STATE OF MICHIGAN

COURT OF APPEALS

BONNIE BLACK, as Next Friend of JESSICA BITNER, a Minor,

Plaintiff-Appellant,

v

WILLIAM SHAFER, MARY SHAFER, and IAN GEARHART,

Defendants,

and

ANTHONY SHAFER,

Defendant-Appellee.

UNPUBLISHED
March 25, 2014

No. 312379
Wayne Circuit Court
LC No. 11-010645 - NO

Before: JANSEN, P.J., and OWENS and SHAPIRO, JJ.

PER CURIAM.

Plaintiff appeals from the trial court order that granted summary disposition in favor of defendant Anthony Shafer under MCR 2.116(C)(10) on plaintiff's negligence claim. Because defendant owed plaintiff a duty of care that a reasonable jury could determine he breached, and because the trial court's legal bases for granting summary disposition were erroneous, we reverse.

This case arises from the accidental discharge of a shotgun that occurred in the early morning hours of July 21, 2011. At the time, 30-year-old defendant lived at the home of his grandparents, William and Mary Shafer, in a house within 100 yards of a lake. William had turned the garage into a den where defendant entertained himself and his friends, often by drinking alcohol and smoking marijuana. William kept a short-barrel shotgun, loaded with two shells, leaning against a wall in the garage. Defendant was aware of the gun's existence, the fact that it was loaded, and its location.

On the afternoon of July 20, 2011, defendant invited four individuals to the home: the 16-year-old plaintiff, 21-year-old Ian Gearhart (his half-brother), 25-year-old Stephanie Sutton, and another friend. After the group had spent time in the garage and gone swimming in the lake,

plaintiff and the other female guest returned home. Soon after, however, defendant and Gearhart drove to the store to purchase alcohol and re-contacted plaintiff and Sutton and picked them up in his vehicle. The four returned to the garage.

By this time, it was nearly midnight and William and Mary were asleep. All four individuals began drinking the hard liquor defendant had purchased.[1] Defendant admitted that he had marijuana in the garage at the time, but denied that any of the individuals smoked it that evening. Plaintiff testified that "the plan" was for her and Sutton to spend the night with defendant and Gearhart at William and Mary's house.

While the four were drinking in the garage, Gearhart picked up the shotgun and began to examine it. Defendant testified that he took the gun from Gearhart, "made sure there was nothing in the chamber, . . . put the slide back, pulled the trigger, and then" gave it back to Gearhart. Defendant acknowledged that the gun's safety was off at the time when he inspected it and that he did not put the safety on before handing it back to Gearhart. Gearhart continued to handle the gun and then placed it back in the corner. Defendant testified that he did not instruct Gearhart not to further handle the shotgun and that he did not check its status after Gearhart put it down.

The four then went to the lake to go skinny dipping. At some point around 3:00 or 4:00 a.m. on July 21, 2011, plaintiff and Gearhart got out of the lake and returned to the garage while defendant and Sutton continued swimming. Plaintiff saw Gearhart pick up the shotgun. She heard him say, "we better move this," and believed that he planned to place the gun on a shelf. Plaintiff testified that Gearhart was not pointing the gun in her direction. However, she soon heard a "big bang" and was shot in the leg.

Plaintiff, through her mother, brought this negligence action.[2] Defendant moved for summary disposition under MCR 2.116(C)(10), arguing that he did not owe plaintiff a duty, and if he did, it was not breached. Plaintiff countered that defendant's duty arose through a special relationship between plaintiff and himself, which was formed when defendant and Gearhart purchased alcohol, picked up the underage plaintiff and her friend, and provided plaintiff with alcohol at his residence. Plaintiff argued that the duty was breached when defendant allowed Gearhart, who had been drinking alcoholic beverages, to return alone to the garage with the minor plaintiff, where defendant had not secured, safetied or unloaded the gun despite knowing that minor plaintiff and Gearhart were likely intoxicated and that Gearhart was interested in the weapon.

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[1] Defendant testified that he could not recall whether plaintiff was drinking in the garage. Plaintiff testified to that she was along with the others. Thus, there is a question of fact and we are obligated to view the facts in the light most favorable to the non-moving party. *Ernsting v Ave Maria College*, 274 Mich App 506, 509-510; 736 NW2d 574 (2007).

[2] Plaintiff also sued William and Mary Shafer and Gearhart in negligence. William and Mary were granted summary disposition, a ruling that plaintiff has not challenged on appeal. Gearhart did not appear in the litigation and a default judgment was entered against him

The trial court granted defendant's motion from the bench, finding that there was no special relationship between plaintiff and defendant, that the shooting was unforeseeable, and that defendant did not breach the limited duties owed to licensees.

We review de novo a trial court's grant of summary disposition under MCR 2.116(C)(10). *Ernsting v Ave Maria College*, 274 Mich App 506, 509; 736 NW2d 574 (2007). "When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party." *Id*. at 509-510. All reasonable inferences are to be drawn in favor of the nonmoving party. *Dextrom v Wexford Co*, 287 Mich App 406, 415; 789 NW2d 211 (2010).

"Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Ernsting*, 274 Mich App at 509. "This Court is liberal in finding genuine issues of material fact." *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008). "A genuine issue of material fact exists when the record, giving the benefit of any reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ." *Ernsting*, 274 Mich App at 510.

"To establish a prima facie case of negligence, a plaintiff must introduce evidence sufficient to establish that (1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) the defendant's breach was a proximate cause of the plaintiff's injuries, and (4) the plaintiff suffered damages." *Latham v Nat'l Car Rental Sys, Inc*, 239 Mich App 330, 340; 608 NW2d 66 (2000) (quotation marks and citation omitted). The first element is at issue in this case. "[T]he existence of a legal duty is a question of law for the court to decide." *Anderson v Wiegand*, 223 Mich App 549, 554; 567 NW2d 452 (1997). Defendant advances two arguments related to the "foreseeability of the harm," a factor we may consider in determining whether a duty exists. *Graves v Warner Bros*, 253 Mich App 486, 492-493; 656 NW2d 195 (2002).

Defendant first argues that the risk of someone being injured by the shotgun was unforeseeable as a general matter. We disagree.

Defendant, a 30-year-old adult, purchased liquor and contacted plaintiff, a 16-year-old minor, and Sutton for the purpose of having a party in his garage. Defendant picked up plaintiff and Sutton and plaintiff testified that she planned to spend the evening at defendant's residence. The individuals arrived at the garage late at night without the knowledge of the property owners. Defendant watched Gearhart handle the shotgun and testified that he appeared "interested" in it. He then provided, and allowed, Gearhart and minor plaintiff to drink hard liquor without securing the loaded shotgun or putting its safety on. Defendant's unlawful provision of liquor affected minor plaintiff's ability to recognize and protect herself from any attendant dangers. "[R]estrictions on underage drinking are premised on the idea that the minor must be protected from his own foibles by those that control the supply of alcohol." *MCA Financial Corp v Grant Thornton, LLP*, 263 Mich App 152, 163; 687 NW2d 850 (2004). We accordingly reject defendant's argument that he cannot be held to any duty beyond that owed by a premises owner to an ordinary licensee. See *Longstreth v Gensel*, 423 Mich 675, 686; 377 NW2d 804 (1985) ("The people of this state (through Const 1963, art 4, § 40), as well as the Legislature [through

MCL 436.22] have determined that those under twenty-one years of age should not be sold, given or furnished alcoholic beverages. We believe that this distinction is crucial for the purposes of this appeal.") We decline to adopt defendant's view that the duty of adults who transport minors to a foreign location and provide them with alcohol is limited to that owed to ordinary licensees.[3]

Having determined that defendant owed plaintiff a duty of ordinary care, we find that a reasonable jury could find that defendant breached that duty. Defendant knew that Gearhart was interested in the shotgun and had handled it without knowing if it was loaded. He also knew that Gearhart, and the rest of the individuals, including minor plaintiff, were consuming hard liquor. Defendant admitted that the shotgun's safety was off and that he knew that two shells were always in the gun. On the existing record, a reasonable jury could reasonable infer that there was a shell in the chamber at the time of the accident as a result of defendant's negligence. There is no evidence that Gearhart chambered a shell and while defendant asserts that he removed the shell from the chamber, a jury is free reject that claim. Thus, a reasonable jury could find that defendant's failure to make the shotgun safe by removing it from the garage, unloading it, putting the safety on, or at a minimum, instructing Gearhart that the gun was loaded and the safety was off, breached his duty of ordinary care to plaintiff.

Second, defendant argues the risk of someone being injured by the shotgun was unforeseeable because property owners are not liable for the criminal acts third parties.[4] See *Graves*, 253 Mich App at 493.

This argument fails for two reasons. First, this rule is grounded in the proposition that a third party's criminal *intent* is unforeseeable. It is undisputed that Gearhart accidentally, not intentionally, discharged the shotgun. There is no evidence that he intended to fire it nor that he intended to harm the plaintiff. See *Graves*, 253 Mich App at 510 ("Criminal activity, by its *deviant nature*, is normally unforeseeable" (citation omitted and emphasis added)). Although negligent discharge of a firearm causing injury is a crime, MCL 752.861, defendant's potential duty does not arise out of a duty to protect plaintiff from the criminal scheme of a third party, but rather his failure under the facts of this case to safeguard or remove the instrumentality of harm while serving alcohol to a minor.

Second, even where an intentional criminal act of a third party is at issue, there is an exception to the general rule of unforeseeability when a "special relationship [exists] between the

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[3] Indeed, as this is a negligence case, not a premises liability case, the question of whether plaintiff was an invitee or a licensee is irrelevant. The question is whether there was a duty of ordinary care under the circumstances and, if so, whether a reasonable jury could conclude that defendant violated that duty.

[4] It is undisputed that Gearhart's firing of the gun constituted a criminal activity. Moreover, Michigan's Offender Tracking Information System reveals that Gearhart pleaded guilty to careless, reckless, or negligent use of a firearm resulting in injury, MCL 752.861, as a result of this incident.

defendant and the plaintiff or the defendant and the third party." See *id*. at 493.[5] The trial court erred by finding that such a special relationship did not exist between plaintiff and defendant in this case. A "special relationship" establishes "a duty of reasonable care toward [] those parties who are readily identifiable as being foreseeably endangered." *Id*. at 494 (quotation marks, brackets, and citations omitted). As discussed above, defendant owed plaintiff a duty of ordinary, reasonable care as a general matter. Additionally, for those same reasons, i.e., that he invited and picked up plaintiff, provided minor plaintiff with alcohol he purchased, and allowed the intoxicated minor plaintiff into his garage with the intoxicated Gearhart and a loaded, displayed, shotgun with its safety off, a "special relationship" existed between plaintiff and defendant.

Defendant owed plaintiff a duty of ordinary care as a general matter and, alternatively, because a "special relationship" existed between the two parties. Accordingly, the trial court erred by granting summary disposition in favor of defendant on plaintiff's negligence claim.

Reversed. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Douglas B. Shapiro

[5] "Examples of the requisite 'special relationship' recognized under Michigan law include a common carrier that may be obligated to protect its passengers, an innkeeper his guests, an employer his employees, owners and occupiers of land their invitees, a doctor his patient, and business invitors or merchants their business invitees." *Graves*, 253 Mich App at 494 (citations omitted).

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JANSEN, P.J. (*dissenting*).

I conclude that the circuit court properly granted summary disposition in favor of defendant Anthony Shafer ("defendant") pursuant to MCR 2.116(C)(10). Therefore, I respectfully dissent.

As the majority correctly observes, "'[t]o establish a prima facie case of negligence, a plaintiff must introduce evidence sufficient to establish that (1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) the defendant's breach was a proximate cause of the plaintiff's injuries, and (4) the plaintiff suffered damages.'" *Latham v Nat'l Car Rental Sys, Inc*, 239 Mich App 330, 340; 608 NW2d 66 (2000) (citation omitted). Whether a duty exists is a question of law, which requires the court to examine, among other things, the foreseeability of the harm. *Graves v Warner Bros*, 253 Mich App 486, 492; 656 NW2d 195 (2002).

Jessica Bitner ("Bitner") was a licensee because she was a social guest of defendant at defendant's home. *Taylor v Laban*, 241 Mich App 449, 453; 616 NW2d 229 (2000). "'[A] licensee is entitled to expect only that he will be placed upon an equal footing with the possessor himself by an adequate disclosure of any dangerous conditions that are known to the possessor.'" *D'Ambrosio v McCready*, 225 Mich App 90, 94; 570 NW2d 797 (1997) (citation omitted); see also *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). It

cannot be seriously disputed that Bitner was aware of any danger posed by the shotgun, which was plainly leaning against the wall of the garage for anyone to see.[1]

Furthermore, it is black-letter law that a defendant owes no duty to warn or protect a licensee with respect to an unforeseeable danger. See *Stabnick v Williams Patrol Service*, 151 Mich App 331, 334-335; 390 NW2d 657 (1986); *McNeal v Henry*, 82 Mich App 88, 90; 266 NW2d 469 (1978). Our Supreme Court has held, albeit in a different context, that no bodily harm can be foreseen when a person pulls the trigger of what he believes to be an unloaded gun; under such circumstances it is unforeseeable that a shot will be discharged. *Allstate Ins Co v McCarn*, 466 Mich 277, 290-291; 645 NW2d 20 (2002). Here, although it does not appear that the shotgun was unloaded, both defendant and Gearhart honestly believed that the chamber was empty. Indeed, defendant testified that he had confirmed that the chamber was empty before handing the gun back to Gearhart. Thus, irrespective of whether it was foreseeable that Gearhart would pull the trigger, defendant could not have foreseen the resulting gunshot.[2] Defendant owed no duty to protect Bitner from this unexpected and unforeseeable result.

Nor was there a special relationship, apart from that of licensor-licensee, between defendant and Bitner in this case. I acknowledge that a duty to protect may arise when a special relationship exists between the plaintiff and the defendant. *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499-500; 418 NW2d 381 (1988). "The rationale behind imposing a duty to protect in these special relationships is based on control." *Id.* "The duty to protect is imposed upon the person in control because he is best able to provide a place of safety." *Id.*

The majority concludes that there was a heightened special relationship in this case because defendant brought Bitner to his house, provided her with alcoholic beverages, and took her into his garage where Gearhart was drinking and handling a loaded shotgun. But as already explained, defendant honestly believed that there was no round in the shotgun's chamber. Moreover, Bitner was not free of culpability in this case. It was unlawful for Bitner, a minor, to consume alcohol. Const 1963, art 4, § 40; MCL 436.1703(1). I fail to understand why Bitner's unlawful consumption of alcoholic beverages should somehow weigh in favor of finding a special relationship and a resulting duty to protect on the part of defendant.

In my opinion, the relationship between Bitner and defendant was unlike the relationship between a common carrier and its passengers, an innkeeper and its guests, or an employer and its

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[1] By pointing this out, it is not my intent to characterize the shotgun as an open and obvious condition of the premises. I merely wish to make clear that Bitner was aware of the shotgun, which was not hidden from view.

[2] There is no record evidence to establish that anyone saw Gearhart pump the shotgun after defendant had checked the chamber. Thus, even if Gearhart did subsequently chamber a round, the only permissible inference is that defendant did not know about it. I perceive no evidence on the record to suggest that the shotgun was mechanically defective in such a way that it could be discharged when no round had been pumped into the chamber. Cf. *United States v Escamilla*, 467 F2d 341, 344 (CA 4, 1972).

employees. Cf. *Williams*, 429 Mich at 499. When Gearhart began handling the shotgun, Bitner was perfectly free to leave defendant's garage and thereby remove herself from a possible position of danger. Quite simply, she was not unable to protect herself. See *id*. There was no heightened special relationship in this case.

No reasonable juror could conclude that defendant breached the limited duty of care that he owed to Bitner as a licensor. Moreover, because there was no special relationship, apart from that of licensor-licensee, defendant owed no increased duty to protect Bitner in this case. The circuit court properly granted summary disposition in favor of defendant. I would affirm.

/s/ Kathleen Jansen