STATE OF MICHIGAN

COURT OF APPEALS

AUDREY BELL, LEO BEASLEY, BRENDA BLACK, KIMBERLY BLEVINS, KATHLEEN CONQUEST, VERONICA DORSETTE, LINDA FACEY, JAYNE FLOYD, GRACE JENNINGS, MARY OLIVER, TERRI SUTTON, ANGELA TURNER, and ALCITA WILLIAMS,

Plaintiffs-Appellees,

v

MICHIGAN COUNCIL 25 OF THE AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO, LOCAL 1023,

Defendants-Appellants,

and

DENTRY BERRY and STEVEN MALACH, Personal Representative of the ESTATE OF YVONNE BERRY, Deceased,

Defendants.

UNPUBLISHED
February 15, 2005

No. 246684
Wayne Circuit Court
LC No. 01-107819-NO

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

PER CURIAM.

In late 1999, plaintiffs all became victims of identity theft. At the time their problems occurred, plaintiffs were all employees of the City of Detroit and worked as emergency service operators (911 operators). All plaintiffs were also members of defendant AFSCME, Local 1023 (defendant or the Union), pursuant to the City's contract with the Union. In March 2001, plaintiffs filed suit against the Union. Plaintiffs asserted that the Union was liable for not safeguarding their personnel information and that this negligence facilitated the identity theft perpetrated by a third party. Following a jury trial, the Union was found to have been negligent and plaintiffs were awarded a collective sum of $275,000. The Union appeals by right. Under the unique circumstances of this case, we find that the Union did owe plaintiffs a duty and the question of negligence was properly submitted to the jury. We also find that the Union's other

appeal issues provide no basis for relief. Therefore, we affirm the jury's decision and award in favor of plaintiffs.

I. Background

Plaintiffs membership in the Union was essentially mandatory. Dues were automatically deducted from plaintiffs' paychecks and personal identification information necessary for their union membership was collected by the City. The City provided the Union with a quarterly report of all personnel who were members of the Union. The Union's treasurer, Yvonne Berry, compared the City's report to a similar report generated by the Union to ensure accuracy and correct any discrepancies. The City's report contained each employee's job classification, social security number, and pension number.

Berry's daughter, Dentry Berry, was arrested in February 2000 for her participation in the appropriation of the 911 operators' identity. At the time of Dentry's arrest, a notebook was found in her bedroom that contained names of 911 operators, their social security and driver's license numbers, and illegal phone services and goods purchased in the operators' names. Dentry later admitted to her involvement and was convicted on criminal charges. However, Dentry denied taking any lists from her mother that the Union had generated and the officer in charge, Sergeant Bertha Parker, testified that her investigation did not conclusively establish how Dentry obtained the Union list.

In March 2002, the case was sent to mediation. Plaintiffs accepted the mediation award, but defendant rejected it. Defendant's subsequent motion for summary disposition was denied and the trial began in November 2002. After the close of plaintiffs' proofs, defendant moved for a directed verdict, which the trial court denied. Defendant re-raised its motion for directed verdict at the close of all proofs and the court again denied the motion. Following the jury's verdict, defendant filed a motion for JNOV, new trial and/or remittitur, which was denied, and this appeal followed.

II. Negligence Claim

Defendant asserts that the trial court erred in denying its motions for directed verdict and judgment notwithstanding the verdict (JNOV) because, as a matter of law, defendant owed no duty to plaintiffs for the unforeseeable criminal acts of a third party. The existence of a legal duty is a question of law that we review de novo. *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 14; 596 NW2d 620 (1999). Defendant argues that there is no special relationship between it and plaintiffs sufficient to justify imposing a duty on defendant for the unforeseeable acts of Dentry Berry, where defendant had no knowledge of Dentry's actions and did not authorize or condone them.

There is no duty to protect against the acts of a third person absent a special relationship between the defendant and the plaintiff or the defendant and the third person. *Foster v Cone-Blanchard Machine Co*, 460 Mich 696, 706-707; 597 NW2d 506 (1999). "The determination whether a duty-imposing special relationship exists in a particular case involves ascertaining whether the plaintiff entrusted himself to the control and protection of the defendant, with a consequent loss of control to protect himself." *Murdock v Higgins*, 208 Mich App 210, 215; 217 NW2d 1 (1994). This Court has held that consideration of certain factors is necessary to

determine whether a "special relationship" giving rise to a legal duty exists: (1) the societal interests involved, (2) the severity of the risk, (3) the burden on the defendant, (4) the likelihood of occurrence of the risk, and (5) the relationship between the parties. Other factors to consider are the foreseeability of the harm, the defendant's ability to comply with the duty, the victim's inability to protect himself, the cost of providing protection, and whether the victim bestowed any economic benefit on the defendant. *Id*.; citations omitted. The scope and extent of the duty to protect against third parties is essentially a question of public policy. *Williams v Cunningham Drug Stores, Inc,* 146 Mich App 23, 26; 379 NW2d 458 (1985), aff'd 429 Mich 495 (1988).

Defendant's argument focuses on the severity of the risk and the likelihood of its occurrence (foreseeability). In regards to the reasonableness of the risk, defendant cites a Minnesota case *Bodah v Lakeville Motor Express, Inc*, 663 NW2d 550 (Minn, 2003), in which the court held that the dissemination of 204 employees' social security numbers to sixteen terminal managers in six states did not constitute "publicity" sufficient to sustain the plaintiffs invasion of privacy tort. Defendant quotes a portion of the case in its appellate brief and erroneously attributes the quote to the sitting court, Minnesota's Supreme Court. The statement was actually made by the state's court of appeals:

> The publicity requirement in this case where the dissemination was not for profit or with malicious intent, ought to be whether it unreasonably exposed appellants to a significant risk that their social security numbers would be misused. [*Id.* at 555.]

Defendant acknowledges that *Bodah* involved an invasion of privacy claim, but nevertheless states, "If the publication of employees' information to sixteen managers did not unreasonably expose them to a significant risk that their social security numbers would be misused, the risk in the instant case was significantly less." However, defendant's corollary is premised on a connection between the quoted statement and the *Bodah* Court's holding, and there is none. Regarding the court of appeals' statement, Minnesota's Supreme Court stated,

> Finally, a lack of reasonableness is neither an element of the invasion of privacy tort of publication of private facts nor part of the publicity analysis. As such, the court of appeals' determination that "[a]n actionable situation requires a level of publication that unreasonably exposes the appellant to significant risk of loss under all the circumstances" inappropriately emphasizes the reasonableness of the defendant's actions. [*Id*. at 556.]

Accordingly, defendant can draw no support for its argument from *Bodah*.

Defendant further argues that it had no duty to protect plaintiffs in this case because the actions of Dentry Berry were not foreseeable, relying on the general rule that criminal activity by its very nature is unforeseeable, citing *Papadimas v Mykonos Lounge*, 176 Mich App 40, 46-47; 439 NW2d 280 (1989). See also *MacDonald v PKT, Inc*, 464 Mich 662; 628 NW2d 33 (2001); *Scott v Harper Recreation, Inc*, 444 Mich 441; 506 NW2d 857 (1993). Defendant asserts that case law supports its position that it had no reason to foresee Dentry's criminal activity.

Defendant relies on *Haupt v Kerr Mfg Co*, 210 Mich App 126; 532 NW2d 859 (1995), in which one of defendant's employees stole a container of reclaim alloy and tried to smelt the alloy

at a private home. In the process, mercury vapors were released and the plaintiffs' decedents died as a result of exposure. The plaintiffs asserted that the defendant was liable for the deaths because it negligently failed to properly label the alloy containers and keep them under tight security to prevent their unauthorized removal. *Id*. at 128. In holding that the defendant owed the plaintiffs' decedents no duty, the Court said, "While such criminal misconduct by employees is unfortunately an all too frequent occurrence, it should not be considered to be reasonably foreseeable so as to impose a duty upon employers." Specifically, the Court noted, "It was not foreseeable that one of Kerr's employees would steal the reclaim alloy, take it to a residence, attempt to smelt the alloy, and thus release the toxic mercury vapors." *Id*. at 130. From this, defendant asserts that it was entitled to a directed verdict or JNOV because Dentry's criminal actions were unforeseeable as a matter of law. However, foreseeability of the harm was only one of the factors considered by the *Haupt* Court in concluding that the defendant did not owe a duty in that case. The *Haupt* Court also determined that the "degree of certainty" of the injury was remote, the injury was not closely connected to the conduct (the defendant's alleged negligence), and while the policy of preventing future harm could be advanced by imposing a duty, the burden and consequences of doing so would unfairly shift the responsibility for the misconduct away from the actual wrongdoer. *Id*. at 130-131.

Thus, we must consider all the factors which may give rise to a duty-imposing relationship in determining if one existed here. On this point we agree with the dissent and recognize that foreseeability is but one of these factors and cannot be the sole basis for imposing a duty. The relationship between the parties in this case is one of union-union member. Plaintiffs liken the relationship to a fiduciary one, where defendant was entrusted with the personal information of plaintiffs, similar to the relationship between a bank and its account holders or any financial institution and its clients. A person in a fiduciary relationship to another is under a duty to act for the benefit of the other as to matters within the scope of the relationship. *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 580-581; 603 NW2d 816 (1999). As plaintiffs' representative union, defendant has an obligation to act on behalf of, and in the best interests of, plaintiffs. See *Sowels v Labors' Int'l Union of North America*, 112 Mich App 616; 317 NW2d 195 (1982). It follows that part and parcel of that relationship is a responsibility to safeguard its members' private information.[1] And society has a right to expect that personal information divulged in confidence, especially to an organization such as a union whose existence is for the benefit of the union members, will be guarded with the utmost care.

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[1] Defendant argues that plaintiffs' mandatory membership in the union cannot be a basis for finding a special relationship because this relationship and defendant's attendant duty is statutorily regulated by federal laws that Michigan has adopted. Defendant's preemption argument fails for two reasons. One, defendant never raised this argument below. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512-513; 667 NW2d 379 (2003) (issue not raised below or addressed by the trial court is not properly preserved for appeal). Two, the Court in *Bescoe v Laborers' Union Local 334*, 98 Mich App 389, 407; 295 NW2d 892 (1980), which defendant cites, held that a union's failure to protect a member from the violent acts of another member at the work site was not preempted by federal law.

Moreover, from a control standpoint, defendant is in the best position to protect plaintiffs because it controls who has access to its membership lists.

In regards to the foreseeability factor, defendant argues that Dentry's actions were not foreseeable. Plaintiff responds that defendant is mistakenly focusing on the foreseeability of a particular person's actions versus the foreseeability of the harm, identity theft. We agree. In determining whether to impose a legal duty, it is the foreseeability of the harm in general that is considered, not the foreseeability in regards to one particular person. See *MacDonald, supra* (discussing foreseeability of criminal acts of third party in invitor-invitee situation).[2]

Despite defendant's assertion to the contrary, there was evidence that, *in this case*, the harm of someone misusing plaintiffs' personal information was foreseeable. The evidence indicated that defendant was aware of the possible problems associated with Yvonne Berry taking the personnel lists home, yet continued to authorize the practice by allowing it to continue. Dentry's testimony confirmed that Yvonne Berry had possession of confidential union membership information outside the union's workplace as late as 1998 or 1999. Patricia Saunders served as vice-president of the union for eleven years and as president for one year. Saunders testified that during her tenure at the union, the issue of Berry taking personnel records home was discussed periodically at monthly executive board meetings. In addition to Berry taking the work home, Dentry Berry would also pick up paperwork, which would include the confidential lists, to take home to her mother due to Berry's deteriorating health. According to Saunders, she and other board members were against the practice and repeatedly voiced their concerns, but no action was ever taken regarding the matter. Saunders testified that her concern was of identity theft. Saunders would sometimes go to Berry's home to pick up papers so that non-authorized persons, i.e., anyone who was not a current union officer, would not transport the papers. Although Dentry Berry denied taking the personnel lists from her mother, she did testify that in 1998 or 1999, her mother's van was broken into and it contained papers including the confidential lists. In March 2001, Dentry gave these papers to the investigating officer in this case. Dentry's testimony confirmed that as late as 1998, Berry had confidential union paperwork in her possession outside of the union's workplace.

The crime of identity theft has been gaining momentum in recent years due to the accessibility of identifying personal information, mainly through computer use. In the past, the

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[2] We believe that *MacDonald, supra,* is distinguishable from the present case. *MacDonald* involved a business invitor-invitee situation. The Court's holding stated that "*merchants* are not required to provide security personnel or otherwise resort to self-help" in order to protect its invitees from the criminal acts of a third person. *Id*. at 326 (emphasis added). The Court further held that a merchant's only duty was to expedite police involvement where there was a present situation of immediate harm to an identifiable invitee. *Id*. at 334. The defendant in *MacDonald* had no relationship to the plaintiffs other than that of merchant-invitees. In essence, the *MacDonald* Court held that a merchant is not the keeper of its invitees' safety and that invitees do not cede control of their safety to a merchant simply based on their presence on the merchant's premises. Here, defendant was charged with the storage of highly sensitive personal information, the control of which plaintiffs necessarily relinguished to defendant.

risk of harm stemming from a worker taking home sensitive information may not have been great. However, with the advancements in technology, holders of such information have had to become increasingly vigilant in protecting such information and the security measures enacted to ensure such protection have become increasingly more complex. As demonstrated by the problems plaintiffs' faced after their identities had been appropriated, the severity of the risk of harm in allowing personal identifying information to be taken to an unsecured environment is high. The instant plaintiffs were very fortunate regarding the limited extent of the fraud perpetrated using their identities. But it is the potential severity of the risk, not the actual risk encountered, that must be considered in deciding to impose liability.

Additionally, the burden on defendant in terms of securing its members' information is not great. While no organization can 100% prevent illegal activities of third parties, it can certainly decrease the likelihood, as in this case, by not providing easy access to such sensitive information. The evidence showed that the union had absolutely no procedures or safeguards in place to ensure that confidential information was not accessed by unauthorized persons. The question of the "degree of certainty of injury" and the "closeness of connection between the conduct and injury" is a difficult one. But we believe that these factors must be considered in light of the technological age in which we now live. Even as recent as a decade ago, it could be said that the likelihood of identity theft occurring as the result of personal information being allowed to leave defendant's premises was remote. However, today, the possibility of identity theft is all too commonplace. Under the circumstances of this case, we find that there is a strong basis for concluding that the criminal acts were foreseeable in this case.

Defendant also argues that it should not be liable for a third party's criminal acts because it did not authorize, condone, or have knowledge of the acts. In support of this argument, defendant relies on the analysis in *Bescoe v Laborers' Union Local 334*, 98 Mich App 389; 295 NW2d 892 (1980), and *Sowels, supra*. Defendant's reliance is misplaced. The reference in these cases to the rule that a union cannot be held liable for the acts of third parties that the union did not authorize, ratify, or have actual knowledge of relates to § 6 of the federal Norris-LaGuardia Act, 29 USC 106. But this section is only applicable in the context of labor disputes. Under the Norris-LaGuardia Act, a "labor dispute" includes

> any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee. [29 USC 152(9).]

Even under this broad definition, the situation in this case cannot be accurately characterized as a labor dispute. Therefore, *Bescoe* and *Sowels* are of no consequence to this case.

After considering all the factors, we find that a special relationship did exist between defendant and plaintiffs such that defendant did owe plaintiffs a duty to protect them from identity theft by providing some safeguards to ensure the security of their most essential confidential identifying information, information which could be easily used to appropriate a person's identity. As we noted above, the question of duty in this case is, at its core, one of public policy and the facts of this case support the imposition of a duty on defendant. We do not intend our holding to be construed as imposing a duty in every case where a third party has

obtained identifying information and subsequently uses that information to commit the crime of identity theft. Each case is unique and the duty determination must be made only after considering the relevant factors, which have been delineated in case law, and the circumstances of the particular case. *Murdock, supra* at 215. Therefore, our holding is limited to the facts of this case where defendant knew confidential information was leaving its premises and no procedures were in place to ensure the security of the information.

The dissent's analysis misses the mark by utilizing premises liability principles. Premises liability focuses on the possessor's duty "to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm *caused by a dangerous condition on the land*." *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 328; 683 NW2d 573 (2004) (emphasis added). Simply because the membership lists were stored at the Union's office does not bring this case into the realm of premises liability; there was no *physical* harm to plaintiffs as a result of a dangerous physical condition at the Union's office. Rather, liability in this instance is based on ordinary negligence principles and as such, the dissent's reliance on the premises liability principles espoused in *MacDonald v PKT, Inc*, 464 Mich 322; 628 NW2d 33 (2001), is misplaced.

Furthermore, we reject defendant's argument that by imposing a duty on defendant we are creating a new tort of "identity theft negligence" and the dissent's suggestion that we are impermissibly encroaching on the Legislature's or Supreme Court's domain. That the Legislature has recognized the need for specific laws addressing the growing problem of identity theft and has recently enacted legislation[3], only strengthens our view that imposition of a duty is appropriate in this case.

III. Evidence of Damages

Next, defendant argues that plaintiffs were not entitled to damages because they failed to show the requisite physical injury as required by our Supreme Court's decision in *Manie v Matson-Oldsmobile-Cadillac Co*, 378 Mich 650, 658; 148 NW2d 7779 (1967), which specifically held that "there is no recovery for mental or emotional distress arising out of simple negligence, absent physical injury." Defendant asserts that this case has not been overruled or amended and thus, is binding precedent. However, defendant is incorrect; the holding in *Manie* has been overruled.

The *Manie* Court reaffirmed that Michigan would only allow recovery for mental damages if there was some *immediate physical impact/injury* on the plaintiff. *Id*. at 655; emphasis added. In *Daley v LeCroix*, 384 Mich 4, 11-12; 179 NW2d 390 (1970), our Supreme Court abolished this so-called "impact rule." In doing so, the Court overruled all previous cases which relied on the principle, which included *Manie*. *Id*. at 14. The result of the holding in *Daley* was

[3] 2004 PA 454, effective March 1, 2005.

> that where a definite and objective physical injury is produced as a result of emotional distress proximately caused by defendant's negligent conduct, the plaintiff in a properly pleaded and proved action may recover in damages for such physical consequences to himself notwithstanding the absence of any physical impact upon plaintiff at the time of the mental shock. [*Id*. at 12-13.]

The rule in Michigan remains that for emotional distress the plaintiff must show a resultant physical injury. *McClain v Univ of Michigan Bd of Regents*, 256 Mich App 492, 498; 665 NW2d 484 (2003). However, as the *Daley* Court recognized, mental damages have always been allowed where the "'plaintiff's mental or emotional reactions were a necessary element in the chain of causation." *McClain, supra* at 498, quoting *Daley, supra* at 8. Therefore, a claim for emotional damages is not necessarily limited to emotional distress, but may also encompass mental anguish. A claim for mental anguish differs from one for emotional distress and is properly awarded in a tort claim upon sufficient proof of such damages. "These include: physical pain and suffering; mental anguish; fright and shock; denial of social pleasure and enjoyment; embarrassment, humiliation, or mortification; or other appropriate damages." *McClain, supra* at 498-499. Therefore, there was no requirement that plaintiffs show physical injury in order to recover for mental anguish damages.

Defendant further argues that even if such damages were recoverable absent physical impact, plaintiffs only stated their damages in general terms and their proofs were insufficient to support even mental anguish damages under *Manie, supra*, and *Clemens v Lesnek*, 200 Mich App 456; 505 NW2d 283 (1993). We disagree.

A plaintiff is able to recover for mental pain damages which naturally flow from the injury. *Ledbetter v Brown City Savings Bank*, 141 Mich App 692, 703; 368 NW2d 257 (1985).

> "[J]uries are not asked to differentiate between mental states, such as shame, mortification, humiliation and indignity. Juries are asked to compensate mental distress and anguish, which flows naturally from the alleged misconduct and may be described in such terms as shame, mortification, humiliation and indignity. In addition, if the plaintiff is being compensated for *all* mental distress and anguish, it matters not whether the source of the mental distress and anguish is the injury itself or the way in which the injury occurred." [*Id*. at 704, quoting *Veselenak v Smith*, 414 Mich 567, 576-577; 327 NW2d 261 (1982) (Emphasis in original).]

In *Clemens, supra* at 458, the plaintiffs filed a complaint against the defendants for fraudulent concealment of latent defects. The plaintiffs sought mental anguish damages regarding their alleged faulty septic system. One of the plaintiffs testified that she was upset by the odor emanating from the leaky septic system and was humiliated knowing that the stench was coming from her own backyard. The plaintiffs also argued that their demeanor on the stand was sufficient to convey to the jury the mental toll suffered by them. The Court concluded that "without direct evidence of the mental anguish suffered by the plaintiffs, we find that the plaintiffs failed to present sufficient evidence of damages related to mental anguish to create an issue for the jury." *Id*. at 463-464. And thus, the trial court was found to have abused its discretion in denying the defendants' motion for judgment notwithstanding the verdict on this issue. *Id*. at 464. In contrast, plaintiffs in this case testified to more than a feeling of frustration.

Each had spent numerous hours trying to correct the problems created by the identity theft, which left their collective credit in ruins. Plaintiffs produced concrete examples of the aggravation and anguish suffered by detailing their experiences of trying to purchase cars, homes, furniture or phone service and the resultant humiliation of being turned down for credit. Accordingly, plaintiffs presented sufficient evidence to create a question for the jury regarding their mental damages.

Defendant also argues that, in any event, plaintiffs only pled emotional distress damages and the trial court should not have allowed the jury to consider mental anguish damages. Defendant's argument is without merit because plaintiffs pled both emotional and mental distress damages. The term "mental distress" encompassed mental anguish damages. *Veselenak, supra.*

IV. Admissibility of Evidence

Defendant also argues that the trial court erred in refusing to admit certain evidence. A trial court's decision regarding the admission of evidence is reviewed for an abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). At trial, defendant sought to admit into evidence plaintiffs' complaint and answers to all interrogatories because they were admissions by a party opponent.

On appeal, defendant argues that the complaint should have been admitted because plaintiffs failed to prove some of the factual allegations contained within it. Defendant relies on *Fed Deposit Ins Corp v Garbutt*, 142 Mich App 462; 370 NW2d 387 (1985), for the proposition that "a new trial was warranted based on the lower court's failure to allow the defendant to rely on the factual admissions contained in the plaintiff's complaint." However, this is not an accurate statement of the case's holding. In *Fed Deposit Ins*, which involved an action on a promissory note, following a bench trial, the plaintiff received a favorable judgment of $11,300 plus 12% interest. *Id.* at 465. This Court held that due to the inconsistencies in the lower court's findings and conclusions the judgment had to be set aside. *Id*. at 470. In dealing with the plaintiff's cross-appeal, the Court agreed that the trial court should apply a 14% interest rate. But the Court also noted that the plaintiff's complaint only requested damages of $6,600, the principal amount of the note. Therefore, this Court held that it was error for the lower court to award a greater amount and that on remand, should the trial court reach the issue of damages, the amount should be limited to $6,600. *Id*. at 473. The defendant never raised this issue. Rather, the Court, in reviewing the trial court's findings, noted the error. This was not a case where the defendant's request to admit the complaint into evidence was denied. The Court simply stated that the defendant was entitled to rely on the admission in the plaintiff's complaint as to the amount of damages requested. Thus, we fail to see how *Fed Deposit Ins* supports defendant's position in this case.

In regards for the reason given before the trial court for admitting the complaint, showing what damages plaintiffs pled, admission was unnecessary because the pleading did not support defendant's argument. And the factual allegations in the complaint that defendant refers to on appeal related to issues that were litigated at trial. We do not believe that the trial court abused its discretion under the circumstances by denying defendant's motion to admit the complaint into evidence.

In regards to the interrogatories, defendant initially sought to have all the answers admitted. The trial court allowed defendant to use specific interrogatory answers for impeachment purposes, but denied outright admission of them because defendant could not show relevance. On appeal, defendant specifically references plaintiffs' answers to interrogatory no. 13, which stated that this was not a personal injury case, and, therefore, plaintiffs declined to delineate their medical history. Defendant claims that plaintiffs' answers "extinguish[] any claim for damages based on a negligence theory." But again, defendant fails to explain itself and we will not surmise the basis for defendant's argument. *Mudge, supra*.

V. Jury Instructions

Defendant alleges four jury instruction errors which it contends mandate a new trial. Defendant first argues that the court erred in not instructing the jury that plaintiffs needed to show physical injury in order to recover for mental damages. Because we concluded above that such a showing was not necessary, this issue has no merit.

Second, defendant argues that the trial court erred in not giving an instruction based on *Bescoe, supra*, and *Sowels, supra*, to the effect that plaintiffs had to show that Dentry Berry was employed by the Union at the time of her illegal actions and that defendant had actual knowledge of, authorized, or condoned her actions. As stated above, these cases are inapplicable to this case because *Bescoe* and *Sowels* relied on the application of § 6 of the Norris-LaGuardia Act. Therefore, any jury instruction based on those cases would have been equally inappropriate.

Third, defendant takes issue with the following jury instruction:

> I also charge you that the union is not liable for the criminal conduct of Dentry Berry unless you find that the union could reasonably anticipate Berry's conduct.
>
> Also, it doesn't necessarily resolve whether or not the union is negligent in this case.

This instruction was given after the court instructed the jury on the basic elements of negligence. Defendant argues that the addition of the second sentence was error. But defendant fails to explain its position or offer any argument pertaining to the alleged error. Therefore, we need not address this issue. *Mudge v Macomb Co*, 458 Mich 89, 115; 580 NW2d 845 (1998) ("It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.").

Lastly, defendant asserts that the trial court erred in not giving the following jury instruction:

> I charge that you consider the fact that Plaintiffs have not produced requested responses to AFSCME's interrogatories and requests to produce, which failure they are bound by, in considering their claims for damages.

Because this is the extent of defendant's argument on appeal regarding this issue, we decline to address this alleged error. *Mudge, supra*.

VI. Case Evaluation Sanctions

Finally, defendant asserts that the trial court's order regarding case evaluation sanctions should be reversed. Regardless of any potential merit to defendant's arguments on this issue, we find that this Court lacks jurisdiction to consider this issue. Defendant appealed by right from the trial court's order denying its motion for JNOV, new trial, and/or remittitur. The court's order was entered on January 27, 2003, and defendant timely filed its claim of appeal on February 12, 2003. MCR 7.204(A)(1)(b). Therefore, in this claim of appeal, defendant is allowed to raise, and this Court has jurisdiction to hear, any issues stemming from the court's rulings made prior to and including the court's denial of defendant's motion for JNOV.

The order that granted plaintiffs' motion for costs and fees was not entered until May 2, 2003. Such a postjudgment order is considered a final order, MCR 7.202(7)(a)(iv), from which defendant could have appealed as of right, MCR 7.203(A)(1). And, in order to vest jurisdiction in this Court, an appeal of right in a civil action must be taken within 21 days after the entry of the order appealed from. MCR 7.204(A)(1). Thus, in order to appeal as of right, defendant had to appeal the court's order awarding costs and fees within 21 days of May 2, 2003. Although defendant's jurisdictional statement in its appellate brief states that it is also appealing the trial court's order allowing costs and fees, defendant did not file a separate claim of appeal from this order as required by the court rules. Defendant's only claim of appeal was filed on February 12, 2003, from the court's order denying its motion for JNOV, and defendant did not file an application for leave to appeal from the order awarding costs and fees. Therefore, this Court lacks jurisdiction over any issues stemming from the court's award of costs and fees to plaintiffs.

Affirmed.

/s/ David H. Sawyer
/s/ Michael R. Smolenski

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MURRAY, J. (*dissenting*)

This is a difficult case, in the sense that the precise issue has not been squarely addressed by any court of this state, nor in any other as far as our research reveals. Yet, it is precisely because there are no such cases on this issue that makes this case easy to resolve. For, in my view, this case does not survive scrutiny under general premises liability cases, and our Court should not expand general negligence law to cases such as this when neither the Legislature nor the Supreme Court have done so. Accordingly, and for the reasons outlined below, I would reverse the judgment and remand for entry of an order granting defendant's motion for a directed verdict.

Throughout the case, plaintiffs have prosecuted their case as a negligence claim, while recognizing that defendant's duties are analogous to that of a premises owner. As both parties recognize, under Michigan law a premises owner has a very limited duty when it comes to protecting against criminal acts of third parties. In *Graves v Warner Bros*, 253 Mich App 486; 656 NW2d 195 (2002), we thoroughly examined the law regarding the duty of a premises owner to protect against the criminal acts of a third party. There, we noted that to maintain a negligence claim there must be a legal duty requiring defendant to conform to a particular standard of conduct in order to protect others against an unreasonable risk of harm. *Graves*, *supra* at 492. To do so, courts must determine if such a duty should be placed upon an actor, which necessitates an evaluation of several factors. *Id.* at 492-493.

Important for purposes of *Graves,* as well as this case, was the general principle that "there is no legal duty obligating one person to aid or protect another." *Id.* at 493. Additionally, because criminal activity is normally unforeseeable, "an individual has no duty to protect another from the criminal acts of a third party in the absence of a special relationship between the defendant and the plaintiff or the defendant and the third party." *Id.*

Thus, if there is no special relationship between plaintiffs and defendant, there is no duty placed upon defendant to protect plaintiffs from the criminal acts involved in this case. However, assuming the union-union member relationship constitutes a special relationship, the duty to protect placed upon defendant does not extend so far to protect plaintiffs from the criminal acts involved in this case.

In *Graves*, we examined the limited duty placed on a premises owner to protect specific persons from criminal acts. In doing so, we relied upon *MacDonald v PKT, Inc*, 464 Mich 322; 628 NW2d 33 (2001), where our Supreme Court outlined the limited duties of protection placed on the premises owner (a merchant) who had a special relationship to another (the customer):

> To summarize, under *Mason* [*v Royal Dequindre, Inc*, 455 Mich 391; 566 NW2d 199 (1997), overruled in part by *MacDonald*, *supra*]], generally merchants "have a duty to use reasonable care to protect their identifiable invitees from the foreseeable criminal acts of third parties." *Id*. at 405. The duty is triggered by specific acts occurring on the premises that pose a risk of imminent and foreseeable harm to an identifiable invitee. Whether an invitee is readily identifiable as being foreseeably endangered is a question for the factfinder if reasonable minds could differ on this point. See *id.* at 404-405. *While a merchant is required to take reasonable measures in response to an ongoing situation that is taking place on the premises, there is no obligation to otherwise anticipate the criminal acts of third parties.* Consistent with *Williams, a merchant is not obligated to do anything more than reasonably expedite the involvement of the police.* We also reaffirm that a merchant is not required to provide security guards or otherwise resort to self-help in order to deter or quell such occurrences. *Williams* [*v Cunningham Drug Stores, Inc*, 429 Mich 495; 418 NW2d 381 (1988)]. [*MacDonald*, *supra* at 338 (emphasis added).]

In *Graves*, we summarized this duty, which is limited to only contacting the police when faced with a risk of imminent and foreseeable harm to invitees:

> *MacDonald* confirms the long-established rule that there is no general duty to anticipate and prevent criminal activity even where, unlike the present case, 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. [*Graves*, *supra* at 497.]

Under the duty imposed upon merchants by *MacDonald*, *Graves*, and other cases, defendant in this case had no duty to protect plaintiffs' social security numbers. It is undisputed that no one was aware of Dentry Berry's criminal intentions or acts until after they had occurred. Thus, there was no opportunity to reasonably respond by contacting the police. And, because plaintiffs are not alleging that defendant failed to take reasonable action after the criminal acts were discovered, defendant simply had no duty to act.

Additionally, the evidence that years before the incident occurred there was concern that the information could be released to the public when Berry took documents home is not enough to impose liability on defendant. As the *MacDonald* Court aptly stated, "[s]ubjecting a merchant to liability solely on the basis of a foreseeability analysis is misbegotten. Because criminal activity is irrational and unpredictable, it is in this sense invariably foreseeable everywhere." *MacDonald, supra* at 335.

The holdings of *MacDonald* and *Graves* cannot be cast aside on the basis that *MacDonald* involved merchant-invitee liability, and this case involves relinquishing control of private information to defendant. Plaintiffs have postured this case under a negligence theory, and the information was taken as a result of a criminal act. Thus, as plaintiffs seem to concede, we must apply the *MacDonald* analysis because it is the only analysis involving the duty element of a negligence claim as it relates to a criminal act.

Moreover, policy implications warrant against this Court imposing a duty on defendant. Although upholding the verdict would not necessarily result only through the creation of a new cause of action, it undoubtedly does extend negligence into a new realm. This is an area of law, both civil and criminal, that is gaining nationwide attention by state legislatures and Congress. Indeed, the Governor recently signed into law numerous enrolled bills that address identity theft issues. In particular, 2004 PA 454, entitled the Social Security Number Privacy Act, creates new obligations and restrictions on the use of social security numbers, including a requirement that businesses create privacy policies,[1] and creates civil[2] and criminal liability[3] for violations of the Act.

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[1] See Sec. 4(1)(a)-(c).

[2] See Sec. 6(2)

[3] See Sec. 6(1)

Although 2004 PA 454 is effective March 1, 2005, and thus affords no relief to these plaintiffs, we should restrain ourselves from creating liability in an area where no precedent exists for doing so and the Legislature has acted to fill any gap in this new area of law. See, e.g., *Koester v VCA Animal Hosp,* 244 Mich App 173, 176-177; 624 NW2d 209 (2000). I would therefore vacate the jury verdict and remand for entry of an order granting defendant's motion for a directed verdict.

/s/ Christopher M. Murray