# STATE OF MICHIGAN

# COURT OF APPEALS

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KELLY WEIDNER and RANDY WEIDNER,

Plaintiffs-Appellants,

v

MIAMY, INC., d/b/a WOODEN SHOE BAR,

Defendant-Appellee,

and

BILL X and LADY Y,

Defendants.

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UNPUBLISHED
March 28, 2000

No. 215276
Gladwin Circuit Court
LC No. 96-012670-NO

Before: Holbrook, Jr., P.J., and Smolenski and Collins, JJ.

PER CURIAM.

In this premises liability action, plaintiffs appeal as of right from an order granting summary disposition for defendant under MCR 2.116(C)(10). We affirm.

This case arises out of an assaults on plaintiff Kelly Weidner by Bill X and Lady Y, patrons of defendant's bar who were alleged to be members of the Zulu Motorcycle Club. Plaintiffs presented evidence that while Kelly and a friend were in the bar's restroom, Lady Y swore at Kelly and she and Kelly exchanged words. As they left the restroom, Lady Y pushed Kelly's friend onto a table and assaulted Kelly. Randy Weidner intervened, followed by the Wooden Shoe's bouncer. Bill X then hit Kelly in the face with an empty beer bottle, causing injuries to her mouth and teeth. The bouncer took an open knife from Bill X's hand and removed him from the bar.

Plaintiffs argue on appeal that the trial court erred in granting defendant's motion for summary disposition on the basis that defendant owed no duty to plaintiffs to protect them from unforeseeable criminal acts of third parties. We disagree. This Court reviews the trial court's decision to grant or deny summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When considering a motion for summary disposition made pursuant to MCR

2.116(C)(10), the trial court must consider the affidavits, pleadings, depositions, admissions, and documentary evidence in the light most favorable to the nonmoving party. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Summary disposition may be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

Generally, merchants are not responsible for protecting their patrons from the criminal acts of others. *Scott v Harper Recreation, Inc*, 444 Mich 441, 452; 506 NW2d 857 (1993); *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 504; 418 NW2d 381 (1988). However, invitors have a duty to use reasonable care to protect their identifiable invitees from the foreseeable criminal acts of third parties. *Mason v Royal Dequindre, Inc*, 455 Mich 391, 405; 566 NW2d 199 (1997); *MacDonald v PKT, Inc*, 233 Mich App 395, 400; 593 NW2d 176 (1999).

Here, plaintiff failed to show that defendant had or should have had knowledge that Kelly Weidner was in danger of attack by either Lady Y or Bill X. There was no evidence presented that there had been prior altercations at the Wooden Shoe involving members of the Zulu Motorcycle Club in general or Bill X or Lady Y in particular, nor was there evidence that there had been any sort of interaction or ongoing altercation between plaintiffs and Bill X or Lady Y. See *Mason, supra* at 404-405. Although there was testimony that Lady Y was behaving in a boisterous manner earlier in the evening, there was no testimony that she was behaving in an aggressive or threatening manner prior to her interaction with Kelly Weidner in the restroom, and all the testimony regarding Bill X was that he had done nothing to indicate that he might assault anyone. Further, there was no evidence of a prolonged disturbance prior to the assaults, such as those found in *Jackson v White Castle System, Inc*, 205 Mich App 137; 517 NW2d 286 (1994) and *Mills v White Castle System, Inc*, 167 Mich App 202; 421 NW2d 631 (1988). Indeed, Randy Weidner testified that the incident happened "[r]eal fast," and that the Wooden Shoe's bouncer was with him and the two women when Bill X "snuck up from behind" and hit Kelly Weidner with the bottle. Further, we do not believe that the size and layout of the bar raise a question of fact regarding the adequacy of security, given the evidence that the bouncer arrived at the scene prior to Bill X's unforeseeable attack and, immediately following the attack, disarmed and removed him from the bar. Therefore, we conclude that the trial court did not err in granting defendant's motion for summary disposition on the basis that defendant had no duty to protect plaintiff against the unforeseeable criminal attacks.

Plaintiffs also argue on appeal that defendant had an affirmative duty to render aid to Kelly Weidner after she was injured and that it breached that duty. However, plaintiffs did not include a claim for "failure to render aid" in their complaint or otherwise properly raise the issue before the trial court, and the trial court did not rule on it. Thus, we decline to review this claim on appeal. *Auto Club Ins Ass'n v Lozanis*, 215 Mich App 415, 421; 546 NW2d 648 (1996).

Affirmed.

/s/ Michael R. Smolenski
/s/ Jeffrey G. Collins