In The

Supreme Court of Virginia

RECORD NO. 081718

MICHAEL H. KELLERMANN, Administrator of the Estate of Jaimee Elizabeth Kellermann, Deceased,

***Appellant*,**

v.

PAUL McDONOUGH and PAULA McDONOUGH,

***Appellees*.**

BRIEF OF APPELLEES

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STATEMENT OF THE CASE

This wrongful death case arises out of an automobile accident that occurred on December 4, 2004 in Hanover County. On that date, the decedent, Jaimee Kellermann (age 14) and three other minors, Becca McDonough, Maddy Lane and Bruce MacConnell, were passengers in a vehicle operated by 17 year-old Nathan DeFrank. Jaimee Kellermann died as a result of injuries sustained in the accident. Michael H. Kellermann, Administrator of the Estate of Jaimee Kellermann ("Kellermann"), seeks to hold Paul and Paula McDonough liable for Paula McDonough's grant of permission for Jaimee and Becca to ride home with DeFrank from a movie theatre approximately two miles from the McDonoughs' home.

Kellermann filed suit on November 30, 2006, alleging that the McDonoughs failed to exercise ordinary care in transporting Jaimee Kellermann or otherwise providing safe transportation for her. Kellermann's theory is that DeFrank was a dangerous person and that the McDonoughs had a duty to inquire as to his suitability before allowing Jaimee to ride with him.

On December 19, 2006, McDonoughs filed a Demurrer, asserting that they owed no legal duty to Jaimee Kellermann; that their actions were not the proximate cause of Jaimee Kellermann's death; and that the allegations

in the Complaint were insufficient to support a cause of action against Paul McDonough. After a hearing on March 5, 2007 ("the first hearing"), the trial court allowed the negligence claim to go forward, but expressed "serious reservations as to whether a third party, as in this case, can be liable without more in a non-paid *in loco parentis* arrangement." *See March 29, 2007 Opinion*. The court permitted the case to proceed into discovery, to determine whether Kellermann could prove a "special relationship" giving rise to a duty of care. *Id.*

In February 2008, the McDonoughs filed a Motion for Summary Judgment and a Motion to Revive Demurrer on the same grounds raised in their initial Demurrer. After extensive briefing and a hearing on May 6, 2008 ("the second hearing"), the trial court reconsidered its earlier ruling and sustained the McDonoughs' demurrer, holding that there was no special relationship between the McDonoughs and Jaimee Kellermann as a matter of law. *See May 22, 2008 Opinion*. Having decided the case on this issue, the court did not reach the issues of duty and proximate cause. *Id.* A Final Order was entered on June 3, 2008. Kellermann now appeals that ruling.

QUESTIONS PRESENTED

The ruling appealed from is the trial court's determination that there was no "special relationship" between the McDonoughs and Jaimee Kellermann. The first four questions presented in the Brief of Appellant concern whether a duty existed and the scope of such duty. As such, they do not relate to the trial court's ruling. The only issues before this Court on Kellermann's appeal are:

1. Did the trial court err in holding that there was no "special relationship" between the McDonoughs and Jaimee Kellermann?
2. Did the trial court err in making its decision on demurrer?

STATEMENT OF FACTS

In ruling on a demurrer, the issue is whether the Complaint sets forth sufficient facts (not conclusions of law) to constitute a foundation in law for the judgment sought. *See Moore v. Jefferson Hosp., Inc*., 208 Va. 438, 440, 158 S.E.2d 124, 126 (1967). Because the trial court sustained the McDonoughs' demurrer, the only relevant "facts" are those contained in the Complaint. **All of Kellermann's citations to deposition testimony and characterizations of facts different from what the Complaint alleges**

should be disregarded by this Court on this appeal.[1] The relevant facts, as alleged in the Complaint, are as follows.

In early December 2004, the Kellermanns planned for Jaimee to spend one night with the McDonoughs. *Complaint*, ¶ 5. Michael Kellermann drove Jaimee to a point roughly halfway to Richmond, where they met Paula and Becca McDonough. *Id*., ¶ 6.

After arriving in Richmond, Paula McDonough drove Jaimee and Becca to the Short Pump shopping center and movie theatre complex. *Id*., ¶ 10. The girls were joined throughout the day by Maddy Lane, Bruce MacConnell and Nathan DeFrank. *See id*., ¶¶ 11, 12 and 22. After seeing a movie, Becca called her mother and asked if the girls could get a ride home with DeFrank. *Id*., ¶ 16. The Complaint also contains allegations concerning DeFrank's reputation, behavioral problems and driving history. *See id*., ¶¶ 13, 14, 15 and 17.

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[1] *See Brief of Appellant*, pp. 18, n. 5, p. 20, p. 21, nn. 6 and 7, p. 23 and p. 36, n. 15 (citing Nathan DeFrank and Paul and Paula McDonough's deposition testimony). *See also*, *e.g. Brief of Appellant*, p. 1 (adding "fact" that the Kellermanns agreed to Jaimee's visit to Richmond "with the understanding that the Defendants would be watching over and taking care of their daughter"), p. 18 (adding allegations that DeFrank "had threatened and fought with other students" and "was … suspended from the Henrico County School System … [and] for, among other things, bullying and fighting with other students"), and p. 19 (adding allegation that "DeFrank has subsequently been convicted of arson, grand larceny and breaking and entering.") There are other examples.

Paula McDonough permitted the two 14-year-olds, **including her own daughter**, to get a ride home with DeFrank. *Id*., ¶ 18. DeFrank drove the group down Cauthorne Road and caused the automobile accident. *See id*., ¶¶ 24 and 26. Jaimee Kellermann died as a result of injuries sustained in the accident. *Id*., ¶ 29.

SUMMARY OF ARGUMENT

Kellermann seeks to extend Virginia law far beyond its current status, by imposing on parents hosting a sleepover duties to warn and protect a visiting child from the conduct of third parties and to inquire as to the reputation and behavioral, psychological and driving history of every third party with whom the visiting child comes into contact. Kellermann also seeks to overturn the well-established principle of Virginia law that every individual is responsible for his own torts, by imposing liability on the McDonoughs for DeFrank's reckless driving.

The trial court correctly ruled that no special relationship existed between the McDonoughs and Jaimee Kellermann. Even if this Court finds a special relationship, the McDonoughs should prevail on appeal, because the McDonoughs owed no duty to protect Jaimee Kellermann from DeFrank's actions, and because Paula McDonough's grant of permission

for Jaimee Kellermann to ride in the car with DeFrank was not, as a matter of law, a proximate cause of Jaimee Kellermann's death.

PRINCIPLES OF LAW, ARGUMENT AND AUTHORITY

I. THE TRIAL COURT CORRECTLY CONCLUDED THAT NO SPECIAL RELATIONSHIP EXISTED BETWEEN THE MCDONOUGHS AND JAIMEE KELLERMANN.

A plaintiff seeking to plead actionable negligence must plead a cognizable legal duty. *See*, *e.g. Fox v. Custis*, 236 Va. 69, 372 S.E.2d 373 (1988). Here, where plaintiff seeks to impose liability on the McDonoughs for failing to protect Jaimee Kellermann from the actions of a third party, no duty to warn or protect exists unless two elements are met: (1) a special relationship; **and** (2) knowledge on the part of the defendants of an imminent probability of harm. *See*, *e.g. Yuzefovsky v. St. John's Wood Apartments*, 261 Va. 97, 540 S.E.2d 134 (2001); *Thompson v. Skate America*, 261 Va. 121, 540 S.E.2d 123 (2001). Here, the trial court correctly determined that there was no special relationship between the McDonoughs and Jaimee Kellermann.

This Court has recognized certain relationships to be "special" as a matter of law: business invitor/invitee, innkeeper/guest, common carrier/passenger and employer/employee. *See Skate America*, 261 Va. at 127, 540 S.E.2d at 129 (citing *A.H. v. Rockingham Pub. Co.*, 255 Va. 216,

495 S.E.2d 482 (1998)).[2] No Virginia court, trial or appellate, has ever recognized a "special relationship" under a social host/sleepover situation like that presented here.

Kellermann relies principally upon three cases to support his claim that a special relationship existed: *Skate America*, *supra*; *Taboada v. Daly Seven, Inc*., 271 Va. 313, 626 S.E.2d 428 (2006), *aff'd*, 273 Va. 269, 641 S.E.2d 68 (2007); and *Doe v. Bruton Parish Church*, 42 Va. Cir. 467 (1997) (Williamsburg). None of these cases supports extension of this area of Virginia law to the social host/sleepover situation.[3]

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[2] Contrary to Kellermann's assertion that *Skate America* did not mention "whether or not the defendants are operating a business" in finding the existence of a special relationship (*Brief of Appellant*, pp. 37 – 38), the fact that Skate America was a business owner and the plaintiff was its invitee was **precisely** the reason this Court found that a special relationship existed as a matter of law. *Skate America*, 261 Va. at 127, 540 S.E.2d at 129. Kellerman conflates this Court's holding in *Skate America* on the special relationship issue with its analysis as to whether that special relationship also gave rise to a duty of care.

[3] Kellermann also cites to a recent district court decision, *Nationwide Mut. Fire Ins. v. Overstreet*, ___ F. Supp. 2d ___, 2008 WL 2926010 (E.D. Va. 2008). In *Overstreet*, a declaratory judgment action, the court ruled that the defendants breached an insurance policy's notice provision and stated that "there is **a possibility** that parents who voluntarily undertake to watch a child in their home … **may** owe a duty of care to that child." *Id*. at *8 (emphasis added). The court did not decide that such a duty existed. The court cited *Bruton Parish*, *supra*. For the reasons stated herein, neither *Bruton Parish* nor the *Restatement (Second) of Torts* (cited in *Bruton Parish*) create a duty on the part of the McDonoughs in this case.

In *Skate America*, one child struck another child in the head with a skate, and this Court held that the business invitor/invitee relationship existing between Skate America and the injured child was a "special relationship." *Id*. at 127, 540 S.E.2d at 129. The dispositive issue was whether that special relationship also gave rise to a duty of care on the part of Skate America to protect the victim from the criminal attack. *Id*.

In *Taboada*, a hotel guest was robbed and assaulted on the hotel's premises, and he sued the hotel for failing to warn or protect him from the attack. *Taboada*, like *Skate America*, involved a "special relationship" recognized by law. *Id.* at 322, 626 S.E.2d at 432 ("innkeeper and guest has long been recognized by the common law as constituting … a 'special relationship.'"). Thus, the first prong of the duty analysis was fulfilled.

Here, there was no presumptive, legally-recognized special relationship between the McDonoughs and Jaimee Kellermann. This was an unpaid social host scenario, not a business invitor/invitee or innkeeper/guest relationship. There is no Virginia opinion recognizing a special relationship under these facts. There are, however, Virginia circuit court opinions recognizing the **absence** of a special relationship (and corresponding duty of care) in the social host context. *See Harrison v.*

Bittler, 72 Va. Cir. 7 (2006) (Loudoun); *Kelley v. Doremus*, 38 Va. Cir. 44 (1995) (Fairfax).

In *Harrison*, defendants allowed a party to take place on their premises involving minors and alcohol. Plaintiff was assaulted by an intoxicated guest at the party. The court sustained defendants' demurrer. *Id*. at 11-12. Noting that this Court had never recognized a special relationship or duty of care between a social host and guest, the court "decline[d] to extend the special relationship, imminent probability of harm exception to the general rule of no duty to protect against third party criminal conduct to a social host as to a social guest on the social host's property." *Id*. at 13-14.

Similarly, in *Kelley*, two minor girls, Kelley and Kolasky, were friends and neighbors. Kolasky's mother drove the girls to a party at which underage alcohol consumption occurred. The girls rode home with a minor boy who was intoxicated, and an accident occurred, killing Kelley. Kelley's parents sued the Kolaskys, alleging "a reciprocal fiduciary duty that Kolasky breached by transporting [the girls] to [the] party…, by failing to warn [Kelley] of the dangers involved, and by failing to warn the Kelleys of the danger to their child." *Id*. The court summarily disposed of the case, finding that no cognizable fiduciary duty had been alleged. *Id*. at 47.

In order to supply a "special relationship" where no Virginia court has ever recognized one, plaintiff relies on *Doe v. Bruton Parish*, *supra*. In *Bruton Parish*, a church's hired babysitter occasionally sent her son to baby-sit in her stead, despite her knowledge, as his mother, of his dangerous proclivities. The son molested the children of the church. Under those facts – a commercial relationship and the knowledge or intimate opportunity for knowledge of her own son's nature – the Williamsburg Circuit Court overruled the mother's demurrer and found that sufficient facts had been alleged to support a duty of care owed by the mother to her charges. In so holding, the court analyzed the *Restatement (Second) of Torts* § 315 (1965), which states that there is no duty to control the conduct of a third person unless "… a special relationship exists between the actor and the other which gives the other a right to protection." *Id*., 42 Va. Cir. at 472. The court recognized the commercial babysitting relationship as a § 315 "special" relationship, then considered whether a duty of care arose.

As *Bruton Parish* was decided in 1997, the court there did not yet have the benefit of this Court's recent decisions on the "special relationship" issue. *See*, *e.g. Taboada*, *Skate America and Yuzefovzky*, *supra*. This Court has never recognized even a paid babysitting relationship as a "special relationship;" in fact, this Court has expressly **rejected** the Restatement rule

imposing a general duty on a business invitor. *See Wright v. Webb*, 234 Va. 527, 362 S.E.2d 919 (1987) (expressly rejecting *Restatement (Second) of Torts* § 314A). Here, Kellermann would have this Court go even further, beyond recognizing a special relationship in a commercial babysitting situation, to an unpaid social host/sleepover situation.

The trial court correctly ruled that no special relationship existed between the McDonoughs and Jaimee Kellermann. As such, this Court should affirm the trial court's decision sustaining the McDonoughs' demurrer.

II. THE TRIAL COURT CORRECTLY DISMISSED THE CASE AT THE DEMURRER STAGE.

The issue of whether a special relationship existed is part of the analysis of whether the McDonoughs owed a duty to warn or protect Jaimee. Whether a duty of care exists is a pure question of law. *See*, *e.g. Burns v. Johnson*, 250 Va. 41, 458 S.E.2d 448 (1995). Accordingly, the "special relationship" issue was ripe for decision on demurrer.

Although the Complaint makes a conclusory allegation that the McDonoughs "had a special relationship of care and trust between themselves and the Kellermanns, including Jaimee Kellermann," *id*. ¶ 8, the facts alleged illustrate only a social relationship. The McDonoughs are the parents of Jaimee's friend and former classmate. A demurrer does not

admit the correctness of a pleader's conclusions of law. *Yuzefovsky*, *supra*. It was appropriate for the trial court to look beyond the legal conclusions set forth in the Complaint and to decide that no special relationship existed as a matter of law.

Kellermann asserts that the sustaining of the demurrer is somehow improper, because the trial court reversed itself after the second hearing. However, it was within the trial court's sound discretion to reverse itself in this manner. *See Cloutier v. Queen*, 35 Va. App. 413, 420-21, 545 S.E.2d 574, 578 (2001) ("[T]he chancellor must have the ability to enter a timely order embodying a correct resolution of the case."). The trial court properly sustained the demurrer after the second hearing.

III. THERE ARE OTHER REASONS FOR WHICH THE TRIAL COURT COULD HAVE SUSTAINED THE DEMURRER.

Kellermann improperly assigns error to matters not reached by the trial court, specifically, whether the McDonoughs owed a duty to Jaimee Kellermann. *See Petition for Appeal*, p. 1-2 (Assignments of Error 1-4). Nonetheless, the McDonoughs address these issues here – and, importantly, the proper resolution of these issues favors the McDonoughs.

The trial court could have reached the following additional conclusions as a matter of law: (1) that the McDonoughs owed no duty of care to Jaimee Kellermann, and (2) that Paula McDonough's grant of

permission for Jaimee Kellermann to ride with DeFrank was not a proximate cause of Jaimee's death. For these independent reasons, the McDonoughs should prevail.

A. The McDonoughs owed no cognizable legal duty to Jaimee Kellermann.

1. The McDonoughs owed no duty to warn or protect Jaimee Kellermann from the actions of Nathan DeFrank.

This Court has cautioned that there are only "narrow exceptions" to the general rule that there is no duty to protect another from the criminal acts of a third party. *Yuzefovsky*, 261 Va. at 106, 540 S.E.2d at 139. The framework for such an exception is two-fold. First, plaintiff must prove the existence of a special relationship. Even when a special relationship has been established, no duty to warn or protect arises unless the defendants knew of an imminent probability of harm. *See id*. Here, Kellermann has failed to allege facts sufficient to fulfill the second prong of this analysis.

In two recent cases involving criminal acts of third parties, this Court overruled defendants' demurrers, *see Skate America and Taboada*, *supra*; however, the allegations of knowledge on the part of the defendants in those cases were markedly different from the allegations in the Complaint herein.

In *Skate America*, the Complaint alleged that the perpetrator had previously caused disturbances, arguments and fights at the rink and was a known troublemaker, so much so that **Skate America had ejected him on prior occasions and had banned him from reentry**. *Id*., 261 Va. at 125, 540 S.E.2d at 125. On the day of the incident, Skate America violated its own ban by allowing the perpetrator into the rink. *Id*.

Similarly, in *Taboada*, the Complaint alleged that in the three years preceding the incident, the hotel had "**regularly called the Roanoke City Police Department on at least 96 occasions** to report [the presence of suspicious persons and crimes]." *Id*., 271 Va. at 319, 626 S.E.2d at 430 (emphasis added). The Complaint further alleged that the **hotel "was informed by the Roanoke City Police Department and by others that its guests were at a specific imminent risk for harm** to their persons from uninvited persons coming into or upon its property…." *Id*. (emphasis added).

The defendants in both *Skate America* and *Taboada* allegedly **knew** of the "imminent probability of harm" presented to the eventual victim. Here, the Complaint makes conclusory allegations as to DeFrank's disciplinary, psychological and driving history, but does not link knowledge

of such history to the McDonoughs.[4] Thus, the McDonoughs owed no duty to Jaimee Kellermann, and the trial court should have sustained the demurrer on this additional ground.

2. The McDonoughs did not voluntarily undertake a duty to warn or protect Jaimee Kellermann.

Kellermann relies on *Doe v. Bruton Parish*, *supra*, in support of his claim that the McDonoughs owed a legal duty to Jaimee Kellermann by "undertaking her care and custody." In *Bruton Parish*, the court recognized a commercial babysitting relationship as a "special relationship" under *Restatement* § 315, then looked to *Restatement* § 320 to define the mother's duty to control her son. *Id*., 42 Va. Cir. at 473.

The plaintiffs in *Bruton Parish* alleged that the son had an unhealthy home family situation, owned hard core pornography magazines, had a very unusual predilection toward children, had few or no peers as friends, harbored anger about supposedly being mistreated by his uncle, liked to lay down with, listen to music with, nap with, tickle and wrestle with, change diapers of, and make bathroom trips with young children, bought violent comic books, had a fascination with spanking, and befriended and reportedly

[4] As argued below, the McDonoughs contend that only DeFrank's **driving** history is relevant to this case.

had sexual relationship with a severely retarded underage girl. *Id*. at 480.[5] The mother, by virtue of the parent-child relationship, knew or had unique access to this information about her son. Accordingly, the plaintiffs in *Bruton Parish* alleged enough facts to survive demurrer.

Even if this Court adopted *Bruton Parish* and took it one step further, recognizing an unpaid social host/guest relationship as "special," Kellermann still has not alleged facts sufficient to impose a duty on the McDonoughs. In *Bruton Parish*, there was a mother-son relationship. Here, there is **no** relationship between Paul or Paula McDonough and DeFrank.

More fundamentally, *Bruton Parish* held that there might be a duty to protect in a commercial babysitting relationship where there is **knowledge of a third-party's likelihood to inflict harm**. Kellermann attempts to extend this alleged duty to one of inquiry into a person's nature, contending that the McDonoughs had a **duty to investigate** DeFrank's nature, character and driving abilities before allowing Jaimee Kellermann to get into his car. That is **not** the duty addressed in *Bruton Parish*.

Bruton Parish and the *Restatement* do not represent the law of Virginia in the third-party criminal act context. Even if they did, the facts of *Bruton*

[5] Although these facts appear in the *Bruton Parish* court's discussion of plaintiffs' Negligent and Grossly Negligent Hiring and Retention Claims, they are the operative facts for the "special relationship"/ability to control third party claim as well.

Parish are markedly different from the case at bar, and the trial court should have ruled that the McDonoughs owed no legal duty to Jaimee Kellermann.

3. The McDonoughs did not assume a duty to warn or protect Jaimee Kellermann from DeFrank's actions.

Kellermann relies on *Didato v. Strehler*, 262 Va. 617, 628, 554 S.E.2d 42, 48 (2001), a medical malpractice case, for his contention that the McDonoughs assumed a duty to Jaimee Kellermann. *Didato* did not involve an alleged duty to warn or protect from the actions of a third party or an alleged duty to inquire as to a third party's history before allowing interaction. Virginia law has an established framework for such cases. Thus, *Didato* has no application here.

The out-of-state cases cited by Kellermann are similarly inapplicable and unpersuasive.[6] None of those cases involve harm inflicted by the criminal acts of a third party. Instead, they deal, at most, with a cause of action for negligent supervision. This Court has unequivocally stated that Virginia does not recognize the tort of negligent supervision. *Chesapeake & Potomac Tel. Co. v. Dowdy*, 235 Va. 55, 61, 365 S.E.2d 751, 754 (1988);

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[6] *See Barrea v. General Elec. Co.*, 378 N.Y.S.2d 239 (N.Y. Sup. Ct. 1975) (holding doctrine of parental immunity did not apply to grandparent); *Standifer v. Pate*, 282 So.2d 261 (Ala. Ct. 1973); *Barbarisi v. Caruso*, 135 A.2d 539 (N.J. Super. 1957); *Rider v. Speaker*, 692 N.Y.S.2d 920 (N.Y. Sup. Ct. 1999); *Anderson v. Mitts*, 185 S.W.3d 154 (Ark. Ct. App. 2004) (all involving toddlers who injured themselves while unsupervised).

see also Kelley v. Doremus, *supra* (holding no duty undertaken by neighbors toward their children in an unpaid babysitting scenario).

B. DeFrank's actions were the sole proximate cause of Jaimee Kellermann's death.

Only DeFrank is responsible for this accident. Under Virginia law, individuals are responsible for their own torts. *See Robinson v. Matt Mary Moran, Inc*., 259 Va. 412, 525 S.E.2d 559 (2000). In *Robinson*, this Court held, **on demurrer**, that a bar that illegally served an underage driver to intoxication was not the proximate cause of the subsequent deadly accident. *Id*.

This principle applies in the social host context as well. In *Kelley v. Doremus*, *supra*, the Fairfax County Circuit Court held, **on demurrer**, that a parent who drove a neighbor's child to a party involving alcohol was not the proximate cause of the child's death. *Id*., 38 Va. Cir. at 48.

Finally, in *Turner v. Lotts*, 244 Va. 554, 422 S.E.2d 765 (1992), this Court **upheld a grant of summary judgment** in favor of parents who entrusted their car to their son, holding that the parents' knowledge of the son's three previous tickets and two previous accidents was not a proximate cause of the accident sued upon. *Id*.

Here, **DeFrank's** speeding and loss of control of his vehicle caused the accident. Paula McDonough's decision to grant permission for her

daughter and Jaimee Kellermann to ride with DeFrank was not a proximate cause of this accident, as a matter of law.

ASSIGNMENTS OF CROSS-ERROR

Paul and Paula McDonough assign the following cross-error:

1. The trial court erred in overruling defendants' demurrer after the first hearing.
2. The trial court erred in overruling Paul McDonough's demurrer after the first hearing.

QUESTIONS PRESENTED

1. Did the trial court err in overruling defendants' demurrer after the first hearing? (Assignment of Cross-Error 1)
2. Did the trial court err in overruling Paul McDonough's demurrer after the first hearing? (Assignment of Cross-Error 2)

PRINCIPLES OF LAW, ARGUMENT AND AUTHORITY

If this Court finds procedural error in the trial court's granting of defendants' demurrer after the second hearing, it should hold that the trial court's decision overruling the demurrer after the first hearing was erroneous. For the reasons set forth above, there was no special relationship between the McDonoughs and Jaimee Kellermann, the McDonoughs owed no duty to warn or protect Jaimee from DeFrank's

actions, and Paula McDonough's grant of permission for Jaimee to ride with DeFrank was not a proximate cause of Jaimee's death.

Finally, Kellermann has cited no facts and no law sufficient to establish a claim against Paul McDonough. Paul McDonough did not grant permission for Jaimee Kellermann to ride with DeFrank. Relying on *Marchioli-Acra v. Commonwealth*, 2005 WL 588303 (Va. App.)), an unpublished opinion, Kellermann suggests that Paul McDonough's assent to his wife's decision to permit Jaimee to ride with DeFrank imposes upon him a duty of care. First, the defendant in *Marchioli-Acra* actually molested the child. Second, the sole issue in *Marchioli-Acra* was whether the child-molesting defendant exercised the necessary degree of control and care over the victim to satisfy the "custodial or supervisory relationship" requirement of Virginia Code section 18.2-370.1. The opinion does **not** address whether a "special relationship" existed that would give rise to a duty of care to protect the child from the actions of a third party. Accordingly, the case is not relevant to any issue now before this Court.

Kellermann implicitly acknowledges that Paul McDonough did not grant permission for Jaimee to ride with DeFrank; instead, Kellerman argues that Paul McDonough had a duty of care because he "knew of, and assented to, the arrangements for and decisions made concerning Jaimee

Kellermann." *Brief of Appellant*, p. 31. The only allegations in the Complaint, however, are that Paul McDonough allowed Jaimee to stay in his home and that "the Defendants, **through Defendant Paula McDonough**, knowingly, consciously and purposefully" allowed Jaimee to ride with DeFrank. There is simply no basis under Virginia law to impose liability on Paul McDonough for the alleged conduct of his wife. Thus, the trial court erred in overruling Paul McDonough's demurrer after the first hearing.

STATEMENT OF PRECISE RELIEF SOUGHT

For the foregoing reasons, this Court should affirm the trial court's decision sustaining the McDonoughs' demurrer because of the absence of a special relationship. Even if this Court is inclined to consider that decision, it should then consider the trial court's denial of the defendants' demurrer after the first hearing and affirm the dismissal of Kellermann's Complaint on both of the following grounds: (1) that the McDonoughs owed no cognizable legal duty to Jaimee Kellermann; and (2) that Paula McDonough's grant of permission for Jaimee Kellermann to ride with DeFrank was not, as a matter of law, a proximate cause of Jaimee Kellermann's death.

PAUL AND PAULA MCDONOUGH

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CERTIFICATE OF FILING AND SERVICE

Pursuant to Rule 5:26(d) of the Rules of the Supreme Court of Virginia, I hereby certify that twelve paper copies and one electronic copy on compact disc of this Brief of Appellees have been hand-filed with the Clerk's Office of the Supreme Court of Virginia and three copies of said brief have been served via hand delivery, this 13th day of February 2009, on:

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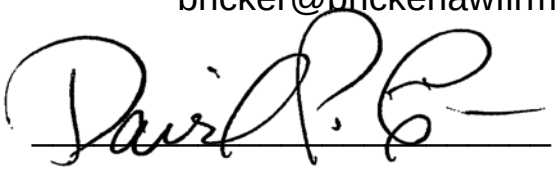
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