[Cite as *Masek v. Warren Redevelopment & Planning Corp.*, 2010-Ohio-819.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

RAYMOND J. MASEK,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2009-T-0059**
- vs -	:	
THE WARREN REDEVELOPMENT AND PLANNING CORPORATION,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2008 CV 02409.

Judgment: Affirmed.

Raymond J. Masek, pro se, 183 West Market Street, #300, Warren, OH 44481-1022 (Plaintiff-Appellant).

William Shackelford, Cincinnati Insurance Company, 50 South Main Street, #615, Akron, OH 44308 (For Defendant-Appellee).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Raymond J. Masek, appeals the summary judgment of the Trumbull County Court of Common Pleas in favor of Appellee, Warren Redevelopment and Planning Corporation, on his claim for property damage. At issue is whether a genuine issue of material fact exists on appellant's claim, thus precluding summary judgment. For the reasons that follow, we affirm.

{¶2} Appellee is a non-profit economic development corporation, which manages various properties owned by the City of Warren. Pursuant to contract,

appellee assumed the management of the City's parking deck, located at the corner of Main and Franklin Avenues, in May 2006.

{¶3} Appellee charges members of the public a daily or monthly fee to use the parking deck. Appellant is a monthly customer, and, prior to the incident at issue, had parked his two vehicles, a 1992 Honda and a 1999 Lincoln, in the deck for several years. Public access to the parking deck is restricted by the use of gates, which are operated by customers by use of a key card. However, during weekends and special events, appellee keeps the gates open and allows free parking to the public.

{¶4} On Saturday evening, August 9, 2008, the Italian-American festival was taking place in nearby Courthouse Square. The gates to the parking deck were open that evening, and parking was free to the public. Sometime that evening, appellant's vehicles were vandalized in the parking deck by a person or persons unknown. The windows of both cars were smashed and their hoods had dents in them. Appellant's Lincoln was damaged in the amount of $3,698. Appellant did not state the amount of damage sustained by the Honda, but subsequently sold it for $500.

{¶5} Prior to this incident, in June 2006, appellant's Honda was broken into and his daughter's CD player was stolen. Also, sometime in 2007, someone wrote some graffiti along the upper wall of the deck. On a third prior occasion, someone scratched appellant's Lincoln, but he admitted in his deposition that he had no idea when this occurred and he never reported it to appellee or to the police.

{¶6} In his complaint, appellant alleged appellee was negligent in failing to provide security for the deck and in failing to notify its regular customers that the deck would be open to the public on August 9, 2008. He sought damages for the property

damage sustained by his vehicles. He also asserted claims based on emotional distress and outrage.

{¶7} Appellee initially filed a partial motion for summary judgment on appellant's emotional distress and outrage claims. After considering the parties' briefs, the trial court granted the motion. Appellant does not challenge that ruling in this appeal. Thereafter, appellee filed a motion for summary judgment on appellant's remaining negligence claim. The trial court also granted that motion, finding appellee owed no duty to appellant.

{¶8} Appellant appeals the trial court's judgment, asserting the following for his sole assignment of error:

{¶9} "The trial court erred to the prejudice of plaintiff-appellant in failing to consider facts raised in his briefing as supportive of foreseeability under the totality of circumstance [sic] doctrine while drawing solely upon those brought to its attention by defendant-appellee."

{¶10} Summary judgment is a procedural device intended to terminate litigation and to avoid trial when there is nothing to try. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358, 1992-Ohio-95. This court has held that summary judgment is proper when: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the nonmoving party, that party being entitled to have the evidence construed most strongly in his favor. Civ.R. 56(C); *Frano v. Red Robin International, Inc*., 181 Ohio App.3d 13, 17-18, 2009-Ohio-685, citing *Leibreich v. A.J. Refrigeration, Inc*., 67 Ohio St.3d 266, 268, 1993-Ohio-12.

{¶11} The party seeking summary judgment on the ground that the nonmoving party cannot prove his case bears the initial burden of informing the trial court of the basis for the motion and of identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential elements of the nonmoving party's claim. *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 1996-Ohio-107.

{¶12} The moving party must point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support his claim. *Dresher*, supra, at 293.

{¶13} If this initial burden is not met, the motion for summary judgment must be denied. Id. However, if the moving party has satisfied his initial burden, the nonmoving party then has a reciprocal burden, as outlined in Civ.R. 56(E), to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against him. Id.

{¶14} Since a trial court's decision whether or not to grant summary judgment involves only questions of law, we conduct a de novo review of the trial court's judgment. *DiSanto v. Safeco Ins. of Am.*, 168 Ohio App.3d 649, 655, 2006-Ohio-4940. A de novo review requires the appellate court to conduct an independent review of the evidence before the trial court without deference to the trial court's decision. *Brown v. Cty. Commrs. of Scioto Cty.* (1993), 87 Ohio App.3d 704, 711.

{¶15} In order to establish an actionable claim for negligence, the plaintiff must establish: (1) the defendant owed a duty to him; (2) the defendant breached that duty; (3) the defendant's breach of duty proximately caused his injury; and (4) he suffered damages. *Bond v. Mathias* (Mar. 17, 1995), 11th Dist. No. 94-T-5081, 1995 Ohio App.

LEXIS 979, *6. The existence of a duty is fundamental to establishing negligence. If there is no duty, then no liability arises on account of negligence. *Hake v. Delpine*, 11th Dist. No. 2002-T-0010, 2003-Ohio-1591, at ¶13. Whether a duty is owed is a question of law for the court to determine on a case-by-case basis. *Reitz v. May Co. Dept. Stores* (1990), 66 Ohio App.3d 188, 192.

{¶16} Under Ohio law, the existence of a duty depends on the injury's foreseeability. *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77. "The test for foreseeability is whether a reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of an act. [Citations omitted]." Id. The foreseeability of harm generally depends on a defendant's knowledge. *Thompson v. Ohio Fuel Gas Co*. (1967), 9 Ohio St.2d 116, 119-120.

{¶17} The duty to protect invitees from the criminal acts of third parties does not arise if the business "does not, and could not in the exercise of ordinary care, know of [the] danger which causes injury to [the] business invitee." *Howard v. Rogers* (1969), 19 Ohio St.2d 42, at paragraph three of the syllabus. "The foreseeability of criminal acts depends upon the knowledge of the defendant-business based on the totality of the circumstances. *White* [*v. Euclid Square Mall* (1995),] 107 Ohio App.3d [536,] at 540; *Feichtner v. Cleveland* (1994), 95 Ohio App.3d 388, 396; *Reitz*[, supra]; *Collins [v. Sabino* (Aug. 8, 1997), 11th App. No. 96-T-5590,] 1997 Ohio App. LEXIS 3587 [WL] at *3. In other words 'the totality of the circumstances must be *somewhat overwhelming* before a business will be held to be on notice of and therefore under the duty to protect against the criminal acts of others.' (Emphasis [sic.]) *Reitz*[, supra,] at 193-194. See,

also, *White*[, supra]; *Cole v. Pine Ridge Apts. Co. II*, 11th Dist. No. 2000-L-020, 2001-Ohio-8788, 2001 Ohio App. LEXIS 5854, at *15; *Collins*[, supra]." *Rozzi v. The Cafaro Company*, 11th Dist. No. 2001-T-0090, 2002-Ohio-4817, at ¶28.

{¶18} This court in *Collins*, supra, held:

{¶19} "*** Where the record contains no evidence of prior, similar occurrences of which the defendant-business was aware, courts have refused to impose a duty upon business owners to insure the safety of invitees from the injurious criminal acts of third persons. See, e.g., *Howard*[, supra]; *Feichtner*, [supra]; *Reitz*, [supra]; *Meyers v. Ramada Inn* (1984), 14 Ohio App. 3d 311; *Doyle v. Akron* (Apr. 21, 1995), Portage App. No. 94-P-0076, unreported." *Collins*, supra, at *7-*8.

{¶20} Thus, before a court will impose a duty on a business to protect its invitees from the criminal acts of third parties, such criminal acts must be foreseeable to the business. Foreseeability in this context depends on the knowledge of the business, based on the totality of the circumstances, of prior, similar occurrences, and the circumstances must be "somewhat overwhelming."

{¶21} Turning to the facts of the instant case, appellee was aware of only two prior incidents at the parking deck; however, neither of them can properly be characterized as similar to the instant act of vandalism. The first involved a break-in of appellant's Honda in June 2006, in which his daughter's CD player was stolen. In the second incident, graffiti was written on the wall of the parking deck sometime in 2007. Appellant also testified about a third incident in which scratches appeared on his Lincoln, but he has no idea when this occurred and he never reported it to appellee or

the police. These facts do not come remotely close to the "somewhat overwhelming" circumstances standard adopted by this court in *Rozzi*, supra.

{¶22} We therefore hold that the instant act of vandalism was not foreseeable to appellee, and it therefore owed no duty to protect appellant from it. As a result, the trial court did not err in entering summary judgment in favor of appellee on appellant's claim for property damage.

{¶23} Appellant argues the trial court erred in not considering the testimony of appellee's director Anthony Iannucci that there is criminal activity in downtown Warren; that there was no police officer or attendant in the deck; and that there was a "raucous" festival nearby at which alcohol was available. First, we note appellant failed to cite the record in support of this alleged testimony, in violation of App.R. 16(A)(6). In any event, while the court did not expressly refer to Mr. Iannucci's testimony in its judgment entry, there is no reason for us to believe the trial court did not consider it, particularly in light of the painstakingly thorough judgment entry of the trial court, which relies heavily on the record. In any event, such testimony does not constitute evidence of appellee's knowledge of prior, similar occurrences, which is necessary to impose a duty to protect a business invitee from the criminal acts of third parties.

{¶24} For the reasons stated in the Opinion of this court, the assignment of error is without merit. It is the judgment and order of this court that the judgment of the Trumbull County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

COLLEEN MARY O'TOOLE, J.,

concur.