STATE OF MICHIGAN

COURT OF APPEALS

WANDA SINDEL,

Plaintiff-Appellant,

v

MERCHANT DETECTIVE AGENCY, d/b/a MERCHANT SECURITY SERVICE, and ALI SAAD, Next Friend of JAMIL ALI SAAD, Minor,

Defendants,

and

RITE-AID OF MICHIGAN, INC., d/b/a RITE-AID DISCOUNT PHARMACY, d/b/a RITE-AID PHARMACY, and Y.H.S., INC., d/b/a PAISANO'S RESTAURANT,

Defendants-Appellees.

UNPUBLISHED
February 16, 2001

No. 214064
Wayne Circuit Court
LC No. 97-702578-NO

Before: Kelly, P.J., and White and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants' Rite-Aid Pharmacy (Rite-Aid) and Paisano's Restaurant (Paisano's) (collectively referred to as "defendants") motions for summary disposition. We affirm.

Defendants jointly owned and operated a common parking lot outside their stores which were located near Dearborn Fordson High School. The high school had an "open campus" policy so students could leave the school grounds for lunch. During the lunch hour on April 16, 1996, many students from the high school congregated in defendants' parking lot. Plaintiff parked her car in the shared parking lot and went into Rite-Aid. As plaintiff was returning to her car, a

student from Fordson High School who was allegedly engaged in "horseplay" backed into plaintiff, knocking her to the ground.[1] As a result of the fall, plaintiff sustained a fractured hip.

Plaintiff filed suit alleging that defendants owed her a duty as a business invitee to exercise reasonable care in the maintenance of the premises and to inspect for dangerous conditions on the premises. Plaintiff alleged that defendants breached their duty by (1) failing to maintain the premises in a reasonably safe condition, (2) failing to exercise due care and caution in the maintenance of its premises, (3) failing to take reasonable measures to diminish the danger posed by congregating and reckless students when defendants had notice and/or knowledge of rough and reckless student behavior in defendants' parking lot, (4) failing to provide guard services in a careful, reasonable and non-negligent manner, after voluntarily assuming the duty of providing security for the premises, (5) failing to warn, advise, and instruct business invitees of the danger posed by the students which existed on the parking lot, and (6) failing to control unruly patrons and notify appropriate authorities when defendant knew or should have known that its patrons were placed in peril.[2] Plaintiff further alleged that defendant Merchant Detective Agency ("Merchant"), a guard service hired by the Dearborn School District to patrol various locations at or around the school where students frequented, had a duty of reasonable care to maintain a secure and safe environment on and around the parking lot, but breached its duty by (1) failing to maintain control of congregating and reckless students, (2) failing to disburse students when they became reckless and endangered others, (3) failing to take reasonable measures to minimize the danger of recklessness among the students on the parking lot, and (4) failing to warn, advise and instruct individuals of the danger posed by the students.[3]

The trial court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) and (10).[4] The trial courtfound that because plaintiff had no intention of conferring any benefit to Paisano's, plaintiff was a licensee of Paisano's and that it only owed her a duty to warn of hidden or concealed dangers about which it knew. Thus, because plaintiff failed to plead that the danger associated with the alleged misconduct of the students was hidden or concealed, the trial court granted summary disposition to Paisano's pursuant to MCR 2.116(C)(8).

With respect to Rite-Aid, the trial court found that plaintiff failed to "set forth any facts to suggest that Rite-Aid had any notice or knowledge that the student, Jamil Saad, was going to harm plaintiff or act in a negligent manner." The trial court ruled that in the absence of actual

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[1] Defendant Jamil Ali Saad was subsequently identified as the student who struck plaintiff and added as a named defendant in plaintiff's second amended complaint. However, Saad is not a party to this appeal.

[2] Plaintiff did not allege liability against Paisano's for failure to provide guard services in a careful and non-negligent manner. In all other respects, the allegations against Rite-Aid and Paisano's were the same.

[3] Defendant Merchant Detective Agency is not a party to this appeal.

[4] The trial court noted in its opinion that although defendants' motions were brought pursuant to MCR 2.116(C)(8), because defendants in their supplemental briefs (filed pursuant to the trial court's request after it took the motions under advisement to review depositions) relied upon facts other than those set forth in the pleadings, the motions would be treated as also having been brought under MCR 2.116(C)(10).

notice or knowledge by Rite-Aid of a specific harm, Rite-Aid did not have a duty to warn or protect plaintiff. Accordingly, the trial court granted summary disposition to Rite-Aid under MCR 2.116(C)(10) on plaintiff's premises liability claim. In addition, relying on the Supreme Court's opinion in *Scott v Harper Recreation, Inc*, 444 Mich 441, 452; 506 NW2d 857 (1993), the trial court granted summary disposition to Rite-Aid under MCR 2.116(C)(8) on plaintiff's claim that Rite-Aid negligently failed to provide guard services. Plaintiff appealed.

Plaintiff argues that the trial court erred in granting summary disposition to defendants on the basis that defendants had no duty to protect her from the negligent acts of third parties, where there was no allegation that defendant had actual notice or knowledge that the student was going to harm plaintiff or act in a negligent manner. Plaintiff contends that the incident causing her injuries was foreseeable and thus defendant had a legal duty to protect her. We disagree.

This Court reviews a trial court's ruling on a motion for summary disposition de novo. *Singerman v Municipal Serv Bureau, Inc*, 455 Mich 135, 139; 565 NW2d 383 (1997). A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of a claim. *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 380; 563 NW2d 23 (1997). In reviewing the motion, the trial court considers only the pleadings to determine whether "the claim is so manifestly unenforceable as a matter of law that no factual progression could possibly support recovery." *Id*.

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim. *Power Press v MSI Battle Creek*, 238 Mich App 173, 177; 604 NW2d 772 (1999). The motion 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. *Ireland v Edwards*, 230 Mich App 607, 613; 584 NW2d 632 (1998). In reviewing the trial court's decision, we must consider the affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties and, giving the benefit of doubt to the nonmoving party, determine whether a record might be developed that will leave open an issue upon which reasonable minds could differ. *Id.*

As part of a prima facie case of negligence, a plaintiff must prove that the defendant owed her a duty of care. *MacDonald v PKT, Inc*, 233 Mich App 395, 399; 593 NW2d 176 (1999), lv granted; *Ross v Glaser*, 220 Mich App 183, 186; 559 NW2d 331 (1996). The existence of a duty is a question of law to be resolved by the court. *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 262; 571 NW2d 716 (1997); *MacDonald, supra* at 400. If the court determines as a matter of law that the defendant owed no duty to the plaintiff, summary disposition is properly granted under MCR 2.116(C)(8).

As a general principle, a person does not have a duty to aid or protect another individual from the conduct of third parties absent a special relationship. *Buczkowski v McKay*, 441 Mich 96, 103; 490 NW2d 330 (1992); *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 498-499; 418 NW2d 381 (1988); *MacDonald, supra*. A special relationship has been found to exist between an owner or occupier of land and its invitees. *Williams, supra* at 499. However, an occupier of land "is not an insurer of the safety of invitees, and his duty is only to exercise reasonable care for their protection." *Id*. Business invitors have no duty to protect invitees from

unreasonable risks that are unforeseeable. *Mason v Royal Dequindre, Inc*, 455 Mich 391, 398; 566 NW2d 199 (1997). Rather, the duty of the business invitor is a duty of reasonable care to protect readily identifiable invitees from the foreseeable misconduct of third parties. *Id*. at 405.

Plaintiff alleged in her complaint that defendants "had knowledge of the dangerous and rough behavior which occurred on a daily basis in the parking lot in question when Fordson High School students were present." She further alleged that, on the day of her fall, "a group of Fordson High School students were engaging in rough, group behavior in the parking lot." However, plaintiff has failed to allege that the "dangerous and rough behavior" in which students purportedly engaged on a daily basis, and of which defendants allegedly knew, was behavior that was likely to endanger the safety of defendants' visitors or that, based on their alleged knowledge of "dangerous and rough behavior," defendants should reasonably have anticipated negligent or criminal conduct on the part of the students. Nor did plaintiff allege that the students' conduct had caused problems with patrons in the past, that their conduct placed patrons at risk of physical injury, or that the particular student's conduct that injured plaintiff was foreseeable. Absent an allegation that defendant had reason to believe that a specific person posed a threat of harm to an identifiable, potential victim, defendant did not owe a legal duty of care to plaintiff and summary disposition was proper.[5] See *Mason*, *supra*.

Plaintiff further argues that summary disposition was improper because Rite-Aid voluntarily provided security to its patrons and "fail[ed] to provide guard services in a careful, reasonable and non-negligent manner." We disagree.

As a general rule, a merchant does not have an obligation to provide police protection on its premises. *Williams*, *supra* at 501, 504. In *Scott*, *supra* at 452, our Supreme Court held that liability may not be imposed where a merchant voluntarily takes safety precautions but the precautions are less effective than they could or should have been. The *Scott* Court cited with approval *Tame v AL Damman Co*, 177 Mich App 453, 457; 442 NW2d 679 (1989), in which this Court

> decline[d] to adopt a policy that imposes liability on a merchant who, in a good faith effort to deter crime, fails to prevent all criminal activity on its premises. Such a policy would penalize merchants who provide some measure of protection, as opposed to merchants who take no such measures. We do not intend, however,

[5] Although the trial court stated it granted summary disposition to Rite-Aid under MCR 2.116(C)(10), where plaintiff failed to establish that Rite-Aid owed an actionable duty, summary disposition was properly granted pursuant to MCR 2.116(C)(8). *Ross*, *supra*. Where summary disposition is granted under one sub-part of the court rule when it was actually appropriate under another, the defect is not fatal and does not preclude appellate review as long as the record permits review under the correct sub-part. *Gibson v Neelis*, 227 Mich App 187, 189; 575 NW2d 313 (1997). That the trial court reviewed depositions prior to granting summary disposition in this case does not change the nature of the court's legal ruling that no actionable duty existed. The factual questions raised in connection with submission of the depositions were not pertinent to the legal question of whether a duty existed.

> to preclude claims of negligent supervision or vicarious liability for negligence on the part of security guard services. [*Scott, supra* at 452.]

Plaintiff here raises no allegation regarding the security guard's performance of his duty, but instead alleges that the security service provided by Rite-Aid was itself inadequate. Such a claim is unenforceable as a matter of law. *Scott, supra*; *Krass v Tri-County Security, Inc*, 233 Mich App 661, 680; 593 NW2d 578 (1999). Summary disposition under MCR 2.116(C)(8) was properly granted.[6]

Plaintiff also argues that the trial court erred in finding that she was a licensee on Paisano's property, rather than a business invitee, and that Paisano's did not owe her a duty of care. However, because we have already concluded that Rite-Aid owed no legal duty to plaintiff as a business invitee to protect her from the students' conduct, and because the duty owed to an invitee is greater than that owed to a licensee, we need not consider whether the trial court correctly characterized plaintiff as a licensee in relation to Paisano's. See *D'Ambrosio v McCready*, 225 Mich App 90, 94; 570 NW2d 797 (1997).

Affirmed.

/s/ Michael J. Kelly
/s/ Kurtis T. Wilder

[6] To the extent that plaintiff relies on *Rhodes v United Jewish Charities*, 184 Mich App 740; 459 NW2d 44 (1990), in support of its position, we note that *Rhodes* was abrogated by the Supreme Court's opinion in *Scott v Harper Recreation, Inc*, 444 Mich 441, 451-452; 506 NW2d 857 (1993), and this Court's opinion in *Krass v Tri-County Security, Inc*, 233 Mich App 661, 667, 680 n 12; 593 NW2d 578 (1999) (to the extent that *Rhodes* implies that an agreement to provide security is an actionable warranty that the guarded area will be safe from all criminal activity, it is inconsistent with Michigan law).