

**STATE OF MICHIGAN  
IN THE SUPREME COURT**

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JESSICA BITNER, a minor,  
and BONNIE BLACK, as next friend,

Plaintiffs/Appellees,

v

ANTHONY SHAFER,

Defendant/Appellant,

and

WILLIAM SHAFER,  
MARY SHAFER, and  
IAN GEARHART,

Defendants.

Supreme Court Case No. 149516

Court of Appeals Case No. 312379

Wayne County Circuit Court

Case No. 11-010645

Hon. Amy P. Hathaway (P40786)

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**PLAINTIFFS-APPELLEES' CORRECTED BRIEF ON APPEAL**

**ORAL ARGUMENT REQUESTED**

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**CONCURRING STATEMENT AS TO JURISDICTION**

Plaintiffs/Appellees accept and concur with the Statement Regarding Jurisdiction found in Defendant/Appellant Anthony Shafer's Brief on Appeal, at page v.

**CONCURRING STATEMENT AS TO STANDARD OF REVIEW**

Plaintiffs/Appellees agree that the standard of review on appeal in this case is de novo, as is stated in Defendant/Appellant Anthony Shafer's Brief on Appeal, page viii.

## COUNTER-STATEMENT OF QUESTIONS INVOLVED

- I. WHETHER DEFENDANT-APPELLANT ANTHONY SHAFER OWED A DUTY TO PLAINTIFF/APPELLEE, JESSICA BITNER, TO USE REASONABLE CARE TO PROTECT HER FROM THE RISK OF HARM POSED BY A LOADED SHOTGUN WHERE HIS HANDLING OF THE SHOTGUN IN THE PRESENCE OF OTHER PERSONS, INCLUDING HIS HALF-BROTHER, DEFENDANT, IAN GEARHART, WHO LATER ACCIDENTALLY SHOT PLAINTIFF/APPELLEE, JESSICA BITNER, WITH THE SAME SHOTGUN, REPRESENTED TO THOSE OBSERVING HIM BOTH THAT HE WAS FAMILIAR WITH THE SHOTGUN AND THAT HE HAD ENSURED THAT IT WAS SAFE FOR OTHERS TO HANDLE THE SHOTGUN?

Plaintiff/Appellee answers "Yes".  
Defendants/Appellants answer "No".  
The trial court would answer "No".  
The Court of Appeals answered "Yes".  
This Court should also answer "Yes".

- II. WHETHER DEFENDANT-APPELLANT ANTHONY SHAFER OWED A DUTY TO PLAINTIFF/APPELLEE, JESSICA BITNER, TO USE REASONABLE CARE TO PROTECT HER FROM THE RISK OF HARM POSED BY A LOADED SHOTGUN BECAUSE IT WAS FORESEEABLE THAT GEARHART WOULD PICK UP THE SHOTGUN AGAIN LATER THAT SAME EVENING WHEN HE HAD BOTH DEMONSTRATED A CLEAR INTEREST IN THE SHOTGUN AND SHAFER HAD EARLIER HANDED THE SHOTGUN BACK TO HIM AFTER LEADING HIM AND THE OTHERS TO BELIEVE THAT IT WAS SAFE TO HANDLE THE SHOTGUN?

Plaintiff/Appellee answers "Yes".  
Defendants/Appellants answer "No".  
The trial court would answer "No".  
The Court of Appeals answered "Yes".  
This Court should also answer "Yes".

- III. WHETHER DEFENDANT/APPELLANT, ANTHONY SHAFER, CAN BE HELD RESPONSIBLE IN A CIVIL ACTION UNDER MICHIGAN LAW FOR HIS CONDUCT IN HANDLING A LOADED SHOTGUN IN THE PRESENCE OF OTHER PERSONS, INCLUDING DEFENDANT, IAN GEARHART, WHERE IT WAS GEARHART, WHO ACCIDENTALLY SHOT PLAINTIFF/APPELLEE, JESSICA BITNER, NOT SHAFER, AND IT IS A CRIME IN MICHIGAN TO NEGLIGENTLY DISCHARGE A FIREARM?

Plaintiff/Appellee answers "Yes".  
Defendants/Appellants answer "No".  
The trial court would answer "No".  
The Court of Appeals answered "Yes".  
This Court should also answer "Yes".

- IV. WHETHER DEFENDANT-APPELLANT ANTHONY SHAFER BREACHED A DUTY TO USE DUE CARE TO PROTECT PLAINTIFF-APPELLEE, JESSICA BITNER, FROM THE UNREASONABLE RISK OF HARM POSED BY AN UNSECURED PUMP ACTION SHOTGUN THAT WAS KEPT IN HIS GRANDPARENTS' GARAGE BECAUSE HE ALONE KNEW THE SHOTGUN HAD 2 BULLETS IN IT AND THE SAFETY WAS NOT ON, AND YET, HE DID NOT SECURE THE WEAPON, ACTIVATE THE SAFETY SWITCH, REMOVE THE BULLETS, OR WARN THE OTHERS PRESENT THAT THE SHOTGUN STILL POSED A DANGER TO THEM?

Plaintiff/Appellee answers "Yes".

Defendants/Appellants answer "No".

The trial court would answer "No".

The Court of Appeals answered "Yes".

This Court should also answer "Yes".

- V. WHETHER DEFENDANT/APPELLANT ANTHONY SHAFER'S CONDUCT IN HANDLING A LOADED SHOTGUN IN THE PRESENCE OF OTHER PERSONS, INCLUDING DEFENDANT, IAN GEARHART, WAS A PROXIMATE CAUSE OF GEARHART'S NEGLIGENCE WHEN THE SAME SHOTGUN ACCIDENTALLY DISCHARGED, AND PLAINTIFF/APPELLEE, JESSICA BITNER, WAS INJURED?

Plaintiff/Appellee answers "Yes".

Defendants/Appellants answer "No".

The trial court was never asked to address this question.

The Court of Appeals also was not asked to address this question.

This Court should not address this question since it was not preserved.

Alternatively, this Court should answer "Yes".



## INTRODUCTION

This case stems from an accidental shooting. The defendants included the shooter, the homeowners (one of whom claimed he was the gun owner), and their grandson, who resided with them. The issues, however, have narrowed since this lawsuit was filed. Most significantly, William and Mary Shafer, who owned, possessed, and controlled the land where this accidental shooting occurred are no longer defendants in this case. The trial court summarily dismissed all claims against them. No appeal was taken from that ruling. As such, the premises liability claims in this case were presumably extinguished. Premises liability claims are viable against the possessor of land only. See generally, M Civ JI 19.01.

Neither defendant remaining in this case<sup>1</sup> possessed or controlled the land where the accidental shooting occurred. Thus, premises liability law should have no bearing here.

Similarly, the presumed “licensee” status of social guests on the premises where the accidental shooting occurred is not the key to determining whether Defendant/Appellant, Anthony Shafer, owed a duty to Plaintiff/Appellee, Jessica Bitner, which would have included protecting her from the risk of being injured when an unsecured shotgun accidentally discharged. As to Anthony Shafer, this case is an ordinary negligence claim. The duties owed by a licensor to a licensee are only relevant to premises liability claims.

Even if this Court were to apply premises liability law to this claim, however, the duty owed by Anthony Shafer to Jessica Bitner, as a social guest, and thus, a licensee, included

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<sup>1</sup>The remaining defendants in this case are Defendant/Appellant, Anthony Shafer and Defendant, Ian Gearhart. Defendants, William and Mary Shafer, were summarily dismissed in the trial court and no appeal was taken as to them. A default judgment was entered below against Gearhart and he is not a party to this appeal. As with Shafer, the claim against Gearhart was for ordinary negligence based on his conduct in handling the loaded shotgun which accidentally discharged and injured Jessica Bitner.

protecting her from an unreasonable risk of harm that was known only to him. M Civ JI 19.06. Here, Anthony Shafer alone knew that the unsecured shotgun had 2 bullets in the magazine/reserve and could be easily armed for firing using the pump action.<sup>2</sup> At a minimum, he should have warned Jessica (and the others present that evening) that there were 2 bullets in the magazine/reserve of the unsecured shotgun that could be advanced into the chamber for firing by simply pumping the action. The additional rounds were not something that Jessica, or the others, including the shooter, knew about, or could have easily discovered, without knowing more about that particular shotgun and how it operated.

Assuming that this Court agrees that the case against Anthony Shafer is an ordinary negligence claim, and not a premises liability claim, the key questions on appeal concern primarily the duty element of this negligence claim. Effectively, this Court is asking, first and foremost, what, if any, duty was owed to Jessica by Anthony Shafer. The answer is a surprisingly simple one here (as sometimes is the case with ordinary negligence claims).<sup>3</sup>

Simply put, Anthony Shafer owed Jessica a duty to use reasonable care in handling the shotgun that was kept unsecured in his grandparent's garage when he was in the presence of other less knowledgeable persons, like his younger half-brother, Ian Gearhart, who might misunderstand what Shafer was doing when he inspected the shotgun, and therefore, mistakenly conclude based on what Shafer did that the shotgun was unloaded.

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<sup>2</sup>The shotgun was a Mossberg pump action shotgun. [Appx 39b; M Shafer Dep Tr, p 12]. It could hold 8 rounds with one in the chamber and the others in the magazine/reserve. [Appx 32b-33b; W. Shafer Dep Tr, pp 29-30].

<sup>3</sup>See generally, *Kwiatkowski v Coachlight Estates of Blissfield*, 480 Mich 1062, 743 NW2d 917 (2007), in which this Court found a viable ordinary negligence claim in plaintiff's allegation that defendant acted negligently when he opened the front door to his home, suddenly, striking plaintiff, so that he fell off the front porch and was injured.

When Shafer undertook steps to ensure the gun was safe, and removed it from Gearhart's hands, his duty to use reasonable care in handling the shotgun did not end when he confirmed that no bullet was in the chamber ready to be fired at that moment. Shafer had a duty at that point to either secure the weapon, unload the bullets, or inform the others present that evening, who were watching him, that there were bullets in the magazine/reserve. Instead of taking those steps, Shafer returned the shotgun to Gearhart, without ever informing him or the others that the shotgun was safe only momentarily, and that there were still 2 bullets in the magazine/reserve and the safety was not activated.

Effectively, when Shafer took the shotgun from Gearhart, checked the chamber by pulling back the slide (and for good measure, clicked the trigger too), and then returned it to him, Shafer told him, via his conduct, that the shotgun was not loaded, and thus, safe. Unlike Gearhart, Shafer knew that there were 2 bullets in the shotgun's magazine/reserve – bullets that could be moved into firing position by racking the gun using the pump action.

Later, when Gearhart again picked up the shotgun, he thought it was unloaded based on Shafer's earlier inspection, and he proceeded to "cock" the gun, according to what he told Shafer immediately afterward. In short, Gearhart, using the pump action, advanced a bullet from the magazine into the firing chamber. Then, with the safety "off", and a round now in the chamber ready to be fired, Gearhart either pulled the trigger, thinking it was safe to do so since Shafer had done it, or he put too much pressure on the trigger and the shotgun accidentally discharged. In either case, it was Shafer's conduct that led Gearhart to believe the shotgun was unloaded, and thus, safe for him to play with.

If Shafer had acted differently when he took the shotgun from Gearhart to ensure that there was not a bullet in the chamber ready to be fired, this accidental shooting would

not have happened. If, for example, Shafer had not returned the shotgun to Gearhart, and instead, had secured the shotgun, or removed the bullets from the magazine/reserve, or activated the safety, or warned Gearhart and the others present that evening that there were bullets in the shotgun's magazine/reserve and it could be easily armed using the shotgun's pump action, Jessica would not have suffered a life-threatening gunshot wound.

As such, this case is a viable ordinary negligence claim. Shafer's conduct in handling the shotgun in front of other persons created a duty for him to use reasonable care to ensure the safety of those other persons. Shafer breached that duty by returning the shotgun to Gearhart after having effectively demonstrated that the shotgun was safe (and presumably, unloaded) when, in actuality, it could be easily armed for firing by using the pump action since there were 2 rounds in the magazine/reserve and the safety switch was not "on". Shafer's negligence caused the accidental shooting, because it was foreseeable that Gearhart, who was interested in the shotgun, would pick up it again later. In sum, Shafer had a duty to use due care which arose from how he handled the shotgun.

Alternatively, Shafer owed a duty to protect Jessica from the unreasonable risk of harm posed by an unsecured shotgun that only he knew had bullets in the magazine that could be easily advanced into the chamber using the pump action for quick, easy firing. After all, Shafer was the one who put Jessica in harm's way that evening by facilitating her presence for a party at the garage, and by purchasing and furnishing alcohol to the guests, including Jessica, who was only 16, and the shooter, Ian Gearhart, who had just turned 21.

Whether Shafer breached the duties he owed Jessica is presumably a fair question, but it is one for a jury to answer at trial, not for judges to decide as a matter of law. The same can be said about the more general question that this Court has asked regarding whether Shafer's negligence was a proximate cause of this accidental shooting. There is

no precedent for excusing such negligence simply because the accidental shooting (and the resulting injuries) occurred when a third-party acted negligently (as opposed to acting with intent to harm) – here, by unknowingly arming the shotgun using the pump action to advance a bullet into the firing chamber, and then, accidentally discharging the weapon.

Under the rather unusual, arguably unique, circumstances in this case, a reasonable juror could conclude that Shafer breached his duty to use due care by failing to secure the weapon, remove the bullets, switch “on” the safety, or instruct the others not to touch the shotgun. Instead, he simply handed the shotgun back to Gearhart. Or alternatively, a juror could reasonably conclude that Shafer violated his duty to Jessica Bitner as a social guest on the premises, and thus, a licensee under Michigan law, entitled to some protection from dangerous conditions on land known only to him that posed an unreasonable risk of harm. Under either analysis, the Court of Appeals’ decision to remand this case for trial should not be reversed by this Court; instead, it should be affirmed either for the reasons stated in the majority’s opinion, or because the undisputed facts in this case, as discussed throughout all levels of these legal proceedings, establish a viable ordinary negligence claim (or alternatively, premises liability claim, based on licensee status as a social guest).

Fundamentally, Defendant/Appellant, Anthony Shafer, owed Plaintiff/Appellee, Jessica Bitner, a duty, sounding in ordinary negligence, which was to protect her from being injured when the unsecured shotgun that was kept in the garage accidentally discharged. He knew that the shotgun had bullets in the magazine and could be easily armed using the pump action. He knew that Gearhart was interested in handling the shotgun. He did nothing to secure or disarm the weapon after Gearhart handled it. He did nothing to warn those present that evening that there were bullets in the shotgun. He

simply handed the shotgun back to Gearhart, thus, effectively telling him it was safe for him to play with. The jury is free to reject that claim, or apportion 100% fault to Gearhart, but the ordinary negligence claims against Anthony Shafer should not have been dismissed.

### **COUNTER-STATEMENT OF FACTS**

This lawsuit arises from an accidental shooting that occurred on July 21, 2011, in a garage on premises owned by William and Mary Shafer, in Belleville, Michigan. [Appx45b-47b; M. Shafer (MS), pp 34-44]. The Shafer's reside in a home on the premises. [Appx 37b, MS, p 4]. Anthony Shafer is their grandson. [Id]. He was 29 years old at that time. [Appx 12b; A. Shafer (AS), p 4]. He lived with his grandparents, having been released from state prison in May, 2010. [Appx 47b; MS, pp 43-44]. [Appx 12b, 14b; AS, pp 4, 11].

The garage where the accidental shooting occurred is attached to the Shafer's home. [Appx 38b; MS, pp 7-8]. It was used by the Shafer's for storage and socializing. [Appx 28b; W. Shafer (WS), pp 11-13] [Appx 39b; MS, pp 10-11]. Mary Shafer kept household sundries on some shelving units located in the garage. [Appx 37b; MS, p 4].

William Shafer spent his days in the garage, where he had a portable heater, a television with cable reception, a radio, and a desk. [Appx 28b-29b; WS, pp 11-16]. He also had a mini-fridge. [Appx 38b; MS, p 8]. It was his "den", where he entertained friends. [Appx 28b; MS, p 11]. One car was parked in the garage. [Id]. There were also armchairs. One was for William. The other was for Mary. [Appx 15b-16b, AS, pp. 17-18]. According to William, Anthony was allowed to use the garage "[i]f I'm not using it." [Appx 28b, WS, p 13]. William kept a shotgun in the garage for home protection. [Appx 39b; MS, p 12].

Jessica Bitner, age 16, was injured when Ian Gearhart, age 21, picked up an unsecured shotgun in the garage, and it suddenly discharged, striking Jessica in the leg. [Appx 4b-5b; J. Bitner (JB), pp 27-32]. The shotgun was a Mossberg pump action, capable of holding up to 8 bullets. [Appx 39b, MS, p 12] [Appx 26b-28b, WS, pp 4-11]. It is designed for “home protection”, not hunting. The Shafer’s used it for “home protection”. It was equipped with a pistol grip and a short barrel. [W. Shafer Dep Tr, pp 6-9]. It was kept in the Shafer’s garage, unsecured, where it could be found leaning against the garage wall between shelving units. [Appx 39b-40b; MS, pp 12-15]. The shotgun belonged to William. [Appx 26b, 33b; WS, pp 5-7, 32-33].<sup>4</sup> Anthony was also no stranger to guns, having been convicted on a felony firearm charge. Before he went to prison, Anthony owned firearms, including both rifles and handguns, which he kept in the Shafer’s home, where he also resided. He was familiar with guns and how to use them. [Appx 13b-14b; AS, pp 8-10].

There were 2 bullets in the shotgun on July 21, 2011. [Appx 19b; AS, p 33] [Appx 32b; WS, p 29]. It could hold up to 8 rounds. [Appx 32b; WS, p 29]. William had recently loaded the shotgun, but he had also fired 6 bullets from the shotgun, thus leaving 2 bullets. [Appx 33b; WS, p 30]. The shotgun has a “safety” switch, and according to William, he put the safety “on” before putting it back in the garage. [Appx 32b, WS, p 31]. It was his practice to keep the safety “on” when not using the gun. [Appx 27b-28b; WS, pp 9-10].

Anthony, however, testified that the safety was not “on” when he handed the gun back to the eventual shooter earlier that same evening. [Appx 19b; AS, p 32]. Anthony testified also that he knew it had 2 bullets in the magazine/reserve. [Appx 19b, AS, p 33].

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<sup>4</sup>William testified that he owned the shotgun, which was not licensed. Licensing is not required for a shotgun, even if used for “home protection”. [Appx 33 b, WS, p 32].

Anthony, and his half-brother, Ian Gearhart, spent the afternoon of July 21, 2012 “hanging out” with some friends in the Shafer’s garage and swimming at a nearby lake. [Appx 18b, AS, pp 26-28]. Jessica was one of the friends who spent the afternoon with them. [Appx 4b-5b; JB pp 27-32]. Also with them was Stephanie Sutton, age 23, another friend, Kayla Warden, and Ian’s brother, Dustin. [Id]. The girls (and Dustin) went home after swimming because Kayla wanted to go home and she was the one who drove them. [Id].

Shortly thereafter, Anthony and Ian contacted Stephanie and Jessica, or vice versa, and they all agreed to “hang out” later that evening in the Shafer’s garage. [Appx 18b, AS, p 28]. But first, they drove in Anthony’s car to the liquor store where Anthony purchased alcohol for them to consume that evening. He bought a fifth of brandy, which is what Jessica likes drinking. [Appx 18b, AS, pp 28-29] [Appx 3b, JB, p 12]. They then picked up Stephanie and Jessica and drove back to the Shafer’s garage where they proceeded to “hang out”, listening to music (and drinking brandy). [Id]. Shafer described the evening:

- Q. And so later on, you hooked back up with the girls, right?
- A. Correct.
- Q. How does that happen?
- A. Ian went with me, okay. We went in my car, and then Kayla drove Stephanie, Jessica, and Dustin back to their home.
- Q. Where did you and Ian go?
- A. I think we went to the store.
- Q. To get booze?



A. I got – yeah, I got some alcohol and I think I got some cigarettes and some – we went and got something to eat, you know.

Q. And how long were you apart from the girls?

A. No more than an hour-and-a-half. It could have been less, but no more than an hour-and-a-half.

Q. Do you know what kind of booze you bought?

A. I bought some brandy.

Q. Okay. Anything else?

A. No.

Q. Is that your drink of choice, brandy?

A. Sometimes.

Q. And how much did you buy?

A. I bought a fifth. [Appx 18b, AS, pp 28-29].

\* \* \*

Q. So then what happens when you come back to your house?

A. We listened to music, socialized.

Q. In the garage?

A. Correct.

Q. Drank?

A. I did. I had some drinks.

Q. Did Ian?

A. I believe Ian did too.

Q. The brandy.

- A. Correct.
- Q. Was it mixed with anything?
- A. I drink my liquor straight. [Appx 19b; AS, p 31].

Anthony claimed that he did not recall whether the girls were drinking. [Appx 19b, AS, pp 30-31]. But, Jessica acknowledged in her deposition that she consumed brandy that evening while the group was socializing in the Shafer's garage. [Appx 8b-9b; JB, pp 40-42].

Anthony Shafer recalled that the shotgun was first handled by Ian (and then him) before the group went swimming again. [Appx 19b-20b, AS, pp 33-34]. Anthony testified:

- Q. Then what happens? Do you go to the lake?
- A. No, the incident with Stephanie recognizing the gun, that happened during that time. . . . .
- Q. She sees the gun and then what? You pick it up?
- A. No.
- Q. What?
- A. **Ian went to go pick it up. I grabbed it out of his hand, made sure there was nothing in the chamber, okay, put the slide back, pulled the trigger, and then I handed him the firearm.**
- Q. **You pulled the trigger for what reason, to make sure there was nothing in it?**
- A. **Correct.**
- Q. **The safety of the gun, was it off at the time you handed it to Ian?**
- A. **If the trigger was pulled, I believe that the safety was not on.**

- Q. And then you handed it to him with no bullets in the chamber, the safety off?
- A. Yes.
- Q. And what did he do with it?
- A. Looked at it and then set it back in the corner.
- Q. Did he pretend to fire it? Did he –
- A. Nothing.
- Q. Did he pull the —
- A. He held it in the air –
- Q. – thingy back?
- A. No, he held it in the air.
- Q. Okay.
- A. Looked at it, you know, just observed it and then set it back in the corner. [Appx 19b, AS, pp 31-33].

\* \* \*

- Q. **At the time that you handed Ian the gun, you were aware that there were bullets in the gun, correct?**
- A. **Correct.**
- Q. But not in the chamber?
- A. Correct. . . .
- Q. **Did you say anything to Ian like “Don’t touch the gun again,” or anything like that?**
- A. **No.** [Emphasis added]. [Appx 19b-20b; AS, pp 33-34].

After handling the shotgun, the group proceeding to walk the hundred or so yards to the nearby lake, where they went swimming. [Id; see also Appx 20b, AS, p 36]. Ian and Jessica, however, stopped swimming before the others and walked back to the Shafer's garage. [Id]. At that point, it was early morning, probably past 3 a.m., and possibly as late as 4 a.m. [Appx 45b; MS, p 34]. Neither Ian, Jessica, or Stephanie had a car with them. Anthony had driven his car to pick the girls up earlier that evening and Ian was with him. [Appx 18b, AS, pp 28-29]. Anthony had the only available transportation. According to Jessica, the plan was for them to stay the night. [Appx 7b, JB, p 36]. Things, however, did not go as planned that evening. Anthony recounted what happened next when he testified:

Q. You ran up to the house?

A. Correct. That night he was – he was scared, you know, worried. He kept asking me, you know, what do I do? What do I do? What's going on? And he admitted to me later and that, that he shot her.

Q. Did he say how it happened? Because originally, I understand there was a story concocted that the gun fell off a shelf?

A. He – **he explained to me that he had picked up the gun, cocked it, and he tried to cock it again and the gun discharged.** [Appx 15b, AS, p 16].

\* \* \*

Q. Now, let's go back to what Ian told you. **Ian told you he cocked the gun. He tried to do it a second time and it discharged?**

A. **Correct.**

Q. Was there a safety on the gun?

A. Yes.

Q. Was the safety on?

A. I'm not aware of that. [Appx 16b, AS, p 20].

Ian Gearhart did not defend himself in this case and a default judgment was entered against him. Consequently, there is no sworn testimony from him about what transpired.

Jessica confirmed the basic events leading up to when the shotgun accidentally discharged, but she does not know precisely what Gearhart was doing immediately beforehand. [Appx 9b-10b; JB, pp 48-49, 54-55]. She recalled only that he said something about putting away the shotgun. She was not watching him closely when he picked it up. [Id]. She was shot in the back of her right leg because she was not facing him when the shotgun discharged. [Id]. Not surprisingly, Jessica was badly injured and nearly died. [Id]. She was fortunate, however, to survive the gunshot wound and she did not lose her leg.

This lawsuit was filed by Jessica's mother, Bonnie Black, as her next friend. Jessica was 16 years old when she was injured. She was age 17 when this lawsuit was initiated. She is now 21 years old. Since she was a minor when this accident happened, Jessica was not old enough legally to consume alcohol in the State of Michigan. In contrast, the others – Anthony, Ian, and Stephanie, were all over 21 (although Ian had evidently just turned 21 in May, 2011). As such, they could purchase and consume alcohol in Michigan. The law in Michigan prohibits adults from furnishing alcohol to minors such as Jessica.

Although Anthony claims that he does not recall Jessica drinking that evening, she testified that she consumed alcohol in the Shafer's garage, as did the others in the group, including Ian Gearhart. [Appx 8b; JB, p 10]. She also testified that she likes to drink brandy,

which is what Shafer purchased for them to consume that evening. [Appx 18b-19b, AS 29-30] [Appx 3b, JB p 12]. Anthony also recalled Gearhart consuming alcohol that evening..

The complaint filed on behalf of Jessica by her mother and next friend, Bonnie Black, alleged both premises liability and ordinary negligence claims against defendants, including not only Ian Gearhart and Anthony Shafer, but also, William and Mary Shafer. More specifically, as to Anthony Shafer, the Complaint alleged negligent acts, including:

- a. Creating a dangerous and hazardous condition so as to endanger the Plaintiff;
- b. Allowing a hazardous condition to exist on the premises;
- c. Failure to exercise reasonable care for Plaintiff's safety in the circumstances;
- d. Negligently leaving a loaded firearm in the garage;
- e. Failing to keep the firearm in a locked storage area;
- f. Failing to properly and adequately supervise the individuals on the premises;
- g. Negligently allowing a loaded firearm in an unlocked area where alcoholic beverages were being consumed;
- h. By the commission of other acts of negligence which are herewith reserved for proof at the time of trial. [Shafer's Appx 47a-48a, and 59a].

Similar allegations were made against William and Mary Shafer in a separate count of the Complaint. [Id]. The Complaint also alleged that William and Mary Shafer owned the home.

After discovery was completed in this case, William and Mary Shafer moved for summary disposition on the claims against them. [Shafer's Appx 1a-2a]. The motion for summary disposition as to the claims against William and Mary Shafer was based on both

MCR 2.116(C)(8) (failure to state a claim) and MCR 2.116(C)(10) (no genuine issue of material fact). The motion was heard on April 20, 2012. [Shafer's Appx, ROA, pp 1a-2a].

At the motion hearing, the trial court granted summary disposition as to the claims against William and Mary Shafer in this case. In short, the trial court held that there was no evidence that they – the grandparents – had any knowledge that Jessica (or anyone else, other than presumably their grandson, Anthony, who lived with them) was even on the premises later that evening, much less “partying” in their garage where the shotgun was kept leaning up against the wall between some shelving units. [Shafer's Appx, 64a].

Later, on June 19, 2012, an order was entered by the trial court, consistent with its earlier ruling on the record, which granted summary disposition on all claims against William and Mary Shafer based on MCR 2.116(C)(10), but not under MCR 2.116(C)(8). [Shafer's Appx 72a-73a]. No appeal was filed as to that ruling nor was reconsideration requested. [Id]. In short, the claims against William and Mary Shafer were not pursued. Consequently, William and Mary Shafer – the co-defendants, who owned the premises, and as to William Shafer, the shotgun too – are no longer parties to this case (and appeal).

Subsequently, Anthony Shafer moved for summary disposition on the claims against him. Again, the motion for summary disposition was based on both MCR 2.116(C)(8) and MCR 2.116(C)(10). After reviewed the briefing for and against Shafer's motion for summary disposition, and hearing argument from counsel at a motion hearing held on June 8, 2012, the trial court also dismissed the case against Anthony Shafer, stating the following:

THE COURT: Okay. I have defendant Shafer. He indicated that he was not even aware that Gearhart and Plaintiff returned to the garage. That's Exhibit D. Page 34 through 36. The Court is satisfied that how Shafer would ever know that

Gearhart would then, pick up the gun, which didn't have shells, and then load the shell into the chamber and then discharge it.

That the Court is satisfied is not foreseeable. And I have no special relationship between defendant Shafer and the plaintiff. Beyond the fact that the plaintiff was at the house, clearly as a social guest and nothing further.

So the Court is satisfied that disposition is proper as to the negligence claim.

With respect to the testimony that plaintiff was invited to Defendant's home, clearly as a social guest, for swimming and drinking alcohol.

Defendant Shafer, did he have a duty to alert the plaintiff to dangers that she was not aware of. I don't think that he did anything wrong. He checked that gun. He made sure that it's not armed. There were no bullets in the chamber before he showed it to defendant, Gearhart. That was earlier in the day. The Court is satisfied that that drinking age, that is illegal for Shafer, the Court is satisfied, that disposition is proper. [Shafer's Appx 67a-68a].

Subsequently, on June 8, 2012, an order was entered by the trial court which granted summary disposition on the claims against Anthony Shafer under MCR 2.116(C)(10) only.

A few months later, when the remaining claim against Defendant, Ian Gearhart, was finally concluded with entry of a default judgment against him, a timely appeal was filed as to the trial court's decision to summarily dismiss the case against Anthony Shafer only. Although an appeal on the claims against William and Mary Shafer would have been timely, if it had been filed at the same time, no appeal was brought as to the grandparents. In short, the premises claims against William and Mary Shafer, who owned, possessed, and controlled the premises, including the garage where this accidental shooting occurred, as well as any individual negligence claims against William Shafer, who owned the shotgun and kept it unsecured in the garage for "home protection", were not pursued on appeal.



On appeal, the trial court's decision to dismiss the case against Anthony Shafer was reversed. Simply stated, the Court of Appeals' majority opinion held that Anthony Shafer owed Jessica Bitner "a duty to use ordinary care as a general matter, and alternatively, because a special relationship existed between the two parties." [Shafer's Appendix 86a]. In reaching that holding, the majority recognized that in this case "[t]he question is whether there is a duty of ordinary care under the circumstances, and if so, whether a reasonable jury could conclude that defendant violated that duty." [Shafer's Appendix 85a, fn 3].

While the majority opinion did not bother to state the obvious in its ruling – that the possessors of land, William and Mary Shafer, had been dismissed and were no longer parties to this case on appeal – it clearly was also understood by the majority that the claim against Anthony Shafer was based on ordinary negligence, not premises liability, given that the majority opinion also said "[i]ndeed, as this is a negligence case, not a premises liability case, the question of whether plaintiff was an invitee or licensee is irrelevant. . . . [Id].

In outlining the facts pertinent to determining if a duty was owed, and if so, whether a jury could reasonably conclude that it had been breached, the majority also observed:

. . . Defendant watched Gearhart handle the shotgun and testified that he "appeared interested in it". He then provided, and allowed, Gearhart and minor plaintiff to drink hard liquor without securing the loaded shotgun or putting its safety on.

\* \* \*

Defendant knew that Gearhart was interested in the shotgun and had handled it without knowing if it was loaded. He also knew that Gearhart, and the rest of the individuals, including minor plaintiff, were consuming hard liquor. Defendant admitted that the shotgun's safety was off and that he knew that two shells were always in the gun. [Shafer's Appx 85a].

Based on the majority's observations about some, but not all, of the pertinent facts in this case, see *infra*, p 19, the majority opinion then further concluded:

Thus, a reasonable jury could find that defendant's failure to make the shotgun safe by removing it from the garage, unloading it, putting the safety on, or at a minimum, instructing Gearhart, that the gun was loaded and the safety was off, breached his duty of ordinary care to the plaintiff. [Appx 85a].

The majority also found support for its conclusions about duty, and breach of duty, in this particular case, in the evidence that Anthony Shafer had furnished alcohol to Jessica, when she was a minor, and only 16 years old, and the shooter, Defendant, Ian Gearhart.

More specifically, in rejecting Shafer's position that he owed Jessica no duty higher than what is owed to a licensee, because she was a social guest, the majority concluded:

Defendant, a 30-year-old adult, purchased liquor and contacted plaintiff, a 16-year-old minor, and Sutton for the purpose of having a party in his garage. Defendant picked up plaintiff and Sutton and plaintiff testified that she planned to spend the evening at defendant's residence. The individuals arrived at the garage late at night without the knowledge of the property owners. Defendant watched Gearhart handle the shotgun and testified that he appeared "interested" in it. He then provided, and allowed, Gearhart and minor plaintiff to drink hard liquor without securing the loaded shotgun or putting its safety on. Defendant's unlawful provision of liquor affected minor plaintiff's ability to recognize and protect herself from any attendant dangers. "[R]estrictions on underage drinking are premised on the idea that the minor must be protected from his own foibles by those that control the supply of alcohol." We accordingly reject defendant's argument that he cannot be held to any duty beyond that owed by a premises owner to an ordinary licensee. We decline to adopt defendant's view that the duty of adults who transport minors to a foreign location and provide them with alcohol is limited to that owed to ordinary licensees. [Citations omitted]. [Appx 85a].

The majority opinion could have observed also that Anthony Shafer's conduct in handling the shotgun after he took it from Gearhart's hands earlier in the evening created

a duty of ordinary care to those present in the garage who were at risk of being injured if it was not understood that pumping the action on the shotgun would be enough to arm it by advancing a bullet into the chamber where it could be easily fired. But, the majority seemingly did not understand the basic mechanics of how this pump action shotgun is operated. The majority did not recognize that Gearhart told Shafer that “he cocked the gun” – meaning, he pumped it, and thus, chambered a round before the gun accidentally fired.<sup>5</sup> But, regardless, the majority’s decision clearly rested on its determination that Anthony Shafer had a duty to use ordinary care to protect the others from harm that evening, especially Jessica, since she was underage, and alcohol was being consumed, but also presumably, the other persons present in the garage that evening, where alcohol was being consumed, because of the unsecured (and loaded) shotgun kept on the premises.

The majority opinion also rejected the defense’s position that Shafer’s negligence should be excused, because third-party criminal acts, such as Gearhart’s conduct in negligently handling, and thus, accidentally discharging the shotgun, are not foreseeable. In rejecting that contention, the majority noted that it was undisputed in this case that Gearhart acted negligently, not intentionally, and although his negligence in discharging a firearm is a crime in Michigan, such third-party criminal acts are not foreseeable only when the actor intended to injure another person, not when he simply acted negligently.

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<sup>5</sup>The majority was mistaken in saying that Shafer testified that he removed a shell from the chamber of the shotgun. [Appx 85a]. In actuality, he said only that he “checked” the slide – which he did by moving the pump back far enough to see into the chamber and confirm that there was no shell in the chamber – before pulling the trigger and then handing the shotgun back to Gearhart for him to play with. [Id]. Thus, contrary to what the majority mistakenly said, the jury does not need to disbelieve Shafer about whether he emptied a shell from the chamber, because he never said that. Shafer said only that he checked the chamber, not that he emptied a shell from the chamber. [Id].

The majority also observed that even when the injuries result from an intentional criminal act perpetrated by a third-party on the plaintiff victim, there is an exception for situations where there is a “special relationship” between the plaintiff and the defendant. [Appx 86a]. Consequently, even if criminally negligent third-party acts were also unforeseeable under Michigan law, there was, in the majority’s view, a “special relationship” between Anthony Shafer, who brought a minor such as Jessica to the garage, furnished the alcohol that was consumed, and failed to protect her from others’ negligent acts in handling a shotgun with 2 bullets in the magazine/reserve that was kept in the garage for “home protection”. [Id].

Defendant/Appellant sought reconsideration in the Court of Appeals, but the same 2-1 majority denied his motion. Subsequently, he applied for leave to appeal to this Court.

This Court granted leave to appeal, asking the parties to address the following questions:

(1) whether this action sounds in ordinary negligence or in premises liability; (2) the role, if any, of licensor-licensee relationships in this action; (3) the specific nature of the duty, if any, owed by defendant Anthony Shafer to the plaintiff’s next friend, Jessica Bitner, with respect to Bitner’s injury, including whether the parties had a legally significant “special relationship,” see generally, e.g., *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495 (1988); (4) whether a reasonable juror could determine that a duty was breached; (5) the import of a third party’s criminal act in negligently discharging a firearm; and (6) causation generally. [Appx 136a].

Effectively, this Court has asked the parties to address 3 out of the 4 elements that must be established in any negligence claim, whether it be for ordinary negligence or premises liability. The first three questions concern the duty element of a negligence claim. The fourth question concerns when breach of duty can reasonably be found. The fifth question also addresses duty (and possibly, also causation) since it is presumably asking whether (and when) a third-party’s criminal act in negligently discharging a firearm is foreseeable.

The sixth question asks the parties to address “causation” generally, presumably because of similar concerns about whether the third-party’s conduct was foreseeable in this case. For brevity’s sake, and clarity also, this brief will address duty, breach, and causation in separate sections with sub-sections directed to the specific questions asked of the parties.

## ARGUMENT

**I. DEFENDANT-APPELLANT, ANTHONY SHAFER, OWED A DUTY TO PLAINTIFF-APPELLEE, JESSICA BITNER, TO USE DUE CARE TO PROTECT HER FROM THE UNREASONABLE RISK OF HARM POSED BY THE SHOTGUN THAT WAS KEPT UNSECURED IN THE GARAGE BECAUSE HE ALONE KNEW IT HAD 2 BULLETS IN THE MAGAZINE/RESERVE AND THE SAFETY WAS NOT “ON”.**

**A. This case is a ordinary negligence claim.**

The key question in this case is whether Anthony Shafer’s conduct in handling the shotgun that evening created a duty for him to use reasonable care to protect the others, including Jessica, from harm, in particular, the danger posed by an unsecured shotgun, which had 2 bullets in the magazine/reserve, and the safety switch in the “off” position”.

In Michigan, the law is clear, as it is in other jurisdictions, that there is a duty to reasonable care when a person is engaged in some undertaking. In other words, the person’s actions create a duty to use ordinary care in performing that undertaking so that others are not subjected to unreasonable risks of harm. It is that duty – the duty to use due care when taking some action – that is at the very core of any ordinary negligence claim.

This Court has recognized the duty to use due care in the context of an ordinary negligence claims in other scenarios. In *Kwiatkowski*, supra, this Court reversed the Court of Appeals’ majority opinion, and instead, adopted the dissenting opinion by Judge Jansen. In *Kwiatkowski*, the majority questioned whether the case was properly viewed as an

ordinary negligence claim, as opposed to a premises liability claim, before concluding that the plaintiff should not have been allowed to amend his complaint to add an ordinary negligence claim. The dissenting opinion, which coincidentally was authored by Judge Jansen, as in this case, concluded that plaintiff had a viable ordinary negligence claim based on defendant's conduct in opening the door into plaintiff knocking him to the ground. Judge Jansen would have affirmed the trial court's refusal to grant summary disposition. This Court agreed with Judge Jansen, and accordingly, adopted the dissenting opinion.

The Court of Appeals has similarly affirmed the duty to use due care in ordinary negligence claims on many occasions. See also, *Laier v Kitchen*, 266 Mich App 482, 490, 702 NW2d 199 (2005); *Hiner v Mojica*, 271 Mich App 614, 615, 722 NW2d 914 (2006); *Sherry v E Suburban Football League*, 292 Mich App 23, 29, 807 NW2d 859 (2011). There is presumably no way to predict the manner in which individuals will attempt to do something, and in so doing, violate the duty to use due care in performing that undertaking.

Most recently, this Court addressed this issue in the context of whether a duty is owed to an injured third person when the defendant's conduct also violates an agreement between contracting parties. In *Loweke v Ann Arbor Ceiling & Partition Co*, 489 Mich 157, 170-172, 809 NW2d 553 (2011), this Court affirmed that a duty is owed to an injured third person when a breach of contractual duties injures that person. In so doing, this Court clarified its prior ruling in *Fultz v Union-Commerce Assocs*, 470 Mich 460, 683 NW2d 587 (2004), regarding when an injured third person can sue contracting parties on a tort claim. But, even more importantly, in the context of this case, this Court affirmed in *Loweke* that an ordinary negligence claim can be based on a defendant's undertaking, when it stated:

. . . . *Fultz* does not extinguish the simple idea that is embedded deep in the American common law of torts . . . : if one “having assumed to act, does so negligently,” then liability exists as to a third party for “failure of the defendant to exercise care and skill in the performance itself.” [Citations omitted].

Although this Court did not find a viable ordinary negligence claim in the *Fultz* case, the defendant snow removal contractor in that case did not perform his contracted undertaking. Without active negligence, this Court concluded that the defendant had no duty to use reasonable care in that case, and consequently, there was no ordinary negligence claim.

In contrast, in *Osman v Summer Green Lawn Care*, 209 Mich App 703, 532 NW2d 186 (1995), which was discussed in *Fultz*, supra, and distinguished by the Court in *Fultz*, at pp 468-469, the snow removal contractor in *Fultz* did not even bother to show up to perform his contracted duties, and thus, no duty to use due care was created, whereas, in *Osman*, the claim was that the defendant snow removal contractor violated his duty to use reasonable care by plowing the parking lot in such a manner as to create a hazard.

In this case, the active negligence on the part of Anthony Shafer could not be much clearer (although admittedly what he actually did and how this gun functions has not always been clearly described below, especially when, in the Court of Appeals’ majority opinion, it was incorrectly stated that “[d]efendant asserted that he removed a shell from the chamber” when, in actuality, he did not say that – he testified only that he checked the chamber of the shotgun, by pulling back the “slide”, meaning the pump, to confirm nothing was in the chamber ready to be fired before he then handed the shotgun back to Gearhart.

Much of the discussion (and argument) in this case has been couched in language debating whether the shotgun was “loaded” or “unloaded” when Shafer gave it back to

Gearhart and let him indulge his curiosity by playing with. Plaintiff's position throughout this case has been that the shotgun was an unsecured "loaded" weapon. Defendant's position has been that the shotgun, while admittedly unsecured, was not "loaded". While the term "loaded" can probably mean different things to different people, it is probably safe to assume that a layperson would say that a gun is "loaded" when there are bullets in the gun.

While an experienced gun owner might see a distinction as to whether a gun is loaded or unloaded, even with bullets in the gun, based on whether the gun can be fired simply by squeezing the trigger, it is probably fair to say that there is some basic gun knowledge that is required to have such an understanding – knowledge that was lacking at times in this case when it came to the decision-making. Here, the trial court also misunderstood the basic facts in this case, when stating on the record at the motion hearing that "[t]he Court is satisfied that how Shafer would ever know that Gearhart would then, pick up the gun, which didn't have shells, and then load the shell into the chamber and then discharge it . . . is not foreseeable." [Appendix, 67a]. That statement is simply, and unequivocally, wrong. The shotgun had "shells" in the magazine/reserve. Shafer knew it. Gearhart did not. Loading a shell into the chamber is simple with a pump action shotgun (for someone with adequate arm strength, as Gearhart evidently had). Gearhart did not need to locate "shells" and then figure out how to load them. All he had to do was rack the gun using the pump action, which he did, when in his words, he "cocked" the gun.

If anything, this debate over whether the gun was loaded or not demonstrates one of the most essential points to understanding this particular negligence claim. Shafer, an experienced gun owner, clearly knew how this shotgun operated. He alone knew that there were bullets in the magazine/reserve which could be advanced to the chamber for firing



simply by using the pump action. Gearhart, in contrast, did not know there were bullets in the magazine/reserve, and probably believed otherwise based on what Shafer did with the shotgun earlier in the evening. If he had, Gearhart would never have “cocked” the gun. Shafer’s knowledge, and Gearhart’s ignorance (as well as his clear interest in the shotgun) made it foreseeable that he would pick up the shotgun again, and believing it was unloaded, he would play with it by using the pump action, and even pulling the trigger. It is an incredibly stupid thing to do. But, he had just seen Shafer handle the shotgun, and seemingly confirm that it was safe (and unloaded). He had even seen Shafer pull the trigger safely. Shafer did not warn him the shotgun was still dangerous because it could be easily armed for firing by using the pump action. Instead, Shafer handed him the gun.

Under those circumstances, it was foreseeable that Gearhart would pick up the shotgun again later that evening and do what he did. Shafer had a duty to use due care to protect the others from harm because of how he handled the gun in front of them earlier that same evening. Shafer had many options available to him that could have easily ensured the safety of the others present that evening; instead, he acted negligently by not securing the weapon, removing the bullets, activating the safety or simply warning them.

**B. This case is not a premises liability claim.**

As set forth in the above section, this case is an ordinary negligence claim. It is not a premises liability claim first, and foremost, because Anthony Shafer is not the possessor of land, and therefore, he is not the proper defendant to sue on a premises liability claim. Second, an unsecured shotgun is presumably not, by itself, a dangerous condition on land. Here, the unsecured shotgun poses an unreasonable risk of harm to those present that evening, because Shafer’s conduct informed Gearhart that it was safe for him to play with.

William and Mary Shafer are no longer defendants in this case. They owned the premises, including the garage, where the accidental shooting occurred. Anthony Shafer, merely resided with them on the premises. He was not paying rent to live with them. He was allowed to use the premises so long as his use did not interfere with his grandparents. Clearly, William and Mary alone had possession and control over the premises, including the garage. Moreover, William owned the shotgun used in this accidental shooting. It did not belong to Anthony, and according to him, he had not touched it before that evening. The trial court summarily dismissed all claims against Mr. and Mrs. Shafer. No appeal was taken from that ruling, and thus, the premises liability claims in this case were extinguished.

**C. Gearhart's negligence was foreseeable because of what happened earlier that evening when he and Shafer handled the shotgun.**

As has been noted previously, Ian Gearhart clearly was interested in the shotgun. He was the one who picked it up after it was first noticed leaning against a wall in the garage between some shelving units. Unfortunately, Shafer did nothing to discourage him. Instead, Shafer indulged Gearhart's curiosity by handing the shotgun back to him, after he checked the slide to confirm that there was not a round in the chamber that could be fired. Instead, Shafer misled him into believing the gun was unloaded, when he pulled the trigger and it clicked harmlessly. Unfortunately, Shafer did not secure the weapon or warn him that there were 2 bullets in the magazine/reserve that could be pumped into the chamber.

While Gearhart did put the shotgun down, after first holding it up over his head, presumably so that the group could go for a late night swim, the brief interlude swimming does not make it unforeseeable that Gearhart would resume playing with the shotgun when he returned to the garage later on. Although the defense oddly suggests that Shafer had

no idea that Gearhart (or Jessica) would return to the garage after swimming, it is a curious claim given that neither had transportation. Where exactly were they going to go if not back to the garage? Jessica testified that they planned to stay the night and by that time it was already early morning. Clearly, it was foreseeable that they would go back to the garage where the shotgun was sitting in the same spot, waiting for Gearhart to again pick it up – unsecured, with 2 bullets in it that only Shafer knew about, and the safety switch off.

**D. Third-party criminal acts, whether negligent or intentional, do not negate existing legal duties, if the criminal act was not unforeseeable.**

Contrary to the defense’s position, there is no hard and fast rule of law that says that third-party criminal acts negate existing legal duties owed by the defendant in a civil case. That being said, it is also true that some third-party criminal acts are not foreseeable. In general, third-party criminal acts are not foreseeable, when done intentionally, because it typically cannot be anticipated that a third-party will intentionally harm another person. Consequently, a defendant in a civil case may owe no legal duty to an injured person when the harm results from a third-party’s intentional criminal act because it was not foreseeable.

The same, however, cannot be said where the resulting harm to another person is caused by a third-party’s criminal negligence. Here, the third-party criminal act was negligently discharging a firearm, which is a crime in Michigan, when it “kills or injures” another person. See generally, MCL 752.861. No cases have been cited by the defense that support the broad proposition that third-party criminal negligence is not foreseeable.

Instead, the cases cited and relied upon by the defense in its briefing all involve situations where the courts have found that no legal duty was owed to an injured person because the harm was caused by a third-party’s intentional criminal acts, i.e., shooting the

plaintiff with a firearm. As such, none of the cases are on point here because the third-party criminal acts of Ian Gearhart amounted to no more than negligent use of a firearm.

In *Lelito v Monroe*, 273 Mich App 416, 729 NW2d 564 (2007), for example, the plaintiff was murdered by her boyfriend who shot her with a loaded unsecured firearm that he got from defendant's bedroom in the home where both he and the plaintiff were living. The defendant owned both the home, and the gun, which he kept unsecured, and loaded. The Court held that it was not foreseeable that the boyfriend would retrieve the gun and use it to murder the plaintiff, who was his girlfriend. If his intentional criminal acts were foreseeable, the plaintiff would never have agreed to live with him, the Court concluded. Consequently, defendant homeowner (and gun owner) owed plaintiff no duty in that case.

The facts in *Lelito* could not be more different from what happened in this case. Gearhart accidentally shot Jessica because he did not know how the shotgun worked (or that it had 2 rounds in the magazine/reserve) when he pumped the action and it fired. Gearhart acted negligently, not intentionally, and he did so, because of Shafer's conduct earlier that evening when he handled the shotgun and then returned to Gearhart's hands.

The fact that the third-party's negligent act is also a crime when it results in another person being injured, as in this particular case, has no real legal "import" when it comes to determining whether a defendant, who is not the third-party actor, owes a legal duty to the injured person. Clearly, the operative question remains the same: was it foreseeable that someone such as the plaintiff would be injured? If so, a legal duty may be owed by the defendant in a civil case, such as the duty to use due care in an ordinary negligence claim.

Effectively, the defense contends that any negligence on Anthony Shafer's part should be excused, because third-party criminal acts such as negligent discharge of a

firearm, are not foreseeable. In making that argument, however, the defense ignores the fact that the rule it is relying on applies to intentional criminal acts, not criminal negligence. Instead, the defense asks this Court to adopt a rule that would dismiss negligence claims not based on whether the harm itself was foreseeable under the circumstances, but rather whether a third-party's negligence, and the ensuing harm, also resulted in criminal charges.

If adopted, such a broad rule would set a dangerous precedent since criminal negligence includes situations where an intoxicated person operating a motor vehicle injures another person. Since drunk driving is often charged as criminal negligence, those persons or entities who served the defendant driver while he or she was visibly intoxicated, or even the owner of the motor vehicle who gave the civil defendant car keys to drive home, would be exonerated from any civil liability because drunk driving is also a crime.

The cases cited by the defense are not on point here, because the outcome in each case clearly hinged on the fact that the injury/death resulted from a third-party's intentional criminal act, and not a merely a third party's negligence – negligence which also happens to be a crime, particularly in situations where it results in significant harm to other persons.

**E. Even if all third-party criminal acts, negligent or intentional, are viewed similarly in civil cases as to foreseeable harm, a duty was owed to Jessica by Anthony Shafer, because there was a special relationship between Shafer and everyone present that evening.**

Anthony Shafer, via his conduct in allowing (even facilitating) a 16 year old minor like Jessica being present in the garage that evening, when adults were consuming alcohol that he furnished, and that she also consumed, even though underage, contributed greatly, in the majority's view, to the underlying claim that Shafer breached his duty to use ordinary care under the circumstances to protect the others (especially Jessica) from unreasonable risks of harm, including the risk of an unsecured shotgun accidentally discharging while it

was in the hands of one of the adults consuming alcohol in the garage that evening. For the majority, Jessica's age and the alcohol consumption, both by her and the others present, played a role in its determination that what happened later that same evening when the shotgun discharged was a foreseeable event, and thus, gave rise to a duty here.

The majority expressed that view when it rejected the defense's claim that no duty higher than what is owed to a licensee in Michigan would be applicable in this case, stating:

Defendant's unlawful provision of liquor affected minor plaintiff's ability to recognize and protect herself from any attendant dangers. [R]estrictions on underage drinking are premised on the idea that the minor must be protected from his own foibles by those that control the supply of alcohol." . . . . We accordingly reject defendant's argument that he cannot be held to any duty beyond that owed by a premises owner to an ordinary licensee. . . . We decline to adopt defendant's view that the duty of adults who transport minors to a foreign location and provide them with alcohol is limited to that owed to ordinary licensees. [Citations omitted]. [Shafer's Appx 85a].

Ultimately, however, the majority went further by also holding that Shafer's conduct in ensuring the presence of a minor like Jessica, when adults were consuming alcohol, and also furnishing alcohol that she consumed, even though she was underage, created a "special relationship" in this case. Certainly, her age and the alcohol consumption should be considered in determining whether a special relationship was created here. However, the majority arguably placed too great an emphasis on her age and the group's alcohol consumption, when, in actuality, it was Shafer's conduct in handling the shotgun that arguably created a "special relationship" between him and the others present that evening.

As this Court aptly noted in *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499-450, 418 NW2d 381 (1988), "[t]he rationale behind imposing a duty to protect in these special relationships is based on control." In short, "[t]he duty to protect is imposed on the

person in control because he is best able to provide a place of safety.” *Id.*, at pp 499-500. Here, the person in control was Anthony Shafer because he alone knew that the shotgun had 2 bullets in this magazine/reserve, and despite his demonstration for the benefit of the others present in the garage that evening, it was not “unloaded” even though he could safely pull the trigger once he confirmed that there was not a round in the chamber ready to be fired. Shafer alone had control because he knew how the shotgun operated, i.e., that it could be armed for firing by using the pump action to advance a round into the chamber. He did not share that knowledge with the others, but he did hand the shotgun back to Gearhart, thus signaling to him that the shotgun was safe (and presumably, unloaded).

As the majority noted below, “[a] special relationship’ establishes ‘a duty of reasonable care toward those parties who are readily identifiable as being foreseeably endangered.” Here, those “foreseeably endangered” persons were everyone present that evening when the shotgun was being handled by Shafer and Gearhart, including Jessica.

**F. Even if this is a premises liability claim, the duty owed to social guests, as licensees, includes protecting them from unreasonable risks of harm that are known only to the defendant as the possessor of land.**

In the event that this Court concludes that this case is a premises liability claim, and that there is not also a viable ordinary negligence claim based on what Shafer did, this Court should nonetheless remand this case to the trial court for further proceedings, including jury trial. As stated previously, the undisputed facts in this case demonstrate that Defendant/Appellant, Anthony Shafer, alone knew that there were 2 bullets in the magazine/reserve of the shotgun that accidentally discharged while in Gearhart’s hands and seriously wounded Jessica. He did nothing to warn the others that the shotgun could be easily armed using the pump action because of the rounds in the magazine/reserve;

instead, he misled them into believing that the shotgun was safe (and that was not loaded) by first checking the chamber for a round and next clicking the trigger to show it was not armed for firing. He then handed the shotgun back to Gearhart, thus demonstrating to the others present that it was safe to play with. He never told them how the shotgun worked. As a social guest, Jessica and the others present that evening, were owed a duty by Anthony Shafer to protect them from any dangers on the land that were known only to him. He did not warn them of the danger posed to them by an unsecured shotgun that could be easily armed using the pump action because it had 2 rounds in the magazine/reserve. To the contrary, he instead misled them into thinking that the shotgun posed not danger at all.

**II. DEFENDANT-APPELLANT, ANTHONY SHAFER, BREACHED A DUTY TO USE DUE CARE TO PROTECT PLAINTIFF-APPELLEE, JESSICA BITNER, FROM THE UNREASONABLE RISK OF HARM POSED BY AN UNSECURED PUMP ACTION SHOTGUN THAT WAS KEPT IN HIS GRANDPARENTS' GARAGE BECAUSE HE ALONE KNEW THE SHOTGUN HAD 2 BULLETS IN IT AND THE SAFETY WAS NOT ON, AND YET, HE DID NOT SECURE THE WEAPON, ACTIVATE THE SAFETY SWITCH, REMOVE THE BULLETS, OR WARN THE OTHERS PRESENT THAT THE SHOTGUN STILL POSED A DANGER TO THEM.**

This Court has also asked “whether a reasonable juror could determine that a duty was breached”. Here, the duty was to use due care in handling a dangerous weapon in the presence of others so as to ensure that no one would misunderstand the risk of harm. Based on Shafer’s testimony in this case alone, there is more than enough evidence for a reasonable juror to conclude that Shafer breached his duty to use reasonable care in handling a dangerous weapon in the presence of others who might not understand or appreciate the danger presented by the situation, i.e. a shotgun loaded with bullets in the magazine capable of being advanced quickly into the firing chamber via the pump action.



Alternatively, Anthony Shafer breached the duty he owed to Jessica, as a social guest, and thus, a licensee, on the premises, because he failed to warn her of the danger that he alone knew was posed by the unsecured shotgun. If he had done so, she could have protected herself by asking that the gun be secured, unloaded, or by simply leaving. Since the knowledge that the shotgun had 2 rounds in the magazine/reserve (and could be easily armed using the pump action) was not revealed to her, or the others present in the garage that evening, she was unable to protect herself from the dangers that it posed.

**III. DEFENDANT/APPELLANT ANTHONY SHAFER'S CONDUCT IN HANDLING A LOADED SHOTGUN IN THE PRESENCE OF OTHER PERSONS, INCLUDING DEFENDANT, IAN GEARHART, WAS A PROXIMATE CAUSE OF GEARHART'S NEGLIGENCE WHEN THE SAME SHOTGUN ACCIDENTALLY DISCHARGED, AND PLAINTIFF/APPELLEE, JESSICA BITNER, WAS SERIOUSLY INJURED.**

Lastly, this Court has also asked whether causation can be established in this case, presumably, because the injuries resulted from "a third-party's criminal act in negligently discharging a firearm", and more generally, because Shafer's breach of his duty to use due care in handling a dangerous weapon in the presence of other persons, must be "a proximate cause" of the injuries sustained when the shotgun was accidentally discharged.

Similar to issues of foreseeability in assessing the element of duty in a negligence case, proximate cause "normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences." *Skinner v Square D Co*, 445 Mich 153, 163, 516 NW2d 475 (1994). See M Civ JI 15.01.

Here, Defendant, Ian Gearhart, was convicted of negligent discharge of a firearm. No one claims that Gearhart intended to shoot Jessica Bitner, who was, and is, his friend.

Nonetheless, he was negligent and his negligence resulted in him accidentally shooting his friend with a shotgun. Under Michigan law, he violated MCL 752.861. He was convicted of that crime and he went to prison. He similarly did not contest his civil liability in this case. He did not defend against the allegations that he was negligent in handling the shotgun, that his negligence resulted in the shotgun being accidentally discharged, and that Jessica was injured. Thus, a default judgment was entered against him in this case.

In Michigan, it is well-established that there may be more than one proximate cause. See generally, M Civ JI 15.03. Moreover, it is typically the jury that determines whether the defendant's conduct was a proximate cause of the plaintiff's injuries. *Id.* Where, as in this case, there are multiple defendants, it is not a defense that another defendant's conduct also may have been a cause of the occurrence. See M Civ JI 15.04. If more than one defendant is a proximate cause of the plaintiff's injuries, the jury apportions fault among the defendants. See M Civ JI 42.01. Here, the jury would determine first whether Shafer's conduct was a proximate cause of Jessica's injuries, and then, fault would be apportioned.

### **CONCLUSION**

This case is an ordinary negligence claim as to Defendant/Appellant, Anthony Shafer, not a premises liability claim. Shafer owed Jessica a duty to use reasonable care in handling the unsecured shotgun found in his grandparents' garage. Instead, he acted in a manner that led the others present that evening, including the shooter, Defendant, Ian Gearhart, to believe that the shotgun was safe (and unloaded). Shafer then proceeded to hand the shotgun to Gearhart, thus telling him that it was okay for him to satisfy his curiosity by playing with it, which he did later that evening when he picked it up again, cocked it, thus chambering a round, and it accidentally discharged, striking Jessica in the

leg. If Shafer had secured the shotgun, removed the bullets from the magazine/reserve, turned on the safety switch, or simply warned the others that there were 2 rounds in the magazine/reserve that could be easily moved into firing position by racking the gun with the pump action, this accident shooting would not have happened. He did not do those things. To the contrary, he handed the shotgun back to Gearhart as if it posed no danger at all. For this reason, the Court of Appeals' majority opinion is fundamentally sound in its conclusion that this claim was for ordinary negligence and Shafer owed Jessica a duty to use reasonable care to protect her from the risk of harm posed by the unsecured shotgun.

### **RELIEF REQUESTED**

Plaintiffs/Appellees, Bonnie Black, as next friend of Jessica Bitner, a minor, by and through their attorneys, Speaker Law Firm, PLLC, ask this Court to affirm the Court of Appeals' ruling in this case, or grant such further and other relief as is warranted in this case, including, but not limited to, remanding this case for further proceedings consistent with this Court's rulings, in particular, so that she can proceed with a jury trial on her claims.

Respectfully submitted:

**SPEAKER LAW FIRM, P.L.L.C.**  
Attorneys for Plaintiffs/Appellees

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