

STATE OF MICHIGAN
COURT OF APPEALS

TERRY ALBANYS,

Plaintiff-Appellee,

v

19055, INC., d/b/a COYOTE II,

Defendant-Appellant.

UNPUBLISHED

April 30, 2002

No. 220505

Wayne Circuit Court

LC No. 97-732662-NO

ON REMAND

Before: Murphy, P.J., and Hood and Cooper, JJ.

PER CURIAM.

Defendant appealed as of right from a judgment entered in favor of plaintiff following a jury trial. In *Albanys v 19055, Inc*, unpublished per curiam opinion of the Court of Appeals, issued March 20, 2001 (Docket No. 220505), we affirmed the judgment. In lieu of granting defendant's application for leave to appeal, our Supreme Court remanded this matter back to us for reconsideration in light of *MacDonald v PKT, Inc*, 464 Mich 322; 628 NW2d 33 (2001). *Albanys v 19055, Inc*, 465 Mich 944; 639 NW2d 805 (2002). Upon reconsideration, we conclude that the trial court did err in failing to grant defendant's motion for judgment notwithstanding the verdict regarding plaintiff's negligence claim. Accordingly, we reverse our previous opinion and the judgment.

In our original opinion, we rejected defendant's argument that the trial court erred when it denied defendant's motion for JNOV, stating:

[I]t was foreseeable that a friend of the other individual involved in the argument with plaintiff could have left the bar and had a fight with plaintiff in the parking lot. See *Mason v Royal Dequindre, Inc*, 455 Mich 391, 404; 566 NW2d 199 (1997). Moreover, the jury could have found that defendant was negligent because defendant's head of security allowed plaintiff to engage in a fight on defendant's property. Our Supreme Court has stated that merchants have a duty to use reasonable care to protect their identifiable invitees from the foreseeable criminal acts of third parties. *Id.* at 405. The measures they take must be reasonable. *Id.* A reasonable jury could have found that defendant did not take

reasonable steps to prevent plaintiff's injury. Although defendant forcefully removed plaintiff from the bar, defendant did not make reasonable attempt to protect plaintiff while he was on defendant's property. [*Albanys, supra*, slip opinion at 2.]

In *MacDonald, supra* at 345-346, our Supreme Court, addressing the duty of premises owners concerning the criminal acts of third parties, held:

[W]e conclude that merchants have a duty to respond reasonably to situations occurring on the premises that pose a risk of imminent and foreseeable harm to identifiable invitees. We hold that the duty to respond is limited to reasonably expediting the involvement of the police, and that there is no duty to otherwise anticipate the criminal acts of third parties. Finally, we affirm that merchants are not required to provide security personnel or otherwise resort to self-help in order to deter or quell such occurrences.”

The Supreme Court additionally held that there is no duty to prevent the criminal acts of third parties. *Id.* at 326.

Here, the jury specifically found that plaintiff did not sustain an injury to his right eye as a result of being battered by an employee of defendant. The jury did find that defendant was negligent; however, the verdict form does not indicate on what basis defendant was negligent.¹ We can only conclude, considering the jury's ultimate finding of liability, that the jury believed that a third party battered plaintiff causing the injuries, but that defendant was negligent in some form or manner for the occurrence. We outlined possible negligence scenarios in our original opinion as quoted above.

The record indicates that defendant's head of security contacted police. Because defendant contacted the police, and because defendant was not otherwise required to resort to self-help to quell any third-party criminal act, it cannot be said that defendant breached any duty regarding an assault against plaintiff. *MacDonald, supra* at 345-346. Further, defendant could not be held liable under a negligence theory on the basis that it failed to anticipate or prevent any assault and battery against plaintiff. *Id.* at 326, 345. Whether the criminal act was foreseeable under the facts is also not relevant. *Id.* at 339. Therefore, plaintiff's negligence theory fails in this action.

¹ The jury was instructed as follows:

It was the duty of the defendant in connection with this occurrence to use ordinary care for the safety of the plaintiff. A possessor of premises has a duty to maintain the premises in a reasonably safe condition. A possessor has a duty to exercise ordinary care to protect an invitee from unreasonable risks of injury that were known to the possessor or that should have been known in the exercise of ordinary care.

Reversed.

/s/ William B. Murphy

/s/ Harold Hood

/s/ Jessica R. Cooper