STATE OF MICHIGAN

COURT OF APPEALS

WALLACE FLOYD, Personal Representative of the Estate of Paul K. Floyd, Deceased,

Plaintiff-Appellant,

v

SEVEN MILE CATERING COMPANY, d/b/a POP-EYE'S FAMOUS FRIED CHICKEN, INC., and HARRISON B. SMITH, III,

Defendants-Appellees.

UNPUBLISHED
November 8, 1996

No. 186529
LC No. 94-427420-NO

Before: Wahls, P.J., and Cavanagh and J.F. Kowalski,* JJ.

PER CURIAM.

Plaintiff appeals as of right from an order of the circuit court granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10)[1] in this wrongful death/premises liability action. We affirm.

A motion for summary disposition may be granted when, "[e]xcept as to the amount of damages, there is no genuine issue of material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). This subsection of the court rules tests whether there is a factual basis for the claim. *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 190; 540 NW2d 297 (1995). When deciding a motion under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence in favor of the party opposing the motion. *Id*. This Court's review of a trial court's decision whether to grant summary disposition is de novo. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995).

Plaintiff first argues that defendants' motion for summary disposition should not have been granted on his ordinary negligence claim. Plaintiff contends that the evidence presented in opposition to the motion established that defendants owed decedent a duty to protect him from the shooter while in their drive-through. We disagree.

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* Circuit judge, sitting on the Court of Appeals by assignment.

Merchants are not normally required to protect their invitees from the criminal acts of third persons. *Williams v Cunningham Drug Store*, 429 Mich 495, 499; 418 NW2d 381 (1988). Furthermore, the duty of care owed by a merchant who operates his business in a high crime area to an invitee is no higher than it is elsewhere. *Papadimas v Mykonos Lounge*, 176 Mich App 40, 47; 439 NW2d 280 (1989). However, a business owner may be liable when he had or should have had notice of the presence of unruly patrons and failed to either control them or summon the police. *Jackson v White Castle System, Inc*, 205 Mich App 137, 141-142; 517 NW2d 286 (1994).

After examining the record, we conclude that the documentary evidence presented by the parties did not support the existence of a duty. Contrary to plaintiff's assertions, the evidence did not show that the assailant and his companions had been engaging in unruly conduct on defendants' premises throughout the day of the shooting, and defendants' employee promptly telephoned the police after being notified of the shooting. Furthermore, plaintiff failed to present evidence contradicting defendants' denial of having experienced problems with loitering on the premises in the two-year period preceding the shooting Therefore, because plaintiff has failed to establish that defendants owed a duty to the decedent, summary disposition was appropriate as a matter of law. *Marr v Yousif*, 167 Mich App 358, 361; 422 NW2d 4 (1988).

Plaintiff next contends that the evidence established that defendants breached their duty to design their drive-through in a way that would have reduced the risk of patrons being attacked by third parties. However, the attack on decedent was the result of the intervening actions of third parties, rather than a dangerous, defective, or even a negligently designed drive-through. The same unannounced criminal act that was visited upon the decedent could have occurred in the light of day, or even under the observation of video cameras. Indeed, the assailant testified that after having consumed beer and liquor all day, he suddenly made up his mind to rob someone at defendants' restaurant simply because he needed some money and the restaurant was the busiest one in the area. Plaintiff would have us require that merchants, like defendants, design their restaurants as a fortress, anticipate the actions of third parties, or, at the very least, police their premises during the late night hours. Such a requirement would contravene public policy. See *Scott v Harper Recreation, Inc*, 444 Mich 441, 452; 506 NW2d 857 (1993); *Williams, supra* at 499, 503-504.

Finally, plaintiff argues that the trial court erred in granting defendants' motion for summary disposition on his claim for public nuisance. He contends that the evidence showed that defendants operated their restaurant in a high crime area and that they knew that criminal activities had been committed on their premises by different persons. Moreover, plaintiff argues that defendant knew that the assailant had been behaving in an unruly manner on the premises for a significant period before the shooting, and that the assailant and a companion were carrying weapons in plain view.

In *Wagner v Regency Inn Corp*, 186 Mich App 158, 163; 463 NW2d 450 (1990), this Court found that the plaintiff had sufficiently stated a claim of public nuisance by alleging that the defendant maintained or created "certain dangerous physical conditions and protracted criminal activities . . . [that] combined to constitute a public nuisance." In contrast, here plaintiff alleged

57. That Defendants knew or had reason to know that criminal activity had been conducted on its property and . . . failed to exercise reasonable care to prevent the nuisance.

58. That Defendants had permitted criminal activity to take place on the premises, thereby creating a public nuisance which ultimately resulted in the decedent's untimely and violent death.

59. That Defendants knew or had reason to know that criminal activity was being conducted and that it caused or involved an unreasonable risk of nuisance.

60. That Defendants consented to the illegal activity and/or failed to exercise reasonable care to prevent the nuisance.

61. That by allowing known criminal activities to be committed upon the premises, Defendants permitted the creation of an atmosphere of criminality which posed a significant risk to public safety.

62. That on various occasions prior to the aforementioned fatal attack on [decedent], other business invitees have had various items stolen from them.

63. That as a result of these crimes against Defendants business invitees, Defendants knew or should have known based on the totality of the circumstances, the possibility and propensity for criminal conduct on Defendants' premises.

64. That Defendants knew and had ample reason to know of the pervasive criminal element in and around its establishment.

65. That Defendants' lack of response to the repeated criminal activity occurring on Defendants' premises allowed the creation and maintenance of a public nuisance . . . .

Unlike the allegations made by the plaintiff in *Wagner*, *supra*, plaintiff's complaint merely contained conclusory statements that were unsupported by any specific allegations of fact. Plaintiff presented no evidence to support his contention that defendants' restaurant was operated in a high crime area or that any criminal activity had taken place there before the night that the decedent was shot. There was also no evidence presented that supported plaintiff's assertion that the assailant and his companions had been on the premises for some time that day or that they were seen openly brandishing weapons. Plaintiff therefore has failed to show that a genuine issue of material fact existed concerning whether defendants created or maintained a nuisance on their premises. Accordingly, summary disposition was appropriate. *Cloverleaf Car Co, supra*.

Affirmed.

/s/ Myron H. Wahls
/s/ Mark J. Cavanagh
/s/ John F. Kowalski

[1] Defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). Because it appears from the record that the trial court considered matters outside the pleadings, we assume that summary disposition was granted pursuant to MCR 2.116(C)(10).