STATE OF MICHIGAN

COURT OF APPEALS

WENDY RYTHER and BEAU RYTHER, Plaintiffs-Appellants,	UNPUBLISHED April 26, 2002
v OCB RESTAURANT CO., Defendant-Appellee. and PHYSICIANS HEALTH PLAN OF MICHIGAN, LEQUESHIA MARTIN, and QUINTINA TIPPENS, Defendants.[1]	No. 229013 Muskegon Circuit Court LC No. 99-039469-NO

Before: Owens, P.J., and Markey and Murray, JJ.

PER CURIAM.

Plaintiffs appeal as of right an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

On January 28, 1999, plaintiffs were eating dinner at Old Country Buffet Restaurant, owned and operated by defendant. Plaintiffs allege that plaintiff Wendy Ryther[2] was injured by Lequeshia Martin, defendant's employee, during a physical altercation that occurred between Martin and Quintina Tippens, a third party.

Plaintiffs argue on appeal that the trial court erred in granting defendant's motion for summary disposition because genuine issues of material fact existed as to whether defendant's employee was acting within the scope of her employment when she injured plaintiff, and

[1] These defendants are non-parties on appeal after being dismissed from the case in the trial court. As such, the term "defendant" refers only to defendant OCB Restaurant Co.

[2] Because plaintiff Wendy Ryther was the person injured, and because her husband, Beau Ryther, was added as a plaintiff to claim loss of consortium, any further references in this opinion to "plaintiff" refer solely to plaintiff Wendy Ryther.

whether the altercation that caused plaintiff's injuries was foreseeable by defendant. We disagree. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *Id.*

> In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).
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> In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Glove Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J. Walter Thompson,* 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins. Association,* 202 Mich App 233, 237; 507 NW2d 741 (1993). [*Smith v Globe Life Insurance Co.,* 460 Mich 446, 454-455; 597 NW2d 28 (1999), quoting *Quinto v Cross & Peters Co.,* 451 Mich 358, 362-363; 547 NW2d 314 (1996).]

"A litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10)." *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). Instead, a litigant opposing a properly supported motion for summary disposition under this subrule must present substantively admissible evidence to the trial court prior to its decision on the motion, which creates a genuine issue of material fact. *Id.*

Plaintiffs first argue that the trial court erroneously granted summary disposition on their vicarious liability theory.[3] "Under the doctrine of respondeat superior, an employer may be

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[3] Plaintiffs' third amended complaint contained three separate counts against defendant that are pertinent to this appeal. Count one sought to impose negligence liability against defendant on the basis of a vicarious liability theory; count two alleged that defendant was directly liable to plaintiffs for its negligence, while count three alleged a premises liability claim. Although count one is captioned "vicarious liability," the proper cause of action is one for "negligence," since vicarious liability is the theory utilized to impose a cause of action of negligence against an

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vicariously liable for the acts of an employee committed within the scope of his employment." *Helsel v Morcom*, 219 Mich App 14, 21; 555 NW2d 852 (1996). However, the employer may not be held liable for the acts committed by the employee while she is working that are beyond the scope of her employment. *Borsuk v Wheeler*, 133 Mich App 403, 410; 349 NW2d 522 (1984). "Intentional and reckless torts are generally held to be beyond the scope of employment." *Id.* An employee is not acting within the scope of his employment "where he steps aside from his employment to gratify some personal animosity or to accomplish some purpose of his own" *Green v Shell Oil Co*, 181 Mich App 439, 446; 450 NW2d 50 (1989) (citations omitted). Furthermore, an employer has not been held liable for the tortious acts of his employee unless the employee could in some way have been promoting or furthering his employer's business. *Bryant v Brannen*, 180 Mich App 87, 98-99; 446 NW2d 847 (1989). Generally, the trier of fact determines whether an employee was acting within the scope of her employment, but summary disposition is appropriate where reasonable minds could not differ with respect to whether the employee was acting to accomplish a purpose of her own. *Green, supra* at 447.

In this case, reasonable minds could not differ in determining that Martin was acting outside the scope of her employment when plaintiff was injured. Martin was working as a dining room attendant or waitress, clearing dishes off plaintiffs' table when the physical altercation with Tippens occurred. Viewing the evidence in the light most favorable to plaintiffs, Martin allegedly dropped the tray of dishes on plaintiff as Tippens approached Martin in the aisle way of the dining area, telling Martin not to "disrespect" her.[4] Immediately thereafter, a fight broke out between Martin and Tippens, during which Martin grabbed plaintiff to either move her out of the way or use her as a shield against Tippens, resulting in plaintiff getting kicked in the knee by Martin. Martin's actions before and during this altercation, whether as an attacker or in self-defense, cannot reasonably be viewed as undertaken to further defendant's business. Rather, Martin's conduct can only be construed as an attempt to accomplish some purpose of her own and gratify some personal animosity toward Tippens. Furthermore, no evidence was presented that Martin's duties as a dining room attendant included "quelling" violent disturbances or ejecting unruly patrons, and thus, excessive violence or a use of force is not expected in the normal course of her duties. See *Bryant, supra* at 102-103.

The cases relied upon by plaintiffs, particularly *Cook v Michigan Central Ry,* 189 Mich 456; 155 NW 451 (1915) and *Green, supra*, do not require reversal in this case. In *Cook,* the Supreme Court relied upon the significant fact that the employee who caused the injury had the specific authority to remove people from the employer's premises. *Cook, supra* at 460-461. As previously noted, in this case there was no evidence in the record before the trial court to establish that Martin had any such authority. Additionally, *Green* also supports the trial court's ruling as the *Green* Court held that the employee who committed the intentional act against the

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employer for the negligent acts of its employees. See *Candelaria v BC General Contractors,* 236 Mich App 67, 72-73; 600 NW2d 348 (1999); *Helsel v Morcom,* 219 Mich App 14, 21; 555 NW2d 852 (1996).

[4] In fact, plaintiff testified in her deposition that Martin dropped the tray as her "attacker" was approaching. Plaintiff presumed that Martin dropped the tray so that she could defend herself.

plaintiff was acting outside the scope of his employment because the attack was not in furtherance of his employer's interests. *Green, supra* at 447. Accordingly, the trial court did not err in holding as a matter of law that Martin was acting outside the scope of her employment when defending herself from an attack by a third party, and that defendant was therefore entitled to summary disposition.

Plaintiffs also argue that the trial court erred in granting summary disposition with regard to their negligence and premises liability claims, erroneously finding that there was no admissible evidence presented that the altercation between Martin and Tippens was foreseeable or preventable by defendant. Because we have already concluded that defendant is not liable for its employee's direct negligence or tortious conduct in the altercation with Tippens for the reason that she was acting outside the scope of her employment, the question is whether defendant was negligent in failing to maintain a reasonably safe premises for its business invitees.

Merchants have a duty to protect their readily identifiable invitees from the foreseeable criminal acts of third parties. *MacDonald v PKT, Inc*, 464 Mich 322, 332, 338; 628 NW2d 33 (2001). This duty is premised on the assumption that patrons will obey the criminal law and "[t]his assumption should continue until a specific situation occurs on the premises that would cause a reasonable person to recognize a risk of imminent harm to an *identifiable invitee*." *Id.* at 335 (emphasis added).

Although plaintiff was not directly injured by the criminal acts of a third party, plaintiff was injured as a result of the criminal acts that took place between an employee and a third party. However, this does not change the application of the foregoing rule. As such, we find it impossible to conclude that plaintiff was "readily identifiable" as being foreseeably endangered. *Id.* at 338. There is no evidence presented that plaintiff was threatened or at risk of imminent harm. Assuming arguendo that plaintiffs' hearsay statements are admissible[5] to show that an ongoing situation between Martin and Tippens was taking place on the premises and that defendant was aware of it, there was no reason for defendant to anticipate that plaintiff would be readily identifiable as at risk of imminent harm. Accordingly, the trial court correctly determined that defendant did not breach any duty owed to plaintiff and summary disposition on this claim was properly granted.

Affirmed.

/s/ Donald S. Owens
/s/ Jane E. Markey
/s/ Christopher M. Murray

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[5] We note, however, that the trial court correctly disregarded the testimony as inadmissible hearsay. *Maiden, supra.* The statement of the unidentified woman was not admissible under the excited utterance exception because it must be the declarant who was "under the stress of excitement," MRE 803(2), and that is not the case here. Similarly, MRE 803(1) is inapplicable because, as the trial court ruled, the statement was so vague that it was inadmissible under *People v Hendrickson,* 459 Mich 229, 236; 586 NW2d 906 (1998).