STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1739

RKL Landholding, LLC,
Appellant,

vs.

Kevin James,
Respondent.

Filed May 20, 2013
Affirmed
Johnson, Chief Judge

Ramsey County District Court
File No. 62-CV-10-6918

Kirk M. Anderson, Anderson Law Firm, PLLC, Minneapolis, Minnesota (for appellant)

Lawrence M. Rocheford, Michael P. Goodwin, Jardine, Logan & O'Brien, P.L.L.P., Lake Elmo, Minnesota (for respondent)

Considered and decided by Johnson, Chief Judge; Peterson, Judge; and Chutich, Judge.

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

JOHNSON, Chief Judge

A vacant building was damaged by a night-time fire, which the fire department determined was caused by arson. On the day of the fire, a contractor was performing

repairs and renovation in the building. The owner of the building sued the contractor, alleging that the contractor negligently failed to prevent the arsonist from entering the building and starting the fire. The district court entered summary judgment in favor of the contractor on the ground that the contractor did not owe a duty to the building owner to prevent the arson. We agree that no duty was owed and, therefore, affirm.

FACTS

RKL Landholding, LLC is a Minnesota company solely owned by Emad Abed. RKL owns a vacant two-story commercial building on University Avenue in St. Paul. In March 2008, RKL hired Kevin James to perform repairs and improvements inside the building.

It is undisputed that, at some point during James's work on the property but before the fire, an unidentified person broke into the building through a rear door. Nothing was stolen during that break-in, and nothing was damaged except the lock on the rear door. The damaged lock forced James to use a make-shift method to secure the rear door after the break-in. The record is unclear and somewhat inconsistent as to exactly how James did so. Abed believes that James nailed sheets of plywood over the door. James's testimony indicates that he drove nails at an angle through the edge of the door and into the door jamb.

During the evening of April 4, 2008, the St. Paul Fire Department responded to a report of a fire in the building. Upon arrival, firefighters observed heavy smoke and flames coming out of the south windows on the second floor of the building. Fire

department investigators determined that an unidentified person intentionally set fire to the building. Investigators determined that the unknown arsonist used gasoline as an accelerant. Investigators also determined that the unknown arsonist likely entered the building through a damaged rear door. Neither party to this case has introduced any evidence to contradict the conclusions of the fire department's investigation.

Since the fire, James has offered conflicting statements concerning the events of April 4. Shortly after the fire, James signed a document, which Abed prepared, that is entitled "Incident Narrative Report." The document states that James forgot to board up the rear door on April 4. The document also states, "Boarding up that door was the only security that door would have had because it didn't have any locks and it wasn't secured except with a board." The document also purports to concede James's responsibility for the fire:

> I believe leaving the door open was my mistake and I take full responsibility for the consequences of that action . . . . I know it was negligent on my part but that wasn't my intention as stated above I will take the responsibility for that action and forward this incident to my insurance carrier in efforts to remedy the situation and the Ownership can be compensated for their losses.

In February 2010, RKL commenced this action against James. RKL's complaint alleged one count of negligence based on James's alleged failure to secure the property and to remove gasoline from the property. In his deposition, James testified that he did *not* leave the door unsecured and that he was *not* responsible for the fire. After his deposition, however, James sent the district court two letters in which he stated that he

had been pressured into giving false statements in his deposition. In the letters, James again acknowledged his own negligence and responsibility for leaving the rear door unsecured. He stated that he and his crew used the rear door throughout the day to remove debris from the building. He further stated that he was preoccupied as he was leaving that day and "overlooked" securing the rear door. He stated that his failure to lock the rear door resulted in "vandals" entering the building and starting the fire.

In June 2012, James moved for summary judgment. In July 2012, the district court granted the motion. The district court reasoned that, despite James's admissions of responsibility, there were no genuine issues of material fact because James had no duty under the common law to prevent harm caused by the criminal conduct of a third-party. RKL appeals.

D E C I S I O N

A district court must grant a motion for summary judgment if the evidence demonstrates "that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. A genuine issue of material fact exists if a rational trier of fact, considering the record as a whole, could find for the non-moving party. *Frieler v. Carlson Mktg. Grp., Inc.*, 751 N.W.2d 558, 564 (Minn. 2008). This court applies a *de novo* standard of review to the district court's legal conclusions on summary judgment, and we view the evidence in the light most favorable to the non-moving party. *RAM Mut. Ins. Co. v. Rohde*, 820 N.W.2d 1, 6 (Minn. 2012).

RKL argues that the district court erred by reasoning that James did not have a duty to protect its vacant building. A plaintiff in a negligence action must prove each of the four elements of a negligence claim: (1) the existence of a duty, (2) a breach of that duty, (3) damages, and (4) causation. *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 672 (Minn. 2001). The district court granted James's summary judgment motion on the ground that RKL could not establish the first element of its negligence claim. This court applies a *de novo* standard of review to the legal question whether a duty exists. *Id.*

As a general rule, a person has no duty to protect another person from the harmful conduct, including criminal conduct, of a third person. *Donaldson v. Young Women's Christian Ass'n of Duluth*, 539 N.W.2d 789, 792 (Minn. 1995); *Funchess*, 632 N.W.2d at 673. An exception to the general rule may apply if there was a "special relationship" between the parties and if the risk of harm was foreseeable. *Funchess*, 632 N.W.2d at 673. But the "special relationship" exception is a narrow one; it has been recognized "only on the part of common carriers, innkeepers, possessors of land who hold it open to the public, and persons who have custody of another person under circumstances in which that other person is deprived of normal opportunities of self-protection." *Donaldson*, 539 N.W.2d at 792.

RKL contends that James had a duty that was breached because of a "special relationship." RKL has not cited any authority for the proposition that a special relationship exists between an owner of commercial real property (especially commercial real property with a vacant building) and a contractor performing improvements to the

property. It appears that the Minnesota appellate courts never have considered whether a contractor-owner relationship is a "special relationship" giving rise to a duty by the contractor to protect the property owner from damage to property caused by third parties. The supreme court has expressed reluctance to expand on the exceptions to the general rule. *See, e.g., Erickson v. Curtis Inv. Co.*, 447 N.W.2d 165, 168 (Minn. 1989). Expanding the scope of exceptions to the general rule is especially problematic in cases with parties who are engaged in a business relationship, which naturally provides an opportunity to allocate duties and risk through contracts. *See Funchess*, 632 N.W.2d at 674.

In personal injury cases, the supreme court has required a plaintiff to satisfy each of the following requirements to establish a special relationship: (1) the victim entrusted his safety to the alleged tortfeasor; (2) the alleged tortfeasor accepted that entrustment; and (3) the alleged tortfeasor was in a position to, and should have been expected to, protect the victim from criminal attack. *Id.* at 673 (citing *Erickson*, 447 N.W.2d at 168). This court has applied the three-part *Erickson-Funchess* test to a case concerning damage to real property on only one occasion. *See United Products Corp. of Am., Inc. v. Atlas Auto Parts, Inc.*, 529 N.W.2d 401, 404 (Minn. App. 1995). The *United Products* opinion is not analogous to the present case because the two parties in that case essentially had no relationship with each other; the parties simply owned adjoining parcels of real property. *Id.* Nonetheless, *United Products* does require us to apply the three-part *Erickson-Funchess* test to determine whether a special relationship should be recognized in this

case. In applying the three-part test, we focus on the particular criminal conduct that caused injury to RKL. *See Spitzak v. Hylands, Ltd.*, 500 N.W.2d 154, 157 (Minn. App. 1993), *review denied* (Minn. July 15, 1993). Given the facts of this particular case, we must consider whether a special relationship exists between an owner of a vacant commercial building and a contractor who was hired to perform improvements to the vacant building.

We need not analyze the first and second requirements of the three-part *Erickson-Funchess* test because RKL cannot establish the third requirement, *i.e.*, that James was in a position to, and should have been expected to, protect RKL's vacant commercial building from arson. *See Funchess*, 632 N.W.2d at 673. Because RKL was the owner of the building, it must have the primary responsibility for protecting its own property against arson. Yet RKL did not maintain a working lock on the rear door, which apparently was the arsonist's point of entry. James cannot be expected to compensate for the lack of a working lock by engaging in the unduly cumbersome process of nailing exterior doors closed after each business day. *See Erickson*, 447 N.W.2d at 169 (applying cost-benefit analysis to determine existence of duty). Furthermore, RKL's building was vacant, which meant that James had fewer reasons to take steps to prevent a break-in because there was no personal property to preserve and there were no human occupants to protect. To impose a duty on James in these circumstances would tend to make James an insurer of RKL's general risks of ownership of a vacant commercial building. If RKL expected James to protect the vacant building against arson, RKL

should have obtained James's agreement to do so. *See Funchess*, 632 N.W.2d at 674. Thus, RKL cannot satisfy the third requirement of the three-part *Erickson-Funchess* test.

We conclude that a special relationship did not exist between RKL and James so as to impose a duty on James to protect RKL's vacant building from arson. In light of that conclusion, we need not address RKL's argument that the arson was foreseeable. *See H.B. by Clark v. Whittemore*, 552 N.W.2d 705, 709 n.5 (Minn. 1996). Therefore, the district court did not err by granting James's motion for summary judgment.

Affirmed.