IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

PAUL L. DEWS, Appellant, v. KENNY SO and JANE DOE SO, individually and their marital community, and ROADRUNNER DELI MART CHEVRON, and CHEVRON U.S.A., INC., a foreign corporation, Respondents.	)	DIVISION ONE No. 66477-8-I UNPUBLISHED OPINION FILED: March 12, 2012

Dwyer, C.J. — Paul Dews was stabbed by Rodrigo Hernandez outside of the Roadrunner Deli Mart Chevron (Deli Mart), a convenience store and fuel station located in Federal Way, during Hernandez's attempt to steal beer from the store. Dews thereafter sued the Deli Mart, Chevron U.S.A., Inc. (Chevron), and Deli Mart owner Kidane Mengistu, asserting that his injuries resulted from the defendants' negligence. Because Hernandez's criminal conduct was not reasonably foreseeable, the Deli Mart owed no duty to protect Dews from such conduct. Because Chevron's alleged liability was premised solely upon its purported agency relationship with the Deli Mart, Chevron is similarly not liable for Hernandez's conduct. For these reasons, we affirm the trial court's dismissal

of Dews' negligence claims against each of the defendants.

I

The Deli Mart is a convenience store and fuel retail outlet located in Federal Way. Although the Deli Mart has a fuel supply agreement with Chevron, the Deli Mart itself independently owns and operates the convenience store and fuel station.

On November 22, 2008, Amanda Johnston was working the night shift at the Deli Mart. Between 1:40 a.m. and 1:50 a.m., her boyfriend, Paul Dews, arrived at the Deli Mart to bring Johnston "her needle point and yarn." Clerk's Papers (CP) at 81. Dews purchased two bottles of Mountain Dew and two packs of cigarettes. Just after 2:00 a.m., "after [the] beer rush was over, the store emptied out" and Dews and Johnston went outside to smoke a cigarette. CP at 271.

Shortly thereafter, a car pulled into the parking lot. Rodrigo Hernandez got out of the car. When Johnston told Hernandez that she would not sell beer to him because it was later than 2:00 a.m., Hernandez responded, "[W]ell we'll just see about that." CP at 263. Johnston followed Hernandez into the store. Hernandez walked toward the beer cooler, and Johnston told Hernandez that if he opened the beer cooler, she would call the police. Hernandez threatened to kill Johnston if she did so. When Hernandez removed beer from the beer cooler, Johnston "came around the counter, grabbed the phone and immediately dialed

911." CP at 264. She then "went back around the . . . counter to follow [Hernandez] outside to get his plate number on his car." CP at 264.

Hernandez then attempted to exit the convenience store with the beer, but Dews, who was still outside of the store, "[stood] in front of the doors, blocking him in, so that he couldn't leave." CP at 264. Dews would later tell police that Hernandez "started to freak out [be]cause I had him blocked in" and "started ramming the door with his shoulder." CP at 272. Johnston told Dews to "just let him go." CP at 264. When Dews let Hernandez out of the store, Hernandez stabbed him in the face and fled the scene. Hernandez later pleaded guilty to attempted second degree murder.

In August 2010, Dews filed a lawsuit against Deli Mart owner Kidane Mengistu, the Deli Mart, and Chevron, alleging that the defendants' negligence was the cause of his injuries.[1] The Deli Mart thereafter filed a motion for summary judgment, seeking dismissal of the claims asserted against Mengistu and the Deli Mart. Chevron also filed a motion for summary judgment dismissal of Dews' claim. On December 17, 2010, the trial court granted both summary judgment motions, thus dismissing Dews' claims against Mengistu, the Deli Mart, and Chevron.

Dews appeals.

[1] Dews initially filed the lawsuit against Kenny So, the previous owner of the Deli Mart, rather than against Mengistu, who owned the Deli Mart when the incident occurred. Dews thereafter filed another complaint, under a separate cause number, listing Mengistu as a defendant. The cases were consolidated on October 1, 2010. So is no longer a defendant in this case.

II

Dews contends that the Deli Mart owed a duty to take reasonable steps to protect him, as a business invitee, from Hernandez's criminal conduct, which, Dews asserts, was both imminent and reasonably foreseeable. However, because the stabbing was neither imminent nor reasonably foreseeable, the Deli Mart owed no such duty.

Although, at common law, there was no general duty to protect others from the criminal conduct of third persons, such a duty may arise where a special relationship exists between the defendant and the third party or the defendant and the third party's victim. Nivens v. 7-11 Hoagy's Corner, 133 Wn.2d 192, 199-200, 943 P.2d 286 (1997). In Nivens, our Supreme Court held that the relationship between a business and a business invitee constitutes such a special relationship, "because the invitee enters the business premises for the economic benefit of the business." 133 Wn.2d at 202.

Our Supreme Court recognized, however, that "[i]n the absence of a clear articulation of the business's duty, the business could become the guarantor of the invitee's safety from all third party conduct on the business premises. This is too expansive a duty." Nivens, 133 Wn.2d at 203. Thus, the court held that "a business owes a duty to its invitees to protect them from imminent criminal harm and reasonably foreseeable criminal conduct by third persons." Nivens, 133 Wn.2d at 205. The business owner generally owes no duty to exercise

reasonable care unless he or she "'knows or has reason to know that the acts of the third person are occurring, or are about to occur.'" Nivens, 133 Wn.2d at 204 (emphasis omitted) (quoting Restatement (Second) of Torts § 344). However,

> "[i]f the place or character of [the] business, or . . . past experience, is such that [the business owner] should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he [or she] may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection."

Nivens, 133 Wn.2d at 205 (quoting Restatement (Second) of Torts § 344). Where such a duty exists, "[t]he business owner must take reasonable steps to prevent such harm in order to satisfy the duty." Nivens, 133 Wn.2d at 205.

Importantly, the duty of a business owner to protect invitees from criminal conduct arises only where "the harm to the invitee by third persons is foreseeable." Nivens, 133 Wn.2d at 205.[2] As our Supreme Court noted in Nivens, "Washington courts have been reluctant to find criminal conduct foreseeable." 133 Wn.2d at 205 n.3. Although foreseeability is generally a

[2] Although, in Nivens, our Supreme Court established that the absence of foreseeability of criminal conduct precludes liability of the business owner premised upon such conduct, the court refrained from analyzing the foreseeability of the assault therein "because Nivens did not base his case on a general duty of a business to an invitee." 133 Wn.2d at 205. Rather, Nivens had asserted only that businesses owe to their invitees a distinct duty to provide security personnel to protect against the criminal conduct of third parties, an argument rejected by the court. Nivens, 133 Wn.2d at 207.

The Court of Appeals had determined, however, that "there was 'a dearth of evidence to support a finding that a reasonable person would have foreseen violence of the general type that occurred,'" and, thus, that the business owner had no duty to protect Nivens from such violence. Nivens, 133 Wn.2d at 197 (quoting Nivens v. 7-11 Hoagy's Corner, 83 Wn. App. 33, 53, 920 P.2d 241 (1996)). Thus, we are not persuaded that, as Dews asserts, Nivens "would have survived summary judgment had he sought to establish a duty on the convenience store based on a general duty of a business invitee." Appellant's Br. at 22.

question for the jury, criminal conduct may be unforeseeable as a matter of law where such conduct "is so highly extraordinary or improbable as to be wholly beyond the range of expectability." Fuentes v. Port of Seattle, 119 Wn. App. 864, 868, 82 P.3d 1175 (2003).

Since our Supreme Court's decision in Nivens, our courts have in many cases determined that, as a matter of law, the criminal conduct underlying a negligence claim was not foreseeable. See, e.g., Tae Kim v. Budget Rent A Car Sys., Inc., 143 Wn.2d 190, 15 P.3d 1283 (2001); Fuentes, 119 Wn. App. 864; Tortes v. King County, 119 Wn. App. 1, 84 P.3d 252 (2003); Raider v. Greyhound Lines, Inc., 94 Wn. App. 816, 975 P.2d 518 (1999); Wilbert v. Metro. Park Dist. of Tacoma, 90 Wn. App. 304, 950 P.2d 522 (1998).

In Fuentes, Nathalie Fuentes sued the Port of Seattle for injuries she sustained when, while waiting in the airport pick-up lane, she was carjacked by an assailant fleeing the port authority police. 119 Wn. App. at 866-67. We affirmed the trial court's summary judgment dismissal of Fuentes' claim, determining that a history of car prowling of "unoccupied cars parked in the airport garage does not create foreseeability of kidnapping or carjackings of occupied cars at the pick-up drive." Fuentes, 119 Wn. App. at 870. "The kind of knowledge required before a duty to protect arises," we noted, "is knowledge from past experience that there is a likelihood of conduct which poses a danger to the safety of patrons." Fuentes, 119 Wn. App. at 870. Thus, although a

history of criminal conduct in the airport garage had been established, because the crimes previously committed were not violent crimes that "pose[d] a danger to the safety of patrons," Fuentes could not establish foreseeability of the carjacking and assault. Fuentes, 119 Wn. App. at 870. We further noted that, even had a history of violent crimes *in the airport garage* been established, such a fact would not be dispositive with regard to the foreseeability of violent crime *at the airport pick-up drive*. Fuentes, 119 Wn. App. at 870.

Similarly, in Tortes, we affirmed the summary judgment dismissal of Tortes's negligence claim against the Municipality of Metropolitan Seattle (Metro). 119 Wn. App. at 15. Tortes's claim was premised upon injuries that she sustained when a third party shot and killed the driver of the bus in which she was riding, causing the bus to plunge off of a bridge.[3] Tortes, 119 Wn. App. at 6-7. Although the evidence demonstrated a history of simple assaults, the evidence did not indicate that crimes similar to the one therein had occurred on other Metro buses. Tortes, 119 Wn. App. at 8. We concluded that "Metro cannot be held liable for a sudden assault that occurs with no warning and that is 'so highly extraordinary or improbable as to be wholly beyond the range of expectability.'" Tortes, 119 Wn. App. at 8 (internal quotation marks omitted) (quoting Raider, 94 Wn. App. at 819).

[3] Although, there, the special relationship upon which a duty was alleged was that of common carrier and passenger, the issue therein was analogous to that raised here—Tortes contended that the criminal acts of the third party were reasonably foreseeable and, thus, that the county was negligent by breaching its duty to protect her from such acts. Tortes, 119 Wn. App. at 7.

Similarly, in Raider, we affirmed the trial court's summary judgment dismissal of Hayes's negligence claim against Greyhound Lines, Inc. on the basis that the harm that she suffered was not imminent or reasonably foreseeable. 94 Wn. App. at 818-20. There, Hayes was repeatedly shot in a Greyhound bus terminal in an apparently racially-motivated attack. Raider, 94 Wn. App. at 818-19. As evidence of foreseeability of the shooting, Hayes submitted affidavits describing the bus station "as an area of high criminal activity, including prostitution, drugs, and a shooting two years earlier." Raider, 94 Wn. App. at 818. Nevertheless, noting that the attack therein appeared to be racially-motivated, we determined that it was not foreseeable because it did not "[bear] any relationship or similarity to the past crimes"—notwithstanding that those "past crimes" included a shooting. Raider, 94 Wn. App. at 820.

Here, Dews asserts that the stabbing was both imminent and foreseeable because Johnston "chased and cornered a violent shoplifter without warning visitors."[4] Appellant's Br. at 23. In so doing, he cites to Passovoy v. Nordstrom, Inc., 52 Wn. App. 166, 758 P.2d 524 (1988), in which we determined that Nordstrom could be liable for negligence if its detectives, while chasing a shoplifter through the department store, had failed to warn customers about the pursuit of the suspect. There, Passovoy was injured when the fleeing suspect shoved him aside during the detectives' pursuit. Passovoy, 52 Wn. App. at 168.

[4] The Deli Mart contends that it owed no duty to Dews because he was not a business invitee when the stabbing occurred. Because we need not address this issue in order to resolve the case, we decline to do so.

We determined that summary judgment dismissal of Passovoy's claim was improper where the evidence was sufficient to create an issue of fact regarding whether the detectives could have warned Passovoy about the potential for harm. Passovoy, 52 Wn. App. at 173.

But Passovoy is inapposite. Notwithstanding the fact that, pursuant to our decision in Passovoy, the Deli Mart may have a duty to warn customers of impending harm from fleeing suspects, the record here is devoid of evidence that Johnston "chased and cornered" Hernandez, as Dews asserts, or that any causal relationship exists between Johnston's actions and the stabbing. In her statement to police, given the morning of the incident, Johnston stated that she "went back around the outside [of] the counter" after dialing 911 in order to "follow [Hernandez] outside to get his plate number on his car." CP at 264. Although this indicates that Johnston followed Hernandez, it does not demonstrate that she "chased and cornered" him; nor does it demonstrate that her actions provoked Hernandez to stab Dews.

Rather, Johnston stated that Dews was "standing in front of the doors, blocking [Hernandez] in, so that he couldn't leave" and that she told Dews to "just let him go," CP at 264, thus indicating that Dews' actions, rather than Johnston's actions, were that which gave rise to Hernandez's decision to stab Dews. Indeed, in his statement to the police, Dews suggested that Hernandez "started to freak out [be]cause I had him blocked in" just before the stabbing

occurred. CP at 272. Thus, Dews' contention that the stabbing was either foreseeable or imminent due to Johnston's actions is without merit.

Dews additionally asserts that the stabbing was foreseeable due to the allegedly high crime rate on the Deli Mart premises.[5] Our Supreme Court, however, "has rejected utilization of high crime rates as a basis for imposing a tort duty." Tae Kim, 143 Wn.2d at 199. Indeed, the court has noted that

> "there is a basis to conclude that the high incidence of crime in an urban area does not favor imposition of [a tort duty], but instead cuts the other way. That is, if the premises are located in an area where criminal assaults often occur, imposition of a duty could result in the departure of businesses from urban core areas—an undesirable result."

Tae Kim, 143 Wn.2d at 199 (quoting Hutchins v. 1001 Fourth Ave. Assocs., 116 Wn.2d 217, 236, 802 P.2d 1360 (1991)). Thus, even if, as Dews asserts, the Deli Mart is located in a high-crime area, no duty arises simply as a result of that fact.

Moreover, based upon the record, the criminal activity that occurred at the Deli Mart prior to the incident here—which, according to the declarations of Mengistu, So, and Johnston, consisted of shoplifting, loitering, and illegal sales

[5] As evidence of the high crime rate, Dews submitted to the trial court a document created by the Federal Way Police Department, which purports to list all crimes reported from the Deli Mart's address and the "surrounding area" between 2004 and November 17, 2010. Based upon this list, Dews asserts that, from 2004 to 2007, there were multiple robberies, assaults, and thefts either at the Deli Mart address or nearby. However, it cannot be determined from this document which crimes were committed at the Deli Mart itself. Moreover, the statements of Mengistu and Kenny So, who owned and operated the convenience store from February 1997 to July 2008, indicate that, while shoplifting was frequent, violent crime was not. Both Mengistu and So, in declarations submitted to the trial court, stated that, to their knowledge, there was no violent crime or fighting inside the convenience store during their ownership of the Deli Mart.

of beer—bears no similarity to the stabbing of Dews, such that it created foreseeability of this particular crime. See, e.g., Raider, 94 Wn. App. at 820. We have determined that a history of non-violent crimes, such as those demonstrated by the record here, does not give rise to a duty to protect invitees from violent crimes, as such crimes do not become reasonably foreseeable due to such a history. See Fuentes, 119 Wn. App. at 870. Because the stabbing was not reasonably foreseeable based upon the criminal conduct that had previously occurred at the Deli Mart, the Deli Mart owed no duty to protect Dews from the sudden assault by Hernandez.

Furthermore, even were Hernandez's criminal conduct foreseeable—such that the Deli Mart would incur a duty to protect Dews from such conduct—the duty of a business to protect its invitees from harm caused by the criminal conduct of third persons is satisfied where the business owner takes reasonable steps to prevent such harm. Nivens, 133 Wn.2d at 205. Thus, Dews must present evidence that the Deli Mart, assuming that it owed a duty to protect Dews from Hernandez's conduct, failed to take reasonable steps to protect him from such conduct. In addition, in order to sustain his negligence action, Dews must present evidence that his injuries were caused by the Deli Mart's failure to take reasonable steps to protect him. Fuentes, 119 Wn. App. at 868.

Dews offers a litany of suggestions as to the actions that the Deli Mart could have taken in order to protect him from Hernandez's criminal conduct,

including locking the alcohol cooler, keeping surveillance cameras in working order, and properly staffing the convenience store. However, Dews does not establish a causal link between the Deli Mart's purported acts or omissions and Hernandez's conduct. "Rather, [Dews provides] only speculation as to what [the Deli Mart] should have done to prevent the [stabbing]." Tortes, 119 Wn. App. at 9. This is not sufficient to demonstrate causation.

Even were Dews correct that the Deli Mart owed a duty to protect him from Hernandez's criminal conduct, the evidence does not establish that any acts or omissions of the Deli Mart were the cause of Dews' injuries. Thus, both because Hernandez's conduct was not reasonably foreseeable and because Dews cannot establish a causal link between his injuries and any act of the Deli Mart, summary judgment dismissal of Dews' negligence claims against both the Deli Mart and Mengistu was proper.[6]

III

Dews additionally contends that the Deli Mart was acting as Chevron's agent when it engaged in the allegedly negligent conduct and, thus, that Chevron may be vicariously liable for damages arising from that alleged negligence. However, vicarious tort liability of a principal may arise only where

[6] Dews also contends that the Deli Mart engaged in negligent hiring and supervision of its employees. He asserts that the Deli Mart was negligent in hiring Hernandez, who had at one time been employed at the Deli Mart but had been fired prior to the incident here. He additionally asserts that the Deli Mart was negligent in failing to properly supervise Johnston, who was working the night shift alone when Dews was stabbed. However, the record includes no evidence that any hiring or supervision decisions by the Deli Mart were the cause of Dews' injuries. "[T]o sustain an action for negligence, a plaintiff must establish causation as an essential element." Tortes, 119 Wn. App. at 8-9. Dews has not done so here.

the agent engaged in negligent conduct. See, e.g., Kroshus v. Koury, 30 Wn. App. 258, 264, 633 P.2d 909 (1981) (quoting Jackson v. Standard Oil Co., 8 Wn. App. 83, 91, 505 P.2d 139 (1972)) (holding that the principal must control or have the right to control "'those activities from whence the *actionable negligence* flowed'" (emphasis added)). Because the Deli Mart neither owed nor breached a duty to protect Dews against Hernandez's criminal conduct, Chevron cannot incur liability premised upon the Deli Mart's actions. Thus, as with the claims against the Deli Mart and Mengistu, the trial court properly dismissed Dews' negligence claim against Chevron.[7]

Affirmed.

Dwyer, C.J.

We concur:

Ellington, J.

Becker, J.

[7] Dews additionally contends that Chevron may be liable for Dews' injuries based upon principles of apparent agency. For the same reason explained above, this contention also fails.