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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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WAYNE KING and TAMMY KING,	)	Appeal from the Circuit Court
Indiv. and as Special Administrators	)	of Stephenson County.
of the Estate of Jeremy King, deceased,	)	
and BRAD KUHLEMEYER and THERESA	)	
KUHLEMEYER, Indiv. and as Special	)	
Administrators of the Estate of Jacob	)	
Kuhlemeyer, deceased,	)	
	)	
Plaintiffs-Appellants,	)	
	)	
v.	)	No. 08-L-18
	)	
EUGENE BAUMGARTNER, THE EUGENE	)	
R. BAUMGARTNER TRUST U/D 9-27-04,	)	
and THE FALINE M. BAUMGARTNER	)	
TRUST U/D 9-27-04,	)	Honorable
	)	David L. Jeffrey,
Defendants-Appellees.	)	Judge, Presiding.

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JUSTICE HUDSON delivered the judgment of the court.  
Justices Schostok and Birkett concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court properly granted defendants summary judgment on plaintiff's negligence claim, as the defendant at issue had no duty to the minor decedents: although the decedents' ATV accident was reasonably foreseeable and reasonably likely, the burden of ensuring their safety could not reasonably be placed on the defendant, as he did not agree to supervise them, did not ask them to assist him in his

farming activities, did not own the ATV, did not authorize them to use it, and did not own the land on which they were injured.

¶ 2 Plaintiffs, Wayne King and Tammy King, individually and as special administrators of the Estate of Jeremy King, deceased, and Brad Kuhlemeyer and Tammy Kuhlemeyer, individually and as special administrators of the Estate of Jacob Kuhlemeyer, deceased, sued defendants, Eugene Baumgartner, The Eugene R. Baumgartner Trust U/D 9-27-04, The Faline M. Baumgartner Trust U/D 9-27-04, and Curt Baumgartner,<sup>1</sup> for damages resulting from the deaths of 15-year-old Jeremy and 13-year-old Jacob (the boys). The trial court granted summary judgment for defendants, and plaintiffs timely appealed. We affirm.

¶ 3 I. BACKGROUND

¶ 4 According to the second amended complaint, Eugene owned and operated a farm located in Stephenson County. Curt was Eugene's son who had a 15-year-old son named Austin. On June 15, 2006, Jeremy and Jacob, who were friends with Austin, were present at the farm. The three boys traveled out to the hayfield to help Eugene bale hay, riding a 2001 Polarus Magnum All Terrain Vehicle (ATV), which was owned by Curt. According to the complaint, Curt consented to the use of the ATV, and Eugene was aware that the boys were riding it. At some point, Eugene began to drive his tractor, which was pulling a hayrack, from the hayfield back to the main farm. Austin rode on the tractor with Eugene. Jeremy and Jacob followed behind the tractor on the ATV, heading west on Pearl City Road. Jeremy drove the ATV, and Jacob rode as a passenger. As Jeremy and Jacob returned to the main farm, the ATV collided head-on with a Dodge Ram pickup truck, which was traveling east on Pearl City Road, and the boys were killed.

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<sup>1</sup>At some point, plaintiffs settled with Curt Baumgartner.

¶ 5 The complaint alleged that “[i]t was the duty of Eugene \*\*\* to exercise reasonable care under the circumstances to protect the safety of the minor[s].” The complaint further alleged that, notwithstanding that duty, Eugene:

“(a) negligently, carelessly[,], and improperly, entrusted and/or allowed, the minor decedent[s] \*\*\* to use the ATV as transportation on his property and/or between his properties;

(b) negligently, carelessly, and improperly failed to properly supervise the minor decedent[s’] operation of the ATV;

(c) negligently, carelessly, and improperly failed to appropriately train the minor decedent[s] in the safe operation of the ATV.”

¶ 6 Deposition testimony was provided by Austin and Eugene. Austin testified that he lived with his parents and his older brother, Chase, in a farm house owned by Eugene. The property owned by Eugene also contained a barn, a garage, and a shed. On June 15, 2006, Jacob came to Austin’s house to spend the day. Jacob brought along Jeremy. When Jacob and Jeremy arrived, sometime in the morning, Austin was outside riding the ATV around the property. After playing outside for about 10 minutes, Austin, Jacob, and Jeremy went inside to watch television, while Chase worked outside cleaning the barnyard. After about a half hour, Eugene came over and asked Austin if he would help him drive the tractor to bale hay. According to Austin, the process of baling hay required one person to drive the tractor and a second person to stack hay on a hayrack that was pulled by the tractor.

¶ 7 Austin testified that Eugene drove the tractor out to the hayfield, with Jacob and Jeremy as passengers, and Austin drove the ATV. Austin’s house was located north of Pearl City Road. The hayfield was located about 300 yards east of Austin’s house, also north of Pearl City Road. To get

to the hayfield, Austin rode the ATV in a ditch along Pearl City Road. When they arrived at the hayfield, Austin helped Eugene bale hay, while Jacob rode the ATV around the hayfield. Austin testified that Jacob had ridden the ATV before and “kn[ew] the rules.” Jeremy was sitting on a “rake,” which was not being used, watching Jacob ride. After Eugene and Austin filled one hayrack, they began to fill a second hayrack. At some point, Jeremy went onto the hayrack and spoke with Eugene. Austin saw Jeremy help Eugene lift a hay bale onto the hayrack. Chase arrived with a tractor to transport the filled hayrack to the barn, and Jeremy returned to the barn with him. Jacob continued to ride around on the ATV. After Eugene and Austin filled the second hayrack, Eugene returned with the hayrack to the barn. Austin rode the ATV home. At this point, Eugene went to his home to have lunch, while the boys drove around the property on the ATV. According to Austin, Jeremy “started getting rough” with the ATV, so Austin told him they had to put it away. The boys then went inside Austin’s house with Austin to eat lunch. Curt, who had come home from work to eat lunch, ate with the boys and, before he left, reminded Austin to put the ATV away if Jeremy and Jacob were getting too rough with it.

¶ 8 Austin further testified that, after lunch, Curt returned to work, and Austin returned to the hayfield with Eugene to bale more hay. Jeremy and Jacob remained at the farm with Chase. Jeremy and Chase unloaded hay from one of the hayracks while Jacob sat around. Sometime in the late afternoon, Eugene and Austin ran out of hay to bale and began to return to the farm. As Eugene started to pull the tractor out of the hayfield, Austin, who was standing behind Eugene on the tractor, saw Jeremy and Jacob on the ATV on the south side of Pearl City Road. They were at the end of the driveway of a house located across from the entrance to the hayfield. Jeremy was driving the ATV and Jacob was sitting in the back. Jeremy and Jacob said something to Austin, but Austin could not

hear them over the tractor. As Eugene turned the tractor west onto Pearl City Road, Austin saw the ATV enter the road behind him, but then he could not see anything else, because his view was blocked by the hay piled on the hayrack. The next thing he saw was a truck coming, and then he heard a loud bang. When he looked back, he saw the ATV go under “whatever the truck was pulling, like a wagon.” Eugene pulled the tractor into the driveway of Austin’s home and told Austin and Chase to call 911. Thereafter, Austin called Jacob’s mother and remained in his house.

¶ 9 Eugene testified that he lived on West Goldmine Road in Pearl City. He also owned 80 acres of farmland on Pearl City Road, about a mile away from his home. Curt lived with his family in a house on that property. On June 15, 2006, sometime after lunch, Eugene went to Curt’s house by tractor and asked Austin to help him bale hay. (Eugene’s testimony conflicted somewhat with Austin’s in that Eugene did not recall going to the property at any time prior to lunch.) When he arrived, he saw Austin, Chase, Jacob, and Jeremy standing outside. Austin got on the hayrack that was being pulled by the tractor and traveled with Eugene to the hayfield. Jeremy and Jacob remained at the property with Chase. At the hayfield, Austin drove the tractor as Eugene stacked the hay on the hayrack. After they filled one hayrack, they removed the hayrack and attached a second, empty hayrack to continue baling. At some point, Chase came to the hayfield in a truck to retrieve the filled hayrack and bring it to the barn. In addition, at some point, Jeremy and Jacob arrived at the hayfield on the ATV. According to Eugene, “they was zooming up through the field right next to [them].” They rode around on the ATV as Eugene and Austin worked. Eugene saw both boys driving at various times. He testified that he “told them they had to quit screwing around with it.” He thought they were “driving a little careless.” Eugene never asked Jeremy or Jacob to help with baling hay. He did recall Jeremy being on the hayrack at some point, but he was not sure why.

¶ 10 Eugene further testified that, when he and Austin were done baling hay, he proceeded to exit the hayfield and return to the farm. Sometime before Eugene and Austin exited the hayfield, Jeremy and Jacob went past him toward the exit. Later, as Eugene approached Pearl City Road from the hayfield, he saw Jeremy and Jacob on the ATV. They were across Pearl City Road, in a neighbor's driveway. Eugene turned right and headed west on Pearl City Road, and he heard a collision. When he looked behind him, he saw a pickup truck heading southeast into a ditch. Eugene pulled the tractor into Curt's driveway. Chase told Eugene that he had called 911, and then Eugene went to the scene of the accident.

¶ 11 Defendants filed a second motion for summary judgment (as to the counts related to Jacob) and a third motion for summary judgment (as to the counts related to Jeremy). In each motion, defendants relied on *Tilschner v. Spangler*, 409 Ill. App. 3d 988 (2011), where we held that, because our supreme court had not adopted section 318 of the Restatement (Second) of Torts (1965), a defendant has no duty to control the conduct of third parties whom he permits to use his land or chattels. Thus, as to Jacob, defendants argued that, because Eugene had no duty to control Jeremy, the driver of the ATV, he therefore had no duty to Jacob. And, as to Jeremy, defendants argued that, because Eugene did not own the ATV, and because Eugene had no duty to control Curt, he therefore had no duty to Jeremy.

¶ 12 Plaintiffs filed a response to defendants' motions and attached the depositions of Eugene and Austin. Plaintiffs argued: "Whether the duty analyses [*sic*] is one framed as negligent entrustment or premises liability or failure to supervise or failure to train, Plaintiff's [*sic*] allege that Defendant Eugene Baumgartner as the landowner, and only adult present during the farming operation, owed

a duty of reasonable care toward both minor decedents \*\*\*. That duty included controlling how and what potentially dangerous equipment the minors were using while on his property.”

¶ 13 The trial court granted summary judgment for defendants. The court found that, with regard to a premises liability claim, although “there is a general duty on the part of a landowner to exercise reasonable care under the circumstances, including the duty to protect minors from their own misuse of the premises,” the boys’ deaths were not caused by a “condition of the premises.” The court declined to “extend this level of care to cause [Eugene] to be the regulator of activities by entrants on the property over whom he had no direct control.” Further, the court found that section 11-1427(g) of the Illinois Vehicle Code (Code) (625 ILCS 5/11-1427(g) (West 2006)) immunized defendants from any liability. Finally, the court noted that, even if defendants had some duty, it would have been only as to conditions on the land, and here the accident took place on a public roadway. Plaintiffs timely appealed.

¶ 14

## II. ANALYSIS

¶ 15 Summary judgment is appropriate where “the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” 735 ILCS 5/2-1005(c) (West 2006). However, it is a drastic means of resolving litigation and should be allowed only when the right of the moving party to judgment is clear and free from doubt. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004). This court reviews *de novo* an order granting summary judgment. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). To prevail in a negligence action, the plaintiff must prove that the defendant owed a duty to him, that the defendant breached that duty, and that the plaintiff’s injury proximately resulted from that breach. *Ward v. K mart*

*Corp.*, 136 Ill. 2d 132, 140 (1990). The question here is whether Eugene owed a duty to Jeremy and Jacob. We consider the question *de novo*. See *Jablonski v. Ford Motor Co.*, 2011 IL 110096, ¶ 83.

¶ 16 Plaintiffs argue that Eugene owed a duty to Jeremy and Jacob. In support, plaintiffs rely on *Marshall v. Burger King Corp.*, 222 Ill. 2d 422 (2006), *Nelson v. Aurora Equipment Co.*, 391 Ill. App. 3d 1036 (2009), and *Allendorf v. Redfern*, 2011 IL App (2d) 110130. In *Marshall*, the supreme court held:

“The touchstone of this court’s duty analysis is to ask whether a plaintiff and a defendant stood in such a relationship to one another that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff. [Citations.] This court often discusses the policy considerations that inform this inquiry in terms of four factors: (1) the reasonable foreseeability of the injury, (2) the likelihood of the injury, (3) the magnitude of the burden of guarding against the injury, and (4) the consequences of placing that burden on the defendant.” *Marshall*, 222 Ill. 2d at 436-37.

The court also noted “that certain special relationships may give rise to an affirmative duty to aid or protect another against unreasonable risk of physical harm” and it recognized those special relationships to be: “common carrier and passenger, innkeeper and guest, custodian and ward, and possessor of land who holds it open to the public and member of the public who enters in response to the possessor’s invitation.” *Id.* at 438-39.

¶ 17 Plaintiffs contend that “[t]his Court must look to the relationship between the parties to see if that relationship gives rise to a duty, and then must weigh four factors in considering whether the circumstances of the injury warrant an exception to that duty.” See *Nelson*, 391 Ill. App. 3d at 1042; *Allendorf*, 2011 IL App (2d) 110130, ¶ 17. According to plaintiffs, Eugene’s duty arose out of his

relationship to the boys, *i.e.*, his status as “the landowner and only adult present during the hay baling farming operation.” Further, plaintiffs contend that consideration of the “four factors” identified in *Marshall* do not warrant finding *an exception* to the duty. In response, defendants maintain that, because plaintiffs have failed to establish the existence of the requisite “special relationship,” this court need not consider the “four factors” set forth in *Marshall*.

¶ 18 The parties’ arguments reveal some confusion over the relevant duty analysis and the applicability of the four factors identified in *Marshall*. This is understandable. As noted by our supreme court, “[t]he concept of duty in negligence cases is involved, complex, and nebulous” and subject to confusion. *Simpkins v. CSX Transportation, Inc.*, 2012 IL 110662, ¶ 17. Nevertheless, although not cited in their brief, at oral argument plaintiffs directed our attention to the supreme court’s decision in *Simpkins*, which clearly sets forth the legal principles that guide our analysis. We restate those principles here:

“ [T]he touchstone of this court’s duty analysis is to ask whether a plaintiff and a defendant stood in such a *relationship* to one another that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff.’ [Citations.] The ‘relationship’ referred to in this context acts as a shorthand description for the sum of four factors: (1) the reasonable foreseeability of the injury, (2) the likelihood of the injury, (3) the magnitude of the burden of guarding against the injury, and (4) the consequences of placing that burden on the defendant. [Citations.] The determination of such a ‘relationship,’ as sufficient to establish a duty of care, requires considerations of policy inherent in the consideration of these four factors and the weight accorded each of these factors in any given analysis depends on the circumstances of the case at hand. [Citation.] \*\*\*

Generally, individuals (and businesses) do not owe an affirmative duty to protect or rescue a stranger. [Citation.] However, this court has long recognized that ‘every person owes a duty of ordinary care to all others to guard against injuries which naturally flow as a reasonably probable and foreseeable consequence of an act, and such a duty does not depend upon contract, privity of interest or the proximity of relationship, but extends to remote and unknown persons.’ [Citations.] Thus, if a course of action *creates* a foreseeable risk of injury, the individual engaged in that course of action has a duty to protect others from such injury. This does not establish a ‘duty to the world at large,’ but rather this duty is limited by the considerations discussed above. An independent ‘direct relationship’ between parties may help to establish the foreseeability of the injury to that plaintiff (as either an individual or as a member of a class of individuals) but is not an additional requirement to establishing a duty in this context.

Even when one has not created the risk of harm, a duty to take affirmative action to aid another may arise where a legally recognized ‘special relationship’ exists between the parties. [Citation.] Such duties are, indeed, premised upon a relationship between the parties that is independent of the specific situation which gave rise to the harm. We have recognized four relationships that give rise to an affirmative duty to aid or protect another against an unreasonable risk of physical harm: ‘common carrier and passenger, innkeeper and guest, custodian and ward, and possessor of land who holds it open to the public and member of the public who enters in response to the possessor’s invitation.’ [Citation.] We have also recognized a duty to a third party to control the individual who is the source of the harm

when a defendant has a special relationship with that person, such as a parent-child relationship [citations] and a master-servant or employer-employee relationship [citations].

Thus, the duty analysis must begin with the threshold question of whether the defendant, by his act or omission, contributed to a risk of harm to this particular plaintiff. If so, we weigh the four factors to determine whether a duty ran from the defendant to the plaintiff: (1) the reasonable foreseeability of the injury, (2) the likelihood of the injury, (3) the magnitude of the burden of guarding against the injury, and (4) the consequences of placing that burden on the defendant. If the answer to this threshold question is ‘no,’ however, we address whether there were any recognized ‘special relationships’ that establish a duty running from the defendant to the plaintiff.” (Emphases in original.) *Id.* ¶¶ 19-21.

Accordingly, as argued by plaintiffs’ counsel during oral argument, the threshold question is whether Eugene committed an act or omission that contributed to a risk of harm to the boys. If so, we then weigh the four factors to determine whether a duty was owed.

¶ 19 We answer the threshold question in the affirmative. It is undisputed that Eugene could have prevented the boys from using the ATV. Indeed, at oral argument, defendants conceded that Eugene had the right (though not the duty) to do so. Thus, we conclude that Eugene’s acts or omissions contributed to the risk of harm to the boys. The question next becomes whether the four factors weigh in favor of finding a duty.

¶ 20 With respect to the first two factors, plaintiffs argue (1) that it was reasonably foreseeable that the boys would injure themselves unless the ATV was used with care and (2) that injury was likely where Eugene had seen the boys “screwing around” on the ATV. “Foreseeability of harm, in connection with a duty, is not a magical concept that ignores common sense. [Citation.]

Foreseeability includes whatever is likely enough to occur that a reasonably thoughtful person would take it into account in guiding his or her practical conduct. [Citation.]” *St. Paul Insurance Co. of Illinois v. Estate of Venute*, 275 Ill. App. 3d 432, 436 (1995). It does not stretch the bounds of reasonableness to say that it was foreseeable that the boys could be injured while riding an ATV. Indeed, it is reasonably foreseeable that one could be injured riding a bicycle or a skateboard. Further, we agree that the boys’ “careless” use of the ATV made an injury reasonably likely. See *Snow v. Judy*, 96 Ill. App. 2d 420, 423 (1968) (“The likelihood of injury \*\*\* must be found not in the inherent nature of the [instrumentality] but in the manner of its particular use at the time and at the place of the occurrence.”). However, as noted, the magnitude of the burden of guarding against the injury, and the consequences of placing that burden upon the defendant, must also be taken into account.

¶ 21 Plaintiffs argue that the burden of guarding against injury and the consequences of imposing that burden are low, where Eugene had the authority to simply tell the boys to put the ATV away. The facts of this case lead us to conclude otherwise. Eugene essentially had no relationship to the boys at all. Eugene was simply farming his land, while Jeremy and Jacob were visiting Austin. Eugene did not agree to supervise Jeremy and Jacob. He did not ask them to help him in the hayfield, even if they might have assisted him at some point. Most importantly, Eugene did not own the ATV, did not authorize the boys to use it, and did not even own the land on which they were injured. While the accident in this case was horribly sad and tragic, to charge Eugene with ensuring the boys’ safety under the facts of this case, would be unreasonable. In other words, we are unable to find that Eugene stood in such a relationship to the boys that he had a duty to prevent or otherwise supervise their use of the ATV.

¶ 22 In addition, we agree with the trial court’s conclusion that any premises liability claim must fail, because plaintiffs cannot establish that the boys were injured by a condition on the premises. See *Hope v. Hope*, 398 Ill. App. 3d 216, 219 (2010) (to prevail on a premises liability claim, the plaintiffs must prove that a “condition on the property presented an unreasonable risk of harm to people on the property”). Plaintiffs make no argument that the ATV was a condition on the property or that the boys were injured on the property.

¶ 23 We note that the trial court found that, notwithstanding any possible duty, section 11-1427(g) of the Code (625 ILCS 5/11-1427(g) (West 2006)) immunized defendants from any liability. Section 11-1427(g) provides:

“(g) Notwithstanding any other law to the contrary, an owner, lessee, or occupant of the premises owes no duty of care to keep the premises safe for entry or use by others for use by an all-terrain vehicle or off-highway motorcycle, or to give warning of any condition, use, structure or activity on such premises. This subsection does not apply where permission to drive or operate an all-terrain vehicle or off-highway vehicle is given for valuable consideration \*\*\*.” *Id.*

It is undisputed that Jeremy and Jacob were not injured on Eugene’s premises. Accordingly, this section does not apply. However, as noted, Eugene had no duty in any event. See *Allianz Insurance Co. v. Guidant Corp.*, 387 Ill. App. 3d 1008, 1026 (2008) (we may affirm the trial court on any basis in the record).

¶ 24

### III. CONCLUSION

¶ 25 For the reasons stated, we affirm summary judgment in favor of defendants.

¶ 26 Affirmed.