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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1093

Filed: 5 July 2017

Madison County, No. 14 CVS 178

KALEB LEE ROBERTS, Plaintiff,

v.

MARS HILL UNIVERSITY, THE BOARD OF TRUSTEES OF MARS HILL UNIVERSITY, Defendants.

Appeal by Plaintiff from order entered 25 July 2016 by Judge J. Thomas Davis in Madison County Superior Court. Heard in the Court of Appeals 23 March 2017.

*The Law Offices of Jason E. Taylor, P.C., by Lawrence B. Serbin, for the Plaintiff-Appellant.*

*Batten Lee PLLC, by Gary Adam Moyers and Michael C. Allen, for the Defendants-Appellees.*

DILLON, Judge.

Kaleb Lee Roberts (“Plaintiff”) appeals from the trial court’s grant of Defendants’ motion for summary judgment. We affirm.

I. Background

In this action, Plaintiff is suing Mars Hill University (the “University”) for an assault he endured from fellow students in his dormitory.

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Plaintiff was a resident of Myers Hall, a residence hall at the University. Plaintiff was the victim of a prank which involved a cup of liquid being placed over his dorm room door so that it would fall when the door was opened. As Plaintiff opened the door, the cup of liquid fell, spilling onto Plaintiff and the floor in his room. Plaintiff subsequently approached several students he believed had been involved, and the interaction escalated into a physical altercation. During the altercation, Plaintiff suffered serious injuries, including several fractures.

Following the altercation, the five students involved were suspended pending a hearing before the University's Student Conduct Board. Plaintiff and his roommate were relocated to a new dormitory the following morning. Plaintiff ultimately withdrew from the University and enrolled at a different college.

In June 2014, Plaintiff filed a complaint against the University and its Board of Trustees,<sup>1</sup> seeking damages for negligence and negligent infliction of emotional distress, and punitive damages for the University's "willful and wanton disregard for the rights of Plaintiff and gross negligence." The University filed an answer, motion to dismiss, and motion for summary judgment. After hearing arguments on the University's motions, the trial court granted summary judgment in favor of the University. Plaintiff timely appealed.

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<sup>1</sup> Plaintiff also named the individual students involved in the altercation in his complaint, seeking damages for assault and battery. However, Plaintiff subsequently dismissed these claims; therefore, they are not before us on appeal.

II. Analysis

On appeal, Plaintiff's sole argument is that the trial court erred in granting Defendants' motion for summary judgment because he properly established each element of negligence. Our Court considers a trial court's grant of summary judgment *de novo*. *Bumpers v. Cmty. Bank of N. Virginia*, 367 N.C. 81, 87, 747 S.E.2d 220, 226 (2013).

In order to sustain an action for negligence, and to survive a motion for summary judgment, a plaintiff must establish (1) that the defendant owed the plaintiff a legal duty, (2) that the defendant breached that duty, and (3) that the plaintiff's injury was proximately caused by the breach. *Petty v. Cranston Print Works Co.*, 243 N.C. 292, 298, 90 S.E.2d 717, 721 (1956). Actionable negligence occurs when a defendant owing a duty fails to exercise the degree of care that a reasonable and prudent person would exercise under similar conditions, *Hart v. Ivey*, 332 N.C. 299, 305, 420 S.E.2d 174, 177-78 (1992), or where such a defendant of ordinary prudence would have foreseen that the plaintiff's injury was probable under the circumstances, *Pittman v. Frost*, 261 N.C. 349, 352, 134 S.E.2d 687, 689 (1964). Thus, summary judgment is properly granted in a negligence action "where there are no genuine issues of material fact and the plaintiff fails to show one of the elements of negligence." *Willis v. City of New Bern*, 137 N.C. App. 762, 764, 529 S.E.2d 691, 692 (2000).

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A. Duty of Care & Foreseeability

Plaintiff contends that the University's negligent omissions resulted in his injuries. In cases involving omissions, a claim for "negligence may arise where a 'special relationship' exists between the parties." *Davidson v. Univ. of N.C. at Chapel Hill*, 142 N.C. App. 544, 554, 543 S.E.2d 920, 926 (2001). However, "the student-university relationship[,] standing alone, does not constitute a special relationship giving rise to a duty of care." *Id.* at 556, 543 S.E.2d at 928.

Generally, a defendant is not liable for the intentional criminal acts of third parties. *See Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013) ("The criminal acts of a third party are generally considered unforeseeable and independent, intervening causes absolving the defendant of liability.") (internal marks omitted)). Nevertheless, we have previously held that a college can be liable for a criminal assault on one of its students by a third party under certain circumstances. *Brown v. N.C. Wesleyan Coll., Inc.*, 65 N.C. App. 579, 583, 309 S.E.2d 701, 703 (1983). In these situations, the foreseeability of the criminal assault "determines a college's duty to safeguard its students from criminal acts of third persons." *Id.* In *Brown*, which involved the assault and murder of a student at a North Carolina college, our Court considered "the forecasts of evidence" in order to determine whether there was a repeated course of conduct which should have put the

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defendant on notice that it was reasonably foreseeable that an attack on the plaintiff might occur. *Id.* at 583-84, 309 S.E.2d at 703.

Here, Plaintiff presented evidence in his complaint and in the form of deposition testimony tending to show that forty-one percent (41%) of the University Police Department's ninety-five (95) calls on campus involved Plaintiff's dormitory, Myers Hall, an average of one call every two months over a period of approximately six years. In the two months prior to the attack on Plaintiff, there were eleven incidents in Myers Hall which required a response from campus security.

Although we acknowledge that "[t]he most probative evidence on the question of whether a criminal act was foreseeable is evidence of prior criminal activity committed[,]" *Connelly v. Family Inns of Am., Inc.*, 141 N.C. App. 583, 588, 540 S.E.2d 38, 41 (2000), we conclude that in this particular case, Judge Davis was correct in ruling that Plaintiff's forecast of evidence was insufficient to show the University breached some legal duty to safeguard Plaintiff against the physical attack by other students. The eleven incidents to which Plaintiff refers involving campus security only included three assaults: a sexual assault, a fight between two siblings, and a fight between former fraternity brothers. These incidents are distinguishable from the attack on Plaintiff and do not constitute sufficient evidence of "repeated incidents of criminal activity" which would establish foreseeability as a matter of law. *See Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 642, 281 S.E.2d 36, 40 (1981).

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Plaintiff did not report any prior incidents of harassment or violence between himself and the specific students involved, and the students did not have any prior history of criminal behavior or violations of the Student Code of Conduct. We agree with the University that in his attempt to establish the element of foreseeability, Plaintiff has cast too wide a net, including incidents which are not close enough in type or location to show that the University could have foreseen his particular injury. *See Connelly*, 141 N.C. App. at 588, 540 S.E.2d at 41 (noting that location, type, and amount of prior crimes is relevant when considering evidence of prior criminal activity).

Furthermore, we find that the ninety-five (95) calls to campus security over the course of almost six years is insufficient to raise a triable issue regarding foreseeability, based on evidence that these calls included reports of physical assaults, fire alarms, alcohol and drug violations, larcenies, and break-ins. *See id.* at 589, 540 S.E.2d at 42 (concluding that public drunkenness, shoplifting, vandalism and disorderly conduct were insufficient to establish the foreseeability necessary to give rise to a legal duty where the subject criminal activity included breaking and entering and robbery); *Liller v. Quick Stop Food Mart, Inc.*, 131 N.C. App. 619, 624, 507 S.E.2d 602, 606 (1998) (refusing to consider shoplifting and “gas driveoffs” as grounds to establish foreseeability where the subject criminal activity was armed robbery). Accordingly, we cannot conclude that the evidence forecasted by Plaintiff

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was sufficient to give rise to a duty of the University to safeguard against the specific harm that Plaintiff suffered. *See Brown*, 65 N.C. App. at 583, 309 S.E.2d at 703.

B. Causation

Assuming *arguendo* that Plaintiff successfully established both duty *and* breach of that duty by the University, we conclude that Plaintiff failed to demonstrate that “the injury would not have occurred but for the [defendants’] negligence.” *Liller*, 131 N.C. App. at 624, 507 S.E.2d at 606 (citing *Rorrer v. Cooke*, 313 N.C. 338, 361, 329 S.E.2d 355, 369 (1985)). Plaintiff’s primary argument regarding the issue of proximate cause is that the University should have placed more security guards on campus and put security cameras in the residence halls in order to deter incidents of this type.<sup>2</sup> We disagree with Plaintiff that the testimony of Plaintiff’s expert regarding these particular measures is sufficient to create a genuine issue of material fact as to the element of proximate cause.

While security patrols and cameras certainly help to promote a safer environment, neither of these tools can entirely deter physical assault or criminal activity in general. *See Braswell v. Braswell*, 330 N.C. 363, 376, 410 S.E.2d 897, 905 (1991) (“It is a sad but certain fact that some individuals commit despicable acts for which neither society at large nor any individual other than those committing the

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<sup>2</sup> We note, but need not address, the University’s argument that Plaintiff was contributorily negligent due to his failure to “exercise due care for his own safety and welfare” when he sought out and confronted the students who committed the prank.

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acts should be held legally accountable.”). There was evidence that the University did, in fact, have a security guard on call at the time of the incident who was dispatched to Myers Hall shortly after receiving a report of a noise complaint. In addition, Plaintiff testified that while the altercation began outside his room, he was immediately punched and fell into his dorm room, an area which certainly would not have been monitored by a security camera had the University installed cameras in the residence hall. Accordingly, we are not persuaded by Plaintiff’s argument on this point.

AFFIRMED.

Judges BRYANT and MURPHY concur.

Report per rule 30(e).