NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2018 CA 0652

JUSTIN STOLLENWERCK, INDIVIDUALLY AND AS NATURAL TUTOR OF HIS MINOR SON, RYSE STOLLENWERCK

VERSUS

ROBERT SCHWEGGMAN, JR. AND SCOTTSDALE INSURANCE COMPANY

Judgment Rendered: NOV 05 2018

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Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Case No. 2016-10059

The Honorable Richard A. Swartz, Jr., Judge Presiding

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* * * * * * * *

BEFORE: GUIDRY, THERIOT, AND PENZATO, JJ.

Penzato, J. concurs

Guidry, J. Dissents

THERIOT, J.

Justin Stollenwerck, individually and as natural tutor on behalf of his minor son, Ryse Stollenwerck, appeals the judgment of the Twenty-Second Judicial District Court denying his motion for partial summary judgment and granting Scottsdale Insurance Company's motion for summary judgment. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

On December 10, 2015, Ryse Stollenwerck ("Ryse"), the minor son of Justin Stollenwerck ("Mr. Stollenwerck"), was severely injured while in the custody of Ryse's mother's boyfriend, Robert Schweggman, Jr. ("Mr. Schweggman")[1]. Ryse, who has autism, was five years old at the time of the accident.

Mr. Schweggman resides in Bush, Louisiana, in a home owned by his great-uncle John Ehret ("Mr. Ehret"). Mr. Schweggman moved into the home around April 2014. Mr. Ehret, however, lives in Sealy, Texas. Prior to the accident, Ryse's mother and Ryse moved into the Bush home. Ryse stayed with his father, Mr. Stollenwerck, every other weekend.

On the day of the accident, Mr. Schweggman was in the front yard of the Bush home playing with Seth (his son) and Ryse. Mr. Schweggman, Seth, and Ryse were playing a game that involved Mr. Schweggman and one of the children holding each other's wrists while Mr. Schweggman spun the child around in circles. During this game, Mr. Schweggman told Ryse to stand back while he spun Seth. According to Mr. Schweggman, Ryse acknowledged that he understood and stood about thirty feet away from Mr. Schweggman and Seth. However, while Mr. Schweggman was spinning Seth, he felt Seth's body hit something. Mr. Schweggman immediately

[1] The record indicates Mr. Schweggman and Ryse's mother have married since the date of the accident.

stopped spinning Seth and saw Ryse sitting down next to them. Mr. Schweggman observed that Ryse had an injury on his chin that was turning blue and realized that while he was swinging Seth, who had been wearing tennis shoes, they had accidently struck Ryse on the chin.

After being hit, Ryse laid down on the grass and Mr. Schweggman noticed that he was breathing differently and that his eyes were only half-open. Mr. Schweggman called 911 and paramedics arrived within a few minutes. Ryse was airlifted to the University Medical Center, where he underwent surgery and remained for approximately two weeks. Ryse was subsequently airlifted to Children's Hospital. Following the accident, Ryse was in the hospital for approximately six months. Although Ryse has been released, he cannot walk and is confined to a wheelchair. Ryse also has a tracheostomy tube in his throat and cannot speak.

On January 6, 2016, Mr. Stollenwerck filed suit on behalf of himself and Ryse against Mr. Schweggman seeking damages and alleging that Ryse had sustained a massive hemorrhage, a subdural hematoma, and a stroke as a result of the injuries sustained while he was in Mr. Schweggman's custody. Mr. Stollenwerck also named XYZ Insurance Company as the liability insurer of Mr. Schweggman and of the Bush home.[2]

On April 1, 2016, Mr. Schweggman answered the petition, denying liability and alleging that Ryse's own negligence was the sole cause of the injury. On April 5, 2016, Mr. Stollenwerck filed a first supplemental and amending petition, adding Scottsdale Insurance Company ("Scottsdale") in place of XYZ Insurance Company as Mr. Schweggman's liability insurer.

[2] Mr. Stollenwerck's original and subsequent amending petitions allege that the premises at issue is located in Covington, Louisiana. However, the home is located in Bush, Louisiana.

On May 10, 2016, Mr. Stollenwerck filed a second supplemental and amending petition, adding Mr. Ehret as a defendant. Specifically, the second supplemental and amending petition named Mr. Ehret as the owner of the Bush home and alleged that Mr. Ehret was negligent in allowing Mr. Schweggman and Mr. Schweggman's minor son to play without proper supervision, thus causing Ryse's injuries. The second supplemental and amending petition also reiterated its allegations that Scottsdale was Mr. Ehret's (and Mr. Schweggman's) liability insurer and the insurer of the Bush home.

On May 26, 2016, Scottsdale answered the original petition and the first supplemental and amending petition, admitting that Mr. Ehret was insured under its policy, but denying any coverage as to Mr. Schweggman. On September 15, 2017, Scottsdale filed a motion for summary judgment. According to Scottsdale, Mr. Schweggman was not insured under the Scottsdale policy because Mr. Schweggman was not a member of Mr. Ehret's "household" under Louisiana law.

On November 7, 2017, Mr. Stollenwerck filed a motion for partial summary judgment on the issue of Mr. Schweggman's status as an employee of Mr. Ehret. Mr. Stollenwerck claimed that Mr. Schweggman was acting as Mr. Ehret's employee at the time of the injury. In a supporting memorandum, Mr. Stollenwerck argued that Mr. Schweggman was Mr. Ehret's "residence employee". As such, Mr. Stollenwerck argued that because Mr. Ehret was Mr. Schweggman's employee, Mr. Ehret was responsible for Mr. Schweggman's actions and Ryse's injures.

On January 10, 2018, the trial court rendered judgment as to Scottsdale's motion for summary judgment and Mr. Stollenwerck's motion for partial summary judgment. The trial court held that Scottsdale's

insurance policy provided no coverage for Mr. Stollenwerck's claims, granted Scottsdale's motion for summary judgment, and dismissed Scottsdale from the lawsuit. In doing so, the trial court denied Mr. Stollenwerck's motion for partial summary judgment on the issue of insurance coverage. In its reasons for judgment, the trial court explained that Mr. Stollenwerck lacked the factual support necessary to establish that Mr. Schweggman was a member of Mr. Ehret's household, and thus, Mr. Schweggman was not insured under the Scottsdale policy.[3] The trial court also found that no employee-employer relationship existed between Mr. Ehret and Mr. Schweggman, and that Mr. Ehret had no duty to protect Ryse against Mr. Schweggman's actions. This appeal followed.

ASSIGNMENTS OF ERROR

Mr. Stollenwerck assigns the following as error:

> (1) In granting summary judgment in favor of Defendant/Appellee Scottsdale, the District Court erred in finding that Defendant Ehret and Defendant Schweggman were not members of the same household.
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> (2) In granting summary judgment in favor of Defendant/Appellee Scottsdale, the District Court erred in finding that no employer-employee relationship existed between Defendant Ehret and Defendant Schweggman.
>
> (3) In granting summary judgment in favor of Defendant/Appellee Scottsdale, the District Court erred in finding that Defendant Ehret owed no duty to protect Ryse Stollenwerck.

STANDARD OF REVIEW

A summary judgment is reviewed on appeal *de novo*, with the appellate court using the same criteria that govern the trial court's determination of whether summary judgment is appropriate; i.e. whether there is any genuine issue of material fact, and whether the mover is entitled

[3] The trial court also found that Ryse was a resident of the Bush home, meaning that an exclusion of medical payments to those regularly residing on the insured location applied. This finding was not challenged on appeal.

to judgment as a matter of law. *Schultz v. Guoth*, 2010-0343 (La. 1/19/11); 57 So.3d 1002, 1005-06.

DISCUSSION

Assignment of Error #1

In his first assignment of error, Mr. Stollenwerck alleges that the trial court erred in finding that Mr. Ehret and Mr. Schweggman were not members of the same household. Mr. Stollenwerck argues that under the Scottsdale policy, Mr. Schweggman is a relative who resides in Mr. Ehret's household, which would mean that Mr. Schweggman is covered under the Scottsdale policy.

The named insured on the Scottsdale policy is John Ehret. The described location of the Scottsdale policy is the Bush home. The policy period of the Scottsdale policy was from December 26, 2014 to December 26, 2015. The Scottsdale policy defines "insured" in pertinent part as:

> a. You [the named insured] and residents of your household who are:
>
> (1) Your [the named insured's] relatives; or
>
> (2) Other persons under the age of 21 and in the care of any person named above[.] (Emphasis added.)

Regarding personal liability coverage, the policy provides in pertinent part:

> If a claim is made or a suit is brought against an "insured" for damages because of "bodily injury" or "property damage" caused by an "occurrence to which this coverage applies, we will:
>
> 1. Pay up to our limit of liability for the damages for which an "insured" is legally liable . . .; and
>
> 2. Provide a defense at our expense by counsel of our choice[.]

Mr. Stollenwerck correctly points out that Mr. Schweggman and Mr. Ehret are relatives, as Mr. Ehret is Mr. Schweggman's great-uncle. Thus, the relevant question is whether there is a genuine issue of material fact as to

whether Mr. Schweggman and Mr. Ehret are residents of the same household.

Black's Law Dictionary defines a household as "[a] family living together", "[a] group of people who dwell under the same roof", or "[t]he contents of a house." Black's Law Dictionary (10th ed. 2014). In *Kemp v. State Farm Fire and Cas. Co.*, 442 So.2d 642 (La. App. 1 Cir. 1983), *writ denied*, 444 So.2d 1224 (La. 1984), this court discussed the term "household" in the context of insurance contracts. This court stated the following:

> Whether the term 'household' or 'family' is used, the term embraces a collection of persons as a single group, with one head, living together, a unit of permanent and domestic character, under one roof; a 'collective body of persons living together within one curtilage, subsisting in common and their attention to a common object, the promotion of their mutual interest and social happiness.'

Kemp, 442 So.2d at 645 (citing *Leteff v. Maryland Casualty Company*, 91 So.2d 123, 130 (La. App. 1 Cir. 1956).

Ultimately, whether a person is a member of a given household is a question of fact, to be determined after consideration of all the circumstances. *Hernandez v. Comco Ins. Co.*, 357 So.2d 1368, 1370 (La. App. 4 Cir. 1978), *writ denied*, 359 So.2d 1305 (La. 1978). In *Hernandez*, the court went on to state that "[t]he pattern which emerges from the myriad of decisions considering the term "household" seems to be an emphasis on dwelling as a family under one head." *Hernandez*, 359 So.2d at 1371.

Mr. Stollenwerck argues that Mr. Schweggman and Mr. Ehret are members of the same household. According to Mr. Stollenwerck, Mr. Ehret maintains personal property on the premises (including furniture and other personal effects), the utility bills of the home remain in Mr. Ehret's name, and Mr. Ehret claimed a Louisiana Homestead Exemption on the property.

Mr. Stollenwerck also cites to *Reynolds v. Select Properties, Ltd.*, 93-1480 (La. 4/11/94); 634 So.2d 1180, 1183, which states, "a provision which seeks to narrow the insurer's obligation is strictly construed against the insurer, and, if the language of the exclusion is subject to two or more reasonable interpretations, the interpretation which favors coverage must be applied."

However, we find that Mr. Stollenwerck failed to produce factual support sufficient to establish the existence of a genuine issue of material fact as to whether Mr. Ehret and Mr. Schweggman are members of the same household. As demonstrated above, a household is generally defined as a group living under the same roof. Mr. Ehret and Mr. Schweggman have never lived under the same roof. Mr. Ehret lives in Texas and has no plans to return to Louisiana. Although Mr. Ehret purchased the Bush home in 1995, he and his wife never moved into the Bush home. Mr. Ehret has only visited the home once since Mr. Schweggman moved in and during that visit he only stayed a few hours. While Mr. Ehret and his wife have left some of their belongings on the premises, those belongings are in a shed, not the home itself.

Although an electricity bill does come to the Bush home in Mr. Ehret's name each month, Mr. Schweggman pays that bill. Further, in regard to a homestead exemption, Mr. Ehret testified that he did not know whether he had claimed a homestead exemption on the Bush home. However, even if he had, doing so would not outweigh the evidence that Mr. Ehret had never lived in the Bush home and had no intent to return to Louisiana. Accordingly, we find that Mr. Stollenwerck failed to produce factual support sufficient to establish the existence of a genuine issue of material fact as to whether Mr. Schweggman and Mr. Ehret are members of the same household. This assignment of error lacks merit.

Assignment of Error #2

In his second assignment of error, Mr. Stollenwerck alleges that the trial court erred in finding that no employer-employee relationship existed between Mr. Ehret and Mr. Schweggman. Mr. Stollenwerck alleges that Mr. Schweggman is Mr. Ehret's "residence employee" under the terms of the policy, which means that a genuine issue of material fact exists as to whether Ryse was injured by Mr. Schweggman while Mr. Schweggman was in the course and scope of his employment.

We first address whether an employer-employee relationship exists between Mr. Ehret and Mr. Schweggman. This particular argument is essentially one of vicarious liability. The premise of vicarious liability is codified in La. Civ. Code art. 2320, which provides an employer is liable for the tortious acts of its "servants and overseers in the exercise of the functions in which they are employed." *Richard v. Hall*, 2003-1488 (La. 4/23/04); 874 So.2d 131, 137. Two essential elements must be established before liability of an employer attaches; namely, (1) that a master-servant or employer-employee relationship existed between the employee tortfeasor and the employer, and (2) that the tortious act of the servant or employee was committed within the scope and during the course of his employment by the employer sought to be held liable. *Parmer v. Suse*, 94-2200 (La. App. 1 Cir. 6/23/95); 657 So.2d 666, 668. We find that neither element is met.

In determining whether an employment relationship exists, the jurisprudence of this state has uniformly held that the most important element to be considered is the right of control and supervision over an individual. *Id.* Factors to be considered in assessing the right of control are the selection and engagement of the worker, the payment of wages, and the power of control and dismissal. *Id.*

Considering the facts of this case, we find that no employer-employee relationship existed between Mr. Ehret and Mr. Schweggman. Mr. Ehret allowed Mr. Schweggman to move into the Bush home rent-free, as long as Mr. Schweggman took care of the home and the yard. There was no written agreement between Mr. Ehret and Mr. Schweggman. Mr. Ehret never paid wages to Mr. Schweggman. Mr. Ehret only visited the home once since Mr. Schweggman moved in. There is no evidence to support that Mr. Ehret exercised any right of control or supervision over Mr. Schweggman. Mr. Ehret simply allowed Mr. Schweggman, his relative, to live on his property rent-free in exchange for basic maintenance. Thus, there is no employer-employee relationship between Mr. Ehret and Mr. Schweggman.

Additionally, even if an employer-employee relationship did exist between Mr. Ehret and Mr. Schweggman, Mr. Schweggman's tortious conduct would have had to have occurred within the course and scope of his employment. *Busby v. St. Paul Ins. Co.*, 95-2128 (La. App. 1 Cir. 5/10/96); 673 So.2d 320, 331, *writ denied*, 96-1519 (La. 9/20/96); 679 So.2d 443. As a general rule, the jurisprudence has identified four factors to consider in making a vicarious liability determination, including whether the tortious act: (1) was primarily employment rooted; (2) was reasonably incidental to performance of employment duties; (3) occurred during work hours; and (4) occurred on the employer's premises. *Emoakemeh v. Southern University*, 94-1194 (La. App. 1 Cir. 4/7/95); 654 So.2d 474, 476. Under this four-factored test, an employer is responsible for the negligent acts of its employee when the conduct is so closely connected in time, place and causation to the employment duties of the employee that it constitutes a risk of harm attributable to the employer's business. *Id.* The scope of the risks attributable to an employer increases with the amount of authority and

freedom of action granted to the employee in performing the assigned tasks. *Id.* at 476-77. However, an employer is not responsible for an employee's conduct that is motivated by purely personal considerations entirely extraneous to the employer's interests. *Id.* at 477.

In this case, Mr. Schweggman was outside playing with Seth and Ryse. He was not performing any duties relating to his alleged employment. His negligence was not rooted in any alleged employment, nor was his negligence incidental to the performance of any alleged employment duties. Mr. Schweggman was simply playing with Seth and Ryse in the front yard of his residence when the accident occurred. Thus, even if we were to find that Mr. Schweggman was Mr. Ehret's employer, we could not find that the accident occurred within the course and scope of this alleged employment.

Next, we address Mr. Stollenweck's argument that Mr. Schweggman was Mr. Ehret's "residence employee," thus creating a genuine issue of material fact as to whether Ryse was injured in the course and scope of Mr. Schweggman's employment. Scottsdale claims that this court should disregard Mr. Stollenwerck's "residence employee" argument, alleging that the "residence employee" argument was not asserted by Mr. Stollenwerck in the lower court. This is incorrect. In his memorandum in support of his motion for partial summary judgment, Mr. Stollenwerck alleged that Mr. Schweggman was Mr. Ehret's "residence employee" under the terms of the Scottsdale policy. Therefore, the issue is properly before this court.

The Scottsdale policy defines the term "residence employee" as:

> a. An employee of an "insured", or an employee leased to an "insured" by a labor leasing firm, under an agreement between an "insured" and the labor leasing firm, whose duties are related to the maintenance or use of the "residence premises", including household or domestic services; or

b. One who performs similar duties elsewhere not related to the "business" of an "insured".

A "residence employee" does not include a temporary employee who is furnished to an "insured" to substitute for a permanent "residence employee" on leave or to meet seasonal or short-term workload conditions.

Under our interpretation of the policy, we find that Mr. Schweggman must be Mr. Ehret's employee in order to be considered a "residence employee." Because we find that no employer-employee relationship exists between Mr. Ehret and Mr. Schweggman, Mr. Schweggman cannot be a "residence employee." This assignment of error lacks merit.

Assignment of Error #3

In his third assignment of error, Mr. Stollenwerck argues that the trial court erred in finding that Mr. Ehret owed no duty to protect Ryse Stollenwerck. Mr. Stollenwerck bases this argument in part on his assertion that Mr. Ehret is Mr. Schweggman's employer.

An issue of negligence or fault can be decided on a motion for summary judgment, provided that the evidence leaves no relevant, genuine issue of fact, and reasonable minds must inevitably conclude that the mover is entitled to judgment based on the facts before the court. *Blacklege v. Font*, 2006-1092 (La. App. 1 Cir. 3/23/07); 960 So.2d 99, 102. Louisiana courts have adopted a duty-risk analysis in determining whether to impose liability under the general negligence principles of La. Civ. Code art. 2315. *Bellanger v. Webre*, 2010-0720 (La. App. 1 Cir. 5/6/11); 65 So.3d 201, 207, *writ denied*, 2011-1171 (La. 9/16/11); 69 So.3d 1149. For liability to attach under a duty-risk analysis, a plaintiff must prove five separate elements: (1) the defendant had a duty to conform his conduct to a specific standard of care; (2) the defendant failed to conform his conduct to the appropriate standard; (3) the defendant's substandard conduct was a cause in fact of the

plaintiff's injuries; (4) the substandard conduct was a legal cause of the plaintiff's injuries; and (5) actual damages. *Id.* A negative answer to any of the inquiries of the duty-risk analysis results in a determination of no liability. *Id.*

Mr. Stollenwerck argues that a special relationship exists between Mr. Ehret and Mr. Schweggman, which would give rise to a duty to protect Ryse. Louisiana jurisprudence makes clear that there is no duty to protect against or control the actions of a third party that causes physical injury to another unless a special relationship exists to give rise to such a duty. *Blacklege*, 960 So.2d at 103. Courts traditionally have found such relationships to exist between parent and child; employer and employee; carrier and passenger; innkeeper and guest; shopkeeper and business visitor; restauranteur and patron; jailer and prisoner; and teacher and pupil. *Id.* None of these special relationships exist between Mr. Ehret and Mr. Schweggman.

Mr. Stollenwerck further argues that Mr. Ehret's own negligence led in part to Ryse's injuries. According to Mr. Stollenwerck, Mr. Ehret was aware of Mr. Schweggman's employment history, and thus Mr. Ehret knew or should have known that Mr. Schweggman had no experience caring for a five-year-old autistic child. However, Mr. Ehret testified in his deposition that as of the time of the accident, Mr. Ehret was unaware that Ryse or Ryse's mother were living in the Bush residence. Mr. Ehret further had no knowledge of Mr. Schweggman's activities with the children. Mr. Ehret did not know the severity of Ryse's condition, nor did he know that Mr. Schweggman was baby-sitting Ryse on the day of the accident. Considering these facts, we find that Mr. Ehret owed no duty to Ryse Stollenwerck. This assignment of error lacks merit.

DECREE

For the above and foregoing reasons, the judgment of the Twenty-Second Judicial Court is affirmed. Costs of this appeal are assessed to Appellant, Justin Stollenwerck, individually and as natural tutor on behalf of his minor son, Ryse Stollenwerck.

AFFIRMED.