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Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000036-MR

CHRISTOPHER PARK APPELLANT

v.

APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE STEPHEN N. FRAZIER, JUDGE
CIVIL ACTION NO. 98-CI-00022

COLEMAN OIL, INC. and
UNKNOWN DEFENDANTS APPELLEES

OPINION

AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, HUDDLESTON and JOHNSON, Judges.

HUDDLESTON, Judge: Christopher Park appeals from a summary judgment in favor of Coleman Oil, Inc. on his claim that Coleman Oil was negligent in failing to take further steps to increase the security at its Happy Mart convenience store in Hager Hill, Kentucky, and that such failure led to the armed robbery of the store and of Park while he was a customer there. The unknown defendants are those individuals who committed the robbery, whose identities were never discovered by Park or law enforcement

officers. While named as parties on appeal, no one argues the merits of any claims against the unknown defendants; therefore, we will only address those claims which relate to Coleman Oil.

In January of 1997, Park was a customer of the Hager Hill Happy Mart during the early morning hours. While there, three unidentified assailants entered the store and ordered the clerk to empty the cash register and, after pointing a gun at Park, demanded his wallet and car keys. The robbers then left the store in Park's car, which was later abandoned and burned. Despite an investigation by law enforcement officers, the identities of the robbers were never determined.

Following the incident, Park brought suit against Coleman Oil, claiming that it was negligent in not providing adequate security measures for the protection of its patrons, including Park, and that such negligence caused Park to suffer various injuries. The circuit court granted Coleman Oil's motion for summary judgment, finding that the robbery in question was not foreseeable. It is from this judgment that Park appeals.

As we said in Murphy v. Second Street Corp.,[1]

> [t]he standard of review on appeal of a summary judgment is whether the trial court correctly found that there was no genuine issue as to any material fact and that the moving party was entitled to judgment as a matter of

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[1] Ky. App., 48 S.W.3d 571, 573 (2001) (internal footnotes renumbered).

law.[2] Since factual findings are not at issue, there is no requirement that the appellate court defer to the trial court.[3] "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor."[4] "The inquiry should be whether, from the evidence of record, facts exist which would make it possible for the nonmoving party to prevail. In the analysis, the focus should be on what is of record rather than what might be presented at trial."[5]

Finally, "[t]he party opposing summary judgment cannot rely on [his] own claims or arguments without significant evidence in order to prevent a summary judgment."[6]

In granting summary judgment for Coleman Oil, the circuit court relied on Napper v. Kenwood Drive-In Theatre Co.[7] The court focused on the analysis in Napper dealing with foreseeability; in that case, the court found that merely because a group of boys had

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[2] Ky. R. Civ. P. (CR) 56.03.

[3] Goldsmith v. Allied Building Components, Inc., Ky., 833 S.W.2d 378, 381 (1992).

[4] Steelvest, Inc., v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991).

[5] Welch v. American Publishing Co. of Kentucky, Ky., 3 S.W.3d 724, 730 (1999).

[6] Wymer v. JH Properties, Inc., Ky., 50 S.W.3d 195, 199 (2001).

[7] Ky., 310 S.W.2d 270 (1958).

been "smarting off" earlier, it was not foreseeable that they would assault a particular patron.[8] The court then ruled that the robbery of the Happy Mart was not foreseeable, absolving Coleman Oil of liability.

A more useful case dealing with the concept of foreseeability in this context is Grisham v. Wal-Mart Stores, Inc.[9] In that case, a Christmas shopper at the Florence Wal-Mart was shot in the parking lot. Following its discussion of Napper, the court in Grisham provided the following example of when a criminal act would be sufficiently foreseeable to create liability for the premises owner:

> The foreseeability of criminal conduct was also relied on in Waldon v. Housing Authority, [[10]] to hold a defendant landowner liable for failing to take action to protect a tenant who was shot and killed. The court noted that the landowner was aware that the decedent, as well as other tenants, were repeatedly threatened by the assailant. Further, the assailant was living at the apartment complex and the defendant took no steps to evict him from the premises. The resultant injury, a

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[8] Id. at 272.

[9] 929 F. Supp. 1054 (E.D. Ky. 1995).

[10] Ky. App., 854 S.W.2d 777 (1991).

violent assault, was the very type of criminal act that was reasonably foreseeable.[11]

The Grisham court pointed out that the plaintiff's expert testified that four robberies took place in parking lots in Florence during the 1991 Christmas season; however, only one of those robberies took place within five miles of the Wal-Mart. The court noted that cases from other jurisdictions held that "neither a single incident nor sporadic incidents are sufficient to establish foreseeability."[12] In responding to the statistics presented by the plaintiff, the court said:

> The 1992 statistics on assaults testified to by Livingood [the plaintiff's expert] cannot be considered by the court. Plaintiffs failed to demonstrate that any of the acts occurred prior to the assault on Mrs. Grisham and, therefore, the data is not relevant to the issue of foreseeability.[] In addition, plaintiffs have failed to establish that the 1991 incidents were sufficiently similar to the attack on Mrs. Grisham to demonstrate foreseeability.[13]

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[11] Grisham, supra, n. 9, at 1057.

[12] Id. at 1058, citing C.S. v. Sophir, 220 Neb. 51, 368 N.W.2d 444, 446 (1985); Garner v. McGinty, 771 S.W.2d 242, 248 (Tex. App. 1989); Sawyer v. Carter, 71 N.C. App. 556, 322 S.E.2d 813, 817 (1984).

[13] Id. at 1058.

Accordingly, the Court did not find Wal-Mart liable for the shooting, based on the lack of evidence presented which would show that the attack was sufficiently foreseeable.

In the instant case, Park's only evidence of foreseeability can be found in his answers to interrogatories propounded by Coleman Oil in which he references a newspaper article from 1998 describing a robbery at the Happy Mart. However, Park never produced the article nor did he explain whether the article was referring to a robbery before or after the one in which he was involved. In fact, it may be that the article refers to the very robbery which gave rise to this case.

In the same interrogatory answer, Park references what he describes as "gas drive offs," which presumably refers to situations where motorists drive away from the Happy Mart without paying for their gasoline. This proffered "evidence" must fail for two reasons. First, this is nothing more than an allegation, with nothing of substance or reliability to support it. Secondly, even if we assume it to be true, we are unwilling to make the leap required to hold that such petty thefts are an indicator of an armed robbery such as occurred to spur this litigation.

In response to Coleman Oil's motion for summary judgment, Park produced an OSHA publication entitled "Recommendations for Workplace Violence Prevention Programs in Late-Night Retail Establishments." However, this publication deals with the

protection of a business's employees, not its patrons. Accordingly, it has little or no relevance to Park's situation.

Finally, after the circuit court granted summary judgment in favor of Coleman Oil, Park attached to his motion to reconsider a printout from the Internet web page of Chris McGoey, a self-described "convenience store security expert." However, the printout only deals with convenience stores in a general sense; McGoey was not retained by Park and provided no independent study or analysis of the Hager Hill Happy Mart.[14] Like the OSHA publication, this printout has no relevance to the case at hand. Accordingly, it is of no evidentiary value. Thus, like the court in Grisham, we are of the opinion that Park has failed to present sufficient evidence to create a jury question whether the robbery in which he was a victim was foreseeable by Coleman Oil.

Park has cited cases from Missouri and California in an attempt to show that the law of other states would view the events in question as having been foreseeable. However, a closer look at those cases shows them not to be significantly different in their analyses. The Missouri approach is exemplified by the case of Madden v. C & K Barbecue Carryout, Inc.[15] Although the evidence in

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[14] That is, assuming McGoey's testimony could survive the requirements of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). Because this "evidence" was never properly submitted, no such analysis was undertaken by the circuit court nor was it required.

[15] 758 S.W.2d 59 (Mo. 1988).

that case was conflicting, one version of the facts described the premises on which the crime occurred as having sustained one armed robbery, one purse snatching and 45 thefts; another version put the total at "four armed robberies, three purse snatchings, robbery second degree, attempted armed robbery, assault, assault with a deadly weapon, flourishing a deadly weapon, stealing over purse snatching [sic], and attempted purse snatching."[16] The Missouri court likened the case to that in Brown v. National Supermarkets, Inc.,[17] wherein the prior occurrence of "sixteen reported robberies involving a firearm, seven reported strong arm robberies, and 136 other reported crimes allegedly occurring on the defendant's premises over a two year period constituted special facts giving rise to a duty to protect patrons from the criminal assaults of unknown third parties."[18] Park has not presented any evidence of such "special facts" as would create the duty described by the Missouri courts.

Likewise, the lead California case on landowner liability for criminal acts by third parties on the owner's premises, Isaacs v. Huntington Memorial Hospital,[19] while not specifically requiring evidence of prior similar acts in order to hold the premises owner liable, found such evidence helpful. Indeed, the hospital premises

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[16] Id. at 61.

[17] 679 S.W.2d 307 (Mo. App. 1984).

[18] Madden, supra, n. 15, citing Brown, supra, n. 17, at 309.

[19] 38 Cal.3d 112, 695 P.2d 653, 211 Cal. Rptr. 356 (1985).

in that case had been the scene of multiple armed assaults, thefts, drunken disturbances of the peace and other events, such that the location was described as "scary" and "physically threatening."[20] Like the Missouri court, the California court did not depart from the general proposition that a landowner is not the insurer of the safety of his guests, and is ordinarily under no duty to exercise any care.[21] "Whether such a duty exists is a question of law to be determined on a case-by-case basis."[22]

Kentucky law likewise holds that a proprietor is not the insurer of the safety of its guests, and that the existence of a duty owed to guests and invitees is a question of law to be determined on a case-by-case basis.[23] In this case, Park has failed to provide any evidence which would demonstrate that the robbery in which he was a victim was any more foreseeable to occur at the Hager Hill Happy Mart than anywhere in the surrounding area, or for that matter in the world at large. Accordingly, there existed no duty on the part of Coleman Oil to provide for his safety from the unforeseen criminal acts of unknown third parties. Since the circuit court correctly granted summary judgment in favor of Coleman Oil, the judgment is affirmed.

ALL CONCUR.

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[20] Id., 38 Cal.3d at 121, 695 P.2d at 656.

[21] Id., 38 Cal.3d at 124, 695 P.2d at 657.

[22] Id., 38 Cal.3d at 124, 695 P.2d at 658.

[23] Murphy, supra, n. 1, at 573.