STATE OF MICHIGAN

COURT OF APPEALS

AMAR YONO,

Plaintiff-Appellant,

v

COOLIDGE #1, INC.,

Defendant-Appellee,

and

TED BENDO OLIVER,

Defendant.

UNPUBLISHED
March 6, 2001

No. 217735
Oakland Circuit Court
LC No. 98-004932-NO

Before: Zahra, P.J., and Smolenski and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in this respondeat superior/premises liability action. We affirm.

This case arises from an assault which occurred at a McDonald's restaurant owned by defendant, Coolidge #1, Inc. According to plaintiff, while waiting for his food at the counter, he removed the paper wrapper from his straw and threw the wrapper in a garbage can located on the other side of the counter. When the cashier informed plaintiff that the garbage can was being used to hold Happy Meal toys, plaintiff apologized and told her that he would remove the wrapper from the can. The cashier brought plaintiff the garbage can, which plaintiff visually searched for the wrapper. At that point, a McDonald's employee named Ted Bendo Oliver emerged from the rear of the restaurant and assaulted plaintiff. Plaintiff sued the defendant employer on theories of respondeat superior and premises liability.

On appeal, a trial court's grant of summary disposition is reviewed de novo. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). This Court must determine whether any genuine issue of material fact exists in order to prevent a judgment for the moving party as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a plaintiff's claim. *Spiek, supra* at 337; *Phillips v Deihm*, 213 Mich App 389,

398; 541 NW2d 566 (1995); *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). A court considers the affidavits, pleadings, depositions, and other documentary evidence to determine whether a genuine issue of material fact exists. *Spiek*, *supra* at 337; *Rollert v Dep't of Civil Service*, 228 Mich App 534, 536; 579 NW2d 118 (1998). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456 n 2; 597 NW2d 28 (1999).

Plaintiff first contends that the trial court erroneously granted summary disposition on his respondeat superior claim. Under the doctrine of respondeat superior, an employer may be vicariously liable for the acts of an employee if those acts were committed within the scope of employment. *Helsel v Morcom*, 219 Mich App 14, 21; 555 NW2d 852 (1996). An employer may even be liable for an employee's intentional torts. *Green v Shell Oil Co*, 181 Mich App 439, 446; 450 NW2d 50 (1989); *Burch v A & G Associates, Inc*, 122 Mich App 798, 804; 333 NW2d 140 (1983). However, "an employer is not liable if the employee's tortious act is committed while the employee is working for the employer but the act is outside his authority." *Green*, *supra* at 446. The employer is not liable for an employee's acts when an employee "'steps aside from his employment to gratify some personal animosity or to accomplish some purpose of his own.'" *Id*., quoting *Martin v Jones*, 302 Mich 355, 358; 4 NW2d 686 (1942).

Although the question whether an employee was acting within the scope of his employment is generally for the trier of fact, the issue may be decided as a matter of law where the employee committed a serious crime involving excessive violence. *Bryant v Brannen*, 180 Mich App 87, 103; 446 NW2d 847 (1989). In *Bryant*, the defendant's apartment manager shot the plaintiff in an argument regarding the repair of an apartment door, and this Court held that the manager's criminal conduct was so far outside the scope of his employment that the defendant employer could not be held liable for the plaintiff's injuries. *Id.* at 90-91, 104. Similarly, we hold that defendant Oliver was acting outside the scope of his employment when he assaulted plaintiff. Defendant Oliver was assigned as a grill worker and was not intended to have any contact with customers. Defendant Oliver's decision to assault plaintiff for mistakenly throwing a straw wrapper into a Happy Meal toy bin cannot reasonably be viewed as an act undertaken with an intent to perform his employer's business.

Plaintiff argues that the instant case is distinguishable from *Bryant* because that case involved a shooting, while the present case involves a simple assault. Based on the facts alleged in plaintiff's complaint, the trial court concluded that defendant Oliver's assault was a serious crime involving excessive violence. Plaintiff alleged in his complaint that defendant Oliver physically assaulted him "suddenly and without warning," and that he suffered "severe and grievous injuries" as a result, including a closed head injury. Given plaintiff's own recitation of the assault and its physical effects on his person, this Court agrees with the trial court's determination that defendant Oliver's attack constituted a serious crime involving excessive violence. Therefore, the trial court did not err in holding as a matter of law that the defendant employer was entitled to summary disposition on plaintiff's respondeat superior claim.

Plaintiff next contends that the trial court erroneously granted summary disposition on his premises liability claim. Questions regarding legal duties are for the courts to decide as a matter

of law. *Mason v Royal Dequindre, Inc*, 455 Mich 391, 397; 566 NW2d 199 (1997). As a general rule, a person does not have a duty to aid or protect another person endangered by a third person's conduct. *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 498-499; 418 NW2d 381 (1988). However, courts have recognized exceptions to this general rule where a special relationship exists between a plaintiff and a defendant. *Id.* at 499. In *Mason, supra* at 405, our Supreme Court held that merchants have a legal duty to exercise reasonable care to protect their identifiable invitees from the foreseeable criminal acts of third parties. Plaintiff contends that defendant, Coolidge #1, Inc., breached such a duty. We disagree.

Plaintiff testified that the assault happened "quick and fast" and that he was "sucker punched," basically alleging that he had no warning that the assault was about to occur and that he had no time to defend himself. Valila Brooks, defendant's manager on duty, also testified that defendant Oliver emerged from the back grill area "all of a sudden." Plaintiff contends that the defendant employer could have prevented the assault because a verbal exchange occurred between plaintiff and defendant Oliver before the actual assault took place. However, plaintiff fails to explain what further actions the defendant employer could have taken to prevent or stop the attack. Brooks, defendant's immediate agent, testified that she saw defendant Oliver move toward plaintiff and she attempted to grab his left arm. Oliver's brother Aaron, also a McDonald's employee, was only able to restrain Oliver after he had already struck plaintiff. Plaintiff never requested intervention from defendant and never requested that defendant call police. Based on these factual circumstances, we find that the trial court correctly ruled, as a matter of law, that the defendant employer could not readily foresee that plaintiff was in danger of a physical assault. Therefore, defendant did not owe plaintiff a duty to protect him from defendant Oliver's criminal attack.

Affirmed.

/s/ Brian K. Zahra
/s/ Michael R. Smolenski
/s/ Hilda R. Gage