

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JOSHUA EVERETT BUSHMAN, *
ADMINISTRATOR FOR THE ESTATE *
OF CALVIN VAN PELT, et al, *

Plaintiffs,

* Case No. CL2023-06260

v. *

OKORI, LLC d/b/a 80P BUILDER, et al, *

Defendants. *

* * * * *

DEMURRER

Defendant, Okori, LLC d/b/a 80P Builder (“Okori”), by and through its undersigned counsel, hereby files this Demurrer and states the following:

This Court must sustain this demurrer as to Count One (Negligence / Gross Negligence) of Plaintiffs’ Amended Complaint because Plaintiffs have not pled facts sufficient to prove that Okori owed Ersheen Elaiasier and Calvin Van Pelt a duty of care. It is a bedrock principle that a duty of care is “owed [only] to those within reach of a defendant’s conduct.” *Quisenberry v. Record No. 171494 Hunting Ingalls, Inc.*, 296 Va. 233, 243 (2018) (internal citation and quotation marks omitted). “[T]here is no such thing as negligence in the abstract, or in general[] . . . it must be in relation to some person.” *Id.* (cleaned up). If there is no relationship between Okori and Elaiasier and Van Pelt, then there is no duty. *Id.* While the relationship does not have to be in the form of an “actual interaction”, there must at least be a “sufficient relation” to place Elaiasier and Van Pelt within the reach of Okori’s conduct. *Id.* at 244.

Here, the Amended Complaint states mere conclusory allegations that Okori owed Elaiasier and Van Pelt a duty of care. *Amend. Compl.* at ¶¶ 139–41. Plaintiffs simply allege that Okori owed

a general duty of care to “all persons[.]” *Id.* at ¶ 139. Even Plaintiffs’ more specific allegations attempting to show that Okori owed Elaiasier and Van Pelt a duty of care fail. Indeed, Plaintiffs merely allege that Okori “had a duty to exercise reasonable care in the marketing, sale, and distribution of a ghost gun kits” without providing the requisite supporting allegations. *Id.* at ¶ 141. Moreover, Plaintiffs allege that Okori owed Elaiasier and Van Pelt a duty to “refrain[] from engaging in any activity that would reasonably create a foreseeability risk of injuries to others[.]” This falls short of establishing that these actions were the natural and probable consequences of Elaiasier’s and Van Pelt’s deaths. However, “to who[m] a duty is owed is established by determining who a is directly and foreseeability exposed to the risk of bodily harm as a result of the defendant’s actions[.]” The foreseeability of harm “is not to be equated with duty.” *Quisenberry*, 296 Va. at 243. As such, none of Plaintiffs’ allegations are sufficient to allege that Okori owed Elaiasier and Van Pelt a duty of care.

Finally, the remaining allegations pled in support of Count One are mere conclusory allegations which cannot support Plaintiffs’ claim. Plaintiffs allege that Okori acted negligently, recklessly, or maliciously by failing to act in accordance with state and federal gun laws when it *knew* that the omission of these acts would cause harm. *Id.* at ¶ 143. There are simply no allegations of fact contained in the Amended Complaint to support Plaintiffs’ allegations as they relate to Okori’s knowledge or intentions. Accordingly, this Court must sustain this demurrer as to Count One because Plaintiffs fail to state a claim upon which relief may be granted.

This Court must sustain this demurrer as to Count Two (Negligence Per Se) of the Amended Complaint because Plaintiffs do not sufficiently allege an essential element in pleading a cause of action for negligence per se, i.e., facts to support that Okori violated a valid statute or a regulation. *Kaltman v. All Am. Pest Control, Inc.*, 281 Va. 483, 496 (2011).

Here, Plaintiffs allege that Okori violated 18 U.S.C. § 922 because the gun parts kit it allegedly sold fits the definition of a firearm. *Amend. Compl.* at ¶ 151. This allegation must fail because Plaintiffs rely upon the definition of “firearm” under the 2022 iteration of the statute—18 USC § 921(a)(3)—not as it existed at the time the alleged negligent acts occurred. *Amend. Compl.* at ¶ 37 at fn.1. This definition is applied to the entirety of 18 U.S.C. Chapter 18, which includes Plaintiffs’ allegations relating to 18 U.S.C. §§ 921 and 922. Thus, Okori could not have violated federal law as pled by Plaintiffs and, as such, the alleged violation of federal law cannot support Count Two of Plaintiffs’ Amended Complaint.

Plaintiffs further allege that Okori violated Virginia’s Background Check Law. However, Plaintiffs fail to allege facts that Elaiasier and Van Pelt belonged to the class of persons to whom the Background Check Law was supposed to benefit, and that their deaths were the type against which the law was supposed to protect. *Amend. Compl.* at ¶¶ 133–37; 148–55. Plaintiffs simply state that Okori’s alleged violations of the Background Check Law “were a direct and proximate cause of the killings of the decedents on April 25, 2021” without the requisite factual support for such a claim. Thus, this Court must sustain this demurrer as to Count Two because Plaintiffs fail to state a claim upon which relief may be granted.

This Court must sustain this demurrer as to Count Three (Negligent Entrustment) of Plaintiffs’ Amended Complaint because it does not allege an essential element in pleading a cause of action for negligent entrustment. Under Virginia law, the “doctrine of negligent entrustment requires that the owner of the instrumentality used to inflict injury knew, or had reasonable cause to know, that he was entrusting the instrumentality to a third person who was likely to use it in a manner that would cause injury to others.” *Kingrey v. Hill*, 245 Va. 76, 77 (1994) (internal citations omitted). Here, Plaintiffs do not even attempt to set forth factual allegations that would show that

Okori knew or should have known that Defendant Burkard was going to use the gun parts kit to kill Elaiasier and Van Pelt. Instead, they merely state that Okori “knew or were willfully blind to the fact, and reasonably should have known, that Defendant Burkard was unfit and ineligible to purchase a weapon.” *Amend. Compl.* at ¶ 161. Without the requisite supporting factual allegations, Plaintiffs fail to state a proper claim for negligent entrustment. As such, this Court must sustain this demurrer as to Count Three.

This Court must sustain this demurrer as to Count Five¹ (Common Law Conspiracy) of Plaintiffs’ Amended Complaint because it does not allege an essential element in pleading a cause of action for common law conspiracy—“unlawful act or an unlawful purpose.” *Hechler Chevrolet, Inc. v. General Motors Corp.*, 230 Va. 396, 402 (1985). Under Virginia law, a successful action for civil conspiracy shows that “two or more persons, by some concerted action, [acted] to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means.” *Id.* (internal citation omitted).

Here, the Amended Complaint does not assert any criminal or unlawful purpose because it defines “firearm” using the language of 15 U.S.C. Chapter 18 as it existed on April 26, 2022. *See supra*. However, Plaintiffs allege in their Amended Complaint that the sale of the parts kit occurred in February 2021. Thus, Plaintiffs have not met the preliminary showing that Okori worked to accomplish some criminal or unlawful purpose. *Hechler Chevrolet, Inc.*, 230 Va. at 402. Moreover, even assuming *arguendo* that Okori worked to accomplish some criminal or unlawful purpose, Plaintiffs fail to allege facts that Okori worked with another individual or entity by some concerted action to accomplish that criminal or unlawful purpose. Accordingly, this Court must sustain this demurrer as to Count Five because Plaintiffs fail to state a claim upon which relief may be granted.

¹ Count Four is for Wrongful Death against Defendant Burkard only. Accordingly, it is not part of this demurrer.

This Court must sustain this demurrer as to Count Six (Public Nuisance) of Plaintiffs' Amended Complaint because it does not sufficiently allege an essential element in pleading a cause of action for public nuisance by a private individual. Under Virginia law:

[i]t is absolutely essential to the right of an individual to relief against a public nuisance that he should show he has suffered or will suffer some special injury other than that in which all the general public share alike, and the difference between the injury to him and the injury to the general public must be one of kind, and not merely degree.”

Bowe v. Scott, 113 Va. 499, 500 (1912). Here, the Plaintiffs have failed to allege any factual support that their injuries suffered were unique. In other words, the risk (and injury) posed to the Plaintiffs was the same risk (and injury) posed to the general public when the use of a weapon is involved. *Amend. Compl.* ¶¶ 189–206. What occurred to the Elaiasier and Van Pelt was tragic, but was the same injury that anyone in the general public would have faced in that situation. As such, the Court must sustain the demurrer as to Count Six.

Finally, this Court must sustain this demurrer as to Count Seven (Punitive Damages) of the Amended Complaint because punitive damages are not a proper stand alone claim under Virginia law. *Eslami v. Global One Communs., Inc.*, 48 Va. Cir. 17, 18 (1999) (“Under Virginia law, punitive damages are not a cause of action, but a remedy.”).

WHEREFORE, Defendant, Okori, LLC d/b/a 80P Builder, prays for the foregoing reasons that this Honorable Court dismiss this action as against Okori, and award any and all further relief the Court deems just and appropriate.

Respectfully Submitted,

OKORI, LLC d/b/a 80P Builder



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served via US mail, postage prepaid thereon, this 16th day of April 2024, to:

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