STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2000

N. G., et al.,
Appellants,

vs.

Nacel Open Door, Inc., et al.,
Respondents.

Filed July 8, 2013
Affirmed
Smith, Judge

Hennepin County District Court
File No. 27-CV-11-17037

Morgan Smith, Richard Raver, Smith & Raver, LLP, Minneapolis, Minnesota (for appellants)

Nicole L. Brand, Kathleen Ghreichi, Meagher & Geer, PLLP, Minneapolis, Minnesota (for respondents)

Considered and decided by Peterson, Presiding Judge; Chutich, Judge; and Smith, Judge.

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

SMITH, Judge

Appellants, two parents and their minor children, challenge the summary-judgment dismissal of their negligence claim. The claim arises from the sexual abuse perpetrated against one of the children by a foreign-exchange student who was placed in

appellants' home by respondents. Appellants challenge the district court's determination that respondents owned them no duty because there was no special relationship and the harm was not foreseeable. Additionally, appellants request that we expand the special-relationship doctrine to include situations such as the present matter. We conclude that the district court did not err in its determination that there was no duty between the parties and properly granted summary judgment. Also, under the circumstances presented here, we decline to alter Minnesota's definition of a special relationship. Therefore, we affirm.

FACTS

In October 2009, respondents Nacel Open Door, Inc. and related entities (collectively "Nacel") placed T.E. with appellants John and Jane Doe and the Does' three minor children.[1] T.E. was a high school student who traveled to the United States from Mongolia through the Nacel program as a foreign-exchange student. T.E.'s application to the Nacel foreign-exchange program required that he disclose extensive information about himself. Nacel collected T.E.'s biographical, parental, academic, and medical information. Nacel also procured school and teacher recommendations and a letter written by T.E. to his potential host family. A Nacel representative interviewed T.E., "proudly" recommended T.E. as a foreign-exchange student, and noted being "very happy with him."

[1] The appellant family will be referred to as the Does, in accordance with the district court's protective order.

As part of the Does' application process to host a student, they provided Nacel with their biographical information, interests, and student placement preference. The Does also provided Nacel with references for Nacel to contact, as well as written recommendations from friends. Nacel then visited the Does and conducted an interview, inquiring into their lifestyle, values, and evaluating the environment that a student would potentially live in. The interviewer described the Does as a "caring [and] loving family." To comply with federal law, Nacel also performed criminal background checks on John and Jane Doe.

T.E. moved into the Doe home in October 2009. In December 2009, T.E. sexually assaulted one of the Doe children in T.E.'s bedroom at the Does' home. John and Jane Doe did not learn of the sexual abuse until June, months after T.E. had moved out of their house and in with another host family. After the Does reported the assault, T.E. was questioned by police. During questioning, T.E. confessed that he had locked one of the Doe children in his bedroom and instructed the child to lie on the bed. T.E. then placed his penis in the child's mouth. It appears that another Doe child, knowing that a sibling was in the room with T.E., then charged the bedroom door, which broke the door's lock.[2] T.E. also revealed to police that, when he was a child in Mongolia, a man had sexually assaulted him in T.E.'s home, in the same manner that T.E. assaulted the Doe child.

[2] After the assault occurred, T.E. reported the broken lock to Nacel, explaining that, "One of the little [Doe children] broke the door to my room trying to come in. Now the lock is broken. [The child] thought [the child's sibling] was in my room when [the child] wasn't."

After a stipulated-facts trial, T.E. was adjudicated delinquent for committing first-degree criminal sexual conduct and deported to Mongolia.

In May 2011, the Does initiated this negligence action against Nacel. The complaint alleged that Nacel undertook a duty to exercise reasonable care to protect the Does and that Nacel represented that any student placed with the Does would be "absolutely safe in homes with small children." The Does alleged that, as a result of Nacel's failure to screen T.E. appropriately, one of the Doe children was sexually abused and that child and the rest of the family suffered harm and distress. Nacel moved for summary judgment. In an affidavit opposing summary judgment, Jane Doe stated that the extensive screening of the host family led her to believe that the students underwent similar screening. She alleged that if Nacel had informed her family that it did not screen the students for criminal history or inquire into each student's sexual history and exposure to sexual abuse, she and her family would not have hosted a foreign-exchange student.

The district court granted summary judgment in favor of Nacel and dismissed the Does' complaint. In its memorandum, the district court noted that Nacel complied with federal regulations and that none of the extensive information that Nacel collected about T.E. indicated that T.E. was inappropriate for acceptance as an exchange student. The district court highlighted that the Does did not contend that Nacel failed to disclose adverse information about T.E., but instead that Nacel undertook a duty to screen T.E. in a manner that would guarantee the safety of the Does. The district court disagreed and concluded that Nacel did not assume a duty to guarantee the safety of the host family,

that T.E.'s behavior was not foreseeable, and that there was no causal link between Nacel's alleged negligence and the Does' injury. Therefore, the district court determined that the Does' negligence claim failed. This appeal followed.

D E C I S I O N

When reviewing a district court's grant of summary judgment, we review the record to determine whether there is any genuine issue of material fact and whether the district court erred in its application of the law. *Dahlin v. Kroening*, 796 N.W.2d 503, 504 (Minn. 2011). The district court properly grants summary judgment if the pleadings, depositions, answers to interrogatories, affidavits, and admissions on file establish 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. We conduct a de novo review of the district court's summary-judgment decision. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010).

On appeal from summary judgment, we "view the evidence in the light most favorable to the party against whom judgment was granted." *RAM Mut. Ins. Co. v. Rohde*, 820 N.W.2d 1, 6 (Minn. 2012) (quotation omitted). To survive summary judgment, a party must do more than merely raise a metaphysical doubt or rest on mere averments. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). Instead, the nonmoving party must present evidence for each element of his or her claim which sufficient to permit reasonable persons to find in his or her favor. *Id.*

Negligence is broadly defined as "the failure to exercise such care as persons of ordinary prudence usually exercise under such circumstances." *Flom v. Flom*, 291

N.W.2d 914, 916 (Minn. 1980). To establish negligence, a plaintiff must show "(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 of care was a proximate cause of the injury." *Domagala v. Rolland*, 805 N.W.2d 14, 22 (Minn. 2011). If there are no facts in the record that give rise to a genuine issue for trial on any one of these essential elements, summary judgment for the defendant is appropriate. *DLH*, 566 N.W.2d at 71.

In this appeal from the dismissal of their negligence claim and grant of summary judgment in favor of Nacel, the Does argue that the district court erred in its evaluation of the existence of a duty of care. The Does also contend that, if Minnesota law does not support their claim that Nacel owed them a duty in this case, then the current law governing special relationships should be expanded to establish that an organization has a legal duty to the family when it places a person in that family's home. We address each of these arguments in turn.

I.

The Does challenge the district court's conclusion that Nacel was not negligent in its placement of T.E. in the Does' home because no duty was established between the Does and Nacel.

"Duty is a threshold question." *Glorvigen v. Cirrus Design Corp.*, 816 N.W.2d 572, 582 (Minn. 2012). A negligence claim fails if the party bringing the action is unable to establish the existence of a legal duty. *Gilbertson v. Leininger*, 599 N.W.2d 127, 130 (Minn. 1999). Whether a duty exists is a legal question, which we review de novo. *Id.* Generally, an individual has no duty to protect another from harm. *Bjerke v. Johnson*,

742 N.W.2d 660, 665 (Minn. 2007). But a duty can arise if there is a special relationship between the parties and the harm is foreseeable. *Becker v. Mayo Found.*, 737 N.W.2d 200, 212 (Minn. 2007). Consequently, to determine whether a duty existed necessitates our addressing both whether a special relationship existed between Nacel and the Does, and whether the harm was foreseeable.

A. Special Relationship

The Does contend that Nacel's informational brochures and marketing materials contain statements regarding Nacel's screening of students that are sufficient to create a special relationship with the Does. These statements, the Does argue, demonstrate that Nacel assumed a duty to protect the Does from T.E.

"To reach the conclusion that a special relationship exists, it must be assumed that the harm to be prevented by the defendant is one that the defendant is in a position to protect against and should be expected to protect against." *Donaldson v. Young Women's Christian Ass'n of Duluth*, 539 N.W.2d 789, 792 (Minn. 1995). Special relationships are created in situations such as (1) between common carriers and customers, parents and children, masters and servants, land possessors and invitees; (2) when an individual has custody of another and the other person is deprived of normal opportunities for protection; and (3) when an individual assumes responsibility for a duty owed by another individual to a third-party. *Bjerke*, 742 N.W.2d at 665. The third type of special relationship is at issue here.

The Minnesota Supreme Court examined the third type of special relationship in *Walsh v. Pagra Air Taxi, Inc.*, 282 N.W.2d 567, 570-71 (Minn. 1979). *See Bjerke*, 742

N.W.2d at 665, 667 (emphasizing that *Walsh* examined the third type of special relationship). *Walsh* involved a private company that offered general aviation support under contract with the City of Mankato. *Walsh*, 282 N.W.2d at 569. The litigation arose after the company failed to produce the requisite firefighting equipment when a plane caught fire. *Id.* at 570. The *Walsh* court held that, because the record established that the pilot relied on the airport fire-protection service, negligence could be apportioned to Mankato for the aviation-support company's failure to provide methods to extinguish the fire. *Id.* at 570-71. In reaching this conclusion, *Walsh* described the third type of special relationship and held that one has a duty to act when:

> One . . . undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Id. (quotation omitted). Under the terms of the aviation company's operating agreement with Mankato, the aviation company was required to have firefighting equipment available, including a fire truck. *Id.* at 569. When the fire broke out, the fire truck was unable to exit the garage and the employees were unable to assist with the fire, so that by the time the fire was extinguished, the airplane was "reduced to salvage value." *Id.* at 570.

The Does do not persuasively support their contention that they have a special relationship with Nacel. The Does fail to explain how, exactly, they meet the special-relationship test described in *Walsh*. Instead, the Does assert generally that Nacel's brochures and other materials led them to believe that the student screening included questions about each student's sexual history and exposure to sexual abuse. The Does highlight language from a "frequently asked questions" document in which Nacel represents that the students are insured. In that document, Nacel states: "Our Students are fully covered by health and accident insurance. In addition, Nacel Open Door is insured, per Department of State guidelines, and is ultimately responsible for the students while they are in the United States." The materials also represent that there is student screening and that Nacel goes "to great lengths to accept only students who [Nacel] believe[s] will be positive role models, are emotionally equipped to participate in our program, are good students[,] and well behaved."

These statements support that Nacel works to ensure they do not place students who will be predisposed to cause problems or be overwhelmed when abroad. But nothing in the materials insulates the family from exposure to criminal activity. The materials do not express that the students are subjected to criminal background checks or asked whether they has been sexually abused. Nor do the materials make any guarantee that the students will not engage in criminal behavior. Instead, the materials describe that the host families are screened and that each person in the host family 18 years of age or older is required to submit to a criminal background check. No similar statements are used to discuss student background checks or inquiry into a student's sexual exposure.

Therefore, if the Does relied on Nacel's statements to mean each student was questioned about his or her sexual habits and was guaranteed not to have been sexually abused, their reliance was unfounded.

The Does do not challenge Nacel's compliance with federal regulations governing foreign-exchange students. *See generally* 22 C.F.R. § 62.25 (2009) (describing the federal requirements for foreign-exchange students who are hosted by American families and the requirements for the programs that sponsor the foreign students). At the summary-judgment hearing, the Does conceded that no evidence in the record suggests that T.E. had a criminal record, and admitted they have no knowledge that T.E. was involved previously in criminal activity. The federal regulations mandate a criminal background check, including a search of the National Sex Offender Public Registry, for any host family household member over the age of 18 years of age, and any volunteer or employee acting on the sponsor's behalf. *Id.* § 62.25(d)(1), (j)(7). Such a background check is not required by federal regulations for a visiting student.

Notably, the Does concede that "under present law, absent a parent-child or custodial relationship, Minnesota courts have to date largely declined to extend a duty of care to protect minor children from sexual assault." They add that, although they view the present matter as distinguishable, Nacel's presentation of the law pertaining to special relationships is "a generally accurate characterization" of Minnesota law. Although the Does qualify these statements by noting that they do not wish to have their duty-of-care arguments discounted, they are correct that Minnesota courts traditionally have been hesitant to find the existence of a special relationship in a number of instances. *See, e.g.*,

Becker, 737 N.W.2d at 213 (finding no special relationship between hospital and child because hospital "did not exercise control over [the child's] daily welfare"); *H.B. by Clark v. Whittemore*, 552 N.W.2d 705, 708-09 (Minn. 1996) (concluding that a trailer park manager did not have duty to report to outside authorities that children residing in the park were being sexually abused); *Donaldson v. Young Women's Christian Ass'n of Duluth*, 539 N.W.2d 789, 793 (Minn. 1995) (determining that that YWCA owes no duty to prevent residents from committing suicide because the YWCA has no custody or control of its guests and guests have no dependence on that YWCA); *Harper v. Herman*, 499 N.W.2d 472, 474-75 (Minn. 1993) (concluding that there was no special relationship between a boat owner and his guest, and so there was no duty for the boat owner to warn of the dangers of diving in shallow water).

We conclude that there is no special relationship between the Does and Nacel. This is particularly true in consideration of the supreme court's directive that, "[t]o reach the conclusion that a special relationship exists, it must be assumed that the harm to be prevented by the defendant is one that the defendant is in a position to protect against and should be expected to protect against." *Donaldson*, 539 N.W.2d at 792. The Does failed to convince us of this. Although Nacel has a legal responsibility to gather certain information during the application process, it is not in the position to protect against all criminal activity that its students may engage in.

B. Foreseeability

The second prong of the test to establish duty examines whether the injury was foreseeable. The Does argue that the harm was foreseeable, citing a case from our court

arising out of allegations that a foreign-exchange student sexually abused and assaulted members of his host family. *See H.A.W. v. Manuel*, 524 N.W.2d 10, 12 (Minn. App. 1994), *review denied* (Minn. Jan. 13, 1995). But we need not examine foreseeability when there is no special relationship. *See Anders v. Trester*, 562 N.W.2d 45, 48 (Minn. App. 1997). Because there was not a special relationship between the Does and Nacel, there was no duty. *See Becker*, 737 N.W.2d at 212 (noting that duty requires both a special relationship *and* a foreseeable harm). Even had we found a special relationship between the parties, the Does' claim that Nacel had a duty to protect them from harm would fail on the requirement that the injury be foreseeable.

No duty exists unless the injury suffered is foreseeable. *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 888 (Minn. 2010). When determining whether a danger is foreseeable, we evaluate whether the specific danger was objectively reasonable to expect, not simply whether it was within the realm of any conceivable possibility. *Whiteford by Whiteford v. Yamaha Motor Corp., U.S.A.*, 582 N.W.2d 916, 918 (Minn. 1998). To determine whether an injury was foreseeable, we examine the defendant's conduct and ask whether it was objectively reasonable to expect the specific danger causing the plaintiff's injury. *Domagala*, 805 N.W.2d at 27. "If the connection between the danger and the alleged negligent act is too remote to impose liability as a matter of public policy, the courts then hold there is no duty." *Id.* (quotation omitted).

Based on the definition of foreseeable injury under Minnesota law, we conclude that the Does have failed to establish that T.E.'s sexual abuse of the Doe child was foreseeable. Nothing in T.E.'s application or interview portrays him as a danger to young

children. The application materials indicated that he had a positive relationship with his parents and younger siblings, his grades ranged from "above average" to "excellent," his school rated his emotional stability, maturity, and potential as an exchange student as "excellent," the interviewer rated T.E.'s relationship with his family members as "respectful and close" and described T.E. as "very mature" and "courteous [and] well-mannered." The interviewer continued by rating him overall as "an exceptionally desirable candidate."

The Does argue that, because foreign-exchange students have been accused of sexually assaulting members of their host families in the past, the screening should have included questions about T.E.'s sexual history and whether he had been sexually abused. But the Does cite no authority legally obligating Nacel to request information about T.E.'s past sexual history or abuse. Instead, they concede that Nacel fulfilled its legal requirements. We analyze whether "the specific danger was objectively reasonable to expect, not simply whether it was within the realm of any conceivable possibility." *Whiteford*, 582 N.W.2d at 918. The fact that a foreign-exchange student was accused of sexually assaulting a member of a host family under distinguishable circumstances is insufficient to demonstrate that it was objectively reasonable for Nacel to expect the specific danger that occurred in the present matter. Therefore, the conduct was not foreseeable.

Without duty, there can be no finding of negligence. Because there was not a special relationship between Nacel and the Does, and because the harm caused by T.E. was not foreseeable, we affirm the district court's grant of summary judgment.[3]

II.

The Does next argue public policy and the implications of the current Minnesota law regarding special relationships. They request that we "create new law [because] . . . the existing law is outdated and inadequate." Specifically, the Does ask us to "expand the definition of a 'special relationship,' [in order] to establish a legal duty of due care in all circumstances in which an organization or agency selects and places a stranger into a host family's home."

First, we note that it is not generally our role to create new law or extend the current law. *See Stubbs v. N. Mem'l Med. Ctr.*, 448 N.W.2d 78, 81 (Minn. App. 1989) (stating that it is not the function of the court of appeals to create new causes of action), *review denied* (Minn. Jan. 12, 1990); *see also Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987) (stating that "the task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court"), *review denied* (Minn. Dec. 18, 1987).

[3] Although Nacel discussed causation in their brief, the Does do not challenge causation. To prove proximate causation, there must be a showing that "the defendant's conduct was a substantial factor in bringing about the injury." *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995) (quotation omitted). Because the Does failed to satisfy the duty prong of their negligence claim, and because they do not clearly challenge cauation on appeal, we decline to continue the negligence analysis by considering causation. *See Domagala*, 805 N.W.2d at 22 (stating that the threshold question for a negligence claim is the existence of a duty, and without a duty, the negligence claim fails).

Second, Nacel properly identifies that the Does did not request that the district court expand the meaning of special relationship, nor did the district court consider such a request. Generally, we will not consider matters not argued to and considered by the district court. *Thiele v. Stich,* 425 N.W.2d 580, 582 (Minn. 1988).

Finally, the Does' public policy argument would fail even if we were to consider it on its merits. The sole authority that the Does cite to support expanding the duty to protect another from criminal harm is *Erickson v. Curtis Inv. Co.*, in which the supreme court held that the parking ramp's owner had a duty to deter criminal activity on its premises. *See* 447 N.W.2d 165, 169-70 (Minn. 1989).[4] However, *Erickson* specifically declined to impose a duty on business enterprises in general, and instead relied heavily on the unique features of the parking ramp that permitted criminal activity: it was large, dimly lit, and provided numerous places to lurk in an area known for its high crime. *Id.* at 169. *Erickson* also stated that "[a] mere merchant-customer relationship is not enough to impose a duty on the merchant to protect [its] customers. *Id.* at 168. Moreover, *Erickson* has regularly been distinguished on its facts. *See, e.g.*, *Anders*, 562 N.W.2d at 48 (affirming the district court's conclusion that Taco John's restaurant had no duty to protect an assault victim because, unlike the parking ramp in *Erickson*, "Taco John's was an open building that did not provide places for criminals to hide or lurk"); *Errico v.*

[4] "The court in *Erickson* examined the following basic public policy considerations: (1) the prevention of crime is a governmental function that should not be shifted to the private sector; (2) imposition of a duty to protect against the unpredictable conduct of criminals does not lend itself easily to an ascertainable standard of care; and (3) the most effective crime deterrent may be cost prohibitive for both the property owner and customer." *Errico v. Southland Corp.*, 509 N.W.2d 585, 587-88 (Minn. App. 1993), *review denied* (Minn. Jan. 27, 1994).

Southland Corp., 509 N.W.2d at 588 (concluding that a convenience store owed no duty to victim assaulted in parking lot because, unlike the parking ramp in *Erickson*, the parking lot was open, well-lit, and next to busy public street). *Erickson* is equally distinguishable from the present case and does not support the expansion of the special-relationship doctrine that the Does request. Because the sole authority raised by the Does is distinguishable in light of their failure to present this argument to the district court, we decline to expand Minnesota law regarding special relationships.

Affirmed.