

STATE OF MICHIGAN
COURT OF APPEALS

DAVID ZWOLINSKI,

Plaintiff-Appellant,

v

ROBERT PIZZIMENTI and INNATE HEALING
ARTS, P.L.L.C., d/b/a GOLDEN GATE CAFE,

Defendants-Appellees.

UNPUBLISHED
October 10, 2013

No. 309500
Wayne Circuit Court
LC No. 10-010444-NO

Before: STEPHENS, P.J., and SAWYER and METER, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendants' motion for summary disposition under MCR 2.116(C)(10). We affirm.

This Court reviews de novo a trial court's grant or denial of summary disposition to determine whether the moving party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). This Court reviews a "motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

This case arose out of an injury suffered by plaintiff from being hit in the head with a glass beer bottle, thrown by an unidentified person. The incident occurred on the evening of August 11, 2010, into the early-morning hours of August 12, 2010, in an alley adjacent to defendants' property, located at 18700 Woodward Avenue in Detroit, during a drum-circle event. Defendants hosted these drum-circle events every Wednesday at 9:00 p.m. The drum-circle events were designed to promote healing, in line with defendants' business purpose. Defendants did not charge admission for the events, but sold food at them. Anyone was welcome to attend the events. The events were advertised on defendants' website and on the back of defendant Pizzimenti's business cards, which were available at the property.

Plaintiff contends that he sufficiently established claims of premises liability and negligence. “The duty that a possessor of land owes to another person who is on the land depends on the latter person’s status. The status of a person on land that the person does not possess will be one of the following: (1) a trespasser, (2) a licensee, or (3) an invitee.” *Hampton v Waste Mgt of Mich, Inc*, 236 Mich App 598, 603; 601 NW2d 172 (1999) (citations omitted). The parties do not dispute that plaintiff was an invitee on defendants’ property at the drum-circle event. Because plaintiff was an invitee and thus entitled to the highest level of protection under premises-liability law, defendants would be liable for injury resulting from an unsafe condition either caused by their active negligence or the active negligence of their employees, or, if otherwise caused, where the condition was known to defendants or the condition was of such a character or had existed a sufficient length of time such that defendants should have had knowledge of it. *Id.* at 603-604. “To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages.” *Id.* at 602.

The parties dispute whether, during the drum-circle event, defendants functionally controlled and thus possessed the city alley where plaintiff was injured. However, we conclude that we need not resolve this dispute, because even assuming that defendants did “possess” the alley at the time of the incident, plaintiff still did not establish a genuine issue of material fact with regard to premises liability or negligence.

For purposes of premises liability, the supposed “unsafe condition” on the land, see *id.* at 604 (internal citations and quotation marks omitted), was the throwing of a beer bottle,¹ which hit plaintiff in the face. There was some evidence that bottles had been thrown on the ground during the evening, although there was no evidence of other bottles being thrown at people.² Witness Theresa Richardson stated that a thrown bottle “hit the ground and shattered and hit my friend, my friend Jerry in the leg,” but she also stated that plaintiff was hit about thirty seconds later. Clearly, something occurring thirty seconds before the incident in question would be insufficient to put defendants on alert that plaintiff was endangered. The additional evidence that plaintiff cites pertaining to bottles being thrown on the ground indicates that the throwing

¹ The parties do not address or dispute whether this activity should be considered a condition on the land for purposes of premises liability.

² One witness, Ryan Aubel, testified that “[t]here was . . . a different group of people who got hit by a bottle,” but the deposition transcript makes clear that Aubel was basing this on information he received from another person, a friend of Theresa Richardson. As noted in MCR 2.116(G)(6), “[a]ffidavits, depositions, admissions, and documentary evidence offered in support of or in opposition to a motion based on subrule [(C)(10)] shall only be considered to the extent that the content or substance *would be admissible as evidence* to establish or deny the grounds stated in the motion” (emphasis added). Hearsay is not admissible evidence. MRE 802. In addition, Aubel did not know if anyone had been injured from the thrown bottle.

occurred about ten minutes before plaintiff's injury.³ Given the nature of the earlier throwing (bottles aimed at the ground and not at people) and, more significantly, the short timeframe between the earlier throwing and plaintiff's injury, we conclude that plaintiff did not establish a prima facie case in accordance with the precepts set forth in *Hampton*, 236 Mich App at 602-604.⁴ In light of the existing evidence, it is simply not reasonable to assume that defendants, during a crowded social gathering encompassing various areas and activities, should have had the necessary foreknowledge of danger and thus taken steps to prevent plaintiff's injury. The trial court properly dismissed the premises-liability and negligence claims.⁵

Plaintiff claims that the trial court erred in dismissing his nuisance claim. "The possessor of land upon which [a] third person conducts an activity that causes a nuisance is subject to liability if: (1) he knows or has reason to know that the activity is being conducted and that it causes or involves an unreasonable risk of causing the nuisance, and (2) he consents to the activity or fails to exercise reasonable care to prevent the nuisance." *Wagner v Regency Inn Corp*, 186 Mich App 158, 163-164; 463 NW2d 450 (1990). Plaintiff contends that defendants tolerated the existence of an activity constituting a nuisance. However, plaintiff, by way of his appellate brief, argues for the existence of a *public* nuisance,⁶ and there was insufficient evidence

³ Aubel testified about bottles being thrown "all night," but this statement was based on the statement of another person and thus was inadmissible hearsay. In addition, Aubel did not give a more specific timeframe about the throwing in relation to plaintiff's injury.

⁴ We also note that the incident was, potentially, a criminal assault, seeing as one witness testified that it appeared that the throwing of the bottle at plaintiff was intentional. "[A] merchant has no obligation generally to anticipate and prevent criminal acts against its invitees." *MacDonald v PKT, Inc*, 464 Mich 322, 334; 628 NW2d 33 (2001). "A premises owner's duty is limited to responding reasonably to situations occurring on the premises because, as a matter of public policy, we should not expect inviters to assume that others will disobey the law." *Id.* at 335. Merchants may assume that patrons will obey the criminal law. *Id.*

This assumption should continue until a specific situation occurs on the premises that would cause a reasonable person to recognize a risk of imminent harm to an identifiable invitee. It is only a present situation on the premises, not any past incidents, that creates a duty to respond. [*Id.*]

As noted in *MacDonald*, the Michigan Supreme Court has "never recognized as 'foreseeable' a criminal act that did not . . . arise from a situation occurring on the premises under circumstances that would cause a person to recognize risk of imminent and foreseeable harm to an identifiable invitee." *Id.* at 334. There was no recognizable risk of imminent and foreseeable harm to plaintiff in the present case.

⁵ Given the factual circumstances, these two claims are properly analyzed in conjunction with one another.

⁶ Plaintiff mentions the concept of a private nuisance but does not make a reasoned argument with respect to it. At any rate, private-nuisance concepts were not applicable here. "A private

here of an “unreasonable interference with a right common to the general public.” *Id.* at 163. Indeed, the crux of plaintiff’s lawsuit was a single injury to his face caused by a thrown bottle.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ David H. Sawyer

/s/ Patrick M. Meter

nuisance is a nontrespassory invasion of another’s interest in the private use and enjoyment of land.” *Adkins v Thomas Solvent Co*, 440 Mich 293, 302; 487 NW2d 715 (1992). “The essence of private nuisance is the protection of a property owner’s or occupier’s reasonable comfort in occupation of the land in question.” *Id.* at 303.