STATE OF MICHIGAN

COURT OF APPEALS

JERRY BASHAM,

Plaintiff-Appellant,

v

CONSOLIDATED RAIL CORPORATION,

Defendant–Appellee.

UNPUBLISHED
July 16, 1996

No. 179984
LC No. 93-326977 NO

Before: Wahls, P.J., and Murphy and C.D. Corwin,* JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition in this negligence action. The trial court found as a matter of law that defendant owed plaintiff no duty of care. We affirm.

Plaintiff was employed by Nation Wide Security and was assigned to security duty at an automobile storage facility owned by defendant. Plaintiff's duties included patrolling the lot, reporting any unauthorized entries, and acting as a visible deterrence to such entries. Plaintiff was not authorized to apprehend or arrest intruders. While patrolling the lot, plaintiff heard a car engine start and, upon closer investigation, saw a car driving toward him. Plaintiff was struck and injured by the car. Plaintiff sued, claiming that defendant's negligence in securing the lot was the proximate cause of his harm.

Plaintiff argues that the trial court erred in finding as a matter of law that defendant did not owe plaintiff a duty of care. Plaintiff claims that a duty of care existed under each of three theories. First, defendant owed its business invitees, including plaintiff, a duty to maintain reasonably safe premises. Second, defendant owed plaintiff a duty not to interfere with plaintiff's ability to safely perform his duties. Last, defendant owed plaintiff a duty not to create a foreseeable risk of harm by negligently storing its cars with their doors unlocked and their keys in the ignition.

* Circuit judge, sitting on the Court of Appeals by assignment.

A property owner does not have a duty to protect its business invitees from the criminal actions of third parties. *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 502; 418 NW2d 381 (1988). While a property owner may be liable for the negligent performance of voluntarily adopted security measures, he does not thereby assume a duty to provide the most effective security measures possible. *Scott v Harper Recreation*, 444 Mich 441, 452; 506 NW2d 857 (1993).

The duty owed by a business owner to its customers differs from that owed to security guards. Under the doctrine of primary assumption of risk, a plaintiff may not recover for harm caused by "performing the very duty . . . which he/she has been asked to perform." *In re Air Crash Disaster at Detroit Metro Airport*, 737 F Supp 409, 412-413 (ED Mich, 1989). Therefore, as a matter of law, a business owner does not have a duty to protect its security guards from the ordinary risks caused by intruders. *Carter v Mercury Theater Co*, 146 Mich App 165, 166-167; 379 NW2d 409 (1985); *Turner v Northwest General Hosp*, 97 Mich App 1, 2-4; 293 NW2d 713 (1980). Plaintiff argues that he did not assume the risk of harm from intruders because his job did not extend to actually encountering or accosting intruders. We cannot agree. Plaintiff was hired to patrol the lot and to find intruders so that he could report their presence. This duty necessarily included the risk of encountering intruders and suffering the type of harm plaintiff sustained.

Plaintiff also argues that defendant is liable for his injuries because defendant was negligent in fulfilling the security responsibilities which it retained, including providing adequate lighting, maintaining the fence, and properly training its security guards. See *Pucalik v Holiday Inns, Inc*, 777 F2d 359 (CA 7, 1985). Plaintiff's reliance on *Pucalik* is misplaced, however, since this case interprets Indiana, not Michigan, law. See *Id*. at 362. An injured security guard advanced similar claims in *Carter, supra* at 166-167, arguing that the defendant business was liable for failing to properly train its employees to exclude disruptive patrons and for failing to maintain the locks on its fire doors. This Court rejected that claim on the basis of primary assumption of risk. *Id.*

In the alternative, plaintiff characterizes defendant's failure to maintain adequate lighting as active interference with plaintiff's ability to be a visible deterrent to illegal entries and argues that a land owner is liable for interfering with an independent contractor's ability to safely perform his duties. However, plaintiff fails to cite authority in support of this argument. This claim is therefore waived. *Winiemko v Valenti*, 203 Mich App 411, 419; 513 NW2d 181 (1994). Further, there is no logical distinction between plaintiff's claim that defendant failed to provide adequate lighting and the claim that defendant actively provided inadequate lighting. Since the first claim could not succeed, this claim must also fail.

Finally, plaintiff argues that defendant is liable because of the manner in which the cars were stored. A car owner may be liable to members of the general public harmed by a car thief if: the car owner negligently left the car unlocked and the keys accessible; the theft was a foreseeable result of the car owner's negligence in securing the car; and the car owner's negligent actions were the proximate cause of the plaintiff's harm. *Davis v Thornton*, 384 Mich 138, 142-146; 180 NW2d 11 (1970); *Thomas v Eppinga*, 179 Mich App 366, 376-378; 445 NW2d 234 (1989). This rule is inapplicable

in this case, however, because defendant took steps to protect the cars, including fencing the lot and hiring security guards. Compare *Davis*, *supra* at 141 with *Thomas*, *supra* at 377-378. Additionally, plaintiff is not a member of the general public, but is, in effect, one of defendant's security measures. As discussed above, plaintiff has assumed the risks inherent in his position, including encountering a would-be thief during his rounds on the lot.

Affirmed.

/s/ Myron H. Wahls
/s/ William B. Murphy
/s/ Charles D. Corwin