

IN THE COURT OF APPEALS 03/26/96
OF THE
STATE OF MISSISSIPPI
NO. 95-CA-00389 COA

DEBORAH LORRAINE MAXWELL

APPELLANT

v.

**THE KROGER COMPANY AND FIRST TIBER S. A., INC., INDIVIDUALLY AND
JOINTLY AND SEVERALLY**

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. KOSTA N. VLAHOS

COURT FROM WHICH APPEALED: HARRISON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

W. HARVEY BARTON

ATTORNEYS FOR APPELLEES:

BOBBY ATKINSON

H. GRAY LAIRD, III

DEE AULTMAN

NATURE OF THE CASE: PERSONAL INJURY (PREMISES LIABILITY)

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT GRANTED TO APPELLEES

EN BANC

BRIDGES, P.J., FOR THE COURT:

Deborah Maxwell sued the Kroger Company and First Tiber S. A., Inc., for injuries she received during an assault in a parking lot leased by Kroger and owned by First Tiber. Summary judgment was granted to the Defendants. On appeal, Maxwell argues that the trial court erred in granting summary judgment. We agree and reverse for a trial on the merits.

FACTS

The Kroger Company leased a parking lot for its grocery store in Gulfport, Mississippi from First Tiber S. A., Inc. The parking lot had a poor safety history, especially at night. Reports from the Gulfport Police Department indicate that there had been eight previous violent crimes committed on the Kroger premises between 1988 and 1991. On the night of January 13, 1992, Deborah Maxwell was assaulted in the parking lot and seriously injured by an unknown assailant attempting to steal her purse. In the two and one-half months prior to Maxwell's assault, there were at least twenty-six violent crimes committed within an approximate one-mile radius of the Kroger store.

Maxwell sued, maintaining that Kroger and First Tiber knew, or should have known, of the violence in the area and on their property. She also argued that Kroger and First Tiber were negligent in making the parking lot safe from such incidents. According to Maxwell, the Kroger parking lot was poorly lit and without security. Additionally, she claimed that Kroger should have erected a fence to separate the Kroger lot from the surrounding woods. Kroger and First Tiber countered that, while some areas of the parking lot were inadequately lit, Maxwell was attacked in an area of the parking lot that did have adequate lighting. Moreover, Kroger and First Tiber contended that because Maxwell resisted her attacker, her injuries were more severe than had she complied with his demand for her purse.

The defendants moved for summary judgment arguing the following: that they lacked notice of the hazard posed by crime in the parking lot; that they did not breach their duty of care to Maxwell; that Maxwell's resistance was not a foreseeable event; that there was a lack of a causal relation between their actions and Maxwell's injuries; and that Maxwell's attacker presented an unforeseeable superseding cause of Maxwell's injuries. In opposition to this motion, Maxwell presented the opinions of several experts. A security expert opined that the parking lot's security was inadequate and that this inadequacy resulted in an environment that fostered criminal activity. A forensic electrical engineer provided his opinion that the parking lot, while providing ample lighting in some areas, failed to shed adequate light on key areas -- including a part of the parking lot bordering woods from and into which previous attackers (including Maxwell's) had entered or escaped from the parking lot.

Kroger and First Tiber were granted summary judgment. In issuing its order, the trial court concluded that Maxwell had failed in presenting her case in two respects. First, she had not

developed evidence to demonstrate that her attack was a foreseeable event. Second and alternatively, there was no proof of a causal connection between the attack and a failure by Kroger and First Tiber to satisfy their duties owed to her.

DISCUSSION

Rule 56(c) of the Mississippi Rules of Civil Procedure allows summary judgment where there are no genuine issues of material fact such that the moving party is entitled to judgment as a matter of law. *Crain v. Cleveland Lodge 1532*, 641 So. 2d 1186, 1188 (Miss. 1994). When reviewing a decision to grant summary judgment, this Court will review the case *de novo*. *Id.* All evidentiary matters are viewed in a light *most favorable to the non-movant*. *Id.* (emphasis added); *Morgan v. City of Ruleville*, 627 So. 2d 275, 277 (Miss. 1993). In other words, Kroger and First Tiber must show that there is *no issue of fact* on one of the following four points: (1) whether they owed a duty to Deborah Maxwell; (2) whether they breached that duty if one was owed to Maxwell; (3) whether Maxwell suffered injuries as a result of a breached duty; and (4) whether such breach substantially contributed to Maxwell's injuries. *Lyle v. Mladinich*, 584 So. 2d 397, 416 (Miss. 1991). We believe that neither Kroger nor First Tiber has met that burden.

A business owner has a duty to exercise reasonable care to protect invitees from reasonably foreseeable injuries. *Crain*, 641 So. 2d at 1188. The Mississippi Supreme Court has extended this duty to include foreseeable injuries caused by the actions of third parties who harm invitees on the premises of another. *Lyle*, 584 So. 2d at 399. This foreseeability of assaults by third-persons may give actual or constructive knowledge that an atmosphere of violence exists in or around the business and its parking lot. *Id.* Further, any business "which invites the company of the public must take 'reasonably necessary acts to guard against the predictable risk of assaults.'" *Id.* (quoting *Banks v. Hyatt Corp.*, 722 F.2d 214, 227 (5th Cir. 1984)).

The emphasis of this duty rests on the "reasonable foreseeability" of the assault. *Id.* Courts have relied on such factors as the overall pattern of criminal activity occurring in the general vicinity of the business premises prior to the event, as well as the frequency of criminal activity on the premises. *Id.* Clearly, Maxwell established that Kroger and First Tiber owed her a duty as premises owners. In addition, Maxwell developed sufficient evidence to show that her assault was reasonably foreseeable. Reports from the Gulfport Police Department indicate that there had been *eight* previous *violent crimes* committed *on the Kroger premises* between 1988 and 1991. Further, in the two and one-half months prior to Maxwell's assault, there were at least *twenty-six violent crimes* committed within an approximate one mile radius of the Kroger store.

There is no evidence that Kroger provided any type of security personnel for the parking lot, even though it knew of the previous assaults on its premises. Uncontroverted expert testimony established that the lighting in the parking lot did not meet minimum industry safety standards. Additionally, uncontroverted testimony showed that Kroger never erected a fence between its premises and neighboring woods, even though at least two previous assailants fled to these woods after attacking Kroger patrons.

Clearly, a duty existed. Whether Kroger and First Tiber breached their duty is an issue for the fact-finder to resolve. *Id.* at 400. The record contains sufficient evidence to support the conclusion that a triable issue of fact exists regarding the breach-of-duty element.

The evidence presented by Maxwell indicated that Kroger or First Tiber's actions could have resulted in the proximate cause of her injuries. At the very least, the issue should have gone to the jury as the finder of fact on whether there was a causal relation between her injuries and the adequacy of security provided by Kroger and First Tiber. Accordingly, this case is remanded for a trial on the merits.

THE JUDGMENT OF THE CIRCUIT COURT OF THE SECOND JUDICIAL DISTRICT OF HARRISON COUNTY IS REVERSED AND REMANDED FOR A TRIAL ON THE MERITS. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLEES.

BARBER, COLEMAN, DIAZ, KING, AND PAYNE, JJ., CONCUR.

DIAZ, J., CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY BARBER, J.

FRAISER, C.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY McMILLIN AND SOUTHWICK, JJ.

SOUTHWICK, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY FRAISER, C.J., AND McMILLIN, J.

THOMAS, P.J., NOT PARTICIPATING.

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DIAZ, J., CONCURRING:

I write to specially concur in the majority opinion. Not only do I find summary judgment on behalf of the appellees inappropriate in this case, I would direct the trial court to consider sanctions under Rule 11(b) of the Mississippi Rules of Civil Procedure for any motions or pleadings filed on behalf of the appellee which are frivolous or filed for the purpose of harassment or delay.

Today, trial courts are backlogged with pending litigation and appeals can take years. The taxpaying public demands and deserves a responsive and accountable judiciary. Often cited as the reason for the current overburdening of the judicial system is the so-called frivolous filing of lawsuits. Largely ignored as a cause of judicial inefficiency have been the frivolous motions and pleadings filed by attorneys whose only motives are to harass litigants and delay proceedings. Frivolous filings impose substantial and unnecessary costs upon both litigants and the courts, and ultimately upon the public. *Tricon Metals & Services, Inc. v. Topp* 537 So.2d 1331, 1335 (Miss. 1989). As stewards of justice and guardians of the public purse, judges have a duty to be vigilant and to actively deter the filing of frivolous pleadings and motions. Judges should not hesitate to apply Rule 11 sanctions where numerous unduly burdensome pleadings and dilatory motions are filed simply to harass a litigant and to "bill hours." Justice and fiscal responsibility demand no less.

BARBER, J., JOINS THIS SEPARATE OPINION.

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SOUTHWICK, J., dissenting

On the issue of foreseeability of this assault, the majority finds clarity when I find murkiness. However, murkiness suggests a fact question that I agree was inappropriate for summary judgment as to foreseeability. Where I dissent to reversal is that the majority has failed to apply the requirement under negligence law, as interpreted in this context by the supreme court, that there be a causal relation between the alleged breach of a duty to Deborah Maxwell and her injuries.

If the assault was foreseeable, then there was a duty to take reasonable steps to protect the invitee. Though the concept is analogous to the "one-bite" rule for common law liability of the owner of a domestic animal, the uncertainty arises from the fact that one crime may not be the threshold of foreseeability. A report from the Gulfport Police Department indicated that robberies took place in the parking lot twice in 1988, once in 1989, once in 1990, and once in 1991. Three assaults occurred in 1989. Other evidence indicated that substantial criminal activity had occurred within the one-mile radius surrounding the Kroger. Is that a "lot" or a "little" prior crime for purposes of foreseeability? In one case the supreme court concluded that as a matter of law there was no reasonable foreseeability of a parking lot assault despite that eleven violent crimes had occurred in the vicinity of the business over a five-year period, especially when only two non-violent crimes had occurred on the premises themselves during the past year. *Crain v. Cleveland Lodge 1532, Order of Moose*, 641 So. 2d 1186, 1192 (Miss. 1994). In other words, the *Crain* evidence did not even create a jury question.

The difficult task under this law is to discern whether a prima facie case of foreseeability has been presented. The simple approach is to permit all such incidents to become jury questions, but that is not the law. *Crain* upheld the grant of summary judgment to a business despite some previous non-assaultive crimes on the premises and numerous violent crimes in the nearby neighborhood. *Crain*, 641 So. 2d at 1192. A directed verdict was upheld in another case involving a murder in a parking lot despite evidence of substantial numbers of previous parking lot crimes. *Kelly v. Retzer & Retzer, Inc.*, 417 So. 2d 556, 563 (Miss. 1982). What must be foreseeable is not just crime. To a distressing degree, crime is foreseeable anywhere and everywhere. The supreme court has held we should "refuse to place upon a business a burden approaching strict liability for all injuries occurring on its premises as a result of criminal acts by third parties." *Crain*, 641 So. 2d at 1191. Merchants are not police, and it is not the court's function to give to juries the unbounded discretion to decide in every case whether a business should have been more police-like. *Id.* at 1192.

Where to draw the line on what is a jury issue becomes the problem. It is one we cannot ignore, for we are bound by these precedents. The parties here allege the issue is resolved mathematically. Did more crimes occur here, of a more similar type, in a closer vicinity, during a shorter period of time, than in cases that did not find liability? If that is the necessary analysis, then after enough such cases there will be rigid and illogical rules that result from having fact situations on each side of the margins

left by previous cases. If this trend in case law continues then eventually a prima facie case of foreseeability and therefore duty will exist when one, or it might be five crimes, have occurred on the premises or no more than one/two/five parking lots away, within one year or maybe two, if the crime is exactly the same or one that differs by no more than one or perhaps two significant elements. The purpose of such formulae is only to make appear objective what is in fact totally subjective.

Crimes are basically randomly located acts of inhumanity, the location affected by many things including the relative strength of security on the premises. In *Crain* no violent crime had previously occurred in the Moose Lodge parking lot, but eleven violent crimes had occurred over a five-year period "in the vicinity of the Moose Lodge." This was found to be "scant evidence" to support foreseeability to the Lodge. *Crain*, 641 So. 2d at 1192. Is such evidence really scant? If assaults had occurred in neighborhood parking lots that were similar in lighting and other security details to that at the Moose Lodge, it is more likely just bad luck that determines whether the next crime occurs on one of those same parking lots or at the Moose Lodge. However, what gives some logic to the formulations in this area of the law is that the duties on a premises owner do not primarily depend on what an objective view would be of the likelihood of certain kinds of crime randomly occurring on his premises. Each business owner is not yet required to read all the crime reports, hire a security expert to compare the security conditions at each of those crime sites and at his own property, and thereby measure the scientific probabilities one of his patrons will be a victim. The focus has been on whether a similar crime has previously occurred so close or actually on the premises that a reasonable owner would be aware -- would be on notice -- of the danger.

Consistent with the supreme court precedents, and without engaging in more mathematics than attorneys should, I find that several assaultive crimes in this Kroger parking lot over the previous four years created a prima facie case of foreseeability. In the face of *Crain*, I am impressed that the majority finds "[c]learly, a duty existed." It is semantics, however, and at least I would say that "apparently, a duty existed." The trial court disagreed, relying on there being found only one assault during the previous year. There is reason in the trial court's conclusion, but these crimes were more frequent, more numerous, and more closely analogous (in fact identical) than in any of the precedents in which foreseeability was not found.

There was a duty on Kroger to take reasonable measures to prevent parking lot assaults. To activate liability for a *breach* of duty, Maxwell necessarily had to show that Kroger had not taken reasonable measures to address the hazard. There are several alleged defects in Kroger's actions:

- 1) The lighting should have been better, even though Maxwell was assaulted in a well-lighted part of the parking lot close to the store itself. In fact, she had parked directly under a light just three parking spaces from the store, and the parking lot between her car and the store was entirely lit. The most that Maxwell argues is that the lighting overall did not meet certain industry standards and that poor lighting might attract criminals because of the relative safety of the shadows on the parking lot. Her proof to that effect is based on measurements made two years after the assault and arises from the fact that areas outside of where Maxwell was victimized were not well-enough lit. There simply is no proof -- her evidence is actually to the contrary -- that her perpetrator raced in from a less well-lit area of the parking lot and assaulted her in the light. Maxwell believed she had seen her attacker near the well-lit area of the pay phones when she entered the store. He was still there when she finished shopping. He followed her through the lighted area to the car. Maxwell argues nonetheless that there

is an issue of causation in that her attacker might have been attracted to the Kroger because of the poor lighting in other parts of the lot, then was able to flee quickly into a dark part of the parking lot. Maxwell had no evidence that her attacker did any of that. She is not entitled to recover because of what might have happened, but only for what she has probative evidence to support did happen.

2) A wooded area on the side of the parking lot may have been the access or escape route for other culprits who committed crimes at Kroger. Maxwell was uncertain but said her attacker may have escaped that way. Consequently, Maxwell argues an issue existed whether Kroger should have fenced off that wooded area and prevented people from entering Kroger from the apartment complex area on the other side of the woods. Maxwell could not definitely place her attacker as having fled into the wooded area, which was on the opposite side of the store from where she parked. She did not see where he went other than for a few steps away from her after the assault because she was on the ground and without her glasses. In her deposition she said she thought he went into the woods, but said he also may have gone the opposite direction and across the main road in front of the Kroger. She had no idea where the criminal came from before the attack. Thus, the probative evidence that the absence of a fence helped the criminal arrive was nonexistent, and that it helped him escape was only speculation. Liability cannot be based on speculation.

Moreover, we have been pointed to no case law in Mississippi that bases premises liability on the failure of a store to cordon itself off from its neighbors. Certainly many if not all the apartment dwellers next to the Kroger wanted access to this grocery store that was within easy walking distance. I cannot find liability in Kroger's failure to keep them from doing so. Writing a requirement of "redlining" into our premises liability law is a dangerous concept.

3) Kroger should have had a full-time security guard. There is even an allegation that there should not have been a pay phone near the front door of the store, since criminals could loiter less suspiciously near a phone. The question of a security guard fails to lead to a causal relation with the assault. Security guards are the most analogous safety measure to that which is to be provided by the police themselves. Our supreme court has made it clear that businesses despite the omnipresence of crime do not have the responsibility of police forces. *Crain*, 641 So. 2d at 1192; *see Retzer*, 417 So. 2d at 562. This was a spontaneous, short-duration crime, a purse-snatching that began and ended in a very short period of time. The absence of a security-guard cannot be said to have been the proximate cause of a crime that a guard could not have prevented unless at that moment he had been near enough to do so. I find no case in which the supreme court has found a premises owner to be liable for not ever having a security guard. The court did decide that if a tavern sometimes had security guards, but there were none on the night of an assault, a jury issue was created on breach of duty. *Lyle v. Mladinich*, 584 So. 2d 397, 399-400 (Miss. 1991).

The supreme court has described the problem of tort liability in this area:

Crime has become so prevalent in recent years that even without taking the financial burden into consideration it would be impossible for a business to guarantee the safety of everyone coming onto its premises.

Crain, 641 So. 2d at 1192. This does not make the victims of crime any less sympathetic. It may in

some people's eyes make them even more of victims. Nonetheless, the supreme court has only partially loosened the restrictions on premises liability for the actions of criminals. It has not created strict liability. Absent proof that Kroger breached a duty of making the premises safe by failing to take reasonable steps that likely would have prevented the crime that injured this plaintiff, there is no liability.

I dissent.

FRAISER, C.J., AND MCMILLIN, J., JOIN THIS SEPARATE OPINION.