

STATE OF MICHIGAN
COURT OF APPEALS

GINO CARLINI,

Plaintiff-Appellant,

v

NUMBERS PRIVATE MEMBERSHIP CLUB,
INC., and MAGNUM SECURITY SERVICES,
INC.,

Defendants-Appellees.

UNPUBLISHED

January 17, 2006

No. 261979

Wayne Circuit Court

LC No. 04-401749-NS

Before: White, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's grant of summary disposition of to defendants Numbers Private Membership Club, Inc. (NPMC) and also challenges the court's prior order granting summary disposition to Magnum Security Services, Inc. (MSS). We affirm.

Plaintiff first asserts that the circuit court erred in granting MSS' and NPMC's respective motions for summary disposition because genuine issues of material fact remained regarding whether MSS and/or NPMC owed plaintiff a duty to protect him from the criminal assault of the unknown assailant. We disagree.

When reviewing a claim that the trial court improperly granted summary disposition, this Court reviews de novo on appeal. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Review is limited to the evidence presented to the trial court at the time the motion was decided. *Peña v Ingham Co Road Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003). When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002). 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 could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003).

To establish a negligence claim, a plaintiff must establish: (1) a duty owed by the defendant to the plaintiff, (2) breach of that duty, (3) injury suffered by the plaintiff, and (4) causation of that injury by the defendant's breach. *Phillips v Deihm*, 213 Mich App 389, 397; 541 NW2d 566 (1995). The issue of duty is one for the court. *Krass v Joliet, Inc and Tri-County Security, Inc*, 233 Mich App 661, 666; 593 NW2d 578 (1999). A duty is an obligation the defendant has to the plaintiff to avoid negligent conduct. *Id.* at 668. Whether a duty exists depends upon the relationship between the actor and the injured person. *Id.* at 668-669. "As a general rule, there is no duty that obligates one person to aid or protect another." *Id.* at 670. Thus, generally speaking, neither NPMC nor MSS had a duty to protect plaintiff. *Id.*

"[H]owever, there are court-recognized exceptions to the general rule of nonliability that apply in circumstances where a 'special relationship' exists between a plaintiff and a defendant." *Krass, supra*, p 670. A special relationship exists between a possessor of land and an invitee. *Id.* "The possessor of land has a duty to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land." *Id.* at 671. However, the possessor of land's duty is not absolute and does not extend to unforeseeable dangers. *Id.* In *Marr v Yousif*, 167 Mich App 358; 422 NW2d 4 (1998), this Court held that a grocery store did not have a duty to protect a plaintiff from an armed robbery in its parking lot because the armed robbery was unforeseeable. *Id.* at 362-364. In *Papadimas v Mykonos Lounge*, 176 Mich App 40; 439 NW2d 280 (1989), this Court held that a restaurant did not have a duty to protect a plaintiff from a criminal assault by another patron because the assault was unforeseeable. *Id.* at 41-42. *Papadimas, supra*, explained that "[c]riminal activity, by its deviant nature, is normally unforeseeable." *Id.* at 46-47.

In *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495; 418 NW2d 381 (1988), our Supreme Court further explained the rationale behind not holding possessors of land responsible for the acts of third party criminals: possessors of land "cannot control the incidence of crime in the community," and to require a possessor of land "to provide armed, visible security guards to protect invitees from criminal acts in a place of business open to the general public would require [a] defendant to provide a safer environment on his premises than his invitees would encounter in the community at large." *Id.* at 502. *Krass, supra*, held that a possessor of land is ordinarily not responsible for the criminal acts of a third party, even if he has voluntarily undertaken security measures to reduce the risk of harm posed by the general threat of crime in the community. *Krass, supra*, p 684. To hold otherwise would "wrongfully penalize possessors of land who provide some measure of protection, as opposed to merchants who take no such measures." *Id.* at 677.

In contrast, several cases have held the merchant initor defendant liable where there the defendant had notice of the presence of unruly patrons on the premises, *Jackson v White Castle System, Inc*, 205 Mich App 137; 517 NW2d 286 (1994), and failed to take action or notify the police. *Mason v Royal Dequindre, Inc*, 455 Mich 391; 566 NW2d 199 (1997); *Mills v White Castle System, Inc*, 167 Mich App 202; 421 NW2d 631 (1988). However, in *MacDonald v PKT, Inc*, 464 Mich 322; 628 NW2d 33 (2001), our Supreme Court clarified its holding in *Mason*:

We hold today that the duty to respond is limited to reasonably expediting the involvement of the police and that there is no duty to otherwise anticipate and prevent the criminal acts of third parties. Finally, consistent with *Williams v Cunningham Drug Stores*, 429 Mich 495; 418 NW2d 381 (1988) and *Scott v*

Harper Recreation, Inc, 444 Mich 441; 506 NW2d 857 (1993), we reaffirm that merchants are not required to provide security personnel or otherwise resort to self-help in order to deter or quell such occurrences. [*MacDonald*, 464 Mich at 322.]

Here, as in the aforementioned cases, the criminal activity that took place was not foreseeable, and thus, NPMC had no special duty as a premises possessor to protect plaintiff from the criminal assault by the unknown assailant. *Krass, supra*, pp 671, 684. The NPMC employee's actions of yelling at the unknown assailant, who had just been kicked out of NPMC and was arguing with his girlfriend outside, to take his dispute elsewhere and then returning to NPMC and shutting the door, does not make it foreseeable that the unknown assailant would assault plaintiff, who was standing outside waiting to get into NPMC, and who had asked the assailant to "calm down." Plaintiff asserts that consistent with *MacDonald*, defendants had a duty to call the police. However, there is no evidence that the altercation with plaintiff was foreseeable. In fact, plaintiff himself stated that he did not have any time to react to the unknown assailant's actions. The attack commenced suddenly. There is no basis to conclude that had defendants summoned the police, the attack would have been thwarted. Therefore, we conclude that the trial court did not err when it granted NPMC's motion for summary disposition. *Krass, supra* at 666, 671, 684.

Plaintiff further asserts that defendant MSS had a contractual duty to protect plaintiff. Here, nothing in MSS and NPMC's agreement suggests that MSS was to provide general police protection to all of NPMC's patrons. In fact, the agreement states that MSS is only acting as a deterrent and does not represent that it will even prevent all property damage. Furthermore, as discussed *supra*, NPMC did not owe plaintiff a duty to protect him from a criminal assault by the unknown assailant, and thus, MSS had no derivative duty to plaintiff based on its contract with NPMC. *Krass, supra*, 672, 680, 683-684. Additionally, under *MacDonald*, plaintiff's argument that the guard should have used mace must fail. Therefore, the circuit court did not err when it granted MSS' motion for summary disposition.

Affirmed.

/s/ Helene N. White
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder