IN THE COURT OF APPEALS OF IOWA

No. 9-294 / 08-1589
Filed June 17, 2009

LORI M. CHILDERS, Administrator of the Estate of Ricardo Berry, Deceased,
Plaintiff-Appellant,

vs.

ANTHONY HERMAN,
Defendant-Appellee.

Appeal from the Iowa District Court for Muscatine County, J. Hobart Darbyshire, Judge.

Plaintiff appeals the district court's entry of summary judgment dismissing a suit based on a wrongful death claim against defendant. **AFFIRMED.**

David Scieszinski, Wilton, for appellant.

Nancy Penner, Robert Houghton, and Jennifer Rinden of Shuttleworth & Ingersoll, P.L.C., Cedar Rapids, for appellee.

Heard by Mahan, P.J., and Eisenhauer and Mansfield, JJ.

MAHAN, P.J.

Plaintiff, Lori M. Childers, the administrator of the estate of Ricardo Berry, appeals the district court's entry of summary judgment dismissing a suit based on a wrongful death claim against defendant Anthony Herman. We affirm.

I. Background Facts and Proceedings.

This case arises from the death of Ricardo Berry. On May 30, 2005, two-year-old Ricardo Berry was struck and killed by a pick-up truck driven by Kenneth Logel Jr. and owned by Kenneth Logel. The incident occurred at CJ's Super Wash in Muscatine, one of four carwashes Anthony Herman has owned in Iowa since 1997. At the time of the accident, Ricardo was at the carwash with his father, Antonio Berry, who was waiting to wash his car. As Antonio and Ricardo walked in front of the truck, Ricardo dropped a toy, let go of Antonio's hand, and went back to pick it up. At that same time, Kenneth Logel Jr. started the truck and drove forward, running over Ricardo and causing him to suffer serious injuries that resulted in his death.[1]

On May 29, 2007, Lori Childers, as administrator of Ricardo's estate, brought this action contending Herman was responsible for the negligent acts of third parties on his property, and alleging Herman failed to exercise reasonable care to discover that such negligent acts were likely to occur or to give adequate warning of such negligent acts. As administrator of the estate, on her behalf, and

[1] Following the incident, Lori Childers and Antonio Berry, individually and as the natural parents and next friend of Ricardo, commenced a lawsuit against Kenneth Logel Jr. and Kenneth Logel for the damages resulting from the injuries and death of Ricardo. Childers and Antonio subsequently accepted the sum of $25,000 from Kenneth Logel's insurer and dismissed their lawsuit with prejudice.

on behalf of Antonio, Childers sought a judgment for damages they sustained.[2] Herman filed for summary judgment on July 30, 2008, arguing he owed no duty in this case. Herman's motion included a brief and statement of undisputed facts with exhibits including excerpts of the depositions of Herman and Childers and an affidavit from Herman. Childers filed a resistance.[3]

On August 27, 2008, the district court granted summary judgment to Herman, dismissing Childers's action upon its finding that Herman "did not know, and had no reason to know, that a third person or persons would likely injure or kill another person lawfully on his premises" and that "[n]othing about the nature of the car wash business itself, or Defendant's personal prior experience in the business, would, or should, alert him to the danger." Childers now appeals.

II. Scope and Standard of Review.

We review the district court's summary judgment ruling for the correction of errors at law. Iowa R. App. P. 6.4; *Lobberecht v. Chendrasekhar*, 744 N.W.2d 104, 106 (Iowa 2008). We may uphold the ruling on any ground raised before the district court, even if that ground was not a basis for the court's decision. Summary judgment is appropriate

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law.

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[2] Childers also sought the same damages against Kenneth Logel Jr. and Kenneth Logel, former defendants in this case. The Logel defendants moved for summary judgment on the basis of their release executed in the prior case, and the district court granted their motion. This court affirmed that ruling in *Childers v. Logel*, No. 08-0748 (Iowa Ct. App. Nov. 26, 2008).

[3] Childers's resistance included authorities, but it did not include a separate statement of disputed facts.

Iowa R. Civ. P. 1.981(3); *Lobberecht*, 744 N.W.2d at 106. The moving party has the burden to establish it is entitled to judgment as a matter of law, and the evidence must be viewed in the light most favorable to the nonmoving party. *Hunter v. City of Des Moines Mun. Hous. Auth.*, 742 N.W.2d 578, 584 (Iowa 2007).

Although claims of negligence are seldom capable of summary adjudication, the threshold question in any tort case is whether the defendant owed the plaintiff a duty of care. *Rieger v. Jacque*, 584 N.W.2d 247, 250 (Iowa 1999). "Whether such a duty arises out of the parties' relationship is always a matter of law for the court." *Id*. Questions of foreseeability, however, are ordinarily left for the fact finder. *See Struve v. Payvandi*, 740 N.W.2d 436, 440 (Iowa Ct. App. 2007).

III. Merits.

Childers argues the district court erred in granting summary judgment in favor of Herman because the incident was reasonably foreseeable. Specifically, Childers contends Herman should have foreseen that a customer driving his motor vehicle would strike and injure Ricardo Berry at the CJ Super Wash because of his past experience as an operator of this type of business or because of the place or kind or character of this business.

The parties agree this case is governed by Restatement (Second) of Torts section 344 (1965) (addressing acts of third parties on premises open to the public). This section states as follows:

> A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm

> caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to
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> (a) discover that such acts are being done or are likely to be done, or
>
> (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

Restatement (Second) of Torts § 344, at 223-24. Comment "f" to that section states:

> Since the possessor [of land] is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.

Id. § 344 cmt. f. Our supreme court has stated the "nub" of section 344 is foreseeability. *Martinko v. H-N-W Assocs*., 393 N.W.2d 320, 321 (Iowa 1986).

In this case, the district court determined the incident was not sufficiently foreseeable to Herman such that liability could attach. The court noted that Childers presented no evidence to create a genuine factual dispute as to whether Herman knew or should have known this type of incident had or would likely occur. As the district court stated:

> Defendant's affidavit indicates that he has owned four carwashes over a period of many years, and there has never been an accident at any of them except the present one. Nothing in the nature of the business or its location would indicate the need for additional safety precautions or warnings.
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> Plaintiff agrees that the Restatement (Second) of Torts, subsection 344, as adopted by the Iowa Supreme Court, contains

> the applicable principles of law that govern this case, and that the crucial determination is whether the potential for harm is foreseeable. Plaintiff has not disputed any of the facts that have been set out, arguing only that this type of occurrence is foreseeable and therefore Defendant had a duty to make the premises safe from such an occurrence or warn persons on the premises of the potential harm.
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> . . . .
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> This case is appropriate for disposition by summary judgment. There are no inferences favorable to the Plaintiff that can be drawn from the undisputed facts. Defendant did not know, and had no reason to know, that a third person or persons would likely injure or kill another person lawfully on his premises. Nothing about the nature of the carwash business itself, or Defendant's personal prior experience in the business, would, or should, alert him to the danger. Plaintiff Lori Childers, as Administrator of the Estate of Ricardo Berry, sets forth no specific facts showing there is a genuine issue of material fact, or inference from undisputed facts, for trial and Defendant is entitled to judgment as a matter of law.

We agree. Upon our review of the record, we find no evidence Herman, in his many years in the carwash business, experienced similar incidents at CJ Super Wash or any of the carwashes he owned. We also do not find the specific place and character of CJ Super Wash, or carwashes in general, lend to this type of incident. There is no evidence carwashes are inherently dangerous for children or that children are usually present, let alone unsupervised, at carwashes.

We conclude there is no evidence in this case establishing Herman should have reasonably foreseen the incident that occurred at CJ Super Wash on May 30, 2005, that caused the injuries and subsequent death of Ricardo Berry. *See Martinko*, 393 N.W.2d at 321-22. The district court did not err in granting summary judgment in favor of Herman. *See, e.g*., *Galloway v. Bankers Trust Co.*, 420 N.W.2d 437, 440 (Iowa 1988); *Struve*, 740 N.W.2d at 440. We therefore affirm the judgment of the district court.

AFFIRMED.