

STATE OF MICHIGAN
IN THE SUPREME COURT

BONNIE BLACK, Next Friend of
JESSICA BITNER, a Minor

Plaintiff-Appellee,

vs.

ANTHONY SHAFER,

Defendant-Appellant.

Case No: 149516

Court of Appeals No: #312379

Trial Court No: 11-010645-NO

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**PLAINTIFF-APPELLEE'S ANSWER TO DEFENDANT-APPELLANT'S
APPLICATION FOR LEAVE TO APPEAL**

149516-

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STATEMENT OF APPELLATE JURISDICTION

Plaintiff-Appellee BONNIE BLACK, Next Friend of JESSICA BITNER, does not contest jurisdiction, but avers that the opinion of the Court of Appeals was not clearly erroneous and material injustice would not result should the decision stand. In fact, material injustice would result if the Court of Appeals decision was reversed.

STATEMENT OF QUESTIONS PRESENTED

I. DID THE COURT APPEALS ERR WHEN IT HELD THAT A DUTY OF ORDINARY CARE WAS OWED BY APPELLANT TO APPELLEE'S MINOR, JESSICA BITNER?

Plaintiff-Appellee answers "no."

Defendant-Appellant answers "yes."

II. DID THE COURT OF APPEALS ERR WHEN IT HELD THAT A SPECIAL RELATIONSHIP EXISTED BETWEEN APPELLANT AND APPELLEE'S MINOR, JESSICA BITNER ?

Plaintiff-Appellee answers "no."

Defendant-Appellant answers "yes."

III. DID THE COURT OF APPEALS ERR WHEN IT HELD THAT WHETHER APPELLANT BREACHED THE DUTY OWED TO APPELLEE'S MINOR, JESSICA BITNER, IS AN ISSUE FOR A JURY TO DETERMINE?

Plaintiff-Appellee answers "no."

Defendant-Appellant answers "yes."

STATEMENT OF FACTS

This is a negligence case stemming from the accidental discharge of a loaded shot gun in Appellant Anthony Shafer's garage by his half-brother, Ian Gearhart. The primary issue in this case is what duty, if any, was owed by Appellant to Appellee under the circumstances. A secondary issue involves whether the incident was foreseeable.

Appellant Anthony Shafer lived with his grandparents in Belleville, Michigan, and had lived with them for years (except for two years while he was incarcerated for felony gun possession). The home is very close to a lake (less than 100 yards) and the distance can be covered in a few seconds.¹ The home contains a garage, which is set up like a "man-cave" with a television, chairs, tables, heater and a shot gun leaning against the wall, in the open.² Appellant, then 30 years of age, often entertained friends and himself in the garage, often imbibing alcohol and smoking marijuana.³ Appellant was aware that the gun was kept in the garage in between a shelf and against the wall, and had handled it before.⁴ **The gun was kept loaded with two bullets.**⁵ Appellant maintains in his brief that the gun was "unloaded", but this is not correct. The shotgun shells were not in the chamber, but they were in the gun. Appellant is attempting to mislead this Court into believing that he did not know the

¹ Ex. 1. Dep of Anthony Shafer. Pg. 36.

² Ex. 2, Dep. of William Shafer, pgs. 13-14, Ex. 3, Dep. of Mary Shafer, pgs. 8-11.

² Ex. 2, pg. 25, Ex. 2, pg. 25, and Ex. 3, pg. 20.

⁴ Ex. 1, pg. 16.

⁵ Ex. 1, pg. 33 and Ex. 2, pg. 8.

gun was loaded, which is contrary to his testimony where he admitted that he knew that there were two bullets in the gun ⁶.

On July 20, 2011, Appellant invited four friends over to his house, including Appellee's minor, Jessica Bitner [hereinafter Appellee], age 16, and his non-resident half-brother Ian Gearhart, age 21. After the group hung out in the garage then went swimming, the girls in the group went home. Appellant and Gearhart got dressed, went to the store to buy "booze" and cigarettes, picked up the girls again in Appellant's car with Appellant driving, and went back to the garage.⁷ It was dark when they began partying. Appellant, Appellee and Gearhart were drinking alcohol.⁸ While in the garage, one of the girls saw a shot gun prompting Gearhart to pick it up.⁹ Appellant inspected the loaded gun and then gave it back to Gearhart.¹⁰ After Gearhart admired the gun, it was put back in the same place. The group then went to the lake to go skinny dipping. Appellant did not tell Gearhart to leave the gun alone, despite his knowledge that Gearhart was interested in it, nor did he warn the guests to stay away from the gun even though it was loaded and Gearhart knew where it was kept in the garage.¹¹ Appellee did not know that the gun was loaded.

⁶ Ex. 1, pg. 33, lines 16-18.

⁷ Ex. 1, pg. 29.

⁸ Ex. 1, pg. 31.

⁹ Ex. 1, pg. 31.

¹⁰ Ex. 1, pg. 32.

¹¹ Ex. 1, pg. 34.

After everyone swam and drank for a short while, Gearhart and Appellee walked back the short distance to the garage, while Appellant and another girl stayed at the lake.¹² After returning to the garage, Gearhart picked up the gun again. After he "cocked it", it accidentally discharged. The bullet struck Appellee in the leg causing severe injuries. Before the police arrived, William Shafer cleaned the gun, and Mary Shafer sprayed blood off of the driveway. Neither were charged with evidence tampering.

Appellee asserted both negligence and premises liability in her Complaint against Appellant, William Shafer and Mary Shafer, alleging the following acts of negligence:

- 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; and
- h. By the commission of other acts of negligence which are herewith reserved for proof at the time of trial.

The defendants all filed motions for summary disposition on the basis that no duty was owed to Appellee and that even if a duty was owed, it was not breached. The

¹² Ex. 1, pg. 34,

trial court granted all of the motions and dismissed the case. With respect to Appellant Tony Shafer, the trial court held that no special relationship existed between Appellant and Appellee giving rise to a duty, the incident was not foreseeable and that "I don't think he [Appellee] did anything wrong." [Ex. 4, Transcript of hearing, pg. 8].

Appellee filed a Claim of Appeal as to Appellant only. Appellee did not appeal the decision with respect to William and Mary Shafer because discovery revealed that they did not know that Appellant brought Appellee to the house that night. The Court of Appeals, in a 2-1 decision, held that a duty of ordinary care was owed with respect to Appellee's negligence claim. The Court also found that a duty of reasonable care was owed by Appellant to Appellee on the basis of a special relationship because Appellee was readily identifiable as being foreseeably endangered. The dissent held that no special relationship existed because Appellee was "perfectly free" to leave and capable of protecting herself (neither of which were proven to be true and are disputed). The dissent also held that no duty was owed beyond that owed to a licensee.

Appellant seeks to be absolved from all liability in this matter, even though he brought young girls to his home, provided them with liquor, and "partied" with them in the garage where a loaded shot gun was kept and handled by a guest. Under these facts, the Court of Appeals was correct in finding that a duty was owed to Appellee by Appellant, and that a jury should determine whether that duty was breached. Further, since the Court of Appeals' decision is not clearly erroneous and material injustice would not result if the decision stood, Appellant's Application for Leave should be denied.

STANDARD OF REVIEW

This Court reviews *de novo* a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 33, 337; 572 NW2d 201 (1998).

LAW AND ARGUMENT

I. THE COURT OF APPEALS WAS CORRECT WHEN IT HELD THAT A DUTY WAS OWED BY APPELLANT TO APPELLEE BECAUSE APPELLEE PRESENTED EVIDENCE THAT A SPECIAL RELATIONSHIP EXISTED BETWEEN APPELLANT AND APPELLEE GIVING RISE TO A DUTY

This Court reviews *de novo* a trial court's decision on a motion for summary disposition. *Spiek, supra*.

To establish a prima facie case of negligence, a plaintiff must show (1) that the defendant owed a duty to the plaintiff, (2) that the defendant breached the duty, (3) that the defendant's breach of the duty caused the plaintiff injuries, and (4) that the plaintiff suffered damages. *Moning v Alfonso*, 400 Mich 425, 254 NW2d 759(1977).

"Duty" is defined as the legal obligation to conform to a specific standard of conduct in order to protect others from unreasonable risks of injury. *Burnett v Bruner*, 247 Mich App 365, 368; 636 NW2d 773 (2001). In deciding whether a duty should be imposed, the court must look at several factors, including the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented. *Hakari v Ski Brule Inc*, 230 Mich App 352, 359; 584 NW2d 345 (1998).

Appellant asserts that he had no duty to protect Appellee from the criminal acts of a third party. The rationale behind this general rule is that criminal activity is normally unforeseeable. *Papadimas v Mykonos Lounge*, 176 Mich App 40, 46-47, 439 NW2d 280 (1989). However, there are exceptions to this rule: where there is a special relationship between the plaintiff and defendant, or the defendant and the third party [*Graves v Warner Brothers*, 253 Mich App 486, 656 NW2d 195 (2002)], and when a defendant is harboring criminal activity on the premises and benefitting from that

activity. [*Wagner v Regency Inn Corp*, 186 Mich App 158, 463 NW2d 450 (1990)].

To determine whether a special relationship exists, it is necessary for the court to

“balance the societal interests involved, the severity of the risk, the burden upon the defendant, the likelihood of occurrence, and the relationship between the parties. Other factors which may give rise to a duty include the foreseeability of the criminal activity, the defendant's ability to comply with the proposed duty, the victim's inability to protect himself from the criminal activity, the costs of providing protection, and whether the plaintiff had bestowed some economic benefit on the defendant.”

Roberts v Pinkins, 171 Mich App 648, 652-653, 430 NW2d 808 (1988).

In this case, Appellee presented evidence that there was a special relationship between Appellant and Appellee, and between Appellant and the person who mishandled the gun (his brother Ian Gearhart), and that Appellant was harboring criminal activity in the home and benefitting from same (giving alcohol to minors for entertainment purposes).

This case does not involve deviant criminal activity in a public place, but rather an accidental discharge of a loaded firearm due to mishandling by a guest (Appellant's brother) who Appellant invited and brought to his home in his car along with underage girls. The severity of risk was high, as was the likelihood of occurrence. The cost of providing protection was not a factor; the gun could have been moved inside of the house, the shells could have been removed, or the gun could have been locked in a safe (especially once Appellant was made aware of his brother's interest in the loaded gun).

Appellant invited Appellee, a 16 year old minor, and Gearhart to his home to “party” in the garage where the loaded gun was located. Appellant and Gearhart

purchased alcoholic beverages together and picked up Appellee and other young women, drove them to the house and set up party central in the garage.¹³ This was a concerted effort between Appellant and his brother to bring the minor into Appellant's home for entertainment purposes.¹⁴ Then Appellant allowed Gearhart, who had been drinking alcoholic beverages, to return to the garage with Appellee when he knew that Gearhart was interested in the loaded gun. Based on these facts, the trial court erred when it held that there was no special relationship between Appellant and Appellee, and the Court of Appeals was correct in reversing that error.

The Court of Appeals did not claim that Appellant was liable based on "social host liability", as set forth by Appellant, but held that fact that Appellant brought a minor to his home and provided her with alcohol was a factor with respect to determining whether the alleged criminal activity was foreseeable and whether a special relationship existed. The citing of *Longstreth v Gensel*, 423 Mich 675; 377 NW2d 804 (1985) was made in the context of discussing foreseeability of the incident. (Opinion, pg.3, last paragraph).

Appellee was under 21 years of age and was drinking alcoholic beverages. Appellant denies that he knew Appellee was drinking, but this claim strains credulity and must be assessed by a jury, as held by the Court of Appeals. Appellant bought the

¹³ Ex. 1, pg. 30.

¹⁴ Appellee denies that he knew that Appellee was drinking, but this claim is self serving and subject to a credibility assessment by a jury.

alcohol ¹⁵, the party was in his home, he picked up Appellee in his car ¹⁶, and Appellee did not bring any alcohol. The reasonable inference to be drawn from the facts is that Appellee was given access to alcohol at Appellant's home by Appellant. Whether Appellant knew that Appellee, an underage girl, was drinking alcohol at his party which is material to a determination as to whether a special relationship existed. As such, the trial court erred in granting summary disposition on this basis, and the Court of Appeals did not err in reversing that holding.

Further, the dissent held that there was no special relationship in this case because Appellee was "perfectly free to leave . . ." and was "not unable to protect herself." (Dissent, pg. 3). The majority held that the fact that she was underage, brought to the home by Appellant and was stranded there, drinking alcohol provided by Appellant, and was brought to a garage where a loaded shot gun was kept, gave rise to a special relationship and hence a duty of reasonable care was owed. As set forth in *Roberts, supra*, a proper special relation analysis involves a balancing of the pertinent facts, as was conducted by the Court of Appeals.

II. THE TRIAL COURT ERRED WHEN IT HELD THAT THE INCIDENT WAS NOT FORESEEABLE, AND THE COURT OF APPEALS DID NOT ERR IN REVERSING THAT ERROR

This Court reviews *de novo* a trial court's decision on a motion for summary disposition. *Spiek, supra*.

¹⁵ Ex. 1, pg. 29.

¹⁶ Ex. 1, pg. 30.

Appellant claims that the incident was not foreseeable, so no duty was owed to Appellee. However, Appellee presented evidence that the incident was indeed foreseeable, certainly enough evidence to warrant a jury deciding the issue, as held by the Court of Appeals.

In order for harm to be foreseeable, **it is not necessary that the manner in which a person might suffer injury be foreseen or anticipated in specific detail.** *Babula v Robertson*, 212 Mich App 45, 536 NW2d 834 (1995).

The facts favor Appellee. Appellant picked up the girls in his car, with Gearhart, and brought them to Appellant's house.¹⁷ They were all partying together in the garage before they went swimming in a lake that was very close to Appellant's home. Gearhart picked up the gun and handled it before they went swimming. Appellant knew that the gun was loaded and certainly could have put the gun away or removed the shells¹⁸. They walked to the lake together and swam together after the gun handling. By the time Gearhart and Appellee left the lake, it was in the middle of the night. It was entirely foreseeable that they were going back to the garage because it was the nighttime¹⁹, they didn't have a vehicle (Appellant drove both of them to the

¹⁷ Ex. 1, pg. 30

¹⁸ Appellant's assertion that he did not own the gun thus did not have control of it is not believable in light of the fact that he lived in the house for years, admitted that he knew the gun was in the garage, and even handled the gun himself. He easily could have moved the gun to a safer location once Gearhart showed an interest in it.

¹⁹ Ex. 1, pg. 30

house²⁰), they were in the garage before they went swimming, they were not fully clothed, they did not have a relationship with the grandparents/owners of the home ²¹, there is no evidence that they weren't invited to stay in the actual home over night, and the garage was left open for them. It defies logic to think that Gearhart and Appellee would have walked half-clothed anywhere other than the garage where the party began.

The reasonable inference to be drawn from these facts is that Appellant knew that his brother and underage guest were going back to the garage from whence they came. Circumstantial evidence, and all reasonable inferences drawn therefrom, may be sufficient to establish a genuine issue of material fact. *Karbel v Comerica Bank*, 247 Mich 90 (2001).

In making the argument that the mishandling of the firearm was not foreseeable, Appellant relied on *Lelito v Monroe*, 272 Mich App 416, 729 NW2d 564 (2007), lv. den. 477 Mich 1116. In that case, the decedent and her boyfriend moved in with another couple, the defendant and his wife. The defendant kept a loaded gun in a cabinet in his bedroom. On a day when the defendant and his wife were gone, decedent's boyfriend found the gun and shot the decedent. The plaintiff estate argued that the incident was not foreseeable otherwise the decedent would not have invited her future murderer to move in with her. The Court agreed, and held that the incident

²⁰ Ex. 1, pg. 29.

²¹ Ex. 2, pg. 21.

was not foreseeable because the defendant had no duty to anticipate the boyfriend's criminal activity if the decedent apparently did not.

However, in this case we are not considering an out-of-the-blue criminal act by a stranger who took a hidden gun from a cabinet in a person's private bedroom. This case involves the mishandling of a loaded gun by the Appellant's brother, who had been driven to the house by Appellant, who was partying with Appellant, and who had picked up the loaded gun shortly before the subject incident in Appellant's garage where they were partying. There is also a question of fact whether Appellant should have known that Gearhart and Appellee were going back to the garage (as discussed previously in this brief). It is entirely foreseeable that a young man who was given access to the garage where the gun was located (garage was open), was drinking alcohol, and had shown interest in the loaded gun a few hours prior, would pick it up again and mishandle same.

This case isn't even remotely close to *Lelito* and presents a unique set of facts and circumstantial evidence supporting Appellee's assertion that the incident was foreseeable. Whether Appellant should have known that Gearhart and Appellee were going back to the garage, and whether Appellant should have anticipated that Gearhart would play with the gun again, are disputed issues. The trial court erroneously resolved these factual disputes in Appellant's favor rather than Appellee's. As such, reversal of the summary disposition motion grant was warranted by the Court of Appeals.

The dissent misses the mark with respect to the foreseeability analysis and held that the incident was not foreseeable because Appellant and Gearhart "honestly believed" that there were no bullets in the chamber thus the actual gunshot was not foreseeable. This argument requires a level of specificity not mandated by case law. *Babula, supra*. The gun was loaded with two shells. The issue is not whether it was foreseeable that a guest would pump a shell into the chamber and shoot another guest. The issue is whether, under the circumstances known to Appellant, it was foreseeable that Gearhart would play with the loaded gun again when he had already picked up the gun earlier in the day and had been drinking.

III. THERE IS AMPLE EVIDENCE THAT APPELLANT BREACHED THE DUTY OWED TO APPELLEE

This Court reviews *de novo* a trial court's decision on a motion for summary disposition. *Spiek, supra*.

As discussed earlier in this brief, Appellant had ample reason to know that Gearhart and Appellee were headed back to the party-central garage where the loaded gun was left in plain sight, a gun Appellant knew Gearhart was interested in.

Additionally, Appellant controlled the environment that they were partying in. It was his house and at the time of the incident, the gun was under his control. Appellant knew that the loaded gun was in the garage where it was easily accessible to all of his friends, some of which were not of legal drinking age, who often drank and smoked marijuana in the garage. Appellant even knew that Gearhart was very interested in the

gun, because he had picked it up a few hours prior to the incident, yet he admittedly did not tell Gearhart to stay away from the gun nor did he remove the bullets from the gun or move the gun. A jury could find that Appellant's failure to warn and failure to take some action to prevent handling of the loaded gun by intoxicated relatives, constitutes actionable negligence.

IV. APPELLEE'S CLAIM SOUNDS IN NEGLIGENCE, NOT PREMISES LIABILITY AS PLED IN THE ALTERNATIVE, THUS A DUTY OF CARE WAS OWED BY APPELLANT

Appellant repeatedly asserts in his brief that Appellee was a mere licensee at the time of the incident, and as such the only duties owed was to warn her of concealed defects and to refrain from wanton misconduct.

As correctly held by the Court of Appeals, Appellee's claim sounds in negligence, because it was the act of leaving the loaded gun in the garage after his brother handled the gun and showed great interest in it, and not instructing his brother to leave the gun alone, that caused the incident. Appellee pled premises liability in the alternative in her Complaint, but clearly stated a negligence claim, as set forth previously in this brief. As such, Appellee's status as a licensee is only relevant with respect to a premises liability claim. The Court of Appeals did not address the premises liability claim.

Furthermore, although not raised by the Court of Appeals, Appellant's conduct in this case may be deemed by a jury to be wanton, thus triggering liability on a premises liability theory as well. This issue was not briefed or argued by the parties.

V. IMPOSING LIABILITY ON APPELLANT WOULD NOT EXTEND LIABILITY "FAR BEYOND WHAT MICHIGAN LAW HAS EVER REQUIRED", AND REQUIRE HOMEOWNERS TO "LOCK UP ANYTHING THAT COULD BE USED AS A DANGEROUS WEAPON" WHEN THERE WILL BE A SOCIAL GUEST ON THE PREMISES

In closing, Appellant asserts that imposing liability in this case would significantly alter Michigan law and would force homeowners to lock up potentially dangerous belongings whenever social guests are brought into their homes. This argument is specious at best, and is not supported by the facts of this case. Michigan law would not change in the slightest should this opinion stand.

Appellant fails to acknowledge his culpability in this case, which is a fatal error with respect to his legal analysis. Appellant, in concert with his brother, brought young girls to party in the garage of his home and provided them with alcohol. Appellant may not have owned the home, but he lived there and had lived there since his release from prison. Once in the "party" garage, and after the parties and guests were drinking, a loaded shot gun was handled by his intoxicated brother. Appellant then picked up the gun and put back in the same spot for anyone to pick up. Then he allowed his drunk brother to go back to the garage with a 16 year old girl who had also been drinking liquor provided by Appellant, when he knew that his brother was very interested in the loaded gun.

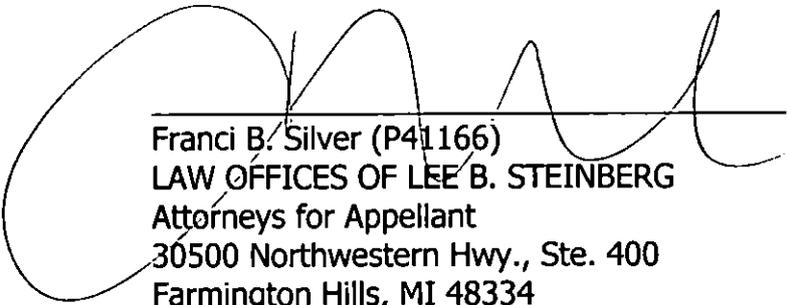
The Court of Appeals correctly held that under these facts, Appellant owed a duty to Appellee, and whether he breached that duty is a jury issue. This ruling in no way alters Michigan negligence law or imposes additional duties on homeowners not already established by law.

RELIEF REQUESTED

Based on the foregoing, Appellee respectfully requests that this Honorable Court deny Appellant's Application for Leave.

Respectfully submitted,

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