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Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0036

Troy David Mack,
Appellant,

vs.

Blake Azurin Martin,
Respondent,

William Azurin Martin,
Respondent,

Ian Alexander Stinson,
Respondent.

Filed August 8, 2022
Reversed and remanded
Johnson, Judge

Carver County District Court
File No. 10-CV-19-1046

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Considered and decided by Johnson, Presiding Judge; Worke, Judge; and Ross, Judge.

NONPRECEDENTIAL OPINION

JOHNSON, Judge

Three men engaged in target-shooting on rural property in Carver County. One of the three men fired a bullet that struck a motorcyclist approximately one-quarter to one-third of a mile from the shooting range. The motorcyclist sued the three men, alleging negligence. The two defendants who did not shoot the plaintiff filed motions for summary judgment, and the district court granted the motions. We conclude that the district court erred by granting the summary-judgment motions because there are genuine issues of material fact as to whether the two movants owed a duty of care to the plaintiff and whether their actions were a proximate cause of the plaintiff's injuries. Therefore, we reverse and remand for further proceedings.

FACTS

In June 2019, Blake Azurin Martin lived on a rural 30- to 40-acre lot in Carver County. In the early evening of June 25, 2019, he and two others—his father, William Azurin Martin, and his step-cousin, Ian Alexander Stinson—gathered at his home to engage in target-shooting. Blake and William had suggested that the group do target-shooting at Blake's before going out to dinner to celebrate William's wife's birthday. Blake wanted to practice target-shooting because he was planning to take a firearms examination to qualify for employment as a police officer.

Blake had done target-shooting on his property on three prior occasions, once with William. On the prior occasions, the targets were cans and metal spinner targets that were set on the ground or low to the ground in front of a stack of logs. On this occasion, Blake,

William, and Ian shot at a paper target with a printed human silhouette, which William provided. Blake stacked logs close together to create a base that was three to four feet high. William may have helped Blake add logs to the base; there is conflicting evidence as to whether he did so.[1] Ian and Blake found a used sheet of plywood, which was five-eighths of an inch in thickness, to hold the paper target. The plywood sheet was wedged between logs in the base so that the plywood sheet would stand up vertically. Ian helped staple the paper target to the plywood sheet. The top of the log base was below the center of the target's silhouette.

Behind the target was a heavily wooded area. Before the men began shooting, William's wife asked about the direction in which the group planned to shoot. Blake used a map application on his cell phone to determine the orientation of the shooting range and determined that the group would not be shooting toward nearby county road 40. William also looked at the map on Blake's cell phone and agreed that the group would be shooting away from the road.

The group stood approximately 47 feet from the target when shooting. Blake, William, and Ian used their own respective firearms and ammunition, and each shot

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[1]Blake initially testified in his deposition that he alone assembled the log base, but he later testified that William "could have" helped him with the placing of the logs. Ian testified in his deposition that William and Blake set up the shooting range but did not provide specifics about which of them performed which steps of the process. William testified in his deposition that he remained inside Blake's home while Blake and Ian set up the shooting range. In his subsequent criminal case, Blake stated under oath that he and his father assembled the target, which included stacked logs and a sheet of plywood. In William's criminal case, he stated under oath that he agreed with "every one" of Blake's answers and stated that he "set up the target" in a reckless manner.

approximately 12 to 15 rounds. Ian shot first, at approximately 6:09 p.m., using a CZ 75 P-01 nine-millimeter pistol. Blake shot second, at approximately 6:11 p.m., using a Glock 19 nine-millimeter pistol. William shot third, from approximately 6:11 to 6:14 p.m., using an HK USP 40-caliber pistol. Ian's fiancée then shot four rounds at approximately 6:15 p.m., using Ian's pistol.

Shortly after the shooting began, a man arrived at Blake's home in a vehicle and informed the group that a person on county road 40 had been struck by a bullet that apparently had been fired by one of them. Troy David Mack had been driving his motorcycle on county road 40, approximately one-quarter to one-third of a mile from the shooting range, when a bullet struck him in his upper chest. A person who stopped to assist Mack called 911 at 6:13 p.m. Based on forensic testing by law enforcement and the timing of the 911 call, all parties agree that Blake fired the bullet that struck Mack.

The state later charged Blake, William, and Ian with felony intentional discharge of a firearm, in violation Minn. Stat. § 609.66, subd. 1a(a)(2) (2018), and misdemeanor reckless discharge of a firearm, in violation of Minn. Stat. § 609.66, subd. 1(a)(1). All three men entered into plea agreements in which they pleaded guilty to the misdemeanor offenses and the state dismissed the felony charges.

In October 2019, Mack commenced this action against Blake, William, Ian, and Ian's fiancée. Mack alleged one count of negligence against each defendant. Mack later stipulated to the dismissal of Ian's fiancée.

In May and June of 2021, William and Ian filed motions for summary judgment. Both William and Ian argued that they did not owe a duty of care to Mack. Ian also argued

that his actions were not a proximate cause of Mack's injuries and that he was not engaged in a joint enterprise with Blake. In September 2021, the district court filed an order in which it granted the motions. The district court reasoned that William's and Ian's actions were not a proximate cause of Mack's injuries and that William and Ian were not engaged in a joint enterprise with Blake. Mack appeals.

DECISION

Mack argues that the district court erred by granting William's and Ian's motions for summary judgment. A district court must grant a motion for summary judgment "if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.01. A genuine issue of material fact exists if a rational trier of fact, considering the record as a whole, could find for the nonmoving 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 a district court's legal conclusions and views the evidence in the light most favorable to the nonmoving party. *Staub as Trustee of Weeks v. Myrtle Lake Resort, LLC*, 964 N.W.2d 613, 620 (Minn. 2021).

"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). "A defendant in a negligence action is entitled to summary judgment when the record reflects a complete lack of proof on any of the four elements necessary for recovery: (1) the existence of a duty of care, (2) a breach of that duty, (3) an injury, and (4) the breach of that duty being the proximate cause of the injury." *Fenrich v. Blake School*, 920 N.W.2d 195, 201 (Minn. 2018) (quotation omitted).

In his principal brief, Mack argues that the district court erred in its analysis of the issues of proximate cause and joint enterprise. Mack contends that William's and Ian's actions in assembling the shooting range were a proximate cause of his injuries and that William, Ian, and Blake were engaged in a joint enterprise. In response, William and Ian argue that the district court did not err with respect to those two issues. In addition, William and Ian argue that the district court's summary judgment may be affirmed on an alternative ground: that neither of them owed a duty of care to Mack. William and Ian presented that argument to the district court, but the district court did not discuss or resolve the duty-of-care issue because it determined that summary judgment was appropriate for other reasons. An appellate court "may affirm a grant of summary judgment if it can be sustained on any ground" that was argued to the district court. *Doe 76C v. Archdiocese of St. Paul*, 817 N.W.2d 150, 163 (Minn. 2012); *see also Day Masonry v. Independent Sch. Dist. 347*, 781 N.W.2d 321, 331 (Minn. 2010). Because we conclude below that one of Mack's arguments has merit, *see infra* part II, we must consider William and Ian's alternative argument concerning duty of care. Because the "existence of a duty of care is a threshold question," *Doe 169*, 845 N.W.2d at 177, we begin our analysis with that issue.

I. Duty of Care

As stated above, William and Ian argue that they are entitled to summary judgment on the ground that they did not owe a duty of care to Mack.

In general, "a person does not owe a duty of care to another—e.g., to aid, protect, or warn that person—if the harm is caused by a third party's conduct." *Doe 169*, 845 N.W.2d at 177-78 (citing *Delgado v. Lohmar*, 289 N.W.2d 479, 483 (Minn. 1979)). But

this general rule is subject to two exceptions. First, the law may impose a duty of care if "there is a special relationship between a plaintiff and a defendant and the harm to the plaintiff is foreseeable." *Fenrich*, 920 N.W.2d at 201-02 (quotation omitted). Second, the law may impose a duty of care if "'the defendant's own conduct creates a foreseeable risk of injury to a foreseeable plaintiff.'" *Id.* at 202 (quoting *Domagala v. Rolland*, 805 N.W.2d 14, 23 (Minn. 2011)). If either exception applies, "a negligent defendant may be held liable to a plaintiff for harm caused by a third party." *Id.*

A. First Exception: Special Relationship

William and Ian argue that the first exception—the existence of a special relationship—does not apply. Mack does not argue on appeal that a special relationship exists. In Minnesota, special relationships have been recognized only in limited situations, such as relationships between "parents and children, masters and servants, possessors of land and licensees, common carriers and their customers, or people who have custody of a person with dangerous propensities." *Delgado*, 289 N.W.2d at 483-84. In this case, there was no such relationship between William and Ian and Mack. Thus, the first exception does not apply.

B. Second Exception: Defendants' Own Conduct

In their responsive briefs, William and Ian do not specifically address the second exception to the general rule. In his reply brief, Mack argues that William's and Ian's conduct created a dangerous situation because of how they assembled the target and the shooting range. At oral argument, Ian's attorney argued that the second exception does not

apply because William and Ian did not engage in the type of conduct required by the caselaw.

1. Misfeasance or Nonfeasance

To reiterate, the second exception to the general rule applies if "the defendant's own conduct creates a foreseeable risk of injury to a foreseeable plaintiff." *Doe 169*, 845 N.W.2d at 178 (emphasis omitted) (quotation omitted). In this context, the defendant's "own conduct" refers to conduct in the nature of misfeasance, not nonfeasance. *Id.* Misfeasance means "active misconduct working positive injury to others." *Fenrich*, 920 N.W.2d at 203 (quotation omitted). In contrast, nonfeasance means "passive inaction or a failure to take steps to protect others from harm." *Id.* (quotation omitted). A defendant may be held liable for harm caused by a third party if the defendant engaged in misfeasance but not if the defendant engaged in nonfeasance. *Doe 169*, 845 N.W.2d at 178. If the relevant facts are undisputed, the question whether conduct "is misfeasance or nonfeasance is a question of law," but if there are genuine issues of material fact about a defendant's actions or inaction, "a court may not be able to decide the question by summary judgment." *Fenrich*, 920 N.W.2d at 205 n.4.

In this case, there are genuine issues of material fact concerning the distinction between misfeasance and nonfeasance. We must view the evidence in the light most favorable to Mack, the nonmoving party. *Staub*, 964 N.W.2d at 620. Viewed in that light, the summary-judgment record contains evidence from which a factfinder reasonably could find that William's conduct was misfeasance rather than nonfeasance. There is evidence in the record that William "could have" helped Blake stack logs to create a base for the

plywood sheet that held the paper target. The logs were stacked to a height of only three to four feet, which was below the center of the silhouette on the paper target and, thus, too low to stop or slow a bullet shot at the upper part of the target. There also is evidence in the record that William confirmed for the group the appropriateness of the orientation of the shooting range when Blake used a map on his cell phone to determine the location of county road 40. With respect to Ian, there is evidence in the record that he helped Blake select a relatively thin sheet of plywood to be the support for the paper target. In addition, Ian helped staple the paper target to the plywood sheet at a height that was above the log base, which may have affected the trajectory of bullets shot through the target and plywood sheet. William's and Ian's conduct is similar to the conduct of defendants in other cases that the supreme court has characterized as misfeasance. *See Abel v. Abbott Northwestern Hosp.*, 947 N.W.2d 58, 79 (Minn. 2020) (concluding that academic advisor engaged in misfeasance by "knowingly endors[ing] a practicum" that might subject student to unlawful discrimination); *Fenrich*, 920 N.W.2d at 203-04 (concluding that high school coach engaged in misfeasance by assuming supervision of students' travel arrangements); *see also Smits as Trustee for Short v. Park Nicollet Health Servs.*, 955 N.W.2d 671, 681-82 (Minn. App. 2021) (concluding that defendant engaged in misfeasance by accepting plaintiff as patient and providing ongoing care), *rev. granted* (Minn. May 18, 2021).

Thus, the evidence is sufficient to create a genuine issue of material fact as to whether William's and Ian's conduct was misfeasance.

2. Foreseeability

If the defendant's conduct is misfeasance, the next step is to "determine whether that conduct created a foreseeable risk of injury to a foreseeable plaintiff." *Doe 169*, 845 N.W.2d at 178. To determine whether a risk is foreseeable, we consider "whether the specific danger was objectively reasonable to expect, not simply whether it was within the realm of any conceivable possibility." *Fenrich*, 920 N.W.2d at 205 (quotation omitted). "The test is not whether the precise nature and manner of the plaintiff's injury was foreseeable, but whether the possibility of an accident was clear to the person of ordinary prudence." *Domagala*, 805 N.W.2d at 27 (quotation omitted). "If the connection between the danger and the defendant's own conduct is too remote, there is no duty." *Doe 169*, 845 N.W.2d at 178. "'In close cases, the issue of foreseeability should be submitted to the jury.'" *Fenrich*, 920 N.W.2d at 205 (quoting *Domagala*, 805 N.W.2d at 27).

Viewing the evidence in the light most favorable to Mack, a reasonable factfinder reasonably could find that the risk of injury to a person such as Mack was foreseeable. The pertinent question is "whether it was objectively reasonable to expect the specific danger causing the plaintiff's injury," *i.e.*, "whether the possibility of an accident was clear to the person of ordinary prudence." *See Domagala*, 805 N.W.2d at 27 (quotation omitted). Blake testified in his deposition that, based on his gun-safety training, he expected that nine-millimeter bullets would pierce the plywood sheet that held the paper target. He also testified that, based on his gun-safety training, he understood that a nine-millimeter bullet could travel a "few hundred yards," which he clarified to mean between 300 and 500 yards (which equates to between 0.17 and 0.28 of a mile). The evidence also shows that members

of the group were aware of the county road beyond the woods that surrounded the shooting range and that they checked a map on Blake's cell phone in an attempt to avoid shooting in the direction of the county road. The evidence that members of the shooting party actually were aware of the possibility and consequences of a stray bullet is sufficient to allow a reasonable factfinder to find that it was objectively reasonable to expect that shooting at the target might endanger persons traveling nearby on county road 40. This evidence is similar to evidence in other cases that the supreme court has deemed sufficient to allow a finding of foreseeability. *See Delgado*, 289 N.W.2d at 484 (concluding that trespassing hunters should have known of "unreasonable risk of harm to those lawfully on the property"); *Domagala*, 805 N.W.2d at 27 (concluding that reasonable person should expect that shaking of large bucket precariously hanging from skid loader could cause injury to nearby person).

Thus, the evidence is sufficient to create a genuine issue of material fact as to whether the risk of injury to Mack was foreseeable. Therefore, William and Ian are not entitled to summary judgment on the ground that they did not owe a duty of care to Mack.

II. Proximate Cause

Mack argues that the district court erred by concluding, as a matter of law, that William's and Ian's actions were not a proximate cause of his injuries.

To prevail on a negligence claim, a plaintiff must prove, among other things, that a defendant's breach of a duty of care was a proximate cause of his or her injury. *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995). But-for causation, by itself, is insufficient. *George v. Estate of Baker*, 724 N.W.2d 1, 10 (Minn. 2006). A defendant's

negligence must be shown to be a "direct" or "proximate" cause of the resulting injury. *Id.* "[F]or a party's negligence to be the proximate cause of an injury, the injury must be a foreseeable result of the negligent act and the act must be a substantial factor in bringing about the injury." *Staub*, 964 N.W.2d at 620 (alteration in original) (quotation omitted). Typically, proximate cause is a question of fact for the jury. *Id.* at 621; *Curtis v. Klausler*, 802 N.W.2d 790, 793 (Minn. App. 2011). But if "reasonable minds could reach only one conclusion, the existence of proximate cause is a question of law." *Staub*, 964 N.W.2d at 621 (quotation omitted).

The district court concluded that William's and Ian's actions in assembling and composing the shooting range were not a proximate cause of Mack's injuries. The district court reasoned that the proximate cause of Mack's injuries was Blake's independent act of discharging his firearm toward county road 40. The district court reasoned that, with respect to his claims against William and Ian, Mack could prove only but-for causation, which is insufficient. *See George*, 724 N.W.2d at 10.

For purposes of this opinion, we do not disagree with the notion that Blake's actions were a proximate cause of Mack's injuries. But an injury can have more than one proximate cause. *Staub*, 964 N.W.2d at 621, 629. The question is whether—setting aside Blake's actions—William's and Ian's actions were "a substantial factor in bringing about the injury." *See id.* at 620. Viewing the evidence in a light most favorable to Mack, the evidence is sufficient to allow a factfinder to so find. As stated above, there is evidence that William helped Blake assemble the log base that held the plywood sheet with the paper target. There also is evidence that William confirmed Blake's determination that the

shooting range was not oriented toward county road 40. In addition, there is evidence that Ian helped Blake select a sheet of plywood to hold the paper target. Also, there is evidence that Ian helped staple the paper target to the plywood sheet so that the center of the silhouette was above the log base and at a height that might have caused bullets shot through the target and plywood to travel as far as county road 40. This evidence is sufficient to allow a reasonable factfinder to find that William's and Ian's actions were a substantial factor in bringing about Mack's injuries.

Thus, the district court erred by concluding that, as a matter of law, William's and Ian's actions were not a proximate cause of Mack's injuries.

III. Joint Enterprise

Mack also argues that the district court erred by determining that William and Ian should not be held jointly liable with Blake on the ground that the three defendants were engaged in a joint enterprise. Mack's joint-enterprise theory is an alternative to his theory that William and Ian should be held liable based solely on their own conduct.

Participants in a joint enterprise may be held liable for the negligent actions of other participants in the enterprise. *Spannaus v. Otolaryngology Clinic*, 242 N.W.2d 594, 597 (Minn. 1976). To establish the existence of a joint enterprise, a plaintiff must prove "(1) a mutual understanding for a common purpose, and (2) a right to a voice in the direction and control of the means used to carry out the common purpose." *Delgado*, 289 N.W.2d at 482. The second requirement has been interpreted to mean that participants have "an *equal* right to direct and govern the movements and conduct of every other participant with respect to the mutual undertaking." *Id.* (emphasis added). The right to control must relate

to the instrument that caused injury to the plaintiff. *See id.* at 483 (firearm); *Pierson v. Edstrom*, 174 N.W.2d 712, 714 (Minn. 1970) (vehicle); *Ruth v. Hutchinson Gas Co.*, 296 N.W. 136, 141 (Minn. 1941) (brooder house). Physical control over the instrument is not required; rather, "the control required is the legal right to exercise such control." *Murphy v. Keating*, 283 N.W. 389, 392 (Minn. 1939). Legal control "implies an enforceable right to control the movements of another." *Weber by Sanft v. Goetzke*, 371 N.W.2d 611, 616 (Minn. App. 1985), *rev. denied* (Minn. Sept. 26, 1985).

The district court determined that there was no joint enterprise because William and Ian did not have control over Blake's firearm, which was the instrumentality that injured Mack. But Mack's joint-enterprise argument is broader than just the use of Blake's firearm. Mack contends that the three defendants engaged in a joint enterprise in everything they did together that evening, including the assembly of the shooting range. Considered in that light, the first requirement of the joint-enterprise doctrine is satisfied because the three men plainly had "a mutual understanding for a common purpose," which was to engage in target-shooting. *See Delgado*, 289 N.W.2d at 482.

But Mack also must prove the second requirement—that each defendant had "a right to a voice in the direction and control of the means used to carry out the common purpose." *See id.* There is a lack of evidence necessary to prove that fact. The target-shooting occurred on Blake's property, where Blake previously had done target-shooting. The logs and plywood sheet were present on Blake's property, and Blake had a primary role in gathering the materials and putting them together. In addition, the map that was consulted to determine the orientation of the shooting range was on Blake's cell phone. The evidence

shows cooperation among the three men, but there is no evidence that William or Ian had "an *equal* right to direct and govern the movements and conduct of every other participant" or had a right to control the instruments that caused injury to Mack—the logs, the plywood sheet, and the arrangement of the shooting range. *See id.* (emphasis added). Instead, the evidence supports a conclusion that the three defendants were, like the defendants in *Delgado*, simply a small group of persons "engaged in recreational activity on a gratuitous and voluntary basis." *See id.* at 483; *see also Weber*, 371 N.W.2d at 616 (concluding family members' agreement to clean up jointly owned property was not joint enterprise).

Thus, the district court did not err by concluding that Blake, William, and Ian were not part of a joint enterprise.

In sum, genuine issues of material fact exist as to whether William and Ian owed Mack a duty of care and whether William's and Ian's actions were a proximate cause of Mack's injuries. Therefore, the district court erred by granting William's and Ian's motions for summary judgment. Accordingly, we reverse and remand for further proceedings.

Reversed and remanded.