

SUPREME COURT EXPANDS DUTIES TO THOSE WATCHING CHILDREN

A recent Virginia Supreme Court decision expanded tort liability for persons supervising children, which could result in increased claims against homeowner's policies in Virginia. In The Estate of Jaimee Kellermann v. Paul McDonough, et al. 679 S.E.2d 203 (2009), the Virginia Supreme Court reinstated a tort action against a married couple for the alleged breach of duties owed to a 14 year old girl who was under their care and supervision when she was killed in an automobile accident as a passenger in a vehicle driven by a 17 year old boy.

In December 2004, 14 year old Jaimee Kellermann was staying overnight at the home of her friend, Jamie McDonough, who lived with her parents. When the Kellermanns dropped Jaimee off with the McDonoughs, Jamie's father told the McDonoughs that, "[Jaimee] was not to be driven by any inexperienced drivers and "was not to be in a car with any young, male drivers." Id. at 206. Paula McDonough agreed and promised to take care of her. Id. While the particular language used by the parents may be unique, the entrustment of a child

to another is a frequent scenario repeated on a daily basis throughout Virginia.

Later that evening, Mrs. McDonough drove her daughter and Jaimee Kellermann to the movies, where they met 17-year old Nathan DeFrank. Although the circumstances surrounding how the ride home was arranged are not clear, it was undisputed that "[Mrs.] McDonough 'purposefully instructed or otherwise permitted the girls to go home with [Nate] in his car.'" Id. On the drive home, Nate began to "drive wildly" and struck a tree, killing Jaimee Kellermann.

The Plaintiff filed suit against the McDonoughs claiming: 1) The McDonoughs were negligent in breaching a duty of care to make wise decisions regarding the care of Jaimee, 2) The McDonoughs agreed to assume a duty of care for Jaimee, and 3) That by caring for Jamie, the McDonoughs created a special relationship with Jaimee that gave rise to a duty to protect her from third parties.

In response, the McDonoughs demurred, denying the existence of the duties. Further, the McDonoughs argued that even if they owed a duty of care to Jaimee, the subsequent criminally negligent actions of Nathan DeFrank were a superseding proximate cause of Jaimee's death which relieved them of liability. The trial court sustained the Defendant's demurrer and dismissed the Complaint.

The Supreme Court overruled the trial court, stating "when a parent relinquishes the supervision and care of a child to an adult who agrees to

supervise and care for that child, the supervising adult must discharge that duty with reasonable care." Id. at 207. The Court looked to its ruling in Didato v. Strehler, 262 Va. 617 (2001) where it decided that a plaintiff could sue a healthcare provider on the theory that it assumed the duty to exercise reasonable care in the communication of medical information to plaintiff, even if no such duty existed prior to the undertaking to render services. Here, the Supreme Court ruled that based on her assurance to that effect, Mrs. McDonough assumed the duty to "exercise reasonable care to prevent Jaimee from riding in cars driven by inexperienced drivers or young male drivers." However, because there were no allegations that Mr. McDonough ever agreed to undertake that duty, the Kellermann's could not proceed against him on that theory.

On the other hand the Supreme Court did rule in defendant's favor on its demurrer to the "Special Relationship" count. The Court acknowledged that, "generally a person does not have a duty to protect another from the conduct of third persons." Id. at 210, citing, Didato, 262 Va. at 629. However, there are exceptions to the general rule where a "special relationship exists between a defendant and a plaintiff that gives rise to a right to protection . . . that imposes a duty upon the defendant to control the conduct of the third person." Id., citing, Taboada v. Daly Seven, Inc., 626 S.E.2d 428, 432-33 (2006) (examples include common carrier-passenger, business-invitee, innkeeper-guest, employer-employee relationships).



Here, the Supreme Court declined to expand the list of special relationships to include “an adult who agrees to supervise and provided care to a minor.” *Id.* Therefore, the Court did not hold the McDonoughs directly responsible for the actions of the reckless driver, but rather, found only that they had a general duty to exercise reasonable care in the supervision of Jaimee. Based on the allegations of the complaint, they could have violated that duty proximately causing her death.

In Defendant’s final argument that Nathan DeFrank’s negligent acts were a superseding cause that broke the causal connection, the Supreme Court ruled that this was a jury question. Under Virginia law, “to relieve a defendant of liability for his negligent act, the negligence intervening between the defendant’s negligent act and the injury must

so entirely supersede the operation of the defendant’s negligence that it alone, without any contributing negligence by the defendant in the slightest degree, causes the injury.” *Kellermann* at 210, citing, *Atkinson v. Scheer*, 508 S.E.2d 68, 71-72 (1998). Here, the Court felt a ruling on this issue was premature, stating that, “if Kellermann presents evidence at a trial to prove the factual allegations in the complaint . . . the jury could find that [the McDonoughs’] breaches of duty constituted a proximate cause of Jaimee’s death and that Nate’s acts were not the sole proximate cause of her death.” *Id.* at 211.

Although the ruling suggests an entirely new avenue of claims may have been created, the Supreme Court was careful to assure host parents that the duties imposed under this ruling do not make them insurers of the safety of the children un-

der their care. However, it is clear from this ruling that the Supreme Court does recognize a very broad duty to supervise and care for another’s child. Recognition of such a broad duty will no doubt lead to a rise in the number of claims brought against host parents, and we can expect the plaintiff’s bar to quickly adapt the allegations in their pleadings to state additional causes of action against host parents, which are likely to survive demurrer.



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