STATE OF MINNESOTA
IN COURT OF APPEALS
A10-879

Collin Jacobson,
a minor by his parent and natural guardian, Kim Jacobson,
Appellant,

vs.

Daniel Stallkamp,
Respondent,
Eugene Stallkamp,
Respondent.

Filed December 14, 2010
Affirmed
Stauber, Judge

Faribault County County District Court
File No. 22CV09126

Charles J. Suk, Suk Law Firm, Rochester, Minnesota (for appellant)

Daniel Stallkamp, Bricelyn, Minnesota (pro se respondent Daniel Stallkamp)

R. Stephen Tillitt, Brock P. Alton, Gislason & Hunter, L.L.P., Minneapolis, Minnesota (for respondent Eugene Stallkamp)

Considered and decided by Stauber, Presiding Judge; Halbrooks, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

STAUBER, Judge

Appellant was accidentally shot while handling a pistol in respondent Eugene Stallkamp's home. In this appeal from the district court's summary-judgment dismissal of his negligence claims, appellant argues that respondent Eugene Stallkamp owed a legal duty (1) because of his special relationship with his grandson; (2) as a landowner under a premises-liability theory; and (3) as an employer of his grandson under a negligent-supervision theory. Because we conclude that respondent owed no legal duty, we affirm.

FACTS

This case involves a shooting that occurred at respondent Eugene Stallkamp's residence on July 22, 2008. Appellant Collin Jacobson suffered a gunshot wound to his left eye while handling a pistol in Eugene Stallkamp's bedroom. Appellant was in the home with respondent Daniel Stallkamp at the time, but Eugene Stallkamp was not home.

The material facts of the case are largely undisputed. Eugene is the grandfather of Daniel.[1] Daniel grew up in his parents' home near Bricelyn, about three miles from Eugene's home and farm. Daniel had a close relationship with his grandfather, but Eugene never had custody of Daniel.

In June 2008, Daniel pleaded guilty to several criminal charges stemming from two arrests. On his first arrest, Daniel was caught stealing car stereos in Austin and had in his possession a handgun that he later admitted stealing from Eugene's home. Less

[1] To avoid confusion, we refer to respondents Daniel and Eugene Stallkamp by their first names.

than two weeks later, Daniel was arrested for attempting to steal iron from the IC&E railroad. He had in his possession 11 truck batteries that he also admitted stealing from Eugene. Eugene hired and paid for an attorney to represent his grandson. As part of his probationary sentence, Daniel was subject to electronic home monitoring (EHM). He was granted work release to perform services on Eugene's farm.

There was some dispute as to the terms of Daniel's work release. Eugene testified that Daniel "was not on the payroll," and the arrangement "was a grandpa/grandson type thing." Daniel indicated that he had a work schedule; he was to be at his grandfather's house by a certain time after summer school and to remain there until 6:30 p.m. He testified that he helped his grandfather with chores, small farm work, and yard work. Eugene testified that Daniel was not there very often and would come over only if they needed something done. Eugene would give Daniel some spending money for his work.

On the date of the incident, Daniel had agreed to give appellant, age 15, a ride home from summer school in Albert Lea. Daniel had permission to use a vehicle owned by Eugene to drive appellant home after school. When school finished, Daniel drove appellant to Eugene's house rather than taking him home. Daniel was to meet a technician who was to repair his EHM equipment. No one was home, and Eugene had given the EHM technician permission to meet Daniel at the property. Eugene testified in his deposition that Daniel did not have permission to enter his home that day. Eugene had not met appellant before, and did not know that Daniel would bring appellant to the home. The home had a security system installed, but it was not activated that day.

There is some dispute as to what happened after Daniel met the EHM technician and the repairs were made. Daniel testified that he was supposed to do some work for his grandfather trimming trees on the property and that he had permission to enter the house, but only to use the bathroom. According to Daniel, he and appellant entered the house because appellant needed to use the bathroom. Daniel accessed the house using a spare key hidden in a gazebo. Daniel testified that he mistakenly directed appellant down the hall to the bathroom near his grandparents' bedroom, rather than a closer one and then went to get two glasses of water. While Daniel was getting water, appellant called to him, and Daniel proceeded down the hallway to find appellant standing in his grandparents' bedroom, holding a handgun. Daniel testified that he took a step back and then saw the gun discharge, shooting appellant in the face. Daniel testified that he had never seen the gun before and did not know it was in the bedroom.

Appellant's version of the story is slightly different. He testified that Daniel "just walked in" to the house, and appellant did not remember Daniel getting a key, although he said it was possible Daniel could have used one. Appellant testified that he used the bathroom but then the two went downstairs and played pool for a while, and afterwards, Daniel went on the computer for 10 to 15 minutes. Then Daniel told appellant that he wanted to show him something. The two went into Eugene's bedroom, and Daniel pulled out a pistol that was hidden between a nightstand and the bed. Appellant testified that Daniel handed it to him, telling him that it was not loaded, and left the room to get something to drink. Appellant stated that the last thing he remembered was standing and

holding the pistol, and then he remembers waking up in the hospital 10 days later. Appellant lost an eye and his hearing in one ear as a result of the shooting.

Eugene testified that he hid the pistol next to his bed for his protection and that it was very well hidden and that Daniel did not know about it. Appellant, however, testified that Daniel knew right where the pistol was, that it only took him ten seconds to find it, and that appellant himself could not have discovered it independently.

Appellant commenced this action alleging that his injuries were the proximate cause of Daniel and Eugene's negligence, carelessness, and unlawful conduct. Eugene moved for summary judgment, arguing that he owed no duty to appellant, and in the alternative, that appellant assumed the risk of handling the pistol. The district court granted the motion, determining that Eugene owed no duty to plaintiff, and entered partial summary judgment in Eugene's favor.

This appeal followed.

D E C I S I O N

Appellant urges this court to find that Eugene owed a duty of care to appellant. Summary judgment is proper when a district court determines that "there is no genuine issue as to any material fact and that either party is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.03. On appeal from summary judgment, this court reviews de novo whether there are any genuine issues of material fact and "whether the district court erred in its application of the law." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002). The existence of a duty is a question of law, reviewed de novo. *H.B. by Clark v. Whittemore*, 552 N.W.2d 705, 707 (Minn. 1996). In addition,

evidence must be viewed "in the light most favorable to the party against whom the motion for summary judgment was granted." *Louis v. Louis*, 636 N.W.2d 314, 318 (Minn. 2001).

Appellant argues that Eugene owed three duties of care: (1) a duty to control Daniel based on a special relationship; (2) a duty of care as a landowner; and (3) a duty of care as an employer of Daniel.

I.

The general rule in Minnesota is that one owes no duty to protect people from the conduct of a third party. *See H.B.*, 552 N.W.2d at 707 ("[A] person does not have a duty to give aid or protection to another or to warn or protect others from harm caused by a third party's conduct."). However, an exception to this general rule arises if the harm was foreseeable and a "special relationship" exists. *See Delgado v. Lohmar*, 289 N.W.2d 479, 483 (Minn. 1979). These special relationships which may give rise to a duty "exist between parents and children, masters and servants, possessors of land and licensees, common carriers and their customers, or people who have custody of a person with dangerous propensities." *Id.* at 483-84. The special relationship may exist between the defendant and the party who is harmed, in which case the defendant owes a duty to protect; or it may exist between the defendant and the third party, in which case the defendant owes a duty to control the third party to prevent harm to others. *Id.* at 483.

Appellant argues that Eugene owed a duty to control Daniel due to their special relationship as grandfather/grandson. Appellant cites to a number of facts that he says demonstrate that a special relationship existed, including that Eugene paid for Daniel's

attorney, helped Daniel pay his fines, allowed Daniel to use his car, gave Daniel a job, and allowed Daniel to enter his home. We find this argument unpersuasive. Appellant cites to no caselaw where a Minnesota court has found a special relationship to exist under similar circumstances. It would be stretching the doctrine beyond its limits to hold that Eugene had a duty to control his fully emancipated adult grandson, simply because he and his grandson had a close relationship. We conclude that the district court correctly found that Eugene owed no duty to control Daniel.

II.

Appellant next argues that Eugene, as the owner of the property where the incident took place, owed him a duty of care. A landowner generally owes a duty of reasonable care to all entrants upon his or her property. *Peterson v. Balach*, 294 Minn. 161, 173-74, 199 N.W.2d 639, 647 (1974). However, absent certain exceptions, a landowner owes no duty of care to trespassers. *Doe v. Brainerd Int'l Raceway, Inc.*, 533 N.W.2d 617, 621 (Minn. 1995). A trespass occurs when a person enters another's land without consent. *Copeland v. Hubbard Broad., Inc.*, 526 N.W.2d 402, 404 (Minn. App. 1995), *review denied* (Minn. Mar. 29, 1995). Consent may be express or implied, and it may also be restricted both temporally and geographically. *Id.* Therefore, "[a] permitted entrant may become a trespasser by exceeding the scope of consent." *Special Force Ministries v. WCCO Television*, 584 N.W.2d 789, 792 (Minn. App. 1998), *review denied* (Minn. Dec. 15, 1998).

The district court concluded that Daniel and appellant were trespassers in Eugene's home at the time of the shooting, and therefore no duty was owed. The court

found that appellant did not have Eugene's express or implied consent to enter his home, and, additionally, that appellant exceeded the scope of any possible consent by entering Eugene's bedroom.

Ordinarily, the question of whether there is consent to enter land, or whether the scope of consent is exceeded, is a question of fact for a jury to decide. *See Copeland*, 526 N.W.2d at 405 ("Whether a possessor of land has given consent for entry is, when disputed, a factual issue."); *Rieger v. Zackoski*, 321 N.W.2d 16, 20 (Minn. 1982) (holding that it was a jury question as to whether entrant became trespasser by exceeding scope of consent). However, appellant has indicated no facts that, even if accepted as true for purposes of summary judgment, create a genuine issue as to consent or scope of consent. The only disputed fact regarding consent was whether Daniel had permission to enter the home to use the bathroom, or whether he was prohibited from entering at all. Appellant himself did not have consent to enter the home and cites to no facts that would permit such a finding. Any consent that could conceivably be implied from the circumstances was exceeded in scope when appellant entered the bedroom. Therefore, because there are no genuine issues of fact, it was not error for the district court to determine that appellant was a trespasser in Eugene's bedroom to whom Eugene owed no duty of care.

III.

Finally, appellant argues that Eugene was the employer of Daniel, that Daniel was at his place of employment on the day of the incident, and that Eugene may be held liable for Daniel's actions based on the theory of negligent supervision. The district court did not specifically determine whether an employer/employee relationship existed between

Eugene and his grandson. Rather, assuming Daniel was an employee, the court ruled that appellant's negligent supervision claim failed as a matter of law because the actions at issue were not within Daniel's scope of employment.

Negligent supervision is "the failure of an employer to exercise ordinary care in supervising the employment relationship so as to prevent foreseeable misconduct of an employee from causing harm to others." *Olson v. First Church of Nazarene*, 661 N.W.2d 254, 264-65 (Minn. App. 2003). Because negligent supervision derives from the doctrine of respondeat superior, the plaintiff "must prove that the employee's actions occurred within the scope of employment in order to succeed on this claim." *M.L. v. Magnuson*, 531 N.W.2d 849, 858 (Minn. App. 1995), *review denied* (Minn. July 20, 1995).

Even assuming that Daniel was an employee of his grandfather, we agree that his actions were outside the scope of his employment. Viewing the facts in the light most favorable to appellant, Daniel was employed to perform services around his grandfather's property. Daniel was not acting within the scope of his employment when he entered the home, entered his grandfather's bedroom, and proceeded to retrieve the gun. Because we find that the contested actions were outside the scope of Daniel's employment, the district court did not err by dismissing appellant's negligent-supervision claim.

Appellant argues that he can maintain a cause of action for negligent supervision based on section 317 of the Restatement (Second) of Torts. Section 317 recognizes a claim for negligent supervision even when the employee is acting outside the scope of employment, so long as the employee is on the employer's premises or is using the employer's chattels. Restatement (Second) of Torts § 317 (1965). Appellant did not

make this argument before the district court, and therefore the district court did not have an opportunity to consider section 317's possible impact. An appellate court will not consider matters not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Because appellant did not raise this issue below, we decline to address it on appeal. In doing so, we make no determination on whether section 317 of the Restatement (Second) of Torts is recognized in Minnesota. Finally, because we conclude that respondent owed no legal duty, we do not reach the issue of assumption of risk.

Affirmed.