

determine not only whether the defendant owed the plaintiff a duty (as noted above) but also what the defendant's duty of reasonable care entailed in the case at hand. Suppose that Donald falls asleep at the wheel and causes a car accident in which another motorist, Peter, is injured. Falling asleep at the wheel involves a foreseeable risk of harm to others, so a reasonable person would remain awake while driving. Because Donald's conduct fell short of this behavioral standard, he has breached a duty to Peter. However, this probably would not be true if Donald's loss of awareness resulted from a sudden, severe, and unforeseeable blackout. On the other hand, there probably would be a breach of duty if Donald was driving and had a blackout to which a doctor had warned him he was subject.

Negligence law does not require that we protect others against all foreseeable risks of harm. Instead, the risk created by the defendant's conduct need only be an unreasonable one. In determining the reasonableness of the risk, courts consider other factors besides the foreseeability of harm. One such factor is the *seriousness* or *magnitude* of the foreseeable harm. As the seriousness of the harm increases, so does the need to take action to avoid it. Another factor is the *social utility* of the defendant's conduct. The more valuable that conduct, the less

likely that it will be regarded as a breach of duty. A further consideration is the *ease or difficulty of avoiding the risk*. Negligence law normally does not require that defendants make superhuman efforts to avoid harm to others.

To a limited extent, negligence law also considers the *personal characteristics* of the defendant. For example, children are generally required to act as would a reasonable person of similar age, intelligence, and experience. A physically disabled person must act as would a reasonable person with the same disability. Mental deficiencies, however, ordinarily do not relieve a person from the duty to conform to the usual reasonable person standard. The same is true of voluntary and negligent intoxication.

Finally, negligence law is sensitive to the *context* in which the defendant acted. For example, someone confronted with an emergency requiring rapid decisions and action need not employ the same level of caution and deliberation as someone in circumstances allowing for calm reflection and deliberate action.

The *Currie* case, which follows, focuses mainly on the duty and breach of duty elements of a negligence claim. It also furnishes an introduction to concepts dealt with more fully later in the chapter.

Currie v. Chevron U.S.A., Inc.

2008 U.S. App. LEXIS 4269 (11th Cir. 2008)

Acting in her own right and as personal representative of the estate of her deceased daughter (Nodiana Antoine), Tracye Currie sued Chevron U.S.A., Inc., and Chevron Stations, Inc. (collectively, "Chevron"), on the theory that Chevron negligently caused Antoine's death. The facts giving rise to the case are summarized here.

For approximately two years, Antoine and Anjail Muhammad had had a close personal relationship. The relationship between the two women was a stormy one, with Muhammad sometimes threatening to inflict physical harm on Antoine. One morning in 2003, Muhammad and Antoine were in Muhammad's car, which Muhammad had parked in a restaurant parking lot in Marietta, Georgia. According to a statement Muhammad later made to the police, Muhammad and Antoine became involved in an argument, during which Antoine said that she wanted to end their relationship. Muhammad also said in her statement that Antoine left the car and started walking toward a Chevron gas station across the street to call her family. Muhammad followed her, and the women continued arguing as they walked across the street.

Pamela Robinson, a customer at the Chevron station, testified at the trial in Currie's case that when she pulled into the station, she saw Muhammad and Antoine approach the station. Muhammad was pulling on Antoine's neck or the collar of her clothing and essentially dragging Antoine. Robinson also stated that Muhammad appeared to tighten her grip when Antoine tried to pull away. Robinson, who watched the two women move in the direction of gas pump number one, went inside the station when she realized that the pump she was seeking to use had to be activated by a Chevron cashier before it would work. Jyotika Shukla was the cashier at the station on that day. Robinson testified that she entered the station and "told [Shukla] immediately that there was something going on with the two young ladies out here and that she needed to contact the police immediately." Robinson explained that she then pointed out the two women to Shukla.

Shukla testified at the trial that she did not know there was anything wrong outside until Robinson came into the station and told her, though an earlier statement by Shukla to the police indicated that Shukla saw the women before Robinson came into the station. Regardless of when she first saw the women, Shukla said that she did see the two women "verbally fighting" and that one woman was holding the other by her shirt. Shukla did not call the police because, according to her testimony, she thought the two women were or would be leaving the Chevron property.

Evidence adduced at the trial indicated that when customers at the Chevron station sought to use a gas pump, they had to lift a lever on the pump. A beeping sound inside the station would then inform the cashier that a customer had lifted the lever. In order for the customer to receive gas through the pump, the cashier would then have to hit the "authorize pump" button. After the pump was authorized, the beeping sound would stop.

The evidence established that Shukla authorized gas pump number one by pushing the appropriate button inside the station. This authorization of the pump enabled Muhammad to use it, even though Muhammad did not have a car on the premises. Shukla testified at trial that she authorized pump number one before Robinson came into the station and before she (Shukla) saw the women fighting, but Shukla's deposition testimony and an earlier statement given to the police indicated that she could not remember whether she knew about or had seen the fighting before she authorized the pump.

Robinson's testimony suggested that Shukla authorized a pump after Robinson told Shukla about the two women fighting. Based on her prior experience of working at a gas station, Robinson recognized that a beeping sound informed the cashier that a gas pump needed to be activated. Robinson testified that she heard a beeping sound when she entered the Chevron station. She also testified that the beeping sound stopped "right after" she told Shukla to call the police. Robinson also stated that she did not ask Shukla to authorize her gas pump until after she talked to Shukla about the two women fighting outside and showed Shukla where they were standing—by gas pump number one. Moreover, there were no other customers waiting for other pumps to be authorized.

Shukla's testimony was inconsistent about whether she looked at gas pump number one before authorizing it. She first testified that she did not remember whether she had looked at pump number one before authorizing it, but later she said "[m]aybe yes." In her statement to the police, Muhammad said that Shukla looked at pump number one before authorizing it. Muhammad stated that "[e]verybody was really helpful like the lady . . . in the store . . . [S]he just turned the pump on." When a police detective asked, "Even though ya'll didn't have a car?" Muhammad responded, "Didn't even have a car right next to it, she just turned it on, she looked at us and just turned the pump on."

After Shukla authorized pump number one, Muhammad sprayed 65 cents worth of gasoline on Antoine. Robinson testified that she exited the station to return to her car to pump gas and immediately saw the two women "in the same position with [Muhammad] holding [Antoine]." Before Robinson got to her car, Muhammad asked Robinson whether she had a cigarette lighter. Robinson said she did not. She then watched the two women as they left the Chevron station, with Muhammad still pulling Antoine by her shirt.

According to Muhammad's statement to the police, she and Antoine left the Chevron station and went back to Muhammad's car. Muhammad then found a cigarette lighter in the car and used the lighter to set Antoine on fire. Antoine ran through the parking lot while on fire and tried to roll over in a grassy area in an effort to put out the flames. A passerby called 911, and Antoine was taken to the hospital. Several weeks later, Antoine died as a result of the burns she had suffered. Muhammad, who confessed to police that she set Antoine on fire, was later indicted on criminal charges of murder, aggravated battery, aggravated assault, and arson.

In Currie's wrongful death lawsuit against Chevron, Currie alleged that Shukla negligently authorized the gas pump used by Muhammad and that Antoine died as a result. Under the respondeat superior principle discussed in Chapter 36 of this text, Chevron would be liable for any negligence on the part of its employee, Shukla, if that negligence occurred within the scope of Shukla's employment. A federal district court jury returned a \$3,500,000 verdict in Currie's favor. The court issued a judgment against Chevron for \$2,625,000, an amount that reflected a 25 percent reduction from \$3,500,000 because of the jury's finding that Antoine's own negligence accounted for 25 percent of the reason why she was killed. (Later in this chapter, you will learn about the comparative negligence principle applied by the court in reducing the amount of damages awarded.) Chevron unsuccessfully moved for judgment as a matter of law or, in the alternative, a new trial. Chevron then appealed to the U.S. Court of Appeals for the Eleventh Circuit.

Per Curiam

In this diversity case controlled by Georgia law, . . . Currie contended at trial that Chevron's Shukla negligently activated the gas pump for Muhammad only after: (1) Shukla saw Muhammad pulling Antoine around the Chevron station's property by her shirt and thought that something was wrong; (2) Shukla saw that Muhammad and Antoine did not have a vehicle; and (3)

customer Pamela Robinson warned Shukla that there was a problem with the two women outside, asked Shukla to call the police, and showed Shukla where the two women were standing by gas pump number one. Currie claimed that, given this evidence, Shukla should have foreseen that Antoine would suffer some injury as a result of Shukla's activating the gas pump for Muhammad. On appeal, Chevron argues that . . . Muhammad's actions

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were not a reasonably foreseeable consequence of Shukla's negligence; [that] Antoine failed to exercise ordinary care to avoid the consequences of Shukla's negligence; [and that] Antoine's negligence was equal to or greater than Shukla's negligence.

A cause of action for negligence in Georgia must contain the following elements: (1) a legal duty to conform to a standard of conduct for the protection of others against unreasonable risks of harm; (2) a breach of this standard; (3) a legally attributable causal connection between the conduct and the resulting injury; and (4) some loss or damage resulting from the breach of the legal duty. In order to establish a breach of the applicable standard of conduct, there must be evidence that the alleged negligent act (or omission) created a foreseeable, unreasonable risk of harm. As to foreseeability of injury, Georgia courts have stated that "in order for a party to be held liable for negligence, it is not necessary that he should have been able to anticipate the particular consequences which ensued. It is sufficient if, in ordinary prudence, he might have foreseen that some injury would result from his act or omission, and that consequences of a generally injurious nature might result." [Citations omitted.]

In Georgia, questions of negligence, proximate cause, and foreseeability are generally for the jury. [After reviewing the record in this case, we] conclude that reasonable minds could differ as to whether Shukla was aware at the moment she authorized gas pump number one that her action would create a foreseeable risk of injury to Antoine. There was evidence from which the jury could have inferred that Shukla was aware that Muhammad and Antoine were involved in a serious fight on the Chevron station's property. In her statement to police on the day of the incident, Shukla said that she saw the two women walking on the station's property, that Muhammad had "grabbed" and "pulled" Antoine by the front of her shirt, and that Shukla "thought something was wrong." Shukla also testified at trial that she saw the women fighting on the Chevron station's property. Robinson's testimony confirmed Shukla's observation that the fight was serious. Robinson testified that [Muhammad tightened her grip on Antoine] when Antoine try to pull away from her. Robinson [also testified] that Muhammad then pulled Antoine "down to the ground like an animal."

There also was evidence from which the jury could have found that Shukla was aware that Muhammad and Antoine were involved in a serious fight at the Chevron station *before* she activated gas pump number one for Muhammad. [In addition,] there was evidence from which the jury could have concluded that Shukla looked at Muhammad before authorizing gas pump number one. Muhammad told police on the day of the incident that "... she looked at us and just turned the pump on. ..." Based on Muhammad's statement and Shukla's own testimony, the jury could have found that Shukla looked at gas pump number one before she authorized it, saw Muhammad (whom Shukla had seen fighting

with Antoine on the station's property and had recognized did not have a car), and nevertheless authorized gas pump number one for Muhammad.

[Considering] the totality of this evidence ... , the jury could have found that the beeping sound that Robinson heard inside the Chevron station was Muhammad seeking authorization of gas pump number one and that Shukla looked at Muhammad and authorized gas pump number one for her (thus stopping the beeping sound) *after* Shukla's conversation with Robinson. The jury also could have found that Shukla was aware at the time she authorized gas pump number one for Muhammad that: (1) Muhammad had been pulling Antoine around the Chevron station's property by her shirt as they were fighting; (2) the fight was sufficiently serious that Shukla herself thought something was wrong and that Robinson came into the station to warn Shukla that something was going on with the two women outside and to ask her to call the police; (3) Muhammad and Antoine were fighting by gas pump number one; and (4) Muhammad and Antoine did not have a car on the station's property. Thus, we conclude that there was, at the very least, a substantial conflict in the evidence such that reasonable and fair-minded jurors might reach different conclusions as to whether Shukla was aware before she authorized gas pump number one that her negligent action would create a foreseeable risk of injury to Antoine.

Chevron presented expert testimony from Rosemary Erickson, Ph.D., a forensic sociologist, that it was not reasonably foreseeable to Shukla that Muhammad would douse Antoine with gas and set her on fire. Dr. Erickson based her opinion on a review of the depositions, the police records, the low crime rate in the area surrounding the Chevron station, the lack of previous violent crimes at this specific Chevron station, and the rarity of the particular crime that occurred here. In addition to Dr. Erickson's testimony, Shukla testified that she had never [witnessed] a crime or fire at the Chevron station before that day and never had to call the police. [The] former Chevron station manager testified that there had not been any criminal activity at the Chevron station in his eight to ten years working there before this incident.

However, in cross-examining Dr. Erickson, plaintiff's counsel asked, "You would agree with me ... would you not, that if something is going on at a gas station and a clerk sees one person holding another at a gas pump and there's no car and no container, that it's foreseeable that the gas may be used inappropriately and harm can result" Dr. Erickson replied, "If all those factors were in evidence." Thus, even from Chevron's own witness, there was in effect testimony to support Currie's claim that Shukla should not have authorized the gas pump after Shukla saw Muhammad and Antoine fighting (or was told by Robinson they were fighting) and where Muhammad and Antoine had no car or gas container. [In addition, both the former station manager and Robinson, who had worked at a gas station,] testified

that they would not activate a gas pump if they saw people at the gas pump without a car or gas can.

In arguing that this incident was not foreseeable, Chevron cites Georgia premises liability cases providing that property owners have a duty to exercise ordinary care to protect invitees from foreseeable third-party criminal attacks where there are prior similar criminal acts occurring on the premises that put the property owner on notice of the dangerous condition. Chevron argues that the criminal attack by Muhammad on Antoine was not foreseeable because this particular Chevron station was in a low crime area and had not been the site of any criminal activity in previous years, much less violent crime.

First, while Currie raised a premises liability theory at trial, her primary theory of liability was that given the particularly serious events unfolding before Shukla and given Robinson's warning, Shukla then committed her own affirmative negligent act in activating gas pump number one for Muhammad, not that Chevron breached its duty to Antoine to keep its premises safe generally. Second, the lack of prior criminal activity at this Chevron station does not wholly foreclose the foreseeability issue. Even in cases grounded solely on a premises liability theory, Georgia courts have stated that "a showing of prior similar incidents on a proprietor's premises is not always required to establish that a danger was reasonably foreseeable. An absolute requirement of this nature would create the equivalent of a one free bite rule for premises liability, even if the proprietor otherwise knew that

the danger existed." [Citation omitted.] This Court applied this same reasoning in a premises liability case to conclude that there was a jury question of whether hostilities throughout the evening of which bowling alley employees were, or should have been, aware were sufficient to make it reasonably foreseeable to them that a fight would erupt, even though there had been no similar prior altercations on the premises. [Citation omitted.] Similarly, in this case, there was a sufficient conflict in the evidence for reasonable minds to differ as to whether the particular serious and exigent events unfolding right before Shukla at the Chevron station that morning, together along with Robinson's warning, should have put her on notice that activating the gas pump for Muhammad would pose an unreasonable risk of harm to Antoine, even though there was no history of prior similar incidents at this specific Chevron station.

Therefore, we cannot say that the district court erred in denying Chevron's motion for judgment as a matter of law or a new trial.

[Note: In a later portion of the opinion not included here, the Eleventh Circuit concluded that the district judge had correctly instructed the jury on issues related to Antoine's own failure to use reasonable care, that the jury's assignment of a 25 percent degree of responsibility to Antoine was supported by the evidence, and that the court had therefore properly reduced the award of damages by 25 percent.]

Judgment in favor of Currie affirmed.



Ethics in Action

Suppose that during regular work hours, an employee of XYZ Co. commits a sexual assault or other violent attack upon a member of the public. The employee, of course, is liable for the intentional tort of battery (about which you learned in Chapter 6), as well as a criminal offense. Although the doctrine of *respondeat superior* makes employers liable for their employees' torts when those torts are committed within the scope of employment, XYZ is quite unlikely to face *respondeat superior* liability for its employee's flagrantly wrongful act because a sexual assault or violent attack, even if committed during regular work hours, presumably would be outside the scope of employment.

However, as the principles explained in this chapter suggest, XYZ could be liable for its *own* tort if XYZ was negligent in hiring, supervising, or retaining the employee who committed the attack. A determination of whether XYZ was negligent would depend upon all of the relevant facts and circumstances.

Regardless of whether XYZ was negligent or would not face legal liability, the scenario described above suggests related

ethical questions that may confront employers. Consider the following:

- Does an employer have an ethical obligation to take corrective or preventive action when the employer knows, or has reason to know, that the employee poses a danger to others?
- Does it matter whether the employer has irrefutable evidence that the employee poses a danger, or whether the employer has only a reasonable suspicion to that effect?
- If the employer has an ethical obligation to take corrective or preventive action, to whom does that obligation run and what should that obligation entail?
- Does the employer owe any ethical duty to the employee in such situations?

You may find it helpful to consider these questions through the frames of reference provided by the ethical theories discussed in Chapter 4 (e.g., utilitarianism, rights theories, and profit maximization). Then compare and contrast the results of the respective analyses.