

STATE OF MICHIGAN
COURT OF APPEALS

AKRAM N. KHERKHER,

Plaintiff-Appellant,

v

JERRY M. RABBAN and FOOD VALUE
MARKET, INC., a Michigan corporation, jointly and
severally,

Defendants-Appellees.

UNPUBLISHED

May 16, 1997

No. 187669

Wayne Circuit Court

LC No. 94-431806 NO

Before: Marilyn Kelly, P.J., and Jansen and M. Warshawsky,* JJ.

PER CURIAM.

Plaintiff appeals as of right from a grant of summary disposition in defendants' favor pursuant to MCR 2.116(C)(10). He argues on appeal that he presented evidence that defendant breached a duty to plaintiff by increasing the risk of harm and not acting reasonably to protect plaintiff from a foreseeable peril. We affirm.

I

This case arose when plaintiff was stabbed while shopping in defendants' grocery store. Plaintiff and defendant Rabban had planned a fishing weekend and went to defendants' store to buy food and supplies. While at the back of the store, Rabban heard a commotion in the front and went to investigate it. He observed a stranger clutching a butcher knife in his right hand. Rabban went to his office, which was elevated above the store floor, to call the police. He lost sight of the assailant.

When Rabban reached his office, not able to see the stranger, he called to plaintiff to go to the front or come to the office. Plaintiff responded to Rabban's directions. Meanwhile, the assailant approached Rabban and instructed him to lock all the doors and call the police. When plaintiff reached the front of the store, he found himself approximately twenty feet from the assailant who then chased plaintiff and stabbed him repeatedly. Rabban fatally shot the assailant four times.

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

Plaintiff filed a negligence action against defendants alleging severe injuries from the stabbing in defendants' grocery store. Defendants moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that they owed no duty to plaintiff to protect him from the criminal acts of a third party. The trial court agreed and granted defendants' motion.

II

On appeal, plaintiff argues that defendants assumed a duty to use reasonable care to protect him when Rabban called him to the front of the store, changing his position relative to a known peril. Plaintiff claims that Rabban failed to exercise reasonable care to protect him and that Rabban's failure increased the risk of harm to him. In reviewing a summary disposition determination, this Court must give the benefit of reasonable doubt to the nonmovant and determine whether a record might be developed which will leave open an issue upon which reasonable minds could differ. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995).

We agree with the trial court and conclude that defendants owed no duty to plaintiff. To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) causation; and (4) damages. *Schultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993). Whether a duty exists is a question of law for the court. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). A business invitor is not required to protect its customers from the crimes of others, even in high crime areas. *Perez v KFC National Management Co, Inc*, 183 Mich App 265, 268-269; 454 NW2d 145 (1990).

In *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495; 418 NW2d 381 (1988), the Supreme Court established the rule that a merchant's duty of reasonable care does not include providing armed, visible security guards to deter criminal acts of third parties. The Court extended the *Williams* rule in the recent case of *Scott v Harper Recreation, Inc*, 444 Mich 441; 506 NW2d 857 (1993). There, it held that a merchant does not owe a duty to protect invitees from criminal acts of third parties regardless of whether the merchant undertakes to provide armed services or other precautionary measures to protect against crime. In *Scott*, the defendant nightclub advertised "free, ample, lighted, guarded parking." *Id.* At 443. The plaintiff was shot while walking to his car in the defendant's parking lot. The plaintiff argued that a person who voluntarily undertakes a responsibility can be held liable if the volunteer's negligence is a proximate cause of injury. The plaintiff alleged that the defendant increased the risk of harm by advertising secure parking, thereby causing patrons to be less wary of criminal activity. The Court rejected the argument that a merchant who makes property visibly safer by providing lighted, guarded parking has increased the risk of harm by causing patrons to be less anxious.

The *Scott* Court summarized:

The central holding of *Williams* is that merchants are ordinarily not responsible for the criminal acts of third persons. The present suit is an attempt to circumvent that holding by invoking the principle that a person can be held liable for improperly discharging a voluntarily undertaken function. However, the rule of *Williams* remains in

force, even where a merchant voluntarily takes safety precautions. Suit may not be maintained on the theory that the safety measures are less effective than they could or should have been. [*Scott v Harper Recreation Inc*, 444 Mich 452.]

In light of the *Williams* and *Scott* decisions, we reject plaintiff's argument that defendants undertook a duty to protect plaintiff when Rabban called plaintiff to the front of the store. Plaintiff may not maintain suit on the theory that the safety measures voluntarily undertaken by defendants were less effective than they could have or should have been. *Abner v Oakland Mall Ltd*, 209 Mich App 490; 531 NW2d 726 (1995). We conclude that the trial court properly granted summary disposition in defendants' favor, because plaintiff cannot establish that defendants owed him a legal duty.

III

We find no support in the record for plaintiff's contention that defendants failed to exercise reasonable care by calling plaintiff to the front of the store and that, by doing so, defendants increased the risk of harm to plaintiff. There is no evidence that Rabban had sight of the assailant when he called to plaintiff. The assailant brandished a butcher's knife. He had just murdered another person and wounded two others with the knife. Plaintiff failed to show that plaintiff would not have been stabbed or even killed if defendant had not called him to the front of the store. The assailant told Rabban to lock the store doors. The assailant could have killed everyone in the grocery store. We cannot say that Rabban increased the risk of harm to plaintiff by calling him to the front.

Plaintiff also argues that defendant had a duty to do something to distract the assailant from plaintiff and that defendant's choice to do nothing was a breach of that duty. This Court rejected the argument that a merchant's failure to take alternative, precautionary measures creates liability in *Marr v Yousif*, 167 Mich App 358; 422 NW2d 4 (1988). The Court stated:

Plaintiff would have us create a duty on the part of store owners to turn their stores into fortresses. Every time a crime occurs on a merchant's premises a plaintiff would have to do no more than allege a measure that a defendant might have taken and the jury would then be allowed to speculate whether the alleged measure might have inhibited the criminal. Since such allegations can be made in every case, we would be imposing strict liability in the guise of negligence. [*Marr v Yousif, supra*, 167 Mich App 364.]

Defendant called the police. Defendant obtained a gun which ultimately stopped the assailant. Plaintiff's argument that defendant could have intervened sooner or in some other manner and thereby produced a different outcome is speculative at best and cannot be used as a basis for imposing liability on defendant.

IV

Finally, plaintiff argues that the trial court improperly focused upon defendant Rabban's intentions and foreseeability as determinative of liability in this case. The trial court noted that Rabban had only rescue-like intentions and that there was no testimony that Rabban had sight of the assailant when he called plaintiff to the front of the store. Our review of the record reveals that the trial court made these observations when deciding whether Rabban's actions increased the risk of harm to plaintiff. They were proper considerations in determining the issue. However, the issue was not dispositive of the case, and the trial court did not treat it as such. The trial court made a separate finding that defendants owed no duty to plaintiff. That issue was dispositive of the case, and the trial court properly granted summary disposition in defendants' favor.

Affirmed. Defendants being the prevailing parties, they may tax costs pursuant to MCR 7.219.

/s/ Marilyn Kelly

/s/ Kathleen Jansen

/s/ Meyer Warshawsky