STATE OF MICHIGAN
IN THE 22nd JUDICIAL CIRCUIT FOR THE COUNTY OF WASHTENAW

GUY BOYD,
Plaintiff,

v.

Case No. 24-000304-NP
Hon. Julia B. Owdziej

NOT AN LLC d/b/a JSD SUPPLY and
KYLE THUEME,
Defendant.

CIVIL-CRIMINAL LITIGATION CLINIC By: David Santacroce (P61367) Attorney for Plaintiff 863 Legal Research Building 801 Monroe Street Ann Arbor, MI 48109-1215 (734) 763-4319	PENTIUK, COUVREUR & KOBILJAK, P.C. By: Randall A. Pentiuk (P32556) And: Kerry L. Morgan (P32645) Attorneys for Defendant Not an LLC d/b/ JSD Supply, Only 2915 Biddle Avenue, Suite 200 Wyandotte, MI 48192 (734) 281-7100 rpentiuk@pck-law.com kmorgan@pck-law.com
BLOCH & WHITE LLP Len H. Kamdang Counsel for Plaintiff – Pro Hac Vice 152 West 57th Street New York, NY 10019 (212) 702-8670 (Main) (646) 780-8052 (Direct) lkamdang@blochwhite.com	The Law Firm of William Amadeo William Amadeo (P76194) Attorney for Defendant Kyle Thueme 3913 Jackson Road Ann Arbor, MI 48103 (609) 816-9438

DEFENDANT JSD'S MOTION FOR RECONSIDERATION OF THIS COURT'S JULY 24, 2024 ORDER DENYING IN PART JSD'S MOTION FOR SUMMARY DISPOSITION

NOW COMES Defendant, JSD Supply ("JSD"), by and through its Attorneys, PENTIUK COUVREUR & KOBILJAK, P.C., pursuant to MCR 2.119(F), brings its Motion for Reconsideration of this Court's July 24, 2024, Order Denying in Part JSD's Motion for Summary Disposition and states as follows:

1. Defendant brings this motion before this Court under MCR 2.119(F) which provides

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that a motion for rehearing or reconsideration must "demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." A "palpable" error is defined as "[e]asily perceptible, plain, obvious, readily visible, noticeable, patent, distinct, manifest." *Estate of Luckow v Luckow*, 291 Mich App 417, 426 (2011).

2. On July 25, 2024, the Court signed and entered its Order Denying in Part Defendant JSD Supply's Motion for Summary Disposition Pursuant to MCR 2.116(C)(8). (See Exhibit 1).

3. The Court committed palpable errors in its ruling as fully addressed in its brief.

4. The federal district court's reasoning in *Lowy v Daniel Defense, LLC*, US District Court, ED VA, Docket No. 1:23-cv-1338, decided July 24, 2024, *the same day* this Court issued its order, is controlling on the tort claims and illustrates how this Court's order regarding proximate cause is palpably erroneous warranting a different outcome. (See Exhibit 3 attached to JSD's Brief in Support of this Motion).

WHEREFORE, for the reasons fully provided and discussed in its Brief in Support, JSD respectfully requests this Honorable Court to reconsider its July 24, 2024, Order, and dismiss Counts I (Negligence) and III (Negligent Entrustment).

Respectfully submitted,
PENTIUK, COUVREUR & KOBILJAK, P.C.

By: /s/Kerry L. Morgan
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Dated: August 13, 2024

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EXHIBIT 1

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STATE OF MICHIGAN
IN THE 22nd CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

GUY BOYD
Plaintiff,

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NOT AN LLC d/b/a JSD SUPPLY and KYLE THUEME,

Defendants.

Case No: 24-000304-NP
Hon. Julia B. Owdziej

CIVIL-CRIMINAL LITIGATION CLINIC
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ORDER DENYING IN PART DEFENDANT NOT AN LLC D/B/A JSD SUPPLY'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(8)

At a session of the Court held in the
County of Washtenaw, State of Michigan
This 24 day of July, 2024

The Court, having considered Defendant Not an LLC d/b/a JSD Supply's ("JSD") motion for summary disposition pursuant to MCR 2.116(C)(8), the briefs offered in support thereof, and written responses and oral argument thereon, and considering the factual allegations contained in Plaintiff's well-pleaded Complaint, accepting them as true, and construing them in the light most favorable to Plaintiff, finds that:

Count 1 Negligence: as to Plaintiff's common law negligence claim, the Court finds that the Plaintiff has stated a claim upon which relief can be granted. There is a duty owed to the Plaintiff not to expose him to an unreasonable risk of harm. The case is analogous to the *Moning v. Alfono* 400 Mich 425 (1977). Whether the Defendant JSD created an unreasonable risk of harm in marketing their product is a question for the

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jury. The obligation to avoid negligent conduct extends to persons within the foreseeable scope of risk, such as Plaintiff.

As to Plaintiff's negligence per se claim, the Court finds that the Plaintiff has not stated a claim upon which relief can be granted. There has been no showing that Defendant, JSD, violated any federal or state law or aided and abetted in any violation of law.

Count 3 Negligent entrustment: Plaintiff has sufficiently alleged a negligent entrustment claim against Defendant JSD. The *Moning* case is also analogous in this claim. JSD had a duty to not entrust chattel to a group of consumers including minors that it knew or should have known was likely to use it in a manner involving an unreasonable risk of physical harm.

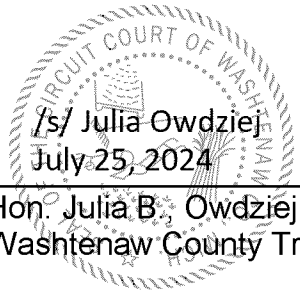
Count 4 Michigan Consumer Protection Act: Plaintiff has sufficiently alleged a negligent entrustment claim against Defendant JSD. Plaintiff does have standing to bring an action under the MCPA even though he was not the purchaser of the product. Defendant JSD has failed to establish that it is exempt from MCPA with its argument that their conduct was specifically authorized by law.

IT IS ORDERED:

As to the common law negligence claim in count 1, count 3 and count 4, Defendant JSD's motion for summary disposition is **DENIED**.

As to the negligence per se claim in count 1, Defendant JSD's motion for summary disposition is **GRANTED.**

This is not a final order.



/s/ Julia Owdziej
July 25, 2024

Hon. Julia B. Owdziej
Washtenaw County Trial Court

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STATE OF MICHIGAN
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BRIEF IN SUPPORT OF JSD'S MOTION FOR RECONSIDERATION OF THIS COURT'S JULY 24, 2024 ORDER DENYING IN PART JSD'S MOTION FOR SUMMARY DISPOSITION

JSD Supply states as follows for its Brief in Support of Its Motion for Reconsideration.

I. Standard of Review

MCR 2.119(F) governs motions for reconsideration and provides as follows:

> Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the

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> parties have been misled and show that a different disposition of the motion must result from correction of the error.

A "palpable" error is defined as "[e]asily perceptible, plain, obvious, readily visible, noticeable, patent, distinct, manifest." *Estate of Luckow v Luckow*, 291 Mich App 417, 426 (2011). The decision to grant or deny a motion for reconsideration is a matter within the discretion of the trial court. *Cason v Auto Owners*, 181 Mich App 600, 605 (1989).

II. Argument

A. *This Court Erred By Relying Upon Moning v Alfono Because That Case Is Expressly Limited to Situations Where a Seller Markets Its Products "Directly to Children" Which Is Not Alleged in any Paragraph of the Plaintiff's Complaint.*

First, this Court palpably erred by finding that Boyd's common law negligence claim "is analogous to the [sic] *Moning v Alfono* 400 Mich 425 (1977)". This Court's July 24, 2024 order is based upon the Court's conclusion that it considered "the factual allegations contained in Plaintiff's well pleaded Complaint, accepting them as true, and construing them in the light most favorable to Plaintiff". In order for this case to be analogous to *Moning*, Boyd's Complaint **must** contain well-pled factual allegations that JSD marketed its products "directly to children" because the special duty of care set forth in *Moning* is the exception in Michigan, not the rule. Unfortunately, this Court erred by finding that this case is "analogous" to *Moning* because **Boyd's Complaint does not contain a single, factual allegation that JSD marketed its products "directly to children"**.

In paragraphs 26 through 42, Boyd describes the technical nature of the products at issue, without making any mention **as to whom** they are marketed towards. (Complaint, ¶s 26-42). At paragraph 43, Plaintiff candidly admits that JSD only marketed its products to the general public, not "directly to children" as required under *Moning*. Specifically, at paragraph 44, Boyd alleged JSD's website was "accessible to **all internet users, including teenagers**" (emphasis added).

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Thus, instead of alleging JSD "directly marketed" its products to children, as *Moning* **requires** in order for there to be a special duty of care owed to a bystander, **Boyd repeatedly alleged that JSD only made its products "accessible" to the general public** (which, by definition, means JSD did not *directly* target its marketing towards children because the general public includes everyone, including senior citizens, middle-aged and younger people).

To be clear, by stating the obvious conclusion that JSD's website was made available to teenagers simply because it was "accessible to all internet users" is a direct, unequivocal admission that JSD marketed its products to the general public, **not** "directly to children". Even accepting all well pled allegations as true in favor of Boyd, as this Court did, there is simply no way to twist Boyd's factual allegation from *accessibility* to the public generally into marketing "directly to children". Indeed, the slingshots at issue in *Moning* were manufactured and sold by a **toy company** and were literally intended for sale only to children, not adults. All of Boyd's allegations on this issue establish that JSD marketed its products to the general public, nothing more. (*See* Complaint, ¶s 43, 44). Moreover, Boyd relied extensively upon an archived version of JSD's website and that website does contain any mention of JSD marketing its products directly to children.[1]

Contrary to this Court's holding, *Moning* **cannot** be "analogous" to this case because *Moning* involved a **toy** slingshot which was marketed **directly** to children:

> The issue in the instant case is not whether slingshots should be manufactured, but **the narrower question of whether marketing slingshots directly to children** creates an unreasonable risk of harm. *Id.* at 451 (emphasis added).

It was a clear, palpable error for this Court to find that the facts alleged here, which do not involve a single allegation that JSD marketed its products "directly to children", are analogous to *Moning*.

[1] The archived website was expressly referenced in Boyd's Complaint and was presumably considered by this Court for purposes of deciding JSD's Motion for Summary Disposition under MCR 2.116(C)(8). To the extent this Court did not review that archived version of JSD's website, JSD respectfully asks this Court to do so now because it does not contain a single fact showing that JSD marketed its products "directly to children".

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Either Boyd alleged that JSD marketed its products directly to children or he did not (the latter is the case) and the error of analogizing this case to *Moning* is "[e]asily perceptible, plain, [and] obvious". *Estate of Luckow, Id.*

B. This Court Applied the Wrong Standard In Determining Whether JSD Owed a Duty of Care to a Bystander Like Boyd Because Moning is the Exception, Not the Rule.

Moreover, the issue of whether JSD directly marketed its products to children is critically important because ***Moning* is the exception, not the rule**, in Michigan. Indeed, *Moning* "extended" a duty of care to a bystander **only** where a seller directly markets its products to children. *See Moning, Id.* at 445 ("**special rules for children** are not unusual")(emphasis added). JSD cited numerous cases highlighting the "standard" rule for determining whether a duty of care exists in favor of a bystander such as Boyd. *See Buczkowski v McKay*, 441 Mich 96 (1992)(emphasizing that *Moning* found a duty of care for innocent bystanders harmed by a product **because the product at issue was targeted specifically toward children, "a class historically protected under the law of torts**")(emphasis added)[2]. This Court's analysis should have ended here: the narrow, special rule set forth in *Moning* is inapplicable because Boyd failed to allege JSD marketed its products directly to children.[3]

[2] *See also Rookus v Randy Merren Auto Sales*, unpublished decision of the Michigan Court of Appeals, Docket No. 336766, decided February 13, 2018 (**Exhibit 4**)("plaintiffs cite caselaw in which our state's Supreme Court imposed duties of care **despite the lack of relationship between the parties**. But **the Court has only imposed such a duty where a protected class of persons, such as children, is involved**… **plaintiffs are not entitled to the imposition of a duty in the absence of any relationship between plaintiffs and defendant**")(emphasis added). *McCarthy v Sturm & Ruger*, Co, 916 F. Supp. 366 ("**to extend this theory to the general public would be a dramatic change in tort doctrine**." *King v RG Industries* 182 Mich App 343 ; 451 NW2d 874 (1990) (dismissing negligence claim against manufacturer of "Saturday night special" .38 revolver and **distinguishing *Moning* because manufacturer did not market weapons directly to criminals and no special relationship existed**). This Court inexplicably ignored every single one of these cases, both unpublished and published alike, even though they all consistently state *Moning* is the exception, not the rule, in Michigan.

[3] The general rule is that there is no duty to protect an individual who is endangered by the conduct of a third person. *Sierocki v Hieber*, 168 Mich App 429, 433; 425 NW2d 477 (1988). The narrow, special rule set forth in *Moning* only applies were a seller directly markets its products to children, **which is not alleged here**.

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This Court has purportedly singlehandedly expanded tort liability in Michigan contrary to published, binding authority. Under this Court's logic, all retailers who sell firearm parts in Michigan, including large chains like Bass Pro Shops who openly advertise the sale of completed firearms to the general public on its website, now owe a duty of care to bystanders like Boyd if those weapons are misused after purchase. (This is not, nor ever has been, the law in Michigan). **The issue of whether JSD "marketed its products directly to children" was simply not before this Court because Boyd never included such a factual allegation in his Complaint**. It was a palpable error for this Court to rely upon *Moning* in the absence of any factual allegations that JSD marketed its products "directly to children".

C. This Court Held JSD Did Not Violate Any State or Federal Statutes But Simultaneously Ignored Buczkowski, Which Holds JSD, Only Owed Boyd a Duty of Care If JSD Violated a Statute Prohibiting It From Selling the Kits to Thueme.

Not only did this Court err by relying upon *Moning*, it also erred by ignoring all of the more recent, published and binding caselaw cited by JSD which holds there is no duty of care owed to a bystander like Boyd, because the Legislature has not defined a class of persons who are prohibited from purchasing the Kits at issue here. Specifically, JSD cited *Buczkowski* for the proposition that "because **the Legislature** has not defined a class of purchasers who we may deem legally incompetent to buy ammunition, we find that the retailer did not have a legal duty to protect plaintiff, a member of the general public, from the criminal act of the defendant". *Id.* at 96. *Moning* cannot be analogous to this case under any interpretation because Boyd did not (and could not) allege JSD marketed the Kits directly to children. Boyd did not allege it, let alone meet the well plead factual standard. On the other hand, *Buczkowski* controls because the Legislature did not define any class of persons who are prohibited from purchasing the Kits.

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Stated another way, JSD did not owe any duty of care to a bystander like Boyd because the Michigan Legislature did not deem Thueme to be "legally incompetent" to purchase the Kits. To make matters even worse, this Court expressly held "**there has been no showing that Defendant, JSD, violated any federal or state law**" (*See* July 24, 2024 Order, emphasis added). Thus, this Court's decision is internally inconsistent because this Court held JSD did not violate any state or federal laws but simultaneously ignored *Buczkowski*, which holds JSD, only owes a duty of care to Boyd ***if*** *JSD violated a statute* prohibiting it from selling the Kits to Thueme. There is no way to reconcile these diametrically opposed conclusions in this Court's July 24, 2024 Order. It was palpable error for this Court to ignore *Buczkowski,* which is published, binding caselaw this Court was bound to follow. *See Tebo v Havlik*, 418 Mich 350, 379; 343 NW2d 181 (1984)(decisions of the Court of Appeals are binding precedent which must be followed by the trial courts).

D. This Court Erred By Relying Upon Moning When Analyzing Boyd's Negligent Entrustment Claim.

Next, this Court committed a palpable error by relying upon *Moning* when analyzing Boyd's negligent entrustment claim. Specifically, in its July 24, 2024 Order, this Court stated "Plaintiff has sufficiently alleged a negligent entrustment claim against Defendant JSD. The *Moning* case is also analogous in this claim". This was a significant, palpable error because, as noted throughout, **there is not a single allegation in Boyd's Complaint that JSD marketed its products "directly to children**". Thus, the *narrow exception* set forth in *Moning* does not apply here. This Court cannot judicially expand the applicability of *Moning* to products that are marketed to the general public, contrary to decades of published, binding authority which holds a seller only owes a special duty of care to a bystander where that seller markets its products "directly to children". In any event, this was palpable error because the Court was bound to follow *Buczkowski* and the other published cases cited by JSD as this issue is well settled law. *Tebo, Id.*

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As with Boyd's negligence claim, he also asserted two theories in support of his negligent entrustment claim: a common law theory and a negligence *per se* theory. In Count III (Negligent Entrustment), Boyd alleged the following:

> 133. Defendant JSD sold the Kits to Defendant Thueme negligently and **in violation and circumvention of myriad Michigan and federal laws**.
>
> 134. **Each of the laws** that Defendant JSD violated and/or circumvented in selling the Kits to Defendant Thueme **were public safety statutes**, intended to protect Mr. Boyd and the public from injuries caused by guns at the hands of prohibited possessors, including minors.
>
> 135. Defendant JSD's violation **of the foregoing laws** creates a presumption that it negligently entrusted a pistol to a minor. (emphasis added).

Although this Court did not specify whether it found that Boyd stated a valid negligent entrustment claim under his common law or negligence *per se* theory, to the extent it found Boyd stated a claim under negligence *per se*, it committed palpable error. It is impossible for Boyd to have stated a negligent entrustment claim based upon violation of state and/or federal statutes because this Court expressly held "there has been no sign that Defendant, JSD, violated any federal or state law". (*See* July 24, 2024 Order).

Thus, the only other basis which this Court could have found that Boyd stated a valid negligent entrustment claim is under the common law. Specifically, at paragraph 137 (Count III – Negligent Entrustment) of his Complaint, Boyd alleged "State law recognizes a general duty to prevent minors from possession **firearms**". (emphasis added). It was palpable error for this Court to hold Boyd pled a valid negligent entrustment claim based upon this single allegation for several reasons.

First, this Court already decided that JSD did not sell Thueme a "firearm". This inescapable conclusion is necessarily true because this Court held that JSD did not violate any state or federal laws prohibiting the sale of firearms to minors. (*See* Order July 24, 2204 Order,

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pg. 2). But Boyd's common law negligent entrustment claim is based **solely** upon his allegation that "state law recognizes a general duty to prevent minors from possessing **firearms**". (Complaint, ¶137, emphasis added). To be clear, **Boyd does not even allege that JSD violated any such duty**, rather, **he merely alleged that such duty exists**, yet this Court inexplicably found that Boyd stated a valid negligent entrustment claim presumably based upon Boyd's abstract, non-specific allegation that such a duty exists. Such an allegation is not enough.

Nor could this Court have found that JSD violated the duty set forth in Paragraph 137, even if it analyzed this allegation in the most favorable light possible because it is undisputed JSD did not sell a "firearm" to Thueme per this Court's own findings. (This Court held JSD did not violate any state or federal statutes which necessarily means this Court found JSD did not sell a "firearm" to Thueme). Boyd's negligent entrustment claim fails as pled because this Court agreed JSD did not violate any statutes (therefore there cannot be a viable negligence per se theory) and Boyd only alleged the existence of a common law duty to prevent minors from purchasing firearms, which JSD did not do by the same logic.

E. This Court Erred By Concluding that JSD "Knew or Should Have Known" Thueme Was a Minor Based Upon the Allegations in Boyd's Complaint.

Next, this Court committed a palpable error by concluding "JSD had a duty to not entrust chattel [sic] **to a group of consumers including minors** that **it knew or should have known** was likely to use it in a manner involving an unreasonable risk of physical harm" (*See* July 24, 2024 Order, emphasis added). This Court did not, and could not, conclude JSD entrusted its products **to Thueme specifically** based upon Boyd's Complaint, rather, it impermissibly concluded JSD entrusted its products to an unspecified "group of consumers" which "included minors". Again, this conclusively establishes the Court used the wrong legal standard because its opinion held that JSD marketed its products to a "group of consumers" i.e., the general public. Having first made

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such a finding, the Court's subsequent opinion stating the products were marketed "directly to children" does not logically follow. Plaintiff's pleading of generic marketing concepts *which incidentally may "include[s] minors", is not the within the exception and fails as a matter pleading*. Plaintiff's complaint is therefore insufficient as a matter of law to state a duty of care in favor of a bystander and the court commits palpable error in concluding the exception applies.

This Court also erred by concluding that JSD "**knew or should have known**" Thueme was likely to use its products in an unsafe manner. At paragraph 138 of his Complaint, Boyd alleged JSD was "**willfully blind to the fact, and therefore knew or reasonably should have known**, that Defendant Thueme, a 17-year-old, was not of sufficient age to legally possess, receive, or purchase **a pistol**". (emphasis added). This Court may only base its decision upon this allegation (and others like it) because it decided JSD's Motion for Summary Disposition under MCR 2.116(C)(8) with reference to the pleadings, alone. Yet there are numerous, fatal defects in this allegation.

First, this Court correctly determined that JSD did not sell Thueme a "pistol". Thus, to the extent this Court's decision was based upon JSD's purported knowledge that Thueme was too young to own a "pistol", it erred because this Court agreed JSD never sold a "pistol" to Thueme in the first place. Second, Boyd's allegation that JSD was "willfully blind" and "therefore knew or reasonably should have known" is insufficient as a matter of law to state a claim for negligent entrustment. **Willful blindness does not equal knowledge. In fact, every court that has considered the issue has held the exact opposite: a seller does not have any affirmative duty to inquire about a purchaser's status and a seller's failure to inquire cannot give rise to a negligent entrustment claim**. *See Buschlen v Ford Motor Co (On Remand)*, 121 Mich App 113, 117; 328 NW2d 592 (1982)("**the *Fredericks* court did not recognize an affirmative duty to**

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inquire on the part of the entrustor to ensure that the chattel being entrusted was being used in a safe manner. Instead, the entrustor **must first have special notice of the peculiarities of the entrustee** sufficient to put the entrustor on notice before the entrustor is under any further duty to ensure an entrusted chattel's safe use.

Yet this is literally the only "factual allegation" Boyd included in his Complaint, i.e. he **admits** JSD did not know of **any** of Thueme's peculiarities (his age, his propensity to illegally consume drugs and alcohol and his reckless use of firearms) but says "willfull" blindness is enough to state a claim because JSD **should have inquired**. **This is not the law in Michigan, nor has it ever been**.[4] *See Fredericks, Id; Buschlen, Id; Burlingame v. Nationsrent, Inc*., unpublished decision of the Michigan Court of Appeals, Docket No. 291312, decided January 25, 2011(**Exhibit 1**)("Plaintiff has not demonstrated that NationsRent knew of any unreasonable risk propensities of Nancy or Jason. Although plaintiff distinguishes Nancy, a private customer, from commercial construction companies that frequently rent from NationsRent, plaintiff has not demonstrated that this distinction constituted an unsafe peculiarity that put NationsRent on notice that Nancy or Jason would use the entrusted chattel in an unsafe manner. Absent sufficient notice of unsafe peculiarities, **NationsRent had no further duty to inquire regarding Jason's experience or training or to otherwise ensure the forklift's safe use** (citing *Buschlen*); *Flowers v. Williams*, unpublished decision of the Michigan Court of Appeals, Docket No. 301175, decided January 17, 2012. (**Exhibit 2**) ("Sandra's knowledge that the [ATV] would potentially be available during Renee's planned party, and that party guests likely would imbibe alcoholic beverages, **does not**

[4] The other allegations in his Complaint are even worse. **Boyd did not allege** JSD "knew or should have known" that it was unlawful for **Thueme** to purchase the Kits. Rather, Boyd alleged, **in the abstract and without reference to any specific person, let alone Thueme**, that JSD knew of "the risks guns pose to children". (Complaint, ¶55). **Thueme's name is not even mentioned in this allegation!** This allegation is insufficient as a matter of law because Boyd was required to allege JSD knew of **Thueme's** peculiarities that gave rise to a risk, not a hypothetical, abstract child.

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constitute notice that the vehicle would be driven unsafely. **The circuit court correctly granted summary disposition of this claim**")[5].

It is unclear why this Court held that Boyd stated a claim for negligent entrustment where he only alleged JSD "knew, or reasonably should have known" **based solely upon JSD's alleged "willful blindness**". Moreover, this allegation does not make sense: either JSD had actual knowledge or it did not, and positive, actual knowledge cannot be equated with "willful blindness" under *Buschlen*. Taken as plead, "willful blindness" is a claim JSD had NO knowledge. Boyd's negligent entrustment claim is defective based upon the allegations of "willful blindness" contained within the four corners of his Complaint because "willful blindness" means JSD had no knowledge, nor did JSD have any duty to make further inquiry. *See Fredericks, Id; Buschlen, Id; Burlingame* and *Flowers.*

F. Boyd's Allegations Regarding Causation Were Facially Defective.

Boyd's allegations regarding causation, even when accepted as true and viewed in a light most favorable to him under MCR 2.116(C)(8), were insufficient as matter of law. (JSD raised its lack of causation arguments in its Motion). **The lack of sufficient pleading in Count I (Negligence) is shocking because Boyd failed to allege the existence of any proximate cause at all!** Instead, he simply stated "**But for** Defendant JSD's sale of the Kits to Defendant Thueme, Defendant Thueme could have not shot Mr. Boyd". (Complaint, ¶116, emphasis added). Boyd did not even attempt to allege the existence of proximate cause in Count I, let alone do so in a conclusory or speculative fashion. *Id*. "Proximate cause is an essential element of a negligence

[5] Nor do Boyd's allegations at paragraphs 56 and 57 fare any better. Those allegations state there was an investigation concerning "JSD's potential sale of ghost gun kits to prohibited persons, including minors". Again, even if taken as true for purposes of MCR 2.116(C)(8), these allegations do not establish JSD had any specific knowledge regarding **Thueme's** age, propensity to use illegal drugs and alcohol and/or to misuse firearms. Boyd was required, as a matter of law, to allege JSD had such knowledge with respect to Thueme, which he failed to do.

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claim." *Ray v Swager*, 501 Mich 52, 63; 903 NW2d 366 (2017). Proximate cause should not be confused with cause in fact, or factual causation, which means that a plaintiff's injury would not have occurred "but for" the actions of a defendant. *Ray*, *Id.*, 501 Mich at 63. Here, Boyd completely and utterly failed to include **any** allegation of proximate causation in Count I of his negligence claim. His failure to plead even the most basic element of causation in Count I *required dismissal* at the pleading stage under MCR 2.116(C)(8). *See Spiek v Dep't of Transp,* 456 Mich 331, 339; 572 NW2d 201 (1998) (summary disposition under MCR 2.116(C)(8) was appropriate when "[t]aking all plaintiffs' factual allegations as true, **the complaint fails to allege an essential element of their cause of action**")(emphasis added).

G. The New Federal Case of Lowy v. Daniel Defense, LLC, affirms that "Proximate Cause" Is Not Plead By Alleging A Manufacturer Allowed A Person Access To Its Products, View Its Website, Or Use its Product to Shoot Innocent Persons.

While Boyd's Complaint does contain conclusory allegations of both "but for" and proximate cause in Count III (Negligent Entrustment), ¶s141 and 142, these allegations are insufficient as a matter of law under *Lowy v Daniel Defense, LLC*, US District Court, ED VA, Docket No. 1:23-cv-1338, decided July 24, 2024 (See attached **Exhibit 3**) which was decided on the same day this Court issued its order. Consideration of a new case is a basis for reconsideration.

The facts of *Lowy* are as follows. That lawsuit arose out of a school shooting in which two of the plaintiffs were struck and injured by bullets. *Id*. The plaintiffs sued the manufacturer of the assault rifle used by the shooter and, like here, asserted negligence and negligence *per se* claims. *Id*. And, just like here, the plaintiffs in Lowy alleged the defendant/manufacturer "deceptively and unfairly marketed their assault rifles…to appeal to the impulsive, risk-taking tendencies of civilian adolescent…males". *Id* at 5. The Lowy plaintiffs further alleged the shooter there "foreseeably used defendants' products in [a] mass shooting" and the shooter was "influenced by defendants' marketing practices and relied on defendants' advertisements when purchasing his weapons". *Id*

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at 5. The theories asserted in *Lowy* are nearly identical to those presented by Boyd here and were addressed in a motion under Fed. R. Civ. 12(b)(6) (a motion to dismiss based upon the complaint, alone, and accepting the factual allegations as true in light most favorable to the plaintiffs).

The *Lowy* court dismissed the plaintiffs' claims for a number of reasons, including because those plaintiffs, like Boyd here, failed to sufficiently plead proximate causation. Specifically, the Lowy court held the complaint in that case "does no more than speculate that Shooter, like other young men…observed defendants' advertisements. Without more support, these pleadings fail to raise plaintiffs' right to relief above the speculative level and can proceed no further". *Id* at 9. Similarly, all Boyd alleges here is that JSD's website, at most, encouraged Thueme to purchase its products.

More importantly, the *Lowy* court also held that in order to successfully plead proximate causation at the pleading stage, those plaintiffs were not only required to allege the defendants' advertisements encouraged the shooter to purchase their assault rifle, but that defendants' advertisements encouraged or coerced the purchaser to illegally shoot innocent children. *Id.* Boyd's allegations are similarly defective here because he does not allege JSD encouraged Thueme to get drunk and high and recklessly shoot Boyd in the face. "Viewed most optimistically, plaintiffs allege that Shooter relied on defendants' advertisements when choosing to purchase defendants' products. **The Court cannot transform that allegation into an allegation that defendants' marketing had a 'determinative or coercive effect' on Shooters' decision to shoot at plaintiffs**" *Id.* at 9, emphasis added. Stated another way, the *Lowy* court held "**absent is any allegation that defendants' advertising coerced Shooter to attack the elementary school. Without that allegation, plaintiffs' alleged causal chain is incomplete**" *Id.* at 10, emphasis added.

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Here, Boyd does not allege JSD coerced or encouraged Thueme to shoot Boyd which is required under MCR 2.116(C)(8) and *Lowy*. Merely alleging JSD encouraged Thueme to purchase its products, without alleging JSD encouraged Thueme to recklessly shoot Boyd is insufficient as a matter of law because Boyd **must** allege that JSD was the proximate cause of Thueme shooting Boyd. (And this Court already held JSD did not violate any state or federal statutes by merely selling its products to Thueme, therefore it is logically impossible for JSD's website, which at best encouraged customers to purchase its products, to be the proximate cause of Thueme's decision to shoot Boyd). What Boyd is alleging here, in a light viewed most favorably to him, is that JSD allowed its products to potentially land in the hands of minors. Merely alleging "proximate cause" by alleging that a manufacturer potentially allowed prohibited persons access to its products has been rejected over and over again.

> The **city alleged that the defendant firearm companies' conduct in marketing and distribution of handguns allows them to fall into the hands of criminals and children…[but] plaintiffs' allegations were too remote to allege proximate cause because plaintiffs failed to allege the gun manufacturers 'intended to inflict injury upon the citizens of Philadelphia**…**the city at most alleged the firearm companies possessed an 'awareness of the means by which prohibited purchasers end up possessing handguns – an allegation insufficient to support proximate cause**. See *City of Philadelphia v Beretta USA Corp*, 277 F3d 415 at 419 (3rd Cir, 2002)(emphasis added).

This is precisely what Boyd alleges here with respect to "proximate causation", merely that JSD marketed its products in such a way that minors such as Thueme could potentially purchase them. (*See* Complaint, ¶18 "ghost guns are particularly dangerous because they can be easily obtained by people who are not lawfully entitled to possess firearms, such as minors"; ¶44 "Kits were available for purchase through Defendant JSD's website, which was accessible to all internet users, including teenagers"; ¶138 "JSD…knew or reasonably should have known…that Defendant Thueme, a 17 year old, was not of sufficient age to legally possess, receive or purchase a pistol"

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but Boyd does not allege JSD knew Thueme would shoot Boyd in the face while under the influence of drugs and alcohol. Merely alleging that a minor could come into possession of a product is insufficient as a matter of law to plead proximate cause).

It was palpable error for this Court to find proximate cause alleged where the complaint fails to actually plead that JSD Supply intended that Thueme would inflict injury upon Boyd.

Additionally, the *Lowy* court acknowledged that while "the question of proximate cause is usually a question of fact for a jury…when 'reasonable persons may not differ in their conclusions that such negligence was such a cause, a trial court properly decide[s] the question as a matter of law. Here, reasonable persons may not differ because plaintiffs' pleadings provide no basis for finding proximate cause. So, plaintiffs' negligence and negligence *per se* claims fail too". *Id.* at 17.

Conclusion and Relief Requested

Based upon the foregoing, JSD respectfully requests that this Court reconsider its July 24, 2024 Order, dismiss Counts I (Negligence) and III (Negligent Entrustment) and award JSD any other relief this Court deems appropriate.

Respectfully submitted,
PENTIUK, COUVREUR & KOBILJAK, P.C.

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Dated: August 13, 2024

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EXHIBIT 1

Document received by the Washtenaw County Trial Court 08/13/2024.

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As of: August 11, 2024 5:17 PM Z

Burlingame v. Nationsrent, Inc.

Court of Appeals of Michigan

January 25, 2011, Decided

No. 291312

Reporter
2011 Mich. App. LEXIS 168 *; 2011 WL 222264

JOSEPH ***BURLINGAME*** III, Plaintiff-Appellant/Cross-Appellee, v ***NATIONSRENT***, INC., Defendant/Cross-Plaintiff-Appellee/Cross-Appellant, and NANCY BROWN, Defendant/Cross-Defendant-Cross-Appellee, and JASON BROWN, Defendant.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: **[*1]** Sanilac Circuit Court. LC No. 05-030686-NI.

Core Terms

forklift, training, summary disposition, entrustment, trial court, warnings, invoice, boom, entrustee, plaintiff's claim, entrustor

Judges: Before: K. F. KELLY, P.J., and WILDER and GLEICHER, JJ.

Opinion

PER CURIAM.

Plaintiff appeals as of right an order dismissing plaintiff's claim against defendant/cross-defendant, Nancy Brown. Plaintiff challenges an earlier order granting defendant/cross-plaintiff, NationsRent's motion for summary disposition and dismissing all of plaintiff's claims against NationsRent with prejudice. On cross-appeal, NationsRent challenges an order denying its motion for summary disposition of its cross-claim against Nancy. We affirm.

I.

Nancy rented a rough terrain forklift from NationsRent to move materials for a new barn from two flatbed trucks onto her property in Sanilac County. Nancy was not present at the time the forklift was delivered to the property and she did not sign or receive a copy of the invoice, which provided that NationsRent "makes available the opportunity for immediate operator familiarization/training. Customer is cautioned to accept the Company's offer for familiarization/training and to avoid all opportunities where untrained persons may cause the equipment to be used or operated." Some time following the delivery, Nancy's son, defendant Jason **[*2]** Brown, operated the forklift with the assistance of plaintiff.

After the materials were successfully moved from the flatbed trucks, Jason continued to operate the forklift elsewhere on the property and plaintiff rode along by holding on to a handle on the outside of the cab. During this time, the forklift fell through ice and became stuck. Jason recalled telling plaintiff that he planned to move the forklift back and forth to free it, and if that plan failed, he would use the boom to push the forklift free. Jason further recalled telling plaintiff to get off the forklift, where he had been sitting. When Jason then attempted to free the forklift, his hand inadvertently hit the forklift's boom lever and the boom lowered onto plaintiff where he had remained sitting on the forklift. Plaintiff sustained severe injuries and was paralyzed.

Plaintiff filed a lawsuit against Nancy, Jason, and NationsRent. [1] Plaintiff asserted claims against NationsRent for negligence, alleging that NationsRent: 1) negligently entrusted the forklift with Nancy, 2) failed

[1] Plaintiff's claims against Nancy and Jason are not relevant to this appeal. However, we note that plaintiff ultimately obtained a default judgment for $5,000,000 against Jason. Plaintiff's claim against Nancy was dismissed by stipulation, but plaintiff apparently filed a separate action against Nancy only and obtained a judgment for $750,000.

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to provide adequate warnings about the forklift, 3) failed to investigate the experience or qualifications of Nancy and Jason, and 4) failed **[*3]** to instruct or train Nancy or Jason to use the forklift. NationsRent then filed a cross-complaint against Nancy, alleging that she was obligated to indemnify and hold harmless NationsRent and its agents, officers, and employees under an indemnity clause in her application for credit.

NationsRent filed a motion for summary disposition of plaintiff's claims under *MCR 2.116(C)(8)* and *(10)*. With respect to plaintiff's negligent entrustment allegation, NationsRent argued that there was no genuine issue of material fact whether peculiarities regarding Nancy or Jason put NationsRent on notice that Nancy or Jason would use the forklift in a harmful manner. In addition, NationsRent argued that it had no duty to instruct or train Nancy or Jason to use the forklift and there were no facts to suggest that instruction or training would have prevented plaintiff's **[*4]** injuries. In response, plaintiff argued that, as a bailor, NationsRent had a duty to disclose dangerous qualities of the forklift to Nancy. The trial court granted NationsRent's motion for summary disposition. The trial court noted that plaintiff's bailment theory was not preserved in the complaint, but it nevertheless found that there were no facts demonstrating that either Nancy or Jason were unaware of the particularly dangerous qualities of the forklift. Noting the presence of safety warnings on the forklift and the invoice, the court declined to impose any duty on behalf NationsRent to provide training to operators of rental equipment. Plaintiff's appeal challenges this order.

NationsRent also filed a motion for summary disposition of its cross-claims against Nancy under *MCR 2.116(C)(8)* and *(C)(10)*. The trial court denied this motion, reasoning that, in light of Nancy's failure to sign the rental contract containing an indemnification clause, there was a question of fact regarding whether Nancy's earlier signature on the application for credit containing a similar indemnification clause demonstrated her intent to indemnify NationsRent. NationsRent's cross-appeal challenges this **[*5]** order.

II.

On appeal, plaintiff argues that the trial court erred in granting NationsRent's motion for summary disposition because NationsRent owed him a duty of care. [2] We disagree. We review de novo a trial court's ruling on a motion for summary disposition. *Coblentz v City of Novi, 475 Mich 558, 567; 719 NW2d 73 (2006)*. NationsRent moved for summary disposition of plaintiff's claims under *MCR 2.116(C)(8)* and *(C)(10)*, but the trial court did not articulate which subrule formed the basis of its decision. Because it appears that the court considered facts outside the pleadings, we treat NationsRent's motion as granted under *MCR 2.116(C)(10)*. Consequently, we review all of the evidence submitted in the light most favorable to the nonmoving party to determine whether a genuine question of material fact exists. *Coblentz v City of Novi, 475 Mich 558, 567-568; 719 NW2d 73 (2006)*. Further, we review de novo whether the defendant owes a duty to the plaintiff. *Fultz v Union-Commerce Assoc, 470 Mich 460, 463; 683 NW2d 587 (2004)*.

Plaintiff first contends that NationsRent owed him a duty to ensure the safe use of the forklift under the theory of negligent entrustment. We note that the trial court did not consider NationsRent's duty under this theory when it granted summary disposition. Generally, an issue must be raised before and addressed by the trial court to be preserved for appellate review. *Detroit Leasing Co v Detroit, 269 Mich App 233, 237; 713 NW2d 269 (2005)*. Nevertheless, we will review this argument because it involves a question of law, and the facts necessary for its resolution have been presented. *Johnson Family Ltd Partnership v White Pine Wireless, LLC, 281 Mich App 364, 377; 761 NW2d 353, 362 (2008)*.

"The tort of negligent entrustment is comprised of two basic elements. *Perin v Peuler (On Rehearing), 373 Mich 531, 537-539; 130 NW2d 4 (1964)*. First, the entrustor is negligent in entrusting the instrumentality to the entrustee. Second, the entrustee must negligently or recklessly misuse the instrumentality." *Allstate Ins Co v Freeman, 160 Mich. App. 349, 357; 408 NW2d 153 (1987)*. **[*7]** An entrustor is negligent in entrusting the instrumentality to the entrustee if the entrustor "knew or should have known of the unreasonable risk propensities of the entrustee . . . To prove an entrustor should have known an entrustee was likely to use the entrusted chattel in an unsafe manner, peculiarities of the entrustee sufficient to put the entrustor on notice of that likelihood must be demonstrated." *Fredericks v*

[2] 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) **[*6]** that the defendant's breach of the duty caused the plaintiff injuries, and (4) that the plaintiff suffered damages. *Lelito v Monroe, 273 Mich App 416, 419; 729 NW2d 564 (2006)*.

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General Motors, 411 Mich 712, 719; 311 NW2d 725 (1981).

When Nancy called NationsRent, she explained that she needed to rent a piece of equipment that would off-load material of a certain weight from semi trailers. Nancy stated that she might have described the piece of equipment as a "hi-lo" and Kris Kryzanski, the salesperson at NationsRent who handled her call, stated that Nancy referred to it as a "reachable forklift." From Nancy's description, Nancy and Kryzanski determined that a rough terrain forklift was best-suited for the project. According to Kryzanski, Nancy informed him that she was renting the forklift on her own behalf and that Jason would be operating it. Plaintiff has not demonstrated that NationsRent knew of any unreasonable risk propensities of Nancy **[*8]** or Jason. Although plaintiff distinguishes Nancy, a private customer, from commercial construction companies that frequently rent from NationsRent, plaintiff has not demonstrated that this distinction constituted an unsafe peculiarity that put NationsRent on notice that Nancy or Jason would use the entrusted chattel in an unsafe manner. On the contrary, the record shows that Kryzanski had a "gut feeling" that both Nancy and Jason had construction equipment experience and, based on Nancy's statements, Kryzanski believed that Jason had operated this type of forklift before. Absent sufficient notice of unsafe peculiarities, NationsRent had no further duty to inquire regarding Jason's experience or training or to otherwise ensure the forklift's safe use. Buschlen v Ford Motor Co, 121 Mich App 113, 118; 328 NW2d 592 (1982). Consequently, if the trial court had considered plaintiff's negligent entrustment argument, it would not have been error to grant NationsRent's motion for summary disposition.

Second, plaintiff relies on Baker v Arbor Drugs, 215 Mich App 198; 544 NW2d 727 (1996), in arguing that NationsRent voluntarily assumed various duties, including investigating an operator's training **[*9]** and experience, offering to provide familiarization training in the invoice at delivery, and providing training by request, and was therefore required to exercise those duties with due care. [3] In *Baker*, a pharmacy "implemented, used, and advertised through the media" that it used a computer system to monitor its customers medication profiles and detect adverse drug interactions. Id. at 205. This Court concluded that by implementing and advertising this system, the pharmacy voluntarily assumed a duty to use the system with due care when filling prescriptions for a client who subsequently suffered a stroke as a result of ingesting incompatible drugs. Conversely, in Estate of Qing Kong v AJ Marshall Co, 233 Mich App 229-232; 590 NW2d 301 (1998), this Court found that the distributor of a food grinder that injured the plaintiff was not under a voluntarily assumed legal duty to assist the manufacturer's recall of the grinder. The facts showed that the manufacturer did not request the distributor's assistance with the recall and the distributor did not take any affirmative action to voluntarily assist or comply with the effort. Id. at 231-232.

Plaintiff's reliance on *Baker* is misplaced. Despite NationsRent's internal goal to create a corporate culture of safety, like the distributor in *Estate of Qing Kong*, NationsRent took no voluntary, affirmative action to either investigate and evaluate Jason's training and experience, or to properly train Jason. Furthermore, even though NationsRent's standard invoice gave customers the option to request familiarization training at the time of delivery, Nancy never received this invoice, and there are no facts demonstrating that NationsRent advertised, or otherwise notified Nancy, that this option would be provided in the invoice. In the absence of such affirmative action, plaintiff's claim that NationsRent voluntarily assumed any duty of care fails.

Third, plaintiff acknowledges that this Court has previously imposed a duty on a bailor for hire, with "actual knowledge of defects in, or dangerous qualities of, the subject of bailment that are not known to the bailee and may result in injury to him," to disclose such defects or dangerous **[*11]** qualities to the bailee. Goldman v Phantom Freight, Inc, 162 Mich App 472; 413 NW2d 433 (1987). Plaintiff urges this Court to extend a duty to any bailor of construction equipment to ensure that unprofessional or private renters, as opposed to commercial construction renters, are informed of the importance and availability of operator training. [4]

In common-law negligence cases, a duty "'concerns

[3] Again, plaintiff's argument is not preserved, **[*10]** but, because the issue presented pertains to a question of law, we will, nevertheless, consider it. Johnson Family Ltd Partnership, 281 Mich App at 377.

[4] Apart from his negligent entrustment claim, plaintiff apparently does not argue on appeal that this Court should impose a common-law duty on a bailor of construction equipment to investigate every operator's experience and qualifications or to train the operator to properly use the forklift.

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whether a defendant is under any legal obligation to act for the benefit of the plaintiff.'" *Rakowski v Sarb, 269 Mich App 619, 629; 713 NW2d 787 (2006)*, quoting *Valcaniant v Detroit Edison Co, 470 Mich 82, 86 n 4; 679 NW2d 689 (2004)*. Whether a duty exists depends on (1) the relationship of the parties, (2) the foreseeability of the harm, (3) the degree of certainty of injury, (4) the closeness of the connection between the conduct and the injury, (5) the moral blame attached to the conduct, (6) the policy **[*12]** of preventing future harm, and (7) the burdens and consequences of imposing a duty and the resulting liability for breach. *Id*.

In the present case, there was no relationship between plaintiff and NationsRent. Plaintiff was only at the Sanilac County property because he was dating Nancy's daughter and had volunteered to accompany Jason to the property while on leave from work. It was arguably foreseeable that an operator's hand could inadvertently hit the forklift's boom lever causing the boom to lower contrary to the operator's intent. However, in light of the following warnings attached to the forklift, a reasonable person would not anticipate that this event would cause human injury: 1) "NO RIDERS PERMITTED ON HANDLER," 2) "KEEP OTHERS AWAY FROM MACHINE WHILE OPERATING. DO NOT STAND UNDER BOOM OR LOAD," and 3) "STAY CLEAR OF PINCH POINT AREA ANYTIME ENGINE IS RUNNING. BEING IN PINCH POINT AREA COULD CAUSE SERIOUS INJURY OR DEATH." Furthermore, the connection between NationsRent's alleged negligence and plaintiff's loss is tenuous. Even in hindsight, plaintiff does not establish that a warning by NationsRent to Nancy regarding the importance and availability of operator training would **[*13]** have caused Nancy to request training for Jason, who she believed had operated similarly equipment before. Plaintiff also fails to demonstrate that a warning would have caused Jason to ensure that plaintiff heeded warnings about remaining on the forklift, under the boom, while the engine ran. In addition, defendant's conduct was not morally blameworthy. For these reasons, although plaintiff argues that the burden of imposing a duty on NationsRent to warn private renters of the importance and availability of operator training would be minimal because it would only require deliverers to point out that warning, which is listed on the company's standard invoice, plaintiff provides no basis for this Court to extend the duty of care upon defendant for plaintiff's benefit in this case.

Because we conclude that no duty existed, we need not address plaintiff's remaining arguments regarding proximate cause or NationsRent's argument on cross-appeal that Nancy agreed to indemnify and hold harmless NationsRent from all claims for personal injury in conjunction with the rental of this forklift.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Kurtis T. Wilder

/s/ Elizabeth L. Gleicher

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EXHIBIT 2

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Flowers v. Williams

Court of Appeals of Michigan

January 17, 2012, Decided

No. 301175

Reporter
2012 Mich. App. LEXIS 71 *; 2012 WL 130413

MICHAEL FLOWERS, Plaintiff-Appellant, v CHARLES THOMPSON and RENEE WILLIAMS, Defendants, and SANDRA WILLIAMS, Defendant-Appellee.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: **[*1]** Oakland Circuit Court. LC No. 2008-092054-NI.

Core Terms

summary disposition, party guest, implied consent, entrustee, boat, negligent entrustment, circuit court, entrustor, unsafely, drive

Judges: Before: GLEICHER, P.J., and CAVANAGH and O'CONNELL, JJ.

Opinion

PER CURIAM.

Renee Williams threw a birthday party for her boyfriend, Jason Armstrong, at a lakefront home owned by defendant Sandra Williams, Renee's mother. The party guests enjoyed a catered meal, a ride in Sandra's pontoon boat, and an evening bonfire. But the good times abruptly ended when an all-terrain vehicle driven by Charles Thompson, one of the party guests, rolled on top of plaintiff Michael Flowers, another party-goer. Flowers' injuries eventually resulted in a partial leg amputation.

Flowers sued Renee and Sandra under the owner's liability statute, *MCL 257.401*, and also asserted a negligent entrustment claim. In granting summary disposition in favor of defendants, the circuit court found that Sandra had not given Thompson express or implied permission to use her ATV, and lacked any knowledge that the vehicle would be used unsafely. We reverse as to the owner's liability claim and affirm the negligent entrustment ruling.

I. FACTS AND PROCEEDINGS

At the end of the summer of 2006, Sandra Williams purchased a lakefront home in Pinckney. By June 2007, she had equipped the property **[*2]** with two jet skis, a pontoon boat, two small "four-wheelers," and a Yamaha Rhino ATV. Jeffrey Williams, Sandra's son, kept his boat there, and Sandra described that Jeffrey "had free rein of all the equipment and toys that were up at the lake house." Sandra acknowledged that when she permitted Renee to host the party at the lake house, she understood that the party guests would use "the boats." Sandra further conceded that she and Renee never discussed the party-goers' use of the ATVs, but that she had never forbidden Renee from using them.

Renee testified that Jeffrey and Armstrong, her boyfriend, used the Rhino to transport gasoline from the garage to the pontoon boat and the jet skis. Renee recalled that the Rhino and its ignition key remained at the lakeshore even after the boat and the skis had been filled with gas. According to Renee, no one else at the party asked to use the ATVs, and she would have denied permission to anyone who did.

Despite Renee's resolve to prohibit general use of the ATVs, record evidence supported that Jeffrey, who also attended the party, freely consented to their use. Thompson claimed that Jeffrey pointed to the Rhino and the jet skis and declared, "the **[*3]** keys are in them." When Thompson decided to go for a spin in the Rhino, he found the vehicle parked approximately 30 feet from the waterfront, and the "[k]eys were in it. Keys were in it the whole day." Jeffrey recounted that Armstrong and two other party guests had used the Rhino to ferry gas to the waterfront, but denied having generally permitted

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the party-goers to use the motorized equipment.

Renee and Sandra sought summary disposition under MCR 2.116(C)(10), contending that neither had expressly or impliedly allowed Thompson to use the Rhino, nor ever entrusted him with the vehicle. Renee additionally asserted that because Sandra owned the ATV, Renee bore no ownership liability. The circuit court entered an opinion and order granting defendants' motions, reasoning as follows:

> The Court finds that summary disposition is appropriate as to these defendants. Sandra Williams is not liable under the Owners Liability Statute because Plaintiff has failed to show that she gave either express or implied consent for Defendant Thompson to drive the vehicle. In addition, Plaintiff has failed to show that Sandra Williams knew anything about Defendant Thompson or that her daughter or any other **[*4]** party guests were likely to use the vehicle in an unsafe manner. Because Renee Williams was not the owner of the vehicle as defined in the statute, she cannot be held liable under the Owners Liability Statute. There is no proof that Renee Williams gave permission for Defendant Thompson to drive the vehicle, therefore she cannot be held liable for negligent entrustment.

II. ANALYSIS

Flowers challenges the circuit court's summary disposition ruling as to Sandra only. Our review of this ruling is de novo. Robertson v Blue Water Oil Co, 268 Mich App 588, 592; 708 NW2d 749 (2005). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." West v Gen Motors Corp, 469 Mich 177, 183; 665 NW2d 468 (2003). Because defendants prevailed on summary disposition, we evaluate the relevant documentary evidence in the light most favorable to Flowers. Walsh v Taylor, 263 Mich App 618, 621; 689 NW2d 506 (2004). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might **[*5]** differ." West, 469 Mich at 183.

The owner's liability statute imposes on a vehicle owner the legal responsibility for negligent vehicle operation when "the motor vehicle is being driven with his or her express or implied consent or knowledge." MCL 257.401(1). Because Sandra did not expressly consent to Thompson's use of the Rhino, the issue boils down to whether she impliedly permitted him to drive it.[1] Flowers' burden of establishing Sandra's implied consent is lightened by the operation of a rebuttable common law presumption "that the operator was driving the vehicle with the express or implied consent of the owner." Fout v Dietz, 401 Mich 403, 405; 258 NW2d 53 (1977); see also Bieszck v Avis Rent-A-Car Sys, Inc, 459 Mich 9, 19; 583 NW2d 691 (1998). To overcome this presumption, the vehicle owner must produce "positive, unequivocal, strong and credible evidence" negating implied consent. Michigan Mut Liability Co v Staal Buick, 41 Mich App 625, 626; 200 NW2d 726 (1972), quoted in Biesczk, 459 Mich at 19. What constitutes evidence of this powerful character? In Krisher v Duff, 331 Mich 699, 710; 50 NW2d 332 (1951), our Supreme Court answered that question as follows:

> It has been held **[*6]** that uncontradicted evidence given by defendants alone is sufficiently clear, positive and credible to rebut the presumption and justify a directed verdict for the defendant. . . . On the other hand, if any doubt has been cast on the testimony of the defendants or their witnesses, either by evidence in rebuttal or by question as to the witnesses' credibility, the evidence is not clear, positive and credible, and the issue of whether or not the presumption of consent has been overcome should be submitted to the jury. [Internal citations omitted].

Flowers presented evidence that Jeffrey explicitly invited the party guests to ride the Rhino, and effectuated his offer by allowing the vehicle to remain in the midst of the party's waterfront action with its keys at the ready. In response, Sandra relied on Jeffrey's denial that he allowed Thompson to use the Rhino, and contends in this Court that Thompson "unlawfully took this vehicle and drove [it] without permission from anyone including Jeffrey Williams[.]"[2] **[*7]** We do not judge the veracity of

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[1] An off-the-road vehicle such as an ATV qualifies as a motor vehicle for purposes of the owner's liability statute. Van Guilder v Collier, 248 Mich App 633, 637-639; 650 NW2d 340 (2001).

[2] Sandra claims that Thompson merely had an "impression" that he could use the motorized equipment, based solely on a "circular wave" of Jeffrey's hand. We do not read Thompson's testimony quite so narrowly:

> Q. After you got back to the residence, what did you do next?

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these differing accounts, but scrutinize them to determine whether a genuine issue exists for a factfinder's resolution. Based on Thompson's testimony, a trier of fact could readily conclude that Jeffrey made the Rhino available to Thompson, and acquiesced in its use. Because the testimony placed in serious dispute the facts surrounding Thompson's use of the Rhino, the circuit court erred by granting Sandra's motion for summary disposition under the owner's liability statute.

Moreover, the case law supports that Jeffrey's mere denial that he consented to Thompson's use of the Rhino does not suffice to eliminate Sandra's ownership liability. In *Baumgartner v Ham, 374 Mich 169, 174; 132 NW2d 159 (1965)*, our Supreme Court dispensed with an "unlawful taking" argument akin to Sandra's by declaring that the owner's "failure to **[*9]** complain and prosecute" the claimed theft "tended to support rather than overcome" the presumption of implied consent. Even more directly on point is the Supreme Court's decision in *Cowan v Strecker, 394 Mich 110; 229 NW2d 302 (1975)*. In *Cowan*, the vehicle owner allowed an acquaintance to use her vehicle "with specific instructions that [the acquaintance] not let anybody else drive her car." *Id. at 112*. The acquaintance "proceeded to disobey the admonition and permitted her son William to operate the vehicle without [the owner's] knowledge." *Id*. The Supreme Court held that the owner could not escape liability merely by placing verbal restrictions on the vehicle's use:

> Thus, when an owner willingly surrenders control of his vehicle to others he 'consents' to assumption of the risks attendant upon his surrender of control regardless of admonitions which would purport to delimit his consent. It must be so, or the statutory purpose would be frustrated. As the Court of Appeals . . . so well stated in resolving this case:
>
> "The specifics of any limitations imposed by the owner are irrelevant to the statute's effectuation of its purpose. Whatever the limitations, once the owner has turned his **[*10]** keys over to another, he is powerless to enforce those limitations. Several thousand pounds of steel are being moved upon the public highway because the owner consented thereto. Even if the individual who borrowed the car has deviated from his instructions, the car is being operated on the highway because the owner consented thereto . . . ." [*Id. at 115*, quoting *Cowan v Strecker, 52 Mich App 638, 641-642; 218 NW2d 50 (1974)]*.

Sandra willingly allowed Jeffrey and Renee to use the Rhino, and consigned the key to their care. In contrast with the owner in *Cowan*, Sandra placed no restrictions on the vehicle's use, and never instructed her children to prevent the party-goers from using it. Jeffrey's denial that he allowed Thompson to ride the Rhino tends to rebut the presumption that Thompson took the vehicle with the owner's consent. But viewed in the light most favorable to Flowers, a reasonable trier of fact could find that Sandra surrendered control of the Rhino to Jeffrey, and that Jeffrey allowed Thompson to ride it. Accordingly, we reverse the circuit court's summary disposition ruling concerning this claim.

Flowers next contends that because record evidence established a prima facie **[*11]** negligent entrustment claim against Sandra, the circuit court erred by summarily dismissing it. "The tort of negligent entrustment is comprised of two basic elements. . . . First, the entrustor is negligent in entrusting the instrumentality to the entrustee. Second, the entrustee

---

> A. Well, Jeff knew that I had lost all my fishing gear, and there was a jet ski there, and I said can I ride the jet ski. *He goes you can ride anything you want, besides the boat*. He said, the keys are in it. And I asked him, because I had never seen these before at their property, and I said where did you get this stuff. And he was like, I just walked into the marina — and, like I said, he likes to be a showoff — and **[*8]** he just pointed at the boat, pointed at the jet ski, pointed at the Rhino, and said I just walked in and said I want that, that, that, that, and that.
>
> Q. What was your understanding of ? *he said you could ride anything you want?*
>
> A. *Yeah*.
>
> Q. What was your understanding of what it was you could ride?
>
> A. Well, he said the keys are in it, if you want to ride them, ride them. So I proceeded to put on a life vest and jumped on the jet ski and rode the jet ski for about 45 minutes.
>
> * * *
>
> Q. Okay. And what was your understanding of what he was giving you permission to ride?
>
> A. There was no understanding, he pointed at everything.
>
> Q. Did he point at the jet ski?
>
> A. He pointed at the jet ski, he pointed at the Rhino, he said the keys are in them. It was just like a nonchalant wave, the keys are in them. Like pretty much free for all wave. [Emphasis added].

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must negligently or recklessly misuse the instrumentality." *Allstate Ins Co v Freeman, 160 Mich App 349, 357; 408 NW2d 153 (1987)* (internal citation omitted). An entrustor negligently entrusts an instrumentality to the entrustee if the entrustor

> knew or should have known of the unreasonable risk propensities of the entrustee. . . . To prove an entrustor should have known an entrustee was likely to use the entrusted chattel in an unsafe manner, peculiarities of the entrustee sufficient to put the entrustor on notice of that likelihood must be demonstrated. [*Fredericks v General Motors Corp, 411 Mich 712, 719; 311 NW2d 725 (1981)*.]

Sandra knew or should have known that Jeffrey, Renee, or anyone else would use the vehicle unsafely. Sandra's knowledge that the Rhino would potentially be available during Renee's planned party, and that party guests likely would imbibe alcoholic beverages, does not constitute notice **[*12]** that the vehicle would be driven unsafely. The circuit court correctly granted summary disposition of this claim.

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher

/s/ Mark J. Cavanagh

/s/ Peter D. O'Connell

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EXHIBIT 3

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No *Shepard's* Signal™
As of: August 7, 2024 7:06 PM Z

Lowy v. Daniel Def., LLC

United States District Court for the Eastern District of Virginia, Alexandria Division

July 24, 2024, Decided; July 24, 2024, Filed

Civil Action No. 1:23-cv-1338

Reporter
2024 U.S. Dist. LEXIS 131253 *; 2024 WL 3521508

KAREN LOWY, et al., Plaintiffs, v. DANIEL DEFENSE, LLC, et al., Defendants.

Core Terms

defendants', plaintiffs', Shooter, allegations, causation, advertisements, manufacturers, proximate cause, marketing, injuries, firearm, predicate, component part, causal chain, proximate, rifle, third party, protections, products, motion to dismiss, speculative, ammunition, pleadings, shooting, invoke

Counsel: **[*1]** For Karen Lowy, individually and as parent and next friend of N.T., Plaintiff: Elizabeth Catherine Lockwood, Meghan Palmer, Ali & Lockwood LLP (DC-NA), Washington, DC; Henry Christopher Boehning, Jacobus Schutte, PRO HAC VICE, Paul, Weiss, Rifking, Wharton & Garrison LLP (NY-NA), New York, NY; Jennifer Nicole Hartley, PRO HAC VICE, Paul, Weiss, Rifkind, Wharton & Garrison, LLP (NY-NA), New York, NY; Kathryn Marshall Ali, Ali & Lockwood LLP, Washington, DC.

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For Loyal 9 Manufacturing, LLC, FOSTECH, Inc., Centurion Arms, LLC, Defendants: David Charles Bowen, LEAD ATTORNEY, Willcox & Savage PC, Wells Fargo Center, Norfolk, VA; Scott Lloyd Braum, Timothy Rockwell Rudd, PRO HAC VICE, Braum Rudd, Dayton, OH.

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Judges: CLAUDE M. HILTON, UNITED STATES DISTRICT JUDGE.

Opinion by: CLAUDE M. HILTON

Opinion

MEMORANDUM OPINION [*4] AND ORDER

THIS MATTER comes before the court on motions to dismiss submitted by all fifteen defendants.

Plaintiffs' suit arises from a shooting on April 22, 2022, at Edmund Burke School in Washington, D.C. That afternoon, when a gunman ("Shooter") opened fire from an apartment window overlooking the school, Plaintiff Karen Lowy was waiting outside the school to pick up her daughter, Plaintiff N.T., and Plaintiff Antonio Harris was a security guard at the school. Bullets struck Lowy and Harris while N.T. sheltered inside the school. In addition to Lowy and Harris's physical injuries, plaintiffs seek to recover for emotional distress.

Plaintiffs describe defendants as manufacturers of assault rifles, rifle accessories, and ammunition. Plaintiffs allege that defendants' liability stems from their negligence, negligence *per se*, and violations of Virginia statutes in a "foreseeable and predictable chain of events" that led to plaintiffs' injuries. Specifically, plaintiffs claim that defendants "have deceptively and unfairly marketed their assault rifles, rifle accessories, and ammunition in ways designed to appeal to the impulsive, risk-taking tendencies of civilian adolescent and post-adolescent **[*5]** males." Those men, according to plaintiffs, then foreseeably use defendants' products in mass shootings. "Upon information and belief," plaintiffs claim that Shooter was one of the men influenced by defendants' marketing practices and relied on defendants' advertisements when purchasing his weapons in Virginia. Plaintiffs allege that, by these acts, all fifteen defendants violated the Virginia False Advertising Statute, Va. Code Ann. § 18.2-216, and the Virginia Consumer Protection Act, Va. Code Ann. § 59.1-196 *et seq.* In addition, plaintiffs claim six defendants committed negligence and another six committed negligence *per se* for violations of the National Firearms Act, 26 U.S.C. § 5801 et seq., and the Virginia Uniform Machine Gun Act, Va. Code Ann. § 18.2-288 *et seq.* Plaintiffs seek compensatory and punitive damages owing to these alleged acts. The fifteen defendants, represented by eleven motions to dismiss, seek to dismiss plaintiffs' complaint for failing to invoke the Court's subject-matter jurisdiction under *Rule 12(b)(1)* and failing to state a claim under *Rule 12(b)(6)*.

Challenges to the Court's subject-matter jurisdiction under *Rule 12(b)(1)* may be either facial or factual. Beck v. McDonald, 848 F.3d 262, 270 (4th Cir. 2017). A facial challenge, like defendants', contends that "a complaint simply fails to allege facts upon which subject matter jurisdiction can be based." Id. (quoting Kerns v. United States, 585 F.3d 187, 192 (4th Cir. 2009)). Faced with such a challenge, the Court "must apply a standard patterned on *Rule 12(b)(6)* and assume the truthfulness of the **[*6]** facts alleged." Kerns, 585 F.3d at 193. "A motion to dismiss pursuant to *Rule 12(b)(6)* tests the sufficiency of the claims pled in a complaint." Nanendla v. WakeMed, 24 F.4th 299, 304 (4th Cir. 2022) (quoting ACA Fin. Guar. Corp. v. City of Buena Vista, 917 F.3d 206, 211 (4th Cir. 2019)). Claims survive a *Rule 12(b)(6)* challenge if the complaint contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Id. (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)). Put another way, a plaintiff alleges sufficient facts when the court can "draw the reasonable inference that the defendant is liable for the misconduct alleged." Id.

Defendants first challenge plaintiffs' standing. "To invoke federal jurisdiction, a plaintiff bears the burden of establishing the three 'irreducible minimum requirements' of Article III standing:

> (1) an injury-in-fact (i.e., a concrete and particularized invasion of a legally protected interest); (2) causation (i.e., a fairly traceable connection between the alleged injury in fact and the alleged conduct of the defendant); and (3) redressability (i.e., it is likely and not merely

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> speculative that the plaintiffs injury will be remedied by the relief plaintiff seeks in bringing suit)."

Beck, 848 F.3d at 269 (quoting David v. Alphin, 704 F.3d 327, 333 (4th Cir. 2013)). Defendants' standing challenge focuses on the second requirement, causation. Alleging causation does not require plaintiffs to allege **[*7]** that the defendants' actions were "the very last step in the chain of causation." Bennett v. Spear, 520 U.S. 154, 169, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997). In fact, "the causation element of standing does not require the challenged action to be the sole or even immediate cause of the injury." Sierra Club v. U.S. Dep't of the Interior, 899 F.3d 260, 284 (4th Cir. 2018) (citing id.). However, when plaintiffs plead that a third party's actions bridge the causal chain between defendants' conduct and plaintiffs' injuries, that indirectness "may make it substantially more difficult to meet the minimum requirement of Art. III." Warth v. Seldin, 422 U.S. 490, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). Plaintiffs cannot satisfy Article III's causation requirement if their injury resulted "from the *independent* action of some third party not before the court." Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 42, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976) (emphasis added). "Indeed, where multiple actors are involved, a plaintiff can establish causation only if the defendant's conduct had a 'determinative or coercive effect upon the action of someone else.'" Alvarez v. Becerra, No. 21-2317, 2023 U.S. App. LEXIS 8751, 2023 WL 2908819, at *3 (4th Cir. Apr. 12, 2023) (quoting Bennett, 520 U.S. at 169).

Here, a third party bridges the alleged causal chain between defendants' conduct and plaintiffs' injuries. At the beginning of the alleged causal chain, defendants marketed their weapons and weapons accessories to potential consumers in Virginia. At the end, Shooter injured plaintiffs by firing at an elementary school. This chain relies on Shooter, a third **[*8]** party not before the Court, to link defendants to plaintiffs' injuries. Accordingly, to establish standing against defendants, plaintiffs must allege that defendants' conduct had a determinative or coercive effect upon Shooter's actions.

Much of plaintiffs' complaint concerns defendants' marketing to Virginia residents generally and "young men like the Shooter," id. ¶ 57, but few paragraphs allege the effect of defendants' marketing on Shooter specifically. To link Shooter's actions to Defendant Daniel Defense, LLC, for example, plaintiffs plead that Daniel Defense "advertised to Virginia residents such as the Shooter," Dkt. No. 1 ¶¶ 149, 240, and allege "[u]pon information and belief, the Shooter relied on Defendant Daniel Defense, LLC's advertisements to purchase the DDM4 V7 rifle and DD magazine," id. ¶ 243 (Counts XV—XXVI allege identical reliance on other defendants' advertisements). These allegations fail for two reasons.

First, concerning Shooter's reliance on defendants' marketing, plaintiffs' allegations are conclusory. Generally, a plaintiff may plead "based on 'information and belief if such plaintiff is in a position of uncertainty because the necessary evidence is controlled **[*9]** by the defendant." Ridenour v. Multi-Color Corp., 147 F. Supp. 3d 452, 456 (E.D. Va. 2015). But, like all other allegations, allegations pled upon information and belief "may not be wholly conclusory." Kashdan v. George Mason Univ., 70 F.4th 694, 701 (4th Cir. 2023). If "not supported by any well-pled facts that exist independent of [plaintiffs'] legal conclusions," allegations pled upon information and belief fail. Id. Such is the case here: no factual allegations in the complaint support the conclusion that Shooter relied on defendants' marketing. The complaint does not suggest defendants control such evidence of Shooter's reliance and does no more than speculate that Shooter, like other young men in Virginia, observed defendants' advertisements. Without more support, these pleadings fail to raise plaintiffs' right to relief above the speculative level and can proceed no further. Lokhova v. Halper, 995 F.3d 134, 148 (4th Cir. 2021) ("It is well established that speculative conclusions are insufficient to survive a motion to dismiss.").

Second, viewed most optimistically, plaintiffs allege that Shooter relied on defendants' advertisements when choosing to purchase defendants' products. The Court cannot transform that allegation into an allegation that defendants' marketing had a "determinative or coercive effect" on Shooters' decision to shoot at plaintiffs. While **[*10]** the bounds of Article III's causation requirement may at times seem opaque, "[c]ausation makes its most useful contribution to standing analysis in circumstances that show a clear break in the causal chain." 13A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3531.5 (3d ed. 2024). Here, the actions of a third party injured plaintiffs. As explained above, completing the causal chain requires plaintiffs to allege defendants' conduct had a determinative or coercive effect on that third party's injurious actions. This complaint, however, fails to make that allegation. *Maybe* defendants' advertising coerced Shooter to *purchase* defendants' products (and that allegation, as discussed above, is speculative), but absent is any allegation that defendants' advertising

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coerced Shooter to attack the elementary school. Without that allegation, plaintiffs' alleged causal chain is incomplete, and plaintiffs lack standing against these defendants.

But, even had plaintiffs invoked standing, the *Protection of Lawful Commerce in Arms Act ("PLCAA"), 15 U.S.C. § 7901 et seq.*, blocks plaintiffs' claims. As the PLCAA's title suggests, the statute protects firearm companies' "lawful" commerce in arms and prohibits plaintiffs from bringing civil liability actions **[*11]** against such companies when their injury results solely from "the criminal or unlawful misuse" of the companies' products by a third party. *§§ 7901(b)(1)*, *7902*, *7903(5)(A)*. The PLCAA contains various exceptions, however, "to ensure that it does not insulate firearm companies against lawsuits resulting from their unlawful behavior." *Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc., 91 F.4th 511, 526 (1st Cir. 2024)*. Here, defendants qualify for the PLCAA's protections, and plaintiffs fail to invoke the Act's exceptions.

The PLCAA protects "a manufacturer or seller of a qualified product, or a trade association" from qualified civil liability actions. *§ 7903(5)(A)*. A "qualified product" includes firearms, ammunition, or "a component part of a firearm or ammunition." *§ 7903(4)*. Defendants here manufacture rifles (e.g., Defendants Daniel Defense and Bravo Company), ammunition (e.g., Defendants Federal Cartridge Company and Vista), and component parts (e.g., Defendants Loyal 9 Manufacturing and Centurion Arms), and plaintiffs do not deny most defendants fall within the PLCAA's protections. But plaintiffs allege that the magazines and grips manufactured by Defendants Magpul Industries and Surefire, LLC are not component parts, excluding those defendants from the PLCAA's protections. Plaintiffs cite *Prescott v. Slide Fire Solutions, LP, 341 F. Supp. 3d 1175 (D. Nev. 2018)* for support, but **[*12]** that case belies their claim. There, the court found that the defendants' bump stocks "are component parts of a rifle and, therefore, constitute qualified products under the PLCAA." *Id. at 1190*. In reaching that conclusion, "the Court [found] significant the fact that bump stocks replace existing stocks rendering them component parts, even if they are after-market enhancements." Id. The same reasoning applies here: when a firearm user substitutes the original components of their firearm for defendants' magazines and grips, defendants' magazines and grips then become component parts of the newly assembled firearm. See *id. at 1189*. As manufacturers of component parts, the PLCAA extends to qualified civil liability actions against these manufacturers like the other defendants.

Plaintiffs must invoke one of the PLCAA's exceptions to proceed—defendants fall within the PLCAA's protections, and this suit is a civil action for damages resulting from the criminal misuse of defendants' products by a third party. *§ 7903(5)(A)*. One of the PLCAA's exceptions exempts actions "in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and **[*13]** the violation was a proximate cause of the harm for which relief is sought." *§ 7903(5)(A)(iii)*. "This exception has come to be known as the 'predicate exception,' because a plaintiff not only must present a cognizable claim, he or she also must allege a knowing violation of a 'predicate statute.' *Ileto v. Glock, Inc., 565 F.3d 1126, 1132 (9th Cir. 2009)*, *cert. denied*, *560 U.S. 924, 130 S. Ct. 3320, 176 L. Ed. 2d 1219 (2010)* (citing *City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 390 (2d Cir. 2008)*, *cert. denied*, *556 U.S. 1104, 129 S. Ct. 1579, 173 L. Ed. 2d 675 (2009)*). Here, the Court assumes without deciding that the VFAS and VCPA are predicate statutes because, in any event, plaintiffs fail the predicate exception's proximate causation requirement.

Part of the PLCAA's predicate exception asks whether defendants' violation of the predicate statute proximately caused the plaintiffs' harm. *§ 7903(5)(A)(iii)*; *Estados Unidos Mexicanos, 91 F.4th at 534*. In Virginia, the "proximate cause of an event is that act or omission which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the event, and without which that event would not have occurred." *Wolf v. Fauquier Cnty. Bd. of Supervisors, 555 F.3d 311, 321 (4th Cir. 2009)* (quoting Beverly Enterprises-Virginia v. Nichols, 247 Va. 264, 269, 441 S.E.2d 1, 10 Va. Law Rep. 995 (1994)). The pleading standard for proximate cause is not the same as the Article III causation standard discussed above—Article III's pleading standard is lower. *DiCocco v. Garland, 52 F.4th 588, 592 (4th Cir. 2022)*. Therefore, the complaint's deficiencies under Article III also doom plaintiffs' allegations of proximate cause. To briefly reiterate, plaintiffs' allegations that Shooter relied **[*14]** on defendants' advertisements are conclusory, and plaintiffs fail to allege that the shooting "would not have occurred" absent those advertisements. See *Wolf, 555 F.3d at 321*. So, even further assuming that plaintiffs adequately allege defendants violated the VCPA and VFAS—which the court does not decide—plaintiffs fail to adequately allege those violations proximately caused their injuries.

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Plaintiffs appeal to a recent First Circuit decision to argue their causation allegations are sufficient. However, the dissimilarities between the pleadings in that case and this one only underscore the deficiencies here. In *Estados Unidos Mexicanos*, the Mexican government alleged that several American firearm companies deliberately "engage in conduct—design decisions, marketing tactics, and repeated supplying of dealers known to sell guns that cross the border—with the intent of growing and maintaining an illegal market in Mexico from which they receive substantial revenues." *91 F.4th at 532*. This conduct allegedly harmed Mexico by requiring the Mexican government to "incur significant costs in response to the increased threats and violence accompanying drug cartels armed with an arsenal of military-grade weapons." *Id. at 534*. The First Circuit held Mexico sufficiently **[*15]** alleged that conduct proximately caused the government's injuries, "thereby satisfying the final demand of the predicate exception." *Id. at 538*. In so holding, the First Circuit contrasted the Mexican government's allegations with the City of Philadelphia's allegations in *City of Philadelphia v. Beretta U.S.A. Corp., 277 F.3d 415 (3d Cir. 2002)*. *Estados Unidos Mexicanos, 91 F.4th at 535*.

In *City of Philadelphia*, the City alleged that the defendant firearm companies' "conduct in the marketing and distribution of handguns allows them to fall into the hands of criminals and children, creating and contributing to their criminal use in Philadelphia." *277 F.3d at 419*. Like the Mexican government's allegations, the City asserted "their injuries include the costs associated with preventing and responding to incidents of handgun violence and crime." Id. The district court dismissed the complaint, holding the plaintiffs' claims "failed for lack of proximate cause because their injuries are too remote from the gun manufacturers' alleged conduct." *Id. at 423-24*. The Third Circuit affirmed; plaintiffs' allegations were too remote to allege proximate cause because plaintiffs failed to allege the gun manufacturers "intend[ed] to inflict injury upon the citizens of Philadelphia . . . ." *Id. at 424*. The City "at most" alleged the firearm companies possessed an "awareness of the **[*16]** means by which prohibited purchasers end up possessing handguns"—an allegation insufficient to support proximate cause. Id. The First Circuit, meanwhile, held the Mexican government succeeded where the City of Philadelphia failed: Mexico adequately alleged the gun manufacturers' intent, "expressly alleg[ing] that the defendants did know which dealers were making illegal sales." *Estados Unidos Mexicanos, 91 F.4th at 535*.

Both *Estados Unidos Mexicanos* and *City of Philadelphia* are unlike this case. First, in those cases, the government plaintiffs pled that defendants' conduct injured them via years of public expenditure. Plaintiffs here are neither a municipal nor a national government; plaintiffs' injuries are specific to a single incident perpetrated by a single shooter. Accordingly, unlike the government plaintiffs, plaintiffs here had to allege defendants' conduct caused one, specific shooting. As discussed above, these pleadings fail to allege defendants' advertisements caused Shooter's singular attack. Second, plaintiffs' pleadings also echo the dificiencies of those in *City of Philadelphia*: plaintiffs here allege *some* causation (defendants' advertisements intentionally caused consumers' purchases), but those allegations do not allege proximate causation (defendants' advertisements **[*17]** intentionally caused Shooter's attack).

The deficiencies in plaintiffs' allegations of causation doom all their claims alike. Their claims under the VFAS and VCPA fail the proximate causation prong of the PLCAA's predicate exception, and their claims of negligence and negligence *per se* fare no better. As is axiomatic, claiming negligence requires the plaintiff to show that the defendant's breach "was the proximate cause of injury." *Willner v. Dimon, 849 F.3d 93, 113 (4th Cir. 2017)*. And when a plaintiff claims negligence *per se*, the alleged "statutory violation must be a proximate cause of plaintiffs injury." Kaltman v. All Am. Pest Control, Inc., 281 Va. 483, 496, 706 S.E.2d 864 (2011). The question of proximate cause is usually a question of fact for a jury, but when "reasonable persons may not differ in their conclusions that such negligence was such a cause[,] a trial court properly decide the question as a matter of law." Thomas v. Settle, 247 Va. 15, 20, 439 S.E.2d 360, 10 Va. Law Rep. 702 (1994). Here, reasonable persons may not differ because plaintiffs' pleadings provide no basis for finding proximate cause. So, plaintiffs' negligence and negligence per se claims fail too.

Accordingly, it is hereby

ORDERED that defendants' motions to dismiss are **GRANTED**, and this case is **DISMISSED**.

Alexandria, Virginia

July 24, 2024

/s/ Claude M. Hilton

CLAUDE M. HILTON

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UNITED STATES DISTRICT JUDGE **[*18]**

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EXHIBIT 4

Document received by the Washtenaw County Trial Court 08/13/2024.

Rookus v. Randy Merren Auto Sales, Inc.

Court of Appeals of Michigan

February 13, 2018, Decided

No. 336766

Reporter
2018 Mich. App. LEXIS 244 *; 2018 WL 842672

GABRIEL ROOKUS and SARAH ROOKUS, Plaintiffs-Appellees, v RANDY MERREN AUTO SALES, INC., doing business as RANDY MERREN AUTO SALES OF IONIA, Defendant-Appellant.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: [*1] Kent Circuit Court. LC No. 16-000832-NO.

Core Terms

duty of care, trial court, plate, parties, summary disposition, spare tire, tow truck, tow truck driver, impose a duty, dealership, dealer, drive, tire

Judges: Before: MARKEY, P.J., and M. J. KELLY and CAMERON, JJ. M. J. KELLY, J. (concurring).

Opinion

PER CURIAM.

Defendant, Randy Merren Auto Sales, Inc., appeals by leave granted the trial court's order denying its motion for summary disposition. We reverse and remand for further proceedings consistent with this opinion.

This case arises out of an automobile accident that occurred on April 24, 2013. On that day, Darrell Raymond and his wife brought their vehicle to defendant for repair work. Defendant's general manager loaned the Raymonds a 2000 Nissan Xterra to use while their vehicle was being repaired.

Later that day, while the Raymonds were traveling on I-96, one of the Xterra's tires failed. The Raymonds drove the Xterra to the side of the highway to change the tire, but Darrell was unable to access the spare tire from its location underneath the Xterra's trunk because the tool necessary to access the spare tire was not located in the vehicle. The Raymonds contacted one of defendant's representatives and were instructed to call a tow truck service.

The Raymonds contacted East Beltline Towing and Service, Inc., and plaintiff tow truck driver Gabriel Rookus was **[*2]** dispatched to their location. After Gabriel arrived, a collision occurred between an oncoming vehicle driven by Joshua Woods and the tow truck, propelling the tow truck toward the Xterra. Gabriel reacted to the collision in time to push Darrell out of harm's way and then attempted to jump into the trunk of the Xterra to avoid harm. Unfortunately, Gabriel's right leg remained beneath the Xterra's tailgate and was crushed between the tow truck and the Xterra. Gabriel suffered significant injury, and doctors later amputated his right leg below the knee. Gabriel and his wife, Sarah Rookus, subsequently filed suit against defendant, alleging that defendant was negligent in failing to equip the Xterra with the tool necessary to lower the spare tire from its storage compartment and that this negligence had caused Gabriel's injuries.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10). Defendant argued that it did not owe a duty of care to plaintiffs because it shared no relationship with plaintiffs. Defendant had not contracted with Gabriel or his employer or instructed the Raymonds to contact Gabriel or his employer in particular. Defendant also argued that even if it did owe a duty of care **[*3]** to plaintiffs, Woods's action of driving his vehicle into the tow truck was not reasonably foreseeable and constituted a superseding cause absolving defendant of liability for plaintiffs' injuries.

The trial court denied defendant's motion for summary disposition. The trial court held that a duty of care could

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arise as a matter of law in the absence of a relationship between the parties and found that such a duty existed here. In so doing, the trial court found that it was reasonably foreseeable that without the proper tools to change a tire, the Raymonds would have to hire a tow truck and the tow truck driver would be injured as a result of the service call. In addition, the trial court also found that defendant had violated *MCL 257.244(6)* and MCL 257.683 by improperly loaning the Xterra for use with a dealer plate and without the necessary tools to access the spare tire and implied that these statutory violations created an inference of negligence. The trial court further found that the question of whether Woods's actions constituted a superseding cause absolving defendant of liability could not be resolved on summary disposition and must be submitted to the trier of fact.

On appeal, defendant argues that **[*4]** the trial court erred when it denied defendant's motion for summary disposition because defendant owed no duty of care to plaintiffs and, without such a relationship, a duty of care could not be imposed. We agree.

This Court reviews de novo motions for summary disposition under MCR 2.116(C)(10). Johnson v Recca, 492 Mich 169, 173; 821 NW2d 520 (2012). This Court, reviewing the record in the same manner as the lower court, "must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the party opposing the motion, and grant the benefit of any reasonable doubt to the opposing party." Radtke v Everett, 442 Mich 368, 374; 501 NW2d 155 (1993). This Court reviews de novo whether defendant owed plaintiff a duty of care. Hill v Sears, Roebuck & Co, 492 Mich 651, 659; 822 NW2d 190 (2012).

MCR 2.116(C)(10) provides that a trial court may grant judgment on all or part of a claim where "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." West v Gen Motors Corp, 469 Mich. 177, 183; 665 N.W.2d 468 (2003). But when deciding a motion for summary disposition, a court may not assess credibility or determine facts. Oade v Jackson Nat'l Life Ins Co, 465 Mich 244, 265; 632 NW2d 126 (2001).

To succeed on **[*5]** a negligence claim, a plaintiff must demonstrate that (1) the defendant owed a duty to the plaintiff; (2) the defendant breached that duty; (3) the plaintiff was harmed, and (4) the defendant's breach of his duty was the cause of plaintiff's harm. Loweke v Ann Arbor Ceiling & Partition Co, 489 Mich 157, 162; 809 NW2d 553 (2011). A defendant cannot be liable unless he owed a duty to the plaintiff. Hill, 492 Mich at 661. "[W]hether a legal duty exists is a question of whether the relationship between the actor and the plaintiff gives rise to any legal obligation on the actor's part to act for the benefit of the subsequently injured person." In re Certified Question, 479 Mich 498, 505-506; 740 NW2d 206 (2007) (quotation marks and citations omitted). In determining whether a duty exists, a trial court should consider the parties' relationship, the foreseeability of the harm, the burden placed on the defendant, the nature and severity of the risk at issue, the moral blame of the conduct, and the connection between the conduct and the harm. Valcaniant v Detroit Edison Co, 470 Mich 82, 86; 679 NW2d 689 (2004); Dyer v Trachtman, 470 Mich 45, 49; 679 NW2d 311 (2004). These considerations inform the trial court as to "the ultimate inquiry in determining whether a legal duty should be imposed," which is "whether the social benefits of imposing a duty outweigh the social costs of imposing a duty." In re Certified Question, 479 Mich at 505.

The "most important factor" in the determination whether a duty exists "is the relationship **[*6]** of the parties." *Id.* It is unnecessary to consider the other factors involved in the determination if no relationship exists between the parties. Id. at 507; see also Buczkowski v McKay, 441 Mich 96, 101; 490 NW2d 330 (1992) ("[T]o require the actor to act, some sort of relationship must exist between the actor and the other party which the law or society views as sufficiently strong to require more than mere observation of the events which unfold on the part of the defendant.") (quotation marks and citations omitted). Similarly, a duty cannot be imposed where the harm is not foreseeable. In re Certified Question, 479 Mich at 509; see also Valcaniant, 470 Mich at 88.

Based on these principles, we conclude that the trial court erred in holding that defendant owed a duty of care to plaintiffs. Defendant and plaintiffs shared no relationship, and, in the absence of such a relationship, it was error to impose a duty of care on defendant. See Hill, 492 Mich at 669; In re Certified Question, 479 Mich at 507. Defendant loaned a vehicle to the Raymonds; it did not contract with or suggest that the Raymonds enter into a contract with Gabriel specifically. Defendant never directly interacted with plaintiffs. The parties were tangentially related to each other only by an extremely attenuated series of events. To the extent that plaintiffs argue that the statement that "when there is no **[*7]**

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relationship between the parties, no duty can be imposed," see *In re Certified Question, 479 Mich at 507*, is a misinterpretation of negligence caselaw, we note that this concept has been repeatedly referenced both before and after the Court decided *In re Certified Question.* See, e.g., *Hill, 492 Mich at 661, 669* ("[B]ecause only a limited relationship existed between the parties . . . it is not necessary for us to consider the additional factors related to whether a duty exists."); *Dyer, 470 Mich at 53*; *Buczkowski, 441 Mich at 103* ("The duty to protect others against harm from third persons is based on a relationship between the parties.").

To support their position, plaintiffs cite caselaw in which our state's Supreme Court imposed duties of care despite the lack of relationship between the parties. But the Court has only imposed such a duty where a protected class of persons, such as children, is involved, *Moning v Alfono, 400 Mich 425, 440-441; 254 NW2d 759 (1977)*, or when a defendant undertook to render services for the protection of a third party, *Smith v Allendale Mut Ins Co, 410 Mich 685, 705-706; 303 NW2d 702 (1981)*. See also *Buczkowski, 441 Mich at 103 n 8* (emphasizing that *Moning* found a duty of care for innocent bystanders harmed by a product because the product at issue was targeted specifically toward children, "a class historically protected under the law of torts"). Plaintiffs are not a protected class of people and have not presented any **[*8]** evidence that defendant's action in loaning the Xterra to the Raymonds was done for the benefit of tow truck drivers. See *Smith, 410 Mich at 705-706*; *Moning, 400 Mich at 440*. Accordingly, under this fact scenario, plaintiffs are not entitled to the imposition of a duty in the absence of any relationship between plaintiffs and defendant.

Further, to the extent that the trial court may have imposed a duty of care upon defendant based on defendant's alleged violations of *MCL 257.244(6)* and *MCL 257.683*,[1] we also hold this to be error. The existence of a duty of care arising from a statute "depends on (1) whether the purpose of the statute was to prevent the type of injury and harm actually suffered and (2) whether the plaintiff was within the class of persons which the statute was designed to protect." *Cipri v Bellingham Frozen Foods, Inc, 235 Mich App 1, 16; 596 NW2d 620 (1999)* (citation, quotation marks and brackets omitted). But even if a duty of care arises from a statute, the violation of that statute is only prima facie evidence of negligence. *Id.*

MCL 257.244(6) provides:

> A licensee shall not use a special plate described in this section on service cars or wreckers operated as an adjunct of a licensee's business. A manufacturer, transporter, or dealer making or permitting any unauthorized use of a special plate under this chapter forfeits the right **[*9]** to use special plates and the secretary of state, after notice and a hearing, may suspend or cancel the right to use special plates and require that the special plates be surrendered or repossessed by the state.

MCL 257.244(4) allows a car dealership to move a vehicle on public roadways without registering the vehicle by displaying a special dealer plate issued to the dealership by the secretary of state. This statutory provision allows a dealership to move its vehicles to and from repair facilities and storage lots and to provide test drives to potential customers without incurring the expenses related to registering the vehicle with the secretary of state. Although it is clear that defendant violated *MCL 257.244(6)* by keeping the dealership plate on the Xterra while using it as a service car, *MCL 257.244* did not impose a duty of care on defendant relevant to plaintiffs' injuries. No caselaw or legislative analysis exists indicating that this statutory provision was enacted to protect tow truck drivers against injury. See *Cipri, 235 Mich App at 16*. Moreover, such a proposition defies common sense. Whether a dealership uses a dealer license plate in violation of *MCL 257.244(6)* has no logical relationship to the physical safety of a tow truck driver called to **[*10]** service a vehicle improperly displaying a dealer license plate. Accordingly, defendant's violation of *MCL 257.244(6)* is irrelevant to whether defendant owed plaintiffs a duty of care. See *id.*

Next, *MCL 257.683* provides:

> (1) A person shall not drive or move or the owner shall not cause or knowingly permit to be driven or moved on a highway a vehicle or combination of

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[1] We note that the trial court's oral opinion as to the determination that defendant owed plaintiffs a duty of care was not entirely clear as to whether it held that a statutory duty existed by virtue of *MCL 257.683* and ***MCL 257.244(6)*** or that a common law duty existed or both. Because the trial court made the necessary findings regarding both a statutory duty and a common law duty, we have chosen to assess the viability of both possible holdings.

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> vehicles that is in such an unsafe condition as to endanger a person, or that does not contain those parts or is not at all times equipped with lamps and other equipment in proper condition and adjustment as required in *sections 683 to 711*, or that is equipped in a manner in violated of *sections 683 to 711*. A person shall not do an act forbidden or fail to perform an act required under *sections 683 to 711*.
> * * *
>
> (4) *Sections 683 to 711* shall not prohibit the use of additional parts and accessories on a vehicle that are not inconsistent with those sections.
>
> (5) The provisions of *sections 683 to 711* with respect to equipment on vehicles shall not apply to implements of husbandry, road machinery, road rollers, or farm tractors, except as specifically provided in *sections 683 to 711*.
>
> (6) Except as otherwise provided in *section 698* or *707d*, a person who violates a provision of *sections 683 to 711* with respect to equipment on vehicles is responsible for a civil infraction.

We hold that defendant's actions **[*11]** in failing to provide the necessary tool for the Raymonds to access the Xterra's spare tire do not constitute "knowingly permit[ting]" the Raymonds to drive the Xterra "in such an unsafe condition as to endanger a person." *MCL 257.683(1)*. This condition by itself did not place any person in danger and only prevented the Raymonds from temporarily replacing their tire. To the extent that *MCL 257.683(1)* also prohibits defendant from permitting the Raymonds from driving a vehicle not properly equipped as required by *MCL 257.683* to *MCL 257.711*, no statutory provision requires a vehicle to contain a spare tire or the tools necessary to access an existing spare tire. And although *MCL 257.710(f)* does prohibit operating "a vehicle on a highway when a tire in use on that vehicle is unsafe" as defined by *MCL 257.710(h)*, plaintiffs have not provided documentary evidence supporting that these provisions were violated. The trial court erred in its determination that defendant violated *MCL 257.683* and erred to the extent that it held that defendant's alleged violations of *MCL 257.683* and *MCL 257.244(6)* were prima facie evidence of negligence. Because we hold that defendant did not owe plaintiffs a duty of care, we need not address defendant's argument that Woods's actions in colliding with the tow truck constituted **[*12]** a superseding cause absolving defendant of liability as a matter of law.

We reverse and remand for further proceedings consistent with this opinion. As the prevailing party, defendant may tax its costs. *MCR 7.219*. We do not retain jurisdiction.

/s/ Jane E. Markey

/s/ Thomas C. Cameron

Concur by: Michael J. Kelly

Concur

M. J. KELLY, J. (*concurring*).

I concur in the result only.

/s/ Michael J. Kelly

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