

STATE OF MICHIGAN  
COURT OF APPEALS

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BONNIE BLACK, as next friend of JESSICA  
BITNER, a Minor,

UNPUBLISHED  
March 25, 2014

Plaintiff-Appellant,

v

No. 312379  
Wayne Circuit Court  
LC No. 11-010645-NO

WILLIAM SHAFER, MARY SHAFER, and IAN  
GEARHART,

Defendants,

and

ANTHONY SHAFER,

Defendant-Appellee.

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Before: JANSEN, P.J., and OWENS and SHAPIRO, JJ.

JANSEN, P.J. (*dissenting*).

I conclude that the circuit court properly granted summary disposition in favor of defendant Anthony Shafer (“defendant”) pursuant to MCR 2.116(C)(10). Therefore, I respectfully dissent.

As the majority correctly observes, “[t]o establish a prima facie case of negligence, a plaintiff must introduce evidence sufficient to establish that (1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) the defendant’s breach was a proximate cause of the plaintiff’s injuries, and (4) the plaintiff suffered damages.” *Latham v Nat’l Car Rental Sys, Inc*, 239 Mich App 330, 340; 608 NW2d 66 (2000) (citation omitted). Whether a duty exists is a question of law, which requires the court to examine, among other things, the foreseeability of the harm. *Graves v Warner Bros*, 253 Mich App 486, 492; 656 NW2d 195 (2002).

Jessica Bitner (“Bitner”) was a licensee because she was a social guest of defendant at defendant’s home. *Taylor v Laban*, 241 Mich App 449, 453; 616 NW2d 229 (2000). “[A] licensee is entitled to expect only that he will be placed upon an equal footing with the possessor himself by an adequate disclosure of any dangerous conditions that are known to the possessor.” *D’Ambrosio v McCreedy*, 225 Mich App 90, 94; 570 NW2d 797 (1997) (citation omitted); see also *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). It

cannot be seriously disputed that Bitner was aware of any danger posed by the shotgun, which was plainly leaning against the wall of the garage for anyone to see.<sup>1</sup>

Furthermore, it is black-letter law that a defendant owes no duty to warn or protect a licensee with respect to an unforeseeable danger. See *Stabnick v Williams Patrol Service*, 151 Mich App 331, 334-335; 390 NW2d 657 (1986); *McNeal v Henry*, 82 Mich App 88, 90; 266 NW2d 469 (1978). Our Supreme Court has held, albeit in a different context, that no bodily harm can be foreseen when a person pulls the trigger of what he believes to be an unloaded gun; under such circumstances it is unforeseeable that a shot will be discharged. *Allstate Ins Co v McCarn*, 466 Mich 277, 290-291; 645 NW2d 20 (2002). Here, although it does not appear that the shotgun was unloaded, both defendant and Gearhart honestly believed that the chamber was empty. Indeed, defendant testified that he had confirmed that the chamber was empty before handing the gun back to Gearhart. Thus, irrespective of whether it was foreseeable that Gearhart would pull the trigger, defendant could not have foreseen the resulting gunshot.<sup>2</sup> Defendant owed no duty to protect Bitner from this unexpected and unforeseeable result.

Nor was there a special relationship, apart from that of licensor-licensee, between defendant and Bitner in this case. I acknowledge that a duty to protect may arise when a special relationship exists between the plaintiff and the defendant. *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499-500; 418 NW2d 381 (1988). “The rationale behind imposing a duty to protect in these special relationships is based on control.” *Id.* “The duty to protect is imposed upon the person in control because he is best able to provide a place of safety.” *Id.*

The majority concludes that there was a heightened special relationship in this case because defendant brought Bitner to his house, provided her with alcoholic beverages, and took her into his garage where Gearhart was drinking and handling a loaded shotgun. But as already explained, defendant honestly believed that there was no round in the shotgun’s chamber. Moreover, Bitner was not free of culpability in this case. It was unlawful for Bitner, a minor, to consume alcohol. Const 1963, art 4, § 40; MCL 436.1703(1). I fail to understand why Bitner’s unlawful consumption of alcoholic beverages should somehow weigh in favor of finding a special relationship and a resulting duty to protect on the part of defendant.

In my opinion, the relationship between Bitner and defendant was unlike the relationship between a common carrier and its passengers, an innkeeper and its guests, or an employer and its

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<sup>1</sup> By pointing this out, it is not my intent to characterize the shotgun as an open and obvious condition of the premises. I merely wish to make clear that Bitner was aware of the shotgun, which was not hidden from view.

<sup>2</sup> There is no record evidence to establish that anyone saw Gearhart pump the shotgun after defendant had checked the chamber. Thus, even if Gearhart did subsequently chamber a round, the only permissible inference is that defendant did not know about it. I perceive no evidence on the record to suggest that the shotgun was mechanically defective in such a way that it could be discharged when no round had been pumped into the chamber. Cf. *United States v Escamilla*, 467 F2d 341, 344 (CA 4, 1972).

employees. Cf. *Williams*, 429 Mich at 499. When Gearhart began handling the shotgun, Bitner was perfectly free to leave defendant's garage and thereby remove herself from a possible position of danger. Quite simply, she was not unable to protect herself. See *id.* There was no heightened special relationship in this case.

No reasonable juror could conclude that defendant breached the limited duty of care that he owed to Bitner as a licensor. Moreover, because there was no special relationship, apart from that of licensor-licensee, defendant owed no increased duty to protect Bitner in this case. The circuit court properly granted summary disposition in favor of defendant. I would affirm.

/s/ Kathleen Jansen