STATE OF MICHIGAN

COURT OF APPEALS

BONNIE FLANIGAN, Personal Representative of the Estate of PATRICK C. FLANIGAN, Deceased,

Plaintiff-Appellant,

v

ANDREW NEIL VICHUNAS, AIRWAY ENTERPRISES, d/b/a AIRWAY LANES, IDA BENNING, and FRANK P. BENNING,

Defendants-Appellees.

UNPUBLISHED
August 6, 2002

No. 231419
Oakland Circuit Court
LC No. 96-524992-NO

Before: Murray, P.J., and Sawyer and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right from the order granting summary disposition to defendants on her premises liability claim. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff's decedent initiated this suit seeking to recover for injuries suffered as a result of a fight in a bowling alley bar parking lot in the early morning hours of June 29, 1995. Although he had arrived with his friends at the bar at approximately 10:30 p.m., he became tired and went out to sleep in the car at around 12:30 or 1:00 a.m. As the bar was closing, a disturbance erupted between his friend and defendant Vichunas in the parking lot. Plaintiff's friend woke him to aid in the fight. Vichunas knocked plaintiff down and kicked him in the head several times. Plaintiff suffered closed head injuries that resulted in short-term memory impairment and other neurological problems. Plaintiff lost his job and committed suicide six months after filing suit. The complaint was subsequently amended to include a claim for wrongful death.

Defendants other than Vichunas (who defaulted) moved for summary disposition of the premises liability action pursuant to MCR 2.116(C)(10), arguing that they could not be held liable for plaintiff's injuries as a matter of law because the injuries were not reasonably foreseeable. The trial court agreed, granted the motion, and subsequently dismissed the complaint after the portion of the complaint alleging dramshop liability was sent to binding arbitration by stipulation of the parties.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). MCR 2.116(C)(10) provides that summary disposition is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. In ruling on the motion, the court must consider the pleadings, affidavits, depositions, and other documentary evidence submitted by the parties. *Smith*, *supra*, 460 Mich 455. The party moving for summary disposition must support its position with documentary evidence. *Id*.; MCR 2.116(G)(4) and (5); *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). The opposing party must then counter the motion with evidentiary materials demonstrating the existence of a genuine issue of disputed fact. MCR 2.116(G)(4); *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994).

Mason v Royal Dequindre, Inc, 455 Mich 391; 566 NW2d 199 (1997), involved facts virtually identical to those presented in this case. In *Mason*, the Supreme Court held that a merchant could not be held liable for injuries to a bar patron because there was no contact between the assailant and the plaintiff that would have placed the bar staff on notice that the plaintiff was in danger when he left the bar. *Id*., 455 Mich 403-404. Similarly, in this case, it is undisputed that there was no contact whatsoever between Vichunas and plaintiff inside the bar. Defendants had no way of knowing that plaintiff remained on the premises sleeping in the car in the parking lot, that a fight would spontaneously erupt as Vichunas was leaving the bar, or that plaintiff's friend would involve him in the altercation. Because plaintiff was not therefore identifiable as an invitee at risk of harm, no duty arose on the part of defendants. *Mason*, *supra*, 455 Mich 405.

Plaintiff's argument is primarily a contention that defendants should have anticipated trouble. However, in *MacDonald v PKT, Inc*, 464 Mich 322; 628 NW2d 33 (2001), the Supreme Court stated conclusively that merchants have "no obligation to . . . anticipate the criminal acts of third parties" and are "not obligated to do anything more than reasonably expedite the involvement of the police" once criminal activity becomes apparent. *Id*., 338. The Court acknowledged that criminal acts are "irrational and unpredictable" and held that "it is unjustifiable to make merchants, who not only have much less experience than the police in dealing with criminal activity, but are also without a community deputation to do so, effectively vicariously liable for the criminal acts of third parties." 464 Mich 335.

To the extent that previous decisions of this Court state a different standard, such as *Gorby v Yeomans*, 4 Mich App 339; 144 NW2d 837 (1966), on which plaintiff relies, it must be concluded that such cases have been impliedly overruled by *Mason* and *MacDonald*. Furthermore, *Gorby* is distinguishable on its facts, because the altercation in that case occurred inside the tavern in view of the staff and the staff unreasonably failed to summon the police or do anything at all once the disturbance became obvious. *Id*., 344. Consequently, we must conclude that the trial court in this case did not err in granting summary disposition to defendants with regard to plaintiff's premises liability claim.

Affirmed.

/s/ Christopher M. Murray
/s/ David H. Sawyer
/s/ Brian K. Zahra