STATE OF MINNESOTA
IN COURT OF APPEALS
A09-707

D. D. N.,
Respondent,

vs.

FACE, Festivals and Concert Events, Inc.
d/b/a WE Fest, defendant and third party plaintiff,
Appellant,

vs.

Security Specialists, Inc.,
Defendant and Third Party Defendant.

Filed March 30, 2010
Affirmed
Stoneburner, Judge

Becker County District Court
File No. 03CV072472

Konstandinos Nicklow, Meshbesher & Spence, Ltd., Minneapolis, Minnesota (for respondent)

Arlo H. Vande Vegte, Arlo H. Vande Vegte, P.A., Plymouth, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Stauber, Judge; and Randall, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

STONEBURNER, Judge

Appellant music-festival organizers appeal from a judgment awarding damages to respondent on her claim that a sexual assault by appellant's employee was directly caused by appellant's negligent-hiring practices. Appellant asserts that it had no duty to respondent and that the district court erred by failing to summarily dismiss respondent's claim. We affirm.

FACTS

Appellant FACE, Festivals and Concert Events, Inc. d/b/a WE Fest (FACE), produces an annual country-music festival held in Detroit Lakes, Minnesota, that draws thousands of patrons, many of whom camp at the venue. In 2006, respondent D.D.N. was sexually assaulted at her campsite at the festival by Eric Fanning, who had been employed by FACE to work at the festival. Fanning pleaded guilty to third-degree criminal sexual conduct.

D.D.N. sued FACE,[1] asserting, in relevant part, that FACE's negligent-hiring practices were a direct cause of the assault. FACE moved for summary judgment, arguing that none of the forms of negligent conduct alleged in D.D.N.'s complaint proximately caused her injuries or breached a legal duty owed by FACE to D.D.N.

The facts about Fanning's history, hiring, and assault are not in dispute. Fanning has a 1994 conviction of first-degree sexual assault committed in Colorado in 1993.

[1] FACE brought a third-party action against Security Specialists, Inc., the security company it hired to provide security at the festival. Security Specialists, Inc. is not involved in this appeal.

Before he moved to Minnesota in February or March of 2006, Fanning was in a hospital in Colorado for drug addiction. He had been fired from three or four jobs and was unemployed and homeless when he was hired by FACE in 2006.

Fanning, like many FACE temporary employees, filled out an on-line application for employment at the 2006 WE Fest. Fanning falsely identified the VA Medical Center in St. Cloud as his address. He did not identify anyone as a reference and described himself as self-employed. Fanning cannot recall if he was interviewed by telephone before he was hired or whether he was informed by e-mail or letter that he had been hired as second-shift "camping staff: front" to admit people into the campground, exchange tickets for wristbands, assist campers, answer questions, and give directions. Fanning was permitted to camp and was given wristbands that gave him access to all parts of the festival and a T-shirt that identified him as festival staff. His employment by FACE lasted 32 hours and ended on the evening of the last day of the festival. He assaulted D.D.N. sometime before 7:00 p.m. that evening.

FACE's 2006 employment director for the festival, Marilyn Sue Holt, along with two assistants, hired approximately 1,400 people for the 2006 festival, mostly though the internet. Applicants were asked to provide their name, address, age, social-security number, prior employment history, and what job they were interested in. People who had not previously worked at a festival were subject to a telephone interview, but FACE had no criteria regarding what information should be obtained from an applicant in the interview, and there were no established questions. Holt and her assistants did not know what questions the others were asking. There was no requirement to ask an applicant

about criminal or employment history or references. There were no reference or criminal-history checks. Holt stated that applicants were hired if they "sound like good people" on the telephone. D.D.N.'s expert witness opined that FACE's hiring practices fell below industry standards.[2]

FACE's awareness of the vulnerability of its female festival patrons at the time it hired Fanning is also undisputed. Holt testified in her deposition that music and drinking are two of the main attractions of the festival and that FACE knew that festival patrons became vulnerable to being victimized due to alcohol consumption. Holt agreed that some individuals, including rapists, would not be good candidates to work at the festival and stated that exposing patrons to individuals with such backgrounds was a "big concern." She considered it common sense not to put a man with that type of background in an environment where he could take advantage of a vulnerable person under the influence of alcohol. She acknowledged that knowing whether an applicant had a criminal conviction would have been important information.

Terence McCloskey, the former owner and current operations coordinator of FACE, testified in his deposition that festival management discussed the occurrence of sexual assaults "[a]lways, [at] every meeting, it's always about making sure that the women are having a good, safe experience or they wouldn't come back." He stated that "protection of women is discussed all the time every day, probably every hour, especially at night."

[2] The record does not reflect that evidence of the opinion of FACE's expert witness was presented to the district court in connection with FACE's motion for summary judgment.

D.D.N.'s complaint alleged that FACE had a "duty to make sure its employees . . . were fit to perform the jobs they were hired for and not to hire convicted felons (sexual offenders) in positions of authority such as acting in the capacity of security personnel" and had a "duty to make sure it did a reasonable background check on its security personnel as such individuals would foreseeably come into contact with festival-goers who had conflicts and also members of the opposite sex who were under the influence of alcohol."

In its motion for summary judgment, FACE argued that there was no evidence supporting the allegation that Fanning was hired to provide security or at any time worked security at the festival, and that there is no "bright line" legal duty to perform criminal background checks for the temporary job of "camping staff front" for which Fanning was hired. FACE argued that there was no evidence that it failed to make a sufficient inquiry into Fanning's fitness for the job for which he was hired and that it had no duty to perform a criminal background check for that position. FACE also argued that, for public policy reasons, it "disputes the duty issue."[3]

The district court denied FACE's summary judgment motion. In the memorandum incorporated into the summary judgment order, the district court described FACE's duty as a landowner, stating: "[a] landowner, such as FACE, who holds its property open to the public, owes a duty to protect its invite[e]s from unreasonable risks of physical harm which can include the criminal acts of third persons, and must exercise

[3] D.D.N.'s asserts appeal that FACE failed to raise the issue of the existence of a duty in the district court and is therefore precluded from raising it on appeal is without merit.

reasonable care under the circumstances." The district court did not specifically address FACE's duty as an employer with regard to hiring but stated that a determination of the facts and "whether they demonstrate a level of probability which would lead a prudent person (employer) to take effective precautions . . . remain questions for a jury's determination."

At trial, the district court instructed the jury, in relevant part, that "an employer is negligent in hiring an employee if the employer knew or should have known, at the time of hiring, that the employee posed a threat of physical injury to others because of the circumstance[s] of the employment" and that "the test for determining liability [for negligent hiring] is whether or not the employer exercised reasonable care in hiring the employee given the totality of the circumstances."

The jury found that FACE was negligent in hiring Fanning and that such negligence was a direct cause of D.D.N's harm. The jury apportioned 42.5% of fault to FACE. FACE moved for judgment as a matter of law based on sufficiency of the evidence, for amended findings, and for a new trial under Minn. R. Civ. P. 59. The district court denied all of FACE's post-trial motions, and this appeal followed, challenging only the district court's failure to grant summary judgment because, as a matter of law, FACE did not have a duty to D.D.N. with regard to Fanning's hiring.

D E C I S I O N

I. Post-trial review of a denial of summary judgment based on a question of law is not barred by case law.

The existence of a legal duty in a negligence action is a question of law, reviewed de novo. *H.B. ex rel. Clark v. Whittemore*, 552 N.W.2d 705, 707 (Minn. 1996). The district court denied FACE's summary-judgment motion based the legal question of the existence of a duty rather than because there were material issues of fact. Therefore, we find no merit in D.D.N.'s argument that the recent opinion in *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910 (Minn. 2009), precludes post-trial review of denial of summary judgment in this case. In *Bahr*, the supreme court held that denial of a motion for summary judgment based on the existence of fact issues is outside of the appellate court's scope of review when a trial has been held and the parties have been given a full and fair opportunity to litigate their claims. *Id.* at 918. *Bahr* did not address whether denial of summary judgment based on a question of law precludes appellate review after trial. *See Id.* at 918 n.9 (stating that it is not necessary to address possible exception for denial of summary judgment based on a legal conclusion or an issue not presented to the jury).

The rationale for the holding in *Bahr* is that

> denial of a motion for summary judgment [based on a determination that a genuine dispute of fact exits] cannot be viewed as 'affecting the judgment' . . . because the district court's conclusion at the summary judgment stage that there was a genuine dispute of fact becomes moot once the jury reaches a verdict on that issue.

Id. at 918. In this case, the issue of whether or not FACE had a duty to D.D.N. in hiring Fanning is a question of law not presented to the jury, and the verdict does not make the issue moot. Therefore, *Bahr* does not preclude this appeal.

II. The district court did not err in holding that FACE had a duty to D.D.N.

An employer's liability for hiring

> is predicated on the negligence of an employer in placing a person with known propensities, or propensities which should have been discovered by reasonable investigation, in an employment position in which, because of the circumstances of the employment, it should have been foreseeable that the hired individual posed a threat of injury to others.

Ponticas v. K.M.S. Invs., 331 N.W.2d 907, 911 (Minn. 1983) (recognizing in Minnesota a cause of action for an employer's liability for negligence in hiring and holding that "[a]n employer has the duty to exercise reasonable care in view of all the circumstances in hiring individuals who, because of the employment, may pose a threat of injury to members of the public"). "Liability for negligent hiring is 'determined by the totality of the circumstances surrounding the hiring and whether the employer exercised reasonable care.'" *L.M. ex rel. S.M. v. Karlson*, 646 N.W.2d 537, 544 (Minn. App. 2002) (quotation omitted), *review denied* (Minn. Aug. 20, 2002).

In *Ponticas*, the supreme court concluded that because the tenant-victim of a sexual assault by an apartment manager met her assailant as a direct result of his employment and the employer-owner-operator of the apartment complex received a benefit from employing the manager, the employer owed the tenants a duty to exercise

reasonable care in hiring a resident manager. 331 N.W.2d at 911. "The scope of the duty was commensurate with the risks of the situation." *Id.* at 912.

FACE relies on *Ponticas* to argue that because Fanning's duties did not constitute a high risk of injury to a foreseeable victim, his hiring required only "slight care." *See id.* at 913 (stating that the scope of investigation into whether an employer breached a hiring duty "is directly related to the severity of the risk third parties are subject to by an incompetent employee," and noting that "only slight care might suffice in the hiring . . . where the employee would not constitute a high risk of injury to third persons . . ."). But this argument conflates the legal question of the existence of a duty with the fact question of whether a legal duty was breached.[4]

FACE also relies on *Yunker v. Honeywell, Inc.*, affirming, in part, summary judgment to an employer on a claim of negligent hiring because the employer did not owe or breach a duty to the victim at the time of hiring. 496 N.W.2d 419, 423 (Minn. App. 1993), *review denied* (Minn. Apr. 20, 1993). In that case, Honeywell re-employed a former employee, Randy Landin, after he was released from prison for the strangulation death of a former co-worker at Honeywell. *Id.* at 421. After rehire, Landin began to harass a co-worker who had spurned his romantic interest. *Id.* The co-worker sought assistance from Honeywell and requested a transfer. *Id.* The day before the co-worker found a death threat scratched on her locker door was the last day Landin came to work. *Id.* He formally resigned from employment ten days later. *Id.* Eight days after he

[4] At oral argument on appeal, counsel for FACE stated that FACE does not dispute that it owed some duty, but asserts that the duty owed was "slight."

resigned from his employment, Landin shot the co-worker to death on her driveway. *Id.* He was convicted of first-degree murder. *Id.*

The trustee of the deceased co-worker's heirs and next-of-kin sued Honeywell for negligent hiring, retention, and supervision of a dangerous employee. *Id.* The district court granted summary judgment to Honeywell, concluding that Honeywell owed no legal duty to the victim. *Id.* This court affirmed summary judgment for negligent hiring and supervision but reversed as to negligent retention. *Id.* at 424.

Honeywell, for purposes of summary judgment, stipulated that it failed to exercise reasonable care in hiring and supervision, but argued that it owed no legal duty to the victim. *Id*. at 421. Honeywell noted that, unlike the employer in *Ponticas*, who provided a dangerous resident apartment manager with a passkey to tenant's apartments, Honeywell's employment of Landin did not enable him to commit the act of violence against his co-worker, which occurred at her home. *Id.* at 422. This court found merit in that argument, citing cases from other jurisdictions defining an employer's duty of reasonable care as largely dependent on the type of responsibilities associated with the particular job. *Id.* *Yunker* held that Honeywell did not owe a duty to the victim at the time of Landin's hire because Landin "was employed as a maintenance worker whose job responsibilities entailed no exposure to the general public and required only limited contact with coemployees," and the ultimate victim "was not a reasonably foreseeable victim at the time Landin was hired." *Id.* at 423. FACE argues that Fanning's employment, likewise, did not implicate any duty to festival attendees including D.D.N.

But the deposition testimony of Holt and McCloskey demonstrate that FACE was hyperaware of and concerned about the vulnerability of its female patrons and the risk of sexual assault at the festival. Fanning's duties put him in contact with everyone who camped in the campground where he worked; his access to the campsites was unlimited. Fanning had access to campers, their driver's licenses, and knowledge about where and with whom each camper was camped. Plainly, Fanning's employment put him in contact with the general public, including the vulnerable female patrons about whom FACE was concerned. Fanning's criminal history, employment history, and falsification of address, which were discoverable with minimal inquiry, were acknowledged by Holt to make him ineligible for employment by FACE.

We conclude that Fanning's circumstances are more similar to those of the facts in *Ponticas* than to those of the facts in *Yunker* and that the district court did not err in rejecting FACE's argument that, as a matter of law, it had no duty to D.D.N. with regard to hiring festival-campground employees. And the district court did not err in defining the duty as reasonable care under the totality of the circumstances. We agree with D.D.N. that FACE's actual argument on appeal is that it did not breach the "slight" duty it owed under the circumstances. But whether a duty is breached is generally a question for the jury, and is not suitable for disposition by summary judgment.

III. Public policy does not preclude imposing a duty of reasonable care in hiring under the circumstances of this case.

FACE argues that the "burdensome" best-hiring practices urged by D.D.N. in this case would have deprived Fanning of work to which he was entitled and raises "the

problem of disparate impact and/or disparate treatment of protected classes of people." FACE argues that because "people with criminal histories are frequently minorities, [minorities] are the ones most likely to be adversely affected by" the standards urged by D.D.N.'s expert witness. FACE argues that for these public-olicy reasons "there should be no duty." We find no merit in this argument. FACE's argument relies in part on its mischaracterization of the duty owed as a duty to perform a criminal-background check. But, as the district court's summary-judgment memorandum implicitly stated, and the jury instructions explicitly stated, FACE's duty was to use reasonable care under the circumstances. We cannot conclude that imposition of such a duty is inconsistent with public policy.

Affirmed.