STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1675

Anthony Joseph Whebbe,
Appellant,

vs.

Beta Eta Chapter of Delta Tau Delta Fraternity, et al.,
Respondents,

Charles Essig, et al.,
Defendants.

Filed March 25, 2013
Affirmed
Worke, Judge

Hennepin County District Court
File No. 27-CV-12-1116

Paul Applebaum, Applebaum Law Firm, St. Paul, Minnesota; and

Roger L. Kramer, Kramer Law, LLC, Mendota Heights, Minnesota (for appellant)

William L. Davidson, Patrick J. Larkin, Lind, Jensen, Sullivan & Peterson, P.A., Minneapolis, Minnesota (for respondents)

Considered and decided by Worke, Presiding Judge; Kalitowski, Judge; and Schellhas, Judge.

U N P U B L I S H E D O P I N I O N

WORKE, Judge

In this negligence action, appellant challenges the district court's grant of summary judgment, arguing that the district court erred by concluding that respondents had no duty to protect him from harm. Because a landowner does not have a duty to protect an invitee from the criminal actions of a third party, we affirm.

FACTS

Appellant Anthony Joseph Whebbe was severely injured while attending a party at respondent Beta Eta Chapter of Delta Tau Delta Fraternity (Beta Eta). The fraternity house, which is adjacent to the University of Minnesota campus, is owned by respondent Beta Eta Educational Foundation, Inc. (the foundation). Police were called to the house 14 times between June 20, 2005 and May 7, 2006, to respond to complaints of loud music, parties, fights, and damage to property, and to make welfare checks. Beta Eta had been warned previously about the university's disapproval of activities at the fraternity house.

On July 16, 2006, appellant, who was 20-years old at the time, attended a party held at the Beta Eta fraternity house. Appellant had attended many parties at the fraternity. This party was planned by appellant's friends; they sent out a mass invitation on Facebook, but appellant was personally invited by one of the fraternity members. Although the party was organized by individual members of the fraternity, it was not a sanctioned fraternity event. After understanding the scope of the event, the president of the fraternity required the party organizers to register the event with the university and to

hire a security guard. Registering the event required a guest list and a certain number of sober individuals at the party to maintain order.

The party attendees included fraternity members, university students who were not members of the fraternity, and others like appellant, who were acquainted with fraternity members but had no ties to the fraternity or to the university. Appellant and his friends brought their own alcohol, including beer and whiskey, to the party. Appellant drank "quite a bit. . . [he] was drinking the whole night." There were an estimated 50 to 400 people at the party and it was quite crowded. During the evening, a group of young men was asked to leave the party. It was not clear why they were asked to leave, although people mentioned that they had been "rapping," "being jerks to people," and "grabbing girls." Later, a female partygoer was accosted by a member of the same group. She told her boyfriend, who was appellant's friend, about the incident. Her boyfriend went into the yard to confront the men.

As the boyfriend verbally confronted the men, appellant and a few other people lined up next to him. The security guard did not intervene. There was no physical contact between the two groups, until appellant was suddenly struck by a person who has never been identified. Appellant fell backwards and hit his head on the pavement; he was unconscious for a couple of minutes and then started to have a seizure. Appellant was hospitalized in a coma for more than one month; because of the traumatic brain injury, he continues to have periodic seizures, dizziness, nausea, memory loss, and mood and personality changes. He has undergone multiple surgeries since the incident.

Appellant sued respondents, alleging negligence. The district court granted respondents' motion for summary judgment, holding that respondents had no duty to protect appellant from the criminal actions of others.

D E C I S I O N

The district court must grant summary judgment if, based on the entire record before it, there are no genuine issues of material fact and a party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. We review the district court's summary-judgment decision to determine whether there are material fact issues and whether the district court erred in its application of the law. *Mattson Ridge, LLC v. Clear Rock Title, LLP*, 824 N.W.2d 622, 627 (Minn. 2012). When, as here, there are no disputed facts, we review the district court's decision de novo, as a question of law. *Bjerke v. Johnson*, 742 N.W.2d 660, 664 (Minn. 2007). We examine the evidence in the light most favorable to the party against whom summary judgment was granted. *Doe v. Archdiocese of St. Paul*, 817 N.W.2d 150, 163 (Minn. 2012).

In order to establish a negligence claim, a plaintiff must show "(1) the existence of a duty of care, (2) a breach of that duty, (3) an injury, and (4) that the breach of the duty of care was a proximate cause of the injury." *Domagala v. Rolland*, 805 N.W.2d 14, 22 (Minn. 2011). The threshold question is the existence of a duty of care; without such a duty, there is no basis for a negligence claim. *Id.* Generally, "a person does not have a duty to give aid or protection to another or to warn or protect others from harm caused by a third party's conduct." *Becker v. Mayo Found.*, 737 N.W.2d 200, 212 (Minn. 2007).

But a duty can arise if there is a special relationship between the parties and the harm is foreseeable. *Id.*

"Special relationships" have been recognized between (1) a common carrier and a passenger; (2) an innkeeper and a guest; (3) a property owner who holds his land open to the public and an invitee; and (4) a person who voluntarily assumes custody of an individual under circumstances that deprives the individual of his normal opportunities for protection. *Id.* Appellant asserts that respondents are property owners who have opened their land to the public by holding "massive adolescent binge-drinking parties in a high-crime area . . . in contravention of University orders[,]" which created a special relationship with appellant as an invitee.

A landowner's duty to an invitee is to "use reasonable care in carrying on activities on the land and to maintain the property's physical condition to ensure entrants on its land are not exposed to unreasonable risks of harm." *Rasivong v. Lakewood Cmty. College*, 504 N.W.2d 778, 783 (Minn. App. 1993), *review denied* (Minn. Oct. 19, 1993). But "[a] landowner has no duty . . . to protect an entrant on its land from a third party's criminal activities because a criminal act committed by an unknown person 'is not an activity of the owner and does not constitute a condition of the land.'" *Id.* at 783-84 (quoting *Pietila v. Congdon*, 362 N.W.2d 328, 333 (Minn. 1985)).

Appellant argues that *Erickson v. Curtis Inv. Co.*, 447 N.W.2d 165 (Minn. 1989) supports his assertion that a landowner who opens his land to the public has a duty to protect an invitee from harm. In *Erickson*, the supreme court affirmed this court's decision remanding a negligence action to the district court, which had granted summary

judgment in favor of a commercial parking lot owner. *Id*. at 166. The supreme court held:

> The operator or owner of a parking ramp facility has a duty to use reasonable care to deter criminal activity on its premises which may cause personal harm to customers. The care to be provided is that care which a reasonably prudent operator or owner would provide under like circumstances. Among the circumstances to be considered are the location and construction of the ramp, the practical feasibility and cost of various security measures, and the risk of personal harm to customers which the owner or operator knows, or in the exercise of due care should know, presents a reasonable likelihood of happening. In this connection, the owner or operator is not an insurer or guarantor of the safety of its premises and cannot be expected to prevent all criminal activity.

Id. at 169. Appellant argues that just as a commercial parking ramp holds its land open for the public to use for parking, respondents have encouraged the public to use their land for parties, and that harm was reasonably foreseeable based on previous incidents of trouble at the large parties.

Erickson is limited to its facts; in that opinion, the supreme court specifically declined to impose a duty to protect on business enterprises in general, and relied heavily on the unique features of the parking ramp that permitted criminal activity: it was large, dimly lit, and provided many places to hide in an area known for its high crime. *Id.* at 169. *Erickson* has regularly been distinguished on its facts. *See, e.g.*, *Anders v. Trester*, 562 N.W.2d 45, 48 (Minn. App. 1997); *Errico v. Southland Corp.*, 509 N.W.2d 585, 588 (Minn. App. 1993), *review denied* (Minn. Jan. 27, 1994).

We are persuaded by the reasoning of *Rasivong*. There, a community college sponsored a two-day event, Southeast Asian Days; before the event occurred, rumors circulated among students at the college that "there might be trouble at the festival because members of two gangs planned to attend Southeast Asian Days." 504 N.W.2d at 780. The college arranged for a low-level of security provided by off-duty uniformed policemen. *Id.* On the first day of the festival, the plaintiff was shot during an exchange of gunfire between rival gangs. *Id.* at 781. After determining that the college had discretionary immunity for certain of its decisions, this court addressed the question of the college's duty as a landowner to warn invitees of possible danger. *Id.* at 784. This court concluded that a landowner has a duty of reasonable care as to its own activities and the property's physical condition, but it does not have a duty to protect an invitee from the criminal actions of third parties. *Id.* at 783-84. Likewise here, respondents did not have a duty to protect appellant from the criminal actions of others.

Appellant argues that a chance of harm was foreseeable, citing the prior interventions by police and the probability of trouble at an alcohol-fueled party attended by up to 400 people. But this ignores the threshold question of whether respondents had a duty to protect him from harm. *See State v. Back*, 775 N.W.2d 866, 871 (Minn. 2009) ("As we explained in *Pietila* [362 N.W.2d at 332], the question of whether a person must provide protection for another is not solved merely by recourse to 'foreseeability' because the question is not simply whether a criminal event is foreseeable, but whether a duty exists to take measures to guard against it." (quotations omitted)); *see also Anders*, 562 N.W.2d at 48 ("The issue of foreseeability need not be reached when there is no

special relationship."). Even as a landowner, respondents would have a duty to protect appellant from harm by a third party only if there was a special relationship between respondents and appellant or between respondents and the unknown assailant.

Such a special relationship arises when the defendant has a relationship with a third party that imposes a duty on the defendant to control the third party or when the defendant has a relationship with the plaintiff that gives the plaintiff a right to protection by the defendant. *Delgado v. Lohmar*, 289 N.W.2d 479, 484 (Minn. 1979) ("Thus, generally, the law imposes no duty on people to protect strangers from being harmed by others"). In *Harper v. Herman*, 499 N.W.2d 472 (Minn. 1993), the supreme court suggested that in the context of a special relationship, the plaintiff is "typically in some respect particularly vulnerable and dependent upon the defendant who, correspondingly, holds considerable power over the plaintiff's welfare. In addition, such relations have often involved some existing or potential economic advantage to the defendant." *Id.* at 474 n.2 (citing W. Page Keeton et al., *Prosser and Keeton on the Laws of Torts* § 56, at 374 (5th ed. 1984)). "To reach the conclusion that a special relationship exists, it must be assumed that the harm to be prevented by the defendant is one that the defendant is in a position to protect against and should be expected to protect against." *Donaldson v. Young Women's Christian Ass'n of Duluth*, 539 N.W.2d 789, 792 (Minn. 1995). Even *Erickson*, on which appellant relies, stated that a special relationship arises when one party "has in some way entrusted his or her safety" to the other, who "has accepted that entrustment." 447 N.W.2d at 168.

The supreme court has set forth some common factors to consider when determining whether a special relationship between parties exists: "the vulnerability and dependency of the individual, the power exerted by the defendant, and the degree to which the defendant has deprived the plaintiff of [his or her] ordinary means of protection." *Becker*, 737 N.W.2d at 213. Appellant was not vulnerable or dependent, and respondents exerted no power over him and did not deprive him of means of protection. Appellant voluntarily attended the party, brought and drank his own alcohol, and stepped forward to assist his friend. He was surprised that a security guard was present ("I don't think they had ever had a security guard up there"). He had attended many parties at Beta Eta without adverse results and this gathering was not uniquely more dangerous than any other social gatherings at the fraternity. Finally, the assault on appellant was sudden and apparently unprovoked. These facts do not support the existence of a special relationship between the parties.

In the absence of some special relationship, a landowner does not have a duty to protect an invitee from the criminal actions of third parties. We therefore affirm.

Affirmed.