

STATE OF MICHIGAN
COURT OF APPEALS

JAMES L. FEUQUAY,

Plaintiff-Appellant,

v

DENBY WHITTIER CORPORATION d/b/a
DAZZLES and ROYAL DEQUINDRE, INC.,

Defendants-Appellees.

UNPUBLISHED
September 28, 2001

No. 223509
Macomb Circuit Court
LC No. 98-005440-AV

Before: Cavanagh, P.J. and Markey and Cooper, JJ.

PER CURIAM.

Plaintiff appeals by leave granted the circuit court's order affirming the district court's order granting defendants' motion for summary disposition in this negligence action. We reverse. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was visiting Dazzles, a bar. While standing up near a wall and holding two glasses, plaintiff saw two "bouncers" employed by defendants trying to eject a patron. The patron resisted the bouncers' efforts, and the altercation moved across the room. The bouncers and patron eventually came to the area where plaintiff was standing. One of the bouncers pushed the patron, who was propelled into plaintiff. Plaintiff fell and the glasses he was holding shattered. Plaintiff landed on his hands and was cut by the broken glass. He brought this action to recover for his injuries.

Defendants moved for summary disposition under MCR 2.116(C)(8) (failure to state a claim) and MCR 2.116(C)(10) (no genuine issue of material fact), arguing that they did not owe a duty to plaintiff to protect him from the criminal acts of the third party patron, who was fighting with defendants' bouncers. They relied on *Mason v Royal Dequindre, Inc*, 455 Mich 391; 566 NW2d 199 (1997), in which our Supreme Court held that merchants have a duty to exercise reasonable care to protect identifiable invitees from foreseeable criminal acts of third parties, providing the invitee is "readily identifiable as [being] foreseeably endangered." *Id.* at 398, quoting *Murdock v Higgins*, 454 Mich 46, 58; 559 NW2d 639 (1997) (alteration in original). Defendants argued that plaintiff was injured through the unexpected criminal activity of a third person and was not identified as being in danger and/or the danger was unforeseeable.

The district court concluded that plaintiff's injury was unforeseeable and he was not readily identifiable as a possible victim of criminal activity. It granted defendants' motion for summary disposition, and the circuit court affirmed.

Plaintiff challenges the lower courts' application of *Mason*, arguing that he is not alleging an injury caused by defendants' negligence in failing to protect him from the criminal conduct of a third party, but that he was injured by defendants' employees' direct negligence in ejecting a third party patron. We agree.

This Court reviews de novo the trial court's decision regarding a motion for summary disposition. *Blackwell v Citizens Ins Co of America*, 457 Mich 662, 667; 579 NW2d 889 (1998). A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal basis of the claim. *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 380; 563 NW2d 23 (1997). Such a motion should be granted "if the claim is so manifestly unenforceable as a matter of law that no factual progression could possibly support recovery." *Id.* MCR 2.116(C)(8) motions are decided on consideration of only the pleadings, and all factual allegations contained in the complaint are accepted as true. *Id.* at 380-381.

A motion brought pursuant to MCR 2.116(C)(10) tests the factual support for a claim. To rule on the motion, the trial court must consider the pleadings, affidavits, depositions and all other documentary evidence submitted by the parties. MCR 2.116(G)(5); *Singerman v Municipal Serv Bureau, Inc*, 455 Mich 135, 139; 565 NW2d 383 (1997). The court must view the evidence and all reasonable inferences drawn from the evidence in favor of the nonmoving party, giving the nonmoving party the benefit of any reasonable doubt. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). The reviewing court must "determine whether any genuine issue of material fact exists in order to prevent entering a judgment for the moving party as a matter of law." *Id.*

Generally, a person has no duty to aid or protect another person who is endangered by a third person's conduct. *Mason, supra* at 397. An exception to the rule arises when there is a special relationship between the defendant and the plaintiff. *Id.* As explained in *Mason*:

Owners and occupiers of land have a special relationship to their invitees. At the same time, merchants are not insurers of their safety. Consequently, merchants do not have a duty to protect their invitees from unreasonable risks that are unforeseeable. This Court has imposed a requirement that, in order for a special-relationship duty to be imposed on a defendant, the invitee must be "readily identifiable as [being] foreseeably endangered." [*Id.* at 398, quoting *Murdock, supra* at 58 (citations omitted).]

Thus, merchants have a duty to exercise "reasonable care to protect their identifiable invitees from the foreseeable criminal acts of third parties." *Mason, supra* at 405.

These principles apply when a plaintiff is injured by the conduct of a third person, and the alleged negligence is based on a failure of the defendant to protect the plaintiff from harm. In this case, plaintiff is alleging direct negligence on the part of defendants' employees—the bouncers—in ejecting the third party patron. Plaintiff is not alleging that defendants failed to

protect him from the actions of the third party patron. Therefore, the court erroneously applied *Mason* to this case and erred in granting defendants' motion for summary disposition because defendants failed to demonstrate that they owed no duty to plaintiff.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Jane E. Markey

/s/ Jessica R. Cooper