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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	Word Count: 5,691 ☐ **COURT USE ONLY** ☐
Plaintiff/Appellant: Dina Navarrette v. Defendant/Appellees: Thomas Howe, Sr. and Avanell Howe	Case No. 14 CA 184 District Court Case Number 2012 CV 172
J. Keith Killian, Esq. No. 9042 Matthew Parmenter, Esq. No. 42937 Damon Davis, Esq. No. 34323 KILLIAN DAVIS Richter & Mayle, PC 202 North Seventh Street Post Office Box 4859 Grand Junction, Colorado 81502 Telephone: (970) 241-0707 Attys. for Appellant: Dina Navarrette	

REPLY BRIEF

CERTIFICATE OF COMPLIANCE

The undersigned certifies that to the best of his knowledge this Reply 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 5,691 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.

KILLIAN DAVIS
Richter & Mayle, P.C.

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)*

/s/ Damon Davis
J. Keith Killian, #9042
Damon Davis, # 34323
Attorney for Plaintiffs/Appellants
Post Office Box 4859
Grand Junction, CO 81502
(970) 241-0707

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I. THE COURT SHOULD DISREGARD PARENTS' UNSUPPORTED STATEMENTS

Throughout their brief, Parents make several unsupported statements that the Court should simply disregard. However, two of these unsupported statements should be specifically addressed.

First, Parents assert that Junior's prior criminal conduct is inadmissible, and imply his prior non-criminal conduct is inadmissible as well. Parents provide no support for their incorrect assertion. C.R.E. 404(b) does not preclude Junior's prior acts, because it only applies to the party seeking the protection of the rule, not to third parties. *Bennett v. Greeley Gas Co.*, 969 P.2d 754, 762 (Colo. App. 1998). Navarrette was not seeking to admit the evidence against Junior, only against Parents, making C.R.E. 404(b) inapplicable.

Junior's prior acts are admissible to establish his foreseeable misuse of the handgun in order to establishing duty and proximate cause. *See Martin v. Minard,* 862 P.2d 1014, 1016 (Colo. App. 1993) *and Hasegawa v. Day*, 684 P.2d 936, 939-40 (Colo. App. 1983) *overruled on other grounds by Casebolt v. Cowan*, 829 P.2d 352 (Colo. 1992). These prior acts are also admissible to show that Parents' failure to secure the handgun was unreasonable. *See Hasegawa*, 684 P.2d at 939-940. A third party's prior acts are admissible when used to establish the elements of a

claim. *See People v. Rivera*, 56 P.3d 1155, 1166-67 (Colo. App. 2002). Junior's prior acts, criminal or otherwise, are admissible against Parents.

Second, Parents assert that Colorado limits the duty to safely store a firearm to parents securing a firearm from minors. This is incorrect. Whether firearms owners in Colorado must use reasonable care in storing their firearms to prevent access by irresponsible or unauthorized adults is an issue of first impression. Asserting that the question has already been answered is disingenuous. Although both prior Colorado appellate cases requiring safe storage of firearms applied the duty to parents who allowed access to minors, neither case stated, or even implied, that this was the only time owners have a duty to safely store their firearms. *See Dickens v. Barnham*, 69 Colo. 349 (1920), *and Hall v. McBryde*, 919 P.2d 910 (Colo. App. 1996). Notably, Parents fail to cite any language from either case supporting their assertion that Colorado only requires safe storage of firearms in the context of parents and children. Colorado should not so limit the duty, as set forth below.

II. PARENTS WAIVED THEIR EVIDENTIARY OBJECTIONS BY NOT MAKING THEM IN THE TRIAL COURT

Parent waived their argument that Navarrette relied on inadmissible evidence to oppose summary judgment by failing to make the argument in the trial court. Therefore, the evidence is properly considered on appeal.

"[A]rguments never presented to a trial court may not be raised for the first time on appeal." *Cody Park Prop. Owners' Ass'n, Inc. v. Harder*, 251 P.3d 1, 4 (Colo. App. 2009). This includes objections that summary judgment exhibits are not sworn or certified. *Id*. Where a party did not make such objections to the trial court, they will not be considered by the court of appeals. *Id*. Because C.R.C.P. 56 is based on Fed. R. Civ. P. 56, the Court may also consider federal authorities as persuasive. *McDaniels v. Laub*, 186 P.3d 86, 87 (Colo. App. 2008).

The federal courts apply the same rule as *Cody*. *DeCintio v. Westchester Cnty. Med. Ctr.*, 821 F.2d 111, 113-14 (2d Cir. 1987), *see also Wittmer v. Peters*, 87 F.3d 916, 917 (7th Cir. 1996) (considering unsworn expert reports because there were no objections in the trial court). Objections to the admissibility of summary judgment exhibits are waived in the absence of an objection, and the courts that have considered the issue "are in unanimous accord." *Id*. at 114 (citing cases). Objections to summary judgment exhibits must be made with specificity. *Id*. at fn 3.

If a timely objection is made, the Court may allow supplemental certification to make the exhibit admissible. C.R.C.P.56(e); *Jones v. Menard*, 559 F.2d 1282, 1286 (5th Cir. 1977) (Thornberry specially concurring). If a sworn statement is submitted prior to entry of judgment, the statement's prior submission in unsworn

form will not preclude its consideration. *Pioneer Sav. & Trust, F.A. v. Ben-Shoshan*, 826 P.2d 421, 425 (Colo. App. 1992)

In *DeCintio,* as here, it was the party who was granted summary judgment that objected on appeal to the appellant's exhibits. *Id*. at 113. The appellee had not objected to the exhibits in the trial court. *Id*. *DeCintio* held that the appellee waived the objections by not making them below, and considered the unsworn exhibits in reversing the grant of summary judgment. *Id*. at 114-116.

Parents failed to file a motion to strike the exhibits attached to Navarrette's responses to the motion for summary judgment and motion for determination of law. Parents also failed to object to the exhibits in their reply briefs. TCF p.1055-1060; p.1062-1074. Further, Parents cited to their own unsworn exhibits. TCF 528.

Parents' claim that they objected to the unsworn expert report of Nuss is inaccurate. The pages cited by Parents are TCF 583 and 665. Answer Brief p.13. These are pages from Parents' Response to Plaintiff's Motion for Late Expert Disclosures, and Parents' Reply in Support of Motion for Reconsideration or Continuance regarding the trial court allowing the late expert disclosures. The cited records have nothing to do with the summary judgment exhibits. Parents did not object to the use of the Nuss report, or any other document, in opposition to

their dispositive motions. Parents' failure to timely and specifically object to Navarrette's exhibits waives any such objections on appeal.

III. THE PREMISES LIABILITY ACT APPLIES TO NAVARRETTE'S CLAIMS, AND THERE IS A QUESTION OF FACT AS TO WHETHER THE LOADED HANDGUN WAS A DANGER

A. Storage of the Loaded, Unsecured Handgun Atop the Refrigerator was a Condition or Circumstance of the Premises, Making the Premises Liability Act Applicable

The Premises Liability Act governs the liability of landowners to entrants on the land who suffer injury due to a conditions, circumstances, or activities on the property. Section 13-21-115, C.R.S.; *Larrieu v. Best Buy Stores, L.P.*, 303 P.3d 558, 559 (Colo. 2013). Parents' storage of the loaded, unsecured handgun atop the refrigerator was a condition or circumstance on their property, making the PLA applicable to Navarrette's claims.

Parents argue that the PLA does not apply here because "the PLA applies to real property, not personal property" and "the storage of a firearm[] relates to the personal property of Defendants." Answer p.15. But this is the very argument Best Buy made and the Supreme Court rejected in *Larrieu*. It is also belied by the facts in *Larrieu* and other cases.

Larrieu rejected that argument that the PLA only applies to "activities and circumstances that are directly or inherently related to the land." *Id.* at 563. In

rejecting Best Buy's argument, the Supreme Court observed that the PLA was not limited to conditions, activities, or circumstances "directly related to the real property itself." *Id*. Instead, it applies to any condition, circumstance, or activity on the land that the landowner is liable for in its capacity as a landowner. *Id*. at 563, 564.

Parents are advocating the standard that *Larrieu* rejected. Parents are asserting that the condition or circumstance must be a part of the real property itself, or directly related or tied to the real property. But this assertion is contrary to *Larrieu*. Instead, under *Larrieu*, the condition or circumstance need only be something that the landowners are responsible for in their capacity as landowners.

The storage of the loaded, unsecured handgun atop the refrigerator was a condition or circumstance of the premises. A "condition" is "a particular state or situation of a person or thing." Random House Webster's Dictionary, p.147 (4th Ed. 2001). "Circumstances" are the "existing conditions or state of affairs." Random House at p. 127. The location of the handgun atop the refrigerator was a situation or state of affairs at Parents' house. Further, they chose to keep it there in their capacity as landowners. They purchased the handgun for use on the property. They used it to control prairie dogs on the property. And they consciously chose to keep the handgun atop the refrigerator so it would be readily available for such use.

The decision on where and how to store the handgun on the property was decision Parents made in their capacity as landowners deciding where and how to store their property on the land.

Larrieu itself demonstrates that the PLA applies to personal property, which the landowner is responsible for in its capacity as a landowner. In *Larrieu*, the activity giving rise to a PLA claim was carrying a heavy tailgate as part of loading a freezer onto a customer's trailer. *Id*. at 560, 564. Both activities, carrying a tailgate and loading a freezer, involve personal property. But Best Buy, in its capacity as landowner, was responsible for the activities on its premises, which included assisting customers with loading their purchases. *Id*. at 564.

Additionally, the PLA applies to dog bites on the landowner's property. *Paris v. Dance*, 194 P.3d 404, 409 (Colo. App. 2008); *Wilson v. Marchiondo*, 124 P.3d 837, 839 (Colo. App. 2005). In *Paris*, the minor plaintiff was bitten by defendant's dog while visiting defendant's house. *Id*. at 405-406. *Paris* affirmed application of the PLA, because the dog bite was "either an 'activity conducted' or a 'circumstance existing'" on defendant's property. *Id*. at 409. Even though dogs are personal property, and are not part of the real property, dog bites are still governed by the PLA. *See Colorado Dog Fancier's, Inc. v. Denver*, 820 P.2d 644, 653 (Colo. 1991) (dogs are property).

Parents assert that Junior's conduct of chambering a round and firing the handgun is unrelated to the property, and falls outside the PLA. But Parents are not being sued under the PLA for Junior's conduct, but for their own conduct in knowingly making unreasonable decision regarding storage of the handgun. It is Parents' own conduct in creating the conditions or circumstances leading to the shooting that determines whether the PLA applies. *Grizzell v. Hartman Enters., Inc.*, 68 P.3d 551, 553-554 (Colo. App. 2003); *Traynom v. Cinemark USA, Inc.*, 940 F.Supp. 2d 1339, 1342-1343, 1346-1347 (D. Colo. 2013).

The location of the loaded, unsecured handgun atop the refrigerator was a condition or circumstance of the property. Parents, in their capacity as landowners, chose to store the handgun atop the refrigerator. They are responsible for the negligent storage of the firearm in their capacity as landowners, meaning the PLA applies.

B. The Premises Liability Act Applies to Conditions, Activities, or Circumstances Leading to a Shooting on the Property

Grizzell and *Traynom* both hold that where a landowner is responsible for an activity or condition on the property leading to a shooting, the landowner's liability arises under the PLA. Parents attempt to distinguish the cases because they were decided on motions to dismiss instead of summary judgment motions. But Parents fail to explain why the distinction matters.

On a motion to dismiss, the Court must accept the averments in the complaint as true, as though they were the actual facts, and decide whether they would prove a claim for relief. On summary judgment, the Court must consider the evidence submitted by the parties in the light most favorable to the non-moving party, and determine whether the facts viewed in that light would prove a claim for relief. In either event, the Court is determining whether facts, if proven, would establish a claim; it is only the quantum of evidence needed to establish the "facts" that changes.

Ultimately, both summary judgment and dismissal orders are determinations of law. *Grizzell* and *Traynom* establish the legal principle that if a landowner creates or acquiesces in a condition, activity, or circumstance on its property that leads or contributes to a shooting on the property, the landowner's liability for the condition, activity, or circumstance will be determined under the PLA. The cases also demonstrate that it is not the act of shooting which gives rise to the landowner's liability, but the creation or acquiescence in the dangerous condition, activity, or circumstance.

Here, it is undisputed that Parents intentionally left a loaded, unsecured handgun atop their refrigerator when they left for vacation and invited Junior to housesit. This act allowed Junior to obtain the handgun, with which he shot

Navarrette. Parents' improper storage of the handgun was a cause of the shooting. Under *Grizzell* and *Traynom*, Navarrette's claim against Parents arises under the PLA.

C. There is a Question of Fact Whether the Loaded, Unsecured Handgun was a Danger

"[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). "[A] handgun is considered an inherently dangerous instrument." *Wood v. Groh*, 7 P.3d 1163, 1168 (Kan. 2000). The danger presented by handguns is so well known that the Court may take judicial notice of it and consider it established as a matter of law. Parents object to this conclusion, yet fail to cite to any authority or evidence establishing that a handgun is not dangerous as a matter of law. Parents also object that *Wood* is an out-of-state case, but fail to explain why it should be considered unpersuasive, especially in light of *Hilberg's* holding. The known capabilities of a handgun to cause great injury and death allow a finding that Parents' loaded, unsecured handgun was a danger.

For a licensee to establish a landowner's liability, the license must show an "unreasonable failure to exercise reasonable care with respect to *dangers* created by the landowner of which the landowner actually knew…." Section 13-21-

115(3)(b)(I), C.R.S. (emphasis added). The licensee must show a danger, but only a danger. The licensee is not required to show a great danger or an unusually danger, just an ordinary danger. Danger may be defined as "liability to harm or injury; risk; peril." Random House, p.178. Another definition is "Peril; exposure to harm, loss, pain, or other negative result." Black's Law Dictionary, p.398 (7th Ed. 1999). Thus, to establish a danger, the licensee need only show some exposure to, or risk of, harm.

Parents testified the handgun was used to kill prairie dogs. This establishes that the handgun is dangerous, because it is capable of taking life; and Parents knew this. Senior stated he kept the handgun and ammunition atop the refrigerator where they would not be obvious to others. This is an implicit recognition that the loaded, unsecured handgun presented a danger, especially in the wrong hands.

Firearms expert Nuss establishes that an improperly stored handgun is dangerous. TCF, p.747-750. But even if the Court disregards Nuss' report based on Parents' untimely objection, Parents did not object to the handgun manual. The manual further establishes that the handgun is dangerous, and that improperly storing it is also dangerous. TCF, p.760, 762, 779, 793-794. There is at least a question of fact whether the loaded, unsecured handgun created some risk of harm, making it a danger.

Despite Parents' attempts to obfuscate the issue, it is undisputed that Parents actually knew of the danger; at the very least there is a question of fact. Navarrette must show that Parents had an active awareness of the dangerous condition and the risks associated with it. *Grizzell*, 68 P.3d at 554. Both Mother and Senior were aware of the risks associated with the handgun and knew that it was kept loaded and unsecured atop the refrigerator. This establishes that they actually knew of the danger. *See Id*.

Parents argue the loaded, unsecured handgun was not a danger by making a flawed analogy to a "steak knife" and asserting that if the handgun is considered a danger it "would subject every homeowner to PLA liability for torts involving items in their house." Answer Brief at 20-21. Faced with a similar argument, another Court said:

> We are not called upon to determine whether the possession of other instrumentalities or objects, such as knives…would impose the same degree of care…we are simply to determine the degree of care imposed upon the possessor of a loaded pistol, a weapon possessing lethal qualities….

Kuhns v. Brugger, 135 A.2d 395, 403 (Pa. 1957). This Court is not being asked to determine whether and when a steak knife is a danger, but whether a loaded, unsecured handgun is.

But considering Parents' hypothetical, a sharp steak knife may very well constitute a danger. Depending on the circumstances, a steak knife presents some risk of harm. This does not establish the landowner's liability, however, because the landowner must have acted unreasonably with respect to the steak knife. This is the flaw is Parents' conclusion. Any item capable of causing harm is a danger; but, liability only arises when the landowner acts unreasonably with respect to the danger. And to the extent landowners do act unreasonably with respect to items presenting a known danger in their home, there is nothing "absurd" in holding them liable.

There is at least a question of fact as to whether the loaded, unsecured handgun presented a danger. And there is a least a question of fact as to whether Parents knew of the danger. Therefore, summary judgment on Navarrette's PLA claim is inappropriate.

IV. PARENTS OWED NAVARRETTE A DUTY OF REASONABLE CARE TO SAFELY STORE THE HANDGUN

A. Navarrette's Claim is for Misfeasance, Because Parents' Conduct Contributed to Her Peril

Parents' actions of placing and storing the handgun atop their refrigerator constitute misfeasance. Their actions contributed to Navarrette's peril by making

the loaded, unsecured handgun readily available to Junior. Navarrette would not have been shot if the handgun was safely secured.

Parents' assertion that their conduct was mere nonfeasance rests on nothing more than their own ipse dixit. While Parents assert Navarrette is alleging a failure to protect her from Junior, this is not the case. Navarrette is not asserting Parents were negligent in failing to control Junior, but that they were negligent in their own conduct of failing to safely store the handgun.

Parents' brief acknowledges they engaged in actions, namely storing the handgun atop the refrigerator. Putting the handgun they owned atop the refrigerator and choosing to store it there is an action. And it is an action contributing to Navarrette's peril, making it misfeasance. *See University of Denver v. Whitlock*, 744 P.2d 54, 57, 59 fn 4 (Colo. 1987); *Groh v. Westin Operator, LLC*, 2013 COA 39 ¶29-30.

Parents again resort to the inapt analogy to a knife. They assert there would be no misfeasance if Junior picked up a knife and stabbed Navarrette; but they provide no citation or authority to support this supposition. For example, if Parents chose to put a hunting knife on the coffee table and leave it there, and someone was later cut with the knife, it would be misfeasance. Parents acted by putting the knife on the table and leaving it. That would not end the duty inquiry, because the

Court would have to consider the *Whitlock* factors, including foreseeability of harm. And it would not end the liability inquiry, because it might be reasonable to leave a hunting knife on the table. But putting the knife on the table in the first place, and leaving it there, is an action and would be misfeasance. Likewise, Parents putting the loaded, unsecured handgun atop the refrigerator and leaving it there was an action contributing to Navarrette's peril and therefore constitutes misfeasance.

B. Colorado Law and Persuasive Authorities Support Finding a Duty to Safely Store Firearms

Analysis of Colorado law and out of state authorities supports recognition of a duty to safely store firearms in Colorado. This analysis starts with *Hall v. McBryde*, 919 P.2d 910 (Colo. App. 1996). *Hall* recognized that a firearm's owner owes "a duty of reasonable care to protect [a] plaintiff from being injured by the weapon." *Id*. at 913. There is no mention of the father-son relationship in finding such a duty. Instead, it appears to be based on the ownership of the firearm, especially as the son did not reside with the father. *See Id*. at 912, 913. Additionally, the degree of care needed in safely storing the firearm was proportional to the risk presented by those who might access it, including any past violent behavior. *Id*. at 913. Such an assessment should also be made with regard to adults who might access the firearm.

Hall is consistent with *Kuhns v. Brugger*, which held a handgun's owner owes a duty to all who might be injured by it, including those injured by a third party firing the handgun, if the owner has reason to know the third party might misuse it. 135 A.2d 395, 403 (1957). *Hall* is also consistent with the well-reasoned opinions in *Heck v. Stoffer*, 786 N.E.2d 265 (Ind. 2003) *and Jupin v. Kask*, 849 N.E.2d 829 (Mass. 2006). *Heck* and *Jupin* engage in a complete duty analysis. Through this analysis they demonstrate that firearms present a high degree of risk; that unsafe storage of a firearms creates a foreseeable risk of injury, especially when irresponsible or unauthorized people have access to them; that while ownership of firearms has social utility, the magnitude of guarding against harm is minimal; and that imposing a duty has the consequence of furthering the public policy of preventing injuries and death. *Heck*, 786 N.E.2d at 268-271; *Jupin*, 849 N.E. 2d at 836-840; s*ee also University of Denver v. Whitlock*, 744 P.2d 54, 57 & fn 2 (Colo. 1987) (describing considerations in finding a duty).

Nor are Indiana and Massachusetts the only states to recognize a duty to safely store firearms. Connecticut, Rhode Island, New Jersey, and Georgia also recognize a duty to safely store firearms. *Irons v. Cole*, 734 A.2d 1052, 1055 (Conn. Super. 1998); *Volpe v. Gallagher*, 821 A.2d 699, 709-710 (R.I. 2003); *Palisamo v. Ehrig*, 408 A.2d 1083, 1083-1085 (N.J. Super. 1979); *Edmunds v.*

Cowan, 386 S.E.2d 39, 40-41 (Ga. App. 1989). In *Edmunds*, the Court held it was foreseeable that defendant's adult son might misuse defendant's handgun, because the son had prior convictions for breaking and entering and carrying a concealed handgun. *Id*. at 41.

In contrast to decisions finding a duty, *Bridges v. Parrish* provides no reason for declining to recognize a duty. 731 S.E.2d 262, 267 (N.C. Ct. App. 2012). It simply stated that cases from other jurisdiction finding a duty to safely store firearms were persuasive, but it was declining to follow them anyway. *Id*. In affirming *Bridges*, the Supreme Court of North Carolina provided no greater explanation. 399 N.C. 539, 542-543 (2013). Neither opinion is persuasive, because neither contains the analysis required in Colorado by *Whitlock*.

As noted in the Opening Brief, *Lelito v. Monroe* is unpersuasive, because it relies on an incorrect foreseeability standard. 729 N.W.2d 564, 567-568 (Mich. App. 2006). *Lelito* required that the specific act by the specific shooter be foreseen in order to impose a duty on the firearm's owner. *Id*. This conflicts with Colorado law on foreseeability. In Colorado, "it is not necessary that the tortfeasor be able to foresee the exact nature and extent of the injuries or the precise manner in which the injuries occur, but only that some injury will likely result in some manner as a

consequence of his negligent acts." *HealthOne v. Rodriguez*, 50 P.3d 879, 889 (Colo. 2002).

Edmunds shows that harm from Parents' unsafe storage of the firearm was foreseeable. There, some misuse of the firearm by the shooter was foreseeable because of his prior convictions for breaking and entering and carrying a concealed weapon, even though neither crime involved violence. Here, Parents knew Junior was a convicted felon. They also knew Junior was an alcoholic; abused marijuana; had anger control issues; had at least two major confrontations with Navarrette, one of which involved violence; had been fired from his job due to a confrontation with a co-worker; and acted irresponsibly when he drank, as shown by his DUIs. Junior's potential misuse of the handgun was foreseeable.

Harm from unsafe storage of a firearm is also foreseeable based upon the numerous accidental and intentional shootings occurring every year, many as a result of improperly obtained firearms. *See 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). Further, when rules exist to avoid a risk, it indicates the risk is foreseeable. *HealthOne*, 50 P.3d at 888-889. The handgun's manual warns that safe storage is necessary to avoid access by unauthorized 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 NRA advises to "Store guns so they are not accessible to unauthorized persons." *Heck*, 786 N.E.2d at 271, *citing* National Rifle Association, *Safety & Training*. As shown by Nuss, hunter's safety programs and the Sporting Arms and Ammunition Manufacturer's Institute, among others, advise to store firearms unloaded when not in use. TCF, p.747-749. These rules exist to avoid harm due to unsafe storage of a firearm. That such rules exist demonstrates the foreseeability of harm from the unsafe storage of a firearm.

Considering Colorado law and persuasive authority, this Court should recognize a duty to safely store firearms, at least when the owner knows irresponsible or unauthorized individuals will have access to them. Such a duty is consistent with *Hall* and is supported by the *Whitlock* factors. Parents failed to address the *Whitlock* factors and rely on unpersuasive out-of-state cases. The Court should reject Parent's arguments and hold they owed a duty of reasonable care to safely store their handgun.

C. The Duty Imposed on Parents is One of Reasonable Care

Parents' assertion that Navarrette seeks to impose a heightened burden on them is inaccurate. As in *Hall*, the burden is one of reasonable care to safely store the handgun. 919 P.2d at 913, *see also Jupin*, 849 N.E.2d at 838-839. However,

what constitutes reasonable care depends on the risk, with greater risk requiring a correspondingly greater degree of care. *Imperial Dist. Servs., Inc. v. Forrest*, 741 P.2d 1251, 1254 (Colo. 1987); *Hall*, 919 P.2d at 913. Because of the high risk of death or serious bodily injury presented by firearms "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." Restatement (Second) of Torts § 298 cmt b, *see also* Prosser and Keeton, *The Law of Torts* §34, p.208 (5th Ed. 1984). Due to the high risk associated with a loaded handgun, Parents had a correspondingly high duty of care in handling the handgun, including its storage. The question in the trial court will be whether Parents met that duty by storing the loaded handgun unsecured atop their refrigerator.

D. Parents' Argument on the Duty to Control Junior is a Straw Man Argument

Parents' argument that they had no duty to control Junior is a straw man argument that they have simply setup in order to knock it down. Navarrette does not contend that Parent's had a duty to control Junior. The question is not whether Parents are liable for failing to control Junior's conduct, but whether they are responsible for their own conduct in failing to safely store the handgun. *See Kuhns*, 135 A.2d at 404, *and Irons*, 734 A.2d at 1054. As set forth above, Parents are

responsible for their own conduct in storing the firearm and they have a duty to use reasonable care to store it safely.

V. THERE IS A QUESTION OF FACT AS TO WHETHER JUNIOR WAS PARENTS' EMPLOYEE

A. Given the Tasks Junior was to Perform, a Jury Could find he was Parents' Employee

Because Junior's housesitting entailed performing numerous chores for Parents, a reasonable jury could find him to be Parents' employee. Junior was to: clean the barn; clean the four-wheelers; vacuum and dust; take out the trash on Thursday morning; water the dog; and leave corn on the sidewalk for the deer. TCF, p.800. Junior was also to water the eight horses, and feed them twice a day. TCF, p.865 (p.51:21-p.52:1); p.896 (p.39:22-p.40:12).

Parents dispute whether Junior was required to perform all the chores on the list. But the list speaks for itself, and a jury could find Junior was expected to perform all the listed tasks. Because the evidence must be viewed in the light most favorable to Navarrette, it must be assumed Junior was expected to perform all of the tasks.

Further, Parents and Junior's affidavits disclaiming an employment relationship must be disregarded because they consist of mere conclusions. TCF 521-526. "[A]ffidavits containing mere conclusions do not satisfy the moving

party's initial [summary judgment] burden." *Smith v. Mehaffy*, 30 P.3d 727, 730 (Colo. App. 2000); *Perkins v. Regional Transp. Dist.*, 907 P.2d 672, 674 (Colo. App. 1995).

As explained in *Madsen v. Scott*, whether a house sitter is an employee depends on whether the house sitter was expected to perform work for the owner, or simply follow household rules and perform a couple menial tasks, like watering plants. 992 P.2d 268, 270-272 (N.M. 1999) (contrasting cases). This is sensible, because an employee is one who agrees to perform services for another and subject to the other's control. Restatement (Second) of Agency §220. An individual should still be considered an employee even if he is providing services as part of housesitting.

This case is distinguishable from those finding a house sitter was not an employee. In *Lai v. St. Peter*, the house sitter was staying at her cousin's house while vacationing in Hawaii, and had paid for her own ticket and expenses. 869 P.2d 1352, 1357 (Haw. App. 1994). The homeowner left a list, but it was not a list of chores. *Id*. at 1357-1358. Instead, it contained general information on operation of the home, such as appliance usage and pool care; helpful information, such as telephone numbers for a doctor and an auto mechanic; and general rules, like no shoes in the house and no wet clothes on the furniture. *Id*. at 1358. In contrast,

Parents reimbursed Junior his expenses and left him a list of chores to perform, such as feeding livestock and cleaning.

In *Austin v. Kaness*, the house sitter was asked to feed the cats, water the plants, and bring in the mail and newspapers. 950 P.2d 561, 563 (Wyo. 1997). The court's decision, however, was not based on the chores to be performed. Instead, the court determined that "[t]he record supports nothing more than a finding that [house sitter] was doing a favor for his parents, as anyone might do for a family member or friend." *Id*. Yet the weight of authority provides that "doing a favor" may create an employment relationship. *See Giese v. Montgomery Ward, Inc.*, 111 Wis. 2d 392, 416 (1983); *Nguyen v. Nguyen*, 746 P.2d 31, 32 (Ariz. App. 1987); Restatement (Second) of Agency §225 ill. 1. Further, Junior's tasks of feeding livestock and cleaning the house and barn are more extensive than those in *Austin*.

In *Madsen*, the instructions consisted of general rules of conduct and one chore, watering plants. 992 P.2d at 269. This is distinct from the list of chores provided to Junior. *Madsen* also considered other factors that are inapplicable here. It considered that housesitting requires little skill. *Id*. at 273. Yet the Restatement provides that the less skill involved, the more likely the person performing the task is an employee. Restatement (Second) of Agency Sec. 220 cmt. i. *Madsen* also considered that housesitting usually is not a job. 992 P.2d at

273. But the chores Junior was to perform, cleaning house and caring for livestock, often are jobs. *Madsen* considered whether the house sitter was paid or had a formal contract. *Id*. But neither pay nor a formal contract are needed for an employment relationship. *Colorado Compensation Ins. Auth. v. Jones*, 131 P.3d 1074, 1079-1080 (Colo. App. 2005). Not only is *Madsen* factually distinguishable, but it also misapplied many of the guidelines for finding an employment relationship.

The cases finding a house sitter was not an employee are distinguishable from this case. Given the chores Junior was to perform, a reasonable jury could find he was an employee. Therefore, this Court should reverse the determination he was not an employee and remand for a trial.

B. Parents did Not Raise Junior's Scope of Employment Below, Meaning it Cannot Serve as a Basis for Summary Judgment

Parents did not address whether Junior was acting in the course and scope of employment in their motion for determination of law. TCF p.502-510. "C.R.C.P. 56 contemplates that opposing parties will be provided an opportunity to respond to authority cited in support of or in opposition to a motion for summary judgment." *Antelope Co. v. Mobil Rocky Mountain, Inc.*, 51 P.3d 995, 1001 (Colo. App. 2001). "An issue not raised by the moving party in the motion or brief cannot serve as the basis for summary judgment because the nonmoving party is

not put on notice of the need to present evidence concerning that issue." *Id*. An issue raised for the first time on appeal cannot serve as a basis for affirming summary judgment. *Jefferson Cnty. Sch. Dist. R-1 v. Justus*, 725 P.2d 767, 773 (Colo. 1986).

Here, Parents raised the issue of whether Junior was acting in the course and scope of employment for the first time on appeal. Navarrette did not have the opportunity to address the issue before the trial court. Therefore, as required by *Justus*, this Court should refuse to consider Parents' argument.

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 Parents' employee and remand for further proceedings on Navarrette's respondeat superior claim.

DATED this 4th day of August, 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)

/s/ Damon J. Davis, Esq.

J. Keith Killian, Esq.	No. 9042
Matthew Parmenter, Esq.	No. 42937
Damon J. Davis, Esq.	No. 34323

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **REPLY 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 4th day of August, 2014, as follows.

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

J. Scott Lasater, Esq. *ICCES
Adam Royval, Esq. *ICCES
Lasater & Martin, P.C.
8822 Ridgeline Boulevard, Suite 405
Highlands Ranch, CO 80129
**Counsel for: Thomas Howe, Sr. & Avanell Howe*

Dina Navarrette *U.S. Mail
1930 Grand Avenue # 105
Grand Junction, CO 81501

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)

/s/Tonya Moody
Tonya Moody, Paralegal