

No. 21-3198

United States Court Of Appeals
for the Seventh Circuit

RICHARD WEBBER, as Special Administrator)	Appeal from the United States
of the Estate of Sara J. Schmidt,)	District Court for the
Plaintiff-Appellant,)	Eastern District of Wisconsin
)	(No. 1:20-cv-01526-WCG)
v.)	
)	
ARMSLIST, LLC, JONATHAN GIBBON,)	William C. Griesbach, Judge
Defendants-Appellees.)	

***Amici Curiae* Brief of American Medical Association and Wisconsin Medical Society
in Support of Richard Webber, as Special Administrator of the Estate of
Sara J. Schmidt, Plaintiff-Appellant and Reversal**

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 21-3198

Short Caption: Webber v. Armslist, LLC

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

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(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

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Date: March 17, 2022

Attorney's Printed Name: Leonard A. Nelson

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N/A

Attorney's Signature: s/ Matthew C. Brown Date: March 17, 2022

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Amici are not-for-profit professional membership associations that do not have parent corporations or issue stock.

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IDENTIFICATION OF AMICI¹

The American Medical Association (AMA) is the largest professional association of physicians, residents, and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all US physicians, residents and medical students are represented in the AMA's policymaking process. AMA members practice and reside in all states, including Wisconsin. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health.

The Wisconsin Medical Society (WMS), a constituent association of the AMA, is the largest professional association of physicians, residents, and medical students in Wisconsin. Its mission is to improve the health of the people of Wisconsin by supporting and strengthening physicians' ability to practice high-quality patient care in a changing environment.

Amici offer this brief because they believe that the proliferation of guns in Wisconsin and in the United States is a significant threat to public health and safety. By filing this brief, they hope to reduce, at least in some part, the sale of weapons to persons who are deemed inherently dangerous by state and federal laws and are unable to pass the legally required background checks.

¹ All parties have consented to the filing of this brief. No party or party's counsel authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief. No person, other than amici curiae, its members, or its counsel contributed money intended to fund preparation or submission of this brief.

The AMA and WMS join this brief on their own behalves and as representatives of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of each state, plus the District of Columbia, whose purpose is to represent the viewpoint of organized medicine in the courts.

SUMMARY OF ARGUMENT

Sara Schmidt's estranged husband shot and killed her with a handgun he had purchased through the Armslist website. Separate Appendix ("SA")-123, ¶147. At the time, he was under a court restraining order, which prohibited him from purchasing or possessing guns and mandated that he wear a GPS monitor. SA-122, ¶139. He could not have passed a background check required for legal gun ownership under state or federal law. SA-122, ¶141. *See* Wis. Stat. § 813.12(6)(am) (requiring court clerk to notify the Department of Justice of a domestic violence injunction for background check purposes); 18 U.S.C. § 922(t)(1) (requiring licensed firearms transferors to check the national instant criminal background check system to ensure that a transferee is not prohibited from owning a firearm because of a domestic violence restraining order).

It is unsurprising that the murderer bought his firearm through the Armslist website. Merely attempting to purchase a gun was a violation of the court order. The website, however, was specifically created to facilitate illegal gun sales by persons, such as Sara's husband, who could not pass a background check. SA-110-117, ¶¶71-102.

Despite this, the district court dismissed the complaint against Armslist and Armslist's proprietor (Jonathan Gibbon) under Rule 12(b)(6). Appendix ("A")-22. On the claim of common law negligence (the focus of this brief), it held that the plaintiff (Richard Webber, the special administrator of Sara's estate) had properly pleaded a duty of care, a breach of that duty, and an injury. A-14-15. However, the district court found a failure to allege proximate cause. On this issue, it held that (1) the defendants' breach of duty was not a "substantial factor" in causing the murders, A-16-17, and (2) Wisconsin public policy barred the lawsuit, as "the injury was too remote from and out of proportion to the conduct and because allowing recovery would place an unreasonable burden on Armslist." A-19.

The district court was wrong on both points. As to the "substantial factor" requirement, the district court ignored fundamental rules of federal pleading. A complaint need only state a plausible basis for recovery, based on non-formulaic allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Alamo v. Bliss*, 864 F.3d 541, 549 (7th Cir. 2017); *Vinson v. Vermilion County*, 776 F.3d 924, 928 (7th Cir. 2015). It need not (and, in general, should not) set forth detailed factual particulars to prove the claim. *Alamo*, 864 F.3d at 549; *see* Fed. Rule Civ. Proc. 8(a)(2) (claim for relief is to be "short and plain"). At the pleading stage, inferences should be drawn to favor the plaintiff. *Alamo*, 864 F.3d at 549.

As to the second point (the public policy bar), *amici* state the obvious: it cannot be sound policy to favor a scheme that subverts, rather than supports, statutory law and a court restraining order. Further, in light of the serious dangers

to public health that arise from the proliferation of illegal weapons and in view of the expectable consequences of the defendants' website design, it would not have unduly burdened them to make the modest adjustments – as articulated in the complaint – needed to protect against unlawful sales and keep the website on the right side of the law.

Therefore, proximate cause was properly alleged, and the complaint stated a claim for negligence.

ARGUMENT

I. The Armslist Website Was a Substantial Factor in Sara Schmidt's Murder.

Sara Schmidt's husband murdered her with a gun bought through an Armslist advertisement. SA-123, ¶147. Because of the restraining order, he could not legally own or possess a gun. SA-122, ¶139. Since he would have failed the required background check, normal mechanisms of firearm purchase, through a licensed dealer or even alternative websites, were unavailable to him. *See* 18 U.S.C. § 922(t)(1) (requiring background checks for gun sales from federal firearm licensees); Alex Yablon, *Internet Gun Sales and Background Checks, Explained*, The Trace (Oct. 6, 2020), <https://www.thetrace.org/2016/01/internet-gun-sales-background-checks/> (explaining the process of buying a firearm from online gun stores). So, he turned to a convenient alternative: the Armslist website, SA-123, ¶144, which was specifically designed to facilitate illegal purchases. SA-110-117, ¶¶71-102.

Under the standards of a Rule 12(b)(6) motion, the plaintiff easily satisfied the “substantial factor” causality requirement, discussed in the district court order at A-16. (Plaintiff also satisfied the requirements of “but for” causality, but Wisconsin applies the less rigorous substantial factor standard. *Merco Distrib. Corp v. Commercial Police Alarm Co., Inc.*, 84 Wis. 2d 455, 267 N.W. 2d 652 (1978)). Shortly before the murder, Sara’s husband had been jailed for domestic violence. SA-122, ¶¶136-137. On January 5, 2018, he was released from jail, and on that same day the restraining order was imposed against him. SA-122, ¶139. Also on that day, Sara filed for divorce. SA-122, ¶140. On January 8, 2018, he purchased the gun unlawfully, through an Armslist advertisement meant to evade lawful restraints on such sales. SA-123, ¶147. *See, e.g., Harvard Injury Control Research Center, Homicide*, Harvard T.H. Chan School of Public Health, <https://www.hsph.harvard.edu/hicrc/firearms-research/guns-and-death/> (last visited Mar. 9, 2022) (“[A] review of the academic literature found that a broad array of evidence indicates that gun availability is a risk factor for homicide.”).

This was a crime of passion. Properly, Sara’s husband should not have had access to a gun under any circumstances, but even if the gun had simply been less readily available, he could have cooled off, and the crime would never have happened. SA-116,124, ¶¶95,149.

The district court speculated that, had the sale not been made through Armslist, Sara’s husband would have found another way to take her life. A-17. This speculation was improper on a 12(b)(6) motion. The husband might have been

unable to buy a gun from another source. He was wearing a GPS monitor, and law enforcement would have tracked his whereabouts. Had Sara's husband attempted to find another avenue for purchasing a gun, the police could have interdicted him. It was not for the district court to minimize the effectiveness of legal protections, and it was not for the court to weigh inferences at this stage of the case – if ever. *Alamo*, 864 F.3d at 548-49 (stating that a court reviewing the sufficiency of a complaint must “draw all permissible inferences in the plaintiff’s favor”).

II. Wisconsin Public Policy Weighs in Favor of, not Against, Allowing This Suit to Proceed.

A. Wisconsin Laws Prohibit Dangerous Individuals from Owning Firearms.

Wisconsin public policy is determined, first and foremost, by its legislature. “When acting within [state] constitutional limitations, the legislature settles and declares the public policy of a state, and not the court.” *Borgnis v. Falk Co.*, 147 Wis. 327, 351, 133 N.W. 209, 216 (1911). Wisconsin’s legislature has spoken clearly about the need to keep firearms out of the hands of dangerous individuals. Wis. Stat. § 941.29(1m) (criminalizing possession of a firearm by classes of dangerous individuals, including convicted felons, those found not guilty by reason of mental disease or defect, and those subject to injunctions for domestic abuse, child abuse, or harassment). To confirm the point, a Wisconsin court specifically prohibited Sara’s husband from owning or possessing a firearm. The Armslist website thus undermined Wisconsin’s clearly stated public policy.

B. Sara Schmidt's Injury is Neither Remote from nor Disproportionate to the Defendants' Conduct.

The district court held that “lawfully providing a forum for individuals to engage others interested in buying and selling firearms is simply too far removed from and out of proportion to the criminal act committed by Schmidt’s killer.” A-20. Implicit in the court’s statement is that Armslist’s misconduct was a minor infraction. *Amici* disagree strongly with that conclusion. The website was not any old Internet forum, neutrally designed to facilitate legal commerce. It was constructed specifically to accommodate illegal transactions. Besides the killing of Sara Schmidt (itself sufficient to justify a change in or a dismantling of the website), the criminal acts committed against numerous others in similar situations militate for liability.

Sales of guns on Armslist lead disproportionately to criminal acts. SA-118,121, ¶¶ 110, 111, 131. The impact of those criminal acts—those dangers to the public—enabled by Armslist’s business model – overwhelmingly outweigh the benefits of lawful commercial transactions. Armslist is a risk to every person within shooting distance of a person prohibited by law from owning a weapon but who is nevertheless able to get one. Viewed this way, Armslist’s conduct—its conscious decision to design its website to generate profits through gun sales to legally prohibited buyers—is entirely proportional to Sara’s injury.

Armslist’s business is an unchecked market for firearms that allows dangerous individuals who are prohibited from owning guns to get them. Anywhere in the United States, a gun seller can post a listing on Armslist and sell a gun to

whoever might respond to the listing. And it is lucrative: Armslist generates almost \$100 million in revenue per year. *Armslist LLC Information*, RocketReach, https://rocketreach.co/armslist-llc-profile_b5e05475f42e682c (last visited Mar. 15, 2022); *Frequently Asked Questions*, Armslist, <https://www.armslist.com/info/faqs> (last visited Mar. 15, 2022) (“ARMSLIST does not get involved in transactions.”).

Armslist takes no steps to ensure that the buyers using its site are eligible to own firearms; purportedly, it relies on the sellers, law abiding or not, to do that job. Armslist figurately winks at the illegal trafficking it encourages.

While some sellers may be scrupulous, enough do not conduct background checks—even when required to do so by state law—that many guns are sold to ineligible buyers. Approximately 1.2 million ads appear each year on Armslist for gun sales that do not require a background check. Approximately one in ten prospective firearm buyers on Armslist cannot legally possess a firearm.

Unchecked: An Investigation of the Online Firearm Marketplace, Everytown Rsch. & Pol’y (Feb. 1, 2021), <https://everytownresearch.org/report/unchecked-an-investigation-of-the-online-firearm-marketplace/>. A recent study showed that only 9% of listings on Armslist used language indicating that a background check would be required by the seller. Coleman Drake et al., *Evidence of Background Checks in an Online Firearms Marketplace*, 57 Am. J. Preventive Med. 718, 718 (2019).

It is thus clear that Armslist depends on surreptitious sales for its financial success. It profits handsomely from the risk it engenders by facilitating firearm sales to individuals disqualified under Wisconsin and other states’ laws from

owning them. Thus, Armslist's head-in-the-sand business model is contrary to the public policy of Wisconsin and of every other state, that dangerous individuals should not own firearms.

C. The Burden Placed on Defendants by Tort Liability is Entirely Reasonable.

The District Court concluded that allowing recovery in this case would “place an unreasonable burden on Defendants.” A-19. *Amici* submit that, in light of the circumstances—Armslist's lucrative business and the danger its business model poses to the public—allowing recovery against Armslist is entirely reasonable.

One of the policy bases for negligence liability is deterrence. *See, e.g., Orlowski v. State Farm Mut. Auto. Ins. Co.*, 339 Wis. 2d 1, 18, 810 N.W.2d 775, 781 (2012); *Ins. Co. of N. Am. v. Cease Electric, Inc.*, 276 Wis. 2d. 361, 378, 688 N.W.2d 462, 470 (2004) (“Tort principles address more than merely a private interest between two commercial companies; they also address society's interest in minimizing harm by deterring negligent conduct.”). As discussed above, Armslist creates an easy avenue for prohibited purchasers to obtain firearms. Those prohibited purchasers pose a threat to the public when they gain access to guns. Armslist makes its money by catering to those who want to avoid the rigors of background checks. SA-121, ¶127. Deterrence in this case is a crucial consideration: Armslist should be deterred from operating with such a lack of care toward the public.

Armslist should be required to internalize the cost of its website's design. The district court observed that subjecting Armslist to liability could put it out of

business. A-20. But regardless of whether such speculation might be true, forcing Armslist to internalize the costs of its dangerous business model is entirely in keeping with the accepted role of tort law.

CONCLUSION

Plaintiff has properly alleged proximate cause. The district court unaccountably strained to find an out, but there is none. Inferences should be drawn in favor of the plaintiff, not against him. This Court should therefore reverse the order of dismissal and remand for further proceedings.

Dated: March 17, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and the Seventh Circuit's Local Rule 32 because this brief contains 2,350 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface 12-point Century font using Microsoft Word.

Dated: March 17, 2022

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CERTIFICATE OF SERVICE

[I hereby certify that on March 17, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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