STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL K. MCGUIGAN,

Plaintiff-Appellant,

and

ACCIDENT FUND INSURANCE COMPANY,

Intervening Plaintiff-Appellee,

V

VASCOR, LTD., DAIMLERCHRYSLER CORPORATION, and CHRYSLER, L.L.C.,

Defendants-Appellees.

UNPUBLISHED
May 29, 2012

No. 302758
Wayne Circuit Court
LC No. 09-006568-NO

Before: SERVITTO, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendants' motion for summary disposition. We affirm.

Plaintiff argues that the trial court erred in granting summary disposition to defendants because the *MacDonald*[1] line of cases is inapplicable when defendants are not merchants. Plaintiff also argues that defendants' duty of care arose under a master-servant relationship because defendants had control over the state fair storage lots, and defendants created a dangerous situation by not instituting proper safety measures at the site. We disagree.

[1] *MacDonald v PKT, Inc*, 464 Mich 322; 628 NW2d 33 (2001).

This Court reviews de novo the grant of a motion for summary disposition under MCR 2.116(C)(10)[2]. *Lakeview Commons LP v Empower Yourself, LLC*, 290 Mich App 503, 506; 802 NW2d 712 (2010).

To establish a prima facie case of negligence, a plaintiff must prove, among other elements, "the defendant[s] owed the plaintiff a legal duty." *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; 809 NW2d 553 (2011). Duty is any obligation owed to the plaintiff to avoid negligent conduct, and whether a duty exists generally presents a question of law for the court. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). However, when the "determination of duty depends on factual findings, those findings must be made by the jury." *Robinson v City of Detroit*, 462 Mich 439, 452; 613 NW2d 307 (2000).

> In determining whether a duty exists, courts examine different variables, including 'foreseeability of the harm, existence of a relationship between the parties involved, degree of certainty of injury, closeness of connection between the conduct and the injury, moral blame attached to the conduct, policy of preventing future harm, and the burdens and consequences of imposing a duty and the resulting liability for breach.' [*Graves v Warner Bros*, 253 Mich App 486, 492-493; 656 NW2d 195 (2002), quoting *Krass v Tri-County Security, Inc*, 233 Mich App 661, 668-669; 593 NW2d 578 (1999).]

Generally, under common law, there is no duty obligating "one person to aid or protect another." *Dawe v Dr Reuven Bar-Levav & Assoc, PC*, 485 Mich 20, 25; 780 NW2d 272 (2010), quoting *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988). However, if a special relationship exists, the defendant may owe a duty of care to the plaintiff. *Dawe*, 485 Mich at 25-26. The rationale behind imposing a duty on a defendant in a special relationship is based upon control; the person in control is best able to provide plaintiff with a safe environment. *Dawe*, 485 Mich at 26, quoting *Williams*, 429 Mich at 499. A "special relationship" can exist when the plaintiff and the defendant are: employer and employee, owners or occupiers of land and invitees, or business invitors and invitees. *Dawe*, 485 Mich at 26 n 3; *Graves* 253 Mich App at 494.

In *MacDonald v PKT, Inc*, 464 Mich 322, 326-327; 628 NW2d 33 (2001), concert attendees sued owners of the concert venue. The plaintiffs were injured when other concert attendees threw sod during a concert. *Id.* at 326-327, 329. The *MacDonald* Court held that merchants have a duty to protect identifiable invitees from foreseeable acts by third parties. "The duty is triggered by specific acts occurring on the premises that pose a risk of imminent and foreseeable harm to an identifiable invitee." *Id.* at 338. The Court reasoned that "[m]erchants do

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[2] Defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10). The parties went beyond the pleadings in their arguments for summary disposition. This Court will review the summary disposition motion pursuant to MCR 2.116(C)(10) if the trial court ruled on the motion without specifying which subrule it used and considered material outside the pleadings. *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007).

not have effective control over situations involving spontaneous and sudden incidents of criminal activity." *Id.* at 337.

In the present case, defendants are not traditional merchants. Consequently, plaintiff argues that the *MacDonald* line of cases does not apply. We disagree. Case law has not limited the *MacDonald* decision to merchants. In *Graves*, the plaintiffs,the personal representatives of a homicide victim, sued the producers of a television talk show where both the victim and murderer had been guests. *Id.* at 488-489. The producers were not merchants. However, *Graves* still applied the *MacDonald* Court's:

> long-established rule that there is no general duty to anticipate and prevent criminal activity even where . . . there have been prior incidents and the site of the injury is a business premises. Any duty is limited to reasonably responding to situations that occur on the premises and pose a risk of imminent and foreseeable harm to identifiable invitees, and the duty to respond is limited to contacting the police. [*Id.* at 497.]

Additionally, in *Bailey v Schaff*, 293 Mich App 611, 615; ___ NW2d ___ (2011), this Court addressed the duty of a premises possessor in response to criminal acts, holding:

> [W]e conclude that a premises possessor has a duty to take reasonable measures in response to an ongoing situation that is occurring on the premises, which means expediting the involvement of, or reasonably attempting to notify, the police. Our basic premise is that public safety is the business of the government, and we emphasize that . . . the *only* duty the owners and managers of apartment complexes have is to summon the police when, either directly or through their agents, they observe criminal acts in progress that pose a risk of imminent harm to identifiable invitees, whether tenants or guests, who are lawfully on their premises. [*Id*. at 615 (footnote omitted).]

Therefore, plaintiff's attempt to limit the application of the *MacDonald* decision is without merit. The parties agree that plaintiff was a business invitee. Therefore, defendants only owed plaintiff a duty to contact the police when the incident began. Defendants' duty as a business premises invitor was discharged when plaintiff's coworkers called the police during the incident.

Even assuming that plaintiff and defendants were in a master-servant relationship, defendants still do not owe plaintiff a duty. *Graves*, 253 Mich App at 492-493. The harm was not foreseeable, directly connected to defendants' conduct, or likely to occur. It is true that the state fair storage lots were located in a high-crime and vehicle theft area, and there had been previous vehicle thefts and attempts. However, defendants could not have foreseen a scenario where DeJeanette Johnson, the trespasser, had a paranoid psychotic episode resulting in her breaking into the state fair storage lots and driving over plaintiff several times. This scenario is unique and unpredictable. Before plaintiff's injury, no employees had been injured by an attempted or successful vehicle theft. Additionally, Vascor made changes to the state fair storage lots before the incident, including putting up barriers (which was eventually what stopped Johnson) and more lighting. Finally, the key handling procedure required by Chrysler was an

industry standard because it was a cost-effective and efficient way to access and store vehicles. Therefore, defendants did not owe plaintiff a duty of care under a master-servant relationship, and defendants fulfilled its duty under a business invitor-invitee relationship when the police were called during the incident.

Affirmed.

/s/ Deborah A. Servitto
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood