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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT
Case type: Other Civil

Sarah B. Van Bogart, as trustee for heirs and next of kin of Jordan Lance Markie,

Plaintiff,

vs.

Scheels All Sports, Inc. and William Ballantyne,

Defendants.

Case No. 27-CV-24-13319
Judge Karen Janisch

**REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

## INTRODUCTION

Despite the attempt by Plaintiff Sarah Van Bogart, as trustee for the heirs and next of kin of Jordan Lance Markie, ("Plaintiff") to stretch the claim of negligent entrustment to fit the unique circumstances of this case, the common sense application of Minnesota case law requires the dismissal of Plaintiff's action. Dispositive of Plaintiff's claims for negligent entrustment and wrongful death is the fact that this is not a case where Defendants Scheels All Sports, Inc. and William Ballantyne ("Defendants") supplied a chattel for Mr. Markie to actually use (*i.e.,* fire). Handing an unloaded firearm to a prospective customer is the equivalent of handing the person a brick. Without ammunition, which Plaintiff does not and cannot allege that Defendants supplied to Mr. Markie in any fashion, the firearm simply cannot be used in a way that causes a foreseeable and unreasonable risk of physical harm.

As explained in Defendants' Memorandum of Law in Support of their Motion to Dismiss, and as further set forth below, no allegations contained in Plaintiff's Amended Complaint are sufficient to support Plaintiff's claim for negligent entrustment. Accordingly, pursuant to

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Minnesota Rule of Civil Procedure 12.02(e), Plaintiff's Amended Complaint is properly dismissed in its entirety for failure to state a claim upon which relief can be granted.

## LEGAL ARGUMENT

### I. PLAINTIFF CANNOT MEET THE REQUIRED LEGAL ELEMENTS FOR NEGLIGENT ENTRUSTMENT.

As set forth in Defendants' initial Memorandum of Law (Dkt. No. 36), for Plaintiff's Amended Complaint to survive Defendants' motion to dismiss, Plaintiff's Amended Complaint must plausibly allege that: (1) Defendants supplied a chattel ***for the use*** of another; (2) whom Defendants ***knew or had reason to know*** to be likely because of his youth, inexperience, or otherwise, ***to use the chattel in a manner involving unreasonable risk*** of physical harm to himself or others; and (3) that physical harm resulted. *See* Restatement (Second) of Torts § 390 (Am. L. Inst. 1977) (emphasis supplied); *see also Johnson v. Johnson,* 611 N.W.2d 823, 826 (Minn. Ct. App. 2000). Plaintiff's Response to Defendants' Motion does nothing to remedy the deficiencies in Plaintiff's Amended Complaint.

#### A. *Plaintiff Cannot Meet Her Burden to Demonstrate that Defendants Supplied the Taurus Handgun to Mr. Markie for Use.*

In her Response to Defendants' Motion, Plaintiff suggests that Defendants "attempt to rewrite the law of negligent entrustment" by impermissibly adding "intent" as an element for the court to consider. (Dkt. No. 44, at pp. 6-7). To the contrary, it is Plaintiff who is attempting to rewrite the law by ignoring a requisite aspect of negligent entrustment analysis so that her deficient claims might survive dismissal. Whether a chattel is supplied to the plaintiff "for use" is, unquestionably, a required element for Plaintiff to state a *prima facie* case for negligent entrustment. *See Johnson,* 611 N.W.2d at 826. Minnesota case law confirms that the intended and understood use of the chattel is certainly relevant in considering whether the actual entrustment involves a foreseeable, unreasonable risk of physical harm, as Plaintiff must also establish. *See,*

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*e.g., Axelson v. Williamson*, 324 N.W.2d 241, 244 (Minn. 1982) (addressing facts in which a defendant car owner allowed a minor without a license to drive the owner's vehicle); *Jones v. Fleischhacker*, 325 N.W.2d 633, 640 (Minn. 1982) (addressing facts in which a defendant father allowed his minor son to drive the father's vehicle despite the son having only a learner's permit). In both *Axelson* and *Jones*, the vehicle owners entrusted their minor children with the chattel at issue (vehicles) to actually use (*i.e.*, drive) and the owners supplied the vehicles to the children in an operable state and with permission to drive. In those contexts, because the vehicles were operable and, indeed, because the owners permitted and intended the vehicles to be driven, it is an easily foreseeable outcome that the inexperienced, minor children who were provided with operable vehicles to drive might end up in an accident that causes injury.

The elements and facts analyzed in the *Axelson* and *Jones* cases demonstrate why Plaintiff does not meet her burden here. Plaintiff's Amended Complaint is clear that Defendants handed Mr. Markie the handgun without ammunition loaded into it. (Am. Compl. at ¶¶ 29-30). Thus, like a car without keys or gas, the handgun was not operable at the time it was handed to Mr. Markie. It was the equivalent of a metal brick and could not be used (*i.e.*, fired) in the state in which it was presented to Mr. Markie. Further, and as discussed in significant detail in Defendants' initial Memorandum, there is no allegation in Plaintiff's Amended Complaint, nor any that could be made, that Defendants permitted Mr. Markie to handle the handgun with any understanding or agreement that the gun would be used. (Am. Compl. at ¶¶ 30-32).

Plaintiff's argument in opposition to the requested dismissal is further undercut by the very examples Plaintiff cited. In her opposition, Plaintiff initially points the Court to the first illustration contained in Section 390 of the Restatement 2d of Torts, which states: "A gives ***a loaded gun*** to B, a feeble-minded girl of ten, to be carried by her to C. While B is carrying the gun, she tampers

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with the trigger and discharges it, harming C." Restatement (Second) of Torts § 390 (emphasis added). This illustration is ***fundamentally and dispositively different*** from the case at hand, where Plaintiff alleges in the Amended Complaint that Defendants supplied Mr. Markie with an unloaded handgun. (Am. Compl. at ¶¶ 29-30). While person A in the Restatement example may not have intended for person B to fire the gun, A supplied B with a loaded gun, making the gun operable and making accidental discharge of the gun a reasonably foreseeable outcome. Again, relying only on facts as alleged by Plaintiff, the case at hand is nothing like the Restatement's illustration. Defendants did not supply Mr. Markie with an operable handgun and also did not supply him with the handgun for him to use it. The purpose of Defendants' entrustment was for inspection in the context of a potential sale. (Am. Compl. at ¶¶ 30-32). Plaintiff cites no authority for a viable negligent entrustment claim under these circumstances.

The other, non-Minnesota cases Plaintiff cites in her opposition also do not supply support to Plaintiff's claims. (*See* Dkt. No. 44 at pp. 7-8 (citing *Foster v. Arthur,* 519 So. 2d 1092, 1094 (Fla. 1st DCA 1988); *Bernethy v. Walt Failor's, Inc* 653 P.2d 280, 282-83 (Wash. 1982); *McGinnis v. Kinkaid*, 437 N.E.2d 313, 318 (Ohio App. 8th Dist. 1981))). In each of cases cited by Plaintiff, as in all negligent entrustment cases, the entrustor's supply of the chattel to the entrustee "for use" remains required.

For example, in *Foster v. Arthur*, a case cited in Plaintiff's opposition, a Florida court found that liability for negligent entrustment relied upon a determination as to whether the owner of the firearm, directly or indirectly, authorized the person who shot the plaintiff to *use the loaded gun. See* 519 So. 2d 1092, 1094 (Fla. 1st DCA 1988). In its ruling, the Florida court explained that the first element in the analysis under Florida law was the requisite determination that the owner "in one way or another, authorized [the shooter] to use the loaded gun." *Id*. The Florida court went

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on to discuss that express or implied consent, which may be given indirectly when a gun owner "provides the opportunity for another person to use the gun", is a necessary finding in addition to the reasonable foreseeability that the person to whom the owner gave consent to use the gun was likely to use the gun in a manner involving an unreasonable risk of harm to others. *Id*. Here, not only is it undisputed that the handgun presented to Mr. Markie was unloaded, but there is no allegation that Defendants consented in any fashion to Mr. Markie's use of the gun. Even if this case was being analyzed under Florida law, which it is not, Plaintiff could not satisfy the legal elements required to advance her case.

*Bernethy v. Walt Failor's, Inc.,* another case cited by Plaintiff, is also inapposite. In *Bernethy*, a Washington court found that, after an almost entirely completed sale, the entrustor placed a gun and ammunition in the hands of a visibly intoxicated person who immediately returned to a nearby tavern and shot the decedent. *See* 653 P.2d 280, 282-83 (Wash. 1982). Here, Plaintiff does not and cannot allege that Defendants supplied Mr. Markie with ammunition or even that a sale that would allow Mr. Markie to use the gun was imminent, a stark contrast to the facts alleged in this case.

Finally, in *McGinnis v. Kinkaid*, another of Plaintiff's cited cases, an Ohio court analyzed a negligence claim advanced under the argument that a parent was liable for injuries caused by a minor child under the parent's exclusive "custody and control." 437 N.E.2d 313, 315 (Ohio App. 8th Dist. 1981). In its review of whether a parent could be liable for negligence as alleged, the Ohio court found that a parent's permission for her minor child to own and have access to a loaded shotgun (which the teen purchased for himself) could constitute negligence. 437 N.E.2d at 318. Again, the situation in *McGinnis* is inapplicable to the case at hand. Here, not only is the theory of recovery different (negligent entrustment vs. negligence), but there is no allegation that Defendants

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allowed Mr. Markie access to a loaded firearm. Further, there is no argument that Defendants had custody or control over Mr. Markie or that Defendants possessed the knowledge akin to that of Mr. Markie's parent such that Defendants were informed as to the element of foreseeability.

This would be an entirely different case had Defendants actually supplied Mr. Markie with a loaded gun, had Defendants offered Mr. Markie the handgun for him to fire it or had Defendants sold Mr. Markie the handgun for him to use at some later point. However, none of that happened here. Because Plaintiff does not and cannot allege that Defendants supplied Mr. Markie the Taurus Handgun "for use," Plaintiff cannot meet the first element for a sustainable claim of negligent entrustment. Accordingly, Plaintiff's Amended Complaint is properly dismissed in its entirety.

**B.** ***Plaintiff Cannot Meet Her Burden to Demonstrate that Defendants Had Reason to Know Mr. Markie Would Likely Use the Taurus Handgun in a Manner Involving Unreasonable Risk of Physical Harm.***

Plaintiff's opposition to Defendants' argument that Plaintiff also fails to meet the legal requirement regarding reasonable foreseeability similarly fails to correct the deficiencies inherent in Plaintiff's Amended Complaint. Specifically, Plaintiff cannot plausibly allege that, "because of [Mr. Markie's] youth, inexperience, or otherwise", Defendants "knew or had reason to know" after a total of fifty-eight seconds of interaction that Mr. Markie would use the Taurus Handgun in a manner involving unreasonable risk of physical harm.

Plaintiff maintains that her "allegations about Jordan's age and youthful appearance are sufficient by themselves to show that Defendants knew or had reason to know that [Mr. Markie] would be likely to use the handgun in a manner involving unreasonable risk of physical harm." (Dkt. No. 44 at p. 10). That simply cannot be the case. In support of Plaintiff's broad assertion that Minnesota courts have noted that it is reasonable to foresee that entire classes of people are "unsuited to operate dangerous instrumentalities"—in this case, "youthfully appearing" nineteen

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year-olds—Plaintiff cites only *Axelson*, supra, and another underage driving/negligent entrustment case, *Granley v. Crandall*, 180 N.W.2d 190 (Minn. 1970), which are inapplicable for several reasons.

First, as discussed above, Defendants did not supply Mr. Markie the Taurus Handgun for him to "operate", as was the case in the underage-driving cases *Axelson* and *Granley*.[1] Considering the fact that it is ***legal*** in Minnesota for persons between the ages of eighteen and twenty-one to possess (and use) handguns, and considering the additional fact that there is no requirement for gun sellers to check identification of potential customers to determine their age pre-sale, it defies logic that a Minnesota court would blanketly conclude that it is reasonable to foresee all that persons in an age bracket that can own and use firearms legally are *per se* unsuited to handle unloaded firearms in the safety of a retail store. Accordingly, Plaintiff's allegations about Mr. Markie's age and "youthful appearance" are not sufficient by themselves for Plaintiff to plausibly show that Defendants knew or had reason to know that Mr. Markie would be likely to both use the handgun (which Defendants did not consent to him doing) and do so in a manner involving unreasonable risk of physical harm.

Second, Plaintiff argues that Defendants knew or had reason to know that Mr. Markie would be likely to use the handgun in a manner involving unreasonable risk of physical harm because of facts alleged involving his "unusual conduct" in the store, and that a reasonable firearms dealer would not have handed Mr. Markie an unloaded handgun for inspection given the presence of that conduct. In support of this argument, Plaintiff points to allegations in the Amended

[1] Plaintiff also points to cases in other jurisdictions principally concerned with a customer's age in the context of the *sale* of a firearm, a situation which is inapplicable to this case where Plaintiff does not allege that the circumstances here involve a sale. *See Rocky Mountain Gun Owners v. Polis,* No. 23-1251, 2024 WL 4677573, at *23 (10th Cir. Nov. 5, 2024); *Crown v. Raymond*, 764 P.2d 1146, 1149 (Ariz. Ct. App. 1988).

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Complaint that: (1) Mr. Markie was "acting nervously in the minutes before Defendants handed him the weapon," (Am. Compl. at ¶ 13); (2) Mr. Markie "walked in and out of the gun department several times, appearing anxious and confused," (*id.* at ¶ 27); (3) Mr. Markie "asked an employee at the sales counter of the firearms department to use the store's telephone," a request which was denied (*id.* at ¶ 28); and (4) Mr. Markie "continued to walk around the firearms department for several more minutes" during which time "his behavior was unusual" – "[h]e fidgeted nervously and appeared to test whether the gun cabinets were locked as if he were considering trying to steal a firearm." (*Id.* at ¶ 29). However, none of these allegations could lead a reasonable factfinder to conclude that, in the fifty-eight seconds of actual interaction with him, Defendants knew or had reason to know Mr. Markie would commit a felony by taking the *unloaded* gun (again, the equivalent of a brick), run off with it, load it on the run with ammunition not supplied by Defendants, and then use the now-loaded gun in a manner involving unreasonable risk of physical harm. The criminal actions undertaken by Mr. Markie, particularly in the context of the incredibly brief period of interaction Defendants had with him, defied prediction, and Plaintiff fails to plausibly allege facts sufficient to support her argument that Mr. Markie's actions were reasonably foreseeable.

Third, Plaintiff claims that Defendants should have exercised additional, special care to monitor and evaluate Mr. Markie before handing him an unloaded firearm because of "dealers' heightened duty to the public to anticipate dangerous misconduct stemming from the inherent risk of firearms." (Dkt. No. 44 at p. 12). Specifically, as support for what Defendants should have considered in light of this heightened duty, Plaintiff points to, among other related things, the Bureau of Alcohol, Tobacco, Firearms, and Explosives guidelines on straw purchases, identifying risk of suicide in the context of a purchase, and watching for other red flags in the context of the

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sale of a firearm. (*Id.* at pp. 12-13). As discussed above, none of these guidelines are applicable to this case, which does not involve the purchase of a firearm – rather, the inspection of an unloaded gun before any sale was imminent. Thus, similar to Defendants' response to Plaintiff's second point above, these allegations are insufficient to support Plaintiff's claim for negligent entrustment because a reasonable factfinder could not conclude that Defendants knew or had reason to know that handing an unloaded gun to Mr. Markie for simple inspection would involve an unreasonable risk of physical harm.

Fourth, Plaintiff misunderstands the dispositive applicability of *Clarine v. Addison*, a case in which the Minnesota Supreme Court found that it was not clear that the entrustee, a nineteen year-old man, was necessarily inexperienced or careless with firearms by virtue of his age or that his father had reason to reasonably foresee the negligent use of the firearm. 234 N.W. 295 (Minn. 1931). Plaintiff states that *Clarine* is distinguishable because "(1) today's firearm regulatory landscape is vastly different than it was in 1931; and (2) unlike the clerk-customer relationship here, the close father-son relationship in Clarine made the 'absence of proof' of dangerous tendencies over many years significant - indeed, it was proof in itself that the son could safely handle the gun." (Dkt. No. 44 at p. 14).

Taking each of these arguments in turn, Plaintiff's blanket statement that the regulatory landscape today is different than it was in 1931 (as well as Plaintiff's related reference to the Gun Control Act of 1968 ("GCA"), 18 U.S.C. § 922(b)(1), which prohibits the sale and delivery[2] by a gun dealer of a handgun to an individual under eighteen) ignores the fact that it is still legal today, as it was in 1931, for a nineteen year-old in Minnesota to possess and use a handgun. *See* Minn.

[2] Plaintiff does not allege that providing a firearm for mere inspection inside a gun retailer store constitutes "sale or delivery" under the GCA, which generally covers the "transfer" of firearms by licensed importers, manufacturers, or dealers. *See generally* 18 U.S.C. § 922(b).

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Stat. §624.713; *see also Worth v. Jacobson*, 108 F.4th 677, 685 (8th Cir. 2024) (confirming that protections in the Second Amendment include adults age eighteen and older). Further, Plaintiff's attempted distinction regarding the "absence of proof" of known dangerous tendencies fails because, here, as set forth above, this case does not involve the "use" of the firearm – rather, the mere inspection of a firearm that was confirmed to be unloaded at the time it was given to Mr. Markie for inspection.

When properly examined, *Clarine* stands for the proposition that a nineteen year-old is not, by singular nature of age, necessarily inexperienced or careless with firearms. Accordingly, Plaintiff's assertions that, by virtue of Mr. Markie's age, Defendants knew or had reason to know that Mr. Markie would be likely to use the handgun in a manner involving unreasonable risk of physical harm do not meet Plaintiff's burden or allow Plaintiff's claims to proceed.

Thus, because Plaintiff fails to establish Defendants knew or had reason to know that Mr. Markie would be likely to use the unloaded handgun provided to him for inspection in a manner involving unreasonable risk of physical harm, Plaintiff fails to plausibly allege facts sufficient to support her claim for negligent entrustment and Plaintiff's Amended Complaint is properly dismissed in its entirety.[3]

## CONCLUSION

Plaintiff's Amended Complaint fails to state a claim upon which relief may be granted against Defendants because Defendants did not supply the Taurus Handgun for Mr. Markie to use, and because Plaintiff cannot plausibly allege that because of Mr. Markie's youth, inexperience, or

[3] As set forth in Defendants' initial Memorandum of Law in Support of Motion to Dismiss, Plaintiff's claim for wrongful death is dependent on the viability of Plaintiff's claim for negligent entrustment, and is properly dismissed where, as here, Plaintiff's negligent entrustment claim must be dismissed. *See, e.g.*, *Beck v. Groe*, 70 N.W.2d 886, 892 (Minn. 1955); *Foley v. W. Alloyed Steel Casting Co.*, 18 N.W.2d 541, 542 (Minn. 1945).

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otherwise, Defendants "knew or had reason to know" that Mr. Markie would use the Taurus Handgun in a manner involving unreasonable risk of physical harm. Plaintiff must succeed on both elements in order to advance her claim, and here she succeeds on neither. As a result, Plaintiff has no viable claims in this case against Defendants. Accordingly, Defendants respectfully request that both counts in Plaintiff's Amended Complaint be dismissed with prejudice pursuant to Minnesota Rule of Civil Procedure 12.02(e) for failure to state a claim upon which relief may be granted.

Dated: December 12, 2024

**COZEN O'CONNOR**

By: */s/Heather L. Marx*

Heather L. Marx (#321163)
hmarx@cozen.com
Samuel E. Mogensen (#0400920)
smogensen@cozen.com
33 South Sixth Street, Suite 3800
Minneapolis, MN 55402
Telephone: 612.260.9004
Fax: 612.260.9084

**ATTORNEYS FOR DEFENDANTS SCHEELS ALL SPORTS, INC. AND WILLIAM BALLANTYNE**

**ACKNOWLEDGMENT**

The undersigned acknowledges that, pursuant to Minnesota Statute §549.211, sanctions may be awarded to the party or parties against whom the allegations made in this pleading are asserted.

*/s/Heather L. Marx*
Heather L. Marx