STATE OF MICHIGAN

COURT OF APPEALS

ANA LUCENA, Personal Representative of the Estate of ESTEBAN GARCIA, JR.,

Plaintiff-Appellant,

v

EL TAURINO'S RESTAURANT AND LOUNGE, d/b/a EL TAURINO'S LOUNGE and RACHEL LEDESMA, a/k/a RAQUEL LEDESMA,

Defendants-Appellees.

UNPUBLISHED
April 13, 1999

No. 205074
Wayne Circuit Court
LC No. 95-517037 NO

Before: Gribbs, P.J., and Griffin and Wilder, JJ.

PER CURIAM.

Plaintiff, Ana Lucena, as personal representative of the estate of Esteban Garcia, Jr., appeals as of right an order granting summary disposition in favor of defendants, El Taurino's Restaurant and Lounge, d/b/a El Taurino's Lounge, and Rachel Ledesma, a/k/a Raquel Ledesma. We affirm.

Plaintiff's decedent, Esteban Garcia, Jr., was shot and killed while a patron at defendant Lounge, which is owned by defendant Ledesma. Consequently, plaintiff filed premises liability, negligence, and dramshop claims against defendants. Plaintiff's claims were summarily dismissed on the basis that defendants did not owe Esteban a duty to protect him from the criminal act of being shot by third party, codefendant Hinjosa.[1]

Plaintiff's first issue on appeal is that the trial court erred in holding that defendants Lounge and Ledesma did not owe a duty to Esteban, an invitee, to protect him from foreseeable, intentional criminal acts of third parties and thereby erred in dismissing plaintiff's premises liability claim. We disagree.

Merchants have a special relationship with their invitees and, thus, are charged with a duty to take reasonable measures to protect identifiable invitees from foreseeable and preventable harm, including harm caused by the criminal acts of third parties. *Mason v Royal Dequindre, Inc*, 455 Mich 391, 393; 566 NW2d 199 (1997). Plaintiff alleges that defendants' deviation from their alleged standard practice of searching patrons for weapons constitutes actionable negligence because this

searching is a "reasonable measure" within the contemplation of the *Mason* standard. However, the *Mason* standard requires only that a merchant provide care that would be considered "reasonable" irrespective of safety measures that may have been contemplated or implemented by the defendant. *Scott v Harper Recreation, Inc*, 444 Mich 441, 452; 506 NW2d 857 (1993); *Tame v A L Damman Co*, 177 Mich App 453, 456-457; 442 NW2d 679 (1989); *Theis v Abduloor*, 174 Mich App 247, 250; 435 NW2d 440 (1988). Ejecting unruly patrons from the premises, calling the police, and not ejecting a patron into a known danger are some measures that have been deemed "reasonable." *Manuel v Weitzman*, 386 Mich 157; 191 NW2d 474 (1971); *Jackson v White Castle System*, Inc, 205 Mich App 137; 517 NW2d 286 (1994); *Schneider v Nectarine Ballroom, Inc (On Remand)*, 204 Mich App 1; 514 NW2d 486 (1994); *Mills v White Castle System, Inc*, 167 Mich App 202; 421 NW2d 631 (1988). However, merchants are not required to provide police protection, including security guards, even in high crime areas, for the purpose of protecting their patrons from criminal acts of third parties. *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 501; 418 NW2d 381 (1988). See also *Krass v Joliet, Inc*, ___Mich App ___; ___ NW2d ___ (Docket No. 204413, issued 2/2/99); *Papadimas v Mykonos Lounge*, 176 Mich App 40; 439 NW2d 280 (1989). Similarly, the searching of patrons for weapons prior to allowing admittance to defendant Lounge is not a reasonable measure within the contemplation of the *Mason* standard and, thus, defendants are not liable for failing to search codefendant Hinjosa for weapons prior to allowing him entry into defendant Lounge. Further, plaintiff's theory that defendants "voluntarily assumed" the duty to search patrons has been rejected. *Scott, supra* at 452; *Abner v Oakland Mall Ltd*, 209 Mich App 490; 531 NW2d 726 (1995).

Even if conducting searches of patrons for weapons prior to allowing admission into defendant Lounge was considered a reasonable measure, defendants would not be liable because Esteban was not an "identifiable invitee" subject to a "foreseeable" shooting which was preventable by the exercise of reasonable care as required by the *Mason* standard. Esteban was neither involved in the fight that preceded the shooting nor was he a target of abusive behavior. Esteban was merely a bystander who was hit with an errant bullet fired by his friend. Further, the alleged fact that defendant Lounge is located in a crime-ridden and gang infested area of Detroit is insufficient to make this particular shooting foreseeable. *Papadimas, supra* at 47.

Plaintiff's second issue on appeal is that the trial court erred in holding that dramshop owners are not liable for intentional criminal acts in light of *Weiss v Hodge (After Remand)*, 223 Mich App 620; 567 NW2d 468 (1997). We agree with plaintiff. However, this Court reviews the grant of a motion for summary disposition de novo and will not reverse the trial court where the right result was reached for the wrong reason. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 640; 534 NW2d 217 (1995).

MCL 436.22(4); MSA 18.993(4) provides in pertinent part:

> Except as otherwise provided in this section, an individual who suffers damage or is personally injured by a minor or visibly intoxicated person by reason of the unlawful selling, giving, or furnishing of alcoholic liquor to the minor or visibly intoxicated

> person, if the unlawful sale is proven to be a proximate cause of the damage, injury, or death, or the spouse, child, parent, or guardian of that individual, shall have a right of action in his or her name against the person who by selling, giving, or furnishing the alcoholic liquor has caused or contributed to the intoxication of the person or who has caused or contributed to the damage, injury, or death.

Consequently, for plaintiff to prevail in her dramshop claim, she must prove that Esteban's death was proximately caused by defendant Lounge serving alcohol to a visibly intoxicated person, in particular, codefendant Hinjosa. Plaintiff did not set forth any evidence in this regard. Thus, plaintiff has failed to establish that a material fact is at issue. *Paul v Lee*, 455 Mich 204, 210-211; 568 NW2d 510 (1997).

Plaintiff further argues that the proximate cause of Esteban's death was a participant in the fight, Landau. However, plaintiff failed to name and retain Landau contrary to MCL 436.22(6); MSA 18.993(6). *Spalo v A & G Enterprises (After Remand)*, 437 Mich 406, 410-412; 471 NW2d 546 (1991). Even if plaintiff was excused from the name and retain provision because she has no cause of action against Landau, defendants would be entitled to adopt the defenses of the allegedly intoxicated person pursuant to MCL 436.22(8); MSA 18.993(8). Thus, plaintiff would have no cause of action against defendants because they would successfully defend on the basis that plaintiff failed to establish that Landau was served alcohol after he became visibly intoxicated and that Landau was the proximate cause of Esteban's death.

Affirmed.

/s/ Roman S. Gribbs
/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder

[1] Plaintiff caused a default judgment to be entered on July 31, 1995, against codefendant Hinjosa for failure to file an appearance and answer to plaintiff's assault and battery claims. Defendants Lounge and Ledesma filed a cross-claim for indemnification against codefendant Hinjosa. Defendants' cross-claim was summarily dismissed, but is subject to automatic and immediate reinstatement if this present appeal is successful. Consequently, codefendant Hinjosa does not appear in the case caption.