

STATE OF MICHIGAN  
COURT OF APPEALS

---

BEVERLY HARSHAW, Personal Representative  
of the Estate of DESHON HARSHAW,

UNPUBLISHED  
December 2, 2010

Plaintiff-Appellee,

v

CLASSIC CONEY ISLAND,

No. 291980  
Wayne Circuit Court  
LC No. 07-727521-NZ

Defendant-Appellant.

---

Before: CAVANAGH, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

In this premises liability action, this Court originally denied defendant's application for leave to appeal the trial court's denial of its motion for summary disposition under MCR 2.116(C)(10). The case is now before this Court pursuant to our Supreme Court's order, in lieu of granting leave to appeal, remanding the case to this Court for consideration as on leave granted. *Harshaw v Classic Coney Island*, 485 Mich 1132; 780 NW2d 294 (2010). We reverse and remand for entry of an order of summary disposition in favor of defendant.

Plaintiff's decedent, a customer at defendant's restaurant, was involved in a fight with other customers at the restaurant, one of whom produced a gun and eventually shot the decedent. Although the restaurant manager and the cashier both testified in their depositions that the cashier called the police, the trial court found that there were issues of fact concerning whether a call was actually made and who made the call. Accordingly, it denied defendant's motion for summary disposition.

The trial court's ruling on a motion for summary disposition is reviewed de novo on appeal. *Gillie v Genesee Co Treasurer*, 277 Mich App 333, 344; 745 NW2d 137 (2007). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When reviewing a motion under subrule (C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant record evidence in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists warranting a trial. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183.

The general rule is that a business invitor does not have a duty to protect its invitees from the criminal acts of third persons. *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495; 418 NW2d 381 (1988). A premises owner's duty to act when faced with criminal activity of third persons arises when "specific acts occur[ ] on the premises that pose a risk of imminent and foreseeable harm to an identifiable invitee." *MacDonald v PKT, Inc*, 464 Mich 322, 338; 628 NW2d 33 (2001). That duty to act is limited to "reasonably expedit[ing] the involvement of the police." *Id.* As long as an employee contacts the police at some point during the incident and the police respond, the defendant has fulfilled its duty notwithstanding the fact that another employee could have called the police sooner. *Lamar v Ramada Franchise Sys, Inc*, 480 Mich 880, 880-881; 738 NW2d 232 (2007); *Smith v Hamilton's Henry VIII Lounge, Inc*, 468 Mich 885; 661 NW2d 234 (2003).

Photographs from defendant's surveillance tapes showed time markers between 2:36 and 2:43 a.m. The restaurant manager testified that upon seeing a man with a gun on the video monitor, he directed the cashier to call the police and then went to the front to try to stop the fight. When one combatant gained control of the gun and began to load it, the manager again directed the cashier to call the police. The manager testified that he heard the cashier making two telephone calls. The cashier stated in her affidavit that she made several calls. Although it was unclear who used which telephone and how often, there was evidence of an actual 911 call in which the cashier reported an ongoing fight involving a person with a gun at 2:41 a.m., and a sheriff's deputy testified that the police were dispatched to the restaurant to investigate "a fight in progress" at 2:42 a.m.

Defendant's counsel obtained a compact disk recording of the 911 calls concerning the events at the restaurant. A transcript of the recording reflects an initial call reporting "an emergency at the Classic Café Coney Island at 12857 Woodward. And they do have a concealed weapon." In response to questioning by the 911 operator, the person making the report responded, "[i]t's a gun. They're fighting in here now." The 911 transcript also documents a second call, consistent with the cashier's affidavit. Although plaintiff asserts that "no employee summoned the police at all," plaintiff has not challenged the accuracy of the 911 transcript. Viewing the facts in the light most favorable to plaintiff, we are unable to discern any genuine dispute as to whether defendant fulfilled its duty to reasonably expedite police involvement. Plaintiff's generic challenge to witness credibility casts no more than a metaphysical doubt on the witnesses' credibility, and simply fails to establish a triable fact issue. Accordingly, the trial court erred in denying defendant's motion for summary disposition.

Reversed and remanded for entry of an order granting summary disposition to defendant. We do not retain jurisdiction.

/s/ Mark J. Cavanagh  
/s/ Joel P. Hoekstra  
/s/ Elizabeth L. Gleicher