

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-000591-MR

FRANCES L. ROSE and ZACHARY
ROSE, a Minor, by and through
his Next Friend, FRANCES L. ROSE

APPELLANTS

v. APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NO. 11-CI-00085

WAL-MART STORES EAST, LP
and TOM WYATT

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, COMBS, AND DIXON, JUDGES.

COMBS, JUDGE: Frances L. Rose and Zachary Rose, her minor son, appeal from a summary judgment entered by the Floyd Circuit Court in favor of Wal-Mart Stores East, LP, and Tom Wyatt (one of the store's asset protection associates).

The trial court granted summary judgment on the basis that Wal-Mart had no duty

either to prevent or to intervene in a physical altercation involving several of its patrons under the facts and circumstances presented. After our review, we affirm.

On the evening of Saturday, December 4, 2010, Rose and her family arrived at the Prestonsburg Wal-Mart for some shopping. Rose and her nine-year-old son made their way directly to the toy department, where Rose overheard another patron using profanity. Rose then observed two women -- later identified as Amy Spriggs and Ann Elizabeth Isaacs -- and their husbands enter the aisle where she and her son were standing. In her deposition testimony, Rose indicated that the profanity had not been directed at her or her son and that she did *not* feel threatened by the group entering the aisle.

Evidence indicated that Spriggs and Isaacs (along with their husbands) had entered the store 15 or 20 minutes before they encountered Rose and her son. There is also evidence to indicate that Spriggs had become loud and unruly during this shopping trip and that Wal-Mart employees were aware that Isaacs had a history of shoplifting at the store. Therefore, Wyatt, a Wal-Mart employee responsible for preventing internal and external theft of store merchandise, had been tracking and observing Spriggs and Isaacs as they made their way around the store.

Instead of seeking assistance from a Wal-Mart employee regarding the offensive language, Rose immediately confronted the group in the aisle and asked that they stop swearing. The cursing escalated as the three women began to argue. Rose indicated that Spriggs suddenly advanced toward her while Isaacs

maneuvered to stand behind her (Rose). Since the women's husbands remained at the end of the aisle, Rose felt trapped.

According to Rose, immediately before the argument turned into a physical altercation, Wyatt (dressed in plain clothes) moved down the aisle between her and the other two women and their husbands and then exited the aisle without comment. Spriggs then pushed her own cart into Rose's back. Punches were immediately exchanged between Rose and Spriggs. Rose admitted that it was possible that she threw the first punch. After Rose got Spriggs to the floor, Isaacs attempted to restrain Rose. According to Rose, the altercation between the women ended when Spriggs and Isaacs overheard Wyatt telephone the police for assistance. Less than two minutes had elapsed between the time that Rose initially confronted Spriggs and Isaacs and the call for police assistance was made.

Spriggs, Isaacs, and their husbands left the store immediately. Wyatt followed and obtained a vehicle description for the local police. The police responded and stopped the vehicle before it left the store parking lot. Following an investigation, Isaacs's husband was arrested for driving on a suspended license.

On January 25, 2011, Rose filed a negligence action against Wal-Mart, Wyatt, Spriggs and Isaacs. After a period of discovery, Wal-Mart filed a motion for summary judgment. It argued that it had no duty, as a matter of law, to protect Rose and/or her son from the unforeseeable conduct of third parties or to intervene once the altercation had commenced. After a hearing, the trial court granted Wal-Mart's motion. Concluding that there was no just cause for delay, the

trial court designated the order as final and appealable. Rose filed a motion to alter, amend, or vacate the judgment, which was denied. This appeal followed.

Upon our review of the trial court's summary judgment, we must decide whether the court correctly determined that there are no genuine issues as to any material facts and that the moving party is entitled to judgment as a matter of law. Kentucky Rule[s] of Civil Procedure (CR) 56.03. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

To recover under a claim of negligence, the plaintiff must prove that the defendant owed her a duty of care, that the defendant breached that duty, and that the breach was the legal cause of the plaintiff's damages. *Lee v. Farmer's Rural Elec. Co-op. Corp.*, 245 S.W.3d 209 (Ky. App. 2007). It is well established that an owner of a business must exercise ordinary care to protect its customers from injury. *Sidebottom v. Aubrey*, 267 Ky. 45, 101 S.W.2d 212 (1937). However, a proprietor is never the insurer of the safety of his guests. *Napper v. Kenwood Drive-in Theatre Co.*, 310 S.W.2d 270 (Ky. 1958).

A business owner has a duty to prevent an assault upon a patron only where: (1) the proprietor had knowledge that one of his patrons was about to injure the plaintiff and he failed to exercise ordinary care to prevent the injury if he reasonably could or (2) the conduct of some of the persons present was such as would lead a reasonably prudent person to believe that they might injure other

guests. *Murphy v. Second Street Corp.*, 48 S.W.3d 571 (Ky. App. 2001). The critical question is whether the assault was foreseeable. *Id.* Foreseeability varies with the circumstances, and the care required is proportionate to the danger presented. *Napper, supra.*

Rose argues that the trial court erred by concluding that Wal-Mart did not have a duty to protect its patrons from the foreseeable injuries caused by Spriggs and Isaacs. Next, she argues that the court erred by failing to recognize the store's duty to assist after she and her son came under attack by the other patrons. Finally, she contends that the trial court erred by failing to impose a duty upon Wal-Mart to train its employees in non-violent intervention techniques.

Viewing the facts most favorably to Rose, we agree with the trial court that the unruly and offensive behavior of Spriggs and Isaacs would not lead a reasonably prudent person to conclude that the two women would become suddenly combative and seek to physically injure other patrons. While the record indicates that Wal-Mart's associate, Wyatt, was aware of Sprigg's disruptive behavior at the store that evening, there is nothing to indicate that he or any other employee knew that either Spriggs or Isaacs was about to assault another patron. Although Wyatt observed the women engaged in a heated exchange in the toy aisle, the circumstances would not have caused a reasonable person to assume that a brawl was likely to ensue. Rose herself admitted that she did not perceive the women to be a threat to her physical well-being -- despite their offensive language.

And apparently Rose did not feel that her son's safety would be at risk even if she were to confront them.

Wyatt felt comfortable enough to walk among the women arguing in the aisle immediately before their exchange took an unforeseen turn and the assaults erupted. Because the assaults were unforeseen, neither Wal-Mart nor Wyatt was under a duty to prevent them.

Next, Rose contends that the store had a separate duty to assist when she and her son came under attack. Assuming, *arguendo*, that a duty arose immediately after the brawl erupted, the evidence indicates that Wyatt's telephone call for police assistance was placed no more than two minutes *after the initial verbal encounter commenced* and that his intervention put an immediate end to the mutual assaults. Furthermore, Wyatt followed the patrons from the store and provided police with key information which permitted an immediate on-site investigation. Because of Wyatt's quick and thorough response, there was no breach of duty (assuming that one had ever arisen) as a matter of law.

Finally, Rose contends that the trial court erred by failing to conclude that Wal-Mart breached its duty to train its associates in non-violent intervention techniques. We disagree.

There is no evidence to indicate that the specific circumstances prevailing at the Prestonburg store gave rise to a duty to hire a private security force to monitor patrons' behavior or to train associates in non-violent intervention

measures. In fact, the parties all agreed that they regarded the store as a safe place.

Given the state of the record, we reject this argument as specious.

We conclude that there existed no genuine issues of material fact and that the appellees were entitled to judgment as a matter of law. Summary judgment was proper, and we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

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Lisa Stumbo
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BRIEF FOR APPELLEE:

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