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IN THE COURT OF APPEALS OF INDIANA

Paul Poppe and Susan Poppe,
Appellants-Plaintiffs,

v.

Angell Enterprises, Inc.,
Appellee-Defendant.

April 19, 2021

Court of Appeals Case No. 20A-CT-2211

Appeal from the Sullivan Superior Court

The Honorable Hugh R. Hunt, Judge

Trial Court Cause No. 77D01-1610-CT-499

Najam, Judge.

Statement of the Case

[1] Paul Poppe and Susan Poppe appeal the trial court's grant of summary judgment for Angell Enterprises, Inc. ("Angell") on the Poppes' complaint alleging Angell's negligence. The Poppes present a single issue for our review,

namely, whether the trial court erred when it granted summary judgment for Angell.

[2] We affirm.

Facts and Procedural History

[3] On August 15, 2015, the Poppes went grocery shopping at Baesler's Market in Sullivan. When they exited the store and walked through a marked crosswalk to reach their minivan, which was parked in a spot reserved for the handicapped, they saw a truck coming towards them. They tried to run to get out of the way, but the truck was moving fast and pinned them both against their parked minivan. The Poppes sustained injuries as a result of the accident.

[4] Police officers arrived at the scene and interviewed the driver of the truck, Davis Hughes, who claimed that he had struck the Poppes when he lost control of his truck. Hughes was under the influence of cocaine and alcohol at the time of the accident, and he subsequently pleaded guilty to two counts of causing serious bodily injury to another person while operating a vehicle while intoxicated, as Level 6 felonies.

[5] On October 7, 2016, the Poppes filed a complaint for negligence against Hughes, Baesler's, Inc., Angell, and USAA. Angell is Baesler's landlord and is responsible for maintaining the parking lot. USAA is the Poppes' underinsured motorist carrier. The court later dismissed Hughes and USAA as parties, and Baesler's moved for summary judgment, which the trial court granted. Angell, the sole remaining defendant, also moved for summary judgment. Following a

hearing, the trial court entered summary judgment for Angell. This appeal ensued.

Discussion and Decision

[6] The Poppes appeal the trial court's entry of summary judgment in favor of Angell. As our Supreme Court has stated:

> This Court reviews summary judgment orders *de novo*. Summary judgment is appropriate if the designated evidence shows there is no genuine issue as to any fact material to a particular issue or claim, and the moving party is entitled to judgment as a matter of law. In viewing the matter through the same lens as the trial court, we construe all designated evidence and reasonable inferences therefrom in favor of the non-moving party. Legal questions, such as contract interpretation, are well-suited for summary judgment. The party appealing the trial court's summary judgment determination bears the burden of persuading us the ruling was erroneous. Nonetheless, we "carefully scrutinize[ ] the trial court's decision to assure that the party against whom summary judgment was entered was not improperly prevented from having its day in court."

Ryan v. TCI Architects/Engineers/Contractors, Inc., 72 N.E.3d 908, 912-13 (Ind. 2017) (citations omitted; alteration original to *Ryan*).

[7] To prevail on a negligence claim, the plaintiff must demonstrate "(1) duty owed to plaintiff by defendant; (2) breach of duty by allowing conduct to fall below the applicable standard of care; and (3) compensable injury proximately caused by defendant's breach of duty." *Goodwin v. Yeakle's Sports Bar & Grill, Inc.*, 62 N.E.3d 384, 386 (Ind. 2016). The issue of "whether a duty exists is a question

of law for the court to decide." *Id.* at 389. Absent a duty, there can be no breach and therefore no liability. *Rogers v. Martin*, 63 N.E.3d 316, 321 (Ind. 2016).

[8] Here, the Poppes base their negligence action on premises liability. In particular, they allege that Angell owed them a duty of reasonable care for their safety as invitees on the property, breached that duty, and proximately caused their injuries. *See Burrell v. Meads*, 569 N.E.2d 637, 639 (Ind. 1991)). The parties dispute, however, whether the Poppes' injuries resulted from a condition on the premises or the criminal act of a third person. If it was the former, we apply the analysis in *Burrell*, which adopted the Restatement (Second) of Torts Section 343, to determine whether a duty exists. *Hoosier Mountain Bike Ass'n v. Kaler*, 73 N.E.3d 712, 716 n.4 (Ind. Ct. App. 2017) (citing *Rogers*, 63 N.E.3d at 322-23). If it was the latter, we apply the analysis in *Goodwin*, which considers the broad type of plaintiff and the broad type of harm when determining whether a duty exists. 62 N.E.3d at 393-94.

[9] The Poppes allege that they were injured "by a condition on the land," namely, "the funneling of pedestrian and vehicular traffic" into the crosswalk without "protective features" such as "bollards."[1] Appellant's Br. at 19. But we agree with Angell that the Poppes were injured by the criminal conduct of Hughes, namely, his driving while intoxicated. Accordingly, we apply the *Goodwin*

[1] A "bollard" is a protective post commonly used in areas where pedestrians and traffic might mix.

analysis here. In *Goodwin*, our Supreme Court held that foreseeability as a component of duty turns on the "broad type of plaintiff and harm involved, without regard to the facts of the actual occurrence." 62 N.E.3d at 390. Applying that analysis here, the broad type of plaintiff is a grocery store patron using a crosswalk, and the broad type of harm is a random intoxicated driver losing control of his vehicle and striking a patron.

[10] In *Fawley v. Martin's Supermarkets, Inc.*, this Court was asked to determine whether a supermarket owed a duty to the same type of plaintiff to protect against the same type of harm. 618 N.E.2d 10 (Ind. Ct. App. 1993), *trans. denied*. In particular, a woman and her two children had just left the supermarket and were walking along a sidewalk outside the building when they were struck by a drunk driver. The plaintiffs sued the supermarket and alleged that it had "a duty to maintain some type of defensive boundary barrier to separate vehicular traffic from patrons using the sidewalk." *Id.* at 12.

[11] On appeal from the trial court's grant of summary judgment for the supermarket, we held as follows:

> The circumstances in the present case did not impose upon Martin's a duty to protect the Fawleys from the errant vehicle that injured them. We recognize that a business proprietor's general duty to exercise reasonable care includes a duty to provide a safe and suitable means of ingress and egress and may extend to warning of or protection from a danger that originates from third persons. *See Bearman v. University of Notre Dame* (1983), Ind. App., 453 N.E.2d 1196, 1198, *trans. denied*. However, a business proprietor is not the insurer of its invitees' safety while on the premises. *Id.* Rather, Martin's, as a business

> proprietor, is charged with the duty of guarding against subjecting the Fawleys, its invitees, to dangers of which Martin's was cognizant or might have reasonably foreseen.
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> * * *
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> Here, the accident which occurred when . . . a drunk driver[] lost control of his vehicle was not as a matter of law sufficiently foreseeable to require Martin's to protect its patrons from such an unfortunate mishap.

Id. at 13.

[12] While *Fawley* predates *Goodwin* by more than two decades, the duty foreseeability analysis is largely the same in both cases, and we apply it here. Angell could not have known or reasonably foreseen that the Poppes would be struck by an intoxicated driver in the Baesler's parking lot. *See id.* To conclude otherwise would be "to impose a blanket duty on proprietors to afford protection to their patrons" and, thus, require proprietors to be "insurers of their patrons' safety," contrary to the public policy of this state. *Goodwin*, 62 N.E.3d at 394; *see also Cavanaugh's Sports Bar & Eatery, Ltd. v. Porterfield*, 140 N.E.3d 837 (Ind. 2020) (holding bar owed no duty to protect patron from sudden parking lot brawl when no evidence showed that the bar knew a fight was impending). Here, it was not a condition on the premises that caused the Poppes to be injured but a random criminal act that Angell could not have prevented. Accordingly, we hold that Angell had no duty to protect the Poppes from being

struck by an intoxicated driver.[2] The trial court did not err when it entered summary judgment for Angell.

[13] Affirmed.

Pyle, J., and Tavitas, J., concur.

[2] Because we affirm the trial court on this issue, we need not address whether the Poppes' claim is barred by the statute of repose in Indiana Code Section 32-30-1-5.