STATE OF MICHIGAN

COURT OF APPEALS

DAWN MARIE WHITAKER

Plaintiff-Appellant,

v

SHELLER-GLOBE CORPORATION and PINKERTON'S, INC.,

Defendants-Appellees.

UNPUBLISHED
June 28, 1996

No. 164597
LC No. 89-004016 NO

Before: Doctoroff, C.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Plaintiff suffered injuries from two gunshot wounds inflicted by an assailant while on the property of plaintiff's employer, defendant Sheller-Globe Corporation. She sued her employer and Pinkerton's, a security company with which Sheller-Globe contracted, alleging that they breached a duty to protect her. The jury found for plaintiff, and a judgment of $399,000 was awarded. The trial court then granted defendants' motions for judgment notwithstanding the verdict (JNOV). Plaintiff appeals as of right. We affirm.

At the time of this incident, plaintiff was employed by defendant Sheller-Globe and working the night shift at the Niles Township plant. Plaintiff's former live-in boyfriend, and the father of her children, Wally Schultz, shot plaintiff twice as she exited her car to go to work. To gain access to the Sheller-Globe plant, Schultz had to climb a remote portion of a seven foot fence which surrounded the facility. It was the only portion of the fence which was not protected by barbed wire.

Plaintiff described Schultz as possessive and jealous. When plaintiff ended her relationship with Schultz, she was forced to escape their house by creating a diversion, and sneaking out of a window with the children while Schultz was briefly absent. Upon learning that plaintiff had moved out, Schultz became enraged and threatened to "beat up" those that helped plaintiff escape. Following this incident, plaintiff asked Randall Farrer, a co-worker in whom plaintiff had a romantic interest, to drive her to work. When plaintiff finished her shift, she learned that Schultz was in his car in the private employee

parking lot. The plant was surrounded by a seven-foot cyclone fence, and an automobile could only access the parking lot through a guarded gate on the west side of the facility. After security was notified that an unauthorized person was on the premises, a security guard hired by Pinkerton's asked Schultz to leave, which he did without incident. Thereafter, Sheller-Globe sent a memorandum to the security guards describing Schultz, and stating that he "has been harassing one of our employees and should not be allowed on Company property under any circumstances."

On February 28, 1988, plaintiff arrived at work at approximately 10:30 p.m. Upon exiting her car, she was shot twice by Schultz. According to testimony at trial, Schultz gained access to the premises by crossing a field to the east of the plant and scaling a pedestrian gate at the rear of the plant, which was the only portion of the cyclone fencing that was not topped with barbed wire. At trial, plaintiff claimed that defendants were negligent in allowing Schultz access to the employee parking lot. We affirm the trial court's order of JNOV.

To establish a prima facie case of negligence, a plaintiff must show (1) that a defendant owed a legal duty to the plaintiff; (2) that the defendant breached the duty owed; (3) that there was a proximate causal relationship between the breach of such duty and the injury to the plaintiff; and (4) that the plaintiff suffered damages. *Marcelletti v Bathani*, 198 Mich App 655, 658; 500 NW2d 124 (1993). The trial court granted defendants' motions for JNOV, finding insufficient evidence regarding the elements of duty and proximate cause.

Generally, there is no duty to protect another from the criminal acts of a third party in the absence of special circumstances. In addition, negligence cannot be found based on a theory that safety measures were less effective than they could or should have been. *Mason v Royal Dequindre*, 209 Mich App 514, 516 (1995). In this case, defendants only promised plaintiff that Schultz would not again get past the guard at the gate. Defendants did not promise to implement additional safety measures, nor did they guarantee plaintiff's personal safety. Defendants did not fail in their duty to prevent Schultz from getting past the guarded gate, thus, defendants properly discharged their duty to plaintiff. *Scott v Harper Recreation, Inc*, 444 Mich 441, 450-452; 506 NW2d 857 (1993). Similarly, the fact that Sheller-Globe voluntarily implemented a seven-foot fence and provided exterior lighting did not create a duty to protect against all criminal activity. *Id.* at 452.

In addition, defendants cannot be held liable based on a theory that the injury to plaintiff was foreseeable. Plaintiff's claim that her employer failed to adequately protect her could only be sustained if defendants had specific knowledge of a substantial danger to plaintiff. *Mason*, *supra*, at 517. In this case, defendants had no knowledge of any physical danger to plaintiff. Sheller-Globe was informed that Schultz had threatened Farrer and that Schultz had been twice seen at plaintiff's place of employment, but on each occasion, he left without incident. Although plaintiff informed Sheller-Globe that she feared plaintiff, she supplied defendants with no evidence from which they could conclude that Schultz harbored violent intentions toward her. The evidentiary record contains no evidence that the attack on plaintiff was foreseeable by defendants. Thus, reasonable jurors could only have concluded that defendants did not breach a duty to protect plaintiff.

The trial court's order granting defendants' motions for JNOV was also granted based on a lack of proximate cause. Ordinarily, the determination of proximate cause is left to the trier of fact, but if reasonable minds could not differ regarding the proximate cause of an injury, the trial court should rule as a matter of law. *Babula v Robertson*, 212 Mich App 45, 54 (1995). We find that the trial court's order was proper. At trial, plaintiff attempted to show that the lighting provided by Sheller-Globe was inadequate. However, no testimony at trial established that more lighting would have prevented Schultz from gaining access to the plant. Accordingly, the trial court correctly determined that Sheller-Globe did not proximately cause plaintiff's injuries. Thus, JNOV was properly granted.

In light of our finding that the trial court properly granted defendants' motions for JNOV, we find it unnecessary to address plaintiff's claims that the trial court erred in finding that collateral estoppel and res judicata barred her from pursuing her cause of action.

Affirmed .

/s/ Martin M. Doctoroff
/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald