COURT OF APPEALS
DECISION
DATED AND RELEASED

February 15, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-2981

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

JACKIE FRANKLIN,

Plaintiff-Appellant,

v.

MICHAEL JACKSON,

Defendant,

DIESEL TRUCK DRIVER TRAINING SCHOOL, INC., a Wisconsin corporation, and FIREMAN'S FUND INSURANCE COMPANY, a foreign corporation,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Dane County: P. CHARLES JONES, Judge. *Affirmed*.

Before Eich, C.J., Gartzke, P.J., and Dykman, J.

PER CURIAM. Jackie Franklin appeals from a summary judgment dismissing his complaint against the Diesel Truck Driver Training School, Inc. and its insurer, Fireman's Fund Insurance Company (collectively referred to as "Diesel Training"). The issue is whether there is a genuine issue of material fact to establish that Diesel Training was negligent because it failed to warn and protect its students against another student who it allegedly should have known was dangerous. We conclude that no reasonable jury could find, upon the facts presented, that Diesel Training had failed to exercise ordinary care. Because the trial court properly granted summary judgment, we affirm.

The facts are undisputed. Franklin and his assailant, Jackson, were students at Diesel Training. They were driving to school with three other students when they began to argue. The five students arrived at Diesel Training in the dark, early morning hours and were walking through the parking lot when Jackson struck Franklin with a glass mug.

Franklin sued Diesel Training on two negligence theories: (1) failure to protect him against a student who was a convicted felon with violent proclivities; and (2) failure to adequately light and secure its parking lot. Diesel Training successfully moved for summary judgment. Franklin appeals.

Summary judgment is used "to decide the preliminary question of law of whether a jury question on the issue of negligence has been presented." ***Morgan v. Pennsylvania Gen. Ins. Co.***, 87 Wis.2d 723, 732-33, 275 N.W.2d 660, 665 (1979). The summary judgment methodology of § 802.08(2), STATS., must be followed by this court as well as the trial court. ***In re Cherokee Park Plat***, 113 Wis.2d 112, 115-16, 334 N.W.2d 580, 582 (Ct. App. 1983). To establish a negligence action, the plaintiff must prove: (1) a duty and a breach of that duty; (2) a close connection between the conduct and the injury; and (3) resulting damages. *See* ***Scholmer v. Perina***, 173 Wis.2d 889, 894, 473 N.W.2d 6, 9 (Ct. App. 1991), *aff'd*, 169 Wis.2d 247, 485 N.W.2d 399 (1992).

The issues on summary judgment are whether Diesel Training was negligent because: (1) it should have known that one of its students had violent proclivities that foreseeably created an unreasonable risk of harm to others; and (2) it had a duty to light and secure its parking lot. The trial court granted summary judgment because it concluded that both allegations of

negligence were based on speculation. *See* ***Merco Distrib. Corp. v. Commercial Police Alarm Co.***, 84 Wis.2d 455, 460, 267 N.W.2d 652, 655 (1978) (if the evidence contains no reasonable basis for choosing liability over nonliability, the matter remains speculative and it becomes the court's duty to direct a verdict for the defendant).

Franklin contends that Diesel Training had a duty to protect its students from another student's intentional torts under ***Korenak v. Curative Workshop Adult Rehabilitation Ctr.,*** 71 Wis.2d 77, 237 N.W.2d 43 (1976). ***Korenak*** extended an adult educational institution's duty of ordinary care to protect its students from the "*known* negligent conduct" of other students to include intentional torts.[1] ***Id.*** at 80-81, 237 N.W.2d at 45 (emphasis supplied). Unlike ***Korenak***, there is no evidence that Diesel Training knew about Jackson's criminal record. Franklin contends that Diesel Training's duty arose when it admitted Jackson as a student because it should have obtained his criminal record, which disclosed his violent proclivities.[2] We disagree.

Korenak is distinguishable because the Center had been notified that the assailant had assaulted Korenak previously. We decline to extend ***Korenak*** to require a truck driving school to investigate its registrants for criminal records or problematic backgrounds. To impose such a duty is likely to result in discriminatory decisions based on speculation.

Franklin also contends that Diesel Training had a duty to light and secure its parking lot, but he does not establish that the absence of lighting and security was a substantial factor in producing his injuries. Franklin provides the court with possible bases for liability. However, there is an equally possible

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[1] ***Korenak*** reviewed an order overruling a demurrer, whereas we are reviewing a summary judgment. Consequently, even if the factual situations were analogous, which we conclude they are not, the procedural postures are different. ***Pavlik v. Kinsey,*** 81 Wis.2d 42, 48, 259 N.W.2d 709, 711 (1977) (standard to review a demurrer); ***Leszczynski v. Surges,*** 30 Wis.2d 534, 538-39, 141 N.W.2d 261, 264-65 (1966) (standard to review a summary judgment).

[2] Jackson's criminal record indicated that he had been convicted of attempted robbery over six years earlier and also had been arrested for retail theft, possession of a pistol, robbery and other offenses. He was on parole and probation at the time of this incident.

basis for nonliability because there is no reasonable basis in the evidence to conclude that lighting and a secure parking lot would have prevented the assault where Jackson struck Franklin in the presence of three other students who were aware of their argument. Because the choice of liability is no more compelling than the choice of nonliability, the matter remains speculative. *See* ***Merco***, 84 Wis.2d at 460, 267 N.W.2d at 655.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.