NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2018 CA 0653

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 granting John Ehret'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 stopped spinning Seth and saw Ryse sitting down next to them. Mr.

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

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 around 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.

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

[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.

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 the allegations that Scottsdale was Mr. Ehret's (and Mr. Schweggman's) liability insurer and the insurer of the Bush home.

On November 29, 2016, Mr. Ehret answered Mr. Stollenwerck's claim for damages, as amended by his first and second supplemental and amending petitions. Mr. Ehret admitted that he was the owner of the Bush home and that he was insured by Scottsdale, but denied liability. On August 7, 2017, Mr. Ehret filed a motion for summary judgment. Mr. Ehret primarily argued that he owed no legal duty to Ryse, nor did he have a duty to supervise Ryse or Mr. Schweggman.

On August 18, 2017, Mr. Stollenwerck opposed Mr. Ehret's motion for summary judgment, alleging that genuine issues of fact existed regarding whether Mr. Ehret was Mr. Schweggman's employer and whether a special relationship existed between the two.

On January 16, 2018, the trial court signed its judgment granting Mr. Ehret's motion for summary judgment. In its written reasons for judgment, the trial court explained that Mr. Ehret had no duty to protect Ryse against Mr. Schweggman's actions. The trial court also found that Mr. Ehret was not Mr. Schweggman's employer. This appeal followed.

ASSIGNMENTS OF ERROR

Mr. Stollenwerck assigns the following as error:

> (1) In granting summary judgment in favor of Defendant/Appellee Ehret, the District Court erred in finding that no employer-employee relationship existed between Defendant/Appellee Ehret and Defendant Schweggman.

(2) In granting summary judgment in favor of Defendant/Appellee Ehret, the District Court erred in finding that 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 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 no employer-employee relationship existed between Mr. Ehret and Mr. Schweggman. Specifically, Mr. Stollenwerck alleges that Mr. Schweggman is Mr. Ehret's "residence employee," 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.

Mr. Ehret argues in his appellate brief that Mr. Stollenwerck failed to plead that Mr. Schweggman was Mr. Ehret's "residence employee" at the trial court level, and thus, Mr. Stollenwerck cannot assert the "residence employee" argument on appeal. Mr. Ehret is correct. Mr. Stollenwerck did not assert a "residence employee" argument in the present case until he filed his appellate brief. Therefore, we will not consider the "residence employee" argument in this appeal.[3] See *Johnson v. State*, 2002-2382 (La.

[3] We note that Mr. Stollenwerck did assert the "residence employee" argument in the accompanying appeal. As such, we discussed this argument in the companion opinion– 2018 CA 0652 – handed down on the same date as this opinion.

5/20/03); 851 So.2d 918, 921 ("We cannot consider contentions raised for the first time in this court which were not pleaded in the court below and which the district court has not addressed").

Mr. Stollenwerck's argument regarding whether an employer-employee relationship exists between Mr. Ehret and Mr. Schweggman 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. 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 any money 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. This assignment of error lacks merit.

Assignment of Error #2

In his second 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 that Ryse was autistic, 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.