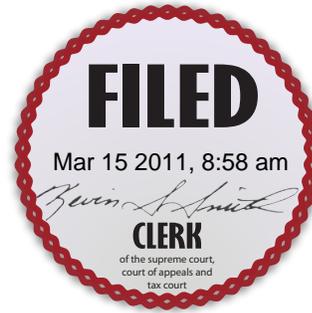


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE
COURT OF APPEALS OF INDIANA

LOVETHA SMITHERMAN,)

Appellant-Plaintiff,)

vs.)

No. 49A02-1008-PL-880)

KROGER LIMITED PARTNERSHIP I, d/b/a)
KROGER CO., THE KROGER CO., and)
DWAYNE HARRIS,)

Appellees-Defendants.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable S.K. Reid, Judge
Cause No. 49D14-0804-PL-16734

March 15, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Lovetha Smitherman (“Smitherman”) appeals a grant of partial summary judgment to Kroger Limited Partnership I d/b/a Kroger Co. and The Kroger Co. (“Kroger”) upon Smitherman’s claim for negligent hiring and retention. We affirm.

Issue

Smitherman presents for our review a single (consolidated and restated) issue: whether partial summary judgment was properly granted upon her negligent hiring claim against Kroger.¹

Facts and Procedural History

On April 15, 2006, Smitherman parked in a handicapped parking space in the parking lot of a Kroger store located at 65th and Keystone in Indianapolis. As Smitherman exited her vehicle, she saw Dwayne Harris (“Harris”), a Kroger employee, pushing shopping carts. Smitherman requested that Harris hand her a cart; receiving no response, she asked again.

Harris then attempted to provide Smitherman with a cart, but some of the carts were stuck together. Harris lifted the back wheels of a cart off the ground in an attempt to dislodge it from the others. Smitherman then complained to Harris that he had hit her foot with the cart. Harris denied doing so, but Smitherman insisted that the cart had hit her foot.

¹ Smitherman contends that she also pled a respondeat superior or vicarious liability claim, upon which the trial court erroneously granted partial summary judgment. She did not so plead. Count I of Smitherman’s Complaint alleged that she was injured as a direct and proximate result of Harris’s conduct. Smitherman’s complaint did not allege that Harris was acting within the scope of his employment. Count II alleged that Kroger was negligent in the hiring, retention, and supervision of Harris. Despite presenting argument on vicarious liability in her response to the motion for summary judgment, Smitherman did not file an amended complaint. Nor did Smitherman object or move to amend her complaint to add an additional claim when, at the summary judgment hearing, Kroger’s counsel advised the trial court that Smitherman had alleged negligent hiring, “training,” and supervision. (App. 217.)

Harris struck Smitherman in the face.

On April 14, 2008, Smitherman filed a complaint against Harris and Kroger. Count I alleged that Harris had caused Smitherman severe and permanent injuries. Count II alleged that Kroger was negligent with regard to the hiring, retention, and supervision of Harris. Smitherman sought compensatory and punitive damages.

Kroger moved for partial summary judgment. On May 12, 2010, the trial court conducted a summary judgment hearing at which argument of counsel was heard. On May 25, 2010, the trial court entered partial summary judgment for Kroger. The trial court certified its order for interlocutory appeal and we accepted jurisdiction.

Discussion and Decision

A. Summary Judgment Standard of Review

Pursuant to Rule 56(C) of the Indiana Rules of Trial Procedure, summary judgment is appropriate when there are no genuine issues of material fact and when the moving party is entitled to judgment as a matter of law. On review of a trial court's decision to grant or deny summary judgment, this Court applies the same standard as the trial court. Best Homes, Inc. v. Rainwater, 714 N.E.2d 702, 705 (Ind. Ct. App. 1999). Neither the trial court nor the reviewing court may look beyond the evidence specifically designated to the trial court. Id.

A party seeking summary judgment bears the burden to make a prima facie showing that there are no genuine issues of material fact and that the party is entitled to judgment as a matter of law. Jackson v. Wrigley, 921 N.E.2d 508, 512 (Ind. Ct. App. 2010). Once the moving party satisfies this burden through evidence designated to the trial court pursuant to

Trial Rule 56, the nonmoving party may not rest on its pleadings, but must designate specific facts demonstrating the existence of a genuine issue for trial. Id. The court must accept as true those facts alleged by the nonmoving party, construe the evidence in favor of the nonmovant, and resolve all doubts against the moving party. Shambaugh & Son, Inc. v. Carlisle, 763 N.E.2d 459, 461 (Ind. 2002). A genuine issue of material fact exists where facts concerning an issue that would dispose of the litigation are in dispute or where the undisputed material facts are capable of supporting conflicting inferences on such an issue. Huntington v. Riggs, 862 N.E.2d 1263, 1266 (Ind. Ct. App. 2007), trans. denied.

The appellant bears the burden of persuading us the grant or denial of summary judgment was erroneous. Insuremax Ins. Co. v. Bice, 879 N.E.2d 1187, 1190 (Ind. Ct. App. 2008), trans. denied. For a defendant in a negligence action to prevail on a motion for summary judgment, the defendant must show that the undisputed material facts negate at least one of the elements essential to the negligence claim, or that the claim is barred by an affirmative defense. McDonald v. Lattire, 844 N.E.2d 206, 210 (Ind. Ct. App. 2006).

B. Analysis – Negligent Hiring and Retention

Smitherman’s complaint alleged that Kroger “knew, or by the exercise of reasonable care should have known, that Harris had a propensity to violence.” (App. 10.) More specifically, Smitherman alleged that Kroger knew, or should have known, that Harris was prescribed medication, had failed to take his medication on the day of the incident, and had struck another Kroger employee earlier in the day. According to Smitherman, Kroger breached a duty of care owed her by permitting Harris to remain at the grocery without

having taken his medication and after having struck another Kroger employee.

To make a successful negligence claim, a plaintiff must establish (1) a duty of care owed by the defendant to the plaintiff, (2) a breach of that duty, and (3) an injury proximately caused by the breach of that duty. Webb v. Jarvis, 575 N.E.2d 992, 995 (Ind. 1991). Negligent hiring may arise when an employee “steps beyond the recognized scope of his employment to commit a tortious injury upon a third party.” Tindall v. Enderle, 162 Ind. App. 524, 320 N.E.2d 764, 767-68 (1974).

Indiana recognizes the tort of negligent hiring and retention of an employee and has adopted the RESTATEMENT (SECOND) OF TORTS § 317 (1965) as the standard with regard to this tort. Sandage v. Bd. of Comm’rs of Vanderburgh County, 897 N.E.2d 507, 511-12 (Ind. Ct. App. 2008). Section 317 provides:

A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if:

- (a) the servant
 - (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant
 - (ii) is using a chattel of the master, and
- (b) the master
 - (i) knows or has reason to know that he has the ability to control his servant, and
 - (ii) knows or should know of the necessity and opportunity for exercising such control.²

² Comment c. provides in relevant part, “Retention in employment of servants known to misconduct themselves. There may be circumstances in which the only effective control which the master can exercise over the conduct of his servant is to discharge the servant. Therefore the master may subject himself to liability under the rule stated in this Section by retaining in his employment servants who, to his knowledge, are in the habit of misconducting themselves in a manner dangerous to others.”

Under the Restatement, to determine whether an employer is liable for negligent hiring or retention of an employee, the court must determine if the employer exercised reasonable care. Sandage, 897 N.E.2d at 512 (citing Konkle v. Henson, 672 N.E.2d 450, 454-55 (Ind. Ct. App. 1996)).

However, there co-exist “general rules and concepts surrounding the imposition of a duty of care that must also be satisfied.” Clark v. Aris, Inc., 890 N.E.2d 760, 763 (Ind. Ct. App. 2008), trans. denied. The Indiana Supreme Court has clarified that three factors must be considered in order to determine whether to impose a duty of care; specifically, (1) the relationship between the parties, (2) the reasonable foreseeability of harm to the person injured, and (3) public policy concerns. Id. (citing Webb, 575 N.E.2d at 995).

The imposition of a duty is limited to those instances where a reasonably foreseeable victim is injured by a reasonably foreseeable harm. Webb, 575 N.E.2d at 995. Accordingly, part of the inquiry into the existence of a duty is concerned with exactly the same factors as is the inquiry into proximate cause – that is, both seek to find what consequences of the challenged conduct should have been foreseen by the actor who engaged in it. Id. We examine what forces and human conduct should have appeared likely to come on the scene, and weigh the dangers likely to flow from the challenged conduct in light of these forces and conduct. Id.

As such, the foreseeability component of duty requires a general analysis of the broad type of plaintiff and harm involved, without regard to the facts of the actual occurrence. Id. Ordinarily, whether a duty exists is a question of law for the court to decide. Sandage, 897

N.E.2d at 512. At times, however, the existence of a duty depends upon underlying facts that require resolution by the trier of fact. Id.

In Frye v. American Painting Co., 642 N.E.2d 995 (Ind. Ct. App. 1994), we reversed the grant of summary judgment where the employer, a painting company, had enabled its employee, a known arsonist, thief, and burglar, to access the inside of clients' homes. The plaintiff hired the employer to paint his house, and the employee, while working there, rifled through a closet and discovered some cash and credit cards. The employee later burglarized and set fire to the house and used the credit cards he had stolen. Based on these facts, we concluded that the questions of whether the employer should have foreseen that the employee posed a danger to its customers and whether it breached its duty to the plaintiff by retaining the employee should be resolved by a jury. See id. at 999.

Here, in contrast, there was no recurrence of criminal behavior by Harris. Indeed, the designated record reveals nothing to suggest that Kroger should reasonably have foreseen that Harris posed a danger to anyone. Summary judgment materials designated by Kroger included an affidavit from Mozella Washington, Harris's mother. She averred that she was Washington's guardian, that Washington was not taking prescription medication at the time of the incident, or in the preceding months, that Washington had no criminal record, that he had never been "in trouble with the law," and that he had "no incidents of misconduct while employed at Kroger." (App. 22.) Harris testified in his deposition that he had never been "written-up" at Kroger. (App. 85.) Kim Hodgens, manager of the subject Kroger store in April of 2006 averred, "there were no allegations of misconduct by Harris as a Kroger

employee until April 16, 2006.” (App. 24-25.)

Accordingly, Kroger’s designated materials indicated that Harris had no prescribed medication that he omitted to take, had no criminal history, and did not present a disciplinary problem in his workplace before the incident. In response, Smitherman did not point to any evidentiary materials supporting her prior claims regarding medication or a prior incident with a co-worker. Smitherman identified no overt act on the part of Harris (prior to the instant event) that would suggest a propensity toward violence. Instead, Smitherman designated a job placement counselor’s “Individual Profile & Strategic Plan,” which included a notation in the “Personality” section opining that Harris was “a passive person, who when pushed, becomes angry.” (App. 118.)

Even so, the job placement counselor did not suggest that the anger would likely progress to violence, nor did she identify any specific instance of which Kroger might have been made aware. A plaintiff, in opposing summary judgment, need not prove her case by a preponderance of the evidence just as she would be required to do at trial. Jarboe v. Landmark Community Newspapers of Indiana, Inc., 644 N.E.2d 118, 123 (Ind. 1994). However, the plaintiff opposing summary judgment should not be permitted to require the defendant to enter into a full-scale trial defense of a claim which is supported solely by speculation or a mere possibility. Brannon v. Wilson, 733 N.E.2d 1000, 1001 (Ind. Ct. App. 2000), trans. denied.

The imposition of a duty is limited to those instances where a reasonably foreseeable victim is injured by a reasonably foreseeable harm. Clark, 890 N.E.2d at 763. Here, we find

as a matter of law that Smitherman was not a reasonably foreseeable victim injured by a reasonably foreseeable harm. Accordingly, Kroger was properly granted partial summary judgment on Smitherman's negligent hiring and retention claim.

Affirmed.

NAJAM, J., and DARDEN, J., concur.