In The

Supreme Court of Virginia

RECORD NO. 081718

MICHAEL H. KELLERMANN,
ADMINISTRATOR OF THE ESTATE OF
JAIMEE ELIZABETH KELLERMANN, Deceased,

***Plaintiff - Appellant*,**

v.

PAUL McDONOUGH and PAULA McDONOUGH,

Defendants - Appellees.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Plaintiff-Appellant Michael H. Kellermann, Administrator of the Estate of Jaimee Elizabeth Kellermann, Deceased, appeals the trial court's dismissal, on demurrer, of his wrongful death claim against Defendants-Appellees Paul and Paula McDonough. As stated in the Complaint, the McDonoughs told Mike and Liz Kellermann that the McDonough's 14-year-old daughter, Becca McDonough, was having a "tough time of it" (App. Vol. II at 137, ¶ 4).[1] The McDonoughs said that their daughter's mood and outlook might improve if she spent some time with her former classmate, Jaimee Kellermann, who had moved with her family to North Carolina two years earlier. (Id.) The McDonough asked if Jaimee could stay a night or two at the McDonoughs' home. (Id.) The Kellermanns agreed, with the understanding that the Defendants would watch over and take care of their daughter. (App. Vol. II at 138, ¶ 5, ¶ 7.) Defendant Paula McDonough picked up Jaimee in North Carolina and drove her to Virginia. She then left Jaimee Kellermann and Becca McDonough at a shopping center and

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[1] All references in this Opening Brief to the Initial Pleading are to the Substitute Complaint. (App. Vol. II at 136-153.) With the exception of an individual's name designation, the Substitute Complaint is identical to the original Complaint (App. Vol. I at 1-18), which was filed under seal. On April 4, 2007, the Circuit Court signed an Order directing that the Complaint in this matter be unsealed in the form of a Substitute Complaint that substituted "NDF" in the place of the name of the individual first referenced in paragraph 12 of the original Complaint. (App. Vol. II at 111-12.)

movie theatre complex in Henrico County, Virginia. (App. Vol. II at 139, ¶ 10.) Defendant Paula McDonough was supposed to return to the shopping complex to pick up Jaimee and Becca, and drive the girls back to the McDonoughs' home. However, with her husband's knowledge and assent, Defendant Paula McDonough ***directed*** that Jaimee Kellermann, Becca McDonough, and one other 14-year-old girl be driven to the McDonoughs' home by a 17-year-old boy whom the McDonoughs knew, or should have known, to be a dangerous and disturbed minor, and a reckless driver. (App. Vol. II at 140, ¶ 17-18.) (That 17-year-old boy subsequently is referred to herein as "NDF"). The McDonoughs' decision to have a dangerous teenage driver serve as their substitute substantially increased the risk of harm to Jaimee Kellermann and led to her death. Instead of taking care of her and protecting her, Defendants put her in a car with someone whom they knew, or should have known, likely would, and, in fact, did, cause her grave harm.

This Court has acknowledged the basic common law principle that when one assumes a duty to act for the benefit of another, one has a duty to act carefully. See Didato v. Strehler, 262 Va. 617, 554 S.E.2d 42 (2001). Such are the facts alleged here. Under these circumstances, there is a duty to exercise reasonable care so as not to increase the risk of harm. A

duty may also arise when one suffers harm resulting from reliance upon the other's undertaking. See Didato (applying the Restatement (Second) of Torts § 323). Under this standard, Defendants can be held liable for their *own* affirmative, unreasonable, and careless conduct. The Defendants voluntarily assumed the duty to take care of Jaimee, including providing her with safe transportation. Neglecting that duty, Defendants opted not to drive her home from the movie and shopping complex, but instead selected a reckless and dangerous 17-year-old boy to carry out their obligations for them.

Plaintiff has also stated a cause of action for imposing liability on Defendants for breaching an additional duty in their failure to protect Jaimee from the actions of NDF. As the trial court determined in its initial ruling on Defendants' demurrer, the rationale in Doe, et al. v. Bruton Parish Church, et al., 42 Va. Cir. 467 (1997) (Williamsburg), and the Restatement (Second) of Torts, 2d, § 320, provides a legal basis for imposing a duty upon Defendants. The Defendants had the ability to control, and, indeed, did control, Jaimee's environment, including who would drive her home from the mall. They specifically designated NDF as their substitute. Plaintiff has alleged facts sufficient to show that NDF was a person who Defendants knew, or should have known, needed to be controlled, given

his history and propensity for reckless, deviant, and impulsive conduct, and given his prior association with their daughter.

Accordingly, a "special relationship" existed between Defendants and Jaimee Kellermann. The finding of a special relationship is not limited, as Defendants have contended, to paid, commercial relationships.

Logic, legal prudence, and public policy demand that the question, "Did Defendants owe Jaimee Kellermann a legal duty?" must be answered in the affirmative. It would be nonsensical to argue otherwise. Indeed, in a bailment for mutual benefit, which is based on the simple delivery and possession of a chattel, the bailee has a duty to use "ordinary care for the protection, preservation, and return of the property." Volvo White Truck Corp. v. Lowell Phillip Vineyard, 239 Va. 87, 91, 387 S.E.2d 763, 766; see also Evans v. Charles Baker Infiniti, Inc., 2002 Va. LEXIS 91 (2002). Human decency and legal consistency demand that this Court recognize that Defendants owed Jaimee a greater duty than they would owe to a non-living chattel.

MATERIAL PROCEEDINGS BELOW

This appeal arises from the entry of a June 3, 2008 Order granting the Defendants' demurrer in a wrongful death case. (App. Vol. II at 443.) The June 3 Order was handed down shortly before the scheduled trial in

this matter, after a hearing upon Defendants' simultaneously filed Motions: 1) for Summary Judgment, and 2) to Revive Demurrer. (App. Vol. II at 156-57, 154-55.) The June 3 Order was "upon reconsideration" of the trial court's initial ruling on Defendants' demurrer, rendered over a year earlier, on March 29, 2007. (App. Vol. II at 109-110.) In its initial ruling, the trial court, by its own characterization, "overruled [Defendants'] demurrer, pending discovery and further arguments of the parties." (App. Vol. II at 441.) *No new dispositive or relevant precedent was handed down in the 14 months between the trial court's decisions to overrule, and then to sustain, Defendants' demurrer.*

On December 19, 2006, the Defendants filed their demurrer. (App. Vol. II at 21-24.) The matter was briefed fully by the parties, and a lengthy hearing on the demurrer was held on March 5, 2007. (App. Vol. II at 25-31, 32-46, 47-102.) Both parties submitted letters to the trial court supplementing their arguments; the letters were accepted by the trial court. (App. Vol. II at 103-105, 106-108.)[2] On March 29, 2007, the trial court issued a letter opinion overruling Defendants' demurrer as to the

[2] Following the filing of the parties' Joint Petition for Certiorari, on January 9, 2009 this Court directed the Clerk of the Circuit Court to include the letters in the record. To ensure the timely inclusion of the letters in the Joint Appendix, the parties have provided the letters rather than awaiting the transmittal of the records from the Clerk of the Circuit Court.

negligence count. (App. Vol. II at 109-110.) The trial court sustained Defendants' demurrer as to the other claims. (App. Vol. II at 109.)

At relevant part, the trial court stated in its Letter Opinion:

> …the Court believes that the negligence claim at this point should go forward. … The Court has 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.
>
> The closest case to this one is an opinion by Justice [then Judge] Donald Lemons in Doe et al. v. Bruton Parish Church et al., 42 Va. Cir. 467 (1997), which involved babysitters. Judge Lemons stated that Virginia 'does recognize § 315(b) relationships', [Restatement (Second) of Torts § (315)][.] That section states no duty exists unless a 'special relationship' exists between the actor and the other which gives to the other a right to protection.'
>
> In Thompson v. Skate America, 261 Va. at 129 (2001), the Court confirmed that a third party must owe a duty to the plaintiff but does hint that 'particular factual circumstances in a given case …' should be examined. The case is not ripe at this point for a demurrer if plaintiff can prove a 'special relationship' that creates a duty of the defendants to plaintiffs.

(App. Vol. II at 109-110.)[3]

On April 5, 2007, the Defendants filed a Motion to Reconsider and/or Clarification of the Court's Letter Ruling (App. Vol. II at 113-116), to which

[3] On January 9, 2009, the parties filed a Joint Petition for Writ of Certiorari seeking to include the Circuit Court's March 29, 2007 letter opinion in the record of this matter. Counsel for the Appellant understands that the Joint Petition will not be presented to this Court until on, or after, the date that Appellant's Opening Brief is due. As a result, although the Appellant has included the March 29 letter opinion in the Joint Appendix and referred to the letter opinion here, the Appellant with file corrected copies of the same in the event that this Court does not grant the Joint Petition.

Plaintiff filed a Memorandum in Opposition. (App. Vol. II at 117-123.) The Motion to Reconsider was not granted. Thereafter, the parties conducted discovery, including the taking of numerous depositions, and the review of copious school disciplinary records relating to the 17-year-old driver selected by the Defendants to drive the car full of teenagers. See Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment, filed with the trial court on April 22, 2008. (App. Vol. II at 214-235.)

On February 12, 2008, Defendants filed: (1) a Motion for Summary Judgment, (2) a Memorandum in Support of Motion for Summary Judgment, and, (3) a Motion to Revive Demurrer. (App. Vol. II at 156-57, 158-172, 154-55.) On April 22, 2008, Plaintiff filed his "Memorandum in Opposition to Defendants' Motion for Summary Judgment," which, among other matters, addressed the "duty" issue. (App. Vol. II at 214-235.) On April 30, 2008, Defendants filed a "Reply Brief in Support of Motion for Summary Judgment and Motion to Revive Demurrer." (App. Vol. II at 303-313.) A hearing was held on May 6, 2008, in which counsel made argument concerning both of Defendants' motions. (App. Vol. II at 314-384.) Following the hearing, both parties submitted additional letters in support of their positions. (App. Vol. II at 385-400, 401-433, 434, 435-36,

437, 438-39.) As previously stated, on June 3, 2008, "upon reconsideration," the Court sustained Defendants' demurrer. (App. Vol. II at 443-447.)

As substantiation for its ruling sustaining Defendants' demurrer, the trial court cited in its May 22, 2008 letter ruling the decisions in Doe v. Bruton Parish Church, 42 Va. Cir. 467 (1997) (Williamsburg) (by Justice (then Judge) Lemons), and Thompson v. Skate America, Inc., 261 Va. 121, 540 S.E.2d 123 (2001). As noted above, the trial court had cited these same authorities 14 months earlier as bases for ***overruling*** the Defendants' demurrer. In its analysis, the trial court said that Bruton Parish, Skate America, and two other cases, one cited by Plaintiff, Ryan Taboada v. Daly Seven, Inc., 271 Va. 313, 626 S.E.2d 428 (2006), and a dram shop case cited by Defendants, Kelley v. Doremus, 38 Va. Cir. 44 (1995) (Fairfax), "…have facts slightly close but not 'on all fours' with the facts of this case." (App. Vol. II at 441.)

In the same May 22, 2008 Letter Opinion, the trial court quoted Justice (then Judge) Lemons's citation to the Restatement of Torts 2d, Sections 315 and 320, from the Bruton Parish case:

> 'One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting

themselves as to create an unreasonable risk of harm to him, if the actor

> (a) knows or has reason to know that he has the ability to control the conduct of the third persons, and
> (b) knows of [or] should know of the necessity and opportunity for exercising such control.'

After citing the foregoing, the trial court stated, "This is not the law in Virginia." (App. Vol. II at 441-442.)[4]

Contrary to the trial court's conclusion concerning the Restatement and Bruton Parish, U.S. District Court Judge Ellis of the Eastern District of Virginia suggested a different interpretation (in dicta) in his opinion in Nationwide Mutual Fire Insurance Co. v. Overstreet, 2008 U.S. Dist. LEXIS 56959 (E.D. Va. July 24, 2008). In that case, decided after the trial court granted Defendants' demurrer in the instant matter, the U.S. District Court, citing both the holding in Bruton Parish and Section 320 of the Restatement of Torts, 2d, stated, "[t]here is also a possibility that parents who voluntarily undertake to watch a child in their home, taking that child away from the

[4] Additionally, at page 3 of its May 22 letter opinion, the trial court stated, "[h]aving considered all of the facts, the Court need not go beyond whether a special relationship existed *between the two sets of parents*." (Emphasis added). (App. Vol. II at 442.) That statement suggests that the trial court erroneously analyzed the duty issue as existing between Mr. & Mrs. McDonough and Mr. & Mrs. Kellermann, and not as existing between the Defendants and Jaimee Kellermann, as Plaintiff principally alleged.

protection of his or her parents, may owe a duty of care to that child." Id. at *27.

On June 3, 2008, the trial court entered its Order sustaining Defendants' demurrer, and this timely appeal followed. See June 18, 2008 Notice of Appeal. On December 10, 2008, this Court granted Appellant's appeal and Appellees' assignments of cross-error.

ASSIGNMENTS OF ERROR

1. The trial court erred in sustaining Defendants' demurrer to Plaintiff's negligence claim, because Defendants owed a legal duty to Jaimee Kellermann, the 14-year-old girl whom they invited to stay at their home, away from the protection of her parents, and for whom they voluntarily undertook care and custody.

2. The trial court erred in sustaining Defendants' demurrer to Plaintiff's negligence claim, because Defendants assumed a duty to act for the benefit of Jaimee Kellermann, the 14-year-old girl whom they invited to stay at their home, away from the protection of her parents, and for whom they voluntarily undertook care and custody; Defendants, therefore, had a duty to act carefully.

3. The trial court erred in sustaining Defendants' demurrer to Plaintiff's negligence claim, because the Defendants had a duty to exercise

reasonable care when they undertook to act for Jaimee Kellermann's protection, and their failure to exercise such care: 1) increased the risk of harm to Jaimee, or, 2) resulted in actual, catastrophic harm to Jaimee due to her reliance upon the Defendants' undertaking.

4. The trial court erred in sustaining Defendants' demurrer to Plaintiff's negligence claim, because the Defendants, who voluntarily undertook the care and custody of Jaimee Kellermann, owed her a duty to exercise reasonable care in controlling the conduct of third parties to prevent her from harm, because they: 1) knew they had the ability to control the third person, and, (2) knew, or should have known, of the necessity of such control.

5. The trial court erred in sustaining Defendants' demurrer to Plaintiff's negligence claim, because a special relationship existed between Defendants and Jaimee Kellermann, the14-year-old girl whom they invited to stay at their home, away from the protection of her parents, and for whom they voluntarily undertook care and custody.

6. The trial court erred in sustaining Defendants' demurrer to Plaintiff's negligence claim, because the facts pleaded, implied, and justly inferred are legally sufficient to state a cause of action against Defendants.

QUESTIONS PRESENTED

This case raises the simple issue of whether Defendants' actions towards, and relationship with, Jaimee Kellermann were such that they owed her a legal duty, in light of the fact that Defendants invited her to stay in their home for the weekend away from the protection of her parents, voluntarily undertook her care and custody, and acted with the understanding of that undertaking. In ruling on this appeal, this Court need not address the issue of duty in every guest/host situation. Instead, this Court need only consider the guest/host relationship with regard to the specific factual situation surrounding Defendants and Jaimee on that December weekend.

As stated in Skate America, 261 Va. at 129, 540 S.E.2d at 127, the "particular factual circumstances in a given case" are relevant to the determination of the existence of a "special relationship." Among the various errors in the trial court's ruling was its finding of a distinction between the babysitter in Bruton Parish, and the Defendants in this case. In Bruton Parish, the court noted "that caring for a child as a babysitter in the context of this case is analogous to taking care of children at school." Id. at 473. Citing that language, the trial court found those facts dissimilar

to the facts in this case, a factual finding which Plaintiff contends to be erroneous. Using that factual finding to support its ruling, the trial court made the legal determination that Defendants owed no duty to Plaintiff because of the absence of a special relationship. This Court now has *de novo* review of those conclusions.

What the trial court failed to take into account is that the facts pleaded, implied, and justly inferred reveal that Jaimee Kellermann, like the children in Bruton Parish, was "deprived of the protection of her parents." Id. at 473. Defendants undertook the care of Jaimee Kellermann and assured her parents, who were miles away and out-of-state, that Defendants would take care of her, including providing her with safe transportation, supervision, and a place to stay.

The questions presented by this appeal are as follows:

1. Did the trial court err in sustaining Defendants' demurrer to Plaintiff's negligence claim because Defendants owed a legal duty to Jaimee Kellermann, the 14-year-old girl whom they invited to stay at their home, away from the protection of her parents, and for whom they voluntarily undertook care and custody? (Assignment of Error 1.)

2. Did the trial court err in sustaining Defendants' demurrer to Plaintiff's negligence claim because Defendants assumed a duty to act for the benefit of Jaimee Kellermann, the 14-year-old girl whom they invited to stay at their home, away from the protection of her parents, and for whom they voluntarily undertook care and custody, and, therefore, had a duty to act carefully? (Assignment of Error 2.)

3. Did the trial court err in sustaining Defendants' demurrer to Plaintiff's negligence claim because the Defendants had a duty to exercise reasonable care when they undertook to act for Jaimee Kellermann's protection, and their failure to exercise such care: 1) increased the risk of harm to Jaimee, or, 2) resulted in actual, catastrophic harm to Jaimee due to her reliance upon the Defendants' undertaking? (Assignment of Error 3.)

4. Did the trial court err in sustaining Defendants' demurrer to Plaintiff's negligence claim when the Defendants, who voluntarily undertook the care and custody of Jaimee Kellermann, owed her a duty to exercise reasonable care in controlling the conduct of third parties to prevent Jaimee from harm, because they: 1) knew they had the ability to control the third person, and, (2) knew or should have known of the necessity of such control? (Assignment of Error 4.)

5. Did the trial court err in sustaining Defendants' demurrer to Plaintiff's negligence claim because a special relationship existed between Defendants and Jaimee Kellermann, the14-year-old girl whom they invited to stay at their home, away from the protection of her parents, and for whom they voluntarily undertook care and custody? (Assignment of Error 5.)

6. Did the trial court err in sustaining Defendants' demurrer to Plaintiff's negligence claim because the facts pleaded, implied, and justly inferred are legally sufficient to state a cause of action against Defendants? (Assignment of Error 6.)

STATEMENT OF FACTS

The Complaint states that in or about early December 2004, the McDonoughs told the Kellermanns that their 14-year-old daughter Becca McDonough was having a "tough time of it," or words to that effect. (App. Vol. II at 137, ¶ 4.) The McDonoughs relayed that their daughter's outlook and mood might improve if she spent some time with her former classmate, Jaimee Kellermann, who had moved with her family to North Carolina two years earlier. (Id.) Specifically, the McDonoughs asked if Jaimee could stay a night or two at the McDonoughs' home in Henrico County, Virginia.

(Id.) The Kellermanns agreed to the request, and planned for Jaimee to spend one night with the McDonoughs. (App. Vol. II at 137, ¶ 5.)

The Complaint further states that early in the morning on or about Saturday, December 4, 2004, Michael Kellermann drove his daughter Jaimee to a point roughly halfway between their Wake Forest, North Carolina home, and Richmond, Virginia. (App. Vol. II at 138, ¶ 6). There, the two met Defendant Paula McDonough and Becca McDonough. (Id.)

At that time, Michael Kellermann asked Defendant Paula McDonough what activities were planned during Jaimee's stay at the McDonoughs' home. Ms. McDonough said that they planned to go to the new shopping mall, and said that she would be driving the girls. (App. Vol. II at 138, ¶ 7.) Michael Kellermann replied that Jaimee was not to be driven by any inexperienced drivers. (Id.) He emphasized that his daughter was not to be in a car with any young, male drivers, stating, "no boys with cars." (Id.) The rule was intended for Jaimee Kellermann's safety. Paula McDonough agreed, and said, "don't worry, I promise we'll take good care of her," or words to that effect. (Id.)

After agreeing to comply with the Kellermanns' directive, and to take Jaimee into Defendants' care, Defendant Paula McDonough drove Jaimee to the McDonoughs' home in Henrico County, Virginia. Michael Kellermann

returned to Wake Forest, North Carolina. (App. Vol. II at 138, ¶ 9.) Liz Kellermann, Jaimee's mother, who was visiting her sister in the Washington, D.C., area, planned to pick up Jaimee in Richmond the following day, and then return to Wake Forest. (App. Vol. II at 138-39, ¶ 9.)

The Complaint further alleges that Defendant Paula McDonough, Becca McDonough, and Jaimee Kellermann arrived in Richmond on or about late morning, Saturday, December 4, 2004. (App. Vol. II at 139, ¶ 10.) Just hours after promising Mr. Kellermann to provide Jaimee with responsible, adult supervision, Defendant Paula McDonough drove Jaimee and Becca to a shopping center and movie theatre complex in Short Pump, Virginia (Henrico County), dropped the girls off, and drove away. (Id.) Neither she nor Defendant Paul McDonough would ever return to pick up the girls. (Id.)

Becca McDonough and Jaimee Kellermann were joined at the mall by then 14-year-old Mary Madelyn "Maddie" Lane. (App. Vol. II at 139, ¶ 11). Jaimee and Maddie were previously classmates and were best friends. (Id.) Maddie and Becca lived about one block apart from each other in the Foxhall subdivision located in Henrico County. (Id.) It had been arranged previously that Maddie Lane would spend the night with Becca and Jaimee at the McDonoughs' home, and that Defendant Paula McDonough would

pick up Maddie from the mall as well. (App. Vol. II at 142, ¶ 21.)[5] After shopping for a few hours, the group was joined later by then fifteen-year-old Bruce MacConnell, who was Becca McDonough's boyfriend at the time. (App. Vol. II at 140, ¶ 15.)

It now being late evening, the friends planned to go to the movies. (App. Vol. II at 139, ¶ 12.) The group was standing outside the complex when NDF, a 17-year-old boy who was a friend of Becca's, drove up to the building. Becca McDonough ran to NDF's car, and, in greeting NDF, leaped halfway into the car. (Id.)

After the Kellermanns had relocated to North Carolina, Becca McDonough had begun to associate with NDF. (App. Vol. II at 139, ¶ 13.) NDF had a reputation for being reckless. While in the ninth grade, NDF had brought a weapon to school. (Id.) He was also suspended from the Henrico County School system. (App. Vol. II at 139, ¶ 13.) He was suspended on other occasions as well, for, among other things, bullying and fighting with other students. (Plaintiff's Memorandum in Opposition to

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[5] Specifically, Paula McDonough testified:

Q. … The plan that evening was for whom to drive the girls home from the mall?
A. Me.
Q. And what was that based upon?
A. The fact that Jaimee was staying at our house.

(App. Vol. II at 215, *quoting* Paula McDonough Depo. 36:11-16.)

Defendants' Motion for Summary Judgment, App. Vol. II at 231; May 6, 2008 Hearing, App. Vol. II at 353-54.) Becca McDonough had gone driving at high speeds with NDF on at least two occasions. (App. Vol. II at 140, ¶ 13.) In 2003, NDF had been stopped and ticketed by police for driving over 20 miles per hour over the speed limit. One of NDF's friends told police that NDF had a "habit" of driving fast. (App. Vol. II 140, ¶ 13.)

The Complaint states that in May 2004, NDF stole his parents' car and drove to New York City. (App. Vol. II at 140, ¶ 14.) Thereafter, NDF began to see a psychologist; he was first diagnosed with a mood disorder, but was later found to have bipolar disorder, for which medication was prescribed. Upon information and belief, Becca McDonough told others that NDF suffered from bipolar disorder. (Id.) Psychologists noted that NDF had significant problems with impulsivity and impaired judgment, and became agitated easily. (Id.) NDF has been convicted subsequently of arson, grand larceny, and breaking and entering. (May 6, 2008 Hearing, App. Vol. II at 353-54.) Defendants knew or should have known of NDF's age, past behavior, and recklessness. (App. Vol. II at 140, ¶ 17.)

Jaimee Kellermann did not know NDF. (App. Vol. II at 140, ¶ 15.) However, Maddie Lane recoiled when Becca McDonough ran up to NDF's car on that December night. Maddie Lane did not associate with NDF, but

recalled that NDF previously had harassed her, throwing chunks of ice at her. (Id.)

The Complaint further alleges that after seeing NDF in front of the movies, hours after Defendant Paula McDonough had left the girls at the complex and when it was dark outside, Becca called her mother, Defendant Paula McDonough. (App. Vol. II at 140, ¶ 16.) Becca asked her mother if the girls could be driven home by NDF. Id. Defendant Paula McDonough testified that *she,* (not Jaimee Kellermann, not Defendants' daughter, and not NDF), *made the decision* that the girls would be driven home by 17-year-old NDF. Specifically, Defendant Paula McDonough testified:

> A. I was the one that made the decision. I gave permission. [for the girls to be driven home by NDF]
> Q. And you were the proper party to have made that decision, not her [14-year-old Jaimee Kellermann], correct?
> A. Correct.

(App. Vol. II at 215, *quoting* Paula McDonough Depo. 139:23-140:3.)

Willfully violating the Kellermanns' directive that Jaimee was not to be driven by any non-adult drivers, the Defendants, through Defendant Paula McDonough, knowingly, consciously, and purposefully instructed the girls to be driven home by NDF in his car. (App. Vol. II at 141, ¶ 18.) Defendant Paul McDonough overheard his wife's side of the conversation and then

questioned her about the call.[6] He knew that Jaimee had been invited to stay at the McDonoughs' home, and that his wife had instructed the 14-year-old girls to be driven home by 17-year-old NDF. He did nothing in response.[7]

In doing so, the Defendants failed to provide safe transportation for 14-year- old Jaimee Kellermann, whose care had been entrusted to them. Defendants purposefully and recklessly handed over *their* duty of care for Jaimee to a boy who not only was driving four other teens late on a Saturday night, but who was known to have reckless and dangerous propensities, including a history of reckless driving. (App. Vol. II at 141, ¶ 9.)

Both Jaimee Kellermann and Maddie Lane did not want to go in the car with NDF. (App. Vol. II at 142, ¶ 20.) After hearing that Defendant Paula McDonough had told the girls to ride home with NDF, Jaimee and Maddie separated from Becca McDonough, NDF, and Bruce MacConnell. (App. Vol. II at 142, ¶ 21.) They called Maddie's father, mother, and

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[6] In his deposition, Defendant Paul McDonough testified that: (1) he was standing right next to Paula McDonough when she made the decision, and, (2) he understood the substance of the conversation. (See App. Vol. II at 215, *citing* Paul McDonough Depo. 85:3-86:25.)

[7] (See App. Vol. II at 215, *citing* Paul McDonough Depo. 85:3-86:25.)

brother at both home and cell phone numbers, but were unable to reach them. (Maddie Lane's parents were not awaiting any calls as they understood that Paula and/or Paul McDonough would drive their daughter to the McDonoughs' for a sleepover.) (Id.) Jaimee and Maddie also called, but failed to reach, at least one other person. Jaimee had not lived in Richmond for over two years, and, having been entrusted to the care of the McDonoughs, and being away from the protection of her parents, had no one else to call for a ride. (Id.)

Jaimee and Maddie thus reluctantly got into NDF's car, a 1991 Acura Integra. (App. Vol. II at 142, ¶ 22.) Jaimee Kellermann sat behind NDF, the driver. Maddie Lane was seated next to her in the middle of the back seat. Bruce MacConnell sat in the rear right seat. Becca McDonough sat in the front seat next to her friend, NDF. (Id.)

The Complaint asserts that the circumstances which followed from the McDonoughs' instructions *violated applicable Virginia law*, which states that a driver under the age of 18 may carry only three passengers under the age of 18. Virginia Code § 46.2-334.01(B). (*Cited in* App. Vol. II at 233.) NDF, who was 17 at the time, carried four such passengers. (App. Vol. II at 142, ¶ 23.) Defendant Paula McDonough has acknowledged that

she was aware of the foregoing law at the time, and the basis for the law. (App. Vol. II at 232 *citing* Paula McDonough Depo. 141:14-19; 142:17; 143: 6.)

After leaving the theatre, NDF began to drive wildly. On a two-lane, winding road, he drove at speeds that at times approached or exceeded 80 miles per hour. (App. Vol. II at 143, ¶ 24.) Jaimee and Maddie begged NDF to slow down or to let them out. At one point, while driving at or over 25 miles per hour, NDF opened his door and told Jaimee and Maddie that they could get out of the moving car if they wished. (Id.)

Fearing for her life, Jaimee Kellermann sent a series of text messages from her cell phone to a friend. In these real-time messages, she said that: she wanted to go home, that she wanted to get away from the "guys," and that she feared that she would "die." (App. Vol. II at 143, ¶ 25.) She also said that "they're planning on street racing." (Id.)

NDF made a u-turn on Cauthorne Road. (App. Vol. II at 143, ¶ 26.) At approximately that time or earlier, Becca McDonough told Jaimee Kellermann and Maddie Lane that NDF had gone to stunt driving school. (App. Vol. II at 143, ¶ 26.) While driving at a speed estimated by police to be at least 77 miles per hour, NDF went into the oncoming lane while negotiating a turn to the left. Seeing oncoming headlights in the distance,

NDF slammed on the brakes and pulled the hand brake. The car skidded, and the front end spun to the right side of the road, causing the rear left passenger side of the car, where Jaimee Kellermann was seated, to slam into a tree. (Id.) The car recoiled off the tree and came to rest in the roadway. The car left a skid mark 173 feet long, and a "yaw mark" that measured 92 feet. (Id.)

As stated in the Complaint, Jaimee Kellermann was airlifted to the VCU Medical Center. (App. Vol. II at 143, ¶ 27.) Lane and MacConnell were taken by ambulance to the same hospital; NDF and Becca McDonough had only minor injuries or no injuries at all, and, upon information and belief, sat in the front of the ambulances. (App. Vol. II at 143-44, ¶ 27.)

Defendant Paula McDonough was notified of the car crash and traveled to the hospital. (App. Vol. II at 144, ¶ 28.) Before she was informed of the critical nature of Jaimee Kellermann's injuries, Paula McDonough repeatedly told persons gathered at the emergency room that she never should have told the girls to go home with NDF. (Id.) Acknowledging her duties to Jaimee (as well as the breach of those duties), Paula McDonough nervously told the parents of Maddie Lane, who had gathered at the hospital, that she feared that she was "going to be sued" for

directing the girls to go in NDF's car. (Id.) Beth Lane, Maddie Lane's mother, recalled that Paula McDonough was more worried about herself while at the hospital than about the injured children and the Kellermann family. Indeed, Beth Lane repeatedly told Defendant Paula McDonough that she needed to assist Liz Kellermann with Jaimee Kellermann at the hospital, but Paula McDonough continually refused. (Id.) Plaintiff alleges that Paula McDonough's behavior throughout her time at the hospital communicated her feelings of liability and remorse, which appeared to be based upon her perception of her duties and relationship to Jaimee, her ability to control Jaimee's environment, and her failure to fulfill her obligations.

Jaimee Kellermann suffered severe trauma to her head and a lacerated spleen. She was pronounced dead at VCU Medical Center, Richmond, Virginia, early Sunday morning, December 5, 2004. (App. Vol. II at 144, ¶ 29.)

PRINCIPLES, ARGUMENT, AND AUTHORITIES

I. SUMMARY OF ARGUMENT

Plaintiff appeals the trial court's ruling sustaining Defendants' demurrer on the basis of the various errors assigned herein. Defendants owed a legal duty to Jaimee Kellermann, the 14-year-old girl from out-of-state whom they invited to stay at their home, away from the protection of her parents, and for whom they voluntarily undertook care and custody. Indeed, the trial court itself, in its March 29, 2007 letter opinion that initially overruled the demurrer, found that such a duty may exist, citing Doe, et al. v. Bruton Parish Church, et al., 42 Va. Cir. 467 (1997) (Williamsburg). When reconsidering that issue 14 months later, the trial court stated that Bruton Parish did not state the law in Virginia. For the reasons stated below, Plaintiff contends that that conclusion is in error.

Additionally, Defendants had a duty to act carefully, and otherwise to exercise reasonable care, when they took upon themselves the responsibility to provide safe transportation for Jaimee Kellermann while she was in their custody and care. See Didato v. Strehler, 262 Va. 617, 554 S.E.2d 48, discussed herein at 31-33. Furthermore, as stated below, the particular factual circumstances in this case created a "special relationship" between Jaimee Kellermann and the Defendants, such that

they owed her a duty to warn and/or protect her against the harm that resulted in her death. See Thompson v. Skate America, 261 Va. 121, 540 S.E.2d 123, and Ryan Taboada v. Daly Seven, Inc., 271 Va. 313, 626 S.E.2d 428. Therefore, the facts pleaded, implied, and justly inferred are legally sufficient to state a cause of action against Defendants. Accordingly, the trial court's decision sustaining the demurrer should be reversed, and the case should be remanded to the Circuit Court for trial.

II. STANDARD OF REVIEW

Because appellate review of the sustaining of a demurrer involves a matter of law, the Supreme Court of Virginia reviews the trial court's judgment *de novo*. Hubbard v. Dresser, Inc., 271 Va. 117, 122, 624 S.E.2d 1, 4 (2006). A demurrer does not allow the trial court to evaluate and decide the merits of a claim. Fun v. Virginia Military Institute, et al., 245 Va. 249, 252, 427 S.E.2d 181, 183 (1993). The test of sufficiency of a complaint is whether it states the essential elements of a cause of action. Lyons v. Grether, 218 Va. 630, 239 S.E.2d 103 (1977). A demurrer admits the truth of all material facts that are "properly pleaded, facts which are impliedly alleged, and facts which may be fairly and justly inferred." Cox Cable Hampton Roads, Inc. v. City of Norfolk, 242 Va. 394, 397, 410 S.E.2d 652, 653 (1991). "The **sole question** to be decided by the court is

whether the facts pleaded, implied, and fairly and justly inferred are legally sufficient to state a cause of action against defendant." Thompson v. Skate America, 261 Va. at 128, 540 S.E.2d at 126-127 (Emphasis added).

III. THE TRIAL COURT ERRED IN SUSTAINING DEFENDANTS' DEMURRER, BECAUSE DEFENDANTS OWED A LEGAL DUTY TO 14-YEAR-OLD JAIMEE KELLERMANN

Jaimee Kellermann was a 14-year-old minor on December 4, 2004. She was in Richmond, Virginia, approximately 150 miles away from her Wake Forest, North Carolina home, with no independent means of transportation and without her parents nearby. For the approximately 24 hours that she was in Richmond, she was dependent upon the Defendants to make wise decisions about her care and safety. She was in the Defendants' care and custody, away from the protection of her parents, who at that time were in North Carolina and the Washington, D.C. area. The Defendants did not have this role thrust upon them; they *sought out* Jaimee to come to their home and knew of her arrival days in advance. As such, Defendants stepped willingly into the position of caregiver and quasi-parent. Consequently, the McDonoughs assumed willingly a *myriad of duties to Jaimee* – among them, to feed her, to give her shelter in their

house, to take her to a doctor or to hospital if she became ill, to drive her in a safe manner, to look out for her welfare, and to protect her from harm.[8]

Moreover, the Defendants may not properly obtain refuge from their duty, or the liability for the breach thereof, by arguing that they were not driving or did not own the car in which Jaimee died. Defendants assumed the responsibility for driving Jaimee home, but instead, they knowingly had NDF serve as their substitute driver for Jaimee. The fact that the Defendants approved a dangerous 17-year-old to take their place is a basis for *imposing liability*, and not, as Defendants claim, a shield from liability.

Defendants' other argument, that they owed *no* duties to Jaimee Kellermann because they did not have a commercial, paid relationship with her, likewise fails. As discussed below, the test for determining whether or not a defendant owes duties is not limited to commercial, paid

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[8] Indeed, parents unmistakably owe, **at the least**, a duty to "exercise ordinary care for the safety" of their children. See Danville v. Howard, 156 Va. 32, 36, 157 S.E. 733, 735 (1931) (a wrongful death case in which the court found the father had breached that duty, and thus was precluded from recovery as a statutory beneficiary). Here, the Defendants voluntarily took upon themselves, for the weekend, responsibility for the custody and supervision of Jaimee Kellermann. Although they did not assume all of the duties and privileges of a parent-child relationship, in their sole caregiver role, they undoubtedly assumed, temporarily, at the least the minimum duty to exercise ordinary care for her safety, and had additional duties via their special relationship with her. See discussions herein at 31-33 and 35-39.

relationships. See e.g. Skate America, 261 Va. at 129, 540 S.E.2d at 127 (holding that certain "special relationships" may give rise to a duty of care); see also Doe v. Bruton Parish Church, 42 Va. Cir. 467, 473 (1997) (Williamsburg); discussion infra at 36-40.[9]

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[9] A review of cases outside of Virginia with facts similar to the instant case indicates that courts regularly have held that a caretaker of a child, *regardless of whether compensated or not,* who accepts responsibility for the supervision of a child, has a duty to exercise reasonable care to protect the child from injury. See Standifer v. Pate, 291 Ala. 434, 282 So.2d 261 (1973) (discussed at App. Vol. II at 273)(overruling demurrer where plaintiff alleged that volunteer babysitter who undertook to supervise, watch and care for plaintiff child was negligent in permitting plaintiff to pull a skillet of hot grease on himself; legal duty arose from the babysitter's undertaking of the care and supervision of the child, and was not dependent upon whether compensation was rendered, or upon theories of premises liability.); Rider v. Speaker, 180 Misc. 2d 999, 692 N.Y.S.2d 920 (1999) (discussed at App. Vol. II at 274) (granting plaintiff's motion to add the babysitter as a defendant where the babysitter had placed, without a car seat, the infant under her care and custody in the back seat of an automobile, driven by the babysitter's sister; the court held that the babysitter was a proper defendant because she had a duty to protect the infant plaintiff as a result of the custodial relationship with him); Anderson v. Mitts, 87 Ark. App. 19, 185 S.W.3d 154 (2004) (discussed at App. Vol. II at 274) (overruling a directed verdict in favor of defendant where child was burned on a heater while staying with his maternal aunt; the aunt picked up the child from his house, where he was under the care of his mother, and took him to her own house); Barrera v. General Electric Co., 84 Misc. 2d 901, 378 N.Y.S.2d 239 (1975) (discussed at App. Vol. II at 275) (denying grandfather's motion to dismiss the claim where the grandchild was injured while under the temporary custody and control of the grandparent).

Moreover, contrary to Defendants' argument in their Assignments of Cross-Error[10] and elsewhere, Defendant Paul McDonough is not relieved of his duties because his wife was the primary contact with Jaimee and her parents. Cf. Marchioli-Acra v. Commonwealth of Virginia, 2005 Va. App. LEXIS 101, No. 0671-04.2 (Va. Ct. App. March 15, 2005), a decision in connection with a violation of Virginia Code 18.2-370-1, concerning indecent liberties with a child in a custodial or supervisory relationship. In an unpublished opinion, the Court of Appeals of Virginia rejected the appellant's argument that he could not have been in a custodial or supervisory relationship with the 14-year-old girl whom he assaulted because his wife had made the arrangements for her to stay at their home that night. The court noted, "[t]he victim's mother drove her to appellant's home to spend the night and left her in the care of appellant and his wife. Appellant clearly accepted her presence in the home." *7. Similarly, Paul McDonough knew of, and assented to, the arrangements for and decisions made concerning Jaimee Kellermann. (App. Vol. II at 43; at 118-19; at 137, ¶ 4; at 138, ¶ 8; at 141, ¶ 18; at 215.)

[10] Appellant's arguments in support of his Assignments of Error also refute Appellees' Assignments of Cross-Error. Appellant specifically incorporates by reference his arguments in support of his Assignments of Error in opposition to Appellees' Assignments of Cross-Error.

IV. THE TRIAL COURT ERRED IN SUSTAINING DEFENDANTS' DEMURRER, BECAUSE DEFENDANTS ASSUMED A DUTY TO ACT FOR THE BENEFIT OF 14-YEAR-OLD JAIMEE KELLERMANN; DEFENDANTS, THEREFORE, HAD A DUTY TO ACT CAREFULLY

and

V. THE TRIAL COURT ERRED IN SUSTAINING DEFENDANTS' DEMURRER, BECAUSE DEFENDANTS HAD A DUTY TO EXERCISE REASONABLE CARE WHEN THEY UNDERTOOK TO ACT FOR JAIMEE KELLERMANN'S PROTECTION, AND THEIR FAILURE TO EXERCISE SUCH CARE: 1) INCREASED THE RISK OF HARM TO JAIMEE, OR, 2) RESULTED IN ACTUAL, CATASTROPHIC HARM TO JAIMEE DUE TO HER RELIANCE UPON THE DEFENDANTS' UNDERTAKING

Defendants' argument that they owed no duty to Jaimee Kellermann first fails under the black letter concept that if one assumes to act for another's benefit, he is subject to the duty to act carefully. See Plaintiff's March 7, 2007 letter to the Court. (App. Vol. II at 105.) As the Supreme Court of Virginia has stated, "it is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all." Didato v. Strehler, 262 Va. 617, 628, 554 S.E.2d 42, 48 (2001) (citations omitted.)

In Didato, the Supreme Court observed that the foregoing common law principle – that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully – is embodied in Restatement (Second) of Torts § 323, which states:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
> (b) the harm is suffered because of the other's reliance upon the undertaking.

262 Va. at 629, 554 S.E.2d at 628.

The Defendants undertook to render services to Jaimee Kellermann which were necessary to protect her, including providing safe transportation back to the McDonough home from the movie and shopping complex where Defendant Paula McDonough left her.

As to parts (a) and (b) of the Restatement, sending 17-year-old NDF to perform the Defendants' duty undoubtedly increased the risk of harm. First, it is statistically well-documented that the accident rate increases exponentially when teens drive teens (especially in large numbers and at night). (App. Vol. II at 231.) Thus, the likelihood of an auto accident occurring when a teenage driver drives other teenagers is a foreseeable occurrence. Indeed, the very law that the Defendants violated, the law restricting the number of teens permitted to be driven by teens, was aimed at decreasing this risk. (App. Vol. II at 232-33.) Second, NDF was a

reckless and dangerous child.[11] At the very least, there exists a disputed issue of fact as to whether Defendants exercised reasonable care to protect Jaimee. And the more likely conclusion is that Defendants' failure to pick up Jaimee, and their direction that Jaimee be driven by NDF, a teenage driver who was known to be reckless and dangerous and who had gone street racing with their daughter, did increase the risk of harm to Jaimee. Quite simply, if the Defendants had fulfilled their duty and picked up Jaimee from the mall, she would not have been in a car with a teenage driver.[12]

VI. THE TRIAL COURT ERRED IN SUSTAINING DEFENDANTS' DEMURRER, BECAUSE THE DEFENDANTS, WHO VOLUNTARILY UNDERTOOK THE CARE AND CUSTODY OF JAIMEE KELLERMANN, OWED HER A DUTY TO EXERCISE REASONABLE CARE IN CONTROLLING THE CONDUCT OF THIRD PARTIES TO PREVENT HER FROM HARM, BECAUSE THEY: 1) KNEW THEY HAD THE ABILITY TO CONTROL THE THIRD PERSON, AND, (2) KNEW, OR SHOULD HAVE KNOWN, OF THE NECESSITY OF SUCH CONTROL

In its original opinion overruling the demurrer, the Court cited as supportive of the finding of a duty in this case Judge (now Justice) Donald W. Lemons's opinion in Bruton Parish. In its final opinion sustaining the

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[11] (App. Vol. II at 130-40 ¶¶ 13-14; at 219-20 and 231-32.)

[12] As Defendant Paula McDonough aptly observed, "clearly if I had picked them up they wouldn't have been in a car with a teenage driver." (App. Vol. II at 218, *quoting* Paula McDonough Depo. 21:22-22:3.)

demurrer, the Court cited the Restatement of Torts test set out in Bruton Parish, but then said that the holding in Bruton Parish "is not the law in Virginia." (App. Vol. II at 442.) Plaintiff contends that Bruton Parish does state correctly the current law in Virginia, and respectfully submits that this Court should reiterate that view in this case.

In Bruton Parish, Judge (now Justice) Donald W. Lemons ruled that a child care worker owed a duty to the children for whom she cared. The Court noted that the duty flowed from the "special relationship" that existed between defendant and the children in her charge, and not from the fact that she was paid for her services.[13]

Judge Lemons began his analysis by referencing Section 315 of the Restatement of Torts 2d. That section concerns "controll[ing] the conduct of a third person as to prevent him from causing physical harm to

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[13] Judge Lemons found that the "special relationship" in Bruton was supported by the legislative enactment of § 40.1-103 of the Code of Virginia, Id. at 474, which provides in part:

> It shall be unlawful for any person employing or having custody of any child willfully or negligently to cause or permit the life of such child to be endangered or the health of such child to be injured … Any person violating this section shall be guilty of a Class 6 felony.

A "child" for purposes of this section is a person less than eighteen. Groot, Virginia Practice, Family Offenses, § 5, n.38 (2006). See also Va. Code Ann. § 1-13.42(a)(1). Accordingly, the same section supports the finding of a "special relationship" in this case.

another…."[14] Judge Lemons stated that "caring for a child in the context of this case is analogous to taking care of children at school. The child is deprived of the protection of his parents, and the babysitter owes a duty to the child to exercise reasonable care in controlling the conduct of third persons if the babysitter (1) knew she had the ability to control the third person and (2) if the babysitter knew or should have known of the necessity of such control." Id. at 473. As in Bruton, the McDonoughs sent NDF as their substitute, which, according to Judge Lemons, was, in and of itself, sufficient to evidence an ability to direct or control, and therefore to satisfy the first prong of the test. Id.[15] The second element is satisfied in that the McDonoughs knew, or at the very least, should have known, of NDF's reckless propensities. (App. Vol. II at 140, ¶ 17; at 217-221; at 230-232.)

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[14] Referenced in § 315 is Barbarisi v. Caruso, 47 N.J. Super. 125, 135 A.2d 539 (1957), which permitted a claim to go forward based upon the breach of a duty by a grandmother who had volunteered to look after her grandchild – obviously not a paid relationship.

[15] NDF underscored the point by saying ***he would not have driven Jaimee home, but for Defendant Paula McDonough's permission to do so.*** (App. Vol. II at 218 *citing* NDF Depo. 142:11-143:1.)

VII. THE TRIAL COURT ERRED IN SUSTAINING DEFENDANTS' DEMURRER, BECAUSE A SPECIAL RELATIONSHIP EXISTED BETWEEN DEFENDANTS AND JAIMEE KELLERMANN, THE 14-YEAR-OLD GIRL WHOM THEY INVITED TO STAY AT THEIR HOME, AWAY FROM THE PROTECTION OF HER PARENTS, AND FOR WHOM THEY VOLUNTARILY UNDERTOOK CARE AND CUSTODY

Plaintiff specifically pled that a "special relationship" existed between Defendants and Jaimee Kellermann, the14-year-old girl whom they invited to stay at their home away from the protection of her parents, and for whom they voluntarily undertook care and custody. (App. Vol. II at 138, ¶ 8.) This Court has recognized repeatedly that such "special relationships" may give rise to a duty of care and protection.

In Thompson v. Skate America, this Court explained that "certain 'special relationships' exist between particular plaintiffs and defendants, either as a matter of law *or because of the particular factual circumstances in a given case*, which may give rise to a duty of care on the part of the defendant to warn and/or protect the plaintiff against the danger of harm from the reasonably foreseeable criminal acts committed by a third person." 261 Va. 121,129, 540 S.E.2d 123, 127 (2001) (emphasis added). In that case, a young boy hit another boy in the head with a roller skate while the two were skating at defendant's rink. Defendant (the rink) demurred, claiming that it had no duty to protect against an assault committed by a

third party. The trial court sustained the demurrer; the Supreme Court of Virginia reversed the trial court's decision. Contrary to the McDonoughs' arguments, whether or not the defendants are operating a business is not mentioned in the test. Instead, the factual circumstances in a given case are dispositive.

In addition, the Skate America case indicates that defendants may not be excused from liability even in the case of an assault by a third party. In Skate America, the defendants did not select or designate the third party to do anything. In the instant case, the Defendants designated NDF to drive Jaimee, and thus, they had the ability to control the third party, as did the defendant in Bruton Parish. Accordingly, the facts in this matter present a far easier case for imposing liability. Also, as indicated above and throughout Plaintiff's pleadings, the plethora of information available to the McDonoughs regarding NDF made any "criminal acts" on his part, especially those involving reckless driving and behavior, "reasonably foreseeable."

In 2006, this Court defined more fully the "special relationships" that give rise to a duty to warn and/or protect the plaintiff against the danger of harm when it handed down its decision in Ryan Taboada v. Daly Seven, Inc., 271 Va. 313, 626 S.E.2d 428 (2006). In Taboada, the Supreme Court

stated that a key issue in determining whether a special relationship exists is *the ability to control the environment*. In that case, the Supreme Court found a special relationship between a guest and an innkeeper. Likening this relationship to one between a common carrier and its passenger, the Supreme Court explained, "[L]ike a passenger, the guest of an innkeeper entrusts his safety to the innkeeper and has little ability to control his environment. The guest relies upon the innkeeper to make the property safe and the innkeeper's knowledge of the neighborhood in taking the reasonably necessary precautions to do so." 271 Va. at 326, 626 S.E.2d at 434. Similarly, the Court explained the rationale for imposing a duty on common carriers as follows: "Imposing an elevated duty of care upon the carrier is justified essentially because the passenger entrusts his safety to the carrier, who alone knows the condition of his vehicle and the dangers of the neighborhoods and environs through which the routes of travel may lie. *This imbalance of knowledge and control warrants imposition of a duty* on common carriers. . ." Taboada, 271 Va. at 325, 626 S.E.2d at 434 (citations omitted)(emphasis added.)[16]

[16] Moreover, as stated in Taboada, where a special relationship was found in a guest-innkeeper relationship, the standard was to warn and/or protect against "reasonably foreseeable" criminal assaults. The court specifically rejected the higher standard of actual knowledge or "imminent probability of harm" 271 Va. at 326-27, 626 S.E.2d at 435. Likewise, the standard in this

As noted in Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment (App. Vol. II at 214-216) and supra at 3, 25, 37, the McDonoughs clearly controlled Jaimee Kellermann's environment. Defendant Paula McDonough specifically testified that she believed that "…they [Jaimee and the other girls] would do what they were asked to" by adults such as her, and that Jaimee further "…would have done whatever [Paula McDonough] suggested or asked…" (App. Vol. II at 216.) There was also a significant imbalance of knowledge and control over Jaimee's transportation choices. At 14 years old, on a cold winter night, and over 100 miles from her parents, Jaimee had no access to independent transportation, no adults to turn to for protection other than the McDonoughs, no security, and limited knowledge of the then new Short Pump mall area.

As in Skate America, and, again, contrary to the McDonoughs' arguments, whether or not the defendant is operating a business is not at all dispositive to the criteria for establishing a "special relationship." Instead, the *particular factual circumstances in a given case* are dispositive. Taboada, 271 Va. at 322, 626 S.E.2d at 432. In Taboada, the Supreme

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case is simply one of knew or *should have known*. See also, Bruton Parish, citing the Restatement 2d of Torts § 320 ("knows or *should know"* of the necessity for exercising such control.) (Emphasis added.)

Court noted that the application of the exception to the general rule "'is always fact specific and thus, not amenable to a bright-line rule for resolution.'" (Citations omitted.) The Supreme Court has thus resisted a clear demarcation as Defendants here suggest (such as based upon whether or not the defendant is a commercial enterprise).

VIII. THE TRIAL COURT ERRED IN SUSTAINING DEFENDANTS' DEMURRER, BECAUSE THE FACTS PLEADED, IMPLIED, AND JUSTLY INFERRED ARE LEGALLY SUFFICIENT TO STATE A CAUSE OF ACTION AGAINST DEFENDANTS

For the reasons stated above, the facts pleaded, implied, and justly inferred are legally sufficient to state a cause of action against Defendants. See supra, the Statement of Facts, Summary of Argument, and Argument. In particular, contrary to the trial court's declaration, Plaintiff maintains that Bruton Parish does correctly state the law in Virginia.

Additionally, on demurrer, the trial court's obligation is simply to determine whether the facts pleaded, implied, and justly inferred are legally sufficient to state a cause of action against Defendants. The trial court stated that it had "considered all of the facts," but then made a legally-based decision – granting Defendants' demurrer.[17] This reversal by the court of its earlier decision was made absent any dispositive or relevant

[17] In its original ruling, the Court overruled the Demurrer "pending discovery and further arguments of the parties." See May 22, 2008, Letter Opinion, p. 2-3. (App. Vol. II at 441-42.)

precedent, 14 months after the initial denial (and refusal to reconsider), and weeks away from the trial.

CONCLUSION

Wherefore, this Court should reverse the trial court's decision sustaining Defendants' demurrer, and remand the matter to the Circuit Court for trial.

Respectfully submitted,

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CERTIFICATE

I hereby certify that Rule 5:26(d) of the Supreme Court of Virginia has been complied with, and that pursuant to the Rule, on this 20th day of January, 2009, twelve (12) paper copies and one (1) electronic copy of the Opening Brief of Appellant and Joint Appendix have been filed with the Clerk of the Supreme Court of Virginia by hand-delivery, and that three (3) copies have been hand delivered to Counsel for Defendants-Appellees:

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