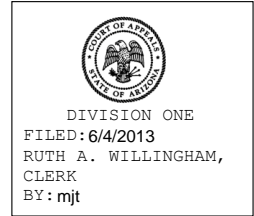


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



HARRY DEPRINS, Individually and) 1 CA-CV 12-0502
as Personal Representative of)
the Estates of Armand DePrins) DEPARTMENT D
and Simonne DePrins, Deceased,)
)
Plaintiff/Appellant,)
)
v.)
)
WAL-MART STORES, INC., a)
Delaware corporation,)
)
Defendant/Appellee.)
)
_____)

Appeal from the Superior Court in Navajo County

Cause No. S0900CV201000575

The Honorable John N. Lamb, Judge

AFFIRMED

The Nielsen Law Firm, PLLC Phoenix
By Yuri B. Nielsen
Attorneys for Plaintiff/Appellant

Lewis and Roca LLP Phoenix
By Craig W. Phillips
Lawrence A. Kasten
Georgia Hamann
Attorneys for Defendant/Appellee

T H O M P S O N, Judge

¶1 Plaintiff/Appellant Harry DePrins, individually and as personal representative of the Estates of Armand DePrins and Simonne DePrins, appeals the superior court's summary judgment for Defendant/Appellee Wal-Mart Stores, Inc., on his claim for the wrongful death of Armand and Simonne. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 On March 2, 2009, Donald Belanger murdered Armand and Simonne DePrins in a Wal-Mart parking lot in Show Low.

¶3 Belanger was the DePrins's former neighbor and had a history of animosity toward them stemming from a dispute concerning the maintenance fund for a common well that supplied several properties, including those of Belanger and the DePrinses. In 2005, the DePrinses and other homeowners filed a lawsuit against Belanger and his wife asking the court for a declaratory judgment concerning the well dispute. They also asked the court to enjoin Belanger's harassment, which, in the case of the DePrinses, consisted of Belanger taking video footage of them on their property, monitoring their movements with motion sensors, entering their property at night to commit vandalism, and cutting the brake lines on their motor home. During the trial, Belanger acknowledged he had previously been treated for mental illness and had stopped taking prescribed medication without a doctor's order. The court ruled in favor of the

DePrinses and the other homeowners and ordered Belanger to pay attorneys' fees.

¶4 Belanger and his wife moved to California in 2008. Sadly, in October 2008, Belanger's wife committed suicide. Belanger then fell into a severe depression, blamed others, including the DePrinses, for his wife's death, and threatened suicide.

¶5 In late February 2009, Belanger returned to the Show Low area and rented a cabin. On March 2, 2009, the DePrinses, following their established pattern for household shopping, drove to the Wal-Mart in Show Low. Belanger entered the parking lot a few minutes after the DePrinses and waited in the lot until they exited the store and began loading their vehicle. Belanger then approached the DePrinses, removed a gun from his pocket, shot Armand and Simonne multiple times, and fled.

¶6 Later that night, New Mexico police observed Belanger driving erratically and initiated a traffic stop of his vehicle. After Belanger pulled to the side of the road, he shot and killed himself. Police found a suicide note on his dashboard.

¶7 The DePrins's son, Harry, filed this action for wrongful death against Wal-Mart. Wal-Mart moved for summary judgment on the grounds that Harry had not produced sufficient evidence to create a material question of fact regarding whether Wal-Mart breached the duty of care it owed to the DePrinses and

whether any such breach caused their deaths. The superior court granted the motion, ruling Wal-Mart did not breach its duty of care because it could not have foreseen that Belanger would kill the DePrinses in its parking lot. It also ruled Wal-Mart did not contribute to or cause the DePrins's deaths. Harry timely appealed.

¶18 We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101(A)(1) (2012).

ISSUES

¶19 Harry contends the superior court erred by granting summary judgment for Wal-Mart because material disputes of fact existed regarding whether Wal-Mart breached the duty of care it owed the DePrinses and whether that breach caused their deaths. Wal-Mart urges us to affirm on the grounds that Harry did not produce sufficient evidence to create a genuine issue of material fact on the issue of breach, or on the alternative basis that he cannot, as a matter of law, establish causation.

DISCUSSION

¶10 A court may grant summary judgment when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). We view the evidence in the light most favorable to Harry and determine de novo "whether there are any genuine issues of material fact and whether the trial court erred in its

application of the law." *Unique Equip. Co., Inc. v. TRW Vehicle Safety Sys., Inc.*, 197 Ariz. 50, 52, ¶ 5, 3 P.3d 970, 972 (App. 1999).

¶11 "To establish a claim for negligence, a plaintiff must prove four elements: (1) a duty requiring the defendant to conform to a certain standard of care; (2) a breach by the defendant of that standard; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual damages." *Gipson v. Kasey*, 214 Ariz. 141, 143, ¶ 9, 150 P.3d 228, 230 (2007). We examine the elements of breach and causation, which the superior court ruled on as a matter of law.

A. Breach of Duty

¶12 A duty is an "obligation, recognized by law, which requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm." *Id.* at 143, ¶ 10, 150 P.3d at 230 (citations omitted). Because the DePrinses were Wal-Mart's business invitees, Wal-Mart's duty required it to use reasonable care to make its premises safe for their use. *Markowitz v. Ariz. Parks Bd.*, 146 Ariz. 352, 355, 706 P.2d 364, 367 (1985), *superseded on other grounds by statute as recognized in Wringer v. United States*, 790 F.Supp. 210, 212 (D. Ariz. 1992). However, the existence of a duty must not be confused with the details of the conduct required to satisfy the duty. *Markowitz*, 146 Ariz. at 355, 706

P.2d at 367. While Wal-Mart's duty remained constant, the acts necessary to fulfill it varied with the circumstances. *Grafitti-Valenzuela v. City of Phoenix*, 216 Ariz. 454, 458, ¶ 12, 167 P.3d 711, 715 (App. 2007).

¶13 Whether a defendant has exercised the care required to satisfy its duty is generally a question of fact for the jury, but the court may rule as a matter of law when no reasonable juror could conclude that the standard of care was breached. *Gipson*, 214 Ariz. at 143 n.1, ¶ 9, 150 P.3d at 230 n.1. We therefore must determine whether, as a matter of law, Wal-Mart's conduct was reasonable and, thus, satisfied the duty it owed the DePrinses. Wal-Mart argues no reasonable jury could find that it breached its duty to the DePrinses because there was no evidence of any similar criminal activity in the Wal-Mart parking lot in Show Low and Belanger's conduct was not reasonably foreseeable. Harry contends Wal-Mart was aware that crimes had occurred in the Show Low parking lot and other Wal-Mart parking lots across the country and that whether, in light of this information, Wal-Mart did enough to keep the DePrinses safe from crime in its parking lot was a question of fact for the jury.

¶14 "The scope and nature of the conduct required to satisfy a duty to keep premises reasonably safe is limited to keeping them safe from those harms that are foreseeable" *Grafitti-Valenzuela*, 216 Ariz. at 458, ¶ 14, 167 P.3d at 715.

Accordingly, a defendant may be required to take precautions against the criminal acts of third parties if they are reasonably foreseeable and preventable. *Martinez v. Woodmar IV Condo. Homeowners Ass'n, Inc.*, 189 Ariz. 206, 211-12, 941 P.2d 218, 223-24 (1997) (holding summary judgment was inappropriate because defendant knew of gang incursions involving drugs and other criminal acts and could have taken reasonable precautions to prevent harm to the plaintiff); *Rogers By & Through Standley v. Retrum*, 170 Ariz. 399, 401-02, 825 P.2d 20, 22-23 (App. 1991) ("[T]he reckless or criminal nature of an intervenor's conduct does not place it beyond the scope of a duty of reasonable care if that duty entails foresight and prevention of precisely such a risk."). While a defendant need not take every precaution to prevent crime, it must act reasonably under the circumstances. *Grafitti-Valenzuela*, 216 Ariz. at 459, ¶ 14, 167 P.3d at 716.

¶15 Wal-Mart contends Harry has not offered any evidence from which a reasonable jury could conclude that Belanger's criminal acts were the type of foreseeable harm from which Wal-Mart was bound to protect the DePrinses. Harry argues that because Wal-Mart knew of past crimes in the Show Low parking lot, as well as Wal-Mart parking lots across the country, the risk of injury to customers in the Show Low parking lot was foreseeable, even if "murder by gunshot from a stalking madman like . . . Belanger was not specifically predictable."

¶16 Wal-Mart cited police records for more than two years prior to the murders that showed no similar crimes had occurred in the Show Low parking lot. During that time, twenty-one incidents were reported to police, including, as relevant, eight thefts from the parking lot while persons were shopping in the store and two charges of disorderly conduct (one brawl resulting in a small cut and one intoxicated person urinating and screaming).¹ In addition, the officer who responded to the scene testified that he was personally and professionally familiar with the Wal-Mart store and that, to his knowledge, the murders were the first violent crimes that had occurred there.

¶17 Harry argues, however, that the Show Low parking lot was not a low-crime area, noting that in the ten years prior to the DePrins's murder, the police had received numerous reports of disorderly conduct, criminal trespass, burglaries, assaults, criminal damage, theft, domestic violence, armed robbery, aggravated assault, stalking, and weapons misconduct in the

¹ With one exception, the other reports related to hit and runs, a traffic accident, possession of controlled substances, using a pay phone to make harassing calls, criminal trespass, and loitering. The exception was that in September 2008, a Wal-Mart employee reported that a co-worker sexually assaulted her in his vehicle in the Show Low parking lot in May 2008. After police interviewed the alleged perpetrator, they declined to file charges against him. There is no indication that this incident was reported to Wal-Mart.

parking lot.² Harry contends Wal-Mart's awareness of these parking lot crimes is evidenced by the fact that it took security measures, such as installing video cameras and sending employees on periodic patrols of the parking lot, but asserts these steps were inadequate to fulfill its duty.

¶18 Belanger's crime differed substantially from the earlier reported crimes and those acts did not make his murder of the DePrinses foreseeable. See *Hill v. Safford Unified Sch. Dist.*, 191 Ariz. 110, 115, 952 P.2d 754, 759 (App. 1997) ("A reasonably foreseeable event is one that might 'reasonably be expected to occur now and then, and would be recognized as not highly unlikely if it did suggest itself to the actor's mind.'") (quoting *Tellez v. Saban*, 188 Ariz. 165, 172, 933 P.2d 1233, 1240 (App. 1996)). Belanger's crime was not one of opportunity, perpetrated on random victims selected only because of their availability in the Show Low parking lot. Rather, Belanger had a long-standing grudge against the DePrinses, whom he blamed for his wife's death. He followed them into the Wal-Mart parking lot, laid in wait while they shopped in the store, and murdered

² Harry does not provide a citation to the record in support of this argument, but appears to rely on the police department synopsis of the location history for the Show Low Wal-Mart submitted by Wal-Mart in support of its motion for summary judgment. Wal-Mart contends Harry has mischaracterized this evidence. For purposes of our review, we accept Harry's alleged facts as true and draw all reasonable inferences from the evidence in his favor. *Sanchez v. City of Tucson*, 191 Ariz. 128, 130, ¶ 7, 953 P.2d 168, 170 (1998).

them without hesitation. Although Wal-Mart's duty required it to take reasonable safety precautions against crime in its parking lot, it was not required to protect its customers from all enemies seeking to do them harm. The evidence of prior crimes in Wal-Mart's parking lot did not make Belanger's crime foreseeable such that Wal-Mart was required to take precautions to prevent it. *Grafitti-Valenzuela*, 216 Ariz. at 458, ¶ 14, 167 P.3d at 715.

¶19 Harry next claims Wal-Mart's knowledge of violent acts routinely occurring in its parking lots around the country made Belanger's conduct foreseeable. In particular, Harry cites:

- (1) The concurring opinion of Justice Starcher of the West Virginia Supreme Court in *Jane Doe v. Wal-Mart Stores, Inc.*, 558 S.E.2d 663, 678 (W. Va. 2001), in which the justice wrote, "Wal-Mart parking lots are a virtual magnet for crime."
- (2) A report entitled "Crime and Wal-Mart - 'Is Wal-Mart Safe?' An Analysis of Official Police Incidents at Wal-Mart Stores," dated May 1, 2006, and published by www.WakeUpWalMart.com.
- (3) An article entitled, "Loss Prevention Racks Up Success," by Dave Gorman a former Wal-Mart security management official.
- (4) An internal, confidential Wal-Mart memorandum dated April 10, 1995.³

³ Wal-Mart challenged the admissibility of this evidence, arguing it lacked foundation and was inadmissible hearsay. The superior court did not strike the documents before granting summary judgment for Wal-Mart.

¶20 We agree with Wal-Mart that evidence of crime at other Wal-Mart parking lots is not relevant to whether Belanger's conduct was foreseeable. First, these documents do not indicate that crimes similar to Belanger's murder of the DePrinses are a common occurrence in Wal-Mart parking lots around the country. Further, a defendant's knowledge that a particular crime has occurred somewhere, sometime, does not make it foreseeable that the same or a similar crime will occur on the defendant's premises such that he must take precautions to safeguard his patrons against that crime. See *Grafitti-Valenzuela*, 216 Ariz. at 459, ¶ 15, 167 P.3d at 716 (stating the law did not require the City to install additional amenities at bus stops with no history of criminal conduct, which would be tantamount to requiring it to install them at virtually every bus stop to prevent crime at those locations). Wal-Mart was not required to take precautions in the Show Low parking lot to prevent crimes similar to any and all other crimes that had occurred in Wal-Mart parking lots.

¶21 Harry also argues Wal-Mart breached its duty of care because it did not discover Belanger's "arguably suspicious" activity in the Show Low parking lot while he waited for the DePrinses to exit the store. However, there is no evidence that Belanger's conduct in the parking lot prior to his shooting the DePrinses was suspicious or should have caused Wal-Mart to

intervene for its customers' safety. The police officer who investigated the murder testified that, as recorded on Wal-Mart's surveillance video, Belanger had not behaved in an obviously threatening manner prior to the shooting.

¶22 Under the circumstances of this case, a reasonable jury could not find that Wal-Mart breached the duty of care it owed to the DePrinses by not implementing security measures that would have prevented Belanger's crime. See *Martinez*, 189 Ariz. at 210-11, 941 P.2d at 222-23 (stating premises owner must only do what is reasonable to protect others from foreseeable and preventable danger); *Retrum*, 170 Ariz. at 403, 825 P.2d at 23 (noting that, "in approaching the question of negligence or unreasonable risk, 'the courts set outer limits. A jury will not be permitted to require a party to take a precaution that is clearly unreasonable'" (quoting 3 F. Harper, F. James, & O. Gray, *The Law of Torts* § 15.3, at 355-57 (2d ed. 1986))). Accordingly, we find no error in the superior court's ruling that, as a matter of law, Wal-Mart did not breach the duty of care it owed to the DePrinses.

B. Causation⁴

⁴ Although our determination that Wal-Mart did not breach the duty of care it owed the DePrinses could conclude our analysis, in the exercise of our discretion we consider Wal-Mart's argument that there exists an additional basis to affirm the superior court's ruling.

¶23 Wal-Mart urges us to affirm on the grounds that Harry cannot, as a matter of law, establish that Wal-Mart's conduct caused the DePrins' deaths. Harry argues that a reasonable jury could conclude that Wal-Mart's failure to provide adequate safety measures proximately caused the DePrins' deaths.

¶24 "A defendant's acts are the proximate cause of a plaintiff's injury only if they are a substantial factor in bringing about the harm." *Grafitti-Valenzuela*, 216 Ariz. at 460, ¶ 21, 167 P.3d at 717. The plaintiff must show that "the injury would not have occurred 'but for' the defendant's negligent conduct," even if the conduct contributed "only a little." *Id.* The mere possibility of causation is not sufficient to create a material question of fact and defeat summary judgment. *Id.* As with the question of breach, causation is usually a factual issue to be decided by the jury, but the court may rule as a matter of law when no reasonable juror could conclude that the damages were proximately caused by the defendant's conduct. *Gipson*, 214 Ariz. at 143 n.1, ¶ 9, 150 P.3d at 230 n.1.

¶25 Here, there is no evidence that Wal-Mart's alleged inadequate security caused Belanger to commit his crime. Harry contends that additional security measures might have prevented the DePrins's deaths, and suggests Belanger may have chosen to commit his crime in the Wal-Mart parking lot because he knew the security was inadequate. In particular, he asserts Belanger may

have known Wal-Mart did not monitor the parking lot surveillance cameras. We have rejected such speculative evidence in other cases involving the criminal conduct of a third party. For example, in *Shaner v. Tucson Airport Authority, Inc.*, 117 Ariz. 444, 448, 573 P.2d 518, 522 (App. 1977), we held that a security expert's testimony that inadequate lighting and security caused the victim's kidnapping from an airport parking lot was speculative and did not rise to the level of a reasonable probability. *Id.* at 448, 573 P.2d at 522. Similarly, in *Grafitti-Valenzuela*, we rejected as speculation the plaintiff's expert's opinion that the lack of a bus shelter and inadequate lighting caused the victim's kidnapping, because there was no indication that the criminal made use of the low lighting conditions or lack of a shelter, or that he would not have committed the abduction if there had been a shelter and additional lighting. 216 Ariz. at 461-62, ¶¶ 24-28, 167 P.3d 718-19.

¶26 Harry's contention that Belanger might have known that Wal-Mart's parking lot security cameras were not actively monitored and chose to murder the DePrinses there because he was unlikely to be apprehended is nothing more than speculation, as there is no evidence in the record that Belanger was familiar with Wal-Mart's surveillance techniques or had, as Harry posits, "cased" the parking lot. Moreover, the circumstances of the

