

STATE OF MICHIGAN
COURT OF APPEALS

RODNEY MASON,

Plaintiff-Appellant/Cross-Appellee,

v

UAW UNION LOCAL 961,

Defendant-Appellee/Cross-
Appellant.

UNPUBLISHED

March 26, 2002

No. 229160

Wayne Circuit Court

LC No. 99-011917-NO

Before: Neff, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). Defendant cross-appeals on the ground that summary disposition was also proper under federal law. We affirm.

On December 23, 1997, plaintiff, a member of defendant union, attended defendant's Christmas party. As he arrived at about 9:00 p.m., he encountered coworker Andrew Finney. Finney grabbed and pushed plaintiff and asked him where he had been and when he would be returning to work. An argument ensued. At the suggestion of another individual, plaintiff and Finney took their discussion outside, where Finney apologized to plaintiff. Union President Virdell King had overheard the argument and came out of her office to see about the disturbance. King told Finney that he was too drunk and ordered him to leave. Finney walked away from the door and plaintiff believed that Finney left the premises. Plaintiff went into the party. About an hour later, plaintiff was playing poker when he was pushed from behind. He turned and saw Finney, who was visibly intoxicated. Plaintiff pushed Finney. Finney pulled a gun from his waistband and shot plaintiff.

Plaintiff brought this action alleging that defendant was negligent for failing to maintain its premises in a safe manner. Defendant moved for summary disposition under MCR 2.116(C)(10), arguing that it owed no duty to plaintiff to protect him from Finney because this incident was an unforeseeable criminal act. The trial court agreed with defendant and granted the motion.

This Court reviews motions for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Taylor v Laban*, 241 Mich App 449, 451; 616

NW2d 229 (2000), citing *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). In evaluating a motion for summary disposition brought under this subsection, 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. *Taylor*, *supra* at 452. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4); *Maiden*, *supra* at 119-120; *Taylor*, *supra* at 452.

In any negligence action, the initial inquiry is whether the defendant owed a legal duty to the plaintiff. *Holland v Liedel*, 197 Mich App 60, 62; 494 NW2d 772 (1992). The existence of a duty is a question for the court to decide as a matter of law. *Girvan v Fuelgas Co*, 238 Mich App 703, 711; 607 NW2d 116 (1999). Our Supreme Court recently clarified the scope of an invitor's duty to his invitees regarding the criminal acts of third parties. In *MacDonald v PKT, Inc*, 464 Mich 322; 628 NW2d 33 (2001), the Court held that a possessor of land has "a duty to respond reasonably to situations occurring on the premises that pose a risk of imminent and foreseeable harm to identifiable invitees." *Id.* at 325-326. "[T]he duty to respond is limited to reasonably expediting the involvement of the police" and "there is no duty to otherwise anticipate and prevent the criminal acts of third parties." *MacDonald*, *supra* at 325-326.

In the instant case, plaintiff maintains that the argument between Finney and plaintiff which preceded Finney's ejection from the party triggered a duty on the part of defendant to protect plaintiff from Finney because plaintiff was an identifiable invitee and the harm to plaintiff was foreseeable. We disagree. The evidence does not suggest that there was an ongoing situation which posed a risk of imminent and foreseeable harm. There is no evidence that Finney threatened plaintiff in any way during the first altercation. According to plaintiff, Finney gave no indication that he had a gun and Finney apologized to plaintiff. Plaintiff relies on the deposition testimony of King that she "knew somebody [was] getting ready to get into it." The fact that Finney and plaintiff engaged in a heated argument does not make it foreseeable that Finney would resort to criminal behavior, especially in the absence of any threat and in light of Finney's apology. Although plaintiff argues that after Finney reentered the party he was seen carrying a gun, the record is void of any evidence regarding his demeanor, other than his intoxicated condition, during this time until he approached plaintiff. Further, the affidavit of Neil Ziegler, which plaintiff offered in opposition to summary disposition, states that Finney "went up to Mr. Mason and shot him without saying a word." Viewing the evidence in the light most favorable to plaintiff, we conclude that reasonable minds could not differ regarding the foreseeability of danger to plaintiff. See *MacDonald*, *supra* at 338. Accordingly, the trial court properly granted summary disposition in favor of defendant.

In light of our affirmance of the trial court's grant of summary disposition, we need not address plaintiff's remaining issues on appeal or defendant's cross-appeal.

Affirmed.

/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot