STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL G. MURPHY,

Plaintiff-Appellant,

V

MACEDONIA ENTERPRISES, INC., and DEFENDANT X,

Defendants-Appellees.

UNPUBLISHED
August 17, 2001

No. 222034
Genesee Circuit Court
LC No. 98-063222-NO

Before: Jansen, P.J., and Collins and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant Macedonia Enterprises, Inc.'s motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

As plaintiff was leaving a night club operated by defendant Macedonia Enterprises, Inc. he stepped on somebody's foot. A scuffle ensued and plaintiff was hit in the face with a beer bottle by an unidentified assailant (defendant X). The entire incident happened in approximately one to two minutes. After the incident two employees of the club escorted plaintiff outside. Plaintiff's friend, who was also at the club, met plaintiff in the parking lot and took him to the hospital.

Plaintiff filed a complaint alleging negligence on the part of defendant Macedonia.[1] Thereafter, plaintiff filed a motion for an amended complaint to add North Pointe Insurance Company as a party defendant. The trial court denied this motion. Defendant Macedonia moved for summary disposition under MCR 2.116(C)(8) and (10). The trial court granted defendant Macedonia's motion for summary disposition pursuant to MCR 2.116(C)(10).

In a motion for summary disposition the trial court must consider all the "affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties . . . in the light most favorable to the party opposing the motion." *Smith v Globe Life*

[1] The trial court dismissed plaintiff's intentional tort claim, pursuant to MCR 2.116(C)(8), finding that it was improperly pleaded. Plaintiff does not address this ruling on appeal.

Ins Co, 460 Mich 446, 454; 597 NW2d 28 (1999) (citation omitted). We review de novo a trial court's decision whether to grant a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Summary disposition is only appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Id*. at 120.

Plaintiff first claims that defendant Macedonia breached its duty to protect plaintiff because the incident in this case was foreseeable and plaintiff was an identifiable invitee. We disagree.

A plaintiff must prove the following four elements to establish a prima facie case of negligence: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) causation; and (4) damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). Questions regarding duty are ordinarily for the court to decide as a matter of law. *Mason v Royal Dequindre, Inc*, 455 Mich 391, 397; 566 NW2d 199 (1997). However, when the determination of duty depends on factual findings, those findings must be made by the jury. *Holland v Liedel*, 197 Mich App 60, 65; 494 NW2d 772 (1992).

Generally, there is no duty which obligates a person to aid or protect another who is endangered by a third person's conduct. *Mason, supra* at 397. An exception to the rule arises if a special relationship exists between the parties. *Id.* One of the special relationships that will impose a duty to protect against the acts of third parties is the relationship between an occupier of land and its invitees. *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988).

Merchants owe a duty to protect invitees from the criminal acts of third parties if the invitee is "'readily identifiable as [being] foreseeably endangered.'" *Mason, supra* at 398, citing *Murdock v Higgins*, 454 Mich 46, 58; 559 NW2d 639 (1997); *Marcelletti v Bathani*, 198 Mich App 655, 665; 500 NW2d 124 (1993). Our Supreme Court, in *Macdonald v PKT, Inc*, ___ Mich ___; 628 NW2d 33 (2001), recently revisited the issue of a merchant's duty to protect their invitees from the criminal acts of third parties. In *Macdonald, supra*, the Court stated that "a merchant has no obligation generally to anticipate and prevent criminal acts against its invitees." Until a situation occurs on the premises indicating "a risk of imminent harm to an identifiable invitee," a merchant can be under the assumption that their patrons will obey the law. *Id*. To the extent that *Mason* supported the proposition that a merchant has a duty to take precautions against the reasonably anticipated criminal conduct of others, it has been overruled. *Macdonald, supra*. Therefore, past incidents of violence do not create a present duty to respond. *Id*.

In the instant case, plaintiff had not been involved in any other confrontations or arguments with anyone in the club that night. Nor does plaintiff provide any evidence that defendant Macedonia was aware of any arguments or altercations earlier in the evening. Instead, plaintiff argues that after he was poked in the forehead defendant Macedonia had sufficient notice to prevent plaintiff from being hit with the bottle. In support of this assertion, plaintiff cites to defendant Macedonia's entry in the log book concerning the incident. However, the entry

provides no information about the timespan of the fight.[2] In fact, plaintiff's own testimony that the entire incident happened in approximately one to two minutes belies the conclusion that the altercation provided defendant Macedonia with notice that plaintiff was at risk of an imminent harm.

Plaintiff also opines that prior incidents involving glass beer bottles in the club rendered it foreseeable to defendant Macedonia that other injuries would be caused by patrons using the bottles as weapons. However, *Macdonald* clearly stated that "[i]t is only a present situation on the premises, not any past incidents, that creates a duty to respond." *Id.* Moreover, plaintiff produced no evidence of these prior incidents to the lower court. The existence of a disputed fact must be established by admissible evidence; a mere promise to offer factual support at trial is insufficient. *Maiden, supra* at 120.

In much the same way, plaintiff claims that the fact defendant Macedonia hired extra security on Thursday nights raises an inference that defendant Macedonia should have foreseen that plaintiff would be injured. However, an expectation that the club would be crowded or that a more crowded club would involve greater security risk does not raise an inference that plaintiff was readily identifiable as being foreseeably endangered. Viewing this evidence in the light most favorable to plaintiff, the facts do not support a finding that plaintiff was identifiable as being foreseeably endangered.

Plaintiff further argues that defendant Macedonia breached its affirmative duty to render effective aid to plaintiff after he was injured. We disagree.

In support of this argument, plaintiff cites *Farwell v Keaton*, 396 Mich 281; 240 NW2d 217 (1976). *Farwell* held that companions of a social venture have a duty to aid each other and that once a party undertakes to aid another, there is a duty to act reasonably. *Id*. Since the incident occurred on defendant Macedonia's property, plaintiff claims they had a legal duty to render effective aid. Pursuant to *Farwell*, once this aid was rendered, defendant Macedonia was required to act reasonably. *Id*. at 288-289. The determination of reasonableness is a question for the jury. *Id.* at 289.

However, regardless of the reasonableness of defendant Macedonia's actions, there is no genuine issue of material fact as to whether plaintiff suffered harm as a result of defendant Macedonia's alleged breach of its duty to render aid. After plaintiff was led out of the club by defendant Macedonia's employees, he did not attempt to reenter; rather, his friend met him in the parking lot and took him to the emergency room. No evidence was presented to indicate that plaintiff's injuries were exacerbated by defendant Macedonia's inaction. Based on the lower

---

[2] Plaintiff also cites the deposition of James Brown, who stated that his employee saw plaintiff "shoving his way through the crowd" as evidence that defendant Macedonia had time to prevent plaintiff's injury. However, this portion of the deposition is not part of the lower court record nor does it indicate that plaintiff was shoving prior to being injured. A party may not expand the record on appeal. *Reeves v Kmart Corp*, 229 Mich App 466, 481 n 7; 582 NW2d 841 (1998).

court record, reasonable minds could not differ on whether defendant Macedonia's failure to render aid to plaintiff after he was injured resulted in further physical harm to plaintiff. Furthermore, plaintiff failed to provide any authority for his assertion that defendant Macedonia was required to identify or detain his attackers for future criminal and civil proceedings. A party may not merely announce its position and leave it to this Court to discover and rationalize the basis for its claims. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

Finally, plaintiff claims that his motion for leave to amend his complaint to add defendant Macedonia's insurer, Northpointe Insurance Co., was improperly denied by the trial court. We disagree. A trial court's decision regarding a motion to amend a pleading is reviewed on appeal for abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997).

MCR 2.118(A)(2) provides that leave to amend a complaint shall be freely given when justice so requires. Reasons justifying denial of leave include futility. *Weymers, supra* at 658. A trial court's failure to specify its reasons for denying leave to amend requires reversal unless the amendment would have been futile. *Dowerk v Oxford Twp*, 233 Mich App 62, 75; 592 NW2d 724 (1998). An amendment is futile, despite the substantive merits of the claim, if it is legally insufficient on its face. *Hakari v Ski Brule, Inc*, 230 Mich App 352, 355; 584 NW2d 345 (1998).

Plaintiff's amendment to add defendant's insurance company would be futile for two reasons. First, plaintiff is not a third-party beneficiary of defendant Macedonia's insurance contract with Northpointe. See *Allstate Ins Co v Hayes*, 442 Mich 56, 60-61; 499 NW2d 743 (1993). Additionally, MCL 500.3030 does not allow plaintiff to add defendant Macedonia's insurer as a party defendant. MCL 500.3030 provides in pertinent part:

> In the original action brought by the injured person . . . the insurer shall not be made or joined as a party defendant, nor . . . shall any reference whatever be made to such insurer or to the question of carrying of such insurance during the course of trial.

We do not find that the trial court abused its discretion in denying plaintiff's motion. Furthermore, the trial court's failure to specify its reasons for denying leave to amend does not require reversal.

Affirmed.

/s/ Kathleen Jansen
/s/ Jeffrey G. Collins
/s/ Jessica R. Cooper