RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4583-13T4

JUDY DOE, by and through her mother, MOTHER DOE and MOTHER DOE,

Plaintiffs-Appellants,

v.

SAKER SHOPRITES, INC., SAKER HOLDINGS CORP., J.S. FAMILY LIMITED PARTNERSHIP, L.P. WAKEFERN FOOD CORPORATION, JOHN ROE and T.S.,

Defendants-Respondents,

and

J.B. and A.Z.,

Defendants.

Argued June 21, 2016 – Decided June 16, 2017

Before Judges Espinosa and Kennedy.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-1761-10.

George B. Forbes argued the cause for appellants (Forbes Law Offices, LLC, attorneys; Mr. Forbes, of counsel and on the brief).

Robert Francis Gold argued the cause for respondents (Gold, Albanese & Barletti, L.L.C., attorneys; Judy T. Albanese, of counsel and on the brief).

PER CURIAM

Judy Doe,[1] by and through her mother, Mother Doe, filed a complaint against Saker ShopRites, Inc. (ShopRite) and Wakefern Food Corporation[2], (Wakefern) (collectively, defendants), based upon an incident that occurred at the East Windsor ShopRite supermarket (the ShopRite store) on July 15, 2008. J.B. and A.Z. were also named as defendants but have never filed an answer. Plaintiff[3] appeals from an order that granted summary judgment to defendants, dismissing the complaint. We affirm.

I.

The facts, viewed in the light most favorable to plaintiff, Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995); R. 4:46-2(c), can be summarized as follows.

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[1] Fictitious names and initials are used to protect the privacy of the child.

[2] Saker Holdings Corp., J.S. Family Limited Partnership, L.P., John Roe and T.S. were also named as defendants. The claims against them were voluntarily dismissed.

[3] Because all claims by Mother Doe were voluntarily dismissed, plaintiff refers to Judy Doe throughout.

At approximately 10:21 p.m. on July 15, 2008, Judy and her mother entered ShopRite's store in East Windsor. Judy, six years old, was wearing a short skirt and a t-shirt.

Approximately fifteen minutes later, Judy walked down aisle number 16 toward the front of the store. A store employee, J.B., looked at Judy as he walked past the aisle. A minute later, he repeated this action and, a few seconds later, he again walked past aisle 16, again looking at Judy. After about one minute, he stared at Judy from the front of the aisle for forty-four seconds and then stopped at the display at the end of aisle 16, where he watched Judy's movements.

After Judy joined her mother in the meat section, J.B. approached them, nearly bumping into Judy. While her mother was in the meat section, Judy picked up a broom in aisle 14. Her mother told her to return the broom after they walked together to aisle 15.

When Judy was alone in aisle 14, J.B. approached her, told her to "come over" and knelt down to take photographs with his cellphone of her bare legs. Then J.B. said, "good girl," lifted Judy's t-shirt to expose her stomach, took a picture, and said,

"really good girl."[4] Judy screamed for her mother and J.B. took off.

The encounter lasted approximately two minutes and occurred before J.B.'s shift began.

Judy's mother found her, shaking, crying and barely able to speak. She went through the store, asking Judy to point out the man who had touched and photographed her. They found J.B. in the warehouse, hiding behind pallets. He volunteered, "I didn't take any photo[s]," and handed Mother Doe a phone as proof. Judy noted that J.B. had a different color phone when he photographed her and her mother asked to speak to a manager.

Before Judy and her mother found him, J.B. had left the store and met with A.Z., who now responded as the manager.[5] He attempted to persuade her there were no photos on the phone, again using the phone J.B. had presented to her. A.Z. also said that J.B. was "mentally slow," would not do it again and would be punished. There was no record that A.Z. filed a report regarding this incident thereafter.

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[4] Although it was alleged that J.B. touched Judy in her chest/breast area at this time, Judy testified that, other than her shirt, J.B. did not touch any part of her body.

[5] Although A.Z. was J.B.'s direct supervisor, A.Z. was not a manager; they were both union employees.

As Judy and her mother walked away, another employee told them A.Z. was a friend of J.B. and directed them to Keith Hayslett, the night manager. Hayslett filled out a Customer Incident Report. He testified he did not call the police because Mother Doe told him not to do so. He also prepared an Employer's Warning Notice Corrective Review, dated July 15, 2008, detailing the incident, that included the following:

> This is against company policy and a violation of harassment in the workplace. For your alledged [sic] actions, you will be disciplined. You have been warned earlier about taking pictures of customers.

The details of the discussion and plan of action stated: "For your alledged [sic] actions [J.B.] is suspended pending union review/termination. You are not to work until the union has cleared you to work." J.B. refused to sign the form.

At his deposition, Hayslett testified that Henry Lemus, the maintenance manager, told him there had been a prior incident of J.B. taking pictures of customers. Hayslett did not know who had warned J.B. about taking pictures or the nature of the pictures taken, other than that the customer was an adult female. When deposed, Lemus did not recall telling Hayslett that J.B. had received a warning or being told that J.B. was taking pictures of women in the store.

ShopRite's Loss Prevention Detective, Dale Scott, interviewed and took audio statements from Hayslett, Lemus, A.Z., and J.B. Hayslett told Scott he had required the assistance of Lemus to translate Mother Doe's statements to him. According to Scott's report, Lemus stated that, when he spoke to her, "she was quite passive about the entire incident and stated that she doesn't want to get anyone in trouble, she just wants to know what happened to her daughter." Lemus's description of Judy's account comports with the allegations in the complaint. A.Z. contended J.B. did not take any photos of Judy. J.B. denied the allegations, claiming he approached Judy out of concern she was alone in the store at a late hour, asked her where her mother was and intended to help her find her mother when she ran off crying. He maintained he had no physical contact with her. Scott concluded there was no evidence to substantiate the allegation against J.B. and told him he could return to work as soon as possible.

At Lemus's request, Michael McDonald, the store manager, reviewed video surveillance tapes and, based on that review, contacted the East Windsor police. A search warrant was obtained for J.B.'s home, resulting in the recovery of pornographic material and two cell phones. One was a black flip phone that J.B. and A.Z. had shown to Mother Doe. The other was a gray phone that contained photos of Judy and other young females. The

investigation also revealed that J.B. sent the photos of Judy to A.Z.'s cell phone.

J.B. began working at the ShopRite store in 1997 as a part-time grocery clerk and was later assigned to the night crew in a full-time position. He had no prior arrests before this incident. J.B. was charged with luring, N.J.S.A. 2C:13-6, and engaging in sexual conduct that would impair or debauch the morals of a child, N.J.S.A. 2C:24-4(a). In a psychological evaluation conducted at the request of his public defender for his defense in the criminal charges filed after this incident, J.B. acknowledged behavioral issues.

A.Z. had worked at the ShopRite store previously, left to start a business and later returned, working as the night crew chief as of 2008. No additional review of his application was conducted at the time he was rehired because his superiors knew his reason for leaving and what his work performance was before he left. A.Z. was charged with engaging in sexual conduct that would impair or debauch the morals of a child, N.J.S.A. 2C:14-9(a), based upon his receipt of photos from J.B.

A psychologist evaluated Judy approximately four years after the incident at ShopRite. Judy was reported to have academic difficulties, impulsive behavior, nightmares and trouble sleeping. The psychologist found "positive symptoms for Posttraumatic Stress

Disorder (PTSD), suffered as a direct result of the traumatic incident at" the ShopRite store. She also opined that "Attention-Deficit/Hyperactivity Disorder (ADHD) of the Inattentive Type or the Hyperactive-Impulsive Type should be ruled out."

The complaint alleged intentional tort and violation of New Jersey's Child Sexual Assault Act, N.J.S.A. 2A:61B-1 (count one), abduction and false imprisonment (count two), assault and battery (count three), negligent hiring, retention, training and supervision (count four), intentional infliction of emotional distress (count five), and negligent infliction of emotional distress (count six).

Defendants filed a motion for summary judgment. Mother Doe's claims were voluntarily dismissed. Plaintiffs did not oppose dismissal of the counts alleging assault and intentional infliction of emotional distress as to Judy, and, at oral argument, announced the dismissal of counts against all defendants except Wakefern and ShopRite.

After additional briefing, the trial judge heard oral argument on whether ShopRite could be liable, under a theory of vicarious liability, for the intentional acts of J.B. and A.Z. Plaintiffs' counsel argued that the statement in the Employer's Warning Notice Corrective Review, "You have been warned earlier about taking pictures of customers," presented an issue of fact

that should preclude summary judgment as to ShopRite.[6] He contended further that the reference to the warning was "bolstered" by the discovery of photographs of other females on J.B.'s cell phone by the police.

Noting that extensive discovery had been conducted, the trial judge found the reference to a prior warning was insufficient to present a material issue of fact to warrant the imposition of vicarious liability on ShopRite, even considering the photos found on J.B.'s cell phone. She observed that the prior warning only referred generally to "pictures of customers," without any additional information as to the age of the customers or whether the pictures were otherwise inappropriate in any way. She stated the jury should not be allowed to speculate "that J.B. was taking pictures of little kids or adults going . . . up their skirts or . . . telling them to pick up their shirts, if you're talking about little kids, or anything inappropriate." And, she concluded, it would be mere speculation for the jury to find that the warning proved J.B. had taken such photos and ShopRite knew about it. Accordingly, she granted summary judgment to defendants.

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[6] Plaintiffs' counsel argued that Wakefern should be denied summary judgment on a different theory, but conceded that if ShopRite was dismissed, there would be no basis for Wakefern to be denied summary judgment.

II.

On appeal, plaintiff argues the trial judge applied an erroneous standard to the summary judgment motion. She argues she sustained her intentional tort claim against J.B. and, therefore, ShopRite is vicariously liable because its retention of J.B. was reckless or negligent. She contends there was adequate evidence to support her claim of negligent retention because ShopRite had previously issued a warning to J.B. Finally, plaintiff argues that, even if J.B. were off-duty at the time of the incident, it was foreseeable that his known behavior would lead to customer harm. We are unpersuaded by any of these arguments.

In reviewing a summary judgment decision, we consider the evidence "in a light most favorable to the non-moving party," Rowe v. Mazel Thirty, LLC, 209 N.J. 35, 38 (2012) (citing R. 4:46-2(c), "to determine if there is a genuine issue as to any material fact or whether the moving party is entitled to judgment as a matter of law," id. at 41 (citing Brill, supra, 142 N.J. at 529). "An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2(c).

Plaintiff cites Section 219 of the Restatement (Second) of Agency (1957) (Restatement), as legal support for her claim against ShopRite. Restatement, supra, § 219 states, in pertinent part:

> (1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.
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> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
>
> . . . .
>
> (b) the master was negligent or reckless . . . .

No credible argument can be made that J.B. was acting within the scope of his employment when he subjected Judy to photographing her and raising her shirt. The question then, is whether plaintiff has presented evidence that creates a material issue of fact as to whether ShopRite was negligent or reckless.

Plaintiff argues "ShopRite was reckless in its retention of J.B. because it had prior knowledge that he was following and taking pictures of customers." To establish such knowledge, plaintiff relies upon the sentence in the Employer's Warning Notice Corrective Review, "You have been warned earlier about taking pictures of customers."

This sentence exists, untethered to any evidence that informs what the warning was, who gave it to J.B. and, most notably, what

meaning should be given to "taking pictures of customers." The ages of the customers and the nature of the pictures are not specified in this statement. Certainly, there is no reference to J.B. touching a child's or any customer's clothing to expose their torso. As the trial judge astutely observed, speculation is required to interpret these general words as proving ShopRite had knowledge that J.B. engaged in similar behavior before.

Plaintiff argues that her characterization of the warning is confirmed by the photographs found on J.B.'s cellphone. The investigating detective described them in his deposition as "several pictures of other juvenile females." Plaintiff has not identified any other evidence in the record that expands the description of these photos. It is, therefore, unknown how young these females were, where or when the photographs were taken, whether the females were customers of ShopRite, or whether the photographs show that J.B. manipulated the clothing of any juvenile female to expose her skin. Most important, there is no evidence in the record that ShopRite had knowledge of the photos on J.B.'s phone before July 15, 2008.

Although the non-moving party is entitled to all favorable inferences, "it is evidence that must be relied upon to establish a genuine issue of fact." Cortez v. Gindhart, 435 N.J. Super. 589, 605 (App. Div. 2014), certif. denied, 220 N.J. 269 (2015).

"Competent opposition requires 'competent evidential material' beyond mere 'speculation' and 'fanciful arguments.'" Hoffman v. AsSeenOnTv.com, Inc., 404 N.J. Super. 415, 426 (App. Div. 2009) (citation omitted).

The evidence relied upon by plaintiff is probative of J.B.'s guilt of the offense for which he was convicted. It does not, however, offer any competent proof that ShopRite had knowledge of any behavior by him prior to July 15, 2008 that would have rendered them reckless or negligent in keeping him employed as a member of their night crew.

To the extent that we have not addressed any arguments presented by plaintiff, it is because we deem those arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.