STATE OF MICHIGAN

COURT OF APPEALS

STEPHEN L. LOWRY,

Plaintiff-Appellant,

v

CELLAR DOOR PRODUCTIONS OF MICHIGAN, INC. and ARENA ASSOCIATES, INC. d/b/a PINE KNOB MUSIC THEATRE,

Defendants-Appellees.

UNPUBLISHED
June 8, 1999

No. 206875
Oakland Circuit Court
LC No. 96-519569 NO

Before: Murphy, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition regarding plaintiff's negligence and handicapper's discrimination claims. On June 22, 1994, plaintiff attended a Suicidal Tendencies/Danzig/Metallica concert at Pine Knob Music Theatre and was struck by sod thrown by other concert spectators. We affirm.

Plaintiff contends that the trial court erred in granting defendants' motion for summary disposition because defendants owed him a duty of care to protect him from the foreseeable criminal acts of third parties. According to plaintiff, it was foreseeable that fellow patrons would throw sod during the concert.

On appeal, this Court reviews the grant or denial of a motion for summary disposition de novo. *Singerman v Municipal Service Bureau, Inc*, 455 Mich 135, 139; 565 NW2d 383 (1997). Whether a duty exists is a question of law. *Murdock v Higgins*, 454 Mich 46, 53; 559 NW2d 639 (1997). In determining whether to impose a duty, the court evaluates factors such as the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented. *Id*. After a finding that a duty exists, the factfinder must then determine whether there was a breach of the duty, in light of the particular facts of the case. *Id*. Any measures taken by the premise owner must be reasonable. *Mason v Royal Dequindre, Inc*, 455 Mich 391, 398-399, 405; 566 NW2d 199 (1997). Questions concerning reasonable care should also be determined by the court as a matter of law where

there are overriding concerns of public policy. See *Scott v Harper Recreation, Inc*, 444 Mich 441, 448; 506 NW2d 857 (1993).

The unidentified individual who threw sod at plaintiff committed a criminal assault and battery.[1] Generally, a person does not have a duty to aid or protect another person endangered by a third person's conduct. *Mason*, *supra* at 397. However, an exception arises when there is a special relationship between the parties. *Id*. In order for a special relationship duty to be imposed on a merchant, the invitee must be "readily identifiable as [being] foreseeably endangered." *Murdock*, *supra* at 58. "'Readily' is defined as 'promptly; quickly; easily.'" *Mason*, *supra* at 398, quoting *The Random House College Dictionary* (rev ed). Mere foreseeability that otherwise random criminal activity may occur is not enough to create a duty to protect an invitee.[2]

Within these parameters, Michigan courts have found criminal conduct of third persons foreseeable where there exists evidence that a merchant was aware of an ongoing or prolonged disturbance directed toward a specific invitee, yet the merchant failed to take action to protect the invitee. *Mason*, *supra* at 404, 405 (finding a duty where the assailant had earlier fought with the plaintiff on the premises and the premises owner's employees refused to call police or escort the plaintiff off the premises and an attack on the plaintiff thereafter occurred); *Jackson v White Castle*, 205 Mich App 137; 517 NW2d 286 (1994) (finding a duty where the assailant was part of an unruly group that had been on the premises and earlier threatened the plaintiff). Conversely, Michigan courts have steadfastly held that criminal acts are unforeseeable as a matter of law where there is no evidence of a prolonged ongoing disturbance that leads to criminal activity against a readily identifiable plaintiff. *Mason*, *supra* at 405 (finding no duty owed to the plaintiff where, although there was an earlier altercation, the plaintiff was never involved in any altercation and therefore was not a foreseeable victim of criminal activity); *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495; 418 NW2d 381 (1988) (finding no duty to protect store patron shot during armed robbery attempt); *Scott*, *supra* (finding no duty to protect a patron shot in parking lot advertised to be lighted and secured).

In the instant case, we find that defendants owed no duty to protect plaintiff because it was unforeseeable as a matter of law that the crowd would throw sod at plaintiff during the concert on June 22, 1994. After numerous concerts at Pine Knob over the past six or seven years, there had been only one or two incidents of sod throwing prior to the incident involving plaintiff.[3] In support of his argument that the sod throwing was foreseeable, plaintiff provided the deposition statement of Pine Knob Event Coordinator Connie Marshall that she believed there had been other incidents of sod throwing prior to June 1994. This statement constituted the totality of the evidence presented by plaintiff tending to establish the number of sod throwing incidents occurring prior to June 22, 1994. Plaintiff provided absolutely no evidence regarding the number of prior incidents or the dates and circumstances of any prior sod throwing occurrence from which we may determine that the June 22, 1994 incident should have been foreseeable to defendants. Furthermore, there was uncontradicted evidence that on the evening prior to plaintiff's injury the same bands played without any instances of sod throwing. Because plaintiff failed to establish that prior incidents of sod throwing made such a danger to plaintiff foreseeable on June 22, 1994, we conclude that the trial court correctly granted summary disposition in favor of

defendant Arena Associates[4] on the basis that it owed plaintiff no duty to protect plaintiff from the criminal sod throwing actions of third parties.[5] *Mason, supra* at 398, 405.

We also find the instant case factually distinguishable from the scenario underlying this Court's recent decision in *MacDonald v PKT, Inc*, 233 Mich App 395; ___ NW2d ___ (1999), which involved a May 24, 1995 sod throwing incident during a PlanetFest concert at Pine Knob. The *MacDonald* Court reversed the circuit court's grant of summary disposition to defendant on the basis that, given plaintiff's submission of evidence that defendant was aware of prior sod throwing at previous concerts and that defendant had formulated policies to deal with sod throwing incidents prior to the PlanetFest concert, an issue of fact existed with respect to whether the sod throwing incident was foreseeable. *Id*. at 400. In the present case, the record is absolutely devoid of any evidence that defendants had formulated a specific policy to deal with sod throwing incidents.[6] Moreover, the *MacDonald* sod throwing incident occurred after the June 22, 1994 incident involved in this case. In *MacDonald*, the plaintiff had been injured during the second occurrence of sod throwing during the same PlanetFest concert. In the instant case, the prior evening's performance involving the same bands had successfully concluded without any sod throwing and no prior occurrences of sod throwing had taken place on June 22, 1994 before the incident during which plaintiff was struck.

Lastly, plaintiff claims that defendant violated his rights under the Michigan Handicapper's Civil Rights Act (MHCRA), MCL 37.1101 *et seq*.; MSA 3.550(101) *et seq*., by failing to adequately accommodate his disability. Plaintiff asserts that, despite the warnings and the knowledge of potentially dangerous activity by the crowd, defendant led him to a handicapped viewing area where he was subjected to the foreseeable danger. The MHCRA guarantees that handicapped individuals are not denied the "full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation or public service because of a handicap that is unrelated to the individual's ability to utilize and benefit from the goods, services, facilities, privileges, advantages, or accommodations." MCL 37.1302(a); MSA 3.550(302)(a). The burden of proof rests with the plaintiff to show that the defendant failed to accommodate his handicap. *Lindberg v Livonia Public Schools*, 219 Mich App 364, 367; 556 NW2d 509 (1996).

Defendant's employees met plaintiff at the entrance gate and provided him with a wheelchair, and escorted him to his seat in a reserved handicapped area. The handicapped area at the rear of the pavilion allowed patrons with disabilities to view the concert even if fellow spectators in front of them were standing. Furthermore, plaintiff's alleged injuries were not caused by defendants' failure to accommodate plaintiff's handicap. Instead, plaintiff was injured by third parties' criminal acts. Because the evidence established that defendants accommodated plaintiff so that he could fully and equally utilize the Pine Knob facilities, we conclude that the trial court properly granted defendant summary disposition regarding plaintiff's handicapper's discrimination claim.

Affirmed.

/s/ Hilda R. Gage
/s/ Brian K. Zahra

[1] A simple criminal assault has been defined as either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery. *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995). A battery is the consummation of an assault. *People v Terry*, 217 Mich App 660, 662; 553 NW2d 23 (1996). In the instant case, the prosecution would be required to prove only that the unidentified individual intended to throw the sod. *Id*. at 662-663. The individual's intent may be established by circumstantial evidence. *Id*. at 663.

[2] The dissent premises its conclusion that sod throwing was foreseeable on the mere fact that there had been prior instances of sod throwing. However, *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 501-502; 418 NW2d 381 (1988), established as a matter of public policy that merchants cannot control and should not be held responsible for random crime that may occur in society.

[3] Defendants attached as an exhibit to their brief in support of their motion for summary disposition the transcript of a motion hearing in the case of *MacDonald v PKT, Inc*, Oakland Circuit Court, June 11, 1997 (Docket No. 96-520074 NO), which involved a Pine Knob spectator plaintiff who in the summer of 1995 had been struck by thrown sod. The circuit court had observed in that case, "We have circumstances where there's testimony that's undisputed that in the six or seven year period that Pine Knob has been open, there have been three sod throwing incidents." Presumably the circuit court referred to a 1991 or 1992 incident at a Lollapalooza concert that had been previously mentioned at the hearing, the June 22, 1994 incident underlying the instant plaintiff's claim, and the 1995 incident involving plaintiff MacDonald. Thus, it would appear that only one occurrence of sod throwing took place prior to the June 22, 1994 incident involving plaintiff.

[4] With respect to defendant Cellar Door Productions of Michigan, Inc. (Cellar Door), we note that the parties and the trial court incorrectly analyzed Cellar Door's potential negligence under a theory of premises liability. Cellar Door did not own or control the Pine Knob Music Theatre, but merely produced the concert involving Suicidal Tendencies, Danzig and Metallica. Defendant Arena Associates owned Pine Knob. Therefore, because Cellar Door was not the owner of the premises, it had no duty to protect plaintiff from any allegedly foreseeable criminal acts of third parties. Cellar Door owed plaintiff only the duty that accompanies every contract: a common law duty to perform with ordinary care the thing agreed to be done. *Home Ins Co v Detroit Fire Extinguisher Co, Inc*, 212 Mich App 522, 529; 538 NW2d 424 (1995). Plaintiff failed to allege the manner in which Cellar Door negligently performed its contractual obligations, and neither party produced a copy of the contract between Cellar Door and Arena Associates. Plaintiff's complaint alleged that Arena Associates was responsible for providing security for the event; thus, it would have been Arena Associates' role, as the entity responsible for security, to take the necessary safety precautions for its patrons and to eject sod throwers. Therefore, we find that summary disposition for Cellar Door was properly granted pursuant to MCR 2.116(C)(8) because plaintiff failed to allege any viable cause of action against Cellar Door. Any further mention of "defendant" in this opinion will thus refer to Arena Associates.

[5] Even assuming that a risk of harm to plaintiff from sod throwing was foreseeable, the trial court correctly granted defendant summary disposition pursuant to MCR 2.116(C)(10) because plaintiff failed to show that defendant acted unreasonably. Plaintiff argues generally that defendant's "security was negligent in the performance of its duties in both planning its course of action for the concert and

providing a safe venue for the concert to take place," and that defendant "did nothing to protect the physically challenged patrons who attended this concert." There was, however, uncontradicted evidence to the contrary. Defendant arranged to have over seventy crowd control personnel working that evening, over three times the number of personnel it employed at a "normal" concert, like the Beach Boys for example, and also arranged for the presence of an increased number of Oakland County Sheriff deputies. During and after the incident, defendant's employees and the sheriff's deputies apprehended and ejected over 100 sod throwers and made two arrests.

[6] We join in the concerns raised by a panel of this Court in *Krass v Tri-County Security, Inc*, 233 Mich App 661, 682, n 13; ___ NW2d ___ (1999):

> We find the consideration in *MacDonald* of the defendant having formulated policies to deal with sod-throwing incidents to be questionable. In *Buczkowski* [*v McKay*, 441 Mich 96,] 99, n 1[; 490 NW2d 330 (1992)], the Michigan Supreme Court stated:
>
> > Imposition of a legal duty on a retailer on the basis of its internal policies is actually contrary to public policy. Such a rule would encourage retailers to abandon all policies enacted for the protection of others in an effort to avoid future liability.
>
> Similar concerns are implicated by consideration of the internal policies of the operator of an indoor or outdoor place of entertainment. Nevertheless, because *MacDonald* is not controlling in the case at hand, we need not consider whether *MacDonald* was correctly decided.