STATE OF MICHIGAN

COURT OF APPEALS

MAURY V. ANDERSON and TAMIKO ANDERSON,

Plaintiffs-Appellants,

v

A-1 BAR-B-Q FOODS, INC.,

Defendant-Appellee.

UNPUBLISHED
June 15, 2001

No. 219532
Wayne Circuit Court
LC No. 97-738301-NO

Before: Hoekstra, P.J., and Whitbeck and Meter, JJ.

PER CURIAM.

This case arose from a robbery on defendant's premise. Plaintiff Maury V. Anderson (Mr. Anderson) received permanent injuries when unknown assailants inflicted gunshot wounds while Mr. Anderson was waiting for his wife, Tamiko Anderson (Mrs. Anderson), in the parking lot of defendant restaurant. In their complaint, plaintiffs alleged negligence, violation of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.*; MSA 19.418(1) *et seq.*, and negligent or intentional infliction of emotional distress. The trial court granted summary disposition in favor of defendant pursuant to MCR 2.116(C)(8) and (10). Plaintiffs appeal as of right. We affirm.

We review a trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Russell v Dep't of Corrections*, 234 Mich App 135, 136; 592 NW2d 125 (1999). A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint and "may be granted only where the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.'" *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999), quoting *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). "In evaluating a motion for summary disposition brought under [MCR 2.116(C)(10)], a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion" to determine whether a genuine issue regarding any material fact exists. *Maiden, supra* at 120. If the nonmoving party fails to present evidentiary proofs showing a genuine issue of material fact for trial, summary disposition is properly granted. *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456, n 2; 597 NW2d 28 (1999).

Plaintiffs first argue that the trial court erred in granting summary disposition on their negligence claim because defendant had a duty to protect plaintiffs from the criminal assault. To establish a prima facie case of negligence, a plaintiff must prove: "(1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached that duty; (3) that the defendant's breach of duty was a proximate cause of the plaintiff's damages; and (4) that the plaintiff suffered damages." *Krass v Tri-County Security, Inc*, 233 Mich App 661, 667-668; 593 NW2d 578 (1999). Duty is a question of law for the court to determine. *Scott v Harper Recreation, Inc*, 444 Mich 441, 448; 506 NW2d 857 (1993); *Krass*, *supra* at 666. In determining whether a duty is owed, the courts must determine "'whether the relationship between the parties will occasion a legal obligation to the injured party.'" *Krass*, *supra*, quoting *Tame v A L Damman Co*, 177 Mich App 453, 455; 442 NW2d 679 (1989).

In the instant case, it is undisputed that plaintiffs were defendant's invitees and therefore defendant owed plaintiffs a duty. The only question is the extent of the duty owed. Plaintiffs maintain that the duty extended to protecting or warning them about potential criminal acts. In this regard, the general rule is that there is no duty to protect individuals from the criminal acts of third parties unless special circumstances are present. *Tame*, *supra* at 455-456. Here, we find that special circumstances are not present.

The factual situation in *Krass*, *supra*, is similar to that in the instant case. In *Krass*, the plaintiff was returning to his car parked in a lot secured by the defendant when three men assaulted him. *Id*. at 664. He was shot in the head and eventually died from that wound. *Id*. The plaintiff's estate brought a negligence action against the security company for failing to properly secure the premises and for failing to affirmatively protect the plaintiff. *Id*. The trial court ruled that the defendant owed no duty to the plaintiff to protect him from the criminal acts of third parties and this Court affirmed that ruling. In pertinent part, this Court said:

> The central issue in this case relates to duty. . . . As did the Supreme Court in *Williams* [*supra*], we find that the duty advanced by plaintiff is essentially one of police protection, but that duty is vested in the government by constitution and statute. As in *Williams*, we further find that although a property owner can control the condition of its premises by correcting physical defects that may result in injuries to its business invitees, *it cannot control the incidence of crime in the community and that the inability of government and law enforcement officials to prevent criminal attacks does not justify transferring the responsibility to a business owner*. . . . [*Id*. at 683-684 (emphasis added).]

We are not persuaded by plaintiffs' argument that this case is controlled by *McDonald v PKT, Inc*, 233 Mich App 395; 593 NW2d 176 (1999), lv gtd 461 Mich 992 (2000). In *MacDonald*, *supra*, the plaintiff fractured her ankle while attempting to avoid being hit by sod that unruly concert-goers were throwing. *Id*. at 397-398. However, *Krass*, *supra*, distinguished the criminal acts conducted in *MacDonald*, *supra*, from general criminal acts when it stated:

> *MacDonald* involved criminal acts that were highly peculiar to defendant's outdoor amphitheater and that the defendant in that case arguably had specific reason to anticipate. In contrast, the tragic shooting underlying the case here was, in essence, a random street crime, as was that at issue in *Scott* [*v Harper*

> *Recreation, Inc*, 444 Mich 441; 506 NW2d 857 (1993)]. The finding of a genuine issue of material fact in *MacDonald* was predicated on the defendant's knowledge of a problem peculiar to its location, not a generalized social problem such as street crime. Thus, we conclude that *MacDonald* is materially distinguishable in light of its peculiar facts and *does not alter our conclusion that a merchant is ordinarily not liable for a criminal act committed against an invitee in a parking lot owned, controlled, or otherwise used by the merchant.* [*Krass, supra* at 682-683 (emphasis supplied).]

The same is true in the instant case. Despite plaintiffs' claim to the contrary, we find that there is nothing peculiar about defendant's business or the circumstances preceding this incident that would make defendant aware of plaintiffs as potential victims of a foreseeable crime. Just because defendant's business previously had been the location of other random criminal occurrences does not translate into plaintiffs being foreseeable victims of another such occurrence and thereby creating a special relationship between plaintiffs and defendant. As this Court further noted in *Krass*, "Michigan law does not treat essentially random 'crime in the community,' such as the tragedy underlying this case, as a 'foreseeable' harm against which a merchant must insure its patrons." *Krass, supra* at 683.

Next, plaintiffs argue that the trial court erred in granting summary disposition because they established a viable violation of the MCPA. "The MCPA is a remedial statute designed to prohibit unfair practices in trade or commerce and must be liberally construed to achieve its intended goals." *Forton v Laszar*, 239 Mich App 711, 715; 609 NW2d 850 (2000). For a valid MCPA claim to be presented, the "courts must examine the nature of the conduct complained of case by case and determine whether it relates to the entrepreneurial, commercial, or business" aspects of the defendant's profession. *Nelson v Ho*, 222 Mich App 74, 84; 564 NW2d 482 (1997). Here, the occasional criminal acts taking place on defendant's premises in no way relate to defendant's conduct in its trade. Additionally, even if we were to assume that not revealing criminal acts to patrons was a violation of the MCPA, defendant's failure to reveal occurrences of street violence occasionally invading defendant's parking lot does not rise to the level of misrepresentation. Plaintiffs provided no facts indicating that defendant in any way misrepresented the safety of his premises. The trial court properly granted summary disposition pursuant to MCR 2.116(C)(8).

Finally, plaintiffs argue that summary disposition was inappropriate with regard to Mrs. Anderson's negligent or intentional infliction of emotional distress claim. For a negligent infliction of emotional distress claim to prevail, a plaintiff must witness an injury caused by negligence. *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 581, n 6; 603 NW2d 816 (1999), citing *Duran v The Detroit News, Inc*, 200 Mich App 622, 629; 504 NW2d 715 (1993). Because we have concluded that defendant did not act negligently when it failed to warn plaintiffs of unforeseeable criminal acts, it cannot be said that Mr. Anderson's injuries were negligently inflicted by defendant. Accordingly, this aspect of the claim was properly dismissed.

To state a claim for intentional infliction of emotional distress, a plaintiff must demonstrate

> (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress. Liability for such a claim has been found only where the conduct complained of has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community. [*Teadt, supra* at 582 (citations omitted).]

Because defendant's conduct could not be reasonably be regarded as so extreme and outrageous as to permit recovery, we agree with the trial court that plaintiffs failed to state a claim on which relief may be granted. Thus, summary disposition was proper under MCR 2.116(C)(8). *Id.*

Affirmed.

/s/ Joel P. Hoekstra
/s/ William C. Whitbeck
/s/ Patrick M. Meter