

93-LW-5620 (10th)

Brucia Simpson, Executor of the Estate of Mary E. Falkenberg, Plaintiff-Appellant
v.
Big Bear Stores Company et al. Defendants-Appellees

No. 93AP-852.
10th District Court of Appeals of Ohio, Franklin County.
Decided on December 30, 1993.

APPEAL from the Franklin County Court of Common Pleas.

Clark, Perdue & Roberts Co., L.P.A., and Edward L. Clark, for appellant.

Lane, Alton and Horst, and John M. Alton; Berlon and Timmel, and Michael J. McLane, for appellee Big Bear Stores.

McNamara and McNamara, and John L. Miller, for appellee Graceland Shoppers Limited Partnership.

OPINION

BRYANT, P.J.

Plaintiff-appellant, Brucia Simpson, Executor of the Estate of Mary E. Falkenberg, deceased, appeals from a judgment of the Franklin County Court of Common Pleas granting the summary judgment motions of defendants-appellees, Big Bear Stores Company ("Big Bear") and Graceland Shoppers Limited Partnership ("Graceland").

On July 5, 1991, Falkenberg went grocery shopping at the Big Bear store located in the Graceland Shopping Center in Columbus, Ohio. Upon arriving at the store Falkenberg parked her car on the west side of the building and entered the store. At approximately 3:00 p.m. Falkenberg finished her shopping, exited the store and proceeded to her car by way of the sidewalk adjacent to the west wall of the store. As she approached her car Falkenberg was confronted by an unknown assailant who pushed her against the wall and stole her purse. Falkenberg suffered various injuries as a result of the attack.

On March 16, 1992, Falkenberg filed a complaint in Franklin County Common Pleas Court seeking compensatory and punitive damages for her injuries from Big Bear and the owner of the shopping center complex, Graceland. Plaintiff's complaint alleged that defendants were negligent either in failing to warn her of the possibility of an attack such as the one that occurred, or in failing to provide security adequate to deter such an attack. On July 26, 1992, Falkenberg died. Thereafter, the executor of her estate, Brucia Simpson, was substituted as plaintiff in this action and the complaint was amended to include a wrongful death claim.

On January 29, 1993 and February 1, 1993, Graceland and Big Bear, respectively, filed motions for summary judgment. The trial court granted both motions, and plaintiff appeals, assigning the following errors:

"I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT BIG BEAR STORES COMPANY BY FINDING THAT REASONABLE MINDS COULD ONLY CONCLUDE THAT BIG BEAR DID NOT OCCUPY OR CONTROL THE PREMISES IN QUESTION.

"II. THE TRIAL COURT ERRED IN RENDERING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT GRACELAND BY FINDING THAT REASONABLE MINDS COULD ONLY CONCLUDE THAT IT WAS NOT FORESEEABLE THAT HARM WAS LIKELY TO OCCUR TO PERSONS WHO SHOP AT THE BIG BEAR STORE AT GRACELAND."

Preliminarily, in accordance with Civ.R. 56, the evidence must be construed most strongly in favor of the nonmoving party; summary judgment should be granted only if no genuine issue of material fact exists, the moving party is entitled to judgment as a matter of law, and reasonable minds can come but to one conclusion, which is adverse to the

nonmoving party. Harless v. Willis Day Warehousing Co. (1978), 54 Ohio St.2d 64. A motion for summary judgment forces the nonmoving party to produce evidence on any issue for which the party bears the burden of production at trial. Wing v. Anchor Media, Ltd. of Texas (1991), 59 Ohio St.3d 108, paragraph three of the syllabus (Celotex v. Catrett [1986], 477 U.S. 317, approved and followed).

Plaintiff's first assignment of error asserts that the trial court erred in granting Big Bear's motion for summary judgment; the trial court concluded that plaintiff failed to show that Big Bear "occupied or controlled" the area where the attack on plaintiff's decedent occurred.

A business "may be subject to liability for harm caused to a business invitee by the conduct of third persons that endangers the safety of such invitee, just as such an occupier may be subject to liability for harm caused to such invitee by any dangerous condition of those premises." Howard v. Rogers (1969), 19 Ohio St.2d 42, paragraph one of the syllabus. However, a necessary prerequisite to the imposition of such liability is that the business be "in such occupation or control" of the premises where the criminal act occurred as to be burdened with the duty to safeguard the premises. See Rogers, supra; Beaney v. Carlson (1963), 174 Ohio St. 409, 412; Brown v. Cleveland Baseball Co. (1952), 158 Ohio St. 1, 5.

The attack on plaintiff's decedent in this case occurred on the sidewalk adjacent to the west wall of the Big Bear store.(fn1) Because Big Bear is located in the Graceland Shopping Center under a written lease with Graceland, the extent of Big Bear's "occupation or control" of the sidewalk is governed by the lease. Under the relevant lease provisions, the common areas, including the sidewalks and parking areas, are for the joint use of all tenants, their customers, and their employees. Thus, Big Bear has only the limited right, in common with the other shopping center tenants, to have its customers and employees use the sidewalks and parking lot of the shopping center. Although Big Bear is granted the additional right to "display and sell merchandise and services" on its sidewalk under Article 31 of the lease, its right is still subordinate to the rights of the other shopping center tenants, who have the use of the sidewalk for pedestrian traffic. Further, according to the lease, Graceland assumes responsibility for providing(fn2) "common area maintenance" which by definition includes providing security.

Because Graceland rather than Big Bear is responsible under the lease for maintaining and providing security on the sidewalk in question, and because the sidewalk is available for the common use of all tenants of the shopping center, Big Bear did not, as a matter of law, "occupy or control" the sidewalk such that it was under a duty to safeguard the sidewalk from the danger posed by the criminal conduct of third persons. Therefore, summary judgment was properly granted to Big Bear on plaintiff's negligence claim against it. Plaintiff's first assignment of error is overruled.

Plaintiff's second assignment of error asserts that the trial court erred in granting Graceland's motion for summary judgment because the evidence creates a genuine issue of material fact concerning whether Graceland owed plaintiff's decedent a duty.

Actionable negligence requires the showing of a duty, the breach of that duty and an injury proximately resulting therefrom. Menifee v. Ohio Welding Products, Inc. (1984), 15 Ohio St.3d 75, 77. Under Ohio law, ordinarily no duty exists to prevent a third person from harming another unless a "special relationship" exists between the actor and the other. Gelbman v. Second Natl. Bank of Warren (1984), 9 Ohio St.3d 77 (adopting 2 Restatement of the Law 2d, Torts (1965) 122, Section 315(b)). Such a "special relationship" exists between a business and its business invitees. Reitz v. May Co. Dept. Stores (1990), 66 Ohio App.3d 188; see, also, Restatement, supra, at 118, Section 314(A); Restatement, supra, at 123, Section 315, Comment c. Thus, a business may be subject to liability for harm caused to a business invitee by the criminal conduct of third persons. Rogers, supra; Taylor v. Dixon (1982), 8 Ohio App.3d 161; see Restatement, supra, at 223-226, Section 344. Nonetheless, a business is not an insurer of the safety of its business invitees while they are on its premises. Rogers, supra, at paragraph two of the syllabus. Consequently, a business has a duty to warn or protect its business invitees from criminal acts of third persons only where the business knows or should know in the exercise of ordinary care that such acts present a danger to its business invitees. Rogers, supra, at paragraph three of the syllabus; Reitz, supra, at 191.

Whether Graceland had a duty with respect to plaintiff's decedent in this case turns upon whether the attack upon her was reasonably foreseeable. Rogers, supra; Rush v. Lawson Co. (1990), 65 Ohio App.3d 817, 820; Reitz, supra, at 191; Montgomery v. Young Men's Christian Assn. of Cincinnati & Hamilton Cty. (1987), 40 Ohio App.3d 56, 57. "The test for foreseeability is whether a reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of an act." Menifee, supra. The inquiry thus is whether "special circumstances" such as prior similar incidents or the place or character of the shopping center create a duty on the part of Graceland to take

measures to protect its business invitees, such as posting a warning sign or providing additional security. Meyers v. Ramada Inn (1984), 14 Ohio App.3d 311, 313; King v. Lindsay (Apr. 27, 1993), Franklin App. Nos. 92AP-1577 and 92AP-1791, unreported (1993 Opinions 1529); Restatement, supra, at 226, Section 344, Comment f.

Plaintiff's evidence in the trial court reflects that eight purse snatchings occurred on the grounds of Graceland shopping center during the three and one-half year period preceding the incident in question. Specifically, police reports and victim affidavits submitted by plaintiff reveal that such incidents occurred on January 13, 1988, at 3:30 p.m., February 8, 1989, at 12:01 a.m., February 1, 1990, at 9:30 a.m., May 24, 1990, at 4:00 p.m., January 18, 1991, at 9:20 a.m., January 20, 1991, at 7:30 p.m., and June 30, 1991, at 11:25 a.m. In addition, the affidavit of decedent's son, Barth Falkenberg and a July 17, 1991 letter from Big Bear to Graceland indicate that an additional purse snatching occurred after the incident of June 30, 1991, but prior to the attack on decedent on July 5, 1991.

Further, the deposition of Clarence Ward creates a reasonable inference that Graceland knew of most of the incidents.(fn3) From the fall of 1989 through March 1992, Graceland employed off-duty Columbus police officers, Clarence Ward and Danny Betts, to patrol the Graceland Shopping Center three evenings per week. (Ward Depo. 8-10.) Officer Ward testified that the Columbus Police Department issues a "daily bulletin" which lists by precinct all of the criminal incidents which occurred the previous day. (Ward depo. 17.) According to Officer Ward, during the period he was employed by Graceland he checked the "daily bulletin" for the shopping center's precinct everyday. (Ward Depo. 19.) If the bulletin revealed that a crime had occurred at the Graceland Shopping Center, he passed the information on to Officer Betts who would include it in his biweekly "Tour of Duty Report" to Graceland. (Ward Depo. 24.)

Given the foregoing evidence, the issue before us resolves to whether Graceland should have reasonably foreseen that an injury was likely to result from a lack of warning or additional security.

If the prior purse snatchings had occurred at random locations within Graceland Shopping Center, we would agree with the trial court's conclusion that the prior purse snatching were simply "random, sporadic episodes of crime" and were as a matter of law insufficient to cause the incident in question to be reasonably foreseeable. See Miles v. Flor-Line Assoc. (La.App. 1983), 442 S.2d 584 (wherein the court found six random purse snatchings in a shopping mall parking lot over a four-year period to be insufficient to give rise to a duty to warn or provide additional security). However, of the eight prior incidents of purse snatchings which occurred at the Graceland Shopping Center, six occurred in the immediate vicinity of the Big Bear store; five of those occurred on the west side of the Big Bear store, where the incident in question took place. Further, the evidence reflects an increasing frequency in attacks at that location during the year preceding decedent's attack, with all four of the 1991 purse-snatchings which preceded the incident in question taking place on the west side of the Big Bear store. With all inferences drawn in plaintiff's favor, such evidence depicts a pattern of purse snatching in the vicinity of the Big Bear store, and in particular on the west side of the store, which makes the issue of foreseeability one for the jury in this instance.

The trial court, however, found that Graceland could not have anticipated the attack upon the decedent because "*** none of the previous purse snatchings involved serious personal injury to the victim ***" and because these previous incidents occurred at various times of the day rather than in the afternoon as the incident in question did. We disagree. Crimes such as purse snatching necessarily involve a significant risk of serious harm to the victim, since absent at least an implied threat of such harm, that type of crime would be unsuccessful. The mere fortuity that none of the prior purse snatchings on the west side of the Big Bear store resulted in injuries to the victims as serious as those sustained by decedent did not prevent Graceland from anticipating that such injuries might result from such an attack. Further, the fact that the six prior purse snatchings on the west side of the Big Bear store occurred at various times of day, when construed in a light most favorable to plaintiff, suggests that an increased likelihood of purse snatching existed at this location throughout the day and not, as the trial court found, that such incidents were random and unpredictable as a matter of law; the time of the prior incidents nonetheless may be a factor for the trier of fact to consider in ultimately determining the issue of Graceland's duty.

In the final analysis, the evidence of multiple purse snatchings occurring on the west side of the Big Bear store, about which Graceland knew or should have known, is such that a question of fact is presented upon which a reasonable trier of fact could conclude that the attack upon plaintiff's decedent was foreseeable, and that Graceland therefore had a duty to post a warning or provide additional security. We do not suggest that a jury necessarily must find the attacks foreseeable, but rather that a question of fact exists which properly should be resolved by the trier of fact.

Finally, we note that our decision addresses only the issue of Graceland's duty; the trial court did not, nor do we, address the issue of proximate cause and, in particular, whether decedent would have modified her conduct had

Graceland posted a warning sign, or whether the attack on decedent would have occurred had Graceland provided additional security. Nonetheless, given our disposition of the issue of Graceland's duty, we sustain plaintiff's second assignment of error.

Having overruled plaintiff's first assignment of error, but having sustained plaintiff's second assignment of error, the judgment of the trial court is affirmed in part and reversed in part and this matter is remanded for further proceedings in accordance herewith.

Judgment affirmed in part and reversed in part; cause remanded.

DESHLER and HOLMES, JJ., concur.

HOLMES, J., retired, of the Ohio Supreme Court, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

Footnotes:

- 1 Plaintiff argues that because decedent struck her head on the west wall of the Big Bear store during the attack, the attack occurred there rather on the sidewalk. Plaintiff's argument is unpersuasive because it is clear that the attack occurred on the sidewalk, an area within the control of Graceland.
- 2 While the lease requires Big Bear and all other tenants to reimburse Graceland for their proportionate share of "common area maintenance" costs, the duty to provide such services clearly resides with Graceland.
- 3 Although Graceland contends it did not know about the prior attacks, a genuine issue of fact exists as to its knowledge, which may not be resolved on summary judgment.