2018 IL App (5th) 160500-U

NO. 5-16-0500

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

CAROL LEVART,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Madison County.
	)	
v.	)	No. 16-AR-89
	)	
WAL-MART STORES, INC., d/b/a Wal-Mart Supercenter, and ANITRA McINTYRE,	)	Honorable
	)	John B. Barberis, Jr.,
Defendants-Appellees.	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Goldenhersh and Moore concurred in the judgment.

ORDER

¶ 1 *Held*: Plaintiff presented enough evidence to show that her injuries during an attempted robbery in the parking lot of the defendants' store were reasonably foreseeable. Thus, the court erred in granting summary judgment in favor of the defendants on the grounds that the defendants did not have a duty to take reasonable steps to warn her or to guard against the risk.

¶ 2 The plaintiff, Carol Levart, was injured when an assailant attempted to rob her of her purse in the parking lot of the Granite City Wal-Mart store. The plaintiff filed a complaint, alleging that the defendants, Wal-Mart Stores, Inc., and store manager Anitra McIntyre, negligently failed to warn her of the danger of a criminal attack in the parking

lot and failed to take steps to guard against the danger of criminal attacks. The defendants filed a motion for summary judgment, arguing that they did not owe a duty to the plaintiff to protect her from the criminal acts of others because such attacks were not reasonably foreseeable. In support of her contention to the contrary, the plaintiff submitted copies of police reports concerning incidents that occurred at the Granite City Wal-Mart, including three robberies of purses from women in the parking lot and four batteries that took place in the parking lot. The court granted the defendants' motion. The plaintiff appeals, arguing that she raised a genuine issue of material fact on the question of foreseeability. We reverse.

¶ 3 On December 24, 2014, the plaintiff went to the Granite City Wal-Mart store with her brother to do some last-minute Christmas shopping. They arrived approximately 30 minutes before the store was scheduled to close for Christmas Eve. When she got inside the store, the plaintiff realized that she left her shopping list in her brother's truck. She returned to the truck alone to retrieve her list. According to the plaintiff's deposition testimony, there were no lights on in the parking lot. When she approached the truck, which was parked in the middle of the lot, a man she did not know approached her and asked her if she had any money to give him. When she told him she did not, the man grabbed her purse from her shoulder "with full force." The plaintiff instinctively punched him in the face to stop the theft. The assailant ran away, and the plaintiff fell to the ground. She injured her hand, wrist, and shoulder as she tried to break her fall.

¶ 4 In March 2016, the plaintiff filed this action. She alleged that when the attempted robbery occurred, the defendants were aware that "numerous criminal acts" had occurred

on the property in the previous two years. She further alleged that the defendants "should have reasonably known that during the holiday season attempted thefts would occur" in the store's parking lot. The plaintiff asserted that the defendants were negligent in three ways: she alleged that they (1) failed to warn customers that there was a risk of criminal activity in the parking lot, (2) failed to "enact security measures" to prevent such criminal activity, and (3) failed to guard against criminal attacks by hiring a security guard to be present in the parking lot. The plaintiff later amended her complaint to include a claim of negligent spoliation of evidence, alleging that the store's asset protection manager, Scott Votrain, erased security camera footage that might have shown what happened.

¶ 5 The plaintiff argued that the attempted robbery was reasonably foreseeable and that the defendants therefore had a duty to warn customers of the risk and to take reasonable steps to prevent it. In support of this assertion, she submitted 18 police reports involving incidents in which the Granite City Police responded to calls from the store. All 18 reports involved incidents occurring between April 2012 and November 2014.

¶ 6 The incidents described in the police reports included three purse thefts, all of which took place in the parking lot. In one incident, the purse was snatched from the victim's arm. In another incident, the victim placed her purse on the driver's seat of her car and began loading her purchases into her car. The assailant reached into the vehicle to grab the purse. Seeing this, the victim in that incident attempted to stop the thief, much as the plaintiff did here. She grabbed hold of the strap of her purse and struggled with the assailant for control of the purse. Unlike the plaintiff, that victim does not appear to have been injured in the scuffle. The third incident involved the theft of a purse from a

shopping cart while the victim was securing her young children in their car seats. Although the purse was taken in her presence, it was not within her view at the time. Another shopper saw the theft and alerted the victim to it.

¶ 7 Other police reports chronicled four batteries and five "disturbances" that took place in the parking lot. One of the disturbances included verbal threats. The remaining reports involved three retail thefts, two batteries of store employees that took place inside the store, and one report of a disturbance in the parking lot which turned out to be nothing more than a family talking loudly and laughing together.

¶ 8 The plaintiff also submitted excerpts from a transcript of Scott Votrain's deposition. In pertinent part, Votrain testified that additional asset protection employees are ordinarily scheduled during the holiday shopping season due to an increased risk of shoplifting. He also testified that the store hires Granite City police officers to act as additional security guards on Black Friday. The plaintiff did not include the entire transcript of Votrain's deposition testimony, nor did she include the transcript of Anitra McIntyre's deposition.

¶ 9 On September 13, 2016, the defendants filed a motion for summary judgment. They argued that a business has no duty to protect its customers from the criminal act of a third party unless the business has knowledge of "previous similar incidents" or other circumstances that make it reasonably likely that the crime will occur. The defendants argued that knowledge of three prior purse thefts over a period of three years was insufficient as a matter of law to put them on notice that another similar incident was reasonably likely to occur.

¶ 10 In her response to the defendants' motion, the plaintiff pointed to the 18 police reports she submitted. She noted that the reports provided details of "incidents in which similar thefts and violent behavior" occurred at the Granite City Wal-Mart prior to the incident at issue. She argued that "this continuous history of criminal activity" made the attempted robbery reasonably likely. In addition, she pointed to Votrain's testimony that extra asset protection employees are scheduled during the holiday shopping season. She argued that this testimony showed that the defendants knew that there was an increased risk of theft during the holiday season, which also made the attempted robbery of the plaintiff reasonably foreseeable.

¶ 11 On September 23, 2016, the court entered an order granting summary judgment in favor of the defendants on the two counts of the plaintiff's complaint alleging negligence by Wal-Mart and McIntyre. The order did not contain any express findings, and the record does not contain a transcript of the hearing on the motion for summary judgment. Subsequently, the plaintiff filed a motion to reconsider that ruling, and the defendants filed a motion to dismiss the plaintiff's remaining claim for negligent spoliation of evidence.

¶ 12 Both motions came for a hearing on October 28, 2016. The plaintiff argued that in order to put a business owner on notice that crimes are reasonably likely to occur—thus imposing a duty to guard against such crimes—previous incidents need not be identical to the incident at issue; they need only involve the same "scope of risk." She argued that the police reports submitted in this case met that standard because the risk involved in all of the incidents was created by the defendants' lack of control over the parking lot. She also

called the court's attention to one of the three previous purse thefts, arguing that it was quite similar to the incident involving the plaintiff because the victim struggled with the thief for control of her purse, much as the plaintiff did in this case. Counsel for the plaintiff told the court that at the earlier summary judgment hearing, she incorrectly informed the court that there were no previous similar incidents.

¶ 13 In addition, the plaintiff asked the court to consider the deposition testimony of asset protection manager Scott Votrain. She noted that Votrain testified that another area Wal-Mart store had regular security in its parking lot and that the Granite City store had arranged for security in its parking lot while the store was closed for Christmas. The court asked plaintiff's counsel if the additional security was meant to protect customers or merchandise. Counsel explained that the additional security was being provided because the store is not normally closed and has extra merchandise in stock during the Christmas season. She noted that there would be no customers to protect while the store was closed.

¶ 14 The defendants argued that the plaintiff did not bring any new evidence to the court's attention. Their attorney stated that his recollection of the summary judgment hearing was different from the plaintiff's attorney's recollection. According to counsel, the court did in fact consider all three reports involving previous purse thefts at the summary judgment hearing. Counsel argued that none of those incidents were relevant because none involved the theft of a purse that was "on the person themselves," and none of the three incidents involved "any physical contact between the person who snatched it and the victim." Counsel further argued that there was no evidence of any physical altercations between thieves and customers prior to the attempted robbery of the plaintiff.

¶ 15 In ruling from the bench, the court stated, "I do recall reviewing those notes and specifically that one incident, and [I] didn't find enough persuasive at that time to not grant the motion" for summary judgment. The court further stated that there was no new evidence and that it did not find any error of law in its previous ruling. The court therefore denied the plaintiff's motion to reconsider.

¶ 16 The court then considered two additional matters. First, the parties informed the court that they agreed that the plaintiff's spoliation of evidence claim was dependent upon the viability of her negligence claims, and they agreed that the claim should therefore be dismissed if the summary judgment was upheld. Second, the plaintiff requested leave to supplement the record with the full transcripts of the depositions of Scott Votrain and Anitra McIntyre. The defendants indicated that they had no objection. The court entered an order that day denying the plaintiff's motion to reconsider, granting the defendants' motion to dismiss the spoliation of evidence claim, and granting the plaintiff leave to supplement the record with the deposition transcripts. This appeal followed. We note that the record on appeal does not include the full transcripts of either deposition.

¶ 17 The purpose of a ruling on a motion for summary judgment is to determine whether there are any genuine issues of material fact to be resolved at trial. *Gill v. Chicago Park District*, 85 Ill. App. 3d 903, 906 (1980). Summary judgment is appropriate only if the pleadings, depositions, and other evidence on file reveal that there are no genuine issues of material fact. *Thompson v. Gordon*, 241 Ill. 2d 428, 438 (2011); *Gvillo v. DeCamp Junction, Inc.*, 2011 IL App (5th) 100262, ¶ 9. Summary judgment

may only be granted if the moving party is entitled to judgment as a matter of law. *Kohn v. Laidlaw Transit, Inc.*, 347 Ill. App. 3d 746, 749 (2004).

¶ 18 The existence of a duty is a question of law to be determined by the court. Thus, a case may be appropriately resolved on a motion for summary judgment if the court finds that the defendant owed no duty to the plaintiff. *Rowe v. State Bank of Lombard*, 125 Ill. 2d 203, 215 (1988). However, summary judgment is a drastic remedy. As such, it should not be granted unless the moving party's right to judgment is "clear and free from doubt." *Kohn*, 347 Ill. App. 3d at 750 (citing *Jones v. Chicago HMO Ltd. of Illinois*, 191 Ill. 2d 278, 291 (2000)). Because summary judgment is a drastic remedy, courts must also "view the factual record in the light most favorable to the nonmoving party." *Gvillo*, 2011 IL App (5th) 100262, ¶ 9.

¶ 19 We conduct a *de novo* review of the trial court's rulings on both the motion for summary judgment and the motion to reconsider its initial decision to grant summary judgment. *Pence v. Northeast Illinois Regional Commuter R.R. Corp.*, 398 Ill. App. 3d 13, 16 (2010). In conducting this review, we must consider all of the facts in the record and all of the grounds presented to the trial court. *Costa v. Gleason*, 256 Ill. App. 3d 150, 153 (1993). As previously noted, we must also view the facts in the light most favorable to the plaintiff as the nonmoving party. See *Gvillo*, 2011 IL App (5th) 100262, ¶ 9.

¶ 20 To survive a motion for summary judgment, the nonmoving party does not need to prove her case, but she does need to present at least some evidentiary support for each element of her claim. *Haupt v. Sharkey*, 358 Ill. App. 3d 212, 216 (2005). In a negligence action, a duty owed by the defendant to the plaintiff is one of the essential elements the

plaintiff must prove. The plaintiff must demonstrate the existence of a duty owed by the defendant, a breach of that duty, and an injury proximately caused by the defendant's breach of its duty. *Rowe*, 125 Ill. 2d at 215. Without such a duty, "there can be no negligence." *Kohn*, 347 Ill. App. 3d at 754.

¶ 21 Here, the plaintiff has asserted that the defendants had a duty to warn her that there was a risk of criminal activity in their parking lot and to take steps to protect her from that risk. Ordinarily, there is no duty to protect others from criminal attacks by third parties. *Osborne v. Stages Music Hall, Inc.*, 312 Ill. App. 3d 141, 147 (2000). There are, however, exceptions to this general rule. Under the exception relevant here, a land holder has a duty to take steps to guard against criminal attacks if the parties have a recognized special relationship *and* the attack is reasonably foreseeable. *Id*. In this case, there is no dispute that the plaintiff was a business invitee of the defendants, which is one of the special relationships recognized by law in Illinois. *Id*. The question is whether the attempted robbery of the plaintiff was reasonably foreseeable.

¶ 22 A criminal attack is reasonably foreseeable when the facts and circumstances known to the defendant are such that they would put a reasonable person on notice that the attack is likely to occur. *Costa*, 256 Ill. App. 3d at 152. The reasonable foreseeability of a crime must be "measured by the individual facts and circumstances of each case." *Osborne*, 312 Ill. App. 3d at 147. In many cases, however, a criminal attack is reasonably foreseeable because the defendants were aware of prior similar incidents. See, *e.g.*, *Costa*, 256 Ill. App. 3d at 152 (declining to find a duty on the part of a tavern owner to protect the plaintiff where the plaintiff submitted *no* evidence of prior "disruptions, acts of

violence, or warnings of any sort"); *Vaughn v. Granite City Steel Division of National Steel Corp.*, 217 Ill. App. 3d 46, 56 (1991) (noting that "evidence of prior criminal acts *** made the attack on the decedent foreseeable"); *Burks v. Madyun*, 105 Ill. App. 3d 917, 921 (1982) (noting that there is no duty to protect others from criminal attacks "absent knowledge of previous incidents or special circumstances which would charge the [defendant] with knowledge of the danger"); *Gill*, 85 Ill. App. 3d at 906 (finding no duty to protect the plaintiff from a crime where the plaintiff provided no evidence of any prior acts of violence). The question in this case is *how* similar prior incidents must be in order to put a defendant on notice that a criminal attack is reasonably likely and should be guarded against.

¶ 23 General assertions of crime are not enough to establish foreseeability. *Salazar v. Crown Enterprises, Inc.*, 328 Ill. App. 3d 735, 745 (2002). This is because "anyone can foresee the commission of a crime virtually anywhere at any time." (Internal quotation marks omitted.) *Osborne*, 312 Ill. App. 3d at 147. However, it is " 'the general character of the event or harm' " that must be reasonably foreseeable before a duty may be imposed, " 'not its precise nature or manner of occurrence.' " *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 442 (2006) (quoting *Bigbee v. Pacific Telephone & Telegraph Co.*, 665 P.2d 947, 952 (Cal. 1983)); see also *Slager v. Commonwealth Edison Co.*, 230 Ill. App. 3d 894, 904 (1992) (explaining that "the precise pattern of events" need not be foreseeable before a duty may be found). Moreover, foreseeability is not based on a magic formula, nor is it assessed without regard to common sense. *Slager*, 230 Ill. App. 3d at 904.

¶ 24 The plaintiff contends that the court erred in limiting its consideration of prior incidents to an overly narrow category of incidents. That is, the court considered only prior incidents involving thefts of purses and ignored the fact that other acts of violence had taken place in the parking lot. We note that it is not entirely clear whether the court found that the attack on the plaintiff was not reasonably foreseeable because it found that there were too few previous purse-snatchings to put the defendants on notice or because it accepted the defendants' claim that even those incidents were not similar enough to the incident involving the plaintiff to be considered. As we noted earlier, the court only stated that it considered the incidents and found nothing "persuasive" that would lead it to deny the motion for summary judgment. In either case, however, we agree with the plaintiff.

¶ 25 As we discussed previously, the defendants argued before the trial court that, despite evidence of incidents involving batteries, threats, and other disturbances in the parking lot, the attempted robbery of the plaintiff was not reasonably foreseeable because none of those incidents involved an attack on a customer by a would-be thief. They also argued that the three purse thefts were not similar enough to make the plaintiff's injury foreseeable because none involved physical contact between the victim and the thief and none involved the theft of a purse that was on the person of the victim at the time. We first note that this is not an accurate characterization of the three previous purse thefts. As discussed earlier, two of the incidents *did* involve physical contact between the thieves and the victims, and the third incident involved the theft of property in the presence of the victim. As we will discuss later in this decision, property crimes committed in the

presence of the victim carry with them a strong likelihood of confrontation between the perpetrator and the victim, which in turn carries a risk of physical harm.

¶ 26 More fundamentally, however, we believe this approach flies in the face of common sense. See *Slager*, 230 Ill. App. 3d at 904 (noting that foreseeability is not a "concept that stalls common sense"). The defendants here had notice that multiple physical assaults had taken place in its parking lot and that multiple thefts had occurred within the immediate presence of customers in the same parking lot. The defendants ask us to ignore the prior physical assaults because the perpetrators were not would-be thieves, and they ask us to ignore the three previous purse snatchings because they were property crimes. Were we to accept this reasoning, virtually any prior incident could be deemed too distinguishable to put a defendant on notice that a crime involving violence is reasonably likely to occur. This defies logic, and it ignores the fact that it is the nature of the harm rather than the precise events leading to it that must be reasonably foreseeable. See *Marshall*, 222 Ill. 2d at 442; *Slager*, 230 Ill. App. 3d at 904. Looking at all the facts known to the defendants, we believe that the plaintiff's injury was reasonably foreseeable.

¶ 27 We must acknowledge that this court has previously drawn a distinction between property crimes and physical assaults in determining the foreseeability of a violent crime at a retail establishment. In *Taylor v. Hocker*, we recognized that property crimes—particularly shoplifting—are common at stores and shopping centers. *Taylor v. Hocker*, 101 Ill. App. 3d 639, 642 (1981). Concerned that this fact might expose stores and shopping centers to limitless liability, this court held that knowledge of property crimes alone was insufficient to give rise to a duty to protect customers from violent crimes. *Id.*

The court noted, however, that a different result may well have been warranted had the mall owners been aware "of a history of assaults in the parking facilities." *Id*. at 642-43.

¶ 28 Subsequently, both the Illinois Supreme Court and this court rejected a bright-line distinction between property crimes and crimes of violence. In *Rowe*, two women were shot by an intruder while working at an office in a large office park. One woman was killed and the other was injured. *Rowe*, 125 Ill. 2d at 207. The injured woman and the family of the decedent filed separate lawsuits against the developer, owner, and manager of the office park. *Id*. The suits were later consolidated. *Id*. at 209. We note that *Rowe* is not precisely analogous to the case before us, and the *Rowe* court considered the foreseeability of the shooting in a different context. However, we find its discussion of foreseeability relevant and instructive.

¶ 29 The plaintiffs in *Rowe* alleged that the defendants were negligent in failing to control distribution of master keys to the offices, failing to warn the two women that some of the master keys were not accounted for, failing to warn them that crimes had been reported in the office park, and failing to provide adequate security. *Id*. The plaintiffs filed an affidavit from a maintenance engineer who worked in the office park. He stated that he had informed one of the defendants that several of the master keys were missing and could not be accounted for. *Id*. at 210. He further stated that he was authorized to purchase the materials needed to change the locks so the master keys would no longer work, but when the parts arrived, he was told not to install them due to the cost. *Id*. at 210-11.

¶ 30 The plaintiffs also submitted evidence of 17 crimes that occurred at the office park over the two years preceding the shooting. All 17 reports involved thefts in the parking lot, thefts from offices, or burglaries of offices. *Id*. at 212. No violent crimes had been reported at the office park prior to the shooting. *Id*.

¶ 31 The trial court entered summary judgment in favor of the defendants, and the appeals court affirmed that ruling. The plaintiffs then appealed to the supreme court. *Id*. at 207-08. The supreme court rejected the plaintiffs' claim that the defendants owed the employees of its tenants a general duty to protect them from the criminal conduct of others on the premises, explaining that the law does not recognize a special relationship between a landlord and those on the leased premises with the consent of its tenants. *Id*. at 215-16. However, the court found that by retaining access to the offices and manufacturing master keys to facilitate that access, the defendants "assumed a duty to take reasonable precautions to prevent unauthorized entries by individuals possessing those keys." *Id*. at 221. The court explained that once the defendants were aware that there were missing master keys that could not be accounted for, they "had a duty either to warn those rightfully on the premises of the danger or to take reasonable precautions to prevent foreseeable unauthorized entries." *Id*. at 223. The court concluded that by failing to do so, the defendants breached this duty. *Id*.

¶ 32 The defendants argued that they nevertheless could not be held liable because the criminal conduct of the shooter was an "independent intervening cause." *Id*. at 223-24. The supreme court noted that ordinarily, when the criminal conduct of a third person is an independent intervening cause, it supersedes the negligence of the defendant as the

proximate cause of the plaintiff's injury. *Id*. at 224. The court explained, however, that if an intervening criminal act is foreseeable at the time of the defendant's negligence, it does not break the causal chain from the defendant's negligence. *Id*.

¶ 33 The defendants in *Rowe* argued, much as the defendants argue here, that the shooting was unforeseeable as a matter of law because there had been no previous violent crimes in the office park. *Id*. at 226. The supreme court rejected this contention. The court noted that the purpose of door locks is to keep out intruders and thereby prevent criminal conduct. *Id*. at 227. The court then explained that "[a]lthough burglary standing alone is a crime against property interests, it also involves a high risk of personal injury or death if the intruder is confronted." *Id*. The court thus concluded that the shooting was "within the scope of the foreseeable risk." *Id*.

¶ 34 In *Vaughn*, this court likewise considered the foreseeability of a violent crime in the context of analyzing proximate cause. There, an employee of the defendant steel mill was shot to death next to his vehicle in a parking lot provided by the defendant for the use of its employees. *Vaughn*, 217 Ill. App. 3d at 48. The defendant maintained several employee parking lots, and it did provide security in those lots. However, a security expert retained by the plaintiffs testified that the measures taken by the defendant were inadequate. He noted that the lot was not fenced, the lighting was inadequate, and the defendant required a single security officer to patrol all of the defendant's parking lots instead of placing a security guard in each lot. *Id*. at 56.

¶ 35 The defendant appealed a judgment entered on a jury verdict after trial. *Id*. at 48. It argued that the trial court erred in not entering a judgment notwithstanding the verdict in

favor of the defendant. *Id*. at 51. This court found that the defendant voluntarily undertook to provide security in its parking lots and that it therefore had a duty not to perform this duty negligently. *Id*. at 54. We then turned our attention to the defendant's argument that it was entitled to a judgment notwithstanding the verdict on the question of proximate cause. *Id*. at 54-57. We noted that the evidence "clearly showed a homicide as opposed to a self-inflicted fatal wound." *Id*. at 55. We further noted that, "although no acts of personal violence had taken place on the defendant's parking lots, there were reported incidents of crimes against property, one of which had resulted in a security guard pulling his weapon." *Id*. We found that the evidence of prior crimes "made the attack on the decedent foreseeable." *Id*. at 56. We noted that in *Rowe*, the supreme court similarly considered reports involving previous property crimes "while the incident in question pertained to crimes against a person." *Id*. at 57.

¶ 36 The defendants argue that *Vaughn* is distinguishable from this case because the court considered the foreseeability of the harm in the context of proximate cause, rather than duty. Presumably, the same argument would apply to *Rowe*. We disagree. We note that *Rowe* involved a landlord-tenant relationship (*Rowe*, 125 Ill. 2d at 216) and *Vaughn* involved an employer-employee relationship (*Vaughn*, 217 Ill. App. 3d at 48). Neither of these is recognized as a special relationship that will give rise to a duty to protect others from even foreseeable crimes. See *Osborne*, 312 Ill. App. 3d at 147. It is for this reason neither the *Rowe* court nor the *Vaughn* court was required to discuss foreseeability in the context of determining whether a duty existed. Obviously, duty and proximate cause are two distinct concepts. See *Marshall*, 222 Ill. 2d at 443. But that does not mean that the

circumstances that make a crime foreseeable when a court is examining proximate cause will suddenly lose their predictive value when the court is instead examining duty. We thus find that property crimes may be considered in determining whether an attack is reasonably foreseeable.

¶ 37 This is not to say that property crimes will *always* make physical assaults reasonably foreseeable. We note that the defendants in *Taylor* had notice that the shopping center had experienced "numerous shoplifting incidents" as well as property crimes in its parking lot, where the violent crime at issue occurred. *Taylor*, 101 Ill. App. 3d at 641. Those crimes included four automobile thefts, one bicycle theft, and several thefts of property from parked vehicles. *Id*. We believe that the reasoning in *Taylor* is still valid with regards to shoplifting. Shoplifting takes place inside the store, not in the parking lot, and involves little if any potential for conflict between the thief and other shoppers. Thus, as a matter of common sense, a history of shoplifting incidents does not make a violent crime against a customer in a parking lot reasonably foreseeable. As a matter of policy, imposing a duty to protect customers from physical assault based solely on a history of shoplifting would mean that shopping centers would owe such a duty in nearly all cases. See *Marshall*, 222 Ill. 2d at 444 (quoting Restatement (Second) of Torts § 344 cmt. f, at 225-26 (1965)) (noting that a business owner is not required to insure the safety of its invitees).

¶ 38 The same reasoning may not apply to the property crimes against customers in the parking lot in light of the supreme court's decision in *Rowe* and this court's decision in *Vaughn*. However, this is not the proper case to revisit this question for two reasons.

First, the defendants in this case, unlike the defendants in *Taylor*, had notice of prior physical assaults in their parking lot. The *Taylor* court explicitly found this distinction to be relevant. *Taylor*, 101 Ill. App. 3d at 642-43 (noting that this distinction is relevant). Second, as we have discussed, the previous property crimes in this case all took place in the presence of the victims, and two of them involved actual contact between the perpetrators and the victims. As the supreme court explained in *Rowe*, property crimes involve "a high risk of personal injury" if the perpetrators are confronted. *Rowe*, 125 Ill. 2d at 227. When property crimes occur in the presence of the victims, as they did here, such a confrontation is almost certain to occur. As such, the risk of injury is particularly foreseeable when a business inviter has knowledge that such crimes have occurred on its premises.

¶ 39 We also reject the defendants' argument that the plaintiff's injury was not made foreseeable by the prior violent crimes that occurred in its parking lot because those crimes did not involve would-be thieves. As we have emphasized, it is the general nature of the harm that must be foreseeable, not the exact sequence of events. See *Marshall*, 222 Ill. 2d at 442; *Slager*, 230 Ill. App. 3d at 904. It is also worth noting that the precautions the defendants might take to guard against a criminal attack are the same regardless of the identity of the perpetrator. We conclude that the defendants' knowledge of prior thefts within the presence of the victims and prior batteries in their parking lot was sufficient to put them on notice that a customer might be injured by the criminal conduct of a third party.

¶ 40 The defendants call our attention to several cases which, they contend, support their position. We find each of those cases distinguishable.

¶ 41 In *Rodgers v. Hook-SuperX, Inc.*, 204 Ill. App. 3d 861 (1990), the plaintiff was mugged in the parking lot of a drug store. Shortly before the mugging, the two men who committed the crime were asked to leave the store because they were verbally harassing another customer. *Id.* at 864. In support of her contention that the attack was reasonably foreseeable, the plaintiff presented the deposition testimony of a cashier who "thought there might have been a prior purse snatching in the area but was not positive." *Id*. The plaintiff also presented deposition testimony describing the behavior of the two men before they were asked to leave the store (*id*.) and her own deposition testimony that she heard the cashier tell a police officer that a similar incident had occurred two months before she was mugged (*id*. at 863). The Fourth District upheld the trial court's grant of summary judgment in favor of the store, finding that these allegations were "insufficient to make the attack upon plaintiff reasonably foreseeable." *Id*. at 864. This case stands in stark contrast to *Rodgers* because the plaintiff there provided *no* reports of prior crimes and presented only deposition testimony that one similar incident *may* have happened previously.

¶ 42 *Popp v. Cash Station, Inc.*, 244 Ill. App. 3d 87 (1992), was a consumer class action against an ATM network and the banks that provided its machines for use by their customers. The plaintiff sought to enjoin the defendants from operating ATMs without providing "reasonable personal security systems for the protection of [their] cardholders from third-party criminal attacks." *Id.* at 90. The named plaintiff alleged that the

defendants owed her and other cardholders a duty to protect them from foreseeable third party criminal attacks because they were business invitees. *Id*. at 91. She alleged that criminal assaults at the defendants' ATMs were foreseeable because 1500 to 5000 assaults occurred at ATMs nationally each year. She did not make any specific allegations about the specific locations or times at which future crimes were likely to occur. *Id*. at 93. In finding these allegations insufficient to support a finding that future attacks were reasonably foreseeable, the First District noted that the plaintiff's allegations were "at best comparable" to an allegation that a building is "in a 'high crime area.' " *Id*. The court also noted that the basis for imposing a duty on a business to protect its invitees is " 'the owner's superior knowledge of the danger.' " *Id*. at 94 (quoting *Altepeter v. Virgil State Bank*, 345 Ill. App. 585, 598 (1952)). The court explained that the plaintiff in that case did not allege that the defendants had "any unique knowledge" concerning the possibility of future attacks at their ATMs. *Id*. at 95. Here, by contrast, the plaintiff has alleged that the defendants knew about several specific incidents involving crimes committed in its parking lot.

¶ 43 *Petrauskas v. Wexenthaller Realty Management, Inc.*, 186 Ill. App. 3d 820 (1989), similarly involved vague allegations. There, the plaintiff alleged that the apartment building where she lived "was located in a 'high crime' area" and that "On information and belief," the defendant landlords "knew or should have known" that there was a fatal shooting across the street one month before the plaintiff was raped in her apartment. *Id.* at 824. The case also involved a much narrower duty than the duty involved in this case. Unlike a business inviter, a landlord does not have a general duty to protect tenants from

criminal acts on the premises. *Id*. at 825. However, a landlord *does* have a duty to keep the common areas of its property in a reasonably safe condition, and a landlord may be liable for foreseeable criminal attacks based on a breach of this duty. *Id*. at 826. A criminal attack is foreseeable if the landlord has knowledge of prior similar incidents " '*which are connected with the physical condition of the premises*.' " (Emphasis in original.) *Id*. at 827 (quoting *Duncavage v. Allen*, 147 Ill. App. 3d 88, 97-98 (1986), citing *Stribling v. Chicago Housing Authority*, 34 Ill. App. 3d 551 (1975)). The First District found that the plaintiff's allegations of prior criminal activity had no connection to the physical condition of the building. *Id*. The instant case involves a broader duty and allegations that are far more specific.

¶ 44 The final case cited by the defendants in support of their position, *Kolodziejzak v. Melvin Simon & Associates*, 292 Ill. App. 3d 490 (1997), merits more detailed discussion. The decedent in that case was a loss prevention specialist at a Montgomery-Ward store. The store was a tenant of a mall managed by Simon Management Company. *Id.* at 491. Simon Management hired a company called Corporate Security to provide security for the common areas of the mall. *Id*. The decedent was fatally shot while attempting to apprehend a suspected shoplifter. *Id*. at 491-92.

¶ 45 The decedent's widow filed a suit against Simon Management, Corporate Security, Montgomery-Ward, and the shooter. *Id.* at 492. Simon Management filed a motion for a directed verdict, arguing that it did not owe the decedent a duty to protect him from criminal attacks. The court denied the motion, and the jury found in favor of the plaintiff and apportioned 10% of the fault to Simon Management. *Id*.

¶ 46 On appeal from a judgment entered on that verdict, the First District explained that although a landlord ordinarily does not have a duty to protect its tenants (or their employees) from criminal attacks, if the landlord voluntarily undertakes a duty to provide security, it has a duty not to do so negligently. *Id*. The court further explained that if a landlord hires a security company, it "may be liable for negligent hiring," but if the landlord "undertakes security measures" itself, it has a duty to exercise reasonable care in performing security-related tasks. *Id*.

¶ 47 The primary issue in *Kolodziejzak* was whether Simon Management had any duty beyond its duty to use reasonable care in hiring a security company. *Id*. at 493. The plaintiff argued that it did have such a duty because it "undertook a duty to oversee the security force." *Id*. at 492-93. She argued that it undertook this duty by reviewing reports provided by Corporate Security. *Id*. at 496. She further argued that Simon Management breached this duty by failing to hire additional security guards. *Id*. at 493. The First District rejected this argument. The court found that, even assuming Simon Management had undertaken any "duty beyond that of reasonable care in hiring the security company, it would be difficult to find a duty that [it] undertook that it failed to fulfill." *Id*. at 496.

¶ 48 The court then considered the plaintiff's argument that Simon Management had a duty to hire additional security guards because the evidence of "criminal acts and gang activities on the premises" made it reasonably foreseeable that a gang member would enter the mall with a weapon and kill or seriously injure an innocent person. *Id*. at 496-97. In rejecting this claim, the First District noted that the only gang activity previously reported at the mall included gang-related graffiti, individuals shouting gang slogans

from a vehicle, and one attempted bicycle theft, none of which were violent crimes. *Id*. The court then noted that the prior violent crimes at the mall—two store robberies, an incident in which a Corporate Security guard was threatened with an oil stick, and a fight in the parking lot—were not related to gang activity. *Id*. The court concluded that these previous incidents were insufficient to put Simon Management on notice that it was reasonably likely that a gang member would enter the mall carrying a gun and shoot someone. *Id*. This reasoning is similar to the approach advocated by the defendants in this case. That is, in determining whether the commission of a serious violent crime by a gang member was reasonably foreseeable, the court discounted both prior incidents of gang activity that were not violent and prior violent crimes that were not committed by gang members. We are not persuaded that we should apply the same reasoning in this case.

¶ 49 We find *Kolodziejzak* distinguishable for two reasons. First, the gang-related incidents there, with the possible exception of the bicycle theft, did not make the shooting foreseeable the way the prior crimes at issue in this case made the attempted robbery of the plaintiff foreseeable—they were neither crimes of violence nor crimes that carried a significant risk of confrontation between perpetrator and victim. Second, the question there was not whether violent crimes in the mall were foreseeable; the fact that Simon Management hired a security company indicates that it did, in fact, foresee this likelihood. Rather, the question was whether a need for additional security was reasonably foreseeable. The court's language discounting the relevance of prior non-gang-related violent crimes to this question appears to have been specifically directed to the plaintiff's argument that Simon Management should have foreseen the need to hire

additional security guards because of the presence of gangs. No similar issue is presented by this case.

¶ 50 Moreover, to the extent *Kolodziejzak* can be read to support the overly narrow approach to duty analysis urged by the defendants, we decline to follow it. See *Schramer v. Tiger Athletic Ass'n of Aurora*, 351 Ill. App. 3d 1016, 1020 (2004) (stating that we are not obliged to follow the holdings of other districts of the Illinois Appellate Court). We have already discussed at length our reasons for finding that the three prior purse thefts and the four prior batteries were all relevant to determining whether the plaintiff's injuries were reasonably foreseeable. Nothing in *Kolodziejzak* convinces us to alter this finding. We conclude that the evidence presented by the plaintiff was sufficient to demonstrate that the attempted robbery that led to her injuries was reasonably foreseeable

¶ 51 This conclusion does not end the inquiry, however. The determination of whether there is a duty includes a consideration of additional factors. Courts must consider not only the foreseeability of the incident, but the likelihood of the harm, the magnitude of the burden in guarding against it, and the consequences of placing that burden on the defendants. *Haupt*, 358 Ill. App. 3d at 216-17. Duty is a "complex and indeed nebulous" concept, and the determination of whether a duty exists involves considerations of public policy. *Marshall*, 222 Ill. 2d at 435-36. The court in this case does not appear to have considered these other factors in light of its conclusion that the attempted robbery was not reasonably foreseeable. We have reached the opposite conclusion. We will therefore remand this matter to the court trial court to allow it to consider the other duty factors.

¶ 52 We note that the plaintiff has indicated that there is testimony in the depositions of Anitra McIntyre and Scott Votrain concerning their knowledge that another area Wal-Mart store regularly posted a security guard in its parking lot. She has also indicated that Votrain testified that the defendants had hired a security guard to patrol the parking lot of the Granite City store while the store was closed for Christmas. Because the plaintiff did not submit either deposition transcript in its entirety, this evidence was not before the court when it ruled. However, the court granted the plaintiff's request to supplement the record with the full deposition transcripts, and the statements described by the plaintiff are relevant to the magnitude of the burden, one of the duty factors. The court may therefore consider this additional information in making its determination.

¶ 53 We also note that the *scope* of any duty owed by the defendants to the plaintiff is also a question of law for the court to determine. See *Cullotta v. Cullotta*, 287 Ill. App. 3d 967, 973 (1997). As we discussed earlier, the plaintiff contends that the defendants had a duty to "enact measures to secure" their parking lot, warn her of the danger, and put a security guard in the parking lot. She also asserted in her deposition that the parking lot was not lit. The magnitude of the burden of imposing a duty to keep the parking lot well lit or to place signs warning of the possibility of criminal attacks is fairly minimal. On the other hand, a duty to control access to the parking lot or post numerous security guards at all times may be excessive for a retail establishment. See *Kolodziejzak*, 292 Ill. App. 3d at 498. A duty to post one security guard in the parking lot may not be too burdensome, especially if the defendants were aware that another area store employed a security guard

in this manner, as the plaintiff asserts. As we have noted, the deposition testimony related to this question will be available for the court to consider on remand.

¶ 54 Finally, we note that the defendants argue, in the alternative, that we should uphold the court's order granting summary judgment because the plaintiff has not presented evidence to support her claim that the defendants' alleged negligence proximately caused her injuries. However, it would be inappropriate for this court to address the issue of proximate cause because the trial court has not addressed that issue. See *In re T.P.S.*, 2011 IL App (5th) 100617, ¶ 10. We therefore decline to consider the defendants' arguments concerning proximate cause.

¶ 55 For the reasons stated, we reverse the order of the court granting summary judgment in favor of the defendants, and we remand this matter to the trial court for further proceedings consistent with this decision.

¶ 56 Reversed and remanded.