IN THE COURT OF APPEALS OF IOWA

No. 8-541 / 08-0019
Filed August 13, 2008

JANINE RIVERS,
Plaintiff-Appellant,

vs.

AMERICAN FAMILY THRIFT STORE FOR THE BLIND, INC.,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Don C. Nickerson, Judge.

Plaintiff appeals from a district court ruling granting summary judgment in favor of the defendant. **AFFIRMED.**

Robert B. Garver, West Des Moines, for appellant.

Andrew C. Johnson of Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, for appellee.

Considered by Miller, P.J., and Vaitheswaran and Eisenhauer, JJ.

MILLER, P.J.

Janine Rivers appeals from a district court ruling granting summary judgment in favor of the American Family Thrift Store for the Blind, Inc. (the store) in her personal injury action against the store. We affirm the judgment of the district court.

I. BACKGROUND FACTS AND PROCEEDINGS.

The summary judgment record, viewed in the light most favorable to Rivers, reveals the following facts. On September 30, 2004, Karen Wayman and her companion, Rivers, stopped at the thrift store to do some shopping. Wayman had just withdrawn some money from a bank across the parking lot from the store. Rivers backed her vehicle into a parking space in front of the store and went to help Wayman, who used a walker, get out of the car.

As Rivers was doing so, she noticed two men walking together in the parking lot of the store. Both of them were wearing hooded sweatshirts with the hoods up even though it was a warm day. One was also wearing sunglasses. While Rivers was observing them, they separated and one of them headed across the parking lot towards the bank. The other man stayed in the parking lot of the store.

After they got out of the car, Rivers and Wayman stopped to look at merchandise displayed outside of the thrift store. Wayman, however, told Rivers that she wanted to go inside the store because the man that had remained behind in the parking lot made her nervous. Once inside, Wayman told the store's cashier, Joann Freeman, "that there were two guys out in the parking lot

that just looked like they didn't belong out there." Freeman told her she would "have somebody check it out . . . . And not to worry." Rivers and Wayman proceeded to browse through the store, eventually purchasing some items. When they exited the store, they saw that one of the men they had noticed earlier was still by the bank, and he was talking on a "walkie-talkie" or cell phone. They did not see the other man.

Rivers was helping Wayman into the car when she was suddenly attacked from behind by the man who had stayed in the parking lot when they entered the store. He threw her to the ground and attempted to grab Wayman's purse. The strap of Wayman's purse broke during their struggle, and he was unable to steal it from her. He kicked Rivers repeatedly and grabbed her purse before running away.

Russell Walker, an employee of the store, was unloading a truck in the parking lot when he heard a woman yelling. He leaned his head out of the back of the truck and saw a man trying to grab Wayman's purse. He had seen that same man inside the store about a half an hour before the incident. Walker ran into the store and told the cashier to call the police. He then attempted to pursue the man but was unable to find him.[1]

Constance Neel, a volunteer at the store, had just finished eating her lunch at a picnic table to the east of the store's parking lot when the assault occurred. She went to help Rivers and Wayman after she heard their screams for help. She told them that while she was outside eating her lunch she had

[1] The police were also unable to apprehend either man that Rivers and Wayman saw in the parking lot that day. No one has been charged with the crime.

noticed a man sitting on a yellow parking barrier behind their car. However, she did not pay much attention to him because it looked like he was either "resting for a minute before he went on" or waiting for the bus that stopped close to the store.

Rivers filed a personal injury lawsuit against the store, alleging it was negligent in failing to protect her from the attack that occurred in its parking lot. The store filed a motion for summary judgment, asserting there was no evidence in the record suggesting that it knew or should have known a criminal act was about to occur. The district court agreed and determined "the assault on [Rivers] on September 30, 2004 was [not] sufficiently foreseeable to the [store] such that liability may attach." The court accordingly granted summary judgment in favor of the store.

Rivers appeals. She claims the district court erred in entering summary judgment in favor of the store because the attack was reasonably foreseeable.

II. SCOPE AND STANDARDS OF REVIEW.

We review the district court's summary judgment rulings for the correction of errors at law. Iowa R. App. P. 6.4; *Faeth v. State Farm Mut. Auto. Ins. Co.*, 707 N.W.2d 328, 331 (Iowa 2005). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Walderbach v. Archdiocese of Dubuque, Inc.*, 730 N.W.2d 198, 199 (Iowa 2007). We review the record in the light most favorable to the party opposing the motion. *Tenney v. Atlantic Assocs.*, 594 N.W.2d 11, 14 (Iowa 1999). A fact question arises if

reasonable minds can differ on how the issue should be resolved. *Walderbach*, 730 N.W.2d at 199. No fact question arises if the only conflict concerns legal consequences flowing from undisputed facts. *McNertney v. Kahler*, 710 N.W.2d 209, 210 (Iowa 2006).

While negligence actions are seldom capable of summary adjudication, the threshold question in any tort case is whether the defendant owed the plaintiff a duty of care. *Sankey v. Richenberger*, 456 N.W.2d 206, 207 (Iowa 1990). "Whether such a duty arises out of the parties' relationship is always a matter of law for the court." *Hoffnagle v. McDonald's Corp.*, 522 N.W.2d 808, 811 (Iowa 1994). However, questions of foreseeability are ordinarily for the fact finder. *Galloway v. Bankers Trust Co.*, 420 N.W.2d 437, 440 (Iowa 1988).

III. MERITS.

The parties agree that this case is governed by Restatement (Second) of Torts section 344 (1965), which addresses acts of third persons on premises open to the public. This provision states:

> A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to
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> (a) discover that such acts are being done or are likely to be done, or
>
> (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

Restatement (Second) of Torts § 344, at 223-24.

"The nub of this section is foreseeability . . . ." *Martinko v. H-N-W Assocs.*, 393 N.W.2d 320, 321 (Iowa 1986).

> Since [a] possessor [of land] is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care *until he knows or has reason to know that the acts of the third person are occurring, or are about to occur*. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the *place* or *character* of his business, or his *past experience,* is such that he should reasonably anticipate . . . criminal conduct on the part of third persons . . . he may be under a duty to take precautions against it . . . .

Restatement (Second) of Torts § 344 cmt. f, at 225-26 (emphasis added). The determinative question in this case is whether the store should have foreseen the attack that occurred in its parking lot. Upon viewing the record in the light most favorable to Rivers, we conclude the district court correctly answered this question in the negative.

There was no evidence that the store, or its surrounding area, experienced any crimes prior to the incident on September 30, 2004. The store's manager, Robin Graves, testified in a deposition that the assault on Rivers and Wayman "was the first time anything like that had ever happened." Graves further testified that she "walked across . . . the parking lot to the bank every day [for the four years she worked there] with a bank bag in my arm" with no issues; the store was not a "hangout for hoodlums." Rivers agreed with Graves that the store was in a safe area, testifying that she had visited the store on prior occasions with no fear "at all" for her safety. She argues, however, that the "absence of prior criminal conduct does not preclude the existence of a duty to protect [her]."

In *Martinko*, our supreme court observed that "[i]n the absence of a history of similar acts in the area in question, most jurisdictions have not allowed plaintiffs to present their claims to juries." 393 N.W.2d at 322 n.3. However, the court acknowledged that an "absence of criminal conduct . . . does not preclude the existence of a duty to protect if possessors of land know or have reason to know [a criminal act] is *about to occur*." *Id.* at 322; *see also Galloway*, 420 N.W.2d at 440 ("A history of crimes against persons would, of course, make a stronger case of foreseeability, but we do not believe it is a prerequisite to proof of foreseeability."). Factors other than past experience may establish foreseeability, such as the place and character of the business. *Martinko*, 393 N.W.2d at 322.

There was no evidence that the place and character of the business at issue in this case, a nonprofit thrift store, was characterized by a likelihood that third persons may endanger its patrons. *Cf. Galloway*, 420 N.W.2d at 440 (finding genuine issue of material fact existed as to foreseeability of homosexual rape in mall restroom due in part to expert testimony regarding the "high incidents of criminal activity in public restrooms in regional shopping centers generally"). Instead, Rivers argues that the store should have reasonably anticipated the attack on her due to the fact that Wayman told an employee of the store there were two suspicious individuals in the parking lot.[2] We do not agree.

[2] She also argues that the employee's promise to investigate "gave rise to a duty to follow through with the promise," which was breached. Regardless of any promise to investigate, section 344 requires that the criminal conduct be reasonably foreseeable before a breach of duty occurs. *See* Restatement (Second) of Torts § 344 cmt. f, at 225-

Wayman testified that upon entering the store she told Freeman, the store's cashier, "something to the effect that there were two guys out in the parking lot that just looked like they didn't belong out there." The men were wearing hooded sweatshirts with the hoods up on a warm day. They also, according to Wayman, "seemed to be together but trying not to let people know they were together." We believe this evidence is too speculative to establish the requisite foreseeability on the part of the store. *See id.* (stating there are cases where evidence of foreseeability is so speculative that a genuine issue of fact is not generated).

Indeed, Rivers testified that she was not concerned about the two men because it was "broad daylight" and there were other people around at the time. Two store employees also observed these same individuals without alarm. Walker, who was unloading a truck for the store at the time of the incident, had seen the man who attacked Rivers shopping in the store earlier that day and did not notice anything suspicious about him. Neel, a volunteer at the store, saw the man sitting behind Rivers's car before the attack while she was eating her lunch outside.[3] She did not "pay that much attention" to him because it looked like he

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26; *Martinko*, 393 N.W.2d at 322-23. Due to our conclusion as to the lack of foreseeability of the attack, we need not and do not address this argument any further.

[3] In her appellate brief, Rivers asserts that Neel "admitted at the scene that the assailant was essentially hiding behind the car out of view from [Rivers] and Karen Wayman." However, Neel's transcribed statement in the appendix does not support this characterization of what she observed. Furthermore, although Wayman recalled that Neel told her she saw the assailant "crouched" behind the car, she later admitted, "I don't know whether the word crouching came from her or whether she used the word sitting and I interpreted it as crouching. I really can't honestly say whose word it was." Wayman did state that Neel "definitely said she saw him behind the car."

was "just sitting there like he was resting for a minute" or waiting for the bus that stopped nearby.

Neither Rivers nor Wayman noticed any overt actions on the part of either man that would indicate an assault was about to occur. *Cf. Regan v. Denbar, Inc.*, 514 N.W.2d 751, 753 (Iowa Ct. App. 1994) (finding sufficient evidence of foreseeability of assault that occurred outside a bar where bartender had witnessed an earlier fight between plaintiff and defendant in the bar). Instead, their concern about the men was based on the way they were dressed and the fact that they "seemed to be together but trying not to let people know they were together." This evidence, without more, does not generate a genuine issue of material fact as to whether the store should have reasonably anticipated the attack. *See, e.g.*, *Getson v. Edifice Lounge, Inc.*, 453 N.E.2d 131, 135 (Ill. App. Ct. 1983) (rejecting argument that bar should have foreseen attack due to its employee's observation of a knife-carrying gang member absent evidence of violent or dangerous conduct on part of gang member); *Welch v. R.R. Crossing, Inc.*, 488 N.E.2d 383, 389 (Ind. Ct. App. 1986) (finding attacker's tattoos, unusual appearance, and possession of pocketknife did not render attack reasonably foreseeable in the absence of some evidence of threatening behavior on the attacker's part); *Nivens v. 7-11 Hoagy's Corner*, 920 P.2d 241, 250 (Wash. Ct. App. 1996) (finding no evidence of foreseeability where group of loitering teens assaulted patron outside convenience store despite the fact that the teens often gathered at the store and had fought among themselves before, because they had never previously engaged in or threatened violence towards the store's

patrons). The district court was thus correct in granting summary judgment in favor of the store. *See Martinko*, 393 N.W.2d at 323.

IV. CONCLUSION.

There was no evidence establishing that the store should have reasonably foreseen the attack that occurred in its parking lot. We therefore conclude the district court did not err in granting summary judgment in favor of the store. The judgment of the district court is accordingly affirmed.

AFFIRMED.