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**IN THE
COURT OF APPEALS OF INDIANA**

DAVID W. JOHNSON and)
PRISCILLA JOHNSON,)
)
Appellants-Plaintiffs,)

vs.)

No. 39A01-1008-CT-398

MADISON REGATTA, INC, and)
AMERICAN BOAT RACING)
ASSOCIATION,)
)
Appellees-Defendants.)

APPEAL FROM THE JEFFERSON CIRCUIT COURT
The Honorable Ted R. Todd, Judge
Cause No. 39C01-0806-CT-467

June 2, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Chief Judge

Case Summary and Issue

David and Priscilla Johnson filed a complaint for damages against Madison Regatta, Inc. (“MRI”), and American Boat Racing Association (“ABRA”) for injuries Priscilla sustained when she was struck by a car while a spectator at the Madison Regatta. The Johnsons appeal the trial court’s grant of summary judgment to MRI and ABRA, raising one issue for our review: whether the trial court properly granted summary judgment upon finding the driver’s conduct was unforeseeable. Concluding the incident was not reasonably foreseeable to MRI and ABRA, we affirm.

Facts and Procedural History

On July 2, 2006, the Johnsons attended the Madison Regatta in Madison, Indiana. The Madison Regatta is a hydroplane boat race held annually on the Ohio River. The race draws a crowd of up to 50,000 spectators to the banks of the river. It is sanctioned by ABRA and organized and staged by MRI. In 2006, the race was being held for the fifty-sixth year. MRI leases the riverfront property it uses for the event from the City of Madison and from private landowners. At a certain time prior to the event, the City cedes control of the riverfront and a portion of certain roads leading to the riverfront to MRI; MRI is thereafter responsible for determining traffic patterns and setting up traffic barricades in this area.

Highway 421 enters Madison from the north and turns into Jefferson Street in the City. Jefferson Street dead ends at Vaughn Street, which runs east-west along the river. MRI and ABRA use Jefferson Street as one of three vehicular access points for those needing official access to the race site, such as emergency personnel, vendors, and race officials, but

it is blocked off to regular traffic with plastic sawhorses and snow fencing. Jefferson Street is also a pedestrian entrance to the race site.

On July 2, 2006, Michael Bowen, after a night of drinking and smoking marijuana, inhaled a can of dust and lint remover aerosol spray and then drove south on Highway 421/Jefferson Street into Madison. There is no indication in the designated evidence that he obtained the alcohol or drugs at the Regatta, and it is undisputed he obtained the air duster at a Wal-Mart store. Bowen drove erratically on Highway 421, ran at least one red light on Jefferson Street, and as he approached the first race-related temporary barricade on Jefferson Street, was traveling approximately 35 to 40 miles per hour. At some point, Bowen passed out and the vehicle accelerated even more. Cory Luedeman, a passenger in the car, was unable to move Bowen from the driver's seat or otherwise control the car. Bowen's car crashed through two temporary barricades and became airborne as it continued over the embankment, landing near where Priscilla was sitting in the "pit area" on the riverbank to watch the race. As the car continued on, it struck Priscilla, threw her onto the hood of the car and into the windshield, and entered the river. In addition to Priscilla, several other spectators were struck by the car as it traveled through the race grounds. Priscilla suffered serious injuries as a result of the collision.

The Johnsons filed a complaint for damages naming MRI and ABRA as defendants and alleging they failed to provide reasonable safety precautions for race spectators, proximately causing Priscilla's injuries. MRI and ABRA filed a motion for summary judgment, alleging their duty of care did not extend to unforeseeable third party acts. They

designated the expert opinion of Ira Somerson, who has experience in security management, risk assessment, premises liability, crime prevention, and crowd control. Somerson opined that MRI and ABRA could not have reasonably foreseen that Bowen would drive his car through the crowd at the Regatta on July 2, 2006, and injure Priscilla, that they took appropriate and reasonable safety measures to respond to known or foreseeable risks, and that this event was a “bizarre and anomalous incident” in the fifty-five year history of the Regatta. Appellants’ Appendix at 101. The Johnsons filed a motion in opposition to the motion for summary judgment, designating the opinion of their expert, Jurg Mattman, the president of a security management and forensic consulting business with experience in crowd management, crowd control, and risk assessment at special events. Mattman opined that the July 2, 2006 incident was reasonably foreseeable and could have been prevented if MRI and ABRA had met their responsibility to take reasonable measures to ensure the safety of spectators at the Regatta. The Johnsons’ “fundamental argument . . . against summary judgment in this case is created by the affidavits of the . . . experts [because] the experts’ affidavits alone create conflicting testimony as to material facts.” Id. at 137.

Following a hearing, the trial court entered, in pertinent part, the following order on MRI and ABRA’s motion for summary judgment:

The Court now finds that there is no genuine issue of material fact in this case, and [MRI and ABRA] are entitled to summary judgment as a matter of law.

The [Johnsons] were injured when Mrs. Johnson was a spectator at the Madison Regatta, an unlimited hydroplane race held on the Ohio River and sponsored by [MRI and ABRA]. A teen who was under the influence of drugs or Freon drove a car at high speed down a road that was blocked off by a snow fence and entry way to the event. He continued to drive the car at a high rate

of speed through the snow fence and through a crowd of people and into the Ohio River.

The driver's conduct was both criminal and unforeseeable. While [MRI and ABRA] do have a duty of reasonable care to a spectator at the event, to protect against foreseeable criminal conduct, they do not have a duty to protect spectators from unforeseeable criminal conduct.

Id. at 13-14. The trial court therefore entered summary judgment in favor of MRI and ABRA and ordered that the Johnsons take nothing by way of their complaint. The Johnsons filed a motion to correct error which was denied. They now appeal. Additional facts will be supplied as appropriate.

Discussion and Decision

I. Summary Judgment Standard of Review

Summary judgment should be granted only if the properly designated evidence “shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Ind. Trial Rule 56(C); Freidline v. Shelby Ins. Co., 774 N.E.2d 37, 39 (Ind. 2002). The moving party has the initial burden of making a prima facie showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. Sheehan Constr. Co., Inc. v. Continental Cas. Co., 938 N.E.2d 685, 689 (Ind. 2010). Once the moving party has satisfied its burden, the burden shifts to the non-moving party to designate specific facts showing the existence of a genuine issue for trial. Dreaded, Inc. v. St. Paul Guardian Ins. Co., 904 N.E.2d 1267, 1270 (Ind. 2009). A genuine issue of material fact exists where facts concerning an issue which would dispose of the litigation are in dispute, or where undisputed facts are capable of supporting conflicting inferences on such an issue. Briggs v. Finley, 631 N.E.2d 959, 963 (Ind. Ct. App. 1994), trans. denied. All

factual inferences must be construed in favor of the non-moving party, and all doubts as to the existence of a material issue must be resolved against the moving party. Kovach v. Caligor Midwest, 913 N.E.2d 193, 197 (Ind. 2009).

The party appealing the grant of summary judgment has the burden of persuading this court that the trial court's decision was improper. First Farmers Bank & Trust Co. v. Whorley, 891 N.E.2d 604, 607 (Ind. Ct. App. 2008), trans. denied. If the trial court's grant of summary judgment can be sustained on any theory or basis in the record, we will affirm. Beck v. City of Evansville, 842 N.E.2d 856, 860 (Ind. Ct. App. 2006), trans. denied.

II. Foreseeability

The operative facts of this case are undisputed: MRI was the leaseholder of the property on which the Regatta was staged and was in charge of crowd and traffic control measures during the Regatta, which were set up in 2006 as they had been for many years previously. Prior to 2006, the Regatta had been held for fifty-five years without incident. On July 2, 2006, Bowen, while under the influence of a chemical he did not obtain at the Regatta, drove his car at high speed through the traffic control measures in place at the Jefferson Street entrance to the Regatta and into the race grounds, injuring several spectators, including Priscilla. The parties agree that MRI and ABRA's duty to the Johnsons was to exercise reasonable care to protect them from foreseeable dangers on the premises. The parties' dispute centers on whether this incident was reasonably foreseeable to MRI and ABRA.

To recover on a theory of negligence, a plaintiff must establish a duty on the part of a defendant to conform his conduct to a standard of care arising from his relationship with the plaintiff; a failure of the defendant to conform his conduct to the requisite standard of care; and an injury to the plaintiff proximately caused by the breach. See Kroger Co. v. Plonski, 930 N.E.2d 1, 6 (Ind. 2010). Possessors of land have a duty to take reasonable precautions to protect their invitees from harm caused by the conduct of third persons that, under the facts of the particular case, is reasonably foreseeable. Id. at 7. Reasonable foreseeability is usually a question of fact for a jury to decide, but in the context of duty, which is a question of law, it is determined by the court. Id. The court must examine the totality of the circumstances, that is, “all of the circumstances surrounding an event, including the nature, condition, and location of the land, as well as prior similar incidents to determine whether a criminal act was foreseeable.” Delta Tau Delta v. Johnson, 712 N.E.2d 968, 972 (Ind. 1999). “A substantial factor in the determination of duty is the number, nature, and location of prior similar incidents, but the lack of prior similar incidents will not preclude a claim where the landowner knew or should have known that the criminal act was foreseeable.” Id. at 973.

In L.W. v. Western Golf Ass’n, 712 N.E.2d 983 (Ind. 1999), our supreme court held that absent evidence of prior violent acts or sexual assaults, isolated pranks and actions in a college co-ed living facility do not make a rape occurring there foreseeable and therefore the trial court properly granted summary judgment to the owners of the building in the victim’s negligence action. Id. at 985. Conversely, in Delta Tau Delta, the court held that a prior instance of sexual assault and dissemination of information about sexual assaults at a

fraternity house demonstrated that a sexual assault on the fraternity's premises was reasonably foreseeable. 712 N.E.2d at 974. See also Vernon v. Kroger Co., 712 N.E.2d 976, 980 (Ind. 1999) (holding evidence of frequent shoplifting and physical confrontations with escaping shoplifters plus frequent police runs to premises made it reasonably foreseeable that a customer might be injured by crime). These cases firmly established that a duty is owed by the possessor of land with respect to acts by third parties; the inquiry is whether a discrete element of the duty – foreseeability – has been satisfied. Plonski, 930 N.E.2d at 7.

As the parties moving for summary judgment, MRI and ABRA have the burden of demonstrating that as a matter of law Bowen's actions were not foreseeable. MRI and ABRA designated to the trial court police reports regarding the incident, the depositions of Bowen and Luedeman, and the opinion testimony of their expert, Somerson. The police reports indicate that Bowen was under the influence of marijuana, alcohol, and an inhalant that he obtained elsewhere when he drove at high speed through the temporary barricades erected by MRI and ABRA for the Regatta. In the designated portion of Bowen's deposition, he states that he does not blame Priscilla, the Indiana State Police, the City of Madison Police, or the people who put on the Regatta for the injuries caused by the car wreck. In the designated portion of Luedeman's deposition, he, too, stated he does not blame anyone but Bowen and himself for the accident.

In Somerson's opinion, MRI and ABRA could not have reasonably foreseen that Bowen would drive his car into the crowd at high speed because "the likelihood that a spectator sitting on the banks of the Ohio River during the Madison Regatta on July 2, 2006,

would be injured by an automobile was extremely remote” Appellants’ App. at 99. He noted that in the fifty-five year history of the Regatta, MRI and ABRA were not aware of any injury to a spectator on the banks of the river, let alone an injury caused in such a manner. He opined that MRI and ABRA took reasonable measures to provide a reasonably safe environment for spectators by meeting at least monthly year-round to discuss the operation of the previous Regatta and plan for the upcoming race; including the board of directors, the committee heads, law enforcement personnel, volunteers, and members of the public in the meetings; having thirty to forty paid event staff patrol the grounds during the Regatta to identify any risks and respond to any problems; having volunteers monitor and control the entrance gates; having the assistance of the Indiana State Police and the City of Madison police; having access to Indiana State Police Incident Reports for previous races; installing link fences, snow fences, and sawhorse barricades; and having all entities monitor the perimeter of the grounds and address crowd control issues as they arose. In sum, Somerson opined MRI and ABRA’s risk assessment and security program was “above standard industry practices” Id. at 102. Somerson also opined that Priscilla, sitting on the banks of the river, was not “in a zone of foreseeable risk or danger from being hit by an automobile travelling [sic] on Jefferson Street” Id.

MRI and ABRA subsequently supplemented their motion for summary judgment to designate deposition testimony from the Johnsons, acquired after their initial motion was filed. In the designated portions of Priscilla’s testimony, she indicated that she had been going to the Regatta since she was a teenager and had been more than twenty times. She was

sitting in the pit area on the banks of the river at the invitation of her brother-in-law, who was that year's race director. She testified that if she had foreseen that she would be hit by an automobile as she sat in the pit area, she would have moved, but no one, including herself, her husband, or her brother-in-law, thought it was a dangerous place to sit. She also indicated that she does not blame her husband, her brother-in-law, any of the MRI directors, or the police officers positioned at the Jefferson Street entrance to the race grounds for her injuries. In the designated portions of David's testimony, he indicated he has been to the Regatta over forty times, and participated twice in racing vintage boats. He testified that if he had prior knowledge that an automobile would drive into the pit area, he "would be a fool not to" have his wife sit elsewhere. Id. at 133.

The Johnsons then filed a motion in opposition to MRI's and ABRA's motion for summary judgment, designating their own expert opinion regarding the foreseeability of the incident, and noting that because it directly contradicts the opinion of Somerson, there is a genuine issue of material fact precluding summary judgment. The Johnsons also contended, based upon their designated evidence, that the totality of the circumstances – including similar incidents at other outdoor events in other locations, the prevalence of alcohol and illegal drug use at the Regatta, the nature and location of the race site, and that MRI and ABRA had complete authority over type and placement of crowd and vehicle control barriers – made the incident foreseeable to MRI and ABRA.

Mattman filed an affidavit in which he averred that the incident in which Priscilla was injured was reasonably foreseeable and could have been prevented if MRI and ABRA had

met the appropriate standard of care “relating to spectator safety at special events.” Id. at 158. Mattman specifically pointed to MRI and ABRA’s failure to conduct a triennial comprehensive risk assessment, failure to retain an independent qualified risk assessor, failure to produce a detailed security plan, and failure to place staggered K-Barriers at the Jefferson Street entrance to the race grounds as evidence they had not met the standard of care. Mattman also pointed to MRI and ABRA officials’ knowledge of the use of alcohol and illegal drugs at the Regatta, police records showing drug- and alcohol-related arrests are fifty percent higher during race weekends than other weekends, the layout of the city streets in relation to the race grounds, and MRI and ABRA officials’ awareness of similar incidents at other special events as evidence this incident was reasonably foreseeable.

In addition, the Johnsons designated deposition testimony from various race officials, in which they acknowledged that consumption of alcohol is commonplace during the Regatta; that the barriers are placed at their direction; that the Jefferson Street gate is a drive-through gate for emergency personnel, race teams and officials, and vendors; and that they had seen news stories about cars entering spectator areas at other outdoor events because of intoxication, health emergencies, or equipment failure. The Johnsons also designated records of arrests occurring during the Regatta dating back to 2000.

The designated evidence shows that although consumption of alcohol and use of illegal drugs was known to occur at the Regatta, Bowen was not impaired due to alcohol or drugs he obtained or consumed at the Regatta. That MRI and ABRA were aware of the consumption of drugs and alcohol on race grounds during the Regatta might play into the

foreseeability of an accident which occurred as one of the spectators who had consumed drugs or alcohol on site left the race, it does not likewise support the foreseeability of the opposite scenario. The designated evidence also shows that in the fifty-five previous years MRI and ABRA had staged the Regatta, no out-of-control vehicle has entered the race grounds, let alone injured a spectator, although race officials were generally aware of non-specific incidents occurring at other events. The lack of prior similar incidents does not preclude a claim where the harm was nonetheless foreseeable. Johnson, 712 N.E.2d at 973. However, the fact that Regatta officials were generally aware that an out-of-control car could leave the roadway and injure pedestrians does not provide a basis for notice to MRI and ABRA that such an incident was any more likely to occur at their event than anywhere else. See L.W., 712 N.E.2d at 985 n.1 (noting that designated statistics showing that crimes such as rape occur on college campuses did not make a rape any more foreseeable on that premises than anywhere else); cf. Johnson, 712 N.E.2d at 973-74 (noting that designated statistics showing a sexual assault was more likely to occur in a fraternity house when alcohol was involved than elsewhere, coupled with previous incidents, made sexual assault of victim foreseeable to fraternity).

MRI and ABRA designated the Jefferson Street entrance to the race grounds as one of three entrances for certain vehicles having official business on the grounds, and therefore needed to keep the race grounds accessible to those vehicles via Jefferson Street. They erected two temporary barricades to keep unauthorized vehicles from entering the grounds from Jefferson Street and positioned police and race staff at that entrance. There is no

evidence that the barricades would have been of a different type or placed differently if Jefferson Street was not a vehicular entrance, however. Further, there is no evidence that because of the configuration of Jefferson Street in relation to the race grounds, it was any more vulnerable than the other vehicular or pedestrian entrances. In hindsight, a more permanent barricade might have prevented this unusual incident, but MRI and ABRA were charged only with taking reasonable precautions to prevent foreseeable harm. See Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928) (“The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension.”). We note that in the recently-decided case of Pfenning v. Lineman, No. 27S02-1006-CV-331 (Ind., May 18, 2011), our supreme court stated it is not the risk the plaintiff subjectively incurs that is at issue, but the objective expectations of the possessor of land. Slip op. at 16-17. The chain of events here – that due to Bowen’s use of drugs and alcohol, he drove erratically and disregarded traffic signals in the City before passing out, that his passenger was unable to take control of the vehicle, and that the vehicle crashed through two temporary barricades, hit several spectators, and traveled what appears to be an appreciable distance before hitting Priscilla as she sat in the pit area on the riverfront – is an unlikely circumstance with regrettably unfortunate results that was not and could not be objectively expected by MRI and ABRA based upon their past experience with safety concerns at the Regatta.

Absent evidence of any prior similar incidents at the Regatta, however, we agree with the trial court that there is no genuine issue of material fact that MRI and ABRA could not

have reasonably foreseen that a driver under the influence of chemicals he obtained elsewhere would disregard a traffic signal and drive through both sawhorse and snow fence barricades to enter the race grounds and injure spectators sitting on the river bank.¹ See Schoop's Rest. v. Hardy, 863 N.E.2d 451, 456 (Ind. Ct. App. 2007) (holding it was not reasonably foreseeable to restaurant that a vehicle the driver of which had suffered a heart attack would crash into the restaurant and injure patrons); cf. Lutheran Hosp. of Indiana, Inc. v. Blaser, 634 N.E.2d 864, 870 (Ind. Ct. App. 1994) (holding it was reasonably foreseeable to hospital that car turning into driveway of parking lot exit “just like vehicles did each day” would hit a pedestrian who was using the driveway to access her car in the parking lot “just as pedestrians did each day,” because the occurrence was “in the ordinary and normal course of events” as opposed to an accident caused by an automobile acting in an unusual or extraordinary manner).

Conclusion

We conclude the incident in which Priscilla was injured was not reasonably foreseeable to MRI and ABRA and judgment as a matter of law was therefore appropriate. The trial court's grant of summary judgment to MRI and ABRA is affirmed.

Affirmed.

RILEY, J., and BROWN, J., concur.

¹ The Johnsons contend that the competing expert opinions alone create an issue of material fact. However, foreseeability is not a factual issue, but a legal one, see Plonski, 930 N.E.2d at 7, and conflicting assertions of conclusions of law in an affidavit are not sufficient to preclude summary judgment.