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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-214

Filed: 2 June 2020

Surry County, No. 17-CVS-1650

SHEILA B. MARLOW and JERRY A. MARLOW, Plaintiffs,

v.

NORTHERN HOSPITAL DISTRICT OF SURRY COUNTY and MARK LEE APPLER, M.D., Defendants.

Appeal by Plaintiffs from judgment entered 15 October 2018 by Judge David L. Hall in Superior Court, Surry County. Heard in the Court of Appeals 3 September 2019.

J. Clark Fischer for Plaintiff-Appellants.

Brotherton Ford Berry & Weaver, PLLC, by Demetrius Worley Berry and Daniel J. Burke, for Defendant-Appellees.

McGEE, Chief Judge.

Sheila B. Marlow (“Ms. Marlow”) and Jerry A. Marlow (“Mr. Marlow”) (together, “Plaintiffs”) appeal the trial court order granting summary judgment for Northern Hospital District of Surry County (“the Hospital”) and Mark Lee Appler

(“Dr. Appler”) (together, “Defendants”). We affirm the trial court’s grant of summary judgment for Defendants.

I. Factual and Procedural Background

Ms. Marlow entered the office of Northern Gastroenterology, a clinic in Mount Airy, North Carolina, operated by Northern Hospital District of Surry County, shortly before a 2:00 p.m. appointment on 11 November 2014. Ms. Marlow testified during a deposition that she arrived around 1:55 p.m. and there were no other patients in the office waiting room when she checked in, but after a “couple of minutes[,]” Caleb Hamm (“Mr. Hamm”) entered the waiting room and stood next to her.

Ms. Marlow testified that, after Mr. Hamm arrived in the waiting room, she walked away and sat in a chair on the other side of the waiting room because Mr. Hamm was “irate [and] demanding to see a doctor.” Ms. Marlow testified that Mr. Hamm said he had a “brain tumor,” that he “th[ought] [he was] going to die,” and that he was sick. She testified the receptionist, Betty Wilhite (“Ms. Wilhite”), told Mr. Hamm his doctor was not at the clinic but that he was at the hospital. Ms. Marlow testified that Mr. Hamm “then []said I’m going to kill a doctor.” Ms. Marlow said she “saw there was going to be some confrontation with the receptionist and him.”

Mr. Hamm continued talking to Ms. Wilhite, saying “he was sick, that he had a brain tumor and he needed to see a doctor.” Ms. Marlow testified Ms. Wilhite asked Mr. Hamm if he needed to go to the emergency room and if she needed to call an

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ambulance for him. Mr. Hamm responded “that’s what I need, a ambulance, a ambulance. Call a ambulance.” She testified she heard Dr. Appler say to the receptionist “tell him I’m looking at his chart. When his grandmother gets here, I will see him.” Ms. Wilhite relayed that message to Mr. Hamm and she told him to sit down and he did so.

Ms. Marlow testified that after Mr. Hamm sat down, he talked to her, saying “I’m sick. Do you understand? I’m sick. I think I have a brain tumor. Do you understand?” He was grabbing his head and pointing at Ms. Marlow. She responded that she was sorry and did not say anything else to Mr. Hamm. According to Ms. Marlow, Mr. Hamm put his hands on the chair in which he was sitting and started moving it. He then got up, walked toward the receptionist and toward where Ms. Marlow was sitting and said “I’m going to kill a doctor.” Ms. Marlow testified Mr. Hamm then “grab[bed] the picture off the wall, thr[e]w[] it down, and start[ed] jumping up and down on it.”

Ms. Marlow testified Mr. Hamm’s grandmother (“Grandmother”) entered the clinic, saw him, and “t[old] him to get control of hisself and sit his hind-end down right now,” and she sat down across from him. Because of the office layout, the interactions and Mr. Hamm’s smashing the picture frame were not visible to the office staff. Ms. Marlow testified the receptionist twice asked her to come to the desk to retrieve her insurance information. Ms. Marlow stood up slowly and walked past Mr.

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Hamm while he was jumping up and down, facing him as she walked. She said his grandmother was telling him to sit down but he was not complying. Ms. Marlow said she went to the reception desk and the receptionist handed her cards to her. Ms. Marlow then said, “I could hear jumping or some kind of sounds. And I realized in my peripheral vision something was coming towards me. And I just put my hands up to my face and I said stop, stop now, please. And he grabbed me by the hair of my head.” She said he “grabbed [her], jerked [her] by the hair of [her] head, and he did not let go of the grip.” She testified Mr. Hamm was jerking her so hard she leaked urine. She also heard a voice telling Mr. Hamm to turn her loose; however, she could not see what was occurring while Mr. Hamm grabbed her because “he had [her] face buried in his chest.”

Ms. Wilhite, the clinic’s receptionist, and Lori Beasley (“Ms. Beasley”), the clinic’s full-time nurse, were also deposed. Ms. Wilhite testified Mr. Hamm came to the office window and said he was ill and that he wanted to see Dr. Orli, his physician. Ms. Wilhite responded Dr. Orli was not at the clinic. Mr. Hamm said he had a “tumor in my head,” and Ms. Wilhite told him if he sat down, she would have someone see him. Ms. Wilhite described Mr. Hamm as “upset” but said “[h]e didn’t really show a lot of anger.” She testified that Dr. Appler saw that Mr. Hamm was upset and asked Ms. Beasley to take him into a room. She testified that she told Mr. Hamm that “as far as [she] knew he didn’t have a brain tumor,” and that he could talk to Dr. Appler,

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although Dr. Orli was not there. She further testified she asked Mr. Hamm where his grandmother was and that she could see her coming slowly at the window. Contrary to Ms. Marlow's testimony, Ms. Wilhite testified that no patients were in the waiting room when Mr. Hamm came in and Mr. Hamm was already talking to her at the window when she saw Ms. Marlow come in. Ms. Wilhite testified that, as Mr. Hamm was standing by the window, Ms. Marlow came up to the window, gave Ms. Wilhite her cards, and told Mr. Hamm either "you need to calm down or you need to behave." Mr. Hamm went on the other side of the L-shaped office, where she could not see, and she heard "a noise," "like something fell," "like the picture fell or something." Ms. Wilhite did not remember Mr. Hamm saying the words "I'm going to kill a doctor" at any time.

Ms. Wilhite testified Ms. Marlow came to her desk for her cards "and she made the remark [to Mr. Hamm] about you need to behave or something, and he grabbed her hair." Ms. Wilhite testified Ms. Marlow's comment "egged [Mr. Hamm] on I believe." Ms. Wilhite hit the panic button when Mr. Hamm grabbed Ms. Marlow and she hit the button three times. She testified Dr. Appler and Justin Hunter ("Mr. Hunter") "tr[ie]d to get [Mr. Hamm] off [Ms. Marlow]." She testified another man came in from outside after seeing what was happening through the window and tried to assist with getting Mr. Hamm off. She called 911 after hitting the panic button three times. After Mr. Hamm was separated from Ms. Marlow, Dr. Appler restrained

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him by his arms until the police arrived. Ms. Wilhite testified the police arrived almost simultaneously with when Mr. Hamm released Ms. Marlow's hair. She testified she thought Mr. Hamm held Ms. Marlow by the hair for "at least five or six minutes" but "[i]t might have been longer."

Ms. Wilhite testified she had seen Mr. Hamm come in as a patient with his Grandmother "two to three times" and that "[h]e had always been calm and listened to his grandmother." She testified there had never been any problems with him before. Ms. Wilhite also testified that, in her opinion, "there was something . . . going on with him," that "[h]e didn't act his age" and "[y]ou could tell he was . . . sort of on the slow side."

Ms. Beasley, the resident nurse, testified that Mr. Hamm was "a little upset or a lot upset saying he needed to see Dr. Orli, that he had a brain tumor," when he came to the clinic. She went to get Dr. Appler to look at Mr. Hamm's MRI and Dr. Appler told her to put Mr. Hamm in a room. She did not have a chance to put Mr. Hamm in a room because, when she got back to the reception desk, Mr. Hamm was pulling Ms. Marlow's hair. Ms. Beasley could not recall "if he was already doing it or he did it right when [she] got up there." She agreed that he was "quite agitated" but she had never seen him misbehave before. Ms. Beasley testified that Mr. Hamm's referral notes indicated he had been diagnosed as autistic.

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Cindy White (“Ms. White”), an employee of Northern Hospital who worked on information systems and was present at the clinic on 11 November 2014, was also deposed. Ms. White testified she was at the reception desk with Ms. Wilhite, who was talking with Ms. Marlow, when Mr. Hamm came up behind Ms. Marlow and grabbed her by the hair. She testified Ms. Wilhite hit the panic button and Dr. Appler and Mr. Hunter came running out to get him off her. She further testified, “I think Dr. Appler even said something about pushing the panic button when it happened.” She recalled that Mr. Hamm was “pacing”—“walking, you know, back and forth.”

Doctor Mark Appler (“Dr. Appler”), also testified that he was the only physician at the clinic on 11 November 2014 and was the owner of the office of Northern Gastroenterology, which he leased to Northern Hospital. He testified that Ms. Wilhite, Ms. White, Ms. Beasley, and Mr. Hunter were working at Northern Gastroenterology on 11 November 2014. He said Northern Hospital had mandatory emergency training modules, but he was not familiar with when specific modules came into place or what they involved. He testified the office, as part of its emergency system, had two panic buttons routed to 911. Dr. Appler did not recall any time from when the buttons were installed in 2001 to the date of the incident on 11 November 2014 when the buttons were used.

Dr. Appler testified Ms. Beasley told him there was a patient of Dr. Orli’s at the clinic concerned about a brain tumor and needing a ride to the hospital. He looked

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at the CT scan Dr. Orli had ordered and saw that it was normal, so he told Ms. Beasley to get Mr. Hamm into a room so he could tell him he did not have a brain tumor and show him the CT scan. He recalled hearing someone saying “come over here and sit down” as though someone had a “four-year-old with them[.]” He heard “some noise that [his] first thought was that this four-year-old had perhaps pulled over a plant or such on himself.” He thought “that sounds like something I need to go out and see what’s going on[.]” so he and Mr. Hunter went to the lobby.¹ Dr. Appler testified he saw Mr. Hamm had grabbed Ms. Marlow, but he did not actually see him grab her. He and Mr. Hunter each took one of Mr. Hamm’s arms to try to pull him off. He testified that a third man came in from outside and grabbed Mr. Hamm around the chest. Dr. Appler told Ms. Wilhite to push the panic button and she replied that she had. Dr. Appler testified “I thought [.]very good.[.] I put that there for a purpose. It sat there for years and . . . [Ms. Wilhite] did her job by pushing the alarm.” With the assistance of the third man, Dr. Appler testified he and Mr. Hunter were able to “pry his fingers off” and “g[e]t him down on the floor.” They had to hold Mr. Hamm down one or two minutes until the police arrived. Dr. Appler further testified that Mr. Hamm was quite agitated, “[b]ecause he was repeating the same thing over and over again[.]” but he did not remember him making any threats or using profanity.

¹ The parties also deposed Mr. Hunter, whose testimony regarding the event is consistent with Dr. Appler’s.

Plaintiffs filed their complaint against Defendants on 6 November 2017, based on the 11 November 2014 incident. Defendants filed an answer 2 January 2018, denying Plaintiffs' claim, asserting defenses, and moving for summary judgment. Superior Court Judge David L. Hall heard Defendants' motion for summary judgment on 17 September 2018. The Court entered its written order granting summary judgment for Defendants on 13 November 2018. Plaintiffs appeal.

II. Analysis

The sole error Plaintiffs assert on appeal is that "the trial court erred in granting summary judgment for Defendants when Plaintiffs forecast evidence from which a jury could have reasonably concluded that Defendants' conduct in dealing with an agitated and threatening patient constituted actionable negligence." This Court's standard of review on a trial court's order of summary judgment is well-established:

Under [N.C. Gen. Stat. § 1A-1], Rule 56(a), summary judgment is properly entered 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 any party is entitled to a judgment as a matter of law. In a motion for summary judgment, the evidence presented to the trial court must be admissible at trial, and must be viewed in a light most favorable to the non-moving party. We review a trial court's order granting or denying summary judgment *de novo*. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal. The party moving for summary judgment bears the burden of establishing that there is no triable issue of material fact. This burden may be met by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery

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that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim.

Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial.

Patterson v. Worley, ___ N.C. App. ___, ___, 828 S.E.2d 744, 747 (2019) (quoting *Blackmon v. Tri-Arc Food Sys, Inc.*, 246 N.C. App. 38, 41-42, 782 S.E.2d 741, 743-44 (2016)).

To prevail in a common law negligence action, a plaintiff must establish that the defendant owed the plaintiff a legal duty, that the defendant breached that duty, and that the plaintiff's injury was proximately caused by the breach. 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, or where such a defendant of ordinary prudence would have foreseen the plaintiff's injury was probable under the circumstances.

Martishius v. Carolco Studios, Inc., 355 N.C. 465, 473, 562 S.E.2d 887, 892 (2002) (internal citations omitted). In *Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998), our Supreme Court abolished the historical common-law trichotomy between the standard of care landowners owe to invitees, licensees, and trespassers, instead adopting “a true negligence standard” and holding that in premises-liability cases, the standard of care a property owner owes to persons entering the owner's property is to “exercise reasonable care in the maintenance of their premises for the protection of lawful visitors.” *Id.* at 632, 507 S.E.2d at 892. “Whether the care provided is

reasonable must be judged against the conduct of a reasonably prudent person under the circumstances.” *Lorinovich v. K Mart Corp.*, 134 N.C. App. 158, 161, 516 S.E.2d 643, 646 (1999) (citing *Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 709, 365 S.E.2d 898, 900 (1988)).

In the present case, Plaintiffs argue the trial court erred in granting summary judgment to Defendants on Plaintiffs’ negligence claim because (1) the standard of care imposed a duty on Defendants to act to protect persons who enter their premises because Mr. Hamm’s assault on Ms. Marlow was foreseeable and that such a duty arose “once an agitated and potentially dangerous patient appeared on the premises,” and (2) Defendants “breached their duty of reasonable care [(a)] by failing to promptly call for help when the agitated patient expressed homicidal intent and [(b)] increased the danger to plaintiff by calling her to the immediate area of the threat.” Plaintiffs also argue Defendants breached this duty because they failed to train staff about how to handle a situation where a patient becomes violent.

In response, Defendants argue (1) the standard of care imposed no duty on Defendants because the assault was not foreseeable under our Supreme Court’s decision in *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 281 S.E.2d 36 (1981); (2) even if a duty to warn or protect under *Foster* was triggered, they did not breach that duty because “they immediately contacted the police and attempted to and did restrain Mr. Hamm”; and (3) Plaintiffs did not preserve their adequacy-of-

training argument because they raised it for the first time on appeal. We first address the “threshold question” of whether Plaintiffs showed Defendants owed them a legal duty. *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 328, 626 S.E.2d 263, 267 (2006) (citing *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 342-44, 162 N.E. 99, 99-100 (1928)).

A. Duty

Plaintiffs argue the standard of care imposed a duty on Defendants to act to protect persons who enter their premises because Mr. Hamm’s assault on Ms. Marlow was foreseeable and that, whether or not it was foreseeable beforehand, this duty arose “once an agitated and potentially dangerous patient appeared on the premises.” However, Defendants argue there was no such duty because it was not sufficiently foreseeable and to hold otherwise would dramatically expand property owners’ liability for the intentional criminal acts of third parties in North Carolina. We agree.

“Ordinarily, the [property] owner is not liable for injuries to his invitees which result from the intentional, criminal acts of third persons.” *Foster*, 303 N.C. at 638, 281 S.E.2d at 38. The rationale for this rule is that “[i]t is usually held that such acts can[]not be reasonably foreseen by the owner, and therefore constitute an independent, intervening cause absolving the owner of liability.” *Id.* Thus, “foreseeability is the test in determining the extent of a landowner’s duty to safeguard

his business invitees from the criminal acts of third persons.” *Id.* at 640, 281 S.E.2d at 39 (citation omitted).

In *Foster*, our Supreme Court held a property owner owed a legal duty to invitees to protect or warn them from intentional criminal acts of third parties “where circumstances existed which gave the owner reason to know that there was a likelihood of conduct on the part of third persons which endangered the safety of his invitees[.]” *Id.* at 638-39, 281 S.E.2d at 38. The plaintiff in *Foster* was assaulted in the parking lot of a mall shopping center. The evidence showed thirty-six criminal incidents were reported at the mall during the year prior to the assault on the plaintiff. Our Supreme Court held “the evidence of repeated incidents of criminal activity could be sufficient for the jury to determine that [the] defendants knew or had reason to know of the existence of a likelihood of injury to its customers from the criminal acts of third persons.” *Id.* at 642, 281 S.E.2d at 40.

After *Foster*, our Courts applied the exception to the general rule limiting liability for criminal acts of third persons in a series of cases, but, as our Supreme Court has noted, in each of those cases, “each plaintiff was a business invitee who was able to forecast evidence sufficient to raise an issue as to the foreseeability of the criminal act.” *Cassell v. Collins*, 344 N.C. 160, 165, 472 S.E.2d 770, 773 (1996) (citing *Murrow v. Daniels*, 321 N.C. 494, 364 S.E.2d 392 (1988) (registered guest of motel assaulted in motel room); *Abernethy v. Spartan Food Sys., Inc.*, 103 N.C. App. 154,

404 S.E.2d 710 (1991) (customer assaulted inside fast food restaurant); *Helms v. Church's Fried Chicken, Inc.*, 81 N.C. App. 427, 344 S.E.2d 349 (1986) (customers assaulted during robbery of fast food restaurant)). Where our Courts have applied *Foster* to entitle the plaintiff to survive the defendant's motion for summary judgment, the plaintiff usually showed a forecast of evidence for the foreseeability of harm from criminal acts of third parties based on prior general criminal activity in the area, as in *Foster* itself. See, e.g., *Murrow v. Daniels*, 321 N.C. 494, 502, 364 S.E.2d 392, 398 (1988) (plaintiff presented evidence of one hundred criminal incidents at intersection where motel was located). However, in general, a plaintiff may produce a sufficient forecast of evidence showing foreseeability where "the dangerous condition or activity . . . arises from the act of third persons . . . [and the owner] knew of its existence or it had existed long enough for him to have discovered it by the exercise of due diligence and to have removed or warned against it." *Abernethy*, 103 N.C. App. at 156, 404 S.E.2d at 712 (citing *Foster*, 303 N.C. at 638, 281 S.E.2d at 37).

In *Foster*, our Supreme Court adopted Restatement (Second) of Torts § 344, and § 344, Comment f, regarding notice, which states:

Since the possessor 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

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experience, is such that he should reasonably anticipate careless or criminal conduct on the part of the 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 [employees] to afford a reasonable protection.

Restatement (Second) of Torts, § 344, Comment f (1965) (emphasis added) (cited in *Foster*, 303 N.C. at 639-40, 281 S.E.2d at 38-39). Therefore, the foreseeability of harm arising from the danger of acts of particular third persons—as distinguished from foreseeability arising from a high level of prior criminal activity in an area in general—may give rise to a duty to warn or protect *only* in the limited circumstance that the dangerous acts are occurring or about to occur, and the property owner had actual knowledge of the existence of the danger or it had existed long enough for him to have discovered it by the exercise of due diligence.

In *Abernethy*, two men entered the defendant's restaurant without shirts or shoes, intoxicated, using profanity, and with one man's nose already visibly broken. The men directed profanity and racial slurs at the restaurant's employees. *Abernethy*, 103 N.C. App. at 156-57, 404 S.E.2d at 712-13. A cashier twice asked the manager to call the police and he refused. As the men left the restaurant they argued with two other customers, and they all exited the restaurant and fought outside, where one man was hit, fell down, arose and ran to a motel across the street. The cashier, who observed what was happening, again asked the manager to call the police and he again refused. One of the men then entered the restaurant and told the

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manager the man who left was going to get a knife and the manager again did not call the police. The plaintiff soon entered the restaurant and the manager did not notify him about what was happening. About ten minutes later, the two men reentered the restaurant with a knife and the man wielding the knife tried to hit the plaintiff and then stabbed him in the chest and neck after he fell to the ground. This Court held that, viewed in the light most favorable to the plaintiff, “a jury could find that [the] defendant’s acting manager should have reasonably foreseen that danger to his customers was imminent; that he was therefore under a duty to either warn them of the danger or to call for police to help protect his customers” *Id.* at 157, 404 S.E.2d at 713.

In the present case, Plaintiffs present no evidence of prior criminal activity in or immediately surrounding the clinic that would indicate a general likelihood of conduct on the part of third persons that could harm clients. Indeed, Plaintiffs go further, conceding that “[u]nquestionably, there had been no prior incidents of violent behavior by [Mr.] Hamm or anybody else at Northern Gastroenterology.” Nevertheless, Plaintiffs argue, relying on *Abernethy*, that Mr. Hamm’s assault on Ms. Marlow was foreseeable under the circumstances. While it is apparent Plaintiffs cannot succeed in establishing foreseeability based on prior reports of criminal activity in the area, Plaintiffs’ reliance on *Abernethy* is misplaced.

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In *Abernethy*, the restaurant manager had actual notice that a violent, intoxicated man who minutes earlier had engaged in a physical altercation on the premises, had fled that altercation and was intending to return to the premises with a knife. The violent propensity of the third party and the danger to customers from the imminent criminal acts of the individual were clearly foreseeable because the manager had both ample opportunity to discover the danger and actual notice when he was told about the man planning to return with the knife. Here, in contrast, as Plaintiffs concede, Mr. Hamm had demonstrated no prior incidents of violent behavior. Although both Ms. Wilhite and Dr. Appler testified they heard a sound like a picture falling from the wall or a four-year old taking it down, there is no evidence Defendants had actual notice Mr. Hamm pulled it down and jumped on it. Even taking the evidence in the light most favorable to Plaintiffs, at most Defendants had actual notice Mr. Hamm was upset and should have known Mr. Hamm was destroying the picture frame. However, a client merely being upset and damaging a picture frame is not sufficient evidence that violent acts toward other persons were foreseeable.

Plaintiffs also suggest that Defendants' knowledge of Mr. Hamm's autism supports the inference that his violent conduct was foreseeable. This Court finds no precedent or research to support the proposition that autism makes violent conduct foreseeable. Moreover, such a holding would encourage property owners to

discriminate against persons with mental disabilities or risk liability, a policy position this Court cannot endorse.

Ultimately, Plaintiffs' assertion that "[j]ust as in *Abernethy*, Defendants here were confronted with an individual acting in an undeniably dangerous and threatening manner" depends on Ms. Marlow's claim that Mr. Hamm said "I'm going to kill a doctor." Ms. Marlow testified she heard Mr. Hamm say this phrase once when he entered the clinic and she was at the receptionist's desk, and again after his grandmother arrived and he got up and grabbed the picture frame. Only Ms. Marlow alleges she heard Mr. Hamm say "I'm going to kill a doctor"; Ms. Wilhite specifically denied hearing him say it. Even taking the evidence in the light most favorable to Plaintiffs and assuming Mr. Hamm did say "I want to kill a doctor," at no point does Ms. Marlow testify he said it loudly or in an area where Ms. Wilhite or any clinic employee would have heard him say it; nor do Plaintiffs allege that an employee of Defendants heard it. Therefore, even assuming Mr. Hamm did say "I want to kill a doctor" and this was an expression of an intent to imminently harm another, Plaintiffs still have not shown Defendants had actual notice or an opportunity to discover this intent.

More fundamentally, the statement "I'm going to kill a doctor" under these circumstances does not indicate an intent to harm. Unlike in *Abernethy*, Mr. Hamm did not threaten a particular individual, and Ms. Marlow would not be a foreseeable

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target even if he did, as the language specifies “a doctor.” Therefore, unlike in *Abernethy*, Plaintiffs cannot show the reasonable foreseeability of the danger from Mr. Hamm to other clients necessary to give rise to a duty to warn or protect. Because Plaintiffs cannot show Defendants owed a duty to Ms. Marlow under the circumstances, their claim of negligence must fail, and we need not address whether Plaintiffs can show Defendants breached a legal duty.

III. Conclusion

Plaintiffs argue the trial court erred in granting Defendants’ motion for summary judgment on Plaintiffs’ claim of negligence arising out of Mr. Hamm’s assault on Ms. Marlow on 11 November 2014. We hold Plaintiffs cannot show the danger was foreseeable and, therefore, Defendants owed no legal duty to Ms. Marlow. The judgment of the trial court is affirmed.

AFFIRMED.

Judges BRYANT and BROOK concur.

Report per Rule 30(e).