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

Appeal From: District Court, Delta County, Colorado
Honorable Charles Greenacre, District Court Judge

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Case No. 14 CA 184

Plaintiff/Appellant:

Dina Navarrette

v.

Defendant/Appellees:

Thomas Howe, Sr. and Avanell Howe

District Court Case Number 2012 CV 172

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OPENING BRIEF

CERTIFICATE OF COMPLIANCE

The undersigned certifies that to the best of his knowledge this Opening Brief complies with all requirements of and C.A.R. 32 and 28(g).

Pursuant to C.A.R.28(g) the undersigned certifies this Opening Brief contains 9,438 words, excluding the caption page, table of contents, table of authorities, certificate of compliance with the word limit, certificate of service, signature block, and the Appendix.

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Duly authorized original signature on file at the offices of KILLIAN DAVIS Richter & Mayle, PC *pursuant to C.R.C.P. 121, § 1-26(9)*

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ISSUES PRESENTED

The Premises Liability Act applies when an injury occurs on the property of another due to a dangerous condition or circumstances existing on the property. Plaintiff was inadvertently shot and injured through the misuse of a loaded, unsecured, and unattended handgun defendants kept on top of their refrigerator in their house. Does plaintiff have a claim arising under the PLA?

Defendants left a loaded, unsecured handgun on top of their refrigerator after asking their son to housesit, despite knowing he was a felon, had altercations with his girlfriend and a co-worker, had a DUI, and had alcohol and drug problems. During an argument, their son, who had invited his girlfriend along as he had done on previous occasions, inadvertently shot her with the handgun. Under the circumstances, did defendants owe a duty to securely store the handgun when it was not in use?

Employment exists when one agrees to work for another and subject to the other's control. Defendants asked their son to stay at their ranch and perform chores such as taking care of horses and cleaning in exchange for having use of the ranch, including free food and use of the ATVs; and their son agreed. Was son an employee of defendants?

STATEMENT OF THE CASE

I. THE NATURE OF THE CASE AND COURSE OF PROCEEDINGS

On the early morning of December 24, 2010, Thomas Howe, Jr. (Junior) inadvertently shot his girlfriend, Dina Navarrette, while the two were in an argument at his parents' house. Trial Court File (TCF), p.6-7.[1] His parents, Thomas Howe, Sr. (Senior) and Avanell Howe (Mother), had asked him to housesit while they were away for Christmas. TCF, p.4-5, 28. Parents kept a loaded handgun on top of their refrigerator. TCF, p.859-860 (p.28:1-3, p.28:24-p.29:1); p.893 (p.24:8-p.25:13). This is the handgun that Navarrette was shot with. TCF, p.991-992.

Navarrette sued Junior for negligence in unsafe use and handling of the handgun. TCF, p.7. Navarrette sued Parents under the Premises Liability Act and for negligent storage of the firearm. TCF, p.7-9. Later, Navarrette amended the complaint to add claims that Parents were vicariously liable for Junior's conduct. TCF, p.87-88, p.443-444.

Parents filed a motion for determination of law that Junior was not their employee or agent, and that they were not vicariously liable for his acts. TCF, p.507-510. Parents did not address whether his acts were within the scope of

[1] Although Parents dispute whether Junior shot Navarrette, they did not contest the issue for purposes of summary judgment.

employment, if he were employed. TCF, p.507-510. Parents also filed a motion for summary judgment, asserting that Navarrette's claim did not arise under the PLA and that they owed no common law duty to safely store the handgun. TCF, p.527, p.529-530.

The trial court granted the motion for summary judgment. TCF, p.1340-1350. The court held that there was no common law duty to safely store the handgun. TCF, p.1343-1347. And it held that the PLA did not apply. TCF, p.1347-1348. The trial court also granted the motion for determination of law. TCF, p.1376-1380. It held that as a house sitter, Junior was not an employee of Parents. TCF, p.1377-1379. Judgment was entered for Parents. TCF, p.1403. Navarrette thereafter obtained a voluntary dismissal of her claims against Junior. TCF, p.1462, p.1473. She timely filed a notice of appeal. TCF, p.1538.

II. STATEMENT OF THE FACTS

A. The Relationship between Navarrette and Junior

Navarrette and Junior met while taking DUI classes in 2006, and they began dating about a month later. TCF, p.823-824 (p.44:22-p.45:3, p.45:20-24). They moved in together shortly thereafter. TCF, p.824 (p.46:6-9). Navarrette and Junior spent time together with Parents, who knew they were together. TCF, p.826-827 (p.56:21-p.57:4), p.829 (p.67:25-p.68:12), p.864 (p.47:9-11).

The relationship between Navarrette and Junior was not always smooth. One time, the two were drinking with a neighbor and Junior got "out of hand" and slammed Navarrette's head into a pantry. TCF, p.824 (p.47:21-p.48:5). She called the police, who arrested Junior. TCF, p.824 (p.47:21-p.48:5, p.48:20-22). Another time in 2009 or 2010, Junior was drinking and got "out of hand;" he frightened Navarrette such that she called Mother for help. TCF, p.825 (p.49:18-22, p.50:1-9, p.51:13-25), p.881 (p.113:20-p.114:3). Mother offered to pick up Navarrette, but Navarrette wanted her to take Junior away. TCF, p.825 (p.51:13-22). After calling Mother, Navarrette called the police, but when they showed up Junior ran out of the house and avoided arrest. TCF, p.825-826 (p.52:16-17, p.52:24-p.53:6).

B. Parents Knew of Junior's History of Misconduct

Junior had a long history of run-ins with the law. He had multiple arrests for crimes such as resisting arrest, obstructing an officer, disturbing the peace, DUI, and harassment. TCF, p.802-809. Parents were aware of Junior's tendencies.[2] Parents knew Junior was a convicted felon and was not permitted to possess a firearm. TCF, p.5, 30, p.864 (p.46:16-18), p.905 (p.73:23-p.74:5). Mother knew Junior was a habitual traffic offender due to multiple DUIs. TCF, p.871 (p.74:15-

[2] Although not admissible to prove Junior's negligence, his prior acts are admissible to prove Parent's knowledge and the foreseeability of his misconduct. C.R.E. 404(b), *see also Martin v. Minard*, 862 P.2d 1014, 1016 (Colo. App. 1993).

20). Junior told Mother that he had shoved Navarrette into a cupboard or closet. TCF, p.869 (p.68:18-25).

Senior knew that Junior had been charged with assaulting Navarrette. TCF, p.904-905 (p.72:23-p.74:4). Senior knew that Junior had a DUI. TCF, p.904 (p.70:12-15). He knew that Junior was fired from Safeway after a confrontation with another employee where Junior "unloaded on him verbally." TCF, p.900 (p.54:5-16). He also knew that Junior had a problem with alcohol. TCF, p.995. Senior opined that Junior has a temper when he drinks. TCF, p.801.

Mother was aware that Junior would become load and belligerent when he drank. TCF, p.883 (p.121:20-p.122:1). Mother opined that Junior had a marijuana problem. TCF, p.801. Mother and Navarrette had a conversation where Mother agreed that Junior was an alcoholic and had anger issues, and stated that he had anger issues his whole life. TCF, p.827 (p.60:7-18), p.870 (p.69:5-10), p.882 (p.119:8-p.120:9).

C. Parent's Requested that Junior Housesit for Them

Parents owned and resided at 28999 Redlands Mesa Road, Hotchkiss, Colorado. TCF, p.3, 28, 995. Parents requested that Junior watch their house from December 23 to December 27 while they were out of town for Christmas. TCF, p.3, 28, 995. Parents wanted Junior to stay at their ranch to feed and water the

horses and care for the dog. TCF, p.865 (p.51:21-p.52:1). The eight horses required food twice a day. TCF, p.896 (p.39:22-p.40:12). Parents had made this arrangement with Junior before. TCF, p.865 (p.52:2-4). Junior liked spending time at their ranch. TCF, p.896 (p.37:23-p.38:12). The arrangement was mutually beneficial because Junior got to spend time at the ranch with the horses, and got to ride the four-wheeler ATVs; and parents got to leave, which they could not do without someone to care for the animals. TCF, p.896 (p.38:10-20), p.878 (p.104:9-17).

Prior to leaving, Mother wrote Junior a note with a list of chores. TCF, p.864-865 (p.48:14-p.49:1). She was in a hurry when she wrote the note. TCF, p.865 (p.52:15-17). The note had several chores for Junior to perform.[3] TCF, p.800. This included: cleaning the barn; cleaning the four-wheelers; vacuuming and dusting; taking out the trash on Thursday morning; watering the dog; and leaving corn on the sidewalk for the deer. TCF, p.800. It included specific directions for watering the horses and for giving treats to the dog. TCF, p.800. The list also provided instructions to stop using the pellet stove if it smells "hot" or starts smoking. TCF, p.800.

[3] Mother later claimed the list was a joke, but a fact finder can infer it was supposed to be followed, especially as Mother was in a hurry when she wrote it.

Parents were aware that Navarrette might be coming along, and did not object to her staying at the ranch. TCF, p.3, p.28, p.995, p.871 (p.73:23-p.74:2), p. 880 (p.111:7-10), p.903 (p.67:12-17). Navarrette generally stayed with Junior at Parents' ranch anytime they were out of town. TCF, p.827 (p.57:8-14). Parents knew she had stayed at the ranch before. TCF, p.864 (p.47:19-21). When staying there, Navarrette would clean Parents' kitchen to show her appreciation. TCF, p.849 (p.147:15-20). Mother knew that Navarrette cleaned up the house when they were away. TCF, p.879 (p.107:12-p.108:7). Senior could tell when Navarrette had stayed at the ranch with Junior, because the house was always cleaner than if Junior stayed by himself. TCF, p.903 (p.67:22-p.68:6).

D. Parents Stored the Loaded Handgun on the Refrigerator

Senior purchased the handgun in order to shoot prairie dogs on his property. TCF, p.889 (p.9:23-p.10:11); p.890 (p.15:22-25). Senior kills the prairie dogs because they harm the agriculture on his property; and they damage the runway on the property by putting holes in it, which endangers his private plane. TCF, p.890 (p.16:5-19). Senior had a lockable gun safe in a building separate from the house. TCF, p.891 (p.19:20-p.20:1, p.20:12-17). But the handgun was kept on top of the refrigerator, with a loaded magazine, but no round in the chamber. TCF, 859 (p.25:19-21), p.893 (p.24:8-p.25:13). It had been kept there for about five years.

p.859 (p.25:22-24), p.901 (p.57:4-10). The handgun was kept on top of the refrigerator with clips for Senior's .22 rifle so that they would be readily available for shooting prairie dogs, while not being obvious to "kids or granddaughters or anybody else that comes in the house…." TCF, p.860 (p.29:2-5), p.898 (p.45:6-21). Although Mother did not purchase the handgun, she realized it could be dangerous. TCF, p.860 (p.29:15-17).

Senior never showed the handgun to Navarrette, and she was too short to have seen it on top of the refrigerator; although Junior could have seen it there. TCF, p.898 (p.46:9-24). Navarrette knew there were firearms on the property, but had never seen them and did not know where they were. TCF, p.828 (p.63:14-22). She believed the firearms were put away, because she never saw them. TCF, p.847 (p.140:16-21). She had never shot a firearm. TCF, p.828-829 (p.64:25-p.65:5).

E. Incidents Leading to the Shooting

Junior arrived at the ranch on December 22, and Navarrette followed on December 23. TCF, p.17. Junior and Navarrette had been riding ATVs and were drinking on December 23. TCF, p.992. No one else was there, although they were planning on having company later. TCF, p.992.

Parents left a turkey for them for Christmas dinner. TCF, p.800, p.865 (p.50:17-22). In the early morning of December 24, Junior was asleep in the

family room. TCF, p.859 (p.27:4-8). At about 1:00 a.m. he was awoken by the oven timer going off. TCF, p.859 (p.27:9-11), p.992. He got up and began arguing with Navarrette about putting the turkey in the oven too soon. TCF, p.858 (p.24:20-25), p.992. Navarrette was shot during this argument.

Junior called 911 to report that Navarrette had been shot in the head. TCF, p.991. When the deputy arrived, he found Junior in his underwear on the floor by Navarrette, attempting to stop the blood flow from her head. TCF, p.991. The deputy observed that Navarrette did not have burn marks that contact with a fired gun would commonly leave. TCF, p.991. He observed the handgun was on the floor to Navarrette's left, and appeared to be "placed there very carefully." TCF, p.991.

Junior claims that Navarrette shot herself. TCF, p.992. But she did not know about the handgun and was too short to see it on top of the refrigerator. The gun was found on Navarrette's left, but she is right handed. TCF, p.832 (p.77:24-p.78:14). The gun has a left side thumb rest, making left handed use difficult. TCF, p.744. Dr. Fox, who operated on Navarrette, found no burn marks around the wound. TCF, p.996. He also opined that the wound being near the center of the head, at or near the hairline, was inconsistent with a self-inflicted gunshot wound. TCF, p.996-997. Because Navarrette is petite, and the handgun barrel is long, it

may have been impossible for Navarrette to shoot herself in the manner described. TCF, p.744, p.832 (p.77:24-p.78:14).

SUMMARY OF THE ARGUMENT

Navarrette's claim arises under the PLA. Parents obtained the handgun for use on their property, namely to keep prairie dogs from damaging the property. They kept the handgun on their property, sitting on top of the refrigerator. The handgun's storage on the refrigerator was a condition or circumstance existing on the property. Due to the handgun's lethal potential, its storage on top of the refrigerator was a dangerous condition or circumstance. And Parents had actual knowledge of the dangerous condition or circumstance because they purposefully chose to keep the loaded handgun there. Thus, the trial court erred in dismissing Navarrette's premises liability claim.

If Navarrette's claim does not arise under the PLA, then she has a common law claim for negligence. Because of the dangerous nature of firearms, reasonable care requires use of extraordinary care in a firearm's use and possession. Colorado has recognized a duty to safely store firearms, at least with regard to preventing misuse by children. Colorado, like other states, should extend this duty to adults; at least where the adult's misuse the firearm is foreseeable. Parents had a duty to safely store their handgun when it was not in use, at least when they knew or had

reason to know irresponsible or unauthorized people would have ready access to the handgun. Thus, the trial court erred in dismissing Navarrette's negligence claim against Parents.

Junior was Parents' employee while staying at the ranch. Parents asked him to stay there and to perform specific tasks; and he agreed to do this. Junior's housesitting did not entail simply following household rules, but included performing specific tasks. Parents could control the details of these tasks, as shown by the detailed instructions on watering the horses. In Colorado, an employment relationship can be informal and does not require compensation. Because Junior was performing work for Parents, and subject to their control, he was their employee. Thus, the trial court erred in dismissing Navarrette's respondeat superior claim.

ARGUMENT

I. LEGAL STANDARD FOR SUMMARY JUDGMENT AND DETERMINATIONS OF LAW

All three issues presented were resolved by summary judgment or a determination of law. A motion for determination of law under C.R.C.P. 56(h) is determined under the same standard as a summary judgment motion. *See Stapleton v. Public Employees Ret. Assoc.*, 2013 COA 116, ¶22.

"Under C.R.C.P. 56(c), summary judgment is proper only when the pleadings, affidavits, depositions, or admissions establish that there is no genuine issue as to any fact and that the moving party is entitled to judgment as a matter of law." *Continental Airlines v. Keenan*, 731 P.2d 708, 712 (Colo. 1987). "The burden of establishing the nonexistence of a genuine issue of material fact is on the moving party." *Id*. "The nonmoving party is entitled to the benefit of all favorable inferences from the undisputed facts, and all doubts as to the existence of a triable issue of fact must be resolved against the moving party." *Stapleton* at ¶21.

II. THE PREMISES LIABILITY ACT APPLIES TO NAVARRETTE'S CLAIMS AGAINST PARENTS, AND THERE IS A QUESTION OF FACT AS TO THEIR LIABILITY THEREUNDER

A. Standard of Review and Preservation of the Issue

The Court reviews summary judgment orders de novo. *Robinson v. Legro*, 2014 CO 40, ¶10. The applicability of the PLA is a matter of statutory construction. Statutory construction is reviewed de novo. *Id*. Navarrette preserved this issue by opposing Parents' motion for summary judgment. TCF, p.703, p.716-725.

B. Navarrette's Claim Arises under the PLA, Because She was Injured on Parent's Property and by Virtue of a Condition or Circumstance Existing on the Property

1. Standard for determining whether the PLA applies

The PLA establishes the duty of care owed by landowners for injuries occurring on the landowner's property because of conditions, circumstances, or activities on the property. Section 13-21-115, C.R.S.; *Grizzell v. Hartman Enters., Inc.*, 68 P.3d 551, 553 (Colo. App. 2003). When it applies, it is the exclusive remedy against a landowner for injuries occurring on the landowner's property. *Vigil v. Franklin*, 103 P.3d 322, 328 (Colo. 2004). Yet it does not extend to "any tort that happens to occur on another's property." *Larrieu v. Best Buy Stores, L.P.*, 303 P.3d 558, 559 (Colo. 2013).

The PLA applies to "conditions, activities, and circumstances on the property that the landowner is liable for in its legal capacity as a landowner." *Id*. This is a "fact-specific, case-by-case inquiry…." *Id*. The court must consider: 1) whether the injury occurred while the plaintiff was on the landowner's property; and 2) whether 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 563. The statute applies to activities, conditions, or circumstances that the landowner is conducting or creating on the property in its capacity as a landowner.

Id. at 564. The "occurred by reason of" language requires that the cause of injury, and not just the location, be tied to the property. *Id*.

2. Navarrette's claim arises under the PLA, because it meets the test set forth in *Larrieu*

The PLA applies to Navarrette's claim because she alleges liability for an injury occurring on Parents' property and that is, at least in part, a result of a condition or circumstance existing on the property. The claim against Junior for his conduct in negligently shooting Navarrette might not arise under the PLA. But the claim against Parents for failing to use reasonable care with respect to the loaded, unsecured handgun falls squarely within the statute.

This Court previously held that the PLA governs liability for negligently allowing a dangerous activity on a landowner's property which led to a shooting. *Grizzell*, 68 P.3d at 554-555. There, the landowner operated a sandwich shop. *Id*. at 552. An employee invited decedent into the shop after hours. *Id*. At some point that night, the employee opened the rear door to an unknown individual, and the individual then shot and killed employee and decedent. *Id*. Plaintiff brought a wrongful death claim alleging the landowner knew that employees were using the backroom and rear door to conduct illegal drug transactions; and that landowner permitted and ratified this ongoing criminal activity. *Id*. at 554. It is this dangerous activity which led to the shooting. *Id*. at 553-554. *Grizzell* held that these facts

stated a claim under the PLA. *Id*. Following *Grizzell*, the United States District Court for the District of Colorado recently held that the liability of a movie theater for a shooting which occurred at the theater would be governed by the PLA. *Traynom v. Cinemark USA, Inc.*, 940 F.Supp. 2d 1339, 1342-1343, 1346-1347 (D. Colo. 2013).

As with *Grizzell* and *Traynom*, Navarrette's claim against Parents is governed by the PLA. In *Grizzell*, the landowner permitted and ratified a dangerous activity leading to a shooting. In *Traynom*, it was a dangerous condition or circumstance that allowed the shooting to occur. Here, it was a dangerous condition or circumstance that resulted, at least in part, in the shooting of Navarrette. Parents left the handgun loaded and unsecured on top of the refrigerator, in easy sight and reach of Junior, allowing him to handle the firearm and to shoot Navarrette with it. But for Parents' conduct, the shooting would not have occurred.

This case meets both *Larrieu* factors. It satisfies the first factor because Navarrette was injured on Parents' real property; the house they owned and resided in. It satisfies the second factor, because she is seeking to hold Parents liable in their capacity as landowners. Parents purchased the handgun for use on the property to control prairie dogs. They used the handgun on the property for this

purpose. They kept and stored the handgun on their property. And they chose to keep it loaded and unsecured on top of the kitchen refrigerator. It was kept there to make it easier to use for prairie dog control. All of these acts were taken in Parents' capacity as landowners.

Parents' ownership and use of the handgun was related to the property. The presence of the loaded, unsecured handgun on top of the refrigerator was a condition or circumstance existing on the property. This circumstance or condition resulted in the shooting, because it made the loaded handgun available to Junior, an irresponsible person not authorized to possess it. If the handgun had been unloaded, or properly secured, Navarrette would not have been shot.

Navarrette was injured on Parents' real property and as a result of a condition or circumstance existing on the property. Therefore, she has satisfied both *Larrieu* factors and her claim falls within the PLA. The trial court erred in finding to the contrary. The trial court reasoned that Junior's acts of shooting the handgun in the house were not connected to the land, meaning the PLA did not apply. But this confuses the defendants and the cause of action. As *Grizzell* and *Traynom* demonstrate, it is not the acts of the shooter, but the acts of the landowner that determine whether the claim against the landowner arises under the PLA.

Navarrette is not seeking to hold Parents liable for Junior's acts under the PLA. Nor is Navarrette alleging a failure to control him, or to protect her from him. Instead, Navarrette seeks to hold Parents responsible for their own failure to use reasonable care with regard to storing the handgun on their property. Parents' act of choosing to keep a loaded, unsecured handgun on top of the refrigerator falls within the PLA; and because Navarrette seeks to hold them responsible for this act, her claim falls within the PLA as well. For this reason, the trial court erred in dismissing her premises liability claim. Therefore, this Court should reverse the trial court and remand for further proceeding.

C. The Loaded, Unsecured Handgun was a Danger of which Parents Actually Knew

Although not addressed by the trial court, Parents presented alternate arguments for summary judgment on the premises liability claim. Under the PLA, a landowner may be liable to a licensee for failure to exercise reasonable care with respect to dangers created by the landowner of which the landowner actually knew. *Grizzell*, 68 P.3d at 554, *citing* section 13-21-115(3)(b), C.R.S. Parents argued that the handgun was not a danger as a matter of law. TCF, p.538-540. Additionally, Parents argued that there was no evidence they had actual knowledge of the dangerous condition. TCF, p.538-540. Both of these arguments lack merit.

1. The handgun presented a danger

The dangerousness of firearms is so well known as to be established as a matter of law. "[T]he knowledge of the hazards of firearms is known by all Americans at an early age… Every reasonable consumer that purchases a gun knows that it is a potentially dangerous weapon." *Hilberg v. F.W. Woolworth Co.*, 761 P.2d 236, 241 (Colo. App. 1988). "Use of any kind of gun involves widely known risks." *Steele v. Daisy Mfg. Co.*, 743 P.2d 1107, 1108 (Okla. App. 1987). "[A] handgun is considered an inherently dangerous instrument." *Wood v. Groh*, 7 P.3d 1163, 1168 (Kan. 2000). A loaded, unsecured handgun unquestionably presents a danger.

Additionally, the evidence presented raises a question of fact that the loaded, unsecured handgun presented a danger. Mother acknowledged that the handgun could be dangerous. She knew Senior used it to kill prairie dogs. Senior bought it to kill prairie dogs and used it for this purpose. Thus, the handgun was capable of taking life. Storage of the handgun and ammunition for other firearms on top of the refrigerator, where they would not be obvious to "kids or granddaughters or anybody else that comes in the house…." is an implicit recognition of the dangerousness of firearms, including the handgun.

Expert witness Nuss established that for safety, firearms must be securely stored unloaded and separate from the ammunition. TCF, p.747-750. The handgun's manual states that, "Firearms are dangerous weapons…." TCF, p.760. It also states the only "safe" handgun is one with the bolt open, the chamber empty, and no magazine loaded. TCF, p.762. And it states that safe gun handling rules must be followed at all times to ensure safety, including securely storing the firearm unloaded and separate from ammunition. TCF, p.793-794. It further states, "Firearms should always be stored securely and unloaded, away from children and careless adults." TCF, p.779 (it also should be stored away from "unauthorized adults").

Loaded firearms present a danger as a matter of law. Or if this is not established as a matter of law, it may at least be judicially noticed. C.R.E. 201. Furthermore, the evidence presented establishes that the handgun was dangerous. This is especially true as basic safety rules were not followed, because the handgun was not secured and was kept loaded in a place accessible to careless or unauthorized adults. There is at least a question of fact as to whether the handgun was a danger.

Parents' sole argument that the handgun was not a danger is Navarrette's testimony that she felt safe at the ranch, even though she knew there were firearms

there. However, her subjective feelings of safety have no bearing on whether there was actually a dangerous condition or circumstance on the premise; and her subjective feeling certainly do not establish the absence of a danger as a matter of law.

The statute does provide for liability to licensees based on a "danger" of which the landowner actually knew. Whether something is a danger is determined on an objective standard. It would be absurd to decrease a landowner's duties based upon the entrant's subjective belief in her safety. Likewise, it would be absurd to increase the landowner's duties based on an entrant's fears, phobias, or beliefs in a danger. Further, to promote private property rights and the availability and affordability of insurance, a landowner's duties and potential liability must be predictable. *See* section 13-21-115(1.5)(d), C.R.S. This can only occur if the existence of a danger is determined objectively, rather than being determined based on the subjective belief of each entrant. Because the existence of a danger is determined objectively, Navarrette's subjective feelings of safety are irrelevant.

Further, even if Navarrette's subjective beliefs mattered, they would have to be based on knowledge of the circumstances. An absence of danger could not rationally be based on an entrant's ignorance. Navarrette was ignorant of the presence of the handgun. She had never been shown the handgun and never saw it.

She believed all of the guns were put away, which was not true. Since Navarrette's feelings of safety were based on the belief all of the firearms at the property were put away, they cannot be used to establish the loaded, unsecured handgun on top of the refrigerator was safe as a matter of law. Instead, because both the law and facts establish that the loaded, unsecured handgun was a danger, summary judgment for parents on this issue is inappropriate.

2. Parents had actual knowledge of the danger

The dangerous condition or circumstances on which liability is predicated is the loaded, unsecured handgun left on top of the refrigerator. Both Mother and Senior knew it was there, because that is where Senior kept it. It is undisputed that they actually knew of this danger, because they both testified they were aware of it.

Yet Parents claimed they did not have actual knowledge of the danger, because they did not have actual knowledge that Junior would misuse the handgun so as to shoot Navarrette. Parents are confusing the danger of which they must be aware, because it is the danger of the handgun that is relevant, not the danger posed by Junior.

This is demonstrated in the *Grizzell* case. As set forth above, *Grizzell* involved the dangerous activity of illegal drug transactions on the premises. 68 P.3d at 554. The Court held that plaintiff "need not allege that owner had actual

knowledge an armed assailant would come in the restaurant and kill the victims." *Id*. Instead, it was sufficient to allege the owner "had an active awareness of the dangerous condition or, in this case, the criminal activity at its restaurant and the risks associated with that activity." *Id*.

Grizzell is on point. Navarrette need not show Parents had actual knowledge that Junior would misuse the gun and shoot Navarrette. Instead, she must show Parents had an active awareness of the handgun and dangers it presented. Navarrette has made this showing. Thus, summary judgment for Parents on this issue would be inappropriate.

Navarrette's claim against parents for their unreasonable failure to safely store the handgun arises under the PLA. There is at least a question of fact as to whether the handgun was a danger, and whether Parents actually knew of the danger. Therefore, this Court should reverse the trial court, reinstate Navarrette's premises liability claim, and remand for further proceedings.

III. PARENTS OWED NAVARRETTE A DUTY OF CARE TO SAFELY STORE THEIR HANDGUN, WHEN IT WAS NOT IN USE, TO PREVENT IT FROM BEING ACCESSED BY IRRESPONSIBLE OR UNAUTHORIZED ADULTS

A. Standard of Review and Preservation of the Issue

The Court reviews summary judgment orders de novo. *Robinson v. Legro*, 2014 CO 40, ¶10. Navarrette preserved this issue by opposing Parents' motion for summary judgment. TCF, p.703, p.730-739.

B. Legal Standard Regarding the Existence and Scope of a Duty

Negligence cases must be premised on circumstances imposing a duty of care upon the defendant. *University of Denver v. Whitlock*, 744 P.2d 54, 56 (Colo. 1987). Whether the defendant owes a duty of care is a question of law. *Id*. at 57. "A duty of reasonable care arises when there is a foreseeable risk of injury to others from a defendant's failure to take protective action to prevent the injury." *Connes v. Molalla Transp. Sys., Inc.*, 831 P.2d 1316, 1320 (Colo. 1992).

Whether a duty exists depends upon many factors, including:

> [T]he risk involved, the foreseeability and likelihood of injury as weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against injury or harm, and the consequences of placing the burden on the actor.

Whitlock, 744 P.2d at 57. Another considerations is the "policy of preventing future injuries…." *Id*. at 57 fn 2. Whether a duty should be imposed is essentially

a question of fairness, "whether reasonable persons would recognize a duty and agree that it exists." *Id*. at 57.

When engaging in an activity, each person is bound to exercise the reasonable care and caution that would be exercised by a reasonable person under the same or similar circumstances. *Imperial Dist. Servs., Inc. v. Forrest*, 741 P.2d 1251, 1254 (Colo. 1987). Under this standard "the greater the risk, the greater the amount of care required to avoid injury to others." *Id*.

The reasonable care standard never varies, but what constitutes reasonable care varies with the danger involved and is proportionate to it. *Wood v. Groh*, 7 P.3d 1163, 1168-1169 (Kan. 2000). "Thus, those who deal with firearms…are required to exercise the closest attention and the most careful precautions, not only in preparing for their use but in using them." *Long v. Turk*, 962 P.2d 1093, 1097 (Kan. 1998) (emphasis removed), *citing* Prosser and Keeton, The Law of Torts §34, p.208 (5th Ed. 1984). One possessing a firearm possesses "an instrument exceptionally dangerous in character" and therefore must "take exceptional precautions to prevent an injury thereby." *Miller v. Civil Constructors*, 651 N.E.2d 239, 243 (Ill. App. 1995), *accord Wood*, 7 P.3d at 1168 (a handgun is "inherently dangerous").

This does not mean possessors of firearms owe an enhanced standard of care, such as applies to propane manufacturers. *See Imperial*, 741 P.2d at 1255. Instead, it simply means the degree of care used must be proportionate to the great danger presented by firearms. "In deciding whether a person in possession of a loaded firearm has exercised 'reasonable care', we must ask whether the person exercised 'extraordinary care'; for someone in possession of a firearm, 'extraordinary care' *is* 'reasonable care.'" *Everette v. New Kensington*, 396 A.2d 467, 468 (Pa. Super. 1978) (emphasis in original).

C. Navarrette's Claim is for Misfeasance in Parents' Storage of the Handgun, Rather than Nonfeasance or Failure to Control Junior

1. This is a case of misfeasance

Navarrette's claim is for misfeasance, because it is based on Parents' actions and choices in storing their handgun, and because they created or increased the risk to her. In finding a duty, the law distinguishes between misfeasance and nonfeasance. *Whitlock*, 744 P.2d at 57. Misfeasance is an action working positive injury to others. *Id*. Nonfeasance is "passive inaction or a failure to take steps to protect" the plaintiff. *Id*. It is nonfeasance if the defendant has created no new risk of harm and has made the plaintiff's position no worse. *Id*. at 57, 59 fn 4.

Not every omission, or failure to act, is nonfeasance instead of misfeasance. Negligence consists of both failing to do an act which a reasonable person would

do, and in doing an act which a reasonable person would not. CJI-Civ. 9:6. "[U]nder some fact situations the difference between negligent action and negligent failure to act can be simply a matter of characterization." *Whitlock*, 744 P.2d at 59 fn 4; *Groh v. Westin Operator, LLC*, 2013 COA 39 ¶29. Nonfeasance is the inaction of a bystander, one who "had no part in creating the peril." *See Whitlock*, 744 P.2d at 57, *and Groh*, 2013 COA at ¶29-30.

Misfeasance through an omission is demonstrated in *Smit v. Anderson*, 72 P.3d 369, 373 (Colo. App. 2002). There, the general contractor alleged his conduct was mere nonfeasance because it was alleged he negligently failed to supervise a construction site, resulting in injury. *Id*. This court disagreed, because the contractor obtained the building permits and loans necessary for the project to go forward. *Id*. Thus, the contractor played a part in creating the peril, making even his inaction misfeasance. *Id*.

This case entails misfeasance because Navarrette is alleging Parents were negligent in the handling and storage of the handgun, a dangerous instrument which they owned and controlled. It is Parents' negligence in storing their handgun that created, or at least contributed to, the risk of Navarrette being shot. *Whitlock* was a case of pure nonfeasance. *Groh*, 2013 COA at ¶29. The defendant did not own the instrument causing injury, did not exercise control over it, and did

not exercise control over the premises where it was located. *Whitlock*, 744 P.2d at 55-56, 59. In contrast, Parents owned the handgun, exercised control over it by deciding how and where it would be stored, and controlled the premises on which it was located. Parents' choices with respect to the handgun played a part in creating the peril faced by Navarrette, making their conduct misfeasance.

Yet even if this case involved nonfeasance, there would still be a duty. "Special relationships are not the only situations that give rise to a duty to take affirmative action for another's aid or protection." *Id*. at 58 fn 3. An actor may have control over land or chattels and be under a duty to exercise such control. *Id*. *citing* Restatement (Second) of Torts, §314 cmt. a. Here, Parents controlled both their land and the handgun. Parents' control over an inherently dangerous instrument such as the handgun gives rise to a duty to exercise such control so that it does not become a danger to others. This includes taking reasonable steps to properly store it to ensure that careless and unauthorized adults do not access it.

2. This is not a case involving the failure to control another

Navarrette's claim against Parents derives from their actions in storing the loaded, unsecured handgun on top of the refrigerator. Her claim is not one for failure to control Junior, or for failure to protect her from him. If Junior had harmed Navarrette completely independent of the handgun, such as by hitting her,

she would not be making her claim against Parents. Instead, her claim is against Parents for failing to properly store the handgun so that it was accessible to Junior, who they knew was irresponsible and not authorized to possess it. Had Parents properly stored the handgun, Navarrette would not have been shot.

This distinction was set forth by the Pennsylvania Supreme Court in *Kuhns v. Brugger*, 135 A.2d 395 (Pa. 1957). There a grandfather kept a loaded handgun in a dresser drawer in his bedroom where the grandchildren were allowed to congregate. *Id*. at 402-403. One of the grandchildren found the gun, and in handling it, shot another. *Id*. The Court explained:

> We are not confronted with the question of grandparent's liability for the tortious conduct of a minor grandchild; on the contrary, we are determining whether the grandparent by his own conduct was guilty of negligence, and whether, if negligent, his negligence was the proximate cause of [grandchild's] injury.

Id. at 404. The same is true here. Navarrette is not seeking to hold Parents' liable for failing to control Junior, or for failing to protect her from him. Instead, she is seeking to hold them liable for their own conduct in improperly storing the handgun.

D. Case Law Supports Finding a Duty to take Reasonable Steps to Securely Store a Handgun so that It is Not Accessible to Irresponsible or Unauthorized Adults

Case law from Colorado and other states supports a finding Parents owed a duty to Navarrette. Colorado has recognized a duty to safely store a firearm to avoid unauthorized access, at least in regard to children. *Dickens v. Barnham,* 69 Colo. 349 (1920). *Dickens* held a father had a duty to ensure a rifle and ammunition were properly stored to prevent access by small children; and where a child accessed the firearm and injured another, the father could be held liable for negligence. *Id*. at 351-352.

Dickens was followed in *Hall v. McBryde,* 919 P.2d 910 (Colo. App. 1996). There, parents' son was home alone, although he was residing in a different household to avoid gang activity. *Id*. at 912. Son observed a car approaching and retrieved a handgun father had hidden under the bed. *Id*. When youths in the other car began shooting, son returned fire, and in the process he struck plaintiff, a bystander. *Id*. *Hall* held that father had a duty to properly store the handgun so as to protect others from injury by the weapon. *Id*. at 913. Notably, *Hall* also held that the degree of care needed with respect to the handgun depended, in part, on son's prior conduct, such as any prior violent behavior. *Id*. Because there had been

no prior violent behavior, the trial court could find that hiding the handgun satisfied reasonable care. *Id*. at 912-913.

Hall not only recognized a duty to safely store a firearm, but recognized the duty rests in part on the foreseeable misuse of the firearm, including the prior conduct of those who might have access to it. Thus, the duty does not rest on the parent-child relationship, but on ownership of the firearm and knowledge of who might have access to it.

Although *Dickens* and *Hall* applied to minors, the logic of *Hall* extends to adults. It is foreseeable that an adult with a history of misconduct would misuse a firearm. And Courts from other states have so held.

The Supreme Court of Indiana held that firearms owners have a duty to take reasonable care in storing their firearms. *Heck v. Stoffer*, 786 N.E.2d 265, 270 (Ind. 2003). There, parents kept a handgun in the side of a chair at their cottage, to which they gave their adult son free access. *Id*. at 266-267. Son had a history of drug use, and of criminal acts such a theft and battery. *Id*. Son took parents' handgun and subsequently shot and killed a police officer with it. *Id*.

In finding a duty, *Heck* recognized the shooting was foreseeable based on son's prior conduct and his unfettered access to the home where the handgun was kept. *Id*. at 269. Further, parents foresaw the potential for misuse of the handgun,

because they hid it when their grandchildren visited. *Id*. Also, statutes prohibiting sale or possession of firearms to felons, and drug and alcohol abusers, indicates their misuse is foreseeable. *Id*. at 270.

Public policy favored finding a duty, particularly the policy of "[p]reserving human life…." *Id*. Thousands of firearms are stolen each year, and many are subsequently used in crimes. *Id*. Yet the burden of reducing this risk by safely storing a firearm is minimal, and may be as simple as using a trigger lock. *Id*. at 269-270. Thus, *Heck* held that parents had a duty to use reasonable care in storing their handgun to prevent unauthorized access by their adult son. *Id*.

The same result was reached in *Juplin v. Kask*, 849 N.E.2d 829, 833, 842 (Mass. 2006). There, homeowner allowed her live-in boyfriend to store numerous firearms in her house. *Id*. at 833. Boyfriend's adult son had free access to the house. *Id*. at 834. Son had a history of violence and mental illness. *Id*. Son took one of boyfriend's handguns and subsequently shot a police officer. *Id*.

Juplin held that it was foreseeable that a mentally unstable and violent person would take and misuse a firearm. *Id*. at 836-837. Although son's specific misuse might not have been foreseeable, the general risk of his taking and misusing a firearm was foreseeable. *Id*. at 837 & fn 8.

Juplin recognized that firearms are dangerous, requiring a high degree of care; but that the burden of such care is modest. *Id*. at 838-839. *Juplin* held there was a duty to store firearms securely to prevent access to those who have free access to the home where they are stored, and who might misuse them. *Id*. at 839, 842.

The trial court and Parents cited one case to the contrary, *Lelito v. Monroe*, 729 N.W.2d 564 (Mich. App. 2006). *Lelito* is unpersuasive because it takes a narrow view of foreseeability, essentially requiring that the specific shooting have been foreseen. *Id*. But it is not necessary to foresee the exact nature of the injuries and how they occurred, but only that "some injury" may result "in some manner" from the conduct. *HealthOne v. Rodriguez*, 50 P.3d 879, 889 (Colo. 2002). Further, foreseeability is not certainty, but simply "whatever is likely enough…that a reasonably thoughtful person would take account of it…." *Taco Bell, Inc. v. Lannon*, 744 P.2d 43, 48 (Colo. 1987). Because of its narrow view of foreseeability, *Lelito* is unpersuasive.

The holdings in *Heck* and *Juplin* are a natural extension of this Court's holding in *Hall*, and they should be followed here. This case fits within *Heck* and *Juplin*. Parents owned the handgun and kept it loaded and unsecured on their refrigerator, and stored it there for years. Parents gave Junior unfettered access to

the house for several days. They could have easily stored the handgun in the safe they already owned. And Parents knew Junior was a felon with a marijuana problem, an alcohol problem, an anger control problem, and acted irresponsible when he drank; and that he had been fired due to a confrontation with a co-worker and had assaulted Navarrette at least once. Under these circumstances, Parents owed Navarrette a duty to take reasonable steps to securely store the handgun so that Junior could not access it.

E. The *Whitlock* Factors Support Finding a Duty

In addition to case law, an assessment of the *Whitlock* factors supports finding a duty here. Firearms present a high risk of injury or death. Several courts have noted that firearms are exceptionally, or inherently, dangerous and require a high degree of care in their handling. The handgun here was specifically obtained to take the life of animals, and could take a person's life as well.

The foreseeability and likelihood of injury from unauthorized access are both high, as explained in *Heck*. There are innumerable shooting injuries and deaths every year, many resulting from unauthorized access to firearms. *Heck*, 786 N.E.2d at 269; Andrew J. McClurg, *Armed and Dangerous: Tort Liability for the Negligent Storage of Firearms*, 32 Conn. L.Rev. 1189, 1127 (Summer 2000). The frequency of such events makes them foreseeable.

Additionally, "[e]veryone …[including] the National Rifle Association… agrees that guns owners must store firearms securely so that they are inaccessible to unauthorized users." McClurg, *supra*. at 1190-1199. The handgun's manual contains several warnings to store the gun unloaded, separate from the ammunition, and securely to avoid access by "unauthorized adults" or "careless adults." TCF, p.758, 775, 778-779, 794. The universally accepted standard is that firearms are to be unloaded when not in use, and stored separate from the ammunition. TCF, p.750. The reason for the rules is to avoid misuse of the firearm, whether accidental or purposeful. When rules exist to avoid a risk, it indicates the risk is foreseeable. *HealthOne*, 50 P.3d at 888-889. Further, that Senior sought to keep the handgun and ammunition out of the obvious sight of others indicates he was aware of the danger of unauthorized access.

Finally, Junior's misuse of the handgun was foreseeable. The misuse of a firearm by an irresponsible person, such as a felon, marijuana user, or alcoholic, is foreseeable. *K-Mart Enter. of Fla., Inc. v. Keller*, 439 So.2d 283, 287-288 (Fla. App. 1983). Colorado has held that an individual's criminal misconduct may be foreseeable based on past misconduct. *Vigil v. Pine*, 176 Colo. 384, 385, 388 (1971). There, a tavern patron struck then beat to death another individual. *Id*. at 385. Decedent's widow sued the tavern owner, who claimed the patron's conduct

was unforeseeable. *Id*. The Supreme Court held the owner's knowledge that patron had been in three prior altercations, one of which involved striking someone, was sufficient to find patron's conduct foreseeable. *Id*. at 385, 388.

Here, Junior was a felon; he had at least two confrontations with Navarrette, one of which involved assaulting her; had a confrontation with a co-worker resulting in his firing; he had alcohol problems; used marijuana; had anger problems; and acted irresponsibly when drinking, including multiple DUI citations. Junior's misuse of the handgun was foreseeable.

Admittedly, there is social utility in firearms ownership. Senior used the firearm to control prairie dog populations on his property. But the burden of guarding against the harm of unauthorized access is minimal. *Heck*, 786 N.E.2d at 269-270. A single pistol gun safe can be purchased for less than $30, allowing the handgun to be securely stored on top of the refrigerator. TCF, p.750. Or Senior could have stored it in the gun safe he already owned, where he keeps it now. TCF, p.902 (p.61:18-p62:4). The burden is simply to do what everyone, including the handgun manufacturer and NRA, agrees a firearms owner should do anyway.

The consequences of placing the burden on firearms owners will be to increase safety and responsible gun ownership. Encouraging safe storage will result in fewer accidents and fewer injuries resulting from intentional misconduct.

This will promote the policy of preventing future injuries. The duty will not impose upon legitimate use of firearms, because it applies when the firearm is stored when not in use. Prudence may support possession of a firearm, but it also dictates locking it up when not in use. *See Kuhns v. Brugger*, 135 A.2d 395, 404 (Pa. 1957).

In conclusion, reasonable people would agree that firearms owners have a duty to take reasonable steps to securely store their firearms to avoid access by irresponsible or unauthorized persons. This is particularly true when the owner is not using the firearm and knows, or has reason to know, a careless or unauthorized individual will have access to the gun. Junior was such a person. In this case, Parents owed Navarrette a duty to securely store their handgun to prevent Junior from accessing it; and the trial court's ruling to the contrary should be reversed.

IV. JUNIOR WAS AN EMPLOYEE OF PARENTS BECAUSE HE WAS PERFORMING WORK FOR THEM AT THEIR REQUEST AND DIRECTION

A. Standard of Review and Preservation of the Issue

Review of an order granting a motion for determination of law is de novo. *Stapleton v. Public Employees Ret. Assoc.*, 2013 COA 116 ¶16-17. Navarrette preserved this issue by opposing Parents' motion. TCF, p.908, 922-930.

B. Junior was Parents' Employee, because Respondeat Superior Can be Based on Informal Employment

1. Legal test for employment

The evidence raises a question of fact as to whether Junior was Parents' employee while housesitting for them. In determining whether there is a question of fact, the Court should decline to consider the affidavits submitted by Parents, because they consist of mere conclusory statements. TCF, p.521-525. Such conclusory statements regarding employment cannot establish a basis for summary judgment. *Perkins v. Regional Transp. Dist.*, 907 P.2d 72, 674 (Colo. App. 1995). The issue should be decided based on the depositions and evidence submitted by Navarrette.

An employee is one who agrees to perform services for another and subject to the other's control. Restatement (Second) of Agency §220. The most important factor in determining if a person is an employee is the right of control, not the fact of control. *Perkins*, 907 P.2d at 675-675. Control may be "very attenuated" and "there may even be an understanding that the employer will not exercise control." Restatement (Second) of Agency §220 cmt. d. The employer need not constantly observe or supervise the work, as long as he has the right to have the work performed as directed. *Colorado Compensation Ins. Auth. v. Jones*, 131 P.3d 1074, 1080 (Colo. App. 2005).

An employee need not be paid, and one providing service gratuitously may still be an employee. Restatement (Second) of Agency §225 & cmt. a. Employment does not require a formal contract, instead "the relation may rest upon the most informal basis." Restatement (Second) of Agency §220 cmt. b. For example, a social guest volunteering to help his host make home repairs is an employee, and if drops a board on a passing person the host is liable under respondeat superior. Restatement (Second) of Agency §225 ill. 1.

Colorado follows the Restatement and recognizes that informal employment can give rise to respondeat superior liability. *Jones*, 131 P.3d at 1080. This includes work being performed without compensation. *Id*. In *Jones*, employee volunteered to assist defendant with a cattle drive. *Id*. at 1080-1081. Defendant controlled the cattle drive by deciding when they would start and stop each day, the route they would take, and their destination. *Id*. This raised a sufficient inference of control that a jury could find employee was employed by defendant for purposes of respondeat superior liability. *Id*.

2. Family members providing assistance may be employees

Furthermore, a familial relationship does not preclude, or even deter, a finding of employment. "If a master-servant relationship exists, it is immaterial that the act was performed by a child rather than a stranger." *Giese v. Montgomery*

Ward, Inc., 111 Wis. 2d 392, 416 (1983). In *Giese*, son was operating a riding mower at his father request and direction when he struck a child. *Id*. at 415-416. Because son was acting at father's request, subject to father's control, and for father's benefit, son was an employee for purposes of respondeat superior liability. *Id*. at 416-417.

A like result was reached in Arizona. *Nguyen v. Nguyen*, 746 P.2d 31, 32 (Ariz. App. 1987). There, defendant's sister was living with her during spring vacation. *Id*. Defendant suggested sister clean the kitchen floor; sister did so, but did not warn another guest in the house. *Id*. The guest slipped on the slick floor and sued defendant and sister for her injuries. *Id*. The court held that because sister performed work for defendant and at her request, she was defendant's employee, subjecting defendant to respondeat superior liability. *Id*.

3. Junior was an employee

There is a question of fact as to whether Junior was an informal employee of Parents, subjecting them to vicarious liability. The evidence establishes that Parents' requested Junior stay at the ranch and take care of their animals; and he agreed to do this. They provided specific directions on how to care for the animals, particularly on where to water the horses. They also left a list of other chores he was to perform for them. And they left directions with respect to the

pellet stove. The list shows that Parents could control what tasks he performed, and the directions with respect to the horses and dog show they could control the details if desired.

Although Parents' did not pay Junior, they did provide food and allow him to use the ATVs, providing some "in kind" compensation. They also paid for his expenses. TCF, p.866 (p.55:1-3). Parents benefited from Junior's work, because they could not leave town without someone watching the animals. And because they resided at the home, his performing chores there benefited them as well. The work performed by Junior is indistinguishable from the examples set forth above. As such, there was a question of fact as to whether he was Parents' employee. Thus, this Court should reverse the trial court and remand for further proceedings on Navarrette's respondeat superior claim.

C. A House Sitter Performing Work for the Owner is an Employee

Housesitting is no different from other tasks that might create an employment relationship. For example, one who is paid to open a summer home by cleaning it and putting it in order is an employee. Restatement (Second) of Agency §220 ill. 4. Although housesitting might be characterized as simply doing a favor, so are things like a guest helping a host with home repairs, mowing a yard, or helping a sibling clean. Yet such tasks can create an employment relationship.

The key issue with housesitting appears to be whether the house sitter is performing work, or merely residing at the house and following rules. *See Madsen v. Scott*, 992 P.2d 268, 270-272. (N.M. 1999). In *Madsen*, the sitter was asked to water plants, and given general rules, such as not to throw wild parties and not to let anyone touch owner's guns. *Id*. at 269. In determining whether the sitter was an employee of owner, the Court contrasted two cases: *State Farm Fire & Cas. Co. v. Miller Metal Co.*, 494 P.2d 178 (N.M. App. 1971) *and Lai v. St. Peter*, 869 P.2d 1352 (Haw. App. 1994).

In *Miller*, owners' daughter watched their house and was given detailed instructions on how to winterize the house. *Id*. at 180, 181. It is not clear that the instructions were followed, and the house burned down as a result. *Id*. For purposes of apportioning fault, the daughter would be considered an employee of owners, because she was given detailed directions which she agreed to carry out on their behalf. *Id*. at 181-182.

In *Lai*, the sitter was staying at a relative's house while vacationing in Hawaii. 869 P.2d at 1357-1358. She was given a list describing the operation of the household and a list of rules, such as no shoes in the house and no wet clothes on the furniture. *Id*. *Lai* held that mere compliance with rules of conduct for the premises did not make the guest the home owner's employee. *Id*.

The *Madsen* court found the case before it closer to *Lai*, because other than watering plants, owner only left a list of rules. 992 P.2d at 272. In contrast, this case is more like *Miller*. Parents left Junior with more than a list of rules; they left him with an extensive list of chores. Completing this list was part of Junior's housesitting task. Similar to the Restatement example, Junior was to clean the house and keep it in order until Parents' returned. As such, the trial court erred in granting summary judgment.

Navarrette's evidence presents a question of fact regarding whether Junior was Parents' employee by virtue of his housesitting. The evidence suggests he agreed to perform tasks for Parents, at their request, for their benefit, and subject to their control. Neither his acting gratuitously nor his status as a family member precludes a finding of employment. Therefore, this Court should reverse the trial court and remand for further proceedings on Navarrette's respondeat superior claim.

CONCLUSION

This Court should reverse the trial court's order granting summary judgment on Navarrette's premises liability claim and remand the case for further proceedings on that claim. In addition, or in the alternative, the Court should reverse the order granting summary judgment on Navarrette's common law

negligence claim and remand the case for further proceedings on that claim. The Court should also reverse the determination of law that Junior was not an employee of Parents and remand for further proceedings on Navarrette's respondeat superior claim.

DATED this 26th day of June, 2014.

KILLIAN DAVIS
Richter & Mayle, PC

Duly authorized original signature on file at the offices of* KILLIAN DAVIS Richter & Mayle, PC *pursuant to C.R.C.P. 121, section 1-26(9)

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **OPENING BRIEF** has been placed with the United States Mail, properly addressed and first-class postage prepaid, or transmitted by other means as indicated below, this 26th day of June, 2014, as follows.

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