

STATE OF MICHIGAN
COURT OF APPEALS

DUANE DENSON and CYNTHIA DENSON,

Plaintiffs-Appellants,

v

KMART CORPORATION and GABBARD &
COMPANY, and JOHN DOE, Jointly and Severally,

Defendants-Appellees.

UNPUBLISHED
January 21, 1997

No. 190379

Wayne Circuit Court
LC No. 94-425568

Before: Griffin, P.J. and T.G. Kavanagh* and D.B. Leiber,** JJ.

PER CURIAM.

Plaintiffs appeal from two circuit court orders granting summary disposition in defendants' favor in this premises liability action. We affirm.

Plaintiffs' complaint alleged that on or about September 16, 1991, Duane Denson (plaintiff) was seriously injured when he was shot just outside the entrance to a Kmart store in Detroit, where he was a customer and business invitee. Defendant Gabbard contracted with Kmart to provide security services at the store, including uniform patrol service during hours which included the hours when the shooting occurred. The complaint alleged that on the same date Shawn Lintez purchased shotgun shells in that Kmart store and that, as a direct and proximate result of that sale, Lintez shot plaintiff, resulting in the partial amputation of plaintiff's lower right leg. Plaintiffs alleged that defendant Kmart had a duty to exercise reasonable care to keep said premises in a reasonably safe condition; that defendants failed to provide a safe parking area; and that defendants allowed persons to remain on the premises whose conduct had become violent, to such a degree that defendants knew or should have known that others were in danger, among other things.

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-10.

** Circuit judge, sitting on the Court of Appeals by assignment.

Plaintiff and Lintez worked for a janitorial service company which cleaned Kmart stores, and a small group of employees of that company would gather nightly outside the Kmart store involved here, around 9:00 p.m., where they would receive their nightly assignments. Plaintiff and Lintez had had a verbal altercation several days before the shooting.

One of Gabbard's security guards, Pollard, testified that he was on duty in a parked car facing the store entrance on the evening in question, did not observe anything unusual, saw the group of men standing near the store entrance, but did not see the shooting or events leading up to the shooting.

Merchants are ordinarily not responsible for the criminal acts of third persons, even where a merchant voluntarily takes safety precautions. *Scott v Harper Recreation, Inc*, 444 Mich 441, 452; 506 NW2d 857 (1993). Suit may not be maintained on the theory that the safety measures are less effective than they could or should have been. *Id.*; *Abner, supra* at 493. Merchants who attempt to provide security services should not be penalized for doing so. *Abner, supra* at 492.

Summary disposition was properly granted to defendants under MCR 2.116(C)(10). Plaintiffs failed to establish a question of fact regarding whether Kmart knew or should have known of plaintiff's peril. The deposition testimony plaintiffs relied on did not establish and was insufficient to raise a question of fact regarding whether the person in blue outside the store was a Kmart employee or security guard. *Abner v Oakland Mall, Ltd*, 209 Mich App 490, 492-494, n 3; 531 NW2d 726 (1995); *Jackson v White Castle*, 205 Mich App 137, 140-142; 517 NW2d 286 (1994). Similarly, plaintiffs failed to establish that Gabbard had specific knowledge or forewarning concerning plaintiff's attacker. *Abner, supra* at 492-494, n 3. Under these circumstances, we conclude that defendants were not responsible for the criminal acts of Lintez. *Id.*

Affirmed.

/s/ Richard Allen Griffin
/s/ Thomas G. Kavanagh
/s/ Dennis B. Leiber