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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

RYAN LEE CHANCELLOR,

Plaintiff and Appellant,

v.

CARLOS AGUERO et al.,

Defendants and Respondents.

E051708

(Super.Ct.No. CIVRS900391)

OPINION

APPEAL from the Superior Court of San Bernardino County. Martin A. Hildreth, Judge. (Retired judge of the San Bernardino Muni. Ct., West Valley Division, sitting under assignment by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)

Affirmed.

Law Offices of Christian J. Amendt and Christian J. Amendt for Plaintiff and Appellant.

Morris Polich & Purdy, Pamela A. Palmer and Michael P. West for Defendants and Respondents.

I

INTRODUCTION

Plaintiff Ryan Lee Chancellor, age 16, was hit with a broken beer bottle when he attended a teenager's party. Chancellor sued the parental hosts, defendants Carlos Agüero and Margarita Agüero, for negligence and assault and battery. Chancellor appeals from the summary judgment the trial court granted in favor of defendants. Based on our independent review, we agree with the trial court that Chancellor could not establish the necessary elements of foreseeability and duty. We affirm the judgment.

II

FACTUAL AND PROCEDURAL BACKGROUND

A. The Complaint

The complaint asserted causes of action for general negligence and assault and battery. Chancellor alleged that on February 1, 2008, he attended a party at the Agüero residence in Chino Hills. The Agüeros permitted the underage guests to drink alcohol and become drunk and disorderly. Defendant Jonathon Vivo, who was 21 years old, was inebriated and struck plaintiff in the face with a broken beer bottle.

B. Defendants' Motion for Summary Judgment

The Agüero defendants filed a motion for summary judgment. In support of their motion, they set forth the following material facts supported by evidence. Both the Agüeros submitted declarations stating they did not know about any similar criminal violence on their property and they did not know defendant Vivo or whether he displayed any dangerous propensities. Vivo had never been to their house. The Agüeros did not

know Vivo was at the party or that Vivo and Chancellor had become involved in an altercation. There was no history of violent conduct at the Aguero residence. Chancellor objected to the declarations of the Agueros on this point but the court overruled his objections.

Vivo came to the party, accompanying an invited guest. Vivo stayed for about an hour before Chancellor asked him to leave. Vivo and Chancellor became involved in a dispute and Vivo hit Chancellor in the face with a broken beer bottle. Vivo claimed Chancellor hit him first.

C. Chancellor's Opposition

Chancellor submitted an opposing separate statement, in which he asserted certain material facts were disputed. Based on declarations from several teenagers, Chancellor contended that the Agueros, and especially Margarita, had hosted large drunken parties for teenagers for several years. Alcohol and drugs were tolerated and even encouraged. At a party in October 2007, four months before the February 2008 incident, a bloody fistfight had broken out between two high school students.

In support of additional material facts, Chancellor submitted evidence that there had been at least eight parties involving underage drinking and drug use at the Aguero residence in the four or five months before February 1, 2008. Margarita knew the October 2007 fistfight had occurred while there was underage drinking. She also allowed underage drinking at her house on February 1, 2008. The beer bottle which injured Chancellor was obtained at the party. Although the police had been called before

Chancellor was hurt, Margarita did not seek their aid to control the party. Instead, she asked Chancellor, who was 16 years old, to stop people from joining the party.

Chancellor conceded he had no evidence against the Agueros to support the intentional tort of assault and battery.

D. The Court's Rulings

Defendants raised numerous objections to plaintiff's evidence based on the grounds of relevance, foundation, speculation, lack of personal knowledge, hearsay, and improper expert opinion. (Evid. Code, §§ 350, 403, 702, 720, 800, 803, 1200.) The court sustained defendants' objections to evidence about there being a history of underage drinking and sexual activity at past parties at the Agueros residence. The court also sustained defendants' objections to evidence about the October 2007 fistfight and Margarita's arrest in March 2008 for the misdemeanor offense of contributing to the delinquency of a minor. (Pen. Code, § 272, subd. (a)(2).)

The trial court held that the October 2007 fistfight between two different people was not similar to the attack by Vivo and that furnishing alcohol to Vivo was not a proximate cause of Chancellor's injuries because a social host is immune from civil liability for furnishing alcohol. (Civ. Code, § 1714, Bus. & Prof. Code, § 25602.) The court granted defendants' motion for summary judgment, ruling there was no evidence the Agueros had any actual knowledge of Vivo's violent propensities. Therefore, Vivo's assault on Chancellor was not reasonably foreseeable and no duty supported plaintiff's negligence claim against defendants.

III

DISCUSSION

In another premises liability case, the California Supreme Court has explained: “In order to prevail in an action based upon a defendant’s alleged negligence, a plaintiff must demonstrate that the defendant owed the plaintiff a legal duty, that the defendant breached the duty, and that the breach was a proximate or legal cause of his or her injuries. [Citation.] . . . [¶] Accordingly, in this matter we must determine whether defendant has shown that plaintiff has not established a prima facie case of negligence. In making that assessment on review of a grant of summary judgment for defendant, we view the evidence in the light most favorable to plaintiff as the losing party below. [Citation.]” (*Morris v. De La Torre* (2005) 36 Cal.4th 260, 264-265.)

The primary issue in this case concerns the foreseeability of Vivo’s conduct. The Agueros did not commit the attack on Chancellor. Instead, they are accused of negligently failing to prevent the attack or to protect Chancellor. “Generally, one has ‘no duty to act to protect others from the conduct of third parties.’ (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 235.) That reflects the law’s reluctance to impose liability for nonfeasance. (*Id.* at p. 235, fn. 12.) ‘A person who has not created a peril is ordinarily not liable in tort merely for failure to take affirmative action to assist or protect another, no matter how great the danger in which the other is placed, or how easily he or she could be rescued, unless there is some relationship between them that gives rise to a duty to act.’ 6 Witkin, Summary of Cal. Law, Torts (10th ed. 2005), § 1038, pp. 332-333.

“If there is no duty, there can be no liability, no matter how easily one may have been able to prevent injury to another. And, while questions concerning whether a duty has been breached and whether that breach caused a plaintiff’s injury may be questions of fact for a jury, the existence of the duty in the first place is a question of law for the court. (*Delgado, supra*, 36 Cal.4th at p. 237.) The existence and scope of any duty, in turn, depends on the foreseeability of the harm, which, in that context, is also a legal issue for the court. (*Ibid.*)” (*Margaret W. v. Kelley R.* (2006) 139 Cal.App.4th 141, 150.)

Citing *Margaret W.*, Chancellor argues that defendants had a special relationship with him as a minor invited to their party. *Margaret W.* recognized that “a host parent assumes a special relationship with children invited into her home. (*Chaney v. Superior Court* (1995) 39 Cal.App.4th 152, 157-158.) . . . The existence of a special relationship, however, is only the beginning of the analysis. [Citations.] In order for there to be a duty to prevent third party criminal conduct, that conduct must be foreseeable. [Citations.]” (*Margaret W. v. Kelley R., supra*, 139 Cal.App.4th at p. 152; *Romero v. Superior Court* (2001) 89 Cal.App.4th 1068, 1081.)

Both *Margaret W.* and *Romero* involved a teenage girl who was raped while visiting a friend. Both cases hold a defendant must have actual knowledge of the assaultive propensities of an assailant. (*Margaret W. v. Kelley R., supra*, 139 Cal.App.4th at p. 153; *Romero v. Superior Court, supra*, 89 Cal.App.4th at p. 1081.)

“Defendants cannot be liable under a negligent supervision theory for nonfeasance based solely on constructive knowledge or information they should have known.[] [Citation.]

There is no per se rule of duty to every invitee, and there must be actual knowledge in addition to a special relationship. [Citation.]” (*Margaret W., supra*, at p. 153.)

On appeal, Chancellor argues his injury “was a foreseeable risk of a pattern of conduct by [defendants] over an extended period of time, both before and after [Chancellor’s] injury, during which [defendants] maintained their property in an unsafe, and unlawful[] manner that created risks to their underage guests.” Chancellor contends the court erred by excluding his evidence about alcohol consumption, sexual activity, the October 2007 fistfight, and Margarita’s arrest in March 2008. He reasons that allowing alcohol at a teen social gathering created a foreseeable risk that an attack would occur, particularly because there was an earlier fistfight between two different people.

Chancellor maintains defendants knew or should have known of the possible danger to him. Additionally, he asserts Margarita knew there was a risk developing at the party when the police responded to the neighbors’ complaints. Finally, Chancellor accuses Margarita of aggravating the situation by asking him to help control the party.

As a preliminary matter, we question how Chancellor can possibly blame the Agueros for an assault by the 21-year-old Vivo based on a theory that they encouraged or permitted underage drinking in their home. Even if the court had admitted evidence that the Agueros had allowed underage drinking, drug use, and sexual activities at past parties and that they knew two other teenagers had engaged in a fistfight at their house, it does not plausibly follow that such knowledge made it likely or foreseeable that the adult Vivo would attack Chancellor.

Furthermore, applying the negligence principles expressed in *Romero* and *Margaret W.*, we agree there was no evidence, whether admitted or not, to establish duty and foreseeability. In determining the scope of a property owner's duty to protect an invitee from criminal acts, the courts recognize that violent crime is unpredictable and difficult to prevent. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 678; *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1194.)¹ Therefore, a heightened degree of foreseeability, based on prior similar incidents, is required to impose liability. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1149-1150; *Delgado v. Trax Bar & Grill, supra*, 36 Cal.4th at pp. 242, 245; *Melton v. Boustred* (2010) 183 Cal.App.4th 521, 537-538.) Chancellor did not offer any evidence of similar prior incidents, only a different incident between two other minors. Chancellor did not meet the test of heightened foreseeability. Chancellor also could not establish that the court should apply a lesser test of reasonable foreseeability based on defendants' failure to respond to imminent or ongoing criminal behavior. (*Morris v. De La Torre, supra*, 36 Cal.4th at pp. 270-271; *Delgado*, at p. 245.) Nothing in the evidence offered by Chancellor suggested an imminent threat should have been known to defendants before Vivo slashed Chancellor in the face.

We also reject Chancellor's effort to argue a new issue on appeal. Chancellor now contends Margarita committed an act of affirmative misfeasance when she enlisted Chancellor's assistance in trying to limit the guests at the party, thereby increasing the

¹ Both *Ann M.* and *Sharon P.* have been disapproved on other grounds. (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 522-523.)

risk of injury to him. (*Melton v. Boustred, supra*, 183 Cal.App.4th at p. 490.) This was not an issue that was raised or developed in the trial court. We will not entertain a new issue on appeal, disadvantaging the trial court and opposing parties. (*People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468-1469.)

What is undisputed in this case is that the Agueros did not know Vivo, did not know he was a violent person, did not know he was at the party, and did not know he posed a threat to Chancellor. Even if all his proffered evidence had been admitted and considered, Chancellor could not establish foreseeability and duty imposing liability for negligence on the Agueros.

IV

DISPOSITION

Evidence of foreseeability and duty are absent from the record below. We affirm the judgment and order defendants, the prevailing parties, to recover their costs on appeal.

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CODRINGTON

J.

We concur:

RICHLI

Acting P.J.

MILLER

J.