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Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001256-MR

WANDA COX; and CURTIS COX, Individually,
and as Administrator of the ESTATE OF
CHRISTOPHER COX, Deceased — APPELLANTS

v.

APPEAL FROM PENDLETON CIRCUIT COURT
HONORABLE ROBERT MCGINNIS, JUDGE
ACTION NO. 97-CI-00123

SHELBY STEPHENS; KAREN
STEPHENS; LARRY FAIN, JR.;
DIANE BRUIN; DANNY BRUIN;
and JOSH ROSE — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUDGEL, Chief Judge; COMBS and KNOPF, Judges.

COMBS, JUDGE: Christopher Cox, the adult son of the appellants, Wanda Cox and Curtis Cox, died from a self-inflicted gunshot wound on August 30, 1996. Wanda and Curtis (Curtis in his individual capacity and as the executor of Christopher's estate) appeal from the summary dismissal of their claims against the appellees for their son's wrongful death as entered by the Pendleton Circuit Court in separate orders on May 19, 1999, and April 26, 2000. The Coxes contend that there are genuine issues

of material fact pertaining to their claims of negligence and negligent entrustment, precluding the entry of a summary judgment. They also argue that they were entitled to summary judgment as a matter of law based on a violation of Kentucky Revised Statute (KRS) 527.100, which criminalizes the possession, manufacture, or transport of a handgun by a minor. Finding no error, we affirm.

We agree with appellants that there are unanswered questions surrounding their son's tragic death. However, the issue for this Court's consideration is whether there are any genuine issues of material fact that must be deferred to a jury after viewing the evidence in a light most favorable to the Coxes. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991); Kentucky Rules of Civil Procedure (CR) 56.03.

Although the trial court did not state the basis for its summary judgment in its orders, it is apparent from the record that it agreed with the appellees' argument that no one could have foreseen that Christopher would accidently or intentionally shoot himself. The trial court entered its ruling pursuant to the following facts which are not in dispute. On the evening of August 29, 1996, two of the appellees, Josh Rose and Larry Fain, Jr., high school friends both seventeen years of age, made plans to spend a portion of the next morning working on Josh's pick-up truck and target shooting. While gathered at the home of Larry's mother and step-father (appellees Karen and Shelby Stephens), the two boys asked Christopher to join them in

these activities the next morning. Christopher, an eighteen-year-old high school graduate, was a friend of Josh and Larry as well as the boyfriend of Larry's sister, Becky Fain. Christopher agreed to meet the boys at Josh's house the next morning and arranged to be absent from his place of employment.

Josh had inherited a .38-caliber Smith and Wesson revolver from his grandfather. With his parents' permission, he kept the gun in his bedroom closet. Josh used the gun primarily for target shooting; he also carried it with him while deer hunting in case he wounded an animal and needed to shoot it at close range. Josh had not unloaded the gun since the last time he had used it. On the morning of August 30, it had at least five rounds of ammunition in its chambers. On that fatal morning, Josh attended an early class at school; his mother and step-father (appellees Diane and Danny Bruin) went to work. Larry, who had spent the night at the Bruin residence, got up, dressed, went outside at about 7:50, and waited for Josh and Christopher, who were both expected to arrive at about 8:00 a.m. As previously instructed by Josh, Larry had removed Josh's revolver from its place in the closet and had taken it outside to prepare for target shooting. He placed it on the hood of his truck. Christopher was the first to arrive. A few minutes later, he died as a result of a gunshot wound to his head.

The autopsy report, prepared by Dr. John C. Hunsaker, III, revealed that Christopher died from a perforating gunshot wound. The bullet entered at his right temple and exited on the left side of his head. In his deposition, Dr. Hunsaker described

the wound as a "contact gunshot wound," a term indicating that the muzzle of the gun "was tightly pressed against the skin when it was discharged." Dr. Hunsaker further explained the manner of Christopher's death as

> not a natural death. . . It could be suicide, homicide, accident or undetermined, and that is based upon the overall investigation. Now, more specifically with regard to your question, certainly regardless of the handedness of the individual, that is a location of a bullet wound entrance, that is quite characteristic not only of self-infliction but of a suicidal infliction of an entrance wound. Accidental gunshot wounds are not typically in that location and are not typically tight contact. Now, there may be, for example, disagreement among death investigators how to sign out the manner of death in a case of a contact gunshot wound when Russian roulette is being played and there's roughly a 50/50 split between accident and suicide. That would be an example of a contact gunshot wound in which some investigators may consider it to be an accident. But if--the typical pattern, that's all I can tell you, is that in accidental gunshot wounds, they are not usually tight contact wounds.

Larry was the only other person present at the time of the shooting. He told police investigators that when Christopher arrived, he appeared to be in good spirits and that the two talked about an upcoming soft-ball tournament. Christopher then picked up the gun from the hood of Larry's car, twirled it around, pointed it at a nearby hillside, and said "pow, pow"--pretending to be shooting at something. Larry next saw Christopher cock the gun. Out of the corner of his eye, he saw Christopher twirl the gun again and then heard it discharge. At first, he thought that Christopher was joking with him. When he realized that Christopher had been shot, he ran into the Bruins'

house to telephone for help. A few minutes later, Josh returned home from school. Paramedics then arrived, but Christopher could not be saved.

Steve Kellam, the state police officer who investigated the incident, testified by deposition that he could not find a motive for anyone else to have caused Christopher's death and could find no evidence that anyone else handled the gun in the brief interval after Christopher had picked it up but before he shot himself. Officer Kellam testified that he did not believe that the gun was being twirled around when it discharged but surmised that Christopher was "horsing around" with the gun when it went off.

In their complaint, Wanda and Curtis Cox alleged that Larry and Josh "were unqualified to handle a .38-caliber handgun"; that both Larry and Josh were "negligent as a matter of law for violating KRS 527.100"; that Danny and Diane Bruin breached their duty to Christopher "by directly . . .supplying a handgun to their son" and that they

> knew or should have known that neither [Josh or Larry] because of their youth and inexperience was qualified to use such handgun, yet permitted them to use the handgun in a manner which caused an unjustifiable risk to [Christopher].

Complaint of Wanda and Curtis Cox. The Coxes' claim against Larry's parents was predicated on their alleged negligent supervision of Larry; *e.g.*, by allowing him to stay home from school.[1] In addition to seeking damages on behalf of

[1]In their brief, Karen and Shelby Stephens argued that any (continued...)

Christopher's estate, the Coxes also asserted a claim for their own damages for their loss of consortium with their adult son, psychological pain and suffering, and loss of services. Their brief does not address the trial court's ruling on these individual claims, which they have apparently abandoned. The claims for loss of love and companionship were correctly dismissed as a matter of law in the trial court's order of May 19, 1999. Kentucky law recognizes the loss of a minor child by a parent (KRS 411.135) and the loss of a parent by a minor child (Giuliani v. Guiler, Ky., 951 S.W.2d 318 (1997)). However, our statutes and case law have thus far refrained from recognizing a cause of action for the loss of an adult child by a parent.

The Coxes argue that there are material issues of fact bearing on the alleged negligence of Diane and Danny Bruin, Josh Rose, and Larry Fain, rendering inappropriate the entry of a summary judgment. With respect to the Bruins, the Coxes contend that they were negligent in allowing their son and his friend to possess and to use the .38-caliber Smith and Wesson handgun without supervision. They discuss the death of their son as:

> a tragedy which should not have occurred had the parents been doing their job. No child should be allowed to keep a loaded hair trigger 1963 pistol in his closet loaded and ready for action at his whim. Does it really make any difference that the tragedy occurred in the driveway instead of the bedroom or in a car? [We] think not. It was totally predictable and sadly predictable. This

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[1](...continued)
claim against them has been abandoned because the appellants did not allege any error with respect to the summary dismissal in their favor. In their reply brief, the Coxes agreed that the Stephenses should not be a party to this appeal.

> Court should not endorse such lack of supervision. This Court should not say [sic] let all of our 17 year old children have loaded pistols in their closets. (Coxes' reply brief to Bruin brief at p. 4)

The seminal case on negligent entrustment of a firearm in Kentucky is Spivey v. Sheeler, Ky., 514 S.W.2d 667 (1974), a case in which an eleven-year-old child, inexperienced in using guns, obtained a gun from a gun case and shot and killed a twelve-year-old playmate. Citing the Restatement of Torts, 2nd, §308, the court held that in order to prevail on a theory of negligent entrustment, the plaintiff had to show that the defendant entrusted a dangerous article to another whom "he knows, or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others." Spivey, supra at 670. In reversing a directed verdict in favor of the parents/defendants, our highest Court stated that "[l]oaded guns are dangerous instrumentalities--highly dangerous instrumentalities in the inexperienced hands of a child" and held that leaving the key to the locked gun case on top of the case "was not such a precaution as can be said to leave no room for reasonable men to determine negligence." Id. at 672.

Unlike the child in Spivey, the Bruins's son, Josh, was some six years older and had a significant amount of experience with guns. The evidence shows that Josh had been exposed to firearms at a very young age and had been formally trained in the use and safety of firearms. Josh first received a "Hunter Safety Certificate" at age eleven after attending an educational camp

run by the Kentucky Department of Fish and Wildlife. In addition to the handgun, Josh had acquired and used numerous other guns between the ages of nine and seventeen.

Another feature distinguishing this case from Spivey is the lack of any evidence to suggest that the Bruins knew or should have known that Josh would use the handgun in a manner that would cause a risk of injury to anyone — including the decedent. The Coxes disagree, pointing to Josh's admission that he once shot a "wild" dog with a rifle. We cannot agree that that isolated incident suffices to establish that Josh behaved carelessly or inappropriately with his firearms around other human beings so as cause his parents to foresee the accident at issue here. Thus, we cannot find a question for the jury on the claim of negligent entrustment.

We next address the critical issue of foreseeability. The duty that one owes to others is "to exercise ordinary care in his activities to prevent foreseeable injury." Isaacs v. Smith, Ky., 5 S.W.3d 500, 502 (1999), citing Grayson Fraternal Order of Eagles v. Claywell, Ky., 736 S.W.2d 328 (1987). The Court reiterated in Isaacs that "such a duty applies only if the injury is foreseeable." Id. We cannot agree that it was even remotely foreseeable to the appellees that Christopher, legally an adult, might use Josh's handgun to shoot himself — either intentionally or accidentally.

The evidence is undisputed that prior to the shooting Christopher neither exhibited any signs of depression nor expressed any suicidal inkling. The appellants admitted in their

deposition that they did not hesitate to trust their son with a gun. Curtis testified that he had taught Christopher how to operate and handle a revolver and that Christopher had had professional training as well:

> Q. So you did have an opportunity to observe him using the handgun, is that right?
>
> A. Yes, sir.
>
> Q. And did he handle that in a safe and responsible manner as far as you were concerned?
>
> A. Yes, sir.
>
> Q. Did you ever see him handle either that gun or any firearm in an unsafe or dangerous manner?
>
> A. No, sir.
>
> * * *
>
> Q. I take it that with him having had that training you were very comfortable around him if he was handling firearms? You felt like he knew what to do and how to do it? Is that right?
>
> A. Yes, sir.
>
> * * *
>
> Q. Do you have any reason to believe that Christopher did not know how to handle a gun in a safe manner?
>
> A. No, sir.

Appellants frame the pivotal issue in this case as being whether a minor should be allowed to keep a loaded gun in his closet. We take judicial notice of the fact that all firearms should be safely stored — especially in households where young children are present. However, that is not the proper legal issue for our consideration and resolution. The issue

before us is whether the record reveals the existence of a question of fact bearing on the foreseeability of harm to Christopher resulting from Josh's possession of a handgun.

We can find no evidence in the record which suggests that the Bruins could have reasonably anticipated the tragically preposterous events that transpired; *i.e.*, that by allowing Josh to maintain control over his .38 Smith and Wesson revolver, the gun would get into the hands of an adult — an adult well trained in the safe operation of a handgun — who would then use the gun to shoot himself. As to the negligence claim against Josh and Larry, we can find no evidence to suggest that their behavior in sharing the weapon with Christopher would foreseeably result in his death. The Coxes themselves admitted that they would not hesitate to entrust their son with a handgun. Perforce, they cannot logically argue that Josh or his parents were negligent in leaving the handgun loaded and accessible to Christopher under the circumstances of this case.

Finally, with respect to Josh and the Bruins, the appellants submit that there is a genuine issue of material fact created by the gun's alleged "hair trigger." However, the record contains no evidence that the gun was in an unsafe condition. Warren Mitchell, a firearms and tool mark examiner for the Kentucky State Police Forensic Laboratory, testified that testing of the gun revealed that it took 2 3/4 pounds of pressure for the gun to discharge in a cocked position. Though less than the more current standard of 3 pounds set by the manufacturer in 1998, the weight of 2½ pounds was standard when the gun was manufactured in

1963. The evidence revealed that it took 11½ pounds of pressure to fire the gun if it were not cocked. The gun fired with a light trigger response apparently as a result of Christopher's action in cocking the hammer in the first instance rather than due to any defect in the gun or any adjustment made to the gun by the Bruins or Josh.

The appellants contend that there are sensitive fact issues to be determined by a jury with respect to liability of Larry Fain, Jr. — mainly because neither Officer Kellam nor Dr. Hunsaker believed that the gun accidentally fired while being twirled on Christopher's finger (as reported by Larry). They believe this fact alone "warrants reversal of the lower court in and of itself." However, Larry testified that he was not looking directly at Christopher at the moment the gun discharged. While he did testify that he saw Christopher playing with the gun and twirling it on his finger, he consistently testified that he was not looking at Christopher when the gun fired so as to ascertain the exact position of the gun upon firing.

The medical experts agreed without exception that the wound was self-inflicted. Officer Kellam, Dr. Hunsaker, and the Coxes' own expert, Dr. Gary Lee Utz, testified that Christopher "died as a result of a self inflicted gunshot wound of the head." Dr. Utz also reported that the type of gunshot wound sustained was "unlikely to be the result of an accident." He stated:

> I can envision no scenario where playing with the gun as described by Mr. Fain would produce such a wound. It is not clear from Mr. Fain's deposition and written statement whether he was actually looking at Mr. Cox when the weapon was fired. In any event, the

> scenario appears highly unlikely. The wound is definitely not the result of the gun "going off" while he was twirling it. If the deceased did in fact put the gun to his head and pull the trigger, which appears to be the case, I would consider this a suicide rather than an accident. The placing of a loaded [gun] against the head by a competent individual is sufficient evidence of suicidal intent....
>
> In summary, it is my opinion, based on the information supplied, that the death of Chris Cox is the result of a suicidal gunshot wound of the head.

The Coxes also base their case on their feeling that they intuitively know that their son would not have shot himself and that he "would not play with a gun and certainly would not twirl a gun on his finger." They criticize the manner in which the Kentucky State Police conducted its investigation — particularly in failing to test either Larry or Josh for gun powder residue. They are adamant that a jury should be allowed to determine "if Larry Fain is telling the truth." However, they cannot point to any concrete evidence in this regard and rely solely on conjecture, which will not suffice to defeat a motion for summary judgment. See Collins v. Rocky Knob Associates, Inc., Ky.App., 911 S.W.2d 608, 611-612 (1995). There is no evidence that anyone other than Christopher held the gun tightly against his head and pulled the trigger. Summary judgment was appropriate on this point.

Finally, the appellants contend that they were entitled to summary judgment as a matter of law under a theory of negligence *per se*. They rely on KRS 527.100 (classifying possession of a handgun by a person under the age of 18 as a

Class A misdemeanor). Arguing that the violation of that statute automatically entitles them to a judgment, they state:

> [t]he accident never would have happened had this gun been locked up. The accident would not have happened had their [sic] been adult supervision. Guns are an [sic] unreasonably dangerous instrument designed to kill and require the utmost caution. To entrust a minor or several minors with a gun without adult supervision was the proximate cause of the death of Christopher Cox and was completely foreseeable.

The issue of negligence *per se* was addressed in Isaacs:

> While it is unquestioned that violations of statutes constitute negligence per se, that statement is coextensive with the requirement that the violation "must be a substantial factor in causing the result." Britton v. Wooten, Ky., 817 S.W.2d 443, 447 (1991). However, the mere violation of a statute does not necessarily create liability unless the statute was specifically intended to prevent the type of occurrence which has taken place. Not all statutory violations result in liability for that violation. The violation must be a substantial factor in causing the injury and the violation must be one intended to prevent the specific type of occurrence before liability can attach. (Emphasis added.)

Isaacs, supra at 502.

We do not agree that KRS 527.100 can be invoked to create civil liability on the part of Josh's parents. It is directed toward the conduct of a minor in possession of a handgun — not at the parents of the minor. It does not mandate that parents keep handguns locked and inaccessible to minor children. Under the precedent of Isaacs, we are not persuaded that the rule of negligence *per se* is applicable to the Bruins.

The judgment of the Pendleton Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANTS:

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