IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON JANUARY 1999 SESSION

PAMELA D. GANTT,	)	Shelby Circuit
	)	
Plaintiff/Appellant	)	Appeal No. 02A01-9801-CV-00009
	)	
v.	)	
	)	
K-MART CORPORATION, DARYL WARD, FEDERAL SECURITY CORPORATION and TRACEY HORTON,	)	
	)	
Defendants/Appellees	)	

FILED

February 17, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

APPEAL FROM THE CIRCUIT COURT OF SHELBY COUNTY
AT MEMPHIS
THE HONORABLE JAMES RUSSELL, JUDGE

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AFFIRMED **WILLIAM H. INMAN, Senior Judge**

CONCUR:

W. FRANK CRAWFORD, JUDGE

DAVID R. FARMER, JUDGE

Plaintiff alleged in her Complaint, and again in her Amended Complaint, that, on July 24, 1995, while shopping at a K-Mart located at 2700 Getwell Road in Memphis, Tennessee, she was knocked to the floor by a fleeing shoplifter and sustained injuries as a result. She filed this action against K-Mart Corporation ("K-Mart") and its loss control manager working at that store at the time of the incident, Daryl Ward ("Ward"), and the Federal Security Corporation ("Federal Security"), the subcontractor who was providing additional security personnel at the store, and one of its security guards, Tracey Horton ("Horton"), claiming that their negligence in pursuing the shoplifter was the proximate cause of her injuries.

All defendants answered the Complaint, asserting that the injuries complained of were proximately caused by the intentional act of the fleeing shoplifter, and not through any act or omission of the defendants.

The motions of the defendants for summary judgment were granted. The plaintiff appeals, and the dispositive issue is whether the motions were properly granted. Where there is no conflict in the evidence as to any material fact, the question on appeal is one of law, and the scope of review is *de novo* with no presumption of correctness accompanying conclusions of law. *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87 (Tenn. 1993).

I

Plaintiff was shopping at the K-Mart located at 2700 Getwell Road in Memphis on July 24, 1996, about 3:30 in the afternoon. She testified that she had finished shopping and was in the foyer, a few feet from exiting the building, when she heard an unidentified individual yell: "Hey, stop. There he is, there he is, stop him." She did not know who made this statement. She thought the uniformed and plain clothes security guard were somewhere behind her, because she never saw

them before the incident, and she also testified that there were other customers behind her at the back of the foyer.

Plaintiff had previously become aware of a man walking behind her, because she had seen his hand, and had zipped up her purse. She testified that the person walking behind her knocked her down, and two security guards, one in uniform and one in plain clothes, pursued this person out of the store. She stated that the security personnel who hurried past her may have "brushed my arm," but that neither caused an injury.

Daryl Ward testified that, as loss control manager for the Getwell K-Mart, he was stationed in the monitor room at the back of the store, and observed an individual shoplifting. He observed the shoplifter continuously until he was about to leave the foyer and go through the doors to the outside, at which point he instructed Mr. Horton over a two-way radio to stop the shoplifter. He testified that he did not see the shoplifter or Tracey Horton running inside the store.

Tracey Horton testified that he was at his regular station in the foyer near the outside doors to the store, when Ward radioed him that he had a shoplifter under surveillance, whom he described. Horton's radio was on the shoulder of his uniform by his left ear, with the volume turned down so no one else could overhear the transmissions. He radioed Horton to tell him that the shoplifter was passing the cashier area. As the shoplifter entered the foyer, he walked past Horton, who was near the exit. When the shoplifter put his hand on the door to exit, Horton asked him to stop, and grabbed his other hand to prevent him from leaving. The shoplifter jerked away, but did not begin to run until he was outside the door. There were no customers between Mr. Horton and the suspect, or in the immediate area of the outside doors, but there were customers in the back of the foyer.

Jocelyn Key was an alleged eye witness. Her testimony by deposition for proof is admittedly unclear. Ms. Key first testified that, on her way *into* the K-Mart, she observed a uniformed security guard rush out of the store, brushing by the plaintiff and causing her to fall. She also testified that she was on her way *out* of K-Mart when she observed plaintiff falling to the floor. Ms. Key finally testified that she and the plaintiff, and a uniformed security guard, were all in the doorway together side by side at the time plaintiff was knocked to the floor, although Ms. Key was unsure whether she was entering the building or leaving it. She heard no shouting or yelling.

The plaintiff testified:

> I started to leave the building, and as I started to leave, I noticed a gentleman walking out behind me. I heard from within the store *someone* say, "Hey, there he is, there he is, stop him," and the gentleman coming behind me hit me in the back and knocked me down.

She further testified that she did not know who shouted the alleged statement, but that it came from behind her as she entered the foyer of the store.

Plaintiff testified that she did not observe any security person, or any other employee of K-Mart "chasing" the shoplifter or "running" prior to her being knocked down by the unidentified individual. To reiterate, the plaintiff testified that she heard an unknown individual shout, "Hey, stop. There he is, there he is, stop him," that she was knocked down from behind by an unknown individual, and that she observed security personnel pursue the unknown individual outside the store.

The witness Horton testified that one or more of the cashiers "indicated" that Ward knocked the plaintiff to the floor. That this testimony is inadmissible and of no probative value clearly appears and further elaboration is unnecessary. He also testified that the K-Mart location is a high crime area, with 70 - 80 shoplifter

apprehensions monthly. At the time of the incident complained of, the store was in the process of liquidation.

After the motions for summary judgments were granted, the plaintiff filed the affidavit of Fred Cruser, Jr., a licensed Protection Professional and private investigator. He opined that the defendants deviated from the required standard of care practiced by security professionals by "knocking down the plaintiff, yelling at the shoplifter, running after him and attempting to chase him inside the store."

Aside from the fact that this affidavit was not timely filed and was not initially considered by the trial court, it is replete with asserted facts not in the record, and therefore is without probative value.

If the record reveals a disputed issue of fact (1) as to the identity of the person who ran into the plaintiff, or (2) if the record reveals a disputed issue of fact as to whether or not the shoplifter was being pursued by K-Mart employees in a heedless manner without proper care for the safety of store patrons, or (3) if the record reveals a disputed issue of fact as to whether the shoplifter was being pursued by security personnel in the course of their duties with K-Mart, and such pursuit was heedless and in disregard of the safety of store patrons, the motions for summary judgment were improvidently granted.

II

In ruling upon motions for summary judgment pursuant to Rule 56 of the Tennessee Rules of Civil Procedure, these issues must be determined: (1) does a factual dispute exist; (2) is the disputed fact material to the outcome of the case; and (3) does the disputed issue create a genuine issue for trial? *Byrd v. Hall,* 847 S.W.2d 208, 214 (Tenn. 1993). In passing upon the motion the court is to take the strongest legitimate view of the evidence of the non-moving party, rejecting all countervailing evidence.

In the case at Bar, the plaintiff's testimony can only reasonably be read as stating that the shoplifter knocked her down in order to flee. The testimony of the witness Key is so conflicting as to be nonprobative, and the testimony of Ward and Horton is not controverted. Whoever yelled at the shoplifter, which inferentially gave him impetus, is not identified.

It is undisputed that the shoplifter who, according to plaintiff's testimony, knocked her to the floor, had been observed on video surveillance concealing merchandise on his person and attempting to leave the store. It is also undisputed that, pursuant to K-Mart policy, the individual was allowed to enter the foyer with apprehension not being attempted until he actually began to exit the store. There is no evidence in the record that security personnel were pursuing the shoplifter in the store, or that apprehension was attempted before the shoplifter began to go through the outside doorway. We assume as true Plaintiff's testimony that she heard someone shout, "Hey, stop. There he is, there he is, stop him," but she testified that she did not know who made this statement, and no one else in the area heard a shout.

To summarize, taking the testimony of the Plaintiff as true, and disregarding all countervailing evidence, as she was about to leave the store through the outside door, she was knocked to the floor by a shoplifter, who was attempting to leave the premises with stolen merchandise. It is undisputed that this individual had been observed on video surveillance concealing stolen merchandise, that he had been under surveillance for some time as he wandered throughout the store, and, pursuant to K-Mart policy, apprehension was only attempted as he began to go through the outside door to leave the premises, at which point the shoplifter pulled away and knocked plaintiff to the ground from behind.

For purposes of a motion for summary judgment, in order for a disputed fact to be "material," or for the material fact to present a "genuine issue for trial," the disputed fact must be determinative of the outcome of the claim or defense to which the motion was directed. *Byrd*, 847 S.W.2d at 215.

There is no evidence that any attempt at apprehension was made until the suspect began to exit the store, and even then, the evidence merely shows that the security personnel only placed a hand upon the suspect and asked him to stop as he attempted to exit through the outside door.

T.C.A. § 40-7-116(d), which is concerned with a merchant's use of force necessary to detain shoplifters and to prevent the loss of merchandise, provides that the merchant has the authority to protect itself by using reasonable force to detain persons attempting to steal merchandise, and provides, in pertinent part:

> (d) The merchant may use a reasonable amount of force necessary to protect such merchant, to prevent escape of the person detained, or to prevent the loss or destruction of property.

Although the issue of injury to third persons by fleeing shoplifters, especially in light of the statutory authority contained in T.C.A. § 40-7-116(d), has not yet been addressed in Tennessee, other jurisdictions have held that the merchant is not liable, as a matter of law, for the intentional acts of shoplifters.

In a case analogous to the one at Bar, with the exception of a higher degree of force being used by the merchant in that case, Maryland's highest court ruled that judgment as a matter of law in favor of the merchant was appropriate. *Giant Food, Inc. v. Mitchell,* 640 A.2d 633 (Md. 1994). In *Giant Food,* the plaintiff had just entered the store when she was knocked down by a fleeing shoplifter in the foyer outside the store, and the pursuing security personnel chasing the shoplifter then fell on top of her. The store security personnel had stopped the shoplifter in the foyer, asked to examine the contents of his bags, and then wrestled with the

shoplifter in the foyer, attempting to retain the stolen items. The shoplifter broke free and ran over the plaintiff in the process of escaping.

The plaintiff in *Giant Food* contended that a merchant who confronts a shoplifter should foresee that the shoplifter may flee. *Giant Food* contended that its employee acted reasonably as a matter of law, under the circumstances, in an attempt to prevent theft of its merchandise. The Maryland court ruled that Giant Foods was entitled to judgment as a matter of law, in light of its statutory authority to regain its stolen merchandise (a statute which mirrors the language in T.C.A. § 40-7-116), and in light of the fact that unreasonable force was not employed:

> In the case sub judice we may assume, without affecting our analysis, that the shoplifter intentionally collided with [plaintiff]. We shall also assume that such an intentional tort or crime in the course of flight by the thief, with pursuit by the storekeeper, was not so remote as to fail to generate a jury issue on whether there was proximate causation between negligence, if any, on the part of [defendant's employee], and [plaintiff's] injuries. But, as we shall explain more fully below, the possibility of flight by the shoplifter and the possibility of injury to a customer do not necessarily create a jury issue on whether [defendant's employee] was negligent.
>
> By focusing exclusively on the foreseeability and proximate causation the Court of Special Appeals failed to give any effect to Giant's privilege to protect its property from theft. Any property owner, including a storekeeper, has a . . . privilege to detain against his will any person he believes has tortiously taken his property. [citation omitted].
>
> In any event, even if [defendant] did not satisfy fully each of the limiting conditions on the exercise of the privilege described in § 100 of the Restatement 2d of Torts, [defendant] had probable cause to believe that the young man headed out of the Giant store had shoplifted from Giant. Under those circumstances Dye enjoyed a statutory privilege, vis-a-vis the shoplifter, to detain him, in the sense that neither [the employee] nor Giant could be held liable for detention, slander, malicious prosecution, false imprisonment, or false arrest of the person detained or arrested. [citation omitted].
>
> If the Court of Special Appeals were correct (as we assume it was) as to the foreseeability of some shoplifters' running when confronted, and if that foreseeability, without more, were sufficient evidence of primary negligence on the storekeepers part in cases of the subjective type, then the policy underlying the common law and

> statutory privileges, reviewed above, would be considerably undermined.

In *Butler v. K-Mart,* 432 So.2d 968 (La.App. 1983), the plaintiff was about to enter a K-Mart when a fleeing shoplifting suspect flung open the door, knocking her down. The court affirmed the trial court's grant of summary judgment, holding that the plaintiff's assertion that the store was negligent for chasing the suspect inside the store was insufficient to avoid summary judgment, since the plaintiff admitted in her deposition that she did not see what happened prior to being knocked to the ground.

> The incident causing the injury suffered by plaintiff was not foreseeable by defendant. Although it is arguable that shoplifting is a foreseeable occurrence, the likelihood that a shoplifter would bolt from the store, throw open a door and injure someone is remote. Defendant cannot be held liable for the actions of a shoplifting suspect in this case.

The Florida Court of Appeals addressed the issue of foreseeability of a shoplifter intentionally injuring a third party in *Graham v. Great Atlantic & Pacific Tea Company,* 240 So.2d 157 (Fla. App. 1970). In *Graham,* the plaintiff was injured when an apprehended shoplifter broke and ran from store security personnel. The *Graham* court upheld the trial court's dismissal of the complaint, ruling that, absent some sort of warning that the shoplifter was going to become violent when asked to stop, the store did not breach its duty of reasonable care in attempting to detain a suspected shoplifter to prevent removal of stolen merchandise. *Id.* at 159.

See also, K-Mart v. Lentini, 650 So.2d 1031 (Fla. App. 1995) (upholding summary judgment for the defendant merchant where plaintiff knocked over by a fleeing shoplifter); *Tabary v. D.H. Holmes Co., Ltd.,* 542 So.2d 526 (La. Ct. App. 1989) (same result); *Brown v. Jewel Companies, Inc.,* 530 N.E.2d 57 (Ill. App. 1988) (upholding dismissal of complaint against shopkeeper where plaintiff pushed down

by fleeing shoplifter and ruling that the consequence of a rule against pursuit would be a substantial encouragement to shoplifting).

Plaintiff argues that the Supreme Court in *McClung v. Delta Square Ltd. Partnership,* 937 S.W.2d 891 (Tenn. 1996), supports her argument that defendants should have foreseen that shoplifting could occur at their store, and therefore, defendants are liable for the intentional act of the shoplifter in knocking plaintiff to the floor.

McClung stands for the proposition that merchants must install reasonable security measures, balanced against the degree of potential injury to its patrons which the merchant knows could occur through past experience. There is no evidence in the record of any patron of K-Mart being knocked down during an apprehension by security at any time in the past, and no evidence of insufficient security measures by K-Mart. On the other hand, there is ample evidence on the record of routine patrols of the grounds by uniformed and plain clothes security guards, as well as sophisticated video surveillance of the premises. While *McClung* removed the harsh common law rule of non-liability for third party criminal acts, and requires merchants to install reasonable security measures, it does not render a merchant the insurer of its patrons' safety from third party criminal activity.

Finally, the plaintiff argues that the trial court erred by "taking judicial notice of a non-adjudicative fact." This contention is derived from language in the order granting summary judgment to defendants K-Mart and Daryl Ward, which provides that the order is based, in part, upon the court's "knowledge that a merchant has authority to apprehend a suspected shoplifter after the suspect has passed the cashier(s)." We think the trial court was applying the statute providing merchants with authority to detain thieves removing stolen merchandise, as

codified at T.C.A. § 40-7-116(d), to the facts of this case. It was not inappropriate for the trial court to apply the statutes of this State to the facts of this case.

Plaintiff argues, in effect, that the trial judge should have recused himself notwithstanding that he disclosed to all parties that he had formerly represented K-Mart in his private practice, and offered to recuse before trial. The plaintiff concedes that the trial court fully disclosed its prior involvement with K-Mart, stated his firm belief that this would not affect his judgment in this matter, and all counsel agreed that there was no conflict.

The judgment is affirmed at the costs of the appellant.

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William H. Inman, Senior Judge

CONCUR:

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W. Frank Crawford, Judge

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David R. Farmer, Judge