

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MARTEZ TILLMAN,

Plaintiff-Appellant,

v

THE PERFECT PITCHER SPORTS PUB, INC.,

Defendant-Appellee.

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UNPUBLISHED  
October 22, 2013

No. 309121  
Wayne County Circuit Court  
LC No. 11-004-876-NO

Before: K. F. KELLY, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

K. F. KELLY, P.J. (*concurring in part and dissenting in part*).

I concur in the majority’s conclusion that the trial court properly denied plaintiff’s motion for leave to amend and motion for reconsideration, but respectfully dissent from its conclusion that the trial court erred in granting defendant’s motion for summary disposition. I would affirm the trial court in all respects.

**I. BASIC FACTS**

Plaintiff arrived at the bar around 11:30 p.m. on the evening of March 12, 2011. Plaintiff’s friend was disc jockeying at the bar that evening and had invited him to stop by and perform some of his rap songs. When he arrived, plaintiff noticed a group of “visibly intoxicated and dangerous, obstreperous persons” in the bar.

At approximately 12:15 a.m., one of plaintiff’s cousins was rapping on a part of the dance floor sectioned off to serve as a stage when one of the visibly intoxicated patrons “put his shoulder into” and tried to “walk through” plaintiff’s cousin rather than go around him. Plaintiff went up to both men and told them to “hold on a minute,” that they had come to the bar to “get away from the hood [sic] mentality,” to relax and have fun, not to fight. No punches were thrown, everything calmed down; plaintiff thought “it was over.”

A second incident occurred at approximately 1:15 a.m., this time involving another of plaintiff’s cousins and a second man, whom plaintiff saw had a gun. Plaintiff realized that the “obstreperous persons” in the bar were gang members when he saw them flashing gang signs. Plaintiff intervened successfully to diffuse tensions between his cousin and the second man. When things calmed down again, plaintiff told the disc jockey that he wanted to perform his songs so that he could leave.

In the middle of his third song, plaintiff noticed that the “obstreperous persons” were “still trying to start something.” Plaintiff saw the man from the second incident “luring” plaintiff’s cousin from the second incident outside. Plaintiff cut short his performance, got his accompaniment CD from the disc jockey, and proceeded to leave the bar around 1:40 a.m. At the same time, 10-20 men headed outside to “shoot it out,” as one witness overheard them say. Plaintiff exited the bar, and as soon as the door closed behind him, he heard a bang, felt a pain in his forearm, looked down, saw blood, and realized he had been shot. Plaintiff did not know who shot him or the direction from whence the bullet came. Meanwhile, the bouncer had telephoned the police. A dispatcher received the call at 1:41:28 a.m. and police were immediately sent to the bar, arriving at 1:45:15 a.m.

Plaintiff filed suit against the bar, alleging that the bar was negligent in failing to summon police when it was obvious that there was an imminent threat of harm to its patrons following the first and second incidences. The majority concludes that the trial court erred in granting the bar summary disposition, finding that there was a genuine issue of material fact as to the bar’s negligence. I respectfully disagree.

## II. ANALYSIS

Because the trial court correctly granted defendant’s motion for summary disposition pursuant to MCR 2.116(C)(10), I would affirm the trial court’s order in its entirety.

“This Court reviews the grant or denial of summary disposition *de novo* to determine if the moving party is entitled to judgment as a matter of law.” *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). “A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint.” *Id.* at 120. “In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted in the light most favorable to the party opposing the motion.” *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). “Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law.” MCR 2.116(C)(10); *Maiden*, 461 Mich at 120.

Both parties rely on *MacDonald v PKT, Inc*, 464 Mich 322; 628 NW2d 33 (2001). In *MacDonald*, the plaintiff was attending an outdoor concert at Pine Knob Theater (PKT) when she broke her ankle during the second of two sod-throwing incidents as she tried to dodge chunks of sod being thrown by unruly concertgoers. *MacDonald*, 464 Mich at 326-327. She brought a number of charges against PKT, including negligence “in failing to provide proper security.” *Id.* at 327. The trial court granted PKT summary disposition under MCR 2.116(C)(8) and (C)(10), and we reversed. *Id.* at 328. The Supreme Court granted PKT leave to appeal in order to address the issue of a merchant’s duty to protect invitees from the criminal acts of third parties, and summarized the law as follows:

[W]e conclude that merchants have a duty to respond reasonably to situations occurring on the premises that pose a risk of imminent and foreseeable harm to identifiable invitees. We hold that the duty to respond is limited to reasonably expediting the involvement of the police, and that there is no duty to otherwise anticipate the criminal acts of third parties. Finally, we affirm that merchants are

not required to provide security personnel or otherwise resort to self-help to deter or quell such occurrences. *MacDonald v PKT, Inc*, 464 Mich 322, 345-346; 628 NW2d 33 (2001).

Plaintiff argues that, under *MacDonald*, the 12:15 a.m. altercation between plaintiff's cousin and a visibly intoxicated patron triggered the bar's duty to respond. In the alternative, the second altercation at 1:15 a.m., when plaintiff noticed that the visibly intoxicated man who confronted another cousin carried a gun, triggered the bar's duty to respond. According to plaintiff's own deposition testimony, however, it was not until everyone started to pour out of the bar at approximately 1:40 a.m. that plaintiff sensed a clear risk of imminent and foreseeable harm. Before that, plaintiff had successfully diffused the tensions that had arisen at 12:15 a.m. and 1:15 a.m. In addition, the man from the second incident had surrendered his gun to the bouncer, and the manager had spoken to both him and the plaintiff, telling the latter that everything was fine. Afterwards, things calmed down and plaintiff felt sufficiently comfortable to begin his planned performance. Thus the chronology of the evening, as well as plaintiff's own account, indicate that the "specific situation" triggering defendant's duty first occurred at 1:40 a.m. *Id.* at 335. Furthermore, it is an undisputed fact that when the "specific situation" did arise, the bar fulfilled its duty under *MacDonald* by calling the police immediately. Finally, the fact that the bar immediately fulfilled its duty renders moot the question of whether plaintiff was an "identifiable invitee." *Id.* at 339-340.

For these reasons, I believe the trial court properly granted defendant's motion for summary disposition and would affirm.

/s/ Kirsten Frank Kelly