[Cite as *Philon v. Knerr*, 2012-Ohio-2342.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Darrell L. Philon

Appellant

v.

Daniel J. Knerr, et al.

Appellee

Court of Appeals No. E-11-011

Trial Court No. 2009-CV-0901

DECISION AND JUDGMENT

Decided: May 25, 2012

* * * * *

Edward W. Rhode III and Joseph A. Zannieri, for appellant.

David W. Doerner, for appellee.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal of a trial court judgment granting summary judgment in a tort action for personal injury. Appellant is Darrell L. Philon. Appellee is District Petroleum Products, Inc. ("District Petroleum"). District Petroleum operates a Hy-Miler convenience store and gas station on Cleveland Road in Sandusky, Ohio. On October

30, 2007, Philon was struck by an automobile while walking in the store parking lot as he left the convenience store. Daniel Knerr was the driver of the automobile that struck Philon. Knerr argued with Philon and store employees in the store moments before the collision. There is conflicting evidence on whether Knerr threatened to harm Philon during the argument.

{¶ 2} Philon filed suit for personal injuries on October 23, 2009, in the Erie County of Common Pleas. Philon named as defendants Knerr, District Petroleum, Mary Ellen Jordan (the owner of the vehicle driven by Knerr), and Progressive Specialty Insurance Company (Philon's uninsured/underinsured motorists insurance carrier). District Petroleum filed a motion for summary judgment as to all claims asserted against it. The trial court granted the motion in a judgment journalized on February 8, 2011. The judgment includes a Civ.R. 54(B) trial court certification that there is no just cause to delay entering final judgment.

Claims

{¶ 3} The allegations of the complaint against District Petroleum are two-fold. First, appellant alleged that District Petroleum was negligent in failing to provide security on the premises due to a claimed high incidence of crime and violence at the store. Appellant alleged that "[t]he general level of criminal or violent activity on * * * [the] * * * premises is such that it is foreseeable that criminal and other violent incidents may happen thereon."

{¶ 4} Second, appellant alleged in the complaint that a store clerk employed by District Petroleum and acting on its behalf negligently failed to call police after Knerr threatened appellant in the store.

Incident

{¶ 5} It is undisputed that on October 30, 2007, appellant overheard a conversation between Daniel Knerr and a minor outside the Hy-Miler convenience store in which the minor requested Knerr to purchase cigars for the minor. Philon was in the convenience store when Knerr subsequently attempted to make the purchase. Philon objected and told the store clerk that Knerr was buying the cigars for a minor. Upon hearing this, the store clerk refused to sell the cigars to Knerr.

{¶ 6} An argument between Knerr and Philon followed. The details of the argument are disputed. The parties have submitted conflicting affidavits concerning both the identity of the clerk who waited on Knerr and what occurred in the store before Knerr and Philon left. By affidavit, appellant contended that Knerr threatened him in the store, saying that "he was going to kick my old fat ass" and repeatedly calling him a "nigger." By affidavit, store clerk Amanda Sharkey supported the contention. Appellant claims Knerr also told him to "bring my fat ass outside" as Knerr walked out of the store. Another store clerk, Antonio Moon, by affidavit, supports that claim as well.

{¶ 7} District Petroleum submitted an affidavit of another store clerk, Paul Dwrye, who denied there were any threats of physical violence directed toward Philon during the

argument in the store. In their affidavits, both Dwrye and Sharkey claim to have been the clerk who waited on Knerr and who refused to sell Knerr cigars.

{¶ 8} In his affidavit, Antonio Moon stated that he talked to Knerr before he left the store in an effort to calm him down. Moon also states in his affidavit that he accompanied appellant as he left the store, walking closely behind him when Knerr struck him with an automobile. According to Moon, Knerr swerved in an S pattern with his automobile to avoid striking the building and aimed directly at Philon with his car. Moon also stated that Knerr made no effort to avoid impact. In her affidavit, Sharkley stated that Knerr did not hit his brakes or slow down and drove away after hitting appellant.

{¶ 9} Appellant asserts three assignments of error on appeal:

> Assignment of Error No. 1. The court erred in granting summary judgment to defendant, District Petroleum. The incident producing and inflicting the injuries to plaintiff, Darrell Philon, was generally foreseeable, and the developing situation should have been foreseen. The location of the gasoline station involved in the incident is a well documented high traffic, high crime location. District may not say that crime and incidents in the area were not foreseeable.
>
> Assignment of Error No. 2. The court erred when it weighed the evidence in violation of Ohio Civil Rule 56(C).
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> Assignment of Error No. 3. The court erred in dismissing the second cause of action in respondeat superior. Even though a specific agent is not

named, a corporation acts through its employees. In this case, the second cause of action should be allowed to remain. However, whether or not the liability for respondeat superior remains, there is still a cause of action against District Petroleum as the property holder.

Summary Judgment

{¶ 10} The standard of review of judgments granting motions for summary judgment is de novo; that is, an appellate court applies the same standard in determining whether summary judgment should be granted as the trial court. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Summary judgment is limited to circumstances where there is no dispute of material fact. Civ.R. 56(C) provides:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

{¶ 11} Under the rule, to prevail on a motion for summary judgment the moving party must demonstrate:

> (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is

made, who is entitled to have the evidence construed most strongly in his favor.

Harless v. Willis Day Warehousing Co., 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

Claimed Negligent Failure to Provide Security at Store to Protect Business Invitees Against Third Party Criminal Conduct

{¶ 12} Assignment of Error No. 1 concerns the trial court's grant of summary judgment on the claim that District Petroleum was negligent in failing to provide security at the store to protect business invitees from third party criminal conduct. Under Assignment of Error No. 1, appellant challenges the trial court's determination that under the "totality of the circumstances" District Petroleum had no duty to take special security precautions at the store as the criminal conduct was not foreseeable.

{¶ 13} The elements of an action in negligence include "a duty, a breach of the duty, and an injury proximately resulting therefrom." *Menifee v. Ohio Welding Products, Inc.*, 15 Ohio St.3d 75, 77, 472 N.E.2d 707 (1984). Ohio recognizes that a "[b]usiness owner has a duty to warn or protect its business invitees from criminal acts of third parties when the business owner knows or should know that there is a substantial risk of harm to its invitees on the premises in the possession and control of the business owner." *Simpson v. Big Bear Stores Co.*, 73 Ohio St.3d 130, 652 N.E.2d 702 (1995), syllabus. No duty exists to protect business invitees against the criminal acts of third parties unless the criminal act was foreseeable. *Howard v. Rogers*, 19 Ohio St.2d 42, 249 N.E.2d 804 (1969) paragraphs one and three of the syllabus; *Clark v. BP Oil*, 6th Dist. No. L-04-1218, 2005-Ohio-1383, ¶ 11.

{¶ 14} Appellant submitted for court consideration on the motion for summary judgment copies of incident reports prepared and kept by the Sandusky Police Department covering the period from 1999 until October 30, 2007 with respect to incidents at the convenience store. Based upon those reports, appellant claims that there was a high incidence of crime and violence at the store that created a foreseeable risk of injury to business invitees from third party criminal conduct. Appellant argues that given the foreseeable risk, District Petroleum owed a duty to business invitees to provide security at the store and that it negligently breached that duty.

{¶ 15} District Petroleum argued that the trial court correctly applied the "totality of the circumstances" test in considering such a claim and properly determined that a risk of criminal conduct against business invitees at the store was not foreseeable.

{¶ 16} This court has approved and followed the analysis of the Eighth District Court of Appeals in *Reitz v. May Co. Dept. Stores*, 66 Ohio App.3d 188, 192-194, 583 N.E.2d 1071 (1990) in applying a totality of the circumstances test to determine whether a criminal act was foreseeable and in holding that evidence of foreseeability must be "somewhat overwhelming" before a duty to protect against third party criminal acts is to be found. *Clark v. B.P. Oil* at ¶ 11; *Warner v. Uptown-Downtown Bar*, 6th Dist. No. WD-97-051, 1998 WL 123087, *2 (Mar. 13, 1998); *Johnson v. District Petroleum*, 6th Dist. No. L-94-245, 1995 WL 96792 (Mar. 10, 1995). The totality of the circumstances test includes consideration of "relevant evidence that includes the location and character

of the business and past crimes of a similar nature." *Clark v. B.P. Oil* at ¶ 11; *Reitz,* 66 Ohio App.3d at 192-193.

{¶ 17} The trial court reviewed the incident reports. In its judgment, the court found four prior instances in which customers argued inside the store and continued their dispute outside:

> September 16, 2002 – male and female argue in the store. Both exit the store and then male kicks female's bike.
>
> August 20, 2006 – argument begins outside with customers, continues briefly inside the store, and customers are armed with bats and a knife. Officers denote that the situation began in a mutual manner. No one was injured. No arrest made.
>
> September 9, 2006 – males arguing in parking lot. One male enters the store and upon exiting the store again argues with the other subject. One male punches the other and flees the area. Subject taken into custody. Subject had no injury and was not taken to the hospital.
>
> January 30, 2007 – intoxicated patron argues with other customers and throws punches at a store patron, takes donuts and failed to pay for them. Intoxicated patron leaves store and is apprehended by police.

{¶ 18} Given these limited incidents, the trial court found that the risk of third party criminal acts on the premises against business invitees was not foreseeable.

{¶ 19} We have conducted a de novo review of the record, including all materials submitted as evidence on the motion for summary judgment. In our view, the police incident reports show periodic break-ins and thefts at the convenience store and isolated incidents where customers argued with each other. They do not show a pattern or significant history of crimes directed against customers at the store.

{¶ 20} Construing the evidence most favorably to appellant, we conclude that there is no dispute of material fact and third party criminal acts against business invitees at the store were not reasonably foreseeable under the totality of the circumstances. The record demonstrates that the foreseeable risk of harm to business invitees from third party criminal acts was not somewhat overwhelming.

{¶ 21} Accordingly, we conclude that District Petroleum owed no duty of care to undertake security precautions at the store to protect customers from harm caused by third party criminal conduct. We conclude that the trial court did not err in granting summary judgment in favor of District Petroleum and against appellant on the claim that District Petroleum failed to provide proper security at the store.

{¶ 22} We find appellant's Assignment of Error No. 1 not well-taken.

{¶ 23} Under Assignment of Error No. 2, appellant argues that the trial court failed to follow Civ.R. 56 procedure in its judgment. Appellant argues that the trial court improperly weighed the evidence and determined credibility of witnesses when considering disputed facts on the motion for summary judgment. District Petroleum

disagrees and asserts that the trial court considered the undisputed facts in granting summary judgment.

{¶ 24} It is unnecessary for this court to resolve this issue. Our review on appeal of a judgment granting summary judgment is de novo. We conduct our own review of the evidence without deference to the trial court's conclusions as to facts under the rule. De novo review renders this assigned error moot. *See Cooper v. Tommy's Pizza*, 10th Dist. No. 09AP-1078, 2010-Ohio-2978, ¶ 6; *Mills v. Best Western Springdale*, 10th Dist. No. 08AP-1022, 2009-Ohio-2901, ¶ 12.

{¶ 25} We find appellant's Assignment of Error No. 2 not well-taken.

{¶ 26} Assignment of Error No. 3 concerns claimed vicarious liability of District Petroleum for the alleged negligent acts of its employees made within the scope of their employment. Specifically, appellant claims that the store clerk, employed by District Petroleum and acting on its behalf, negligently failed to call police when Knerr threatened to harm appellant during the argument in the convenience store.

{¶ 27} Whether such threats were made is a disputed issue of fact in the negligence claim. The trial court did not address the merits of the negligence claim in its judgment. Instead, the court held that the claim was barred due to the failure of appellant to identify and join the claimed negligent employee as a defendant in this case, citing as authority the Ohio Supreme Court decision in *Nat'l. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601, 913 N.E.2d 939.

Effect of Failure to Join Alleged Negligent Employee as Party

{¶ 28} Under Assignment of Error No. 3, appellant argues that the trial court erred in holding that appellant's failure to identify and join the claimed negligent employee as a defendant barred the vicarious liability claim. District Petroleum argues that the trial court correctly applied the Ohio Supreme Court's decision in *Wuerth* in granting it summary judgment on the employee negligence claim.

{¶ 29} In *Wuerth* the United States Court of Appeals for the Sixth Circuit certified a question of state law to the Ohio Supreme Court for resolution: "Under Ohio law, can a legal malpractice claim be maintained directly against a law firm when all the relevant principals and employees have either been dismissed from the lawsuit or were never sued in the first instance?" *Wuerth* at ¶ 1. The Ohio Supreme Court answered the certified question in the negative. *Wuerth* at ¶ 2.

{¶ 30} This court and other appellate courts in this state have subsequently recognized that the holding in *Wuerth* applies only to legal and medical malpractice claims. *Tisdale v. Toledo Hosp.*, 6th Dist. No. L-11-1005, 2012-Ohio-1110, ¶ 24-33; *Henik v. Robinson Mem. Hosp.*, 9th Dist. No. 25701, 2012-Ohio-1169, ¶ 18-19; *Cope v. Miami Valley Hosp.*, 195 Ohio App.3d 513, 2011-Ohio-4869, ¶ 21. Accordingly, a negligence claim asserting negligence of an employee for acts undertaken within the scope of his employment that does not constitute a claim in legal or medical malpractice may be brought against the employer without joining the negligent employee as a party.

Tisdale at ¶ 32-33; *Henik v. Robinson Memorial Hosp.* at ¶ 19-21; *Cope v. Miami Valley Hosp*. at ¶ 18.

{¶ 31} In making this determination, we express no opinion on the merits of the vicarious liability claim.

{¶ 32} We find appellant's Assignment of Error No. 3 well-taken.

{¶ 33} We affirm the judgment of the Erie County Court of Common Pleas in part and overrule it in part. We affirm the grant of summary judgment in favor of District Petroleum with respect to its claimed failure to institute appropriate security at the convenience store to protect against third party criminal acts. We reverse the trial court judgment to the extent it granted District Petroleum summary judgment on the vicarious liability claim, under the doctrine of respondeat superior, asserting liability of District Petroleum for the claimed negligence of its employee in failing to call police after Daniel Knerr allegedly threatened appellant at the convenience store. Pursuant to App.R. 24, we order the parties to share the costs of this appeal equally.

Judgment affirmed, in part,
and reversed, in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____

JUDGE

Thomas J. Osowik, J. _____

Stephen A. Yarbrough, J. _____
CONCUR.

JUDGE

JUDGE