[Cite as *Grant v. Spann*, 2015-Ohio-831.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

ALYNN S. GRANT	)	CASE NO. 13 MA 2
	)	
PLAINTIFF-APPELLANT	)	
	)	
VS.	)	OPINION
	)	
NECHELLE M. SPANN	)	
	)	
DEFENDANT-APPELLEE	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas of Mahoning County, Ohio Case No. 11 CV 1127

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellant:

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For Defendant-Appellee:

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JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: March 3, 2015

[Cite as *Grant v. Spann*, 2015-Ohio-831.]
WAITE, J.

{¶1} Appellant Alynn S. Grant appeals a December 3, 2012 Mahoning County Common Pleas Court judgment entry granting summary judgment to Appellee Necehelle M. Spann. In an action alleging negligence, Appellant argues that Appellee owed a duty to warn or protect him from her new boyfriend, Casimiro Ellis, who has a violent criminal record. Appellant argues that although a person does not ordinarily owe a duty to protect another from the criminal acts of a third party, there is an exception to this general principle when the parties have a special relationship. Appellee argues that she owed no duty to Appellant and even if she did, she had no way of knowing that Ellis would shoot him. Appellant did not provide either statutory or judicial authority that would give rise to the creation of a special relationship in this case. Moreover, he knew of Ellis' prior criminal history. For the reasoning provided below, Appellant's assignment of error is without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} Appellant and Appellee lived together in a house that they co-owned for an unknown period of time before ending their relationship in 2009. Once the relationship ended, Appellant maintained his residence in the house. Appellee moved in with her mother, but continued to occasionally spend some time at the house. At some point after the relationship ended, Appellee started dating Appellant's cousin, Ellis.

{¶3} On April 14, 2004, Appellant drove to the house during his lunch break. While he was sitting in his car in the driveway, Appellee drove up behind his car and

then pulled out and into the neighbor's driveway. Appellee's children and Ellis were in the car with her. After briefly speaking with Appellant, Appellee went into the house with the children while Ellis remained in the car.

{¶4} While Appellee was inside the house, Appellant attempted to make a phone call from his car but stopped when he heard Ellis call out, asking him to meet Ellis on the east side. Appellant responded by telling Ellis that whatever he wanted to do on the east side he could do there at the house. Ellis exited Appellee's car, walked up to Appellant's car and began firing a gun at Appellant. Appellant was struck by five bullets before he was able to exit his car and flee into the house where he called 911. Appellee allegedly could be overheard on the 911 tape pleading with him not to call the police as she was fearful that she would be in jeopardy for bringing Ellis, who had previously been convicted of manslaughter, to the house. The parties dispute whether there had been previous incidents between Appellant and Ellis; however, there is no indication that any of the alleged previous incidents resulted in violence.

{¶5} Appellant underwent several surgeries and continues to receive treatment. Ellis was prosecuted for the shooting and remains in jail. On April 8, 2011, Appellant filed a civil complaint against Appellee for negligently bringing Ellis onto his property and for allegedly converting his property. On December 3, 2012, the trial court granted Appellee's motion for summary judgment. The trial court found that Appellee did not owe Appellant a duty of care and that Ellis' actions were those

of a purely independent third party. Appellant filed a timely notice of appeal on January 2, 2013.

Summary Judgment

{¶6} When reviewing a trial court's decision to grant summary judgment, an appellate court conducts a *de novo* review using the same standards as the trial court, in accordance with Civ.R. 56(C). *Campbell Oil Co. v. Shepperson,* 7th Dist. No. 05-CA-817, 2006-Ohio-1763, ¶8, citing *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Before ruling on a motion for summary judgment, the trial court must look at all facts in the light most favorable to the non-moving party and find that: "(1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most favorably in favor of the party against whom the motion for summary judgment is made, the conclusion is adverse to that party." *Campbell Oil Co.* at ¶8, citing *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977).

{¶7} In moving for summary judgment, "the moving party bears the initial responsibility of informing the trial court of the basis for the motion, and *identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim*." (Emphasis sic.) *Campbell Oil Co.* at ¶9, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 296, 662 N.E.2d 264 (1996). In response, the non-moving party must set forth specific facts showing

that there is a genuine issue of fact for trial and that a reasonable factfinder could rule in that party's favor. *Id*., citing *Brewer v. Cleveland Bd. of Edn.*, 122 Ohio App.3d 378, 386, 701 N.E.2d 1023 (1997).

ASSIGNMENT OF ERROR

> THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AS THERE ARE GENUINE ISSUES OF MATERIAL FACT INCLUDING WHETHER A SPECIAL RELATIONSHIP EXISTED BETWEEN THE PARTIES AND WHICH IS IN ITSELF A JURY QUESTION AND THE DEFENDANT SPANN WAS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW.

{¶8} Under Ohio law, to prevail on a negligence claim, "a plaintiff must show the existence of a duty, a breach of that duty, and injury directly and proximately resulting from a breach of the duty." *Hague v. Summit Acres Skilled Nursing & Rehab,* 7th Dist. No. 09-NO-364, 2010-Ohio-6404, ¶35, citing *Menifee v. Welding Prods, Inc.,* 15 Ohio St.3d 75, 77, 472 N.E.2d 707 (1984). Generally, there is no duty to control a third party's conduct or prevent that party from harming another. *Federal Steel & Wire Corp. v. Ruhlin Const. Co.,* 45 Ohio St.3d 171, 173, 543 N.E.2d 769 (1989). However, when a special relationship between the defendant-owner and the plaintiff-third party is specified in a statute or judicial determination, a special duty is imposed. *Gelbman v. Second Nat'l. Bank of Warren,* 9 Ohio St.3d 77, 79, 458 N.E.2d 1262 (1984). The plaintiff bears the burden of proving that the special duty exists. *Id.* at 78.

{¶9} In his sole assignment of error, Appellant argues that he and Appellee had a special relationship due to the fact that they co-owned the house. As he believes a special relationship exists between the parties, Appellant argues that Appellee owed both a duty to control Ellis and a duty to protect Appellant. Appellant also asserts that Appellee owed him a duty under premises liability, as she was a possessor of the land with superior knowledge of Ellis' dangerous disposition. For these reasons, Appellant contends that the trial court erred in finding that Ellis' actions were "purely independent actions of a third party." (Appellant's Brf., p. 9.) Appellant believes that there are genuine issues of material fact to be resolved and the trial court erred in granting summary judgment in favor of Appellee.

{¶10} In response, Appellee contends that a mere co-ownership arrangement does not create a special relationship. Appellee asserts that, in order to legally exist, a special relationship must be created by either a statute or judicial determination, neither of which is present in this case. *Hill v. Sonitrol of Southwestern Ohio, Inc.,* 36 Ohio St.3d 36, 521 N.E.2d 780 (1988). Appellee argues that co-ownership of property is not found to create a special relationship in any statute or caselaw. Accordingly, it does not give rise to a special relationship.

{¶11} Appellee also argues that she did not bring Ellis onto the property or instruct him to go onto the property. Therefore, even if a special relationship existed, she is not liable according to *Gelbman v. Second Nat'l. Bank of Warren,* 9 Ohio St.3d 77, 458 N.E.2d 1262 (1984). Appellee explains that although she knew of Ellis' prior manslaughter conviction, Appellant also had knowledge of this conviction. Thus, she

did not have superior knowledge. Regardless, Appellee asserts that she did not know or have reason to believe that Ellis would attack Appellant.

{¶12} The first step in determining whether a special relationship exists is to discover if there is a specific duty imposed by statute. *Gelbman, supra,* at 79. Appellee lists the legally recognized special relationships, which include: (1) common carrier and its passengers, (2) innkeeper and guest, (3) possessor of land and invitee, (4) custodian and person in custody, (5) employer and employee, (6) parent and child, and (7) master and servant. *Reddick v. Said,* 11th Dist. No. 2011-L-067, 2012-Ohio-1885. As neither co-ownership of property nor premises liability is found within these recognized relationships, no specific statutory duty exists on which Appellant can rely. Thus, the analysis must proceed to the second step and we must determine whether Appellant can rely on a judicial determination for his claim that a special relationship exists.

{¶13} Appellant was unable to provide any authority extending a duty to control the acts of a third party to co-owners of property. Both parties cite to *Simpson v. Big Bear Stores Co.*, 73 Ohio St.3d 130, 652 N.E.2d 702 (1995) where the Ohio Supreme Court held that unless a special relationship exists, a business owner's duty to warn and protect its invitees from criminal acts by a third party does not extend to premises not in the possession and control of the business owner. *Simpson v. Big Bear Stores Co., supra*, at syllabus. In *Simpson,* a woman exiting a shopping center was attacked by an unknown person as she reached her car, which was parked on land adjacent to and not owned by Big Bear Stores Co. *Id.* There was evidence that

several similar incidents had taken place on the property and that Big Bear Stores Co. was aware of these incidents. *Id.*

{¶14} The Court noted that under Ohio law, in the absence of a special relationship there is generally no duty to prevent a third party from harming another person. *Id.* at 134. The Court further stated that foreseeability alone is not enough to create liability. *Id.* In finding that Big Bear Stores was not liable, the Court highlighted the fact that the incident occurred on adjacent property, not on property owned by Big Bear Stores. *Id.* Clearly, this case is silent as to any duty between co-owners of property and is inapplicable to the question at hand.

{¶15} In a case involving private property, the First District held that absent a finding there was a common-law or statutory duty, a landlord has no duty to warn or protect a tenant from criminal acts committed by a co-tenant. *Doe v. Blaney,* 1st Dist. No. C-950093, 1995 WL 763623, *4 (Dec. 29, 1995). In *Doe,* the co-tenants, the landlord's son and his female friend, arranged to live at a house owned by the landlord. *Id.* at *1. After the female friend learned that her son was being sexually abused by the landlord's son, she vacated the premises and sued the landlord for failing to warn her about his son's history as a child predator. *Id.* at *2. The Court first found that the landlord was not in possession of the premises and had no way of controlling his son. *Id.* at *4. Second, the Court found that there is no common law or statutory duty to warn or protect a tenant from the criminal acts of a co-tenant. *Id.* Again, while instructive, this case in no way addresses co-owners of property in regard to acts of third persons.

{¶16} While not pertinent to the notion of "special relationship," the Ohio Supreme Court has also held that when a party allows a third person onto their land in a manner other than as a servant, that party has a duty to exercise reasonable care to control the third person's conduct and prevent that person from intentionally harming another party. *Gelbman*, *supra*, at 79. However, this duty only arises when the party knows or has reason to know that they have the ability to control the third person and they are aware of the potential need for control. *Id.*

{¶17} Appellant presented no authority to indicate that co-owners of property give rise to a special duty and was unable to present facts to show that Appellee's duty arose from superior knowledge and an ability to control Ellis. Appellant argues that a text message sent from Appellee to him reflects her superior knowledge of Ellis' dangerousness. The text read: "[h]e isn't. But I wouldn't do anything stupid. He is not to be played with, and he is not scared of you at all." (Grant Depo., p. 65.) Although the message suggests Appellee knew that Ellis might be dangerous, it also works against Appellant, because it also evidenced the fact that Appellant was on notice that Ellis may be dangerous.

{¶18} The record reflects that Appellee believed that Ellis' manslaughter charge stemmed from an incident where he acted in self-defense. It is undisputed in the record that Appellee believed this view of Ellis' behavior. The record also reveals that Appellant knew of Ellis' criminal history and that Ellis always carried a gun, which he had a reputation for pulling out. It is apparent in the record that Appellant, who was Ellis' cousin, knew of Ellis' prior conviction for manslaughter.

{¶19} Even if we could agree with Appellant's argument that Ellis' criminal history should have prompted Appellee to warn him that Ellis presented a danger, we must also note that Appellant's knowledge of Ellis' criminal history equally placed him on notice that Ellis could pose a danger. Although Appellee may have exercised poor judgment in bringing Ellis to the house, she stated in her deposition that she believed Appellant was at work at the time. Further, as his driver's license was suspended, his parked car in the driveway did not initially alert her to his presence.

{¶20} Appellant cannot cite to any authority to show that co-owners of property have a special relationship in regard to protection from a third party's actions. Further, there are no facts in the record that could lead a reasonable person to conclude that Appellee, who brought her four children along, had any way of knowing that a dangerous situation would result from bringing Ellis to the house. Nothing in the record suggests she had any ability to control Ellis and the record clearly reveals that Appellee did not have any knowledge of Ellis' propensities superior to that of Appellant.

Conclusion

{¶21} The trial court correctly granted summary judgment in favor of Appellee as Appellant has not shown that co-ownership of property or premises liability gives rise to a special relationship under law. Further, as Appellant was aware of Ellis' criminal record and dangerous propensity, it cannot be said that Appellee had superior knowledge of Ellis' potential for violent actions. Looking at the evidence in a light most favorable to Appellant, there is no genuine issue of fact remaining for trial

that could lead a reasonable factfinder to rule in his favor. Accordingly, the judgment of the trial court is affirmed.

Donofrio, P.J., concurs.

DeGenaro, J., concurs.