STATE OF MICHIGAN

COURT OF APPEALS

AMY DOBOS,

Plaintiff-Appellant,

v

LAN WU and SAAD HARRIS AHMAD,

Defendants,

and

MEIJER, INC., #64,

Defendant-Appellee.

UNPUBLISHED
November 23, 2021

No. 353926
Washtenaw Circuit Court
LC No. 19-000140-NO

Before: MURRAY, C.J., and MARKEY and RIORDAN, JJ.

RIORDAN, J. (*concurring in part and dissenting in part*).

I concur with the majority that there is a question of fact as to whether defendant Saad Harris Ahmad was acting within the scope of his employment when he intervened in the fight at issue. However, I respectfully dissent from the majority's conclusion that there is a question of fact as to plaintiff's claim for negligent training against defendant Meijer, Inc., #64 (hereinafter "defendant").

Employers are "subject to liability for their negligence in hiring, training, and supervising their employees." *Zsigo v Hurley Med Ctr*, 475 Mich 215, 227; 716 NW2d 220 (2006). "[T]he negligent hiring, retaining, training, or supervising of an employee [is] a direct tort committed by the employer itself, not a matter of vicarious liability." *Mueller v Brannigan Bros Restaurants & Taverns, LLC*, 323 Mich App 566, 572; 918 NW2d 545 (2018). "In order to make out a prima facie case of negligence, the plaintiff must prove the four elements of duty, breach of that duty, causation, and damages." *Brown v Brown*, 478 Mich 545, 552; 739 NW2d 313 (2007). If the harm to the plaintiff is not foreseeable, then the defendant does not owe the plaintiff a duty. See *Valcaniant v Detroit Edison Co*, 470 Mich 82, 87; 679 NW2d 689 (2004). With regard to the duty owned by a merchant to an invitee, "a duty arises only on behalf of those invitees that are readily

identifiable as being foreseeably endangered." *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001) (cleaned up).

In this case, plaintiff argues that defendant, apparently by mere virtue of the fact that it operates as a store, should have been aware that patrons would possibly engage in fisticuffs on its premises and that it should have trained its employees accordingly on the art of mediating such physical disputes. The majority agrees, concluding that "a reasonable juror could deem it foreseeable that a Meijer employee, upon observing a fight between customers . . . would intervene in the altercation in an effort to stop it . . . and that the employee might physically mishandle the situation, resulting in injuries."

However, "a merchant has no obligation generally to *anticipate* and prevent criminal acts against its invitees." *Id.* at 334 (emphasis added). Our Supreme Court has "never recognized as 'foreseeable' a criminal act that did not . . . arise from a situation occurring on the premises under circumstances that would cause a person to recognize a risk of imminent and foreseeable harm to an identifiable invitee." *Id.* Thus, for example, when a bar is aware of an ongoing fight between two patrons, the resulting harm is generally foreseeable. See *Mason v Royal Dequindre, Inc*, 455 Mich 391, 404-405; 566 NW2d 199 (1997). Otherwise, "[a] merchant can assume that patrons will obey the criminal law." *MacDonald*, 464 Mich at 335. "This assumption should continue until a specific situation occurs on the premises that would cause a reasonable person to recognize a risk of imminent harm to an identifiable invitee." *Id.*

Simply put, criminal conduct by the patrons of a merchant is unforeseeable by the merchant itself until a specific situation occurs on the premises suggesting the possibility of such conduct. The majority therefore errs, in my view, by reasoning that defendant should have foreseen that at some indefinite point in the future, two or more of its patrons would engage in an unlawful fight, such as the type that occurred in the matter before us. As a matter of law, such criminal conduct is unforeseeable. See *id.* And, if such conduct is unforeseeable, it follows that defendant also could not have foreseen that employee training concerning such conduct would prevent injury to a patron. In other words, defendant is not obligated to train its employees for an unforeseeable event. Accordingly, defendant cannot owe a duty to plaintiff under these circumstances because the harm to plaintiff was unforeseeable, and the claim for negligent training must fail.[1]

[1] Further, even disregarding the caselaw discussing foreseeability in this particular context, I would still conclude that defendant did not owe a duty to plaintiff under these circumstances. Plaintiff has not shown or even alleged that fights between patrons on defendant's premises were relatively common or anticipated. In the absence of such evidence, I would not impose a blanket obligation upon defendant, or any similarly situated merchant, to train its employees for how to respond to such a hypothetical event. Compare *Long v MGM Grand Hotel, LLC*, 128 Nev 914; 381 P3d 635 (2012) (allowing claims including negligent training to proceed against the casino, where two patrons assaulted a third patron, and where the casino "knew that fights between its patrons were a regular occurrence and it had additional security on hand due to the New Year's holiday and the UFC fight").

For these reasons, I would affirm the trial court's grant of summary disposition in favor of defendant with regard to plaintiff's claim for negligent training.

/s/ Michael J. Riordan