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.

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. Plaintiff Has Alleged a Cause of Action Against Defendants for Their Own Tortious Conduct

Defendants' suggestion in their Brief of Appellees that Plaintiff's case somehow seeks to alter the legal proposition that "every individual is responsible for his own torts," misjudges Plaintiff's contentions, including, in particular, the two bases for negligence liability in this case. First, Plaintiff has maintained that Defendants are liable for *their own* negligent conduct: that is, for failing to exercise reasonable care by selecting seventeen-year-old NDF to serve as their substitute to drive Jaimee Kellermann home from the movie/shopping complex. Defendants had undertaken the responsibility to supervise and care for Jaimee during her weekend stay at their home (an obligation that they assumed voluntarily and had acted upon), including agreeing to provide safe transportation (free of boys with cars.) (App. Vol. II at 137, ¶¶ 4-10.) They failed to exercise reasonable care in that undertaking; this failure increased the risk of harm to Jaimee Kellermann and led to her tragic death. This basis of liability comes from Defendants' affirmative decision to put her into harm's way. See Didato v. Strehler, 262 Va. 617, 628-29, 554 S.E.2d 42, 48 (2001); Restatement (Second) of Torts § 323; cf. Bradshaw v. Minter, 206 Va. 450, 143 S.E.2d 827 (1965).

In Bradshaw, the plaintiff, Ms. Bradshaw, was a social guest at the home of defendant Mr. Minter. She was injured when she fell from Minter's horse that he had invited her to ride, although he knew, or should have known, that the horse was unsafe or untrustworthy for Bradshaw, an inexperienced rider. 206 Va. at 455, 143 S.E.2d at 830. The Court found that where the host had engaged in "active or affirmative negligence" by placing his guest on the unsafe and untrustworthy horse, the proper standard of care was a duty to exercise "ordinary and reasonable care." Id. The Court reasoned that although Bradshaw was a social guest, with a legal status of licensee, because the injury occurred through the active and affirmative negligence of the host, and not simply due to the condition of the premises, the ordinary and reasonable care standard should apply, and not the higher duty standard of gross negligence. Id. at 453. Although in Bradshaw the host's liability is anchored on principles of premises liability, that case illustrates that social hosts can be held to a higher duty to their guests when they engage in active, affirmative negligent conduct, such as was done by Defendants in this case.

II. A Special Relationship Is Present Based Upon the Particular Facts Alleged in this Case

The second basis for liability is founded on the well-recognized "special relationship" exception to the rule that, generally, one does not

have a duty to protect another from the wrongful conduct of a third person. Plaintiff maintains, contrary to the trial court's ruling, that the facts are legally sufficient to show a special relationship between Defendants and Jaimee, and, therefore, that Defendants had an affirmative duty to aid, warn, and/or protect her against reasonably foreseeable harm. See Doe, et al. v. Bruton Parish Church, et al., 42 Va. Cir. 467, 472-73 (1997) (Williamsburg); Restatement (Second) of Torts § 314A[1]; Restatement (Second) of Torts § 315; Restatement (Second) of Torts § 320; see also Thompson v. Skate America, 261 Va. 121, 129, 540 S.E.2d 123, 127 (2001).

Moreover, contrary to Defendants' implication, Plaintiff's case does not seek, nor would overruling the trial court's decision require, this Court to extend Virginia law to impose a "special relationship" upon every social

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[1] Although the Supreme Court refused to adopt Restatement (Second) of Torts § 314A in Wright v. Webb, 234 Va. 527, 530, 362 S.E.2d 919, 921 (1987), as it applies to require a business owner to take positive affirmative action to protect his business invitee from third party assault, Wright does not address expressly the applicability of § 314A(4). That provision, which would be relevant here, defines a special relationship giving rise to a duty to protect to include "[O]ne 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 opportunities for protection..." Moreover, in Schieszler v. Ferrum College, 236 F. Supp. 2d 602, 607 (W.D. Va. 2002), discussed below herein, the court considered § 314A and its interrelationship with § 315(b) in finding a special relationship and a corresponding duty. Both provisions are likewise implicated in this case.

host/sleepover situation. As stated in Skate America, "*the particular factual circumstances in a given case"* are to be considered in deciding whether there is a special relationship between Defendants and Jaimee Kellermann. 261 Va. at 129, 540 S.E.2d at 127. (Emphasis added.)

Contrary to Defendants' argument, Virginia law does not limit, by a specific laundry list, types of relationships that give rise to an affirmative duty to assist and protect. Schieszler v. Ferrum College, 236 F. Supp. 2d at 607 (noting that under Restatement § 314A of the Restatement (Second) of Torts and under Virginia case law, other relationships will "give rise to an affirmative duty to assist or protect" besides those of business owner/ invitee, innkeeper/guest, common carrier/passenger, and employer/ employee.) Indeed, in Schieszler, Judge Kiser, referring, *in dicta*, to Seidman v. Fishburne-Hudgins Ed. Found., 724 F.2d 413, 418 (1984), suggested that, in and of itself, an *in loco parentis* relationship with a minor child alone may create a special relationship warranting a duty.[2]

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[2] In Seidman, a mother brought a wrongful death claim against a private boarding school for failure to exercise reasonable care to protect her minor son. Upon dismissing the troubled boy, the school returned his personal items, including a firearm which he used to shoot himself immediately thereafter. Discussing that case in Schieszler, Judge Kiser noted:

> In a case arising under Virginia law, the Fourth Circuit has concluded that "[a school's] acceptance of a student with special problems created a corresponding duty to take reasonable steps

Schieszler is a wrongful death case in which a student committed suicide while attending college. In Schieszler, the court found that a special relationship existed between the defendants (the college and its representatives) and the student, which gave rise to a duty to protect the student from the foreseeable danger that he would hurt himself. In making that finding, the court, after a lengthy discussion of the Virginia law on special relationships, looked to the facts in that case and concluded that "[w]hile it is unlikely that Virginia would conclude that a special relationship exists as a matter of law between colleges and universities and their students, it might find that a special relationship exists ***on the particular facts alleged in this case.***" 236 F. Supp. 2d at 609. (Emphasis added.)

> to cope with the problems." Seidman v. Fishburne-Hudgins Ed. Found., 724 F.2d 413, 418 (1984). . . .Thus, the Fourth Circuit found a duty to protect under facts very similar to the facts in this case. Beyond its conclusion that the school had a duty to protect the student, however, the court did not discuss whether a special relationship existed between the school and the student or whether the duty arose from such a relationship. Moreover, this case can be distinguished because *Seidman* involved a minor. Because the student in *Seidman* was a minor, the Fourth Circuit may simply have presumed that the school stood *in loco parentis* to the student, and that a special relationship therefore existed. The instant case does not involve a minor, and therefore, strictly speaking, no duty arises from an *in loco parentis* relationship between [the defendants and the decedent].

236 F. Supp. 2d at 608.

Likewise, in this case, this Court need not find that as a matter of law all social host/guest relationships are "special relationship[s]," but rather, that based on the distinct facts of this case, a "special relationship" existed between the Defendants and Jaimee Kellermann. Consistent with the current Virginia law definition of a special relationship, there are various relevant factors present among the facts alleged in this case that warrant a finding of a special relationship between Defendants and Jaimee Kellermann. Those factors include:

- *Jaimee Kellermann was a 14-year-old minor.* (App. Vol. II at 137, ¶ 8.) See e.g. Schieszler, supra, dicta, (*in loco parentis* relationship with minor may create presumption that special relationship existed); cf. Va. Code Ann. § 40.1-103, cited in Bruton Parish, 42 Va. Cir. at 474 (having custody of a child in and of itself imposes a responsibility (subject to criminal penalties) not to endanger his/her life or health willfully or negligently.)
- *Jaimee Kellermann did not herself engage in wrongful conduct; she simply followed the directive of Defendants.* Indeed, she did not want to go with NDF and unsuccessfully sought other transportation (App. Vol. II at 142, ¶20-21.) Compare with the cases relied upon by Defendants, Kelley v. Doremus, 38 Va. Cir. 44 (1995) (Fairfax) (Minors drank alcohol

and got into car with intoxicated driver; no allegation that defendant told them to ride with intoxicated driver) and Harrison v. Bittler, 72 Va. Cir. 7 (2006) (Loundon) (Plaintiff participated actively in underage drinking that defendants permitted to occur.)

- *Jaimee Kellermann was deprived of her parents' protection.* Due to the circumstances of the pre-arranged weekend, Jaimee's parents were geographically remote and not readily inaccessible. (App. Vol. II at 137, ¶5,138-39, ¶ 9.) See Bruton Parish, 42 Va. Cir. at 473; Restatement (Second) of Torts § 320.

- *Jaimee Kellermann was in the personal care and custody of the Defendants. They invited her to their home for the weekend, and they voluntarily assumed the responsibility to care for and supervise her*. (App. Vol. II at 137-139, ¶¶ 4-10, at 215.) See Bruton Parish, 42 Va. Cir. at 473; Restatement (Second) of Torts § 320; cf. Fox v. Custis, 236 Va. 69, 75, 372 S.E.2d 373, 376 (1988) (applying that factor in determining whether § 315(a) applied.)

- *There is no requirement that the relationship be a paid one.* See Burdette v. Marks, 244 Va. 309, 312, 421 S.E.2d 419, 421 (1992) (no duty to public at large (although officer presumably was paid by public taxes); the relationship with a specific person or classes of persons creates the

duty); see also Bruton Parish, 42 Va. Cir at 473 (duty flowed from "special relationship," not from fact that defendant was paid for services.)

- *Defendants had represented to Jaimee Kellermann and her parents that they would take care of her, including providing safe transportation (free of boys in cars.)* (App. Vol. II at 138, ¶¶ 7-9.) See Schieszler, 236 F. Supp. at 610 (A "reasonable expectation" among the parents and students existed that the college would exercise "reasonable care" to protect the students from "foreseeable harm.") (citation omitted.)

- *Jaimee Kellermann and her parents reasonably relied upon Defendants to take care of her.* Jaimee's parents were miles away; she had been entrusted to the Defendants' care; she was away from her hometown at a large and unfamiliar shopping/movie complex; she had no reason to doubt that Defendants would take care of her. Id.

- *Defendants reasonably foresaw that they were expected to take affirmative action to assist or protect Jaimee Kellermann*. (App. Vol. II at 138, ¶¶ 4-9, at 144, ¶ 28, at 215-16.) See Schieszler, 236 F. Supp. at 609-610, quoting Burdette v. Marks, 244 Va. at 312, 421 S.E.2d at 421 ("In determining whether such a special relationship existed, it is important to consider whether [the defendant] reasonably could have foreseen that he would be expected to take affirmative action to protect [the plaintiff]."); see

also Delk v. Columbia/HCA Healthcare Corp., 259 Va. 125, 132-33, 523 S.E.2d 826, 831 (2000) *(*Hospital's knowledge of plaintiff's need for protection was factor considered in finding special relationship.)

- *Jaimee Kellermann entrusted her safety to Defendants and had little to no ability to control her environment.* A child, over 100 miles from her parents, on a winter night at an unfamiliar movie/shopping complex, and as a guest at Defendants' home, she had little to no ability to control her environment, and no adults to turn to for protection besides Defendants. (App. Vol. II at 216). See Ryan Taboada v. Daly Seven, Inc., 271 Va. 313, 325, 626 S.E.2d 428, 434 (2006).

- *Defendants took affirmative action that increased the risk of harm to Jaimee Kellermann*. (App. Vol. II at 139-44, ¶¶ 10, 16, 18-19, 23, 28, at 215.) Cf. Bradshaw v. Minter, 206 Va. at 453, 143 S.E.2d at 829 (social host's activities were "active or affirmative negligence"); Harrison v. Bittler, 72 Va. Cir. at 12 (finding no "active conduct" on the part of defendants.)

- *Defendants knew or should have known of the likelihood of increasing the risk of harm to Jaimee Kellermann*. It is foreseeable that a teenage boy driver, with multiple teen passengers (in violation of teen driving laws), is more likely to be in an automobile collision than an experienced adult driver; moreover, Defendants knew or should have

known information about NDF and his reckless and dangerous propensities. (App. Vol. II at 139-142, ¶¶ 13-20, 23, 26, 28.) See Taboada, 271 Va. at 326-27, 626 S.E.2d at 434-35; see also discussion pp. 12-13 below.

- *The third person, NDF, was a specific individual designated by Defendants and not an unknown criminal assailant.* (App. Vol. II at 215); See Bruton Parish, 42 Va. Cir. at 473; see also Skate America, 261 Va. at 130, 540 S.E.2d at 128.
- *Defendants had the ability to control NDF.* NDF would not have driven the girls without Defendants' permission. (App. Vol. II at 215, at 218.) See Bruton Parish, 42 Va. Cir. at 473; Restatement (Second) of Torts § 320.
- *There was a minimum burden on Defendants to guard against the likelihood of injury.* See Wright v. Webb, 234 Va. at 531, 362 S.E.2d at 921 (1987); see also discussion below at 13.

III. Defendants Owed a Legal Duty to Jaimee Kellermann

Conceding the possibility that this Court could find a "special relationship," the Defendants suggest that they had no duty to protect Jaimee. That argument is contrary to the facts and law. As stated before,

Defendants assumed a duty to act carefully when they undertook to provide Jaimee with transportation and selected NDF as their substitute driver.[3]

Additionally, Defendants had a duty since they knew or should have known of the necessity to protect Jaimee from the danger posed by NDF. This duty arose because there was a special relationship between Jaimee and Defendants, and the risk of injury to her was reasonably foreseeable. Contrary to Defendants' erroneous, repeated assertions, the standard is not "actual knowledge of imminent probability of harm." That standard was rejected expressly in Taboada in a guest-innkeeper special relationship. The "reasonably foreseeable" standard in Taboada should be applied in this case since the special relationship between Jaimee and Defendants is more akin to the Taboada guest-innkeeper situation than to the business-owner/invitee one of Wright v. Webb, 234 Va. 527, 362 S.E.2d 919 (1987), or the landlord/tenant one in Yuzefovsky v. St. John's Wood Apartments,

[3] In support of their argument that they did not assume a duty to warn or protect Jaimee, Defendants have contended that Virginia does not recognize a claim for negligent supervision. That argument is misplaced and the cases relied upon by Defendants are inapposite. The primary case cited, Chesapeake & Potomac Tel. Co. v. Dowdy, 235 Va. 55, 61, 365 S.E.2d 751, 754 (1988), is an employer/employee case in which the dispositive question was whether Virginia recognizes a tort of negligent supervision of an employee by the employer/ its managerial personnel. That is distinct from duties adult supervisors may have to children in their care/custody.

261 Va. 97, 540 S.E.2d 134 (2001). Likewise, the test in Bruton Parish is "knows or should know" of the need for exercising such control. See Bruton Parish, 42 Va. Cir. at 473, citing the Restatement 2d of Torts § 320.

Defendants also attempt to distinguish Bruton Parish, Skate America, and Taboada based upon the information available about the third-party bad-actors. Those cases all involved criminal assaults, and the criminal conduct (with the exception of that in Bruton Parish), was not committed by the defendant's designee. Here, where the third party was assigned to drive Jaimee by Defendants, it is reasonable to expect that Defendants would know or should have known of the circumstances of his driving that night and his driving abilities, including whether driving laws were being violated, and his tendencies towards reckless, impulsive, and otherwise dangerous behavior. Or, are Defendants contending that they basically put Jaimee Kellermann with three other teenagers, into a car, driven by a seventeen year-old boy whom they knew nothing about, despite the fact that he had associated previously with their troubled daughter, and was known by the school, other parents, other teens, and by their own daughter as being a dangerous and reckless boy? Plaintiff has alleged sufficient facts, including those implied, and fairly and justly inferred, to establish that

Defendants knew or should have known of the danger.[4] Defendants cannot hide behind a shield of ignorance and neglect as their defense.

Furthermore, in determining whether a duty exists, in addition to the likelihood of injury, considerations include "'the magnitude of the burden of guarding against it, and the consequences of placing that burden on the defendant.'" See Wright v. Webb, 234 Va. at 531, 362 S.E.2d at 921 (1987) (quotation citations omitted); see also Skate America, 261 Va. at 130-31, 540 S.E.2d at 128. Here, there was a minimal and inconsequential burden – simply having one of the Defendants leave their home and go approximately two miles away to pick up the girls at the movie/shopping complex, as Defendants had represented to Jaimee, her parents, and Maddie Lane's parents that they would do.

At a minimum, the complaint alleges sufficient facts to create a jury issue of whether the likelihood of harm to Jaimee was "reasonably foreseeable." See Delk, 259 Va. at 134, 523 S.E.2d at 831; see also A. H. v. Rockingham Publishing Co., 255 Va. 216, 225-226, 495 S.E.2d 482, 488-89 (1998) (Kinser, J. dissenting).

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[4] Defendants' objection to Plaintiff's reference to deposition testimony and other characterizations is unfounded. To the extent that Defendants actually have admitted facts and Plaintiff has referenced actual deposition testimony of Defendants and NDF, or characterized the facts alleged, this falls within the realm of facts "implied and fairly and justly inferred."

IV. Proximate Cause is an Issue for the Trier of Fact; Defendants Put into Operation Any Other Cause

Finally, proximate cause is ordinarily a question of fact for the jury, Poliquin v. Daniels, 254 Va. 51, 57, 486 S.E.2d 530, 534 (1997), and thus is not pertinent to this appeal on the demurrer. Moreover, in their brief, Defendants (in particular Defendant Paul McDonough) have attempted "to wash their hands" of Jaimee Kellermann's death by referring repeatedly to the "accident." What Defendants fail to acknowledge is that their negligence put Jaimee into that car, and thus set into motion the events that would ultimately lead to her death. "[A]n intervening cause does not operate to exempt a defendant from liability if that cause is put into operation by the defendant's wrongful act or omission." Jefferson Hospital Inc. v. Van Lear, 186 Va. 74, 81, 41 S.E.2d 441, 444 (1947), cited in Williams v. Cong Le, 276 Va. 161, 167-168, 662 S.E.2d 73, 77 (2008). Finally, unlike a pure accident, the event leading to Jaimee's death was a foreseeable and preventable result of Defendants' wrongful conduct. [5]

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[5] "Accidents, as they occur, are seldom foreshadowed ...In other words, if the act or omission is one which the party ought, in the exercise of ordinary care, to have anticipated was likely to result in injury to others, then he is liable for any injury proximately resulting therefrom, although he might not have foreseen the particular injury which did happen." Gregory v. Lehigh Portland Cement Company, 157 Va. 545, 559, 162 S.E. 881, 885 (1932) (quotation citation omitted.)

V. Defendants' Assignments of Cross-Error are Unfounded

For the reasons set forth in Plaintiff's Opening Brief and those stated herein, this Court should disregard Defendants' assignments of cross-error and the bases thereof.

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 26th day of February, 2009, twelve (12) copies and one (1) electronic copy of the Reply Brief of Appellant have been filed with the Clerk of the Supreme Court of Virginia by hand-delivery, and that three (3) copies have been sent by First Class Mail, postage prepaid, to Counsel for Defendants-Appellees at the following address:

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