STATE OF MICHIGAN
SUPREME COURT
(On Appeal from the Michigan Court of Appeals)

BONNIE BLACK, Next Friend of JESSICA BITNER, a minor,

Plaintiffs-Appellees,

v.

WILLIAM SHAFER, MARY SHAFER, and IAN GEARHART,

Defendants,

and

ANTHONY SHAFER,

Defendant-Appellant.

Supreme Court Case Number: 149516
COA Case Number:312379
Lower Court Case Number: 11-010645-NO
Honorable Amy P. Hathaway

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DEFENDANT/APPELLANT ANTHONY SHAFER'S REPLY IN SUPPORT OF BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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ARGUMENT

At issue in this case is whether Shafer (who did not own the gun or the property) owed a duty to Plaintiff (a social guest) to protect her from an unforeseeable gunshot. It is undisputed that Shafer had previously checked the gun to make sure that there were no shells in the chamber and had even pulled the trigger to confirm it was not loaded.[1] It is also undisputed that hours before the incident, Gearhart had picked up the gun, looked at it, and put it back in the spot that it was found in the garage.[2] Subsequently, Gearhart, Plaintiff, Shafer and Sutton went skinny dipping in a lake which was approximately 100 yards away. After about an hour, Plaintiff and her boyfriend, Gearhart, left the lake and returned to the garage (unbeknown to Shafer). Gearhart subsequently picked up the shotgun, "cocked it" and pulled the trigger striking Plaintiff. Shafer was not even aware that Plaintiff and Gearhart were no longer by the lake until **after** the incident took place.[3]

While the above facts are consistent with the evidence in this case, Plaintiff in her Brief on Appeal assumes additional "facts" that are not supported by the evidence and repeatedly relies on these unsupported assumptions. Plaintiff claims to know what Gearhart believed, thought, and knew. Plaintiff alleges (without citation to any testimony in support) that Gearhart was ignorant about guns and did not know how the shotgun worked. Plaintiff further alleges (without citation to any testimony in support) that Gearhart believed the shotgun was unloaded and safe to play with, and had he known there were shells in the reserve, he would never have "cocked" it. It is undisputed that Gearhart's

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[1]See **Appellant's Appendix p. 22a**, Deposition of Anthony Shafer at pgs. 32-33 of transcript.
[2]See **Appellant's Appendix p. 22a**, Deposition of Anthony Shafer at pgs. 32-33 of transcript.
[3]See **Appellant's Appendix, p. 23a**, Deposition of Anthony Shafer at pgs. 34-35 of transcript.

deposition was never taken and no affidavits from him were presented. Additionally, there is no deposition testimony from any witness as to Gearhart's knowledge of guns or any statements he made as to whether he thought the shotgun was loaded or unloaded. On page 3 of Plaintiff's Brief she states, "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." This statement is contrary to the actual testimony in the case. Shafer did not testify that Gearhart told him that he thought that the shotgun was unloaded, he simply testified that:[4]

> 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.

Plaintiff's statements as to Gearhart's thoughts, beliefs, and knowledge are nothing more than mere speculation and conjecture. "Conjecture" is defined as "a guess; supposition; surmise." Black's Law Dictionary, 7th Ed. (1999). "Speculation" is defined as "the act or practice of theorizing about matters over which there is no certain knowledge". Black's Law Dictionary, 7th Ed. (1999).

Additionally, Plaintiff repeatedly states in her Brief that the gun accidentally or suddenly discharged. On page 7 of her Brief, Plaintiff states as a "fact" that "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."[5] Plaintiff's repeated characterization of the gun "accidentally discharging" when Gearhart picked it up is misleading and incorrect. The gun did not discharge merely because Gearhart picked it up.

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[4]See **Appellant's Appendix p. 20a**, Deposition of Anthony Shafer at p.16 of transcript.

[5]Plaintiff cites to Appx 4b-5b; Bitner (JB), pp 27-32 in support of this statement. Nothing on the pages cited supports Plaintiff's statement. See also pages 3 and 5 of Plaintiff's Brief.

Gearhart picked up the gun, cocked it, and pulled the trigger.[6] The gun could not have discharged on its own as Shafer had previously made sure that there were no shells in the chamber and the shotgun could not fire without a shell being racked into the chamber.

Shafer Did Not Owe Plaintiff A Duty

As set forth in Shafer's Brief on Appeal, this case sounds in premises liability. However, regardless of whether this case is determined to sound in premises liability or ordinary negligence, Shafer did not owe Plaintiff a duty. Plaintiff now alleges that Shafer had a duty to use reasonable care in handling the shotgun in the presence of other less knowledgeable persons, like Gearhart, so as to ensure that no one would misunderstand the risk of harm (i.e. misunderstand that pumping the shotgun would be enough to arm it). Plaintiff further alleges that Shafer had a duty to either secure the shotgun, unload the bullets, or inform the others that there were bullets in the reserve.

Plaintiff's allegations fail for several reasons. First, Plaintiff is alleging that Shafer should have done more. Shafer secured the shotgun by making sure that there were no shells in the chamber and pulling the trigger to confirm that the shotgun was not loaded. The shotgun could not fire a bullet without a shell being racked into the chamber. "Simply alleging that an actor could have done more is insufficient under Michigan law, because, with the benefit of hindsight, a claim can always be made that extra precautions could have influenced the result. However, saying that a defendant could have taken additional precautions is insufficient to find ordinary negligence . . .". *Tarlea v. Crabtree*, 263 Mich. App. 80, 90(2004).

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[6]See **Appellant's Appendix p. 20a**, Deposition of Anthony Shafer at p. 16 of transcript.

Second, Gearhart's deposition was never taken and therefore, there is absolutely no evidence of his knowledge about guns or his understanding of the risk of harm. Further, no other witness testified about Gearhart's knowledge of guns. There is no evidence that anyone misunderstood the risk of harm related to a shotgun.

The Incident was Unforeseeable. Contrary to Plaintiff's allegations, Shafer could not have foreseen this incident. Plaintiff argues that Shafer's knowledge and Gearhart's ignorance (as well as his interest in the shotgun) made it foreseeable that he would pick up the shotgun again and play with it by using the pump action and pulling the trigger. Plaintiff's argument fails for several reasons. First, Plaintiff cites no testimony in support of the alleged "fact" that Gearhart was ignorant about guns. As set forth above, Gearhart's deposition was never taken and no one deposed ever testified about Gearhart's knowledge of guns.

Further, Gearhart's prior conduct did not put Shafer on notice that he was likely to pump the shotgun, pull the trigger, and shoot Plaintiff. When Gearhart picked up the gun hours before, he did not pump the shotgun, pretend to pump the shotgun, pull the trigger, pretend to pull the trigger, aim the gun at anyone, play with it, or otherwise indicate that he wanted to fire the weapon. He simply looked at it and put it back. Additionally, there is no evidence that Gearhart had been arguing with Plaintiff before the incident or was otherwise angry with her. It was not foreseeable that Gearhart would pump the shotgun, pull the trigger, and shoot Plaintiff.

Additionally, Plaintiff argues that it was foreseeable that Gearhart and Plaintiff were going to go back to the garage after they left the lake because they had no other place to go. What Plaintiff fails to acknowledge is the fact that Shafer was not even aware that

Plaintiff and Gearhart were no longer by the lake until **after** the incident took place.[7] Shafer did not see Plaintiff and Gearhart walking toward the garage or even leaving the lake. If Shafer thought that Plaintiff and Gearhart were still swimming, how could it be foreseeable to him that Gearhart would shoot Plaintiff when he thought he was no where near the unloaded shotgun? However, even if he had seen them leave the lake (he did not), it still was not foreseeable that Gearhart and Plaintiff (who were dating and had just been skinny dipping together)[8], would return to the garage where Gearhart would pick up the shotgun, rack a shell into the gun's chamber, aim in the direction of Plaintiff, and then pull the trigger causing it to fire.

It is undisputed that Gearhart committed a criminal act in shooting Plaintiff. Third-party criminal acts are unforeseeable by nature. See *Papadimas v. Mykonos Lounge*, 176 Mich App 40, 46-47; 439 N.W.2d 280 (1989); *Williams v. Cunningham Grocery Stores,* 429 Mich 495, 498-499; 418 N.W.2d 381 (1988); *MacDonald v. PKT, Inc.*, 464 Mich 322; 628 N.W.2d 33 (2001). While Plaintiff alleges that this rule only applies to intentional criminal acts, not "negligent" criminal acts, Plaintiff cites no case law in support of her position. Additionally, Plaintiff alleges that the cases cited by Shafer are distinguishable because they involve intentional criminal acts and this was a negligent criminal act.

Contrary to Plaintiff's statement, *Cuolahan v. Stamper*, unpublished opinion per curiam of the Court of Appeals, issued Nov. 9, 2004 (Docket No. 249244), cited on page 17 of Shafer's Brief on Appeal, involves an accidental shooting.[9] In *Cuolahan, supra*, the

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[7]See **Appellant's Appendix, p. 23a**, Deposition of Anthony Shafer at pgs. 34-35 of transcript.
[8]See **Appellant's Appendix, p. 17a**, Deposition of Jessica Bitner at pgs. 46-47 of transcript.
[9]See **Appellant's Appendix, pgs. 7a-8a**.

evidence showed that on at least one prior occasion Ludwig had been playing with the gun and pretending to shoot people. In fact, he had been playing with the gun in the moments before approaching Nicholas and accidentally shooting him. If the *Cuolahan* Court could discern no foreseeability where there was a history of playing with the gun and pretending to shoot people, there can be no foreseeability here where the evidence demonstrates that: Gearhart had simply looked at the shotgun hours earlier and put it back; Gearhart did not pretend to shoot anyone, pull the trigger, pump the shotgun, or otherwise play with it; the parties all went to the lake to go swimming; and Gearhart and Plaintiff later left the lake and returned to the garage alone (unbeknown to Shafer); and Gearhart picked up the shotgun without the knowledge of Shafer.

There Was No Special Relationship. Plaintiff wants the Court to create a new category of special relationships. Examples of the requisite special relationship recognized in Michigan include: common carrier and passengers, innkeepers and guests, employer and employee, premises owners and invitees, merchants and invitees, landlord and tenants, and doctors and patients. *See Dykema v. Gus Macker Enterprises, Inc.,* 196 Mich. App. 6, 8; 492 N.W.2d 472 (1992). "The rationale behind imposing a duty to protect in these special relationships is based on control." *Williams v. Cunningham Drug Stores, Inc.*, 429 Mich. 495, 499-500; 418 N.W.2d 381 (1988). Plaintiff alleges that it was Shafer's conduct in handling the shotgun that created a special relationship between him and the others present. Plaintiff alleges that Shafer alone had control because he knew how the shotgun operated and he did not share that knowledge with others. Plaintiff's argument fails. Shafer was not the gun owner nor the landowner and there is no evidence that the others did not know how the shotgun operated. Gearhart was never deposed and no one

testified about his knowledge of the shotgun. Additionally, Plaintiff was aware of how shotguns operate and testified that she knew that the shotgun had to be "cocked" for it to fire. Further, there is no evidence that Shafer had the ability to control the criminal acts of Gearhart. Finally, Plaintiff was not unable to protect herself from the dangers posed by the shotgun. She was clearly able to appreciate the potential danger associated with a firearm. She could have left the garage when Gearhart was handling the shotgun and removed herself from a possible position of danger.

Even If Shafer Did Owe Plaintiff A Duty, He Did Not Breach Said Duty

Plaintiff alleges that Shafer breached his duty to use reasonable care in handling the shotgun because he did not secure the weapon, activate the safety switch, remove the bullets, or warn the others that the shotgun posed a danger to them. Shafer made the shotgun safe in another manner, he verified that it was not loaded (there were no shells in the chamber).[10] Gearhart had to load the weapon by racking a shell into the chamber before it could fire. Whether Shafer made the shotgun safe by verifying there were no shells in the chamber, putting the safety on, or even instructing Gearhart that there were shells in the reserve, Gearhart still had to take an affirmative/negligent/criminal action (taking the safety off and/or racking a shell into the chamber) and point the shotgun at Plaintiff in order for the shotgun to fire and strike Plaintiff. Shafer did not breach any duty to Shafer.

Plaintiff further alleges that had Shafer warned her of the danger of the shotgun, she could have protected herself by asking that the gun be secured, unloaded, or by simply

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[10]See **Appellant's Appendix**, **p. 22a**, Deposition of Anthony Shafer at pgs. 32-33 of transcript.

leaving. Nothing stopped Plaintiff from doing those things when Gearhart first picked up the gun hours before the incident. Further, there is no evidence that Plaintiff was not aware of the potential dangers that shotguns possess.

Shafer's Actions Were Not The Proximate Cause of Plaintiff's Injury

Because Shafer owed no duty to Plaintiff, there is no need to discuss proximate cause. However, even if Shafer owed Plaintiff a duty and breached that duty (he did not), he cannot be liable as his actions were not the proximate cause of Plaintiff's injuries.

Plaintiff claims that had Shafer secured the shotgun, removed the bullets from the reserve, activated the safety, or warned Gearhart and the others that there were bullets in the shotgun's reserve and that it could be armed using the pump action, Plaintiff would not have been injured. Plaintiff's statement is untrue. Plaintiff still could have been injured had Shafer warned Gearhart or activated the safety. Gearhart could have easily deactivated the safety (a simple on/off button) or could have simply ignored Shafer's warning. But for Gearhart's conduct in picking up the gun, racking a shell, and pulling the trigger, Plaintiff would not have been injured. Gearhart's conduct was the proximate cause of this incident, not Shafer's.

Additionally, Plaintiff argues that a jury should determine proximate cause, not the Court. "In a negligence case, proximate cause is generally a factual issue to be decided by the trier of fact. *Vsetula v Whitmyer*, 187 Mich. App. 675, 682; 468 N.W.2d 53 (1991); *Derbeck v Ward*, 178 Mich. App. 38, 44; 443 N.W.2d 812 (1989). However, if reasonable minds could not differ regarding the proximate cause of the plaintiff's injury, the court should decide the issue as a matter of law. *Whitmyer; supra* at 682; *Derbeck, supra* at 44." *Farmer v. Christensen*, 229 Mich. App. 417, 424, 581 N.W.2d 807, 811 (1998). Here,

reasonable minds could not differ that Gearhart's actions in returning to the garage hours later with Plaintiff (without the knowledge of Shafer), picking up the gun, racking a shell, and pointing the gun toward Plaintiff constitute an intervening superseding cause which relieves Shafer from liability.

RELIEF REQUESTED

For the above reasons and those set forth in his Brief on Appeal, Defendant/Appellant Anthony Shafer respectfully requests that this Honorable Court peremptorily reverse the Court of Appeals' reversal of the trial court's Order Granting Summary Disposition to Shafer, and reinstate the decision of the trial court granting summary disposition to Anthony Shafer.

Respectfully submitted,

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Dated: May 7, 2015

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PROOF OF SERVICE

The undersigned certifies that on May 7, 2015, she did serve:

- **Defendant/Appellant Anthony Shafer's Reply in Support of Brief on Appeal, Oral Argument Requested** and **Proof of Service**

with the Clerk of the Court using the Supreme Court's **TrueFiling E-File/E-Serve** program.

/s/ Linda Pillsworth
Linda Pillsworth