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COLORADO COURT OF APPEALS
Ralph L Carr Judicial Center
2 East 14th Avenue
Denver, CO 80203

DISTRICT COURT, DELTA COUNTY, STATE OF COLORADO
Judge Charles Greenacre
Case Number: 2012CV172

Plaintiff-Appellant:
Dina Navarrette

v.

Defendants-Appellees:
Thomas Howe and Avanell Howe

Attorneys for Defendants/Appellees:
Adam M. Royval, Atty. Reg. #43836
J. Scott Lasater, Atty. Reg. #16070

LASATER & MARTIN, P.C.
8822 South Ridgeline Boulevard, Suite 405
Highlands Ranch, CO 80129
Phone: (303) 730-3900
Fax: (303) 730-3939
E-mail: Adam@LasaterandMartin.com
E-mail: Scott@LasaterandMartin.com

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Case No.: 2014 CA 184

ANSWER BRIEF

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Attorneys for Defendants/Appellees: Adam M. Royval, Atty. Reg. #43836 J. Scott Lasater, Atty. Reg. #16070 LASATER & MARTIN, P.C. 8822 South Ridgeline Boulevard, Suite 405 Highlands Ranch, CO 80129 Phone: (303) 730-3900 Fax: (303) 730-3939 E-mail: Adam@LasaterandMartin.com E-mail: Scott@LasaterandMartin.com	Case No.: 2014 CA 184

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The brief complies with C.A.R. 28(g).

- It contains 6769 words, and
- It does not exceed 30 pages.

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- It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

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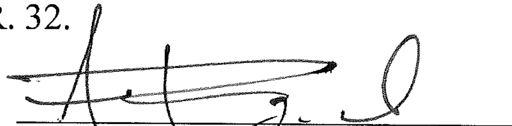

Adam M. Royval
J. Scott Lasater
Attorneys for Thomas Howe and
Avanell Howe

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I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Plaintiff presents the following issues on appeal:

1. Does an action for allegedly being shot by a third party on the private property of another with a gun stored on that property arise under Colorado's premises liability statute?

2. Do Defendants owe Plaintiff a duty to store their a handgun in a manner to prevent an adult third party from using it to injure Plaintiff?

3. Does an adult son housesitting for his parents constitute an employer-employee relationship sufficient to impose vicarious liability?

II. STATEMENT OF THE CASE

Early in the morning of December 24, 2010, Plaintiff, was shot in the head with a .22 caliber pistol that Thomas Howe and Avanell Howe ("Defendants"), kept on top of their refrigerator at their home. Plaintiff alleges that Defendants' son, Thomas Howe Jr. ("Tommy"), shot her. Tommy was criminally prosecuted and the charges related to the shooting were dismissed by the district attorney for lack of evidence. CF, p. 551. Tommy testified Plaintiff shot herself in the head while waving the gun around in a state of extreme intoxication.

Regardless of how Plaintiff was shot, she sued Defendants for:

1) negligence; and 2) premises liability under C.R.S. § 13-21-115 as a licensee; or alternatively, 3) premises liability under C.R.S. § 13-21-115 as an invitee. Plaintiff sued Tommy separately for negligence. Plaintiff amended her Complaint to argue that Defendants were vicariously liable for Tommy's negligence. CF, p. 73.

Defendants filed two dispositive motions: 1) A Motion for Summary Judgment, asking the Court to find that this case was controlled by common law negligence principles and determine that Defendants did not owe Plaintiff a duty, and; 2) a Motion for Determination of Question of Law, asking the Court to determine that, as a matter of law, a son housesitting for his parents, without compensation, did not establish a relationship sufficient for imposing vicarious liability (together, the "Motions").

The Delta County District Court Judge, Charles Greenacre, granted the Motions, resulting in a complete dismissal of Plaintiff's claims in favor of Defendants. Subsequently, Plaintiff voluntarily dismissed her claims against Tommy, with the understanding that, once dismissed, those claims were barred by the statute of limitations. CF, p. 1429 at ¶ 11-12; 1479.

III. STATEMENT OF THE FACTS

Plaintiff's version of the "facts" inaccurately portrays this case and relies on incompetent evidence. As addressed *infra*, no sworn testimony or affidavits were

provided by any officers, doctors, investigators or experts in this matter. Thus, Plaintiff's "facts" based on these documents cannot be considered.

Plaintiff and Tommy shared a long intimate relationship, spanning six years. CF, p. 823-24. They drank heavily during their time together CF, p.824. Over the course of their relationship, there was a single domestic incident in 2008 where Tommy pushed Plaintiff into a cabinet and the police arrested him. Those charges were deferred and dismissed. CF, p. 824. Another time, Plaintiff alleges she called the police because Tommy was "out of hand." CF, p. 825.

Tommy is a convicted felon due to traffic violations and has a criminal record reflecting other misdemeanors and minor infractions. Tommy has no other history of violence, with firearms or otherwise. CF, p. 802-09.

Defendants reside in Hotchkiss, Colorado on a large, rural parcel of land, located at 28999 Redlands Mesa, Rd. They keep a .22 caliber Ruger pistol on their refrigerator with a magazine loaded, but no round in the chamber. The gun has been stored there for at least five years for controlling prairie dogs. CF, p. 143. Plaintiff was aware there were firearms at the house and regardless, she felt safe while at the home. CF, p. 318-20, at 99:22-101:9. No children reside at Defendants' home. *See* CF, p. 655.

Over Christmas 2010, Defendants asked Tommy to stay at their home from

December 23-27, 2010. CF, p. 83. Defendants provided a cursory list of household chores for Tommy. CF, p. 106-07. Tommy invited Plaintiff to stay with him. CF, p. 67. Defendants did not invite Plaintiff to their home and did not know Plaintiff would be there on this occasion. CF, p. 287. Plaintiff arrived at the Ranch on December 23, 2010. CF, p. 83. She and Tommy drank alcohol throughout the day beginning mid-morning. CF, p.198-99.

That evening, the pistol stored on top of the refrigerator inflicted a head injury on Plaintiff. Tommy stated that Plaintiff shot herself in a suicide attempt during a state of extreme intoxication during an argument. CF, p. 859. Plaintiff has no recollection whatsoever of how she was shot. CF, p. 217. The hospital admitted Plaintiff with a blood alcohol level of .288. CF, p. 552. Plaintiff survived and recovered and the district court lawsuit followed.

IV. SUMMARY OF THE ARGUMENT

Plaintiff's appeal lacks merit and relies on incompetent evidence. The trial court properly ruled that: 1) the Colorado Premises Liability Act ("PLA") does not govern this case; 2) Defendants had no duty to Plaintiff under her negligence cause of action; and 3) Defendants did not employ their adult son and cannot be vicariously liable for his alleged actions.

First, Plaintiff relies on incompetent evidence to advance her arguments. None of Plaintiff's "experts" provided sworn affidavits regarding their opinions and thus, Plaintiff's "expert" opinions cannot rebut the Motions.

Second, the PLA does not govern this case. Under the recent Colorado Supreme Court decision, *Larrieu v. Best Buy*, 303 P.3d 558 (Colo. 2013) the PLA does not apply because Plaintiff's injuries did not occur "by reason of the property's condition or as a result of activities conducted or circumstances existing on the property." The case law cited by Plaintiff is not on point. Defendants' storage of handgun on their property is not a dangerous condition or circumstance on the property sufficient to trigger the PLA. In an adults-only household, without human intervention, there is nothing dangerous about a gun stored in a holster on top of a refrigerator. Because the storage of the gun is not a dangerous condition or circumstance, there is no support for a PLA claim.

Third, the trial court correctly dismissed Plaintiff's negligence claims because Defendants did not owe Plaintiff a duty of care. The touchstone of the duty inquiry is foreseeability. *See Perreira v. State of Colorado*, 768 P.2d 1198, 1208 (Colo. 1989); *University of Denver v. Whitlock*, 744 P.2d 54, 56 (Colo. 1987). As plead, the circumstances allegedly leading to Plaintiff's injury were so unforeseeable "as to be inconceivable." CF, p. 1563. Colorado has no heightened

duty associated with storing firearms. Additionally, Colorado law is clear Defendants had no duty to control their adult son's actions. Plaintiff's attempts to paint Tommy as an "irresponsible," "careless," or "unauthorized" person sufficient to impose a duty to Plaintiff on Defendants is based on out-of state law and lacks factual and legal support.

Finally, Tommy was not his parents' employee or agent and therefore Defendants' vicarious liability cannot exist. Defendants did not compensate Tommy, they did not control to the manner in which he performed, and they explicitly claimed no responsibility for his actions. CF, p. 147 at 73:11-22; 521-526.

Accordingly, the trial court's rulings should be affirmed.

V. ARGUMENT

I. Standard of Review and Preservation of Issues

A. Standard of Review

The grant of a summary judgment motion is reviewed *de novo. W. Elk Ranch, L.L.C. v. United States*, 65 P.3d 479, 481 (Colo. 2002). Summary judgment is appropriate when the pleadings and supporting documentation show that no genuine issue of material fact exists and that the moving party is entitled to

judgment as a matter of law. C.R.C.P. 56(c); *Andersen v. Lindenbaum*, 160 P.3d 237, 239 (Colo. 2007).

The moving party has the initial burden to show that there is no genuine issue of material fact. Once this burden of production is satisfied, the burden then shifts to the nonmoving party to establish that there is a triable issue of fact. *Cont'l Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712-13 (Colo. 1987). Failure to meet this burden will result in summary judgment in favor of the moving party. *Casey v. Christie Lodge Owners Ass'n*, 923 P.2d 365, 366 (Colo. App. 1996). In determining the existence of an issue of material fact, a court must view the evidence in the light most favorable to the nonmoving party. *Han Ye Lee v. Colo. Times, Inc.*, 222 P.3d 957, 960 (Colo. App. 2009).

B. Preservation of Issues

Defendants do not dispute that the issues associated with the Motions were properly preserved to the extent they were briefed. Defendants dispute Plaintiff's claim that the issue of whether Tommy's alleged actions were within the scope of his alleged "employment" was not properly preserved. *See Opening Brief*, 2-3; CF, p. 173. Defendants raised and dismissed the scope of employment issue as irrelevant, but preserved it for appeal.

II. Plaintiff's Appellate Arguments Rely on Unsworn, Improper, Expert Opinions and Documents and Incompetent Evidence

Throughout the Opening Brief, Plaintiff's counsel repeatedly relies on expert reports and disclosure documents that are unauthenticated by sworn testimony and unsupported by affidavits. These documents include, but are not limited to: 1) the expert report of Troy Nuss (CF, p.743-799); 2) various police reports (including, e.g., CF, p. 991); 3) the expert report of J. Michael Bozeman, (R. Supr., SUPPRESSED DOCUMENTS, p. 240-58); 4) hearsay expert opinion testimony by physicians and police officers (including e.g., CF, p. 995-97; 832); and 5) physician opinion testimony (including e.g., R. Supr., SUPPRESSED DOCUMENTS, p. 83-84).

Defendants challenged the authenticity and credibility of Plaintiff's experts in district court and thus, preserved this issue for appeal. CF, p. 583 *et seq.*; 665 *et seq.*

The party opposing a Motion for Summary Judgment cannot rely on the mere allegations of its pleadings, but must, by affidavit or otherwise as provided in C.R.C.P. 56, set forth specific facts showing a genuine issue of material fact. *McDaniels v. Laub*, 186 P.3d 86, 87 (Colo. App. 2008). Unsworn expert witness reports are not admissible to support or oppose a motion for summary judgment.

Id. Moreover, an expert report filed pursuant to C.R.C.P. 26 is not a "pleading" under C.R.C.P. 7(a) and thus is not available for consideration under C.R.C.P. 56(c). *See* C.R.C.P. 7(a); *McDaniels*, 186 P.3d at 87.

Thus, the Court may not properly consider the unsworn expert testimony and unauthenticated information Plaintiff's counsel attached to pleadings in opposition to Defendants' Motions and must analyze the record without the portions of Plaintiff's version of the "facts" which rely on this information.

III. The Trial Court Correctly Dismissed Plaintiff's Premises Liability Claim Because the Colorado Premises Liability Act Does Not Apply to This Case

The trial court correctly dismissed Plaintiff's premises liability claim on Defendants' Motion for Summary Judgment. Colorado courts have made clear that, where it applies, the PLA is a plaintiff's sole means of recovery, in an action against a landowner. *See Wilson v. Marchiondo*, 124 P.2d 837, 839 (Colo.App. 2005); *Vigil v. Franklin*, 103 P.3d 322, 331 (Colo. 2004). However, the PLA simply does not apply to this case.

A. Under the Supreme Court Decision in Larrieu v. Best Buy, 303 P.3d 558 (Colo. 2013) *This Case Should Not Be Determined Under the PLA*

Following the reasoning of Colorado Supreme Court's holding in *Larrieu v. Best Buy*, 303 P.3d 558 (Colo. 2013), this case was correctly decided under common law negligence principles.

In *Larrieu*, the Court stated that whether a case falls within the ambit of the PLA is a fact-specific, case-by-case, inquiry. The Court clarified that the PLA's scope must be left to case-by-case development with the relevant inquiry being whether: "(a) the plaintiff's alleged injury occurred while on the landowner's real property; and (b) the alleged injury occurred by reason of the property's condition or as a result of activities conducted or circumstances existing on the property." *Id.* at 561. The Court was clear that not all torts occurring on the property of another are PLA claims. *Id.*

Here, the undisputed facts place this litigation outside of the purview of the PLA. While it is undisputed that Plaintiff's injuries occurred on Defendants' property, there was no activity conducted on, or circumstances existing on Defendants' property which would operate to bring this claim under the ambit of PLA.

As correctly analyzed by the district court, the PLA applies to real property, not personal property. The alleged activity, condition, or circumstance, the storage of a firearm, relates to the personal property of Defendants. The injuries sustained

by Plaintiff are alleged to be the result of the manipulation of their personal property by Tommy. Plaintiff alleges, with specificity, how Defendants' 47-year-old son picked up the pistol, intentionally chambered a round, returned the pistol to the top of a refrigerator and, at a later time, picked up the loaded pistol and fired two shots in the house, with one round striking Plaintiff in the head. CF, p. 86-87. These allegations are unrelated to Defendants' real property.

Under the fact-specific analysis required by *Larrieu*, if this type of conduct is permitted to fall within the ambit of the PLA, any meaningful distinction between the PLA and other causes of action is lost. Thus, the trial court correctly ruled this is not a PLA action and its holding must be affirmed.

B. Grizzell and Traynom Do Not Hold That Injuries Caused by Third-Parties on the Property of Another Require a Case to Be Evaluated Under the PLA

Plaintiff improperly relies on *Grizzell v. Hartman Enters., Inc.* 68 P.3d 551 (Colo. App. 2003) and *Traynom v. Cinemark USA, Inc.*, 940 F. Supp. 2d 1339 (D. Colo. 2013) for the proposition that the PLA controls this case. *Grizell* and *Traynom* are easily distinguishable from the facts and procedural posture before the Court and are thus, unpersuasive.

In *Grizell*, an unknown assailant shot and killed decedent in a commercial property after hours. Plaintiff, decedent's parent, brought a PLA action against the property owner, alleging

> [Owner] negligently operated the premises by permitting and ratifying ongoing criminal activity, including transactions for the sale, distribution and possession of illegal drugs and substances, including marijuana, by its employees who would routinely meet in the back room near the rear exit door for the purpose of distributing, possessing and [sic] illegal, intoxicating drugs and controlled substances. [E]mployees and non-employees routinely entered the premises via the rear door when they intended to partake of the above illegal activities.

Grizell, 68 P.3d at 554.

The property owners filed a Motion to Dismiss for failure to state a claim pursuant to C.R.C.P. 12(b)(5) and the trial court granted the Motion. *Id.* at 553. On appeal, the Court of Appeals determined the district court erred because the allegations pled were sufficient to withstand the low standard for overcoming a C.R.C.P. 12(b)(5) Motion.

In *Traynom*, the Federal District Court narrowly considered whether the plaintiffs' PLA claims against a movie theater for a freak mass shooting by a mentally unstable assailant could survive a Motion to Dismiss filed by the movie theater pursuant to F.R.C.P. 12(b)(6) (the federal equivalent of C.R.C.P. 12(b)(5)). The Court held "only that plaintiffs have sufficiently stated a claim to survive a

motion to dismiss under Rule 12(b)(6)." *Id.* at 1346. The court never reached the summary judgment analysis and never ruled the plaintiffs correctly pled the case under the PLA.

Grizzell and *Traynom* were both narrow holdings based on completely different facts than those before the court. They only addressed whether the allegations plead were sufficient to withstand a Motion to Dismiss. Reviewing a Motion to Dismiss, the court accepts all allegations in the complaint as true and views them in the light most favorable to the plaintiff. The trial court properly grants a C.R.C.P. 12(b)(5) motion only where the plaintiff's factual allegations cannot, as a matter of law, support a claim for relief. *Deutsche Bank Trust Co. Americas v. Samora*, 2014 WL 1162939 (Colo. Mar. 24, 2014).

Neither the *Grizell* nor *Traynom* Courts considered the same type of evidence considered by the trial court as the basis for Defendants' Motion for Summary Judgment. Those Courts considered only the plaintiffs' allegations. *Grizzell* and *Traynom*, are therefore unpersuasive authority.

Here, Defendants, Plaintiff, and Tommy all provided sworn testimony, participated in written discovery, and executed affidavits in support of Defendants' Motions. Defendants provided extensive testimony regarding the circumstances existing on their property, their firearms, and their son and his duties at their home.

Thus, the trial Court had substantive, undisputed evidence to make its decision, not merely Plaintiff's allegations as in *Grizzell and Traynom*. Defendants' Motion for Summary Judgment provided the trial court a wealth of evidence on which to base its decision. Thus, the district court did not error in determining that the PLA does not apply and its ruling should be affirmed.

C. Defendants' Ownership and Storage of Firearms Do Not Establish a Dangerous Condition for the Purposes of the PLA

Plaintiff's argument that "the dangerousness of firearms is so well known as to be established as a matter of law"[1] misrepresents the law and leads to an absurd result when analyzed in the context of the PLA. *Opening Brief*, at 18; § IV(A) *infra*. Ownership and storage of firearms does not demand a PLA inquiry as to whether a dangerous condition existed.

Under the PLA, Plaintiff may recover only for Defendants' 1) unreasonable failure to; 2) exercise reasonable care with respect to dangers; 3) created by Defendants; 4) which Defendants actually knew about. C.R.S. § 13–21–115(5). As discussed in Defendants' Reply in Support of Motion for Summary Judgment, the PLA requires "actual" knowledge of a dangerous condition. *Wright v. Vail Run*

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[1] Plaintiff cites *Wood v. Groh*, 7 P.3d 1163 (Kan. 2000) for the proposition that "a handgun is an inherently dangerous instrument." *Id.* at 1168. This is not Colorado law. *Wood* is inapplicable to this case.

Resort Cmty. Ass'n, Inc., 917 P.2d 364 (Colo. App. 1996)(defining "actual"); CF, p.1068 *et seq*.

Plaintiff seems to argue that since: 1) Defendants used the pistol to shoot prairie dogs; 2) since Defendants were aware that guns have the potential to cause harm, and; 3) since the pistol was stored for easy access, that Defendants were aware of a dangerous condition existing on their property. *Opening Brief*, at 18.[2]

Plaintiff's argument confuses the knowledge inquiry. Defendants' knowledge that a gun may potentially cause harm is distinct from knowledge of a presently existing danger, activity, or condition, on their property. A simple hypothetical reveals Plaintiff's argument frustrates the purpose of the PLA. Defendants could know, for example, that a steak knife, on their kitchen counter, could be used by a third-party to harm someone. It is common knowledge that steak knives are sharp and can cut flesh and steak knives are stored for easy access. Clearly though, knowledge of the steak knife on a kitchen counter cannot establish the existence of a dangerous condition on a landowner's property. Plaintiff's interpretation of this type of "dangerous condition" would subject every

[2] Plaintiff cites her "expert" opinions for the proposition that the pistol was stored improperly, and not hidden from "careless" adults constituting a dangerous condition. *Opening Brief*, at 19. As discussed *supra*, these opinions may not be considered. *McDaniels v. Laub*, 186 P.3d 86, 87 (Colo. App. 2008) (unsworn expert testimony may not be used to oppose a Motion for Summary Judgment).

homeowner to PLA liability for torts involving items in their homes. This is an absurd result.

Even with all the facts examined in a light most favorable to Plaintiff, Plaintiff cannot demonstrate that any dangerous condition existed on Defendant's property to subject this claim to the PLA.

The court did not error in determining that the PLA does not apply and its decision should be affirmed.

IV. The Trial Court Correctly Ruled Defendants Owed No Duty to Plaintiff

To prevail on her negligence claim, Plaintiff must demonstrate that Defendants owed her a duty of care. Defendants did not owe Plaintiff a duty because Plaintiff's injuries were unforeseeable. Defendants had no obligation to control their adult son and had no obligation to store the personal firearms in any particular manner.

In Colorado, the elements of negligence are: 1) the existence of a legal duty; 2) breach of that duty; 3) injury to the plaintiff; and 4) a sufficient causal relationship between the defendant's breach and the plaintiff's injuries. *See e.g. Casebolt v. Cowan*, 829 P.2d 352, 356 (Colo. 1992). A negligence claim predicated on circumstances for which the law imposes no duty of care upon the

defendant will fail. *See e.g., Perreira v. State of Colorado*, 768 P.2d 1198, 1208 (Colo. 1989); *University of Denver v. Whitlock*, 744 P.2d 54, 56 (Colo. 1987). The initial question in any negligence action is whether the defendant owed a legal duty to protect the plaintiff against injury. Whether that duty exists is a question of law reserved for the Court. *Connes v. Molalla Transp. Sys., Inc.*, 831 P.2d 1316, 1320 (Colo. 1992).

A. Colorado Law Does Not Impose a Heightened Duty for the Storage of Firearms

Colorado Courts have not classified firearms as "inherently dangerous" or "patently dangerous." No Colorado case has ever likened "extraordinary care" to "reasonable care." Plaintiff takes the position that storage of firearms requires a heightened duty of care and cites out of state authority in support. For example, Plaintiff cites *Kuhns v. Brugger*, 135 A. 2d. 395 (Pa. 1957) apparently for the proposition that she may maintain a cause of action separate from an action against the alleged tortfeasor for failure to properly store a firearm. These cases misrepresent Colorado law and are not persuasive authority.

In Colorado, the only heightened duty regarding firearms is that which stems from a parent to a minor. Parents may only be liable for negligently permitting a minor child access to a weapon that causes injury to a plaintiff. *Hall v. McBryde*,

919 P.2d 910, 913 (Colo. App. 1996). Like *McBryde,* in *Kuhns*, a minor child accessed an unsecured weapon and injured another child. *Kuhns* is neither controlling nor persuasive. Its holding simply reinforces the rule of *McBryde*, that a negligence cause of action may be maintained where an adult improperly stores a firearm so that a minor child may access it and injure another.

Here, no heightened duty applies. Defendants reside in an adults-only household and their children are all adults. Tommy was 47 years old at the time Plaintiff alleges he shot her and accordingly, Defendants were free to store their firearms however they saw fit.

B. Plaintiff's Allegations Against Defendants are For Non-Feasance

Plaintiff's argument that this is a case of misfeasance rather than one of nonfeasance has no merit. Colorado law disfavors imposing a duty in cases involving nonfeasance, a negligent failure to act, as opposed to misfeasance, an affirmative act resulting in harm. *University of Denver v Whitlo*ck, 744 P.2d 54 (Colo. 1987).

Here, Defendants stored their gun on top of their refrigerator for over five years without incident. Plaintiff explicitly alleges Defendants failed to act, namely by failing to take steps to protect her. CF, p. 6, ¶ 47-48. She alleges that Tommy picked up a firearm that was sitting idly on top of the refrigerator, loaded a round,

set it down, and then, at a later time, fired two shots indoors, one striking Plaintiff. CF, p. 6-7.

Defendants did nothing more than store the gun in a holster, in their house, so that they could use it to shoot prairie dogs. Revisiting the steak knife example, discussed above, Defendants clearly would not have engaged in misfeasance if Tommy had picked up a knife off the counter and stabbed Plaintiff with it. As discussed in the Motion for Summary Judgment, Defendants mere storage of their gun is nonfeasance, and thus, the law disfavors imposing a duty and the trial court's ruling that no duty exists should be affirmed.

C. Defendants Had No Duty to Control Their Adult Son

Plaintiff argues that this is not a case of failure to control. However, in the same brief, Plaintiff argues that Defendants are vicariously liable for their son's actions because they controlled him through an employment relationship. Thus, Defendants must address the control issue.

It is clear that a defendant has no duty to control the conduct of third-persons. *See Davenport v. Community Corrections of the Pikes Peak Region, Inc.*, 942 P.2d 1301 (Colo. App. 1997); *but see, Perreira v. State of Colorado*, 768 P.2d 1198, 1208 (Colo. 1989) (imposing a duty on psychiatrists to third parties for the actions of their dangerous patients).

Plaintiff alleges that Tommy's criminal record makes him "careless" or "irresponsible." These allegations are completely unsubstantiated and insufficient to impose a duty on Defendants to protect Plaintiff. The only arguably admissible piece of evidence regarding Tommy's criminal history is his felony conviction for repeated traffic offenses.[3] CF, p. 1199-1206. Even if Tommy's criminal could be considered, it cannot be the basis for imposing a duty to control on Defendants.

In *Molosz v. Hohertz*, 957 P.2d 1049, 1051 (Colo. App. 1998), plaintiffs, the neighbors of a rental home, sued the neighboring landlords who were also the tenant's parents, for negligent retention of a violent tenant after the tenant fired several shots through the plaintiffs' windows. *Id.* at 1050. Plaintiffs alleged that, because defendants knew their son was mentally unstable and had been violent before, defendants owed plaintiffs a duty to protect third parties from their son's criminal conduct. The trial court directed a verdict in favor of defendants, concluding that the law imposed no duty with respect to the behavior of their adult son, regardless of their knowledge of his past. *Id.* In reaching its decision, the trial court assumed that the allegations of the shooter's previous violent acts were true,

[3] Tommy admitted to touching the pistol on the day of Plaintiff's injury and plead guilty to possessing a firearm as a previous offender. This felony is likely inadmissible, given Tommy was convicted after the events giving rise to this litigation.

but still determined that the parents had no duty to the plaintiffs. *Id.* at 1051. Affirming the trial court's decision, the Court of Appeals stated:

> The plaintiffs seek to impose on defendants a burden of potentially unlimited magnitude. If the defendants' duty was predicated upon their knowledge of the tenant's prior acts of violence, they would be required to warn almost all people with whom the tenant could potentially contact, especially at or near the leased premises.
>
> ***
>
> After careful review of the record, we conclude that, even with plaintiffs having demonstrated defendants' awareness of the shooter's [violent] criminal record, such evidence was insufficient to establish that a duty should have been imposed . . . to protect third parties from the harm that occurred. Furthermore, no statute or other principle of common law imposes such a duty.

Molosz, 957 P.2d at 1051.

Molosz is persuasive here. Like the parents in *Molosz*, Defendants could not control Tommy's actions or predict his alleged negligent behavior. While *Molosz* considered violent behavior, here Plaintiff has alleged negligent behavior. The act alleged to have injured Plaintiff was an incident completely unrelated to any previous acts, particularly Tommy's traffic felony. Even if the Howes were aware of past domestic disputes between Tommy and Plaintiff, Plaintiff cannot use that knowledge to suggest that being *negligently* shot in the head on Christmas Eve was foreseeable under *Molosz*. The trial court correctly ruled that the Defendants had no duty to control their son and that the alleged incident was unforeseeable.

D. The Out-of-State Case Law Plaintiff Cites Does Not Support Imposing a Duty on Defendants

As discussed in part IV(A) *supra*, Colorado only extends a heightened duty to safeguard firearms to households where minor children may access them. *Hall v. McBryde*, 919 P.2d 910 (Colo. App. 1996). Plaintiff's strained attempts to find out-of-state cases controverting Colorado law is unpersuasive. *Heck v. Stoffer*, 786 N.E.2d 265 (Ind. 2003), and *Juplin v. Kask*, 849 N.E. 2d 829 (Mass. 2006), are easily distinguishable from the facts before the Court. The more relevant and persuasive lines of reasoning are found in *Bridges v. Parrish*, 731 S.E. 2d 262 (N.C. App. 2012) and *Lelito v. Monroe*, 729 N.W. 2d 564 (Mich. App. 2006).

In *Heck*, the adult son of the defendants, a mentally disturbed, violent, drug-addicted, habitual felon, stole a handgun from his parents and killed a police officer to avoid apprehension. *Id.* at 267. There, the parents testified that they knew their son "had a death wish" and knew he would rather flee the police than face a sentencing hearing. *Id.* at 269. The parents also took extra precautions to hide valuables when their son visited, knowing that their son had a history of theft. *Id.* Considering this narrow set of facts, and Ind. Code § 35-47-2-7, a statute which prohibits the transfer and making available of handguns to substance abusers and mentally incompetent individuals, the Indiana Supreme Court found that the parents had a duty to safeguard their firearms from their son.

In *Juplin*, a case from a jurisdiction notoriously strict on gun control, the son of defendant's roommate stole one of the roommate's guns and killed a police officer. There, the son had been arrested for assaulting a professor, institutionalized in a psychiatric facility, had assaulted his girlfriend, been imprisoned for the assault, been involved in a third altercation where he had an outstanding court date, and had deserted his post with the army. *Id.* at 834. Under these circumstances, the Massachusetts Supreme Court determined that the defendants had a duty to store the firearms away from the shooter.

Conversely, in *Bridges*, defendants' 52-year old son used defendants' handgun to shoot his estranged ex-girlfriend. There, the son had a history of violence toward women, numerous drug and weapon charges, charges for first-degree kidnapping, assault with intent to kill, and possession of a firearm by a prior felon. Defendants filed a Motion to Dismiss for failure to state a claim on the basis that they had no duty to safeguard their firearms from their adult son and the trial court granted the motion. *Bridges*, 731 S.E. 2d at 264. The North Carolina Court of Appeals, considering *Heck*, upheld the trial court's ruling, stating that North Carolina courts "have not recognized a duty to secure firearms under common law principles, and we decline to do so based on the facts of this case." *Id.* at 267.

There, the court reiterated in a footnote, that, like Colorado, under North Carolina statute, individuals must only secure their firearms from minors. *Id. at* n.3.

The Court rejected the connection between a felony conviction and foreseeability of gun violence in *Lelito v. Monroe*, 729 N.W. 2d 564 (Mich. App. 2006). There, the estate of the girlfriend of a convicted felon brought an action against the landowners of a property where a loaded gun was stored, on theories of negligence and strict liability. The decedent, and her felon boyfriend, moved in with the defendant and his wife. The defendant kept a loaded gun in a cabinet in his bedroom. The felon retrieved the gun and used it to kill decedent. *Id.* at 566. Decedent's estate sued for negligence and the defendant moved for summary judgment. The Michigan Court of Appeals found no degree of foreseeability between felon status and the storage of a firearm and refused to extend the duty of safe storage to lawful firearm owners, granting summary judgment. *Id.* at 568.

Taking all of these cases into consideration, there is no duty to safeguard a pistol from a 47 year-old man with a "history of misconduct" and a traffic felony. The duty Plaintiff argues for does not rise to the same level as safeguarding a firearm against unauthorized use by minor children, nor its unauthorized use by violent felons. Here, Tommy has a non-violent felony conviction from traffic infractions and a history of misdemeanor offenses. Unlike the shooters in *Heck*,

Juplin, and *Bridges*, he has no history of mental illness or significant violent conduct. He was involved in a single isolated domestic incident, two years before the alleged shooting occurred, which was ultimately deferred and dismissed. CF, p. 802-09. Tommy's criminal record, which is inadmissible except for an arguably admissible single felony, does not even support that he was "irresponsible" or "careless." Notably, neither of the cases Plaintiff cites impose a duty to safeguard firearms against "irresponsible" or "careless" parties. *Juplin* and *Heck* are extremely fact-specific, and require the imposition of a duty only where there is clear evidence that a violent, mentally unstable, person would misuse a firearm.

Here, the trial court conducted the correct analysis, finding no evidence in the record to demonstrate that Tommy's alleged conduct was foreseeable and its ruling should be affirmed.

V. The Trial Court Correctly Ruled as a Matter of Law that Tommy Was Not an Employee of Defendants

A. There Are No Disputed Facts Regarding the Alleged Employment Relationship

Where there is no dispute or conflict in the facts alleged to have created an agency, the question of the existence of an agency relationship should be

determined by the court as a matter of law. *People v. Morrow*, 682 P.2d 1201 (Colo.App.1983).

Here, there are no disputed issues of fact surrounding Tommy's role at Defendants' home. Defendants asked Tommy to housesit for three days and left him a menial list of tasks to accomplish in their absence, including: 1) taking out the trash; 2) giving the dog and horses food and water; 3) making sure the wood burning stove did not overheat, and; 4) giving the wild deer pieces of corn.[4] CF, p. 93; 106-07; 108 at 53:5-55:22. Defendants did not compensate Tommy and both Defendants and Tommy provided extensive unrebutted sworn testimony and affidavits disclaiming their alleged employment relationship with him. CF, p. 108 at 54:24-55:5; 138 at 37:18-37:22; 521-23, ¶ 4; 523-24, ¶ 5; 525-26, ¶5. Thus, the trial court properly determined Tommy's employment status as a matter of law.

B. The Activities Performed by Tommy Are Insufficient to Give Rise to an Employment Relationship

Plaintiff's allegation that Tommy was an employee of Defendants has no merit. Under the doctrine of *respondeat superior*, an employer is vicariously liable for the acts of its employee committed in the course of the employee's

[4] Defendants' list states that Tommy should vacuum and dust, clean the ATVs, sweep the barn, and clean the horse poop. However, Avanell Howe testified these line items were a joke and that she did not expect Tommy to perform those tasks. CF, p. 108 at 53:5-55:22. Moreover, they were impracticable as Tommy was only staying at the home for a very short time.

employment. *Raleigh v. Performance Plumbing & Heating, Inc.,* 130 P.3d 1011, 1019 (Colo.2006); *see also* Restatement (Third) of Agency §§ 2.04, 7.03(2)(a), 7.07(1) (2006). Directing a person how to perform a task indicates the control required to establish an employment relationship. *Colorado Comp. Ins. Auth. v. Jones*, 131 P.3d 1074, 1080 (Colo. App. 2005) (an employer must have the right to control the details of performance). Other relevant factors include the right to hire, the payment of salary and the right to dismiss. *See Norton v. Gilman* 949 P.2d 565, 567 (Colo. 1997) (collecting cases).

Colorado cases do not directly address whether housesitting may create an agency or employee relationship. Plaintiff cites two polarizing cases, which she suggests form opposite ends of a spectrum of the types of housesitting responsibilities that may form an employment relationship, with the activities in *Lai v. St. Peter*, 869 P.2d 1352 (Haw. App. 1994) creating no employment relationship and the activities in *State Farm Fire & Cas. Co. v. Miller Metal Co.*, 494 P.2d 178 (N.M. App 1971) creating an employment relationship.

In *Lai*, the Hawaii Court of Appeals evaluated whether a housesitter qualified as an employee for the purposes of *respondeat superior* when the sitter, a relative of the property owner, injured the plaintiff with the property owner's vehicle. The homeowner provided the sitter with a list of chores, including "among

other things, general information regarding the daily operation of [alleged employer's] home, such as yard service, bug extermination service, sprinkler system, home appliances, swimming pool care, trash pickup, location of keys, and watering the plants." *Id.* at 305-06. The court found this list of activities insufficient to establish an employment relationship.

In *State Farm*, the homeowners left for 10 days. The owner contacted the house sitter by phone and provided explicit, detailed instructions regarding winterizing the house, and turning on a furnace. Ultimately, the house burned down. The court found that that the house sitter would be considered an employee under these circumstances. *Id.* at 182.

Similar to *Lai*, in the Wyoming case, *Austin v. Kannes*, 950 P.2d 561 (Wyo. 1997), the homeowners asked their adult son to house sit while they were away. They asked that he "feed their cats, water their plants, and bring in their mail and newspapers." *Id.* at 563. The son threw a party at which a minor became intoxicated and was involved in a car accident. The plaintiff sued the parents under a theory of vicarious liability and defendants moved for summary judgment. The Wyoming Supreme Court affirmed summary judgment, finding that no employment relationship existed.

In *Madsen v. Scott* the New Mexico Supreme Court determined that a homeowner's friend and co-worker was not an employee of the homeowner by virtue of being asked to house-sit. 992 P.2d 268, 273. There, the homeowner gave the house-sitter general instructions to care for the house, including watering the plants, not to let anyone touch any guns, and not to throw any parties. *Id.* at 269. The house sitter invited friends over, one of whom brought his own gun, and one of the guests was shot and killed. *Id.* The decedent's estate sued the homeowner on a theory of vicarious liability, alleging that the house sitter was an employee of the homeowner. *Id.* at 269-70. Citing *Austin,* the Court stated:

> House-sitting requires little or no skills, and is not usually an occupation or business. Homeowner did not pay [house-sitter], enter into a contract with him, or give him detailed instructions regarding care of the house which would indicate that [homeowner's] performance of the services was subject to Homeowner's control or right to control. . . . We conclude that Homeowner and [house-sitter] did not form an employer-employee relationship.

Madsen, 992 P.2d 268, 273

Madsen and *Austin* and more on point than *Lai* or *State Farm*. Defendants asked Tommy feed the horses and dog, to take out the trash, keep an eye on the wood burning stove, and give the wild deer corn. Some of his responsibilities were affirmative but others were merely following the rules of the house. He was not paid, and he was staying for only a few days. In *Austin*, feeding animals did not

arise to an employment relationship. Under the reasoning in *Lai*, simply watching over the stove does not create an employment relationship. Unlike *State Farm* where the homeowner expressly contacted the house sitter and gave them step-by-step instructions on winterizing a house and turning on a furnace, Defendants did not exercise any such control over the simple activities they requested Tommy perform.

The trial court did not error in determining that no employment relationship existed and Defendants cannot be vicariously liable for Tommy's actions.

C. If Defendants Are Vicariously Liable for Tommy, the District Court's Ruling is Harmless Error

If, on appeal, this Court finds Tommy is Defendants' employee, the next inquiry is whether his alleged conduct occurred during his scope of work. Under the doctrine of *respondeat superior*, an employer is vicariously liable only for the acts of its employee committed in the course of the employee's employment. *Raleigh v. Performance Plumbing & Heating, Inc.*, 130 P.3d 1011, 1019 (Colo. 2006).

Here, Plaintiff alleges with great specificity, how Tommy removed the pistol from the refrigerator, chambered a round, set it back on top of the refrigerator, and later fired two shots in the kitchen, one of which struck Plaintiff. CF, p. 6-7.

Regardless of whether this Court ultimately determines that housesitting establishes an employment relationship, there can be no question that picking up a gun and firing it inside a house is outside the scope of housesitting. None of the tasks Defendants asked Tommy to do remotely involved the use of a firearm.

Thus, even if this Court determines that Tommy was acting within the scope of his employment, he cannot be vicariously liable to Plaintiff and the trial court's ruling was harmless error.

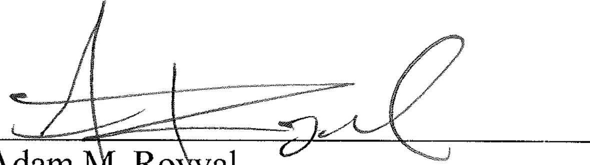
VI. CONCLUSION

For the reasons stated, the trial court's orders concerning Defendants' Motion for Determination of Question of Law and Defendants' Motion for Summary Judgment should be affirmed.

WHEREFORE, Defendants/Appellees Thomas Howe and Avanell Howe respectfully request that this Court affirm the trial court's rulings.

Respectfully submitted:

LASATER & MARTIN, P.C.



Adam M. Royval
J. Scott Lasater
Attorneys for Defendants/Appellees Thomas Howe and Avanell Howe

CERTIFICATE OF SERVICE

I certify that on August 14, 2014, I have served a true and correct copy of **THOMAS AND AVANELL HOWE'S ANSWER BRIEF** via ICCES to all counsel of record.

Original signature on file at Lasater & Martin, P.C., per Rule 121 § 1-26

/s/ Kate Braden

Kate Braden