STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA GRAVES and FRANK AMEDURE, SR., as Personal Representatives of the Estate of Scott Amedure, Deceased, Plaintiffs-Appellees, v WARNER BROS., JENNY JONES SHOW, and TELEPICTURES, jointly and severally, Defendants-Appellants.	FOR PUBLICATION October 22, 2002 9:10 a.m. No. 226645 Oakland Circuit Court LC No. 95-494536-NZ Updated Copy January 17, 2003

Before: Murphy, P.J., and Griffin and Meter, JJ.

GRIFFIN, J.

Defendants appeal as of right from the entry of judgment in the amount of $29,332,686 following the jury's verdict in plaintiffs' favor in this wrongful death action. We reverse the judgment, vacate the court's order, and remand for entry of a judgment and order in favor of defendants, holding that under the circumstances defendants owed no legally cognizable duty to protect plaintiffs' decedent from the homicidal acts of a third party.

I

The instant case has its origins in the tragic murder of plaintiffs' decedent, Scott Amedure, in March of 1995 by Jonathan Schmitz, who was ultimately convicted of second-degree murder. The facts underlying the highly publicized criminal case are set forth in this Court's decision, *People v Schmitz*, 231 Mich App 521, 523; 586 NW2d 766 (1998), which addressed Schmitz' original appeal of his murder conviction:

> This case arises from defendant's killing of Scott Amedure with a shotgun on March 9, 1995. Three days before the shooting, defendant appeared with Amedure and Donna Riley in Chicago for a taping of an episode of the Jenny Jones talk show, during which defendant was surprised by Amedure's revelation that he had a secret crush on him. After the taping, defendant told many friends and acquaintances that he was quite embarrassed and humiliated by the experience and began a drinking binge.

> On the morning of the shooting, defendant found a sexually suggestive note from Amedure on his front door. Defendant then drove to a local bank, withdrew money from his savings account, and purchased a 12-gauge pump-action shotgun and some ammunition. Defendant then drove to Amedure's trailer, where he confronted Amedure about the note. When Amedure just smiled at him, defendant walked out of the trailer, stating that he had to shut off his car. Instead, defendant retrieved the shotgun and returned to the trailer. Standing at the front door, defendant fired two shots into Amedure's chest, leaving him with no chance for survival. Defendant left the scene and telephoned 911 to confess to the shooting.

Following a jury trial, Schmitz was found guilty of second-degree murder and possession of a firearm during the commission of a felony; however, this Court reversed the conviction and remanded the case for a new trial on the basis of an error concerning peremptory challenges and jury selection. *Schmitz*, *supra*. On remand, Schmitz was again found guilty of second-degree murder and felony-firearm and sentenced to twenty-five to fifty years' imprisonment for the murder conviction. His conviction and sentence were affirmed by this Court in *People v Schmitz*, unpublished opinion per curiam of the Court of Appeals, issued January 22, 2002 (Docket No. 222834).

In the wrongful death action now before this Court, plaintiffs Patricia Graves and Frank Amedure, Sr., as personal representatives of the estate of Scott Amedure, deceased, alleged that Schmitz shot and killed Amedure as a direct and proximate result of the actions of the present defendants, the Jenny Jones Show (the show), its owner, Warner Bros., and its producer, Telepictures.[1] Plaintiffs essentially contended that defendants "ambushed" Schmitz when they taped the episode of the show in question,[2] intentionally withholding from Schmitz that the true topic of the show was same-sex crushes and never attempting to determine, before the show, the effect the ambush might have on Schmitz. Plaintiffs alleged that defendants knew or should have known that their actions would incite violence, with the sole purpose of the show being the increase in television ratings, and that defendants had an affirmative duty to prevent or refrain from placing plaintiffs' decedent in a position that would unnecessarily and unreasonably expose him to the risk of harm, albeit the criminal conduct of a third person. Plaintiffs maintained that the show breached its duty and foreseeably subjected plaintiffs' decedent to an unreasonable risk of harm, ultimately resulting in his death.

Defendants' motions for summary disposition and a directed verdict were denied by the trial court, which opined that there were genuine issues of material fact regarding duty and foreseeability, negligence, and causation. Following extensive trial proceedings, a jury returned a verdict in plaintiffs' favor, and a judgment was subsequently entered thereon awarding

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[1] Jonathan Schmitz, the sole original defendant in this case before plaintiffs amended their complaint to add the present defendants, was dismissed from the suit as a result of a settlement agreement.

[2] The taped segment was never broadcast.

plaintiffs $29,332,686 in damages. The trial court denied defendants' posttrial motion for judgment notwithstanding the verdict or, in the alternative, a new trial or remittitur. Defendants now appeal.

II

In defendants' first issue on appeal, we are confronted with the cornerstone of this case – whether defendants owed a duty to plaintiffs' decedent to protect him from harm caused by the criminal acts of a third party, Jonathan Schmitz. Defendants argue that they owed no such duty and that the trial court erred in denying defendants relief as a matter of law where plaintiffs failed to show a duty to prevent Schmitz' violent conduct. We agree.

Motions for summary disposition, a directed verdict, and judgment notwithstanding the verdict are reviewed de novo. *Badalamenti v William Beaumont Hosp*, 237 Mich App 278, 284; 602 NW2d 854 (1999); *Meagher v Wayne State Univ*, 222 Mich App 700, 708; 565 NW2d 401 (1997); *Turner v Mercy Hosps & Health Services of Detroit*, 210 Mich App 345, 348; 533 NW2d 365 (1995); *Jenkins v Southeastern Michigan Chapter, American Red Cross*, 141 Mich App 785, 792; 369 NW2d 223 (1985).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. Under subsection 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. The trial court should grant the motion if the affidavits or other documentary evidence show that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), and (G)(4). *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999); *Quinto v Cross & Peters Co*, 451 Mich 358; 547 NW2d 314 (1996).

In reviewing a trial court's decision on a motion for a directed verdict, this Court must examine the evidence and all reasonable inferences that may be drawn from it in a light most favorable to the nonmoving party. *Clark v Kmart Corp*, 465 Mich 416, 418; 634 NW2d 347 (2001); *Mason v Royal Dequindre, Inc*, 455 Mich 391, 397; 566 NW2d 199 (1997). Only if the evidence so viewed fails to establish a claim as a matter of law should the motion be granted. *Clark, supra* at 418-419. The same standard applies in reviewing motions for judgment notwithstanding the verdict. *Orzel v Scott Drug Co*, 449 Mich 550, 557-558; 537 NW2d 208 (1995).

Questions about whether a duty exists are for the court to decide as a matter of law. *Mason, supra*; *Murdock v Higgins*, 454 Mich 46, 53; 559 NW2d 639 (1997); *Scott v Harper Recreation, Inc*, 444 Mich 441, 448; 506 NW2d 857 (1993). The fundamental principles concerning the threshold issue of duty in a negligence action are well established and have been set forth in detail on numerous occasions by our courts. See, generally, *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000); *Maiden, supra*; *Murdock, supra*; *Buczkowski v McKay*, 441 Mich 96, 100-101; 490 NW2d 330 (1992); *Friedman v Dozorc*, 412 Mich 1, 22; 312 NW2d 585 (1981); *Moning v Alfono*, 400 Mich 425, 437; 254 NW2d 759 (1977); *Krass v Tri-County Security, Inc*, 233 Mich App 661, 667-668; 593 NW2d 578 (1999); *Baker v Arbor Drugs*,

Inc, 215 Mich App 198, 203; 544 NW2d 727 (1996). Briefly reiterated, a negligence action may be maintained only if a legal duty exists that requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm. *Maiden, supra* at 131-132. This analysis requires a determination whether the relationship of the parties is the sort that a legal obligation should be imposed on one for the benefit of another. *Id*.; *Friedman, supra*. In determining whether a duty exists, courts examine different variables, including

> foreseeability of the harm, existence of a relationship between the parties involved, degree of certainty of injury, closeness of connection between the conduct and the injury, moral blame attached to the conduct, policy of preventing future harm, and the burdens and consequences of imposing a duty and the resulting liability for breach. [*Krass, supra* at 668-669].

See also *Buczkowski, supra* at 100-101; *Terry v Detroit*, 226 Mich App 418, 424; 573 NW2d 348 (1997).

Of particular import to the present appeal is the principle that, in general, there is no legal duty obligating one person to aid or protect another. *Krass, supra* at 668. Moreover, an individual has no duty to protect another from the criminal acts of a third party in the absence of a special relationship between the defendant and the plaintiff or the defendant and the third party. *Murdock, supra* at 54; *Buczkowski, supra* at 103-104; *Smith v Jones*, 246 Mich App 270, 275; 632 NW2d 509 (2001); *Krass, supra* at 668-669; *Marcelletti v Bathani*, 198 Mich App 655, 664; 500 NW2d 124 (1993). The rationale underlying this general rule is the fact that "[c]riminal activity, by its deviant nature, is normally unforeseeable." *Papadimas v Mykonos Lounge*, 176 Mich App 40, 46-47; 439 NW2d 280 (1989). Our Court in *Papadimas*, *id.* at 47, quoting Prosser & Keeton, Torts (5th ed), § 33, p 201, emphasized that "'[u]nder all ordinary and normal circumstances, in the absence of any reason to expect the contrary, the actor may reasonably proceed upon the assumption that others will obey the criminal law.'" As further explained by our Supreme Court in *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 498-499; 418 NW2d 381 (1988):

> In determining standards of conduct in the area of negligence, the courts have made a distinction between misfeasance, or active misconduct causing personal injury, and nonfeasance, which is passive inaction or the failure to actively protect others from harm. The common law has been slow in recognizing liability for nonfeasance because the courts are reluctant to force persons to help one another and because such conduct does not create a new risk of harm to a potential plaintiff. Thus, as a general rule, there is no duty that obligates one person to aid or protect another.
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> Social policy, however, has led the courts to recognize an exception to this general rule where a special relationship exists between a plaintiff and a defendant. . . . The rationale behind imposing a duty to protect in these special relationships is based on control. In each situation one person entrusts himself to the control and protection of another, with a consequent loss of control to protect

himself. The duty to protect is imposed upon the person in control because he is best able to provide a place of safety.

See also *Ross v Glaser*, 220 Mich App 183, 186-187; 559 NW2d 331 (1996); 2 Restatement of Torts, 2d, § 315, p 122.

"Such a special relationship must be sufficiently strong to require a defendant to take action to benefit the injured party." *Murdock, supra* at 54. Examples of the requisite "special relationship" recognized under Michigan law include a common carrier that may be obligated to protect its passengers, an innkeeper his guests, an employer his employees, owners and occupiers of land their invitees, a doctor his patient, and business invitors or merchants their business invitees. *Id*.; *Buczkowski, supra* at 103-104*; Krass, supra* at 670-671; *Marcelletti, supra* at 664; *Bell & Hudson, PC v Buhl Realty Co*, 185 Mich App 714, 718; 462 NW2d 851 (1990); *Moore v St Joseph Nursing Home, Inc*, 184 Mich App 766, 768; 459 NW2d 100 (1990). In this context, our courts have established a duty of reasonable care toward only those parties who are "'readily identifiable as [being] foreseeably endangered.'" *Mason, supra* at 398, quoting *Murdock, supra* at 58. See also *Jenks v Brown*, 219 Mich App 415, 421; 557 NW2d 114 (1996); *Marcelletti, supra* at 665. As the *Mason* Court noted, "'Readily' is defined as 'promptly; quickly; easily.'" *Mason, supra* at 398, quoting *The Random House College Dictionary* (rev ed).

In its most recent pronouncement in this regard, our Supreme Court, in *MacDonald v PKT, Inc*, 464 Mich 322; 628 NW2d 33 (2001), revisited the issue of a merchant's duty to protect business invitees from the criminal acts of third parties and substantially narrowed the scope of the duty owed by a premises owner to his invitee. The plaintiff in *MacDonald* brought an action against the defendant PKT, Inc. (Pine Knob), for injuries suffered during a concert at the defendant's theater as a result of sod being thrown by other concertgoers. She alleged that the defendant was negligent in failing to provide proper security, failing to stop the performance when it should have known that continuing the performance would incite the crowd, failing to screen the crowd to eliminate intoxicated individuals, and by selling alcoholic beverages. The Court held that merchants have a duty to respond reasonably to situations occurring on their premises that pose a risk of imminent and foreseeable harm to identifiable invitees; however, the 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. The Court stated in pertinent part:

> To summarize, under *Mason* [*v Royal Dequindre, Inc, supra*], *generally merchants "have a duty to use reasonable care to protect their identifiable invitees from the foreseeable criminal acts of third parties." Id. at 405. The duty is triggered by specific acts occurring on the premises that pose a risk of imminent and foreseeable harm to an identifiable invitee.* Whether an invitee is readily identifiable as being foreseeably endangered is a question for the factfinder if reasonable minds could differ on this point. See *id.* at 404-405. *While a merchant is required to take reasonable measures in response to an ongoing situation that is taking place on the premises, there is no obligation to otherwise anticipate the criminal acts of third parties.* Consistent with *Williams* [*v Cunningham, supra*], a merchant is not obligated to do anything more than

> reasonably expedite the involvement of the police. We also reaffirm that a merchant is not required to provide security guards or otherwise resort to self-help in order to deter or quell such occurrences. *Williams, supra*. [*MacDonald, supra* at 338 (emphasis added).]

The *MacDonald* Court, *id*. at 334, n 10, expressly overruled that portion of *Mason* that indicated that a merchant has a duty to take precautions against the criminal conduct of third persons that may be reasonably anticipated. The Court explained that

> a merchant has no obligation generally to anticipate and prevent criminal acts against its invitees. . . . [*W*]*e have 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.* Consequently, a merchant's only duty is to *respond* reasonably to such a situation. To hold otherwise would mean that merchants have an obligation to provide what amounts to police protection . . . .
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> A premises owner's duty is limited to responding reasonably to situations occurring on the premises because, as a matter of public policy, we should not expect invitors to assume that others will disobey the law. *A merchant can assume that patrons will obey the criminal law.* See *People v Stone*, 463 Mich 558, 565; 621 NW2d 702 (2001), citing Prosser & Keeton, Torts (5th ed), § 33, p 201; *Robinson v Detroit*, 462 Mich 439, 457; 613 NW2d 307 (2000); *Buczkowski* v *McKay*, 441 Mich 96, 108, n 16; 490 NW2d 330 (1992); *Placek v Sterling Hts*, 405 Mich 638, 673, n 18; 275 NW2d 511 (1979). *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. It is only a present situation on the premises, not any past incidents, that creates a duty to respond.*
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> Subjecting a merchant to liability solely on the basis of a foreseeability analysis is misbegotten. Because criminal activity is irrational and unpredictable, it is in this sense invariably foreseeable everywhere. However, even police, who are specially trained and equipped to anticipate and deal with crime, are unfortunately unable universally to prevent it. This is a testament to the arbitrary nature of crime. Given these realities, it is unjustifiable to make merchants, who not only have much less experience than the police in dealing with criminal activity but are also without a community deputation to do so, effectively vicariously liable for the criminal acts of third parties. [*Id*. at 334-335 (emphasis in original and added).]

MacDonald confirms the long-established rule that there is no general duty to anticipate and prevent criminal activity even where, unlike the present case, there have been prior incidents and the site of the injury is a business premises. Any duty is limited to reasonably responding to situations that occur on the premises and pose a risk of imminent and foreseeable harm to identifiable invitees, and the duty to respond is limited to contacting the police.

Logic compels the conclusion that defendants in this case had no duty to anticipate and prevent the act of murder committed by Schmitz three days after leaving defendants' studio and hundreds of miles away. Here, the only special relationship, if any, that ever existed between defendants and plaintiffs' decedent, or between defendants and Schmitz, was that of business invitor to invitee. However, any duty ends when the relationship ends, *MacDonald, supra*; *Murdock, supra* at 54-55; *Williams, supra*; 2 Restatement of Torts, 2d, § 314A, comment c, p 119, and in this instance the invitor/invitee relationship ended on March 6, 1995, three days before the murder, when Schmitz and Amedure peacefully left the Chicago studio following the taping of the episode. Because the evidence, even when viewed from a perspective most favorable to plaintiffs, revealed no ongoing special relationship at the time of the murder,[3] defendants owed no duty to protect plaintiffs' decedent from Schmitz' violent attack on March 9, 1995. The present situation simply cannot, under any reasonable interpretation of the circumstances, be construed as involving an existing special relationship that required defendants to respond to a risk of imminent and foreseeable harm to an identifiable invitee on the premises. *MacDonald, supra*. Consequently, the trial court erred as a matter of law in denying defendants' motions for summary disposition, a directed verdict, and judgment notwithstanding the verdict on the basis of lack of duty, an essential element of any negligence action. *Maiden, supra*; *Buczkowski, supra.*

Plaintiffs seek to characterize the case as one involving misfeasance, alleging that it was reasonably foreseeable that defendants' conduct both in creating and taping an episode on the topic of same-sex crushes and in actively creating a volatile situation would cause Schmitz to murder Amedure. A duty may be imposed in cases of alleged misfeasance where, notwithstanding the general rule that criminal conduct is unforeseeable as a matter of law, the third party's criminal conduct is a reasonably foreseeable consequence of the defendant's actions under the particular circumstances of the case. See, generally, *Williams, supra* at 498; *Ross, supra* at 187; 2 Restatement of Torts, 2d, § 302B, p 88, and § 314A, p 118. However, here, we agree with defendants that such a rationale is wholly unavailing. As previously noted, "[c]riminal activity, by its deviant nature, is normally unforeseeable," *Papadimas, supra* at 46-47, and thus "'[u]nder all ordinary and normal circumstances, in the absence of any reason to expect the contrary, the actor may reasonably proceed upon the assumption that others will obey the criminal law.'" *Id.*, quoting Prosser, § 33, p 201. This case presents no exceptional circumstances warranting departure from that general rule because the evidence at trial disclosed no "reason to expect the contrary" here. Schmitz gave every appearance of being a normal, well-adjusted adult who consented to being surprised on the show by a secret admirer of unknown sex and identity. The evidence of record indicates that nothing in Schmitz' demeanor, or in any of his interactions with the show, put defendants on notice that he posed a risk of violence to

[3] Plaintiffs argue that the special relationship between defendants and Schmitz and Amedure did not end when Schmitz and Amedure left the show. Plaintiffs analogize to a dramshop action, in which a bar may be held liable for a drunk-driving accident after improperly serving alcoholic beverages to a drunk driver even though the driver at the time of the accident was no longer on the premises. However, a dram shop action is statutory in nature and involves serving liquor to a visibly intoxicated person. In this case, Schmitz was neither visibly upset nor dangerous during the taping of the show.

others.[4] Reasonable foreseeability is a necessary prerequisite to any finding of a duty under Michigan law. *Buczkowski, supra*; cf. *Groncki v Detroit Edison Co*, 453 Mich 644, 657; 557 NW2d 289 (1996) (opinion by Brickley, C.J.). Viewed from a perspective most favorable to plaintiffs, the evidence failed to establish a jury question regarding whether it was reasonably foreseeable that Schmitz would murder Amedure as the natural and probable result of the events on the show. Accordingly, the trial court should have ruled that the murder was not foreseeable as a matter of law and entered judgment in favor of defendants. See *Buczkowski, supra* at 108, n 16 (emphasizing that because there was no evidence of actual notice of "abnormal behavior," the "retailer [who sold ammunition to an allegedly intoxicated person] was entitled to proceed on the assumption that the purchaser would obey the criminal law"), and *Johnson v Detroit*, 457 Mich 695, 712; 579 NW2d 895 (1998) (opinion by Mallett, C.J.) ("defendants could not have suspected that the decedent [who committed suicide in a police station holding cell by using exposed overhead bars that originally had been covered with mesh but were exposed because the mesh had been torn away and had not been repaired despite knowledge of the problem by the police] was suicidal. Consequently, there was no duty to prevent this unforeseeable death."). To impose a duty based on a misfeasance theory under the circumstances at hand would expand the concept of duty to limitless proportions.

III

Finally, to the extent the torts of misrepresentation and intentional infliction of emotional distress were either pleaded as alternative theories of recovery or incorporated into the cause of action, over defendants' objection, by the trial court's jury instructions, we conclude that such claims must fail as a matter of law. Amedure's estate cannot recover under the separate tort of intentional misrepresentation, based on defendants' alleged statements to Schmitz, a third party. *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976).[5] The elements of intentional infliction of emotional distress are similarly lacking. See *Roberts v Auto-*

[4] In this regard, the present case differs substantially from *Ross, supra*, in which a divided panel of this Court found a duty to protect against the criminal acts of a third party based on a theory of misfeasance. The *Ross* majority focused on the defendant's actual knowledge that his son suffered from chronic mental problems and of a history of conflicts between his son and some neighbors. In those circumstances, the defendant's decision to hand his son a loaded gun at the moment one such conflict was flaring up was found to entail a foreseeable risk of injury. *Ross, supra* at 188. The *Ross* Court expressly distinguished *Buczkowski, supra*, on the ground that in *Buczkowski*, as here, "there was no evidence that the customer acted in a threatening manner or was legally incompetent." *Id*. at 189. The Court also relied on the "proximity in time between defendant's conduct and the shooting," *id*., explaining that the shooting occurred "just minutes after defendant handed [his son] a loaded gun," *id*. at 193, not days later and a long distance away as in the instant case.

[5] Moreover, assuming the alleged misrepresentation was not a separate cause of action but rather a manifestation of plaintiffs' negligence claim, as already noted, no ongoing special relationship existed between defendants and Amedure on the day of the unforeseeable murder; thus, defendants owed no duty to prevent Schmitz' criminal conduct.

Owners Ins Co, 422 Mich 594, 602; 374 NW2d 905 (1985). The mental distress that is the subject of this case was allegedly inflicted on Schmitz, a nonparty to this appeal, not on plaintiffs' decedent. Therefore, this count could not be sustained as a matter of law.

IV

In sum, we conclude that defendants owed no duty as a matter of law to protect plaintiffs' decedent from the intentional criminal acts of a third party, Jonathan Schmitz, that occurred three days after the taping of the Jenny Jones Show. While defendants' actions in creating and producing this episode of the show may be regarded by many as the epitome of bad taste and sensationalism, such actions are, under the circumstances, insufficient to impute the requisite relationship between the parties that would give rise to a legally cognizable duty. The trial court therefore erred in denying defendants' motions in this regard. Because we find no antecedent duty, we need not address the other issues raised by defendants on appeal. Accordingly, we reverse the judgment, vacate the order, and remand to the trial court with directions that it enter a judgment and order in favor of defendants.

Judgment reversed, order vacated, and case remanded. We do not retain jurisdiction.

Meter, J., concurred.

/s/ Richard Allen Griffin
/s/ Patrick M. Meter