



## The Company You Keep – The Virginia Supreme Court Allows a Claim to Proceed Against a Landowner Liability for a Third Parties' Acts

By William DeVinney

The Virginia Supreme Court recently expanded the potential liability of a landowner for acts committed by third parties while on the landowner's property. *Shoemaker v. Funkhouser*, No. 191218 (March 25, 2021).<sup>1</sup> At common law, although a landowner owes a duty to those outside his property for his or her own acts, that duty does not extend to acts committed by others; a landowner usually owes no duty to protect others from third parties' acts while on or near the landowner's property. Rather, a landowner may presume that the third party will use reasonable care toward others until the landowner learns otherwise.

The Virginia Supreme Court recently analyzed that doctrine in *Shoemaker*. In that case, the Funkhouser's adult grandson visited their home and, while there, went outside to target shoot with a rifle. He shot in the direction of Dorothy Nesselrodt's house which, according to the complaint, was visible from the Funkhouser's property. One of the rounds hit Nesselrodt's house, penetrated the wall, struck Nesselrodt's daughter Gina Shoemaker, and killed her.

Shoemaker's administrator brought a wrongful death action against the Funkhousers. The complaint alleged that the Funkhouser's allowed their grandson "to shoot targets with a rifle on the Funkhouser property in the direction of 259 Charlotte Lane, at a firing position within sight of the Funkhouser home."<sup>2</sup> The Funkhousers knew that the house "was on the other side of trees, which were not densely arranged."<sup>3</sup> The Funkhousers also "knew, or should have known, that the firing of a

rifle in the direction of the residence at 259 Charlotte Lane would go around or penetrate through the trees and result in bullets/ammunition striking such residence and anyone located therein."<sup>4</sup>

The circuit court sustained a demurrer to Shoemaker's complaint. The circuit court held that the Funkhousers owed no duty to Shoemaker arising from their grandson's acts on the Funkhousers' land. The circuit court also held that Shoemaker's claims were barred by Virginia's Recreational Land Use Act which immunizes landowners from tort liability for third parties' recreational activities, such as fishing and hunting, on a landowners' property.

On appeal, a majority of the Virginia Supreme Court reversed and remanded. The majority acknowledged that at common law a landowner generally owes no duty for third parties' acts committed on the landowner's property.<sup>5</sup> But that rule is subject to exceptions.<sup>6</sup> Under the Second Restatement of Torts, Section 318, a duty of care may arise based on the landowner's control of the third party. If the landowner is present when the third party is committing the disputed acts, the landowner "knows or has reason to know that he has the ability to control the third person," and also "knows or should know of the necessity and opportunity for exercising such control," a duty of care arises.<sup>7</sup> The Restatement takes no position on whether the landowner owes a duty of care if he or she is not present when the third party's activity is taking place.

The majority adopted the Restatement’s rule and held that “a landowner has a duty in tort to exercise reasonable care to control the conduct of a third party, who has been granted permission by the landowner to use the land, to prevent that third party from intentionally harming others or from conducting himself so as to create an unreasonable risk of bodily harm to others.”<sup>8</sup> The Supreme Court further held that, for that duty of care to arise, the landowner “(1) must be present, (2) knows or has reason to know that he or she has the ability to control the third person, and (3) the landowner knows or should know of the necessity and opportunity for exercising such control.”<sup>9</sup>

Under the facts before it, the Supreme Court found that Shoemaker stated a viable claim. The Supreme Court found that the following allegations satisfied the Restatement’s standard:

- that the Funkhousers granted permission “to shoot targets with a rifle on the Funkhouser property in the direction of 259 Charlotte Lane, at a firing position within sight of the Funkhouser home”;
- that the Funkhousers knew that Nesselrodt’s house “was on the other side of trees, which were not densely arranged”; and
- that the Funkhousers “knew, or should have known, that the firing of a rifle in the direction of the [Nesselrodt’s house] would go around or penetrate through the trees and result in bullets/ammunition striking such residence and anyone located therein.”<sup>10</sup>

The majority applied a broad definition of “present” when analyzing whether Shoemaker sufficiently alleged the Funkhouser’s were present during their grandson’s target shooting. Present, according to the majority, “does not mean standing at the shoulder of the person engaging in the activity.”<sup>11</sup> Rather, the complaint was sufficient because it alleged that the Funkhousers “were physically present on their land when they granted permission, not just to conduct an activity, but to conduct that activity in a specific way, and they were present at their house when the activity was being conducted such that they could exercise oversight over the activity.”<sup>12</sup>

The majority also found that the Recreational Use Act did not apply. The Virginia Recreational Use Act protects a landowner from liability for the negligent acts of a third person engaged in recreational activities on the landowner’s property:

*Any landowner who gives permission, express or implied, to another person to hunt, fish, launch and retrieve boats, swim, ride, foxhunt, trap, camp, hike, bicycle, rock climb, hang glide, skydive, sightsee, ... does not thereby ... [a]ssume responsibility for or incur liability for any intentional or negligent acts of such person or any other person.*

Va. Code § 29.1-509(C). The majority held that, because the Recreational Use Act supplants the common law, it must be strictly construed.<sup>13</sup> Thus, because the Recreational Use Act does not specifically include target shooting as a protected activity, the act did not protect the Funkhousers.

Three justices dissented from the majority opinion and would have sustained the demurrer under the common law and under the Recreational Use Act. The dissent did not dispute that, under the common law, a landowner may be liable for a third parties’ acts committed in the presence of the landowner.<sup>14</sup> The dissent, however, believed that the Restatement and the majority opinion improperly expanded the common law exception from “presence into vicinity for the purpose of expanding a landowner’s duty to control licensees.”<sup>15</sup> The complaint did not allege that the grandparents were present when their grandson target shot. Rather, it alleged that they were elsewhere—“present at their house.”<sup>16</sup> Nor did the complaint allege that the grandparents were present on their property when they granted the grandson permission to shoot, or that the grandson was present on the property when the grandparents gave permission: “For all we know, the permission could have been given by phone or text message to [the grandson] before he arrived and while the grandparents were at the grocery store or at a neighbor’s house for lunch.”<sup>17</sup>

The dissent similarly would have sustained the demurrer under Virginia’s Recreational Use Act. Subsection B of the act—the majority focused on Subsection C—provides that a landowner owes no duty to keep his or her property safe for “hunting, fishing, trapping, camping, ... [or] for any other recreational use.” Va. Code § 29.1-509(B). The dissent would have found that Subsection B’s “other recreational use” clause encompasses the grandson’s target shooting and thus protected the Funkhousers from liability.<sup>18</sup> That finding would further the statute’s intent to protect landowners from liability for recreational use of their property by third parties.

The Supreme Court’s decision arguably expands a landowner’s liability for third parties’ acts while on the landowner’s property. As the dissent suggests, the majority’s interpretation of “presence” will likely spawn litigation over the proximity and degree of control necessary to impose liability on a landowner. Must the landowner be in the mere vicinity to be “present”? Within eyesight? Within shouting distance? These questions likely will only be answered after the trial courts have applied Shoemaker to cases before it. In the meantime, lawyers should be aware of this potential liability when advising their clients.

## Notes

1. *The Supreme Court’s opinion is available at <http://www.courts.state.va.us/opinions/opnscvwtp/1191218.pdf> (last visited March 31, 2021).*
2. *Shoemaker, at 2.*
3. *Id.*
4. *Id.*
5. *Id. at 4-5.*
6. *Id. at 6.*
7. *Restatement (Second) of Torts § 318.*
8. *Shoemaker, at 7.*
9. *Id.*
10. *Id. at 7-8.*
11. *Id. at 9.*
12. *Id.*
13. *Id. at 10.*
14. *Id. at 21-22.*
15. *Id. at 24.*
16. *Id. at 26.*
17. *Id. at 25.*
18. *Subsection C, on which the majority relied, does not have a catchall “other recreational use clause.”*

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## CONTACT BRIGLIA HUNDLEY

### Tysons Corner Office

1921 Gallows Road, Suite 750  
Tysons Corner, Virginia 22182

Telephone: 703.883.0880

Fax: 703.883.0899