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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1795**

Jennifer Smith, individually and as parent
and natural guardian of Zoeie Meister, a minor,
Appellant,

vs.

Patricia J. Holloman,
Respondent,

JaiMarie Meister,
Respondent.

**Filed July 16, 2018
Affirmed in part, reversed in part, and remanded
Peterson, Judge**

Carver County District Court
File No. 10-CV-15-811

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JaiMarie Meister, St. Cloud, Minnesota (pro se respondent)

Considered and decided by Peterson, Presiding Judge; Kirk, Judge; and Jesson,
Judge.

UNPUBLISHED OPINION

PETERSON, Judge

This appeal is from a summary judgment that dismissed appellant's negligence claims for injuries that appellant's daughter sustained while attending a holiday celebration at respondent's home. We affirm in part, reverse in part, and remand.

FACTS

During a Fourth of July celebration at respondent Patricia Holloman's home, four-year-old Z.M. was injured when she fell into a fire ring. Z.M.'s father, Anthony Meister, is married to Holloman's daughter, respondent JaiMarie Meister. Z.M.'s mother, appellant Jennifer Smith, has sole legal and sole physical custody of Z.M. and agreed to allow Z.M. to visit Anthony and JaiMarie on the weekend when Z.M. was injured.

Anthony was not present when the accident occurred, and JaiMarie was supervising Z.M. Anthony stated in his deposition that JaiMarie was supposed to be watching Z.M. when the accident occurred, although there were four or five adults present on the property, and "[e]verybody kind of watches the kids."

During her deposition, JaiMarie stated that she treated Z.M. as her own child, and Z.M. "considered [Holloman] her grandmother." JaiMarie stated that the accident happened when "the kids were all playing in the yard" with a basket of water balloons that she had helped prepare. According to JaiMarie, Z.M.'s brother said that Z.M. "slipped," while "[s]he was running and playing," and he "grabbed her, pulled her up." JaiMarie said that the fire ring contained "fresh ashes" from the night before and that she warned Z.M. "at least three or four times" to stay away from it.

Just before the accident, JaiMarie went inside to put one of her children down for a nap, and there were four or five other adults, including Holloman, on the deck or in the yard. According to JaiMarie, it was assumed that she would be watching the kids and it was also assumed that, when she went inside, Holloman would be responsible for supervising them.

Holloman stated in her deposition that she placed two kiddie swimming pools near each other, 12 feet from the fire ring. Holloman believed that there were “low coals” in the fire ring, but she did not disagree with another guest’s purported statement that “there was an actual fire burning.” Although Holloman did not recall anyone specifically warning Z.M. about the danger of the fire ring, she stated that “[t]he children were all told to stay away from it.” Holloman denied that JaiMarie “delegated supervisory duties” to her when JaiMarie went inside the house with her baby.

Smith brought a negligence action on behalf of Z.M. against Holloman and JaiMarie. Smith alleged two theories of liability against Holloman, negligent supervision of Z.M. and the condition of her property caused Z.M.’s injuries, and a single theory against JaiMarie, negligent supervision of Z.M. In her answer, Holloman denied that she owed any duty to Z.M. and cross-claimed against JaiMarie, contending that JaiMarie’s negligence caused Z.M.’s injuries. After the parties conducted depositions, Holloman moved for summary judgment, asserting that she owed Z.M. no duty of care as a matter of law.

Following a hearing, the district court granted Holloman’s motion for summary judgment. JaiMarie failed to appear for trial, and, on Smith’s motion, the claim against

JaiMarie was dismissed without prejudice. Smith now appeals the grant of summary judgment to Holloman.

DECISION

We review the grant of summary judgment de novo to determine whether there are genuine issues of material fact and whether the district court erred in its application of the law. In doing so, we must not weigh facts or determine the credibility of affidavits and other evidence. Summary judgment is a blunt instrument that is inappropriate when reasonable persons might draw different conclusions from the evidence presented. Thus, the moving party has the burden of showing an absence of factual issues and the nonmoving party has the benefit of that view of the evidence most favorable to him. All doubts and factual inferences must be resolved against the moving party.

Montemayor v. Sebright Prods., Inc., 898 N.W.2d 623, 628 (Minn. 2017) (quotations and citation omitted).

“Negligence is the failure to exercise the level of care that a person of ordinary prudence would exercise under the same or similar circumstances.” *Doe 169 v. Brandon*, 845 N.W.2d 174, 177 (Minn. 2014). To succeed in a negligence action, “a plaintiff must prove: (1) the existence of a duty of care; (2) a breach of that duty; (3) an injury; and (4) that the breach of the duty was a proximate cause of the injury.” *Id.* Whether a duty of care exists is a threshold question. *Id.* Smith relied on two separate negligence theories in her suit against Holloman: that Holloman had a duty to supervise Z.M. and that Holloman owed Z.M. a duty of care as a landowner.

Duty to supervise Z.M.

Generally, an individual owes no duty to protect another from harm. *Bjerke v. Johnson*, 742 N.W.2d 660, 665 (Minn. 2007). But a duty is recognized if a special relationship exists and the risk is foreseeable. *Id.* “A special relationship may arise when a person accepts responsibility to protect another, although there was no initial duty.” *Sunnarborg v. Howard*, 581 N.W.2d 397, 399 (Minn. App. 1998) (quotation omitted), review denied (Minn. Sept. 22, 1998).

“The responsibility for supervision of [a] child may be relinquished or obtained only upon the mutual consent, expressed or implied, by the one legally charged with the care of the child and by the one assuming the responsibility.” *Id.* (quotation omitted). The duty to supervise a child may not be imposed “on a third person unless that person accepts the responsibility.” *Id.*

Holloman testified that she was aware that JaiMarie had gone inside the house, but she did not know whether JaiMarie delegated supervisory duties to anybody. JaiMarie testified that she was not “positive” that she told her mother to “keep an eye” on the children when she went inside the house. JaiMarie stated that she either told Holloman to supervise Z.M. or she assumed that Holloman or one of the other adults would supervise Z.M. in her absence. When viewed in the light most favorable to Smith, this testimony is insufficient to establish that Holloman had a duty to supervise Z.M. because it does not establish that Holloman either expressly or impliedly consented to assuming the responsibility of supervising. The district court did not err in granting Holloman summary judgment on Smith’s negligent-supervision claim. *See Lubbers v. Anderson*, 539 N.W.2d

398, 401 (Minn. 1995) (stating that defendant in negligence action is entitled to summary judgment when record reflects complete lack of proof on any of four elements necessary for recovery).

Duty as landowner

“A landowner generally has a continuing duty to use reasonable care for the safety of all entrants.” *Senogles v. Carlson*, 902 N.W.2d 38, 42 (Minn. 2017) (quotations omitted). “‘Entrants’ refers to . . . invitees and licensees.” *Id.* But “[a] landowner is not liable to invitees when the danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.” *Id.* (quotation omitted). Whether a landowner should anticipate a particular “harm is an issue of foreseeability,” which “depends heavily on the facts and circumstances of each case.” *Id.* at 43 (quotation omitted). A court may decide foreseeability as a matter of law if it is “clear,” “but in close cases, the issue of foreseeability is for the jury.” *Id.*

Citing this court’s opinion in *Foss v. Kincade*, 746 N.W.2d 912, 917 (Minn. App. 2008), *aff’d*, 766 N.W.2d 317 (Minn. 2009), the district court concluded that, when small children are being watched by their parents, a landowner may be relieved of a duty to remove, or warn the children about, a dangerous instrumentality, the danger from which is apparent. The district court then granted Holloman summary judgment on Smith’s claim against her as a landowner because Z.M.’s father and stepmother were responsible for Z.M.’s care, not Holloman.

In *Foss*, a three-year-old child was injured when a bookcase fell onto him while he and his mother were visiting at the Kincades’ home. *Id.* at 913. The child’s father asserted

a negligence claim against the Kincades, alleging that they were negligent in failing to secure the bookcase and in failing to warn the child about the danger posed by the bookcase. *Id.* at 914. The Kincades moved for summary judgment, arguing that they owed no duty to protect the child, who was under the supervision of his mother when he was injured, and the district court granted the motion. *Id.* This court agreed with the district court that the child's injury was not foreseeable and, therefore, the Kincades did not owe the child a duty as a matter of law. *Id.* at 916. This court concluded "that the paramount duty to provide for a child's safety rests with that child's parents and cannot be delegated merely by entering the home of another." *Id.* at 917.

The child's father then appealed to the supreme court, "arguing that a landowner owes a duty of care to children invited on the premises and that the presence of the child's parent does not eliminate the duty owed by the landowner." *Foss*, 766 N.W.2d at 320. The supreme court agreed, stating that "whether an invitee child's injuries might also be causally linked to a parent's failure to supervise is a question of comparative negligence, not a ground on which to extinguish the landowner's duty to maintain a safe premises for social guests." *Id.* at 322; *see also Louis v. Louis*, 636 N.W.2d 314, 320-21 (Minn. 2001) (explaining that duty based on special-relationship theory is separate and distinct from duty based on premises-liability theory, and holding that, where negligence claim is based on premises-liability theory, whether there is a duty owed by landowner does not depend on existence of special relationship). The supreme court affirmed this court's decision in *Foss*, but it did so because the harm to the child was not reasonably foreseeable, not because the child's mother was present. 766 N.W.2d at 322-23.

Under the supreme court's reasoning in *Louis* and *Foss*, Smith's premises-liability theory of liability is separate and distinct from her negligent-supervision theory, and the district court erred when it dismissed Smith's premises-liability claim because Z.M.'s father and stepmother were responsible for Z.M.'s care. We, therefore, reverse the dismissal of Smith's premises-liability claim and remand for further consideration of whether Holloman is liable as a landowner.

Affirmed in part, reversed in part, and remanded.