lee and Georgianna assert they "did not affirmatively put the gun in a place where it was likely to be used or misused" because they locked the gun with a

trigger lock and hid it in the closet.

Viewing the evidence in the light most favorable to Raymond, there are genuine issues of material fact as to whether David Lee's affirmative acts establish a duty under Restatement (Second) of Torts section 302B. David Lee told David Jay about the location of the shotgun so that David Jay could defend himself in the event of a burglary. David Lee testified, in pertinent part:

> Q. So you put [the shotgun] up in the closet to keep it away from who?
> A. From everybody.
> Q. Why?
> A. Well, nobody needs to know it was up there except my wife and I.
> Q. If you weren't going to tell David [Jay] that it was up there when you left for vacation why didn't you disarm it and put it away?
> A. Oh, well, we had been broke into in January. There was still burglaries going on. He was laid up with a bad knee in bed. What if this happened again? He's, you know, laying in bed. He can't defend himself.
> Q. Right, but you didn't tell him it was there anyway.
> A. No, I know, but if he -- I don't know. If he did get to searching around or something. I don't know.

David Lee also testified that he did not remember whether he secured the gun. In addition, there was inconsistent testimony about the type of lock on the gun and the location of the keys to the lock. David Lee testified he used a trigger lock and stored the key in his dresser drawer, but David Jay testified the gun was locked with a cable lock and he found the key on a bookshelf.[9] Further, David Jay told the police that he loaded the shotgun and the shotgun was "[a]lways ready."

Raymond also argues that by leaving a loaded, unlocked firearm with "a felon who had shown a lifelong inability to make good decisions," David Jay's parents

[9] The police found the trigger lock and the cable lock stored in David Lee's dresser.

created a foreseeably high degree of risk of harm that a reasonable person would take into account. Raymond asserts David Jay's history of crime, substance abuse, and mental illness, as well as "ongoing emotional and behavior problems," supports finding that a reasonable person would not have left the shotgun accessible to David Jay. David Lee and Georgianna contend that "[n]one of these facts are material because the alleged negligence was failure to remove a gun from the home" and "David Jay had no propensity to misuse or even use guns." **David Lee and Georgianna also assert the record shows they "had no knowledge that David Jay had any psychological problems."**

Viewing the evidence in the light most favorable to Raymond, there is evidence that leaving the loaded shotgun with David Jay created a foreseeable risk of harm. For example, there is evidence that David Jay previously cut up his parents' furniture with a knife and broke a fence while he was intoxicated. There is also evidence that shows David Lee and Georgianna knew that David Jay struggled with mental illness as an adult. Georgianna testified, in pertinent part:

> Q. But nothing you've told me is inconsistent with what you told [the defense attorney]?
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> A. I sure hope not.
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> . . . .
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> A. [S]ome of these things that [the defense attorney] had asked for he asked us to give him any kind of anything that would make it look like [David Jay] had some kind of mental reason for him to go in and shoot a gun. And [the defense attorney] specifically led us on putting information together on that. What was clear on this is that [David Jay] has not had -- I'm not seeing paranoia, and I have seen the depression and the anxiety and the worthlessness and the drugs and the alcoholism, and we talked about that through our letters here.
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> As far as the paranoia and the victimization and whatnot those are the things that we were told that we needed to consider and put in this letter in order to get [David Jay] any kind of assistance at all. And this is 30 minutes at a table talking to him, and we had to write two letters because we couldn't get anyone to even respond from the office.
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> Q. From the first letter.

> A. From the first letter. And we asked for everything. We sorted, we dug through everything we could find, every strip of paper we could find in a box. We dug out everything that we could find in any place to put something together for [the defense attorney]. So is this letter consistent with what the testimony as far as him hearing voices and this and that? I've never seen [David Jay] have paranoid hearing voices or acting any kind of peculiar type of behavior. But I can say that he was asking for him to get a psychological evaluation so that he could get some help.

We conclude there are material issues of fact as to whether David Lee and Georgianna **created a high degree of risk of harm that a reasonable person would take into account under** Restatement (Second) of Torts section 302B.

Negligent Entrustment

Raymond contends there are also genuine issues of material fact as to whether David Lee and Georgianna negligently entrusted the shotgun to David Jay. Under the theory of negligent entrustment, "[a] party in control of [an] instrumentality may be held liable for damages resulting from the use of that instrumentality when it is supplied or entrusted to someone who is intoxicated or otherwise incompetent." Parrilla, 138 Wn. App. at 441. See also Bernethy, 97 Wn.2d at 933-34.

Negligent entrustment 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." Hickle v. Whitney Farms, Inc., 148 Wn.2d 911, 925, 64 P.3d 1244 (2003); see also Bernethy, 97 Wn.2d at 933-34. Consent to relinquish control of the instrumentality is a necessary element of a negligent entrustment claim. Parrilla, 138 Wn. App. at 441.

Viewing the evidence in the light most favorable to Raymond, David Jay's

criminal and mental health history create material issues of fact as to whether David Lee and Georgianna consented to David Jay's use of the shotgun and the foreseeability of harm. David Lee testified that he left the shotgun in the closet in the event David Jay needed protection, and David Lee told the police that he suggested David Jay stay in the master bedroom because of an attempted break in. The police Case Report states, in pertinent part:

> I asked David [Lee] if it was unusual that his son would sleep in their bed. David [Lee] said when they left out of town he suggested to his son that he sleep in their bedroom because of an attempted break-in to their house which occurred sometime earlier this year. David [Lee] said ever since the break in he purchased the shotgun and had loaded it with birdshot.

We reverse summary judgment dismissal and remand for trial.

WE CONCUR: