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.

MURPHY, P.J. (*dissenting*).

I respectfully dissent from the majority's opinion because the issue of foreseeability concerning the shotgun slaying was properly placed in the hands of the jury. Viewing the evidence in a light most favorable to plaintiffs, I believe that the issue was properly left to the jury where the evidence indicated that Jonathan Schmitz was humiliated and devastated on a show scheduled to be broadcast[1] on national television by defendants through the revelation of a homosexual crush and lurid sexual fantasy by Scott Amedure after Schmitz told defendants that he did not want the crush to be that of another man, and where defendants nonetheless proceeded with the production of the show, using deceit, sensationalism, and outrageous behavior. I reach my conclusion taking into consideration Schmitz' personal history, which included mental illness, alcohol and drug abuse, suicide attempts, anger management problems, and sexual identity concerns. Certainly, reasonable men and women could differ on whether Schmitz' violent act foreseeably resulted from defendants' actions in manipulating and exploiting the lives, emotions, and sexual identities of individuals for the purpose of producing their television talk show.[2]

[1] Although the taped segment was never broadcast, presumably because of the tragic event that unfolded, it is clear from the record that Schmitz anticipated that it would be.

[2] Although Schmitz first declined to appear on the show, he subsequently decided to appear because, in part, he believed that there was a chance he could meet the love of his life or get back together with his ex-girlfriend.

The existence of a legal duty in a negligence action is a question of law that this Court reviews de novo. *Cipri v Bellingham Frozen Foods, Inc,* 235 Mich App 1, 14; 596 NW2d 620 (1999). However, where there are factual circumstances that give rise to a legal duty, the existence or nonexistence of those facts must be decided by a jury. *Aisner v Lafayette Towers,* 129 Mich App 642, 645; 341 NW2d 852 (1983). Whether the risk of harm from third-party criminal activity is foreseeable in a particular case is generally a question of fact for the jury. *Holland v Liedel,* 197 Mich App 60, 63; 494 NW2d 772 (1992). Although the question of duty is ordinarily one of law to be decided by the court, where a determination of duty depends on factual findings, those findings must be found by the jury. *Id.* at 65.

Defendants' arguments regarding duty arose below in the context of defendants' motions for summary disposition, a directed verdict, and judgment notwithstanding the verdict (JNOV). Each of those motions is reviewed de novo by this Court. *Spiek v Dep't of Trans,* 456 Mich 331, 337; 572 NW2d 201 (1998); *Cacevic v Simplimatic Engineering Co (On Remand),* 248 Mich App 670, 679; 645 NW2d 287 (2001); *Morinelli v Provident Life & Accident Ins Co,* 242 Mich App 255, 260; 617 NW2d 777 (2000).[3]

In *Terry v Detroit,* 226 Mich App 418, 424; 573 NW2d 348 (1997), this Court outlined the following general principles concerning a negligence action:

> In order to establish a prima facie case of negligence, the 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." *Baker v Arbor Drugs, Inc,* 215 Mich App 198, 203; 544 NW2d 727 (1996). Duty is an obligation that the defendant has to the plaintiff to avoid negligent conduct. *Id.* Whether a duty exists is a question of law for the court. *Simko v Blake,* 448 Mich 648, 655; 532 NW2d 842 (1995). If a court determines as a matter of law that a defendant owed no duty to a plaintiff, summary disposition is appropriate under MCR 2.116(C)(8). *Dykema v Gus Macker Enterprises, Inc*[,] 196 Mich App 6, 9; 492 NW2d 472 (1992).
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> In determining whether a duty exists, courts look to different variables, including the (1) foreseeability of the harm, (2) degree of certainty of injury, (3) existence of a relationship between the parties involved, (4) closeness of connection between the conduct and injury, (5) moral blame attached to the

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[3] 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 a light most favorable to the nonmoving party. *Maiden v Rozwood,* 461 Mich 109, 120; 597 NW2d 817 (1999). In a motion under subsection C(8), all factual allegations in support of the claim are accepted as true and construed in a light most favorable to the nonmoving party. *Maiden, supra* at 119. The test for evaluating a motion for a directed verdict and JNOV is identical. *Smith v Jones,* 246 Mich App 270, 273-274; 632 NW2d 509 (2001). The evidence and all legitimate inferences therefrom must be viewed in a light most favorable to the nonmoving party. *Wilkinson v Lee,* 463 Mich 388, 391; 617 NW2d 305 (2000).

> conduct, (6) policy of preventing future harm, and (7) the burdens and consequences of imposing a duty and the resulting liability for breach. *Buczkowski* [*v McKay*, 441 Mich 96, 101; 490 NW2d 330 (1992)], citing Prosser & Keeton, Torts (5th ed), § 53, p 359, n 24; *Baker, supra*.

One of the initial difficulties in addressing the issues presented in this case is the development of the proper analytical framework. In *Babula v Robertson*, 212 Mich App 45, 52, n 2; 536 NW2d 834 (1995), this Court, quoting *Moning v Alfono*, 400 Mich 425, 437-438; 254 NW2d 759 (1977), stated:

> "'Duty' comprehends whether the defendant is under *any* obligation to the plaintiff to avoid negligent conduct; it does not include—where there is *an* obligation—the nature of the obligation: the general standard of care and the specific standard of care. . . . While the court decides questions of duty, general standard of care and proximate cause, the jury decides whether there is cause in fact and the specific standard of care: whether defendants' conduct in the particular case is below the general standard of care, including—unless the court is of the opinion that all reasonable persons would agree or there is an overriding legislatively or judicially declared public policy—whether in the particular case the risk of harm created by the defendants' conduct is or is not reasonable." [Emphasis in original.]

The *Babula* panel noted that the questions of duty and proximate cause are interrelated because the question whether there is the requisite relationship, giving rise to a legal duty, and the question whether the cause is so significant and important as to be regarded a proximate cause both depend in part on foreseeability. *Babula, supra* at 53.

The first matter that needs to be addressed in properly analyzing the duty issue is whether plaintiffs' action is premised on nonfeasance or misfeasance. I specifically disagree with that portion of the majority's opinion that implicitly focuses on the concept of nonfeasance and the necessarily incorporated principles concerning the duty to protect and the necessity of a special relationship. Such an analysis is inapplicable in this case, a case of misfeasance, not nonfeasance.

In *Ross v Glaser*, 220 Mich App 183, 184-185; 559 NW2d 331 (1996), the personal representative of the decedent's estate brought suit against the father of an adult son after the son, who had a history of mental illness, shot the decedent with a gun provided by the father, which gun was given to the son while he was in an agitated state. This Court reversed the trial court's order granting summary disposition to the defendant. *Id.* at 184. The *Ross* panel, distinguishing misfeasance from nonfeasance, stated:

> In this case, defendant argues that he has no duty to control the conduct of third parties absent a special relationship to them, particularly when the conduct is criminal. He asserts that the father-son relationship is insufficient to establish the required special relationship that would impose a duty on him.

> The argument is unavailing. Michigan courts have distinguished active misconduct causing personal injury (misfeasance) and passive inaction or the failure to protect others from harm (nonfeasance). Generally, with respect to nonfeasance, there is no legal duty that obligates a person to aid or protect another. An exception has developed where a special relationship exists between the persons.
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> However, defendant's act of handing a loaded gun to [his son] was not one of nonfeasance, but rather misfeasance. Therefore, the special relationship doctrine is inapplicable . . . . Instead, we must determine whether defendant had a duty to refrain from handing [his son] a loaded weapon.
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> As to foreseeability, we determine whether it is foreseeable that the conduct may create a risk of harm to the victim and whether the result and intervening causes were foreseeable. [*Id.* at 186-187 (citations omitted).]

The *Ross* panel concluded that summary disposition was improper because the likelihood of injury was high where the mentally ill son was handed a loaded gun while in an agitated state and in conflict with antagonists. *Id.* at 189. *Ross* makes clear that principles regarding the duty to protect another from the criminal acts of third parties and the necessity of a special relationship do not apply in cases of misfeasance.

The essence of plaintiffs' case is premised on misfeasance, or active misconduct, as opposed to nonfeasance or passive inaction, which would require a special relationship, because plaintiffs challenged defendants' actions in producing the same-sex crush show.[4] Plaintiffs were not asserting liability based on defendants' failure to properly respond to Schmitz' pointing a shotgun at Amedure or failure to actively protect Amedure from Schmitz' actions, nor, on close inspection, is plaintiffs' action premised on defendants' failure to anticipate or prevent Schmitz' criminal act. Rather, plaintiffs' action focuses on defendants' active misconduct *that allegedly created a risk of foreseeable harm* to Amedure, which conduct included lies, deceit, and outrageous behavior. Although it is true that certain aspects of plaintiffs' claims involved

[4] Defendants argue in their reply brief that plaintiffs did not request a jury instruction based on misfeasance, nor did the trial court ever rule that alleged misfeasance was an appropriate basis for imposing liability. Defendants' argument lacks merit. The trial court and plaintiffs continually referred to this case as a simple negligence case, or a "classic case of negligence." The trial court denied the initial motion for summary disposition, in part, because plaintiffs alleged that the show *actively created a volatile situation.* In its instructions, the court instructed the jury: "Therefore, by 'negligence,' I mean the failure to do something that a reasonably careful television production company would do, or *the doing of something* that a reasonably careful television production company would not do under the circumstances that you find existed in this case." Moreover, plaintiffs sought instructions regarding affirmative acts, e.g., misrepresentation and intentional infliction of emotional distress.

inaction, such as the failure to check into Schmitz' background, the claims are all in the context of the manner in which the show was produced, which is a matter of active misconduct.

The majority mistakenly relies on *MacDonald v PKT, Inc*, 464 Mich 322; 628 NW2d 33 (2001), in support of its position. *MacDonald, id.* at 345, specifically reaffirmed our Supreme Court's earlier decision in *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495; 418 NW2d 381 (1988), in which the Supreme Court stated:

> 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.* [*Id.* at 498 (emphasis added).]

In *MacDonald, supra* at 345-346,[5] the Supreme Court, addressing the duty of premises owners concerning the criminal acts of third parties, held:

> [W]e conclude that merchants have a duty to respond reasonably to situations occurring on the premises that pose a risk of imminent and foreseeable harm to identifiable invitees. We hold that the duty to respond is limited to reasonably expediting the involvement of the police, and that there is no duty to otherwise anticipate the criminal acts of third parties. Finally, we affirm that merchants are not required to provide security personnel or otherwise resort to self-help in order to deter or quell such occurrences."

The Supreme Court additionally held that there is no duty to prevent the criminal acts of third parties. *Id.* at 326. The *MacDonald* Court did not hold that there was no duty to avoid actively creating a volatile situation that gives rise to a criminal act.

Defendants focus on the lack of any duty owed to Amedure. Based on the case law cited above, the determination whether defendants owed a duty to Amedure to avoid negligent conduct depended on the conduct at issue in relation to the harm claimed. In other words, the relevant inquiry in determining the existence of a duty is whether defendants should have refrained from producing and taping a same-sex crush show in the fashion it was done and under the circumstances presented, where plaintiffs asserted that the conduct caused physical harm and

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[5] The Supreme Court noted the factual circumstances, stating that

> [i]n these consolidated premises liability cases, plaintiffs seek to recover for injuries they suffered when fellow concertgoers at the Pine Knob Music Theater . . . , an outdoor amphitheater that offered seating on a grass-covered hill, began pulling up and throwing pieces of sod. We granted leave to address the duty of premises owners concerning the criminal acts of third parties. [*MacDonald, supra* at 325.]

death to Amedure.[6] In determining whether defendants should have refrained from producing the same-sex crush show in light of the alleged harm, we must examine whether the harm was foreseeable in that context. Reversal is mandated only if we can rule, as a matter of law and viewing the evidence in a light most favorable to plaintiffs, that a violent response by Schmitz was not foreseeable under the circumstances of this case.

A duty arises if events are foreseeable. *Groncki v Detroit Edison Co*, 453 Mich 644, 657; 557 NW2d 289 (1996). "Criminal activity, by its deviant nature, is normally unforeseeable." *Papadimas v Mykonos Lounge*, 176 Mich App 40, 46-47; 439 NW2d 280 (1989). The *Papadimas* panel, *id.* at 47, quoting Prosser & Keeton, Torts (5th ed), § 33, p 201, noted 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.'" "It is not necessary that the manner in which a person might suffer injury be foreseen or anticipated in specific detail." *Ross, supra* at 188.

Plaintiffs rely, in part, on *Pamela L v Farmer*, 112 Cal App 3d 206, 207-209; 169 Cal Rptr 282 (1980), where the California Court of Appeals reversed a summary disposition granted in favor of the defendant wife, where the wife knew of her defendant husband's history of molesting women and children when she encouraged and invited the plaintiff minors to use the swimming pool at her house and told the minors' parents that it was safe for their children to play at her house while she was at work and her husband was home. The court ruled, in part, that if the allegations were true, the wife could have been held to have unreasonably exposed the minors to harm. *Id.* at 211. The court also ruled that "where the defendant, through his or her own action (misfeasance) has made the plaintiff's position worse and has created a foreseeable risk of harm from the third person[,]" liability may arise. *Id.* at 209. The principles enunciated in *Ross* parallel those in *Pamela L.*

Defendants rely on *Johnson v Detroit*, 457 Mich 695, 697, 699-700; 579 NW2d 895 (1998), in which the decedent committed suicide in a police station holding cell through use of exposed overhead bars that originally had been covered by mesh but were exposed because the mesh had been torn away and had not been repaired. Although the defendant was aware of the need to repair the problem, it had failed to do so. Our Supreme Court, rejecting the plaintiff's negligence claim, stated:

> In her negligence claim, the plaintiff has to establish that the defendant had a duty to this particular decedent, that it breached that duty by placing the decedent in the defective cell, and that the breach was a proximate and factual cause of the decedent's death. A defendant does not owe a duty to an unforeseeable plaintiff. In this case, plaintiff failed to present a genuine issue of material fact establishing the existence of a duty owed to plaintiff's decedent because defendants were actually unaware, and it was not reasonably foreseeable, that the decedent was suicidal before placing him in the defective cell. . . .

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[6] In *Ross, supra* at 187, this Court stated that "we must determine whether defendant had a duty to refrain from handing Anthony a loaded weapon."

> . . . [O]fficers testified that the decedent gave no indication that he was suicidal. Conversely, the plaintiff presented nothing to refute this evidence and did not offer any evidence that the suicide was reasonably foreseeable.
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> Where the events leading to injury are not foreseeable, there is no duty, and summary disposition is appropriate. *Groncki v Detroit Edison Co*, 453 Mich 644, 657; 557 NW2d 289 (1996). In this case, the defendants had no notice that the decedent might attempt suicide, and therefore they cannot be held responsible for failing to prevent the decedent's death. This death was not reasonably foreseeable. Tragic as it was, defendants cannot be held responsible for the unforeseen suicide of the plaintiff 's decedent. [*Johnson, supra* at 711-712.]

Johnson leads to the issue whether Schmitz' personal history, which included depression, alcohol and drug abuse, suicide attempts, anger management problems, and sexual identity concerns, should be taken into account in determining whether a violent response was foreseeable, where there was no evidence that defendants knew about Schmitz' personal or psychiatric history.[7] The majority states, when it does reach the issue of misfeasance, that "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." *Ante* at ___. For the most part, I agree with this statement.[8]

The matter presents a unique situation in the law regarding the foreseeability of third-party criminal acts because ordinarily one would not have the opportunity to look into the personal history of the criminal actor's life or even know who the criminal actor was going to be before the negligent act occurred; however, here the show knew that it was going to surprise Jonathan Schmitz and cause some type of emotional reaction before it proceeded with its intentional act. In *Johnson, supra,* where the Supreme Court relied on the lack of notice of suicidal tendencies, the police did not have the opportunity or ability to review the decedent's background, let alone know his identity, in order to make an assessment of any suicidal tendencies before arresting him and putting him in the holding cell, and to require the police to do so would be unreasonable; they were only able to assess any suicidal tendencies on the basis of his interaction with the police at the time of the arrest. In *Ross* and *Pamela L, supra,* the defendants knew of the criminal actors' personal history because the actors were family members.

The question should not involve whether the show must be required or has a duty to make an inquiry into the background of a particular person, the failure of which may result in liability,

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[7] This evidence was presented to the jury through the testimony of plaintiffs' experts and individuals with personal knowledge of Schmitz' life, including his ex-girlfriend with whom he had lived.

[8] There was some testimony presented that one of the show's producers was so annoyed by Schmitz' constant telephone calls before the show that if Schmitz called one more time, the producer would smack him.

but rather whether defendants should be charged with the knowledge of the actual history for the purpose of foreseeability analysis.

I would hold that as a matter of public policy, if defendants, for their own benefit, wish to produce "ambush" shows that can conceivably create a volatile situation, they should bear the risk if a guest is psychologically unstable or criminally dangerous by being charged with that knowledge in the context of any foreseeability analysis. "'Public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" *Terrien v Zwit*, 467 Mich 56, 68; 648 NW2d 602 (2002), quoting *Muschany v United States*, 324 US 49, 66; 65 S Ct 442; 89 L Ed 744 (1945). Analogous legal precedents form the basis of my public policy position.

In *Richman v City of Berkley*, 84 Mich App 258, 261; 269 NW2d 555 (1978), this Court stated that it "is a basic tort rule of law—a tortfeasor takes his victim as he finds him." In a separate dissenting opinion in *Pierce v Gen Motors Corp*, 443 Mich 137, 155-156; 504 NW2d 648 (1993), Justice Levin noted that all first-year law school students are taught that a tortfeasor takes his victim as he finds him as explained through the example of the man with an eggshell skull; one is responsible for the consequences of hitting a person on the head and cracking the skull even if the skull was weak to begin with and one gave only a slight blow as a joke. Finally, our Supreme Court in *Wilkinson v Lee*, 463 Mich 388, 396-397; 617 NW2d 305 (2000), quoting with approval 2 Restatement Torts, 2d, § 461, p 502, and the accompanying comment, stated:

> "The negligent actor is subject to liability for harm to another although a physical condition of the other which is neither known nor should be known to the actor makes the injury greater than that which the actor as a reasonable man should have foreseen as a probable result of his conduct."
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> "The rule stated in this Section applies not only where the peculiar physical condition which makes the other's injuries greater than the actor expected is not known to him, but also where the actor could not have discovered it by the exercise of reasonable care, or, indeed even where it is unknown to the person suffering it or to anyone else until after the harm is sustained. A negligent actor must bear the risk that his liability will be increased by reason of the actual physical condition of the other toward whom his act is negligent."

I would apply these principles by analogy to the case sub judice. Although Amedure, through his estate, was the "victim" for purposes of the instant action, the alleged misfeasance was also directed at Schmitz, and on the basis of the very unique circumstances of this case, defendants should take Schmitz *as they found him*, making it appropriate to consider Schmitz' personal history in determining foreseeability. To rule otherwise would allow television, radio, or other media outlets to undertake similar actions as occurred here without limit and claim lack of foreseeability in the face of a civil action because they lacked knowledge concerning the history of a person they set up for ridicule. The *Wilkinson* Court concluded that "[t]he fact that this particular plaintiff was unusually vulnerable to head injuries does not relieve the defendants of responsibility for those damages." *Wilkinson*, *supra* at 397. Likewise, the fact that Schmitz was unusually vulnerable should not relieve defendants of their responsibility. For purposes of foreseeability analysis, defendants should be made to bear the risk where a guest is

psychologically unstable or criminally dangerous and defendants acted intentionally in producing the show for their own benefit.

I am not asserting that defendants should not be allowed to produce shows of this kind, nor that they must be required to make inquiry into the personal backgrounds of guests (although an industry practice to make minimal inquiry could be beneficial to all), but only that if they wish to produce "ambush" shows through the exploitation of guests, they must take those guests as they are.[9]

Considering the evidence in a light most favorable to plaintiffs, the show used lies, deceit, sensationalism, and outrageous behavior, while playing with human emotions, in order to orchestrate a grand surprise for the benefit of its audience and ratings, which caused Schmitz to suffer deep embarrassment, humiliation, and extreme anger. Taking into consideration Schmitz' personal mental frailties and dangerous inclinations, those circumstances could lead reasonable jurors to draw different conclusions regarding whether it was foreseeable that Schmitz would commit an act of violence against Amedure.[10] Therefore, resolution by the jury was appropriate.

In view of the majority's opinion to reverse on the basis of the "duty" issue, other than to record my disagreement with the analysis by the majority in this dissent, I see no value in attempting to address the other issues raised on appeal.

/s/ William B. Murphy

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[9] If a show were to surprise a person about a spouse's infidelities, and the surprised spouse had a history of numerous convictions for felonious and brutal assaults against domestic partners, it would only be appropriate to attribute knowledge of that history to the producers of such a show where the unfaithful spouse is subsequently harmed by the surprised spouse because of the public revelation.

[10] The jury was also presented with expert testimony about the potential dangerous repercussions of producing shows of this nature and with testimony that warnings concerning these dangers were actually given to defendants before the taping of the show at issue.