STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
(Judges Beckering, Whitbeck and M.J. Kelly)

DEVON SCOTT BAILEY,

Plaintiff-Appellee/Cross-Appellant,

vs.

EVERGREEN REGENCY TOWNHOUSES, LTD, a Texas limited partnership; RADNEY MANAGEMENT AND INVESTMENTS, a Texas corporation,

Defendants/Appellants/Cross-Appellees,

and

T.J. REALTY, INC., a Michigan corporation, d/b/a HI-TECH PROTECTION, INC., an assumed named; HI-TECH PROTECTION, LLC, an assumed name; TIMOTHY JOHNSON, President of Hi-Tec Protection and owner of T.J. Realty, Inc.; WILLIAM BOYD BAKER, employee of Hi-Tech Protection; and CHRISTOPHER LEE CAMPBELL, employee of Hi-Tech Protection,

Defendants/Cross-Appellees.

Supreme Court Docket No. 144055
Court of Appeals Docket No. 295801
Genesee County Circuit Court No. 07-87454-NO

MICHIGAN DEFENSE TRIAL COUNSEL'S BRIEF *AMICUS CURIAE*

Respectfully submitted by:

Carson J. Tucker (P62209)
Lacey & Jones, LLP
600 South Adams Rd., Suite 300
Birmingham, MI 48009
(248) 283-0763

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STATEMENT OF JURISDICTION

Amicus curiae Michigan Defense Trial Counsel agrees with Defendant / Appellant's Statement of Jurisdiction. This Court has jurisdiction over this appeal pursuant to MICH CONST 1963 ART 6, § 4, MCL 600.212, MCL 600.215(3), and MCR 7.301(A)(2), (7).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

In its Order granting leave to appeal, the Court requested the parties to brief the issue of "whether the Court of Appeals erred when it extended the limited duty of merchants – to involve the police when a situation on the premises poses an imminent risk of harm to identifiable invitees, see *MacDonald v. PKT, Inc.*, 464 Mich. 322 (2001) – to landlords and other premises proprietors, such as the defendant apartment complex and property management company."[1] *Amicus curiae* MDTC proposes the additional questions of law presented by this appeal as follows:

I. WHETHER THE COURT OF APPEALS ERRED IN CONCLUDING LANDLORDS HAVE A COMMON-LAW "SPECIAL RELATIONSHIP" WITH THEIR TENANTS SUCH THAT THERE IS *ANY DUTY* ON THE PART OF THE FORMER TO PROTECT THE LATTER OR THEIR GUESTS FROM INTENTIONAL CRIMINAL ACTS OF THIRD PARTIES WITH WHOM THE LANDLORD HAS NO SEPARATE RELATIONSHIP?

Plaintiff / Appellant Answers: No.

Defendant / Appellee Answers: Yes.

Court of Appeals Answers: No.

***Amicus Curiae* MDTC Answers: Yes.**

[1] 491 Mich. 924 (2012).

STATEMENT OF INTEREST BY *AMICUS CURIAE*

Amicus curiae, Michigan Defense Trial Counsel (MDTC), is a statewide association of attorneys whose primary focus is the representation of defendants in civil proceedings. Established in 1979 to enhance and promote the civil defense bar, MDTC accomplishes this by facilitating discourse among and advancing the knowledge and skills of defense lawyers to improve the adversary system of justice in Michigan. MDTC appears before this Court as a representative of defense lawyers and their clients throughout Michigan, a significant portion of which are potentially affected by the issues involved in this case.

MDTC is particularly concerned about judicial deviation from well-established common-law principles because defense lawyers, insurers, and insureds depend on fairness, predictability, and certainty in the law when managing their practices and businesses, respectively. Here, the common-law rule that one is generally not liable to another injured by random criminal acts is at issue because the opinion of the Court of Appeals imposes liability on landlords and property management companies when tenants or their guests are the victims of such acts. The panel reasoned that landlords and tenants have a "special relationship" giving rise to a heightened duty of care on the part of the landlord.

In this brief, MDTC offers analysis demonstrating that the "special relationship" between certain businesses and their invitees which does give rise to a "heightened duty" to protect against or prevent criminal attacks does not exist in the landlord-tenant relationship. In the former case, a heightened duty is imposed because these common-law business invitors exercise a substantial degree of control over their invitees. Contrariwise, landlords actually surrender control of most of their property to tenants. Therefore, a landlord's duty is limited to maintaining the physical condition of the common areas in reasonable repair.

The decision below also has wide-ranging economic and policy implications. Imposing liability on landlords and property management companies for criminal acts perpetrated on tenants and guests would necessarily lead to adverse consequences. The opinion is not limited to residential landlords. Many property owners rent to other businesses. Under the Court of Appeals' analysis, commercial tenants (and their invitees) would be able to bring civil lawsuits against the property owner, i.e., the landlord, when a random criminal attack occurs by alleging the landlord failed to fulfill this duty. Such a rule will create reluctance in the underwriting market to assume the risks associated with such unbridled liability. This would, in turn, create a disincentive to these businesses to continue to offer affordable accommodations. Such a situation could lead to a movement away from, rather than toward, communities with the greatest need for economic stimulus.[2]

Needless to say, this case presents the Court with issues that implicate significant policy concerns and therefore it is bound to clearly articulate the applicable legal duty,[3] if there is one, to be applied by the finder of fact.[4] As Justice Marshall famously said, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[5]

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[2] Homant & Kennedy, *Landholder Responsibility for Third Party Crimes in Michigan: An Analysis of Underlying Legal Values*, 27 Univ. of Toledo L.R. 115, 116, 147 (1995).

[3] *Moning v. Alfono*, 400 Mich. 425, 438 (1977), reh'g denied at 401 Mich. 951 (1977). See also *Williams v. Cunningham Drug Stores, Inc.*, 429 Mich. 495, 500-01 (1988) (explaining that "in cases in which overriding public policy concerns arise, the court determines what constitutes reasonable care", i.e., the question of duty), accord *Frederick v. City of Detroit, Dep't of St. Railways*, 370 Mich. 425 (1963).

[4] *Murdock v. Higgins*, 454 Mich. 46, 53 (1997) (only after the Court finds a duty exists may the finder of fact be allowed to determine whether that duty has been breached).

[5] *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 177-180 (1803). Having an independent judicial body express "what the law is" so that others may be guided by it is at the root of this watershed opinion. Indeed, "[t]his is of the very essence of judicial duty." *Id.*

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the Court once again with the question of the extent to which the law should hold one person vicariously liable in a civil suit for the criminal acts of another.[6] The traditional common-law rule is that the law imposes no duty on one person to aid another victimized by unforeseeable criminal acts.[7] Relying on this common-law rule, this Court has, in the past decade, systematically rejected the notion that such liability can be imposed on a person for acts perpetrated by others in a variety of circumstances, e.g., employers,[8] property owners,[9] commercial business owners,[10] and governmental entities.[11] Simply put, there is no such thing as a vicarious criminal.[12]

The fundamental rationale relied on in these cases is that criminal acts are "by their very nature unforeseeable."[13] Imposing what is essentially an arbitrary duty on the defendant in such cases burdens him with the seemingly insurmountable task of taking measures to prevent

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[6] Baker & Cole, *Property Owners' Liability for Criminal Acts on Their Premises: Are There Foreseeable Limits?*, Contemporary Legal Notes Series, No. 26 (Nov. 1997), at 2.

[7] *Williams v. Cunningham Drug Stores, Inc.*, 429 Mich. 495, 499 (1988), citing 2 Restatement of Torts (Second), § 314, p. 116. See also *Farwell v. Keaton*, 396 Mich. 281, 290-91 and nn 3-5 (1976) (citing cases); Prosser, Torts (4th ed), § 56, pp. 340-41; Harper & James, The Law of Torts, § 18.6, p. 1046.

[8] *Hamed v. Wayne County*, 490 Mich. 1 (2011) (overruling *Champion v. Nationwide Security, Inc.*, 450 Mich. 702 (1995) and holding that employers cannot be strictly liable for the unforeseeable intentional criminal acts of employees perpetrated on third parties). See also *Brown v. Brown*, 478 Mich. 545 (2007).

[9] *MacDonald v. PKT, Inc.*, 464 Mich. 322 (2001).

[10] *Zsigo v. Hurley Medical Center*, 475 Mich. 215, 224-25 (2006).

[11] *Hamed, supra.*

[12] See Baker & Cole, *supra.*

[13] "Criminal activity, by its deviant nature, is normally unforeseeable." *Papadimas v. Mykonos Lounge*, 176 Mich. App. 40, 46-7 (1989).

unforeseeable, random criminal acts committed against his invitees – which not even the police can predict or prevent, but which are inevitably going to occur[14] – or risk untold liability and costs for failing to do so, while at the same time holding his business or enterprise open in an attempt to offer reasonably priced services.

Ultimately, with respect to merchants, this Court has ruled there is no duty to protect against unforeseeable and random criminal acts at all.[15] The only duty is to take reasonable steps to involve the police once notified of an *identifiable* threat – defined by the case law that led up to this decision with very strict precision. An *identifiable* threat, in this Court's view, encompasses not only the requirement that the defendant know of the existence and intent to harm of the criminal perpetrator, but too, he or she must be shown to be aware that an *identifiable* invitee is at risk. And then, even after all of this is shown, the only duty is to take reasonable measures to involve the police, not intervene or act to prevent the harm from occurring – in effect, *MacDonald* reaffirmed there is no "duty *to respond*" on the part of merchants.[16]

In this case, the Court is asked to extend the rule from *MacDonald*, ostensibly imposing a duty on merchants and property owners, i.e., business invitors, to landlords, and particularly, in this instance, landlords and residential property management companies. However, as explained herein, there is no legal basis for doing so. In fact, the jurisprudence of this state has consistently recognized that the landlord-tenant relationship involves a surrender of substantial property

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[14] *MacDonald*, *supra* at 335 (stating "criminal activity is irrational and unpredictable, it is in this sense invariably foreseeable everywhere" and "even police, who are specially trained and equipped to anticipate and deal with crime, are unfortunately unable universally to prevent it").

[15] *MacDonald*, *supra* at 338.

[16] *Id.*

rights by the landlord to the tenant and carries with that surrender the concomitant liberties that accompany privacy in property given by the former to the latter by virtue of the transaction.[17] Thus, when Michigan courts have had occasion to address a landlord's alleged liability for criminal acts upon commercial[18] *and* residential[19] tenants they have, for the most part, held the landlord responsible only for such acts that occur within the "common areas" of the demised property; areas over which the landlord retains some control and a consequent duty to maintain.

Moreover, such liability is imposed only for incidents which are a result of, i.e., proximately caused by, some inherent physical condition or defect in or upon such common areas, which is alleged to have then given rise to the opportunity for the criminal attack to occur, i.e., faulty locks, poor lighting, and the like;[20] what some courts have described as virtual "traps" existing within the enclosed common areas of properties in high crime areas.[21] Indeed, to the extent that such a duty does exist, it has been described as a very limited one.[22]

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[17] *Williams v. City of Detroit*, 127 Mich. App. 464, 469-71 (1983) (citing *Samson v. Saginaw Professional Building, Inc.*, 393 Mich. 393 (1975) and analyzing the City of Detroit's duty as a landlord for a criminal attack that occurred at Cobo Hall and holding that the City was *not liable* to an invitee injured by a shooting that occurred within the premises).

[18] *Id.* See also *Samson, supra* (a split decision in which this Court held the owner of a commercial office building, which rented space to a state mental health clinic, owed a duty to other tenants and their invitees to take appropriate steps to protect them from criminal attacks in common areas).

[19] *Johnston v. Harris*, 387 Mich. 569 (1972).

[20] In *Johnston, supra*, for example, a tenant was mugged in an unlocked, unlighted vestibule of the building which was located in a high crime area.

[21] *Johnston, supra* at 573.

[22] See *Williams*, 127 Mich. App. at 469, n 9, stating that Justice Kavanagh, the "author of [*Samson*], suggest[ed] that the duty may have been *so slight* as only to require a suggestion to "office personnel to ride the elevators in pairs.'" (emphasis added), citing *Samson*, 393 Mich. at 409. See also *Pagano v. Mesirow*, 147 Mich. App. 51, 54 (1985) (citing *Williams, supra* at 470

Finally, contrary to the Court of Appeals opinion here, this Court has never held landlords liable for criminal acts occurring *without* the common areas of the rental property, such as parking lots, lawns, and neutral zones adjacent to and accessible via general public areas and thruways. To the extent that any duty has been imposed, it has been limited to the landlord's obligation (the same as with any premises owner) to maintain in reasonable repair those "common" areas over which the property owner retains some measure of control.[23]

In the case *sub judice*, the basic premise upon which the Court of Appeals has extended the duty which applies to merchants, as expressed by this Court in *MacDonald*, to landlords, is incorrect. The landlord-tenant relationship is not among the limited and specific types of legal relationships recognized at common law as imposing any "special" or "heightened" duty of care. While Michigan courts have recognized the traditional common-law duties that innkeepers, tavern owners and, to some extent, common carriers have to protect those who, by virtue of the nature of their relationship with these entities, surrender some degree of control over their own person and entrust them with their personal safety and protection, when this Court has directly addressed the nature of a landlord's obligation to protect tenants and their guests from criminal attacks it has not concluded that there is any "heightened duty" of care. In fact, the last case in which this Court directly addressed a landlord's duty to protect tenants and their invitees from random criminal assaults was *Samson*,[24] a split opinion which resulted in a ruling that imposed a

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and noting that the Court in *Samson* did not extend the landlord's duty to incidents which occurred *within* the boundaries of the leased premises).

[23] *Williams*, 127 Mich. App. at 469-71.

[24] 393 Mich. 393 (1975).

very limited duty, and which, in any event, retained the common-law rule that landlords were responsible only for keeping the common areas safe from dangerous and hazardous conditions.[25]

In fact, with the exception of *Williams v. Cunningham Drug Stores, Inc.*,[26] which was a true "merchant" case, all of the cases decided by this Court that have articulated the principle that an ordinary *merchant* has some heightened duty of care to protect invitees from criminal attacks upon their premises have been cases involving "special relationships" which do give rise to heightened duties of care at common law. *Mason v. Royal Dequindre, Inc.*[27] and *Goodman* (the companion case), involved tavern owner defendants; while *MacDonald*[28] and *Lowry* (the companion case), involved a defendant operating a paid admittance closed entertainment venue. The relationships between these types of defendants and their patrons are treated differently by the common law, arguably for good reason, than owners of ordinary businesses open to the public.[29]

Thus, it is questionable whether any of these aforementioned cases ever stood to impose any *extraordinary* duty on the *ordinary* merchant to protect his business invitees from criminal attacks unrelated to some defect or dangerous condition kept or maintained within and upon the physical confines of his property. The more common articulation of an ordinary merchant's duty

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[25] See note 22, *supra*.

[26] 429 Mich 495 (1988). The plaintiff was the patron of the defendant's drug store and was shot by an armed robber who held up the store. Thus, *Williams* is the only case from this Court that addressed an ordinary business owner's duty to his or her patrons with respect to a criminal attack perpetrated by an unknown third party. The Court found the merchant had no duty.

[27] 455 Mich. 391 (1997).

[28] 464 Mich. 322 (2001).

[29] See, e.g., *Alexander v. American Multi-Cinema*, 450 Mich. 877, 878-883 (1995) (Levin, J., dissenting from the order denying leave to appeal) (citing cases involving various entertainment venues).

towards business invitees is, indeed, that expressed in the premises liability context – cases in which physical injuries occur on the owner's premises as the result of an alleged physical defect or condition of the premises that the merchant is said to have allowed to persist despite knowing (actually or constructively) of its existence.[30] That duty is one of *ordinary* care to keep the premises *reasonably safe* – a duty articulated long ago by Justice Cooley in his treatise on Torts.[31]

These ordinary merchant cases and the *extraordinary* business proprietor cases, i.e., those involving innkeepers, tavern owners, enclosed and controlled entertainment venues, and common carriers have been conflated such that there is a pervasive, but mistaken view that ordinary merchants *and landlords* have some sort of heightened or extraordinary duty to protect patrons and tenants, respectively, from the criminal acts of third parties with whom the former have had no previous relationship.

Contrary to the Court of Appeals reasoning here, it is even more clear that no such duty should exist for landlords than there be one, however limited it is, imposed on the ordinary merchant. This Court has never held a landlord to a heightened duty of care towards tenants (or their guests) such that the former is obligated to protect the latter from randomly occurring criminal acts of third parties with whom the landlord has no separate relationship. The duty of a landlord is the same as any business invitor; to wit, take reasonable measures to protect tenants and their guests from dangerous or hazardous conditions *on the premises*. In the case of a landlord, who retains *less* control over the premises than a business owner, this limited duty

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[30] See, e.g., *Bertrand v. Alan Ford, Inc.*, 449 Mich. 606, 609 (1995), citing *Williams*, *supra* at 499.

[31] Thomas M. Cooley, A Treatise on the Law of Torts or the Wrongs which Arise Independent of Contract (2d ed), p. 718 (emphasis added).

extends only to such conditions that exist in the common areas of the premises over which the landlord retains some control.

While, in *dicta*,[32] this Court, and many Court of Appeals panels (including the instant one) frequently shepherd landlords in with certain other entities that do have "special relationships" recognized at common law as imposing a heightened duty of care, there is no legal basis for this grouping. *Williams*,[33] *Murdock*,[34] *Mason*,[35] *Scott*,[36] *Dawe*,[37] etc., and countless Court of Appeals opinions continue to repeat the declaration that landlords and tenants have a "special relationship" as if simply stating it carries with it legal consequences. However, it is a shibboleth void of legal significance.

Aside from the lack of authority to extend a heightened duty to landlords to protect tenants and their guests against random criminal attacks, the same important public policy issues attendant to imposing such a duty on merchants that confronted this Court in *Williams*, *Mason* and *MacDonald* are also present in the instant case.[38] Imposing vicarious liability upon landlords for the criminal acts of third parties upon tenants and their guests is fraught with

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[32] *Williams*, *supra* at 502 and n 17.

[33] *Id.*

[34] *Murdock v. Higgins*, 454 Mich. 46, 55 and n 11 (1997).

[35] *Mason v. Royal Dequindre, Inc.*, 455 Mich. 391, 397-98 and n 2 (1997).

[36] *Scott v. Harper Recreation, Inc.*, 444 Mich. 441, 452 and n 15 (1993) (holding that a merchant's voluntary undertaking of security measures does not expose him to greater liability for criminal attacks on patrons than if he had no such measures in place and reserving whether the rule enunciated should apply in the landlord-tenant context citing *Holland v. Liedel*, 197 Mich. App. 60 (1992)).

[37] *Dawe v. Dr. Reuven Bar-Levav & Assoc., P.C.*, 485 Mich. 20, 26 and n 3 (2010).

[38] *Williams*, *supra* at 500-04; *Mason*, *supra* at 401-05 and 405-09 (Weaver, J. and Boyle, J., dissenting separately); *MacDonald*, *supra* at 340-45.

dangerous consequences. These are important, indeed overriding, public policy concerns which require this Court to question the *scope* of the duty sought to be imposed.[39]

As explained herein, *amicus curiae* MDTC submits that the ostensible legal duty imposed on merchants in *MacDonald*, to wit, "to involve the police when a situation on the premises poses an imminent risk of harm to identifiable invitees" cannot be "extended...to landlords and other premises proprietors, such as the defendant apartment complex and property management company" in the instant case.[40]

MDTC respectfully suggests in this brief, consistent with Michigan jurisprudence, the only duty a landlord should be held to owe tenants and their guests (whether to protect against criminal attacks by strangers or injury from some defective condition on the premises) is to keep the *physical* condition of the common areas free from defects so as to avoid or prevent such injuries.[41] Simply put, this Court has never adopted *and applied* a heightened duty based on a special relationship in a landlord-tenant case such that a landlord would have a duty to do anything more to protect tenants from the criminal attacks of strangers than to maintain in reasonable repair the *common areas* over which the landlord usually retains some measure of control. For these reasons, and as further detailed in this brief, *amicus curiae* MDTC urges this Court to reverse the Court of Appeals decision.

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[39] See, e.g., *Moning v. Alfono*, 400 Mich. 425, 438-39 (1977) (even where a duty may exist based on the relationship between the parties, where overriding public policies are at issue, it is legitimate for this Court to consider the *scope* of the duty ultimately imposed).

[40] See 491 Mich. 924 (2012).

[41] See *Samson*, *supra* at 414-15 (Levin J., dissenting and joined by Justices Coleman and Fitzgerald).

BACKGROUND

The facts necessary to resolve the legal issues before this Court are presented in the opinion of the Court of Appeals and the parties' briefs and.

ARGUMENT

LANDLORDS HAVE NO COMMON-LAW "SPECIAL RELATIONSHIP" WITH THEIR TENANTS SUCH THAT THERE IS *ANY DUTY* ON THE PART OF THE FORMER TO PROTECT THE LATTER OR THEIR GUESTS FROM INTENTIONAL CRIMINAL ACTS OF THIRD PARTIES WITH WHOM THE LANDLORD HAS NO SEPARATE RELATIONSHIP

A. Standard of Review

As this case presents itself to the Court on the question of a landlord's "duty" to protect a tenant's guest from random criminal attacks perpetrated by unknown third parties, the standard of review is *de novo*.[42] "[Q]uestions regarding duty are for the Court to decide as a matter of law."[43] It has also been noted that the standard of care owed by a business owner or property owner towards invitees and others with whom there is a legal relationship involve "overriding concerns of public policy" and are to be decided by the courts as a matter of law.[44]

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[42] *Scott v. Harper Recreation, Inc.*, 444 Mich. 441, 448 (1993).

[43] *Id.*, citing *Williams*, 429 Mich. at 500. See also *Frederick*, 370 Mich. at 437 ("[i]t is the court's function to determine as a matter of law whether the relation of the parties gives rise to a duty and to define it" because doing so provides the best method of preserving the importance of trial by jury – juries must be informed by standards and instructions defined by the law as it is or should be and the best way to preserve the jury's province in applying the law to the multitude of factual situations brought before them is for the Court to clearly articulate the state of the law).

[44] *Id.*, citing *Williams*, *supra* at 500-04.

B. Applicable Law

1. The General Common Law Rule: There is No Duty to Prevent Criminal Attacks On Others

Traditional concepts of personal responsibility prompted early courts to avoid "converting [themselves] into an agency for forcing men to help one another."[45] Therefore, "liability for nonfeasance[46] was…slow to receive recognition in the law."[47] Where such liability was imposed, the cases were limited to those in which the defendants, "by holding themselves out to the public, were regarded as having undertaken a duty to give service."[48]

"The duty to do no wrong is a legal duty. The duty *to protect against wrong* is, generally speaking, and excepting certain intimate relations in the nature of a trust, a moral obligation only, not recognized or enforced by law."[49] Thus, at common law, there was no duty on the part of an ordinary landowner or merchant to protect invitees from the intentional criminal acts of third parties.[50]

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[45] Prosser, Law of Torts (4th ed) § 56, at 336.

[46] *Nonfeasance*, in its simplest form as used in this context, is a failure to act or "nonperformance of an act". The use of *nonfeasance* and *misfeasance* in these cases is not entirely accurate. Legally defined, nonfeasance presupposes the existence of a duty and a failure to act upon that duty, as opposed to *misfeasance* or, sometimes, *malfeasance*, which describes an affirmative act, in breach of a duty, that causes some harm. BLACK'S LAW DICTIONARY (Deluxe 7th ed), p. 1076. *Cf.* BLACK'S LAW DICTIONARY (revised 4th ed), p. 1208 ("[n]onperformance of some act which ought to be performed, omission to perform a required duty at all, or total neglect of duty"; with Ballentine's formulation: "[t]he failure to act where duty requires an act; or simply as "[a] matter of 'not doing'". BALLENTINE'S LAW DICTIONARY (3rd ed), p. 858, citing 35 Am. Jur. 1st M & S § 586.

[47] *Id.*, see also 3 Harper, James, & Gray, Torts, (2d ed), § 12.3, at 111.

[48] Prosser, *supra* at 336.

[49] *Buch v. Amory Mfg. Co.*, 44 A. 809, 811 (N.H. 1898) (emphasis added).

[50] Annotation, *Private Person's Duty and Liability for the Failure to Protect Another Against Criminal Attack by Third Person*, 10 ALR 3d 619 (1967), see also 62 Am. Jur. 2d § 45, at 396.

In *Williams v Cunningham Drug Stores, Inc.*,[51] this Court addressed Michigan law defining the ordinary merchant's duty in light of *nonfeasance*. The Court began with the general rule: "there is no duty that obligates one person to aid or protect another."[52] The Court explained that the common law generally imposed no liability for *nonfeasance* because there is no legal obligation for one person to come to the aid of another and such conduct, i.e., *nonfeasance* or a failure to act, creates no additional risk of harm to the potential plaintiff.[53] The Court next discussed the "special relationship" exception to the general rule.

2. *The "Special Relationship" Exception to the Common-Law Principle of No Duty to Aid Others*

While the common law was slow to recognize liability for nonfeasance, "[s]ocial policy…led the courts to recognize an exception to this general rule where a *special relationship* exists between a plaintiff and a defendant."[54] The common law originally recognized limited exceptions to the general rule of nonliability for nonfeasance.[55] Elements of a duty to protect arose in the discussion of liability for innkeepers,[56] tavern owners,[57] and common carriers.[58]

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[51] 429 Mich. 495 (1988).

[52] *Id.* at 499, citing Restatement, Torts (Second), § 314, p. 116.

[53] *Id.*, citing Prosser & Keeton, Torts (5th ed), § 56, p. 373.

[54] *Williams*, *supra* at 499, citing 2 Restatement of Torts (Second), § 314A, p. 118.

[55] *Id.*

[56] *Keech v. Clements*, 303 Mich. 69 (1942). See also 70 A.L.R.2d 621 (1960) (discussing the innkeeper's common-law duties and citing cases).

[57] See, e.g., *Manuel v. Weitzman*, 386 Mich. 157, 162-64 and n 2 (1971) (discussing the duty of tavern keepers at common law and citations to case law and secondary authorities).

[58] *Michigan Central Railroad v. Coleman*, 28 Mich. 440 (1874).

a. Innkeepers, Tavern Owners and Common Carriers

Since the birth of the common law, innkeepers and tavern owners have been subject to liability based on the nature of the control they exercise over invitees utilizing their premises. This duty finds its origin in the English common law, where a separate action was first allowed against innkeepers and tavern owners based on "the custom of the realm".[59]

The "onerous liability" placed on innkeepers and tavern owners originated in English common law.[60] "The innkeeper, while not an insurer of a guest against personal injury, must protect him against injury from third persons so far as it is within his power to do so."[61] Thus, the innkeeper's most important function, after furnishing food and drink, was seen as the protection which he offered against robbers.[62]

> The "rigorous rule" regarding the liability of innkeepers and taverners had its origin in the feudal conditions which were the outgrowth of the Middle Ages. In those days there was little safety outside of castles and fortified towns for the wayfaring traveler, who, exposed on his journey to the depredations of bandits and brigands, had little protection when he sought at night temporary refuge at the wayside inns, established and conducted for his entertainment and convenience. Exposed as he was to robbery and violence, he was compelled to repose confidence, when stopping on his pilgrimages over night, in landlords[63]

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[59] 8 W. Holdsworth, History of English Law, at 449-50 (1923). See also Greer, F.A., Custom in the Common Law, 9 L.Q. Rev. 153 (1893).

[60] Plucknett, A Concise History of the Common Law (5th ed. 1956), at 475 and 480-82.

[61] J. Beale, Law of Innkeepers, § 171, at 110 (1906), citing *Rommel v. Schambacher*, 120 Pa. 579; 11 A. 779 (1887).

[62] *Id.* § 181, citing YB, 42 Ed. 3, 11, pl. 13 (1367).

[63] The description in this passage refers to the traditional common-law innkeeper or tavern owner. At page 792 of BLACK'S LAW DICTIONARY (7th ed) an "[i]nnkeeper" is described as "[a] person who, for compensation, keeps open a public house for the lodging and entertainment of *travelers*. The keeper of a common inn for the lodging and entertainment of *travelers* and *passengers*, their horses and attendants, for a reasonable compensation." Citing J. Story, Bailments § 475. Indeed, the guests' surrender of person and property to the care and protection of the innkeeper is what induces the concomitant heightened duty of care. A tenant vis-à-vis a landlord, on the contrary, has exclusive control over his person and property within the confines

> who were not exempt from temptation; and hence there grew up the salutary principle that a host owed to his guest the duty, not only of hospitality, but also of protection. With the march of civilization and the progress of commercial development, the conditions in which the common-law liability of the innkeeper to his guest originated have passed away; but other conditions exist, which render it wise and expedient that the modern hotel keeper should respond for the loss of his guest's property while he is extending to the latter for compensation his hospitality, and there has consequently been no relaxation in the rule of his common-law liability, except as such liability has been modified by statute.[64]

"The true reason for this exceptional responsibility was the exceptional confidence necessarily reposed in carriers and innkeepers."[65]

Michigan has recognized the common-law duty of innkeepers,[66] and, to some extent common carriers[67] and tavern owners.[68] Justice Campbell explained the rationale for imposing a heightened duty when he spoke of common carriers in *Coleman*:

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of his leasehold interest. See *Williams v. City of Detroit*, 127 Mich. App. 464, 468 (1983); *Stanley v. Town Square Coop.*, 203 Mich. App. 143, 147-49 (1993).

[64] *Crapo v. Rockwell*, 94 N.Y.S. 1122, 1123 (1905) (even this acknowledgment of the existence of a heightened duty for innkeepers and tavern owners is limited to protection of the guest's property as in the case of bailments).

[65] Holmes, The Common Law (1881), at 92.

[66] "The rules of the common law touching the liability of innkeepers, common carriers, and the like, have not been relaxed by the courts and are in full force, except as expressly changed by statute, or as they may be modified by special contract." *Weadock v. Swart*, 163 Mich. 602 (1910).

[67] *Michigan Central Railroad v. Coleman*, 28 Mich. 440, 449 (1874). The "special relationship" said to exist between common carriers and their customers may have a strictly American origin. Apparently, the rule was first expressed in 1839 in *Stokes v. Salton Stall*, 13 Pet. (38 U.S.) 181; 10 L.Ed. 115 (1839), see also F. Green, *High Care and Gross Negligence*, 23 Ill. L. Rev. 4, 5-8 (1928) (suggesting that the "high care" rule as applied to common carriers arose from a misinterpretation of early English cases). *Cf. Frederick v. City of Detroit Dep't of St. Railways*, 370 Mich. 425, 435-437 and n 1 (1963) (discussing this Court's post-*Coleman* adoption of a *higher* degree of care for common carriers, and then, its subsequent rejection of such "degrees of negligence" analysis altogether – adopting, ultimately, "the common law duty of *due care*...defined simply as the duty to exercise such diligence as would be exercised in the circumstances by a reasonably prudent carrier") (emphasis added).

> [C]ommon carriers of passengers are bound to the utmost care and skill in the performance of their duty. That the degree of responsibility to which carriers of passengers are subjected is not ordinary care, which will make them liable for ordinary neglect, but extraordinary care which renders them liable for slight neglect. It is the danger to the public which may proceed even from slight faults, unskillfulness or negligence of passenger carriers of their servants, and *the helplessness in which passengers by their conveyances are, which make this duty of extraordinary care a legal one.*[69]

b. The "Special Relationship" Exception to No Duty to Aid Others from Criminal Attacks Is Based on Control by the Tortfeasor Over the Person of the Assailant and/or the Victim

Regardless of the "special relationship" at issue, whether based on the innkeeper's duty to his guests, which arose from the "custom of the realm", or modern articulations extending to other legal relationships, the common denominator in these cases that have justifiably imposed a heightened duty to protect against criminal acts is the degree of control exercised by the defendant over the assailant and/or the plaintiff-victim.[70] "In each situation one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself. The duty to protect is imposed upon the person in control *because he is best able to*

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[68] *Manuel v. Weitzman*, 386 Mich.157 (1971). In *Weitzman*, it was stated that "[t]he common law duty of a liquor establishment to maintain a safe place of business for its customers is the same duty any business owes to those it invites upon its premises." *Id.* at 163. The Michigan appellate court cases relied on, *Gorby v. Yeomans*, 4 Mich. App. 339 (1966), and *De Villez v. Schifano*, 23 Mich. App. 72 (1970), were based on statements from other jurisdictions. Thus, it cannot be said with firm conviction that a "heightened duty" recognized at common law, even with respect to tavern owners, has been unambiguously adopted in Michigan. Moreover, even the tavern owner cases originally imposed a heightened duty only where it was shown that the tavern owner had some element of knowledge about and control over the assailant. *Weitzman, supra* at 164. Thus, the typical case was that one unruly patron assaulted another, after having made threats of which the tavern owner was made aware. Failing to prevent the attack, the tavern owner was charged with the duty to do so because both the assailant and the victim were within and using his establishment.

[69] 28 Mich at 449, but see footnote 67, *supra.*

[70] *Mason*, 455 Mich. at 398.

provide a place of safety."[71] As will be discussed, this heightened duty is based on circumstances which do not exist in the typical business invitor-invitee or landlord-tenant relationship.

C. *Analysis -- This Court has Never Adopted or Applied A Rule that Would Recognize a "Special Relationship" between Landlords and Tenants and a Concomitant Heightened Duty to Generally Prevent Criminal Attacks on Tenants – The Only Duty a Landlord Has is to Keep the Physical Property of the Common Areas Safe and Free from Dangerous or Hazardous Conditions*

Justice Cooley said, in his influential treatise on the law of torts, that "[o]ne is under no obligation *to keep his premises* in a safe condition for trespassers. On the other hand, when he expressly or by implication invites others to come on his premises, whether for business, or any other purpose, it is his duty to be reasonably sure that he is not *inviting them into danger*, and to that end he must exercise *ordinary care and prudence* to render *the premises safe* for the visit."[72] Of course, this expression of the duty that a business owner or merchant owes to his or her business invitees is invoked in premises liability cases. One who invites, expressly or by implication, another upon his premise is duty-bound to exercise *ordinary care and prudence* to render *the premises reasonably safe* for the visit.[73]

This articulation of the property owner's duty contains no expression of a heightened duty of care. Indeed, a review of this Court's jurisprudence reveals that while a property owner and an invitee are seen as having a "special relationship" in the law this does not equate to

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[71] *Id.* (emphasis added), citing *Williams*, *supra* at 499 and Restatement of Torts (Second), p. 118, § 314A.

[72] Thomas M. Cooley, A Treatise on the Law of Torts or the Wrongs which Arise Independent of Contract (2d ed), p. 718 (emphasis added).

[73] *Blakely v. White Star Line*, 154 Mich. 635, 637 (1908) (Graves, J.), cited in *Keech v. Clements*, 303 Mich. 69, 73 (1942).

imposing any heightened duty upon the former vis-à-vis the latter – the duty, as expressed by the case law is simply one of *ordinary care* and *prudence*, and, as stated it has always been limited to the obligation on the part of the premises owner to keep and maintain the physical spaces encompassing his or her property, over which he or she has control, in a reasonably safe condition. The law speaks nothing to an ordinary premises owner's duty to keep *people* safe; nor, for that matter does it concern his or her ability *to control* the actions and conduct of his patrons or others whose independent actions might cause injury.

Innkeepers and tavern owners appear to be the only premises owners to have a justifiably heightened duty of care vis-à-vis their guests and patrons, respectively.[74] As will be shown, extending such a duty to ordinary merchants, much less landlords, is incongruous with the rationale supporting such a duty and cannot be sustained.

1. Williams was an Ordinary Merchant Case which Found No Duty to Protect Invitees from Random Criminal Attacks and its Reference to the Landlord-Tenant Relationship was Dicta

In *Williams*, this Court held:

> [A]s a matter of law...the duty of reasonable care a merchant owes his invitees does not extend to providing armed, visible security guards to protect customers from the criminal acts of third parties. The merchant is not an insurer of the safety of his invitees, and for reasons of public policy he does not have the responsibility for providing police protection on his premises.[75]

However, in footnote 17, the Court stated, again, in *dicta*, as follows:

> We find that a landlord has more control in his relationship with his tenants than does a merchant in his relationship with his invitees. Should a dangerous condition exist in the common areas of a building which tenants must necessarily

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[74] As noted in footnote 29, *supra*, Justice Levin explored the arguably similar "heightened" duty for owners of enclosed entertainment venues in his dissenting statement in *Alexander v. American Multi-Cinema*, 450 Mich. 877, 877-82 (1995).

[75] 429 Mich. at 504.

> use, the tenants can voice their complaints to the landlord. Thus, in *Samson*[76], we upheld a landlord's duty to investigate and take available preventive measures when informed by his tenants that a possible dangerous condition exists in the common areas of the building, noting that the landlord's duty may be slight. The relationship between a merchant and invitee, however, is distinguishable because the merchant does not have the same degree of control. When the dangerous condition to be guarded against is crime in the surrounding neighborhood, as it is in the present case, the merchant may be the target as often as his invitees. Therefore, there is little the merchant can do to remedy the situation, short of closing his business.[77]

The Court thereby espoused a view that there was more control in a landlord-tenant relationship than that between and ordinary merchant and his or her invitee. However, the language of this footnote does limit the landlord's duty to one of maintaining the common areas of the premises in a safe condition.

Nonetheless, this footnote probably deserves the most credit for the ease with which subsequent courts have concluded, often without more than a mere reference to it, that landlords have some sort of heightened duty of care towards their tenants. At least one Court of Appeals panel recognized that although footnote 17, *dicta* though it was, provides a reference point for discussion of the legal duty in landlord-tenant cases, the Court's contextual treatment of that specific relationship in light of other references in the opinion itself could lead to an opposite conclusion altogether.[78] Interestingly, that very case, a landlord-tenant case involving a criminal attack upon a tenant, was remanded to the Court of Appeals by this Court for consideration in light of *Williams*.[79]

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[76] 393 Mich. 393 (1975).

[77] 429 Mich. at 502 and n. 17.

[78] *Bryant v. Brannen (On Remand)*, 180 Mich. App. 87, 92-98 (1989), discussed *infra*.

[79] 431 Mich. 865 (1988).

For all its treatment, the cryptic reference in footnote 17 has thus far eluded in-depth analysis of its legal underpinnings and what it means when applied to a case such as the one now before the Court. *Williams* was not, after all, a landlord-tenant case. Thus, any ostensible *rule of law* drawn from the *dicta* in that opinion and applied to landlord-tenant cases is simply wrong. [80]

Finally, as explained herein, even the cases from this Court that have directly addressed a landlord's duty to protect tenants and guests from criminal attacks, *Johnston*[81] and *Samson*[82] (a hopelessly vague and split opinion with a curious mixture of Justices on different sides)[83] expressed only that very limited duty which appears to be the one espoused for ordinary business invitors, further limited by the unique situation of the landlord who only maintains constructive control over the common areas of his premises.

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[80] The statement in footnote 17 of *Williams* was not adoption by this Court of an applicable principle of law to a particular set of facts. "[S]tatements concerning a principle of law not essential to determination of the case are *obiter dictum* [sic] and lack the force of an adjudication." *Roberts v. Auto-Owners Ins. Co.*, 422 Mich. 594, 597-98 (1985). "[A]ny statements and comments in an opinion concerning some...debated legal proposition not necessarily involved nor essential to determination of the case in hand are, however illuminating, but obiter dicta and lack the force of a binding adjudication." *Foreman v. Foreman*, 266 Mich. App. 132, 139 (2005), quoting *McNally v. Wayne Co. Canvassers*, 316 Mich. 551, 558 (1947), quoting *People v. Case*, 220 Mich. 379, 382-83 (1922).

[81] *Johnston v. Harris*, 387 Mich. 569 (1972).

[82] *Samson v. Saginaw Professional Bldg., Inc.*, 393 Mich. 393 (1975).

[83] Justice T.M. Kavanagh wrote the lead opinion in which Justices Williams, Swainson and T.G. Kavanagh joined in holding the landlord liable. Dissenting were Justices Levin, Coleman and Fitzgerald who would have reversed and remanded for a directed verdict in favor of the landlord. See also *Williams v. City of Detroit*, 127 Mich. App. 464, 469, n 9 (1983) (explaining that even Justice Kavanagh, the "author of [*Samson*], suggest[ed] that the duty may have been *so slight* as only to require a suggestion to 'office personnel to ride the elevators in pairs.'") (emphasis added), citing *Samson*, 393 Mich. at 409. See also *Pagano v. Mesirow*, 147 Mich. App. 51, 54 (1985) (citing *Williams*, *supra* at 470 and noting that the Court in *Samson* did not even extend the landlord's duty to incidents which occurred *within* the boundaries of the leased premises).

2. *Mason Reoriented the Law and Led to the Mistaken Rule that Ordinary Merchants had Extraordinary Duties of Care towards Invitees*

Mason followed *Williams* in the evolution of this Court's modern jurisprudence regarding the responsibility of business invitors for criminal attacks upon invitees. As this Court requested the parties to address whether the "duty" articulated in *MacDonald* should be extended to landlords, it is helpful to discuss *Mason*, which *MacDonald* significantly curtailed.

The cornerstone of the Court's reasoning in *Mason*, which led it to hold that ordinary merchants had some measure of "heightened duty" towards invitees for the criminal acts of third parties was its conclusion that there was a "special relationship" by and between ordinary merchants and their invitees as was discussed in *Williams*.[84] This "special relationship" and the "rationale behind imposing a duty to protect" in these circumstances, explained the Court, was "based on control".[85] "In each situation one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself. The duty to protect is imposed upon the person in control *because he is best able to provide a place of safety.*"[86]

Ultimately, the Court found no liability for the tavern owner because there was no indication he or any of his employees knew that plaintiff, who was a patron, was in danger – even though the defendant had been put on notice that the criminal assailant, another patron, had

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[84] 455 Mich at 397-98, quoting 2 Restatement of Torts (Second), p. 118, § 314A – which lays out the generally regarded common-law "special relationships" that give rise to a heightened duty: the common carrier: passenger; innkeeper: guest; a *possessor* of land who holds it open to the public has a similar duty to those who enter in response to his invitation; and one required by law to take or who voluntarily takes the custody of another.

[85] *Id.* at 398.

[86] *Id.*, citing *Williams*, 429 Mich. at 499 and Restatement of Torts (Second), p. 118, § 314A.

been involved in an earlier altercation.[87] In the companion case, *Goodman*, the Court did find liability because the defendant, again a tavern owner, had been placed on notice that the plaintiff was in danger.[88] In the latter case, the Court also concluded that the assault (a shooting) was foreseeable, in part, because two other shooting incidents had occurred or originated at the defendant's bar in the months prior.[89] The *Mason* Court stated the rule going forward as follows: "*[M]erchants* have a duty to use reasonable care to protect their identifiable invitees from the foreseeable criminal acts of third parties."[90]

In her partial dissent, Justice Weaver correctly noted the majority's errant foreseeability analysis applied to *Goodman*.[91] That the plaintiff's "injury was foreseeable because two previous shootings had recently occurred in the defendant bar's parking lot", Justice Weaver explained "[w]as tantamount to saying that almost any injury is foreseeable to an invitee in high-crime, high-risk areas."[92] Justice Weaver disagreed with the majority's analysis because it was based on a mistaken premise. She pointed out that the Court's precedent consistently held

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[87] *Id.* at 403-04.

[88] *Id.* at 404. As explained herein, *Mason* and *Goodman* were tavern owner cases and the facts fell in line with the question of duty and liability discussed by Michigan courts with respect to these unique defendants. See, e.g., *Weitzman*, *supra*. See also *Gorby*, 4 Mich. App. at 342-43 (citing cases and discussing the elements necessary in tavern owner liability cases), overruling by *MacDonald* recognized by *Flanigan v. Vichunas*, Unpublished Per Curiam Decision of the Michigan Court of Appeals, dated August 6, 2002 (Docket No. 231419) (**ATTACHMENT A**) (Zahra, J. on the panel).

[89] *Id.* at 404-05.

[90] *Id.* at 405 (emphasis added).

[91] *Id.* at 405-07.

[92] *Id.* at 405-06.

"owners and occupiers of land do not have a duty to protect invitees from the criminal acts of third parties, absent *extraordinary circumstances*."[93]

She further observed that *Williams* had addressed tort liability for *nonfeasance*, holding that "as a general rule, there is no duty that obligates one person to aid or protect another."[94] *Williams* acknowledged an exception to this general rule in the context of specific special relationships, discussed *supra*, between defendant and plaintiff, e.g., innkeeper-guest, common carriers, etc., but ultimately "rejected the plaintiff's assertion that the defendant [an ordinary merchant] had a duty to provide police protection against third-party criminal acts."[95]

As Justice Weaver indicated, the majority in *Mason* added "six words to the general rule for nonfeasance" and made it seem, incorrectly, that *Williams* had created liability for a failure to protect others "*from a third party's actions*" when there is a special relationship between plaintiff and defendant.[96] Justice Weaver pointed out the fallacy in extending the rule, thus modified by the majority, because in *Williams* the Court actually held "merchants *do not have a duty to provide police protection against third-party criminal acts*."[97]

Justice Boyle also dissented, correctly noting that both *Mason* and *Goodman* were classic "tavern keeper" cases and the Court had already recognized in such cases a "duty to supervise

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[93] *Id.* at 406 (emphasis added), citing *Scott*, *supra* and *Williams*, *supra*.

[94] *Id.*, citing *Williams*, *supra* at 499.

[95] *Id.* at 407.

[96] *Id.* at 407 (emphasis in original).

[97] *Id.* (emphasis added).

the premises by using reasonable care to protect patrons from foreseeable injury."[98] *Williams* and *Scott*,[99] he explained, had both involved the issue of a merchant's duty to an invitee and both reaffirmed that Michigan does not impose upon these defendants "a general duty to protect an invitee from the intentional criminal acts of another arising from prior crimes in the area or on the premises...."[100] The majority improvidently opined regarding an ordinary merchant's duty of care toward invitees and its decision "impermissibly expanded the general rule of nonliability for criminal acts of third parties."[101] Justice Boyle concluded that the case was "an inappropriate vehicle for consideration of whether, and to what extent, a *merchant* has a general duty to anticipate the criminal acts of third parties."[102]

Mason was a marked divergence from prior law in both its rationale and holding. It increased the *ordinary* merchant's *ordinary* duty of due (or reasonable) care as a premises owner by referencing the legal duties that were discussed in *Murdock v Higgins*[103] and *Marcelletti v Bathani*.[104] *Murdock*, however, was a negligent supervision case in which the duty under consideration was based on the "special relationship" between employers and employees and the

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[98] *Id.* at 408 (Boyle, J., concurring in part and dissenting in part), citing *Manuel v. Weitzman*, 386 Mich. 157 (1971); *Millross v. Plum Hollow Golf Club*, 429 Mich. 178 (1987) and *Jackson v. PKM Corp.*, 430 Mich. 262, 276-77 (1988).

[99] 444 Mich. 441 (1993). Although the business invitor defendant in *Scott* was a night club, it was not a traditional tavern keeper case in that the plaintiff was attacked by an unknown assailant in the parking lot, which was owned and maintained by the defendant and patrolled by security personnel it had hired. *Id.* at 443.

[100] *Id.*

[101] *Id.*

[102] *Mason, supra* at 409 (emphasis added).

[103] 454 Mich. 46, 58 (1997).

[104] 198 Mich. App. 655, 665 (1993).

duty of the former to protect others from harm by the latter; a separate, well-established common-law principle.[105] Liability in such circumstances was fully addressed by the Court more recently in *Brown v. Brown*,[106] and *Hamed v. Wayne County*.[107] *Marcelletti*, a Court of Appeals decision, involved an infant plaintiff injured by a babysitter, and a physician-defendant who had failed to report abuse of another child by the same babysitter.[108] Thus, the physician-patient "special relationship" was implicated.[109]

Based on unique and special circumstances from these disparate cases where the "special relationship" between the tortfeasor, the assailant and the victim contained significant degrees of control, the Court in *Mason*, for the first time, applied two principles to ordinary merchants it had previously refused to embrace: (1) it extended the common-law "special relationship" to ordinary merchants (despite the fact, as noted by Justice Boyle, that *Mason* and its companion case *Goodman* were classic tavern keeper liability cases) and held they could be liable to invitees for criminal attacks committed upon them by third parties;[110] and (2) prior incidents of general criminal activity could be cited to implicate the foreseeability of such attacks, allowing the merchant to be liable for failing to take measures to prevent such attacks.[111]

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[105] 3 Harper, James, & Gray, Torts, (2nd ed.), § 18.7, at 738-39.

[106] 478 Mich. 545 (2007).

[107] 490 Mich. 1 (2011).

[108] 198 Mich. App. at 665.

[109] *Id.*

[110] *Id.* at 393, 395.

[111] *Id.* at 398-99.

3. *MacDonald Signified a Partial Retreat and Reinstated the Concept that Ordinary Merchants have No Extraordinary Duty to Prevent or Protect Patrons Against Unforeseeable Criminal Attacks*

In *MacDonald*, this Court focused only on the second of these two sea changes in the law that *Mason* brought about.[112] The Court retreated substantially from *Mason's foreseeability* rationale. The Court held that ordinary merchants "have a duty to use reasonable care to protect *their identifiable invitees from the foreseeable criminal acts of third parties.*"[113] This duty, the Court continued, "is triggered by specific acts occurring *on the premises* that pose a risk of *imminent and foreseeable* harm to an identifiable invitee." Thus, *MacDonald* expressly overruled that portion of *Mason* that imposed upon a merchant a duty to take precautions against the criminal conduct of third persons that may be *reasonably anticipated.*[114] The Court explained:

> [A] merchant has no obligation generally to anticipate and prevent criminal acts against its invitees . . . . [W]e have 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 a risk of imminent and foreseeable harm to an identifiable invitee. Consequently, a merchant's only duty is to respond reasonably to such a situation. To hold otherwise would mean that merchants have an obligation to provide what amounts to police protection . . . .[115]

While *MacDonald* confirmed there is no general duty to anticipate and prevent criminal activity, it retained the concept from *Mason* that ordinary merchants have some duty to protect identifiable invitees from foreseeable criminal acts of third parties and that the "special

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[112] *Id.* at 338.

[113] *Id.*

[114] *Id.* at 334, n 10.

[115] *Id.* at 334.

relationship" between an ordinary merchant and his invitees was akin to those "special relationships" that give rise to a *heightened duty of care* at common law.[116]

Prior to *Mason*, ordinary business invitors had no duty to protect invitees from criminal attacks on their premises where such attacks had nothing to do with some defective condition of the invitor's property, unless the business invitor was one of a very small category of those who were seen at common law as having a heightened duty of care. It was not until *Mason* that the concept of the "special relationship" and the *control* exerted by the defendant over the plaintiff in traditional common-law relationships such as innkeeper, tavern owner, common carrier, etc., was applied to ordinary merchants. However, none of the cases from this Court relied on in *Mason* (including *Mason* itself) to extend this ostensible duty to merchants actually involved ordinary merchants.[117]

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[116] *Id.* at 338. Although the Court pointed out that both *Mason* and its companion case *Goodman* "involved altercations that began in bars", it did not appreciate the legitimate distinction between a tavern keeper's liability and that of an ordinary merchant. *Id.* at 333. *MacDonald*, itself, of course, dealt with criminal attacks occurring at the Pine Knob Music Theatre, "an outdoor amphitheater that offered seating on a grass-covered hill." *Id.* at 325. The injuries complained of by the separate plaintiffs in the two consolidated cases, occurred at the hands of fellow concertgoers who were pulling up sod and throwing it during separate rock-music performances. *Id.* at 398. As noted in footnote 74, *supra*, there is a separate line of case law recognizing a "special relationship" between owners of entertainment venues and their patrons. So, *MacDonald* also cannot be cited for the principle, originally dispelled by *Williams*, *supra*, that ordinary merchants can be liable for random criminal attacks perpetrated on their patrons. Incidentally, *MacDonald* itself did not involve an ordinary merchant defendant.

[117] See footnote 68, *supra*, explaining that *Manuel v. Weitzman*, 386 Mich. 157 (1971) was a tavern owner case. *Murdock* was a case which sought to impose liability on an employer for an assault committed by an employee upon the plaintiff, a juvenile performing court-ordered community services at a publicly run camp. The other cases cited in *Mason* were decisions of the Court of Appeals. Finally, as noted in *MacDonald*, *supra* at 341-42 and n 13, *Mason* relied on 2 Restatement Torts, 2d, § 344 and comment f, and its distillation of cases from other jurisdictions. "[T]his Court is not, nor is any other court, bound to follow any of the rules set out in the Restatement". *MacDonald*, *supra*, citing *Rowe v. Montgomery Ward*, 437 Mich. 627, 652 (1991). As noted by this Court in *Smith v. Allendale Mut. Ins. Co.*, 410 Mich. 685, 712-13 (1981):

Unfortunately, the Court in *MacDonald* continued to allow propagation of the mistaken premise that ordinary business invitors had a "special relationship" with their invitees such that there was the level of control by the former over the latter exerted in the traditional common-law "special relationships". This was error. The "relationship" between ordinary merchants and their invitees and between landlords and their tenants does not contain the same fundamental elements of "exclusive control" and "surrender of control", respectively, as do the traditional common law relationships in which a heightened duty of care does exist.[118]

Commercial and residential properties otherwise open and exposed to the public at large do not fall within the specialized category of entities which have relationships with their patrons that give rise to a "heightened duty" of care. As noted in the Second Restatement of Torts:

> One who is required by law to take or who voluntarily takes the *custody of another* under circumstances such as *to deprive the other of his normal power of self-protection* or to *subject him to association* with persons likely to harm him, is under a duty of exercising reasonable care so to *control the conduct of third persons* as to prevent them from intentionally harming the other....[119]

> [A]pplication of a common-law rule to a particular set of facts does not turn upon whether those facts can be characterized in the language of the Restatement section corresponding to the common-law rule. Unlike a statute, which expresses a legislative directive for the treatment of future cases, the Restatement seeks primarily to distill the teachings of decided cases and is descriptive. While its drafters may sometimes strive to choose "the better rule" or to predict or shape the development of the law, its influence depends upon its persuasiveness. Even where a particular Restatement section has received specific judicial endorsement, cases where that section is invoked must be decided by reference to the policies and precedents underlying the rule restated. Textual analysis of the Restatement is useful only to the extent that it illuminates these fundamental considerations.

[118] See generally, *Goldberg*, 186 A.2d at 294-95 (None of the cases analyzed, even those involving tavern owners and owners of entertainment venues "support[ed] the proposition that proprietors of such places must provide police protection against an intruding thug.").

[119] Restatement of Torts (Second), § 320 (1965) (emphasis added).

Certainly, as previously discussed, these circumstances *may be present* in the case of an innkeeper or tavern owner and thereby give rise to a "heightened duty of care", even though that duty is described, even by the Restatement, as one of *reasonable care* – applied in the *context* of each particular relationship. Therefore, circumstances in such cases *may exist* to compel the conclusion that in a given case one's own ability to protect himself is surrendered to such a degree to the proprietor that the proprietor thereby necessarily acquires the ability and therefore assumes the duty to protect him.[120] But, in the case of ordinary business owners, grocers, merchants, landlords (commercial and residential), etc., absent extraordinary custodial environments involving a surrender of control on the part of the invitees and a concomitant devolvement thereof to the proprietors, these defendants are placed in no better physical position to protect others as they are in a position to protect themselves and their own property.[121]

Based on the research and jurisprudence examined in this brief, MDTC submits the rule of law applicable to landlords, as with ordinary merchants, concerning liability for criminal acts upon their premises is that of an ordinary business invitor – to wit, *ordinary* care to keep the *premises reasonably safe*, and further limited in the case of landlords to the conditions and physical aspects of the common areas.

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[120] Compare the treatment given to the two cases in *Mason*. While *Mason* has been cited as a case representing the statement of law concerning a merchant's duty to business invitees, the two establishments at which the criminal attack occurred were bars. In principal, the Court properly applied the law: in *Goodman* liability could be imposed because the tavern owner had been placed on notice of the threat and of the identifiable target of the threat; in *Mason* liability could not be imposed because although the tavern owner knew of the threat he was unaware of the identifiable target of the threat. This rationale was *directly* based on the level of control the proprietor had over his patrons (the assailants and the eventual victims). This followed the precise elements articulated for common-law tavern keeper liability cases. See, e.g., *Gorby*, 4 Mich. App. at 342-43.

[121] *Williams*, *supra* at 499; *Mason*, *supra* at 406 (Weaver, J., dissenting).

Nothing in *Johnston*, *Samson*, *Williams*, *Scott*, *Mason*, or *MacDonald* can be interpreted to require responsibility on the part of an ordinary merchant or landlord for general criminal acts perpetrated on others upon his or her premises. The concept, which appears to have been applied for the first time in *Mason*, that there is a "special relationship" by and between ordinary merchants and their invitees and landlords and their tenants, respectively, is based on an improper infusion into these relationships of the elements in traditional, common-law "special relationships," the latter of which do impose justifiably heightened duties of care on certain businesses (particularly innkeepers and tavern owners) to protect their patrons. This duty is imposed in the latter cases because the invitees do actually surrender control over their person and/or property to the proprietor. These circumstances simply do not exist in the case of ordinary merchants, and, especially as demonstrated herein, landlords.

4. The Court of Appeals Relied on the Mistaken Premise that there is a "Special Relationship" Between Landlords and Tenants Such that the Former has a Heightened Duty of Care Toward the Latter

In the instant case, the Court of Appeals extended the unsupported rationale of *Mason*, which somehow survived *MacDonald*, to the landlord-tenant relationship. Relying on the dicta in footnote 17 of *Williams*, the Court of Appeals reasoned that landlords have a "closer relationship" to their tenants and guests than a merchant vis-à-vis his or her invitees, and, based on this premise, held the limited duty of merchants to invitees to protect against criminal acts occurring on their premises applies with equal or greater force to landlords.[122] This premise is based on a misapprehension of the law. Landlords, in fact, do not have a *heightened* duty based

[122] *Bailey v. Schaaf, et al.*, 293 Mich. App. 611, 640-41 and n 80 (2012), citing *Williams,* 429 Mich at 502 and n 17.

on a "special relationship" with tenants and their guests to protect them from criminal acts of third parties with whom the landlord has no separate relationship.

To arrive at its conclusion – that a landlord may be vicariously liable for the criminal acts of third parties with whom the landlord has no relationship and which are no more foreseeable than any random occurrence of crime in the community – the panel relied on a tenuous, ultimately mistaken premise: "a landlord's *closer relationship* to its tenants and their guests."[123] Quoting *Williams*, the Court of Appeals stated: "[A] landlord has more control in his relationship with his tenants than does a merchant in his relationship with his invitees."[124] The logical conclusion from this mistaken premise then becomes but a simple syllogism, to wit, "if a merchant with lesser ability or responsibility to control or protect its invitees than a landlord is nevertheless required to take reasonable efforts to contact the police in response to a situation presently occurring on the premises that poses an imminent risk of harm to identifiable invitees, *then surely it is logical to hold a landlord, who is in a relationship of higher control, to the same standard.*"[125]

Since "control" is a key element necessary to find the defendant ostensibly liable to the third party who is the victim of the assailant's crime it must be considered whether a landlord really does exercise greater control over his or her premises than does the ordinary merchant. A certain measure of "control" is retained by the latter precisely because the defendant retains actual physical control over the entire venue at the time the events in question arise. Put another way, these proprietors remain in control of their own premises during the entire time it is open to

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[123] *Id.*

[124] *Id.*

[125] *Id.* (emphasis added).

the invitees who are protected by the "duty" in question. Thus, without conceding the point, the "duty" *may be* greater in these cases, however limited, to include a duty to any and all invitees, generally, to protect them from any and all criminal threats on the premises of which the defendant is put on notice.

However, a landlord's "control" over both person (tenants and their guests) and his own property is significantly more attenuated that that of the ordinary merchant. This makes "extrapolation" of the "duty" expressed in *MacDonald*, limited as it is, inapplicable to landlords. There is no rationale to justify extending a duty to a landlord to protect others from random, criminal acts occurring on premises which are essentially surrendered to the control of tenants and guests of tenants; tenants have a significant amount of liberty of association that brings with it, in and of itself, untold variables of circumstances fraught with unfathomable risk. Landlords, in fact and law, have *less control* over tenants and their guests.

The general rule is that a landlord, absent an agreement to the contrary, surrenders possession of the leasehold interest and holds only a reversionary interest.[126] None of the elements of *control* and *custody* that might exist even in an ordinary merchant case are present in the context of the landlord-tenant relationship. Thus, the landlord has no obligation to maintain the demised premises.[127] He does have a duty to maintain and repair any portion of the premises which remains under his control, such as elevators, porches, stairwells, walkways, etc., generally referred to as "common areas".

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[126] *Williams v. City of Detroit*, 127 Mich. App. at 468, citing *Lipsitz v. Schecter*, 377 Mich. 685, 687 (1966). See also Prosser, Torts (4th ed), § 63, pp. 399-400.

[127] *Id.*

When this Court first addressed a landlord's duty to protect tenants from random criminal attacks, it did so based on this "common area" exception and limited the analysis to the landlord's alleged failure to recognize and remedy a defect in the condition of such a common area. In *Johnston*, the tenant was mugged by an unknown person in an unlit and unlocked vestibule of the building, which was located in a high crime area.[128] The Court held that the landlord's duty of care extended to foreseeable criminal activities committed by third parties within the common areas of the apartment unit so as to make the landlord liable for the injuries inflicted on the tenant by the unknown assailant; but it limited the duty of the landlord to maintain or repair, as the case may be, the condition of the common areas, which conditions were seen as having invited or brought about the opportunity for the criminal act.[129]

Later, this Court held that a landlord of a commercial building owed a duty to protect tenants and their invitees from criminal assaults occurring within the building.[130] Again, however, the "duty" limited as it was held to be, was based on the landlord's retention of control over the common areas of the property (an elevator). The Court reasoned that it was the landlord's "responsibility to insure that these areas are kept in good repair and reasonably safe for the use of his tenants and invitees."[131]

The *Johnston* and *Samson* decisions holding landlords liable for injuries sustained by tenants and their guests as the result of criminal attacks are limited to cases in which assailants are on the premises as a consequence of the failure of landlords to take sufficient steps to keep the

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[128] 387 Mich. at 572-73.

[129] *Id.* at 573.

[130] *Samson v. Saginaw Professional Building, Inc.*, 393 Mich. 393 (1975).

[131] *Id.* at 407.

common areas of their premises safe. None of these cases speaks to a separate and independent duty to protect tenants and their invitees by affirmative measures based solely on the legal relationship by and between the landlord and the tenant. In other words, while the legal duties imposed at common law as the result of the relationship between innkeepers and their guest, tavern owners and their patrons; and common carriers and their passengers, to name a few, are grounded in the principal of control and surrender of control, respectively, existing in these legal relationships, the opposite appears to be the case in the legal relationship between landlord and tenant.

In fact, it seems this fine distinction was lost when the Court in *Williams*, in *dicta*, speculated about the "special relationship" by and between landlords and tenants. Subsequent to that decision, Courts began lumping the landlord-tenant relationship in with the "special relationships" of innkeeper / guest, tavern keeper / patron, etc., and apparently assumed, without truly analyzing the nature of the relationship, that the legal duty which adhered in the former was based on the same concepts of control and surrender as have been traditionally recognized at common law for the latter group. Yet, a careful reading of the *Samson* Court's decision reveals the Court was very well aware of the legal limits of the relationship it was addressing when seeking to impose liability upon landlords for criminal attacks of third parties. Some panels of the Court of Appeals appear to have maintained this limitation.[132] However, as noted, other panels

[132] *Stanley*, 203 Mich. App. at 148-149; *Bryant v. Brannen (On Remand)*, 180 Mich. App. 87, 97-98 (1989) ("landlord remains liable to the extent that foreseeable criminal acts are facilitated by a failure to keep the physical premises under his control reasonably safe (e.g., poor locks) or in good repair (e.g., broken locks) but policy reasons expressed in *Williams* led court to conclude landlords not obligated to provide police protection); *Williams v. City of Detroit*, 127 Mich. App. 464 (1983).

have concluded simply that "the landlord's duty to act arises where the risk of harm is foreseeable and the perceived risk is unreasonable."[133] These decisions improperly expand a landlord's duty.

For guidance as to how *Williams* should be treated as it relates to the issue before the Court, consider the Court of Appeals decision in *Bryant v. Brannen (On Remand)*,[134] in which the Court of Appeals held that a residential landlord was not liable where the building's manager shot a tenant who lived across a common hallway. This case provides a unique and timely view of the post-*Williams* application of a premises owner's duty in the context of the landlord-tenant relationship. This Court remanded for consideration and application of *Williams*.[135]

The discussion in *Bryant* is a crucial reference point for the issue being considered in this case because it was a precise treatment by the Court of Appeals, on remand from this Court in light of its decision in *Williams*, of the effect of the reasoning in the latter decision, which was an ordinary merchant liability case, and particularly footnote 17 of that opinion, upon a residential landlord-tenant case. The Court of Appeals concluded, consistent with the position taken in this brief, that the landlord's duty is, and always has been, limited to keeping the physical condition of the common areas safe and free from defects that could increase the risk of danger to tenants and their invitees. Thus, it agreed with the decision in *Williams* to impose *no duty* on the residential

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[133] *Aisner v. Lafayette Towers*, 129 Mich. App. 642 (1983) (landlord owes a duty to tenants based on special relationship as with innkeepers and tavern owners); *Rodis v. Herman Keifer Hosp.*, 142 Mich. App. 425 (1985) (citing *Samson* and *Aisner* and stating, again incorrectly, "the owner of property generally has a duty to protect tenants and invitees from...risk of harm resulting from the foreseeable criminal acts of third parties"); *Holland v. Liedel*, 197 Mich. App. 60, 62 (1992) (misstating "[a] landlord has the duty to protect tenants from foreseeable criminal activities of third parties in the common area of the landlord's premises").

[134] 180 Mich. App. 87, 92-98 (1989).

[135] 431 Mich. 865 (1988).

landlord "find[ing] *Williams'* public policy rationale persuasive *despite* the existence of footnote 17 in that opinion...."[136]

To the contrary, the Court of Appeals in the instant case interpreted this Court's reference in *Williams* to a landlord's duty in footnote 17, coupled with its mention of the split decision in *Samson* and the 1962 decision by the New Jersey Supreme Court in *Goldberg v. Housing Authority of City of New Jersey*,[137] as implicitly overruling any notion that *Samson* suggested anything *more* than the rule that a landlord "remains liable to the extent that foreseeable criminal acts are facilitated by his failure to keep the physical premises under his control reasonably safe (e.g., poor locks) or in good repair (e.g., faulty locks)."[138]

Thus, at least as of 1989, the Court of Appeals interpreted the law, as implied from this Court's decision in *Williams*, and as explicitly set forth in *Samson*, as limiting a residential landlord's liability for criminal attacks perpetrated on tenants to situations in which it could be demonstrated that a physical defect or condition in the premises itself, and particularly in the common areas over which the landlord retained some measure of control, was the *proximate* cause of the criminal attack and resulting injury.[139] More recent decisions of the Court of Appeals have also properly limited the landlord's duty in this regard.[140]

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[136] *Id.* at 97 (emphasis added).

[137] 186 A.2d 291 (1962).

[138] 180 Mich. App. at 97-98, citing *Johnston, supra.*

[139] *Id.*

[140] See **ATTACHMENT B**, *Cuolahan v. Stamper*, Unpublished Per Curiam Decision of the Michigan Court of Appeals, dated November 9, 2004 (Docket No. 249244), Slip Op at 1-2 and n 1; **ATTACHMENT C**, *Loper v. John Doe, et al.*, Unpublished Per Curiam Decision of the Michigan Court of Appeals, dated May 19, 2005 (Docket No. 252675), Slip Op. at 3-4 (Zahra, J. on the panel).

It is the nature of the respective possessory interests in the landlord-tenant relationship, as opposed to any custodial relationship, which dictates the question of duty.[141] The duty in the former relationship arises only when the landlord, either affirmatively or through neglect, created a dangerous condition in the common areas, i.e., those spaces over which the landlord retains a possessory property interest, which condition then amplifies potential exposure to criminal assaults.[142] Where "[t]he landlord has done nothing to create a condition conducive to criminal assaults" then there is no legally cognizable duty.[143]

By relying on a broad application of footnote 17 from *Williams*, the Court of Appeals in the instant case effectively overruled the holding in *Bryant* and reinstated this notion that the relationship between a landlord and tenant and the *control* the former exerts over the latter is equal to that between innkeepers and their guests and tavern owners and their patrons; the concept from *Mason* left undisturbed by this Court's decision in *MacDonald*.

Although there are important and well-grounded reasons for imposing on certain business proprietors, i.e., innkeepers, tavern owners, common carriers, a "heightened duty" based on a "special relationship", the *parallel* duty that is said to exist by and between merchants and business invitees and landlords and tenants, respectively, is not supported by this rationale. As this Court has consistently recognized in the past, the "special relationships" that were recognized at common law for inns, taverns, and common carriers, and the concomitant duties that attach to these entities in such relationships depend largely, if not exclusively, on the concept and level of "control" that these entities are seen as having over their invitees and the

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[141] *Stanley*, 203 Mich. App. at 147-48; *Johnston*, *supra* at 573.

[142] *Id.* at 150, citing *Johnston*, *supra*.

[143] *Id.* at 150-51.

necessary *surrender* thereof on the part of the latter over their own person.[144] In the context of everyday commercial businesses and residential rental properties, this level of "control" by the premises owner over invitees is simply not present.

Moreover, there is a unique aspect of the landlord-tenant relationship that makes imposing liability under the circumstances of this case quite onerous. A landlord, and more particularly the landlord of a commercial residential property as in this case, has virtually *no control* over what tenants do on and about their privately held leasehold interests, nor whom they invite to partake in such activities.[145] Indeed, a landlord must respect, within the boundaries of the law, the tenants' rights to privacy, liberty and freedom of association. The landlord has little control over circumstances in which a gathering at a tenant's dwelling attracts attention of an unwanted sort. Indeed, the tenant, not the landlord, has more control over his own actions and that of the individuals with whom he chooses to associate. There is, in such cases, therefore a conspicuous *lack* of surrender of control by a tenant (or his guest) over his or her own person.

D. Policy Concerns

MDTC has demonstrated that the relationship between landlords and their tenants is far more attenuated than any of the common-law special relationships that gave rise to a heightened duty of care at common law. Since these latter relationships are based on the degree of control the defendant has over the assailant and/or the victim, and because landlords exercise virtually no control over either in the usual case, there is no legal or rational justification for imposing a

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[144] *William*, 495 Mich. at 499 and n 8, citing Bazyler, The duty to provide adequate protection: Landowners' liability for failure to protect patrons from criminal attack, 21 Ariz. L. Rev. 727, 736 (1979).

[145] See, e.g., *Williams*, 127 Mich. App. at 469 (stating "the general rule is that a landlord, absent an agreement to the contrary, surrenders possession of the leasehold and holds only a reversionary interest....").

duty of extraordinary care in what is essentially an ordinary business relationship. For the same reason, there is also no rationale for extending the limited duty articulated in *MacDonald* to landlords. MDTC believes that this rationale is sufficient to reverse the decision of the Court of Appeals.

However, significant policy concerns are also associated with the question of duty and liability in this case. Where the circumstances of a case defy conventional analysis using legal principles such as negligence, duty, breach, foreseeability and causation, "recourse must be had to the basic issues of policy underlying the core problem whether the plaintiff's interests are entitled to legal protection against the defendant's conduct."[146]

1. Imposing Liability Would Lead to Economic Disincentives to Offer Affordable Housing

As with the situation facing merchants in *MacDonald*, imposing liability for failing to protect against or prevent criminal acts upon tenants and their guests would create a disincentive on the part of landlords to offer affordable housing in areas where it is most needed and in which there is a higher volume of criminal activity.[147] Many courts have expressed concerns about this potential consequence. "Businesses may react by moving from poorer areas where crime rates are often highest."[148] As Judge Brennan explained:

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[146] *Buczkowski v. McKay*, 441 Mich. 96, 102 (1992), citing *Waube v. Warrington*, 216 Wis. 603; 258 N.W. 497 (1935).

[147] *MacDonald*, 464 Mich. at 344-345 and n 16, citing *McNeal v. Henry*, 82 Mich. App. 88, 90-91, n 1 (1978) and Homant & Kennedy, *Landholder Responsibility for Third Party Crimes in Michigan: An Analysis of Underlying Legal Values*, 27 Univ. of Toledo L.R. 115, 116, 147 (1995).

[148] See, e.g., *McClung v. Delta Square Ltd. Partnership*, 937 S.W.2d 891, 900 (Tenn. 1996), accord *McNeal*, *supra*.

> In the majority of urban communities, both large and small businesses could not bear the heavy insurance burden which would be required to protect against this extraordinary kind of liability. Some of our big cities have more than their share of destructive and violent persons, young and old, who roam through downtown department stores and other small retail businesses stealing and physically abusing legitimate patrons. Guards are placed in the stores but those activities continue. We fear that to hold businessmen liable for the clearly unforeseeable third-party torts and crimes incident to these activities would eventually drive them out of business.[149]

Certainly, insurers would be wary to underwrite ventures that sought to offer housing in such areas. The end result of this would be avoidance of these locations by business owners and insurers; areas where affordable and decent housing is most needed.

The significance of this policy concern cannot be understated. If liability is imposed, it would seem that only the most unscrupulous or most resolute would offer housing at a greater risk of inviting predation upon tenants and their guests in the former case and, in the latter case, the risk of unwarranted infringements upon tenants' freedoms and liberties.

The fear that imposing liability on landlords for criminal acts perpetrated on tenants and their guests carries with it the same unwanted consequences on decisions to provide affordable and safe housing in high crime areas that was expressed in *MacDonald* and *McNeal*. This rationale applies with equal, if not greater, force to landlords:

> We are not dealing with a risk which can be passed along in an increase in liability insurance premiums. We are talking of the employment of men, perhaps...if something like effective assurance is to be realized...around the clock.... If the owner must provide that service, every insurance carrier will insist that he do it. The bill will be paid, not by the owner, but by the tenants. And if, as we apprehend, the incidence of crime is greatest in the areas in which the poor must live, they, and they alone, will be singled out to pay for their own police protection. The burden should be upon the whole community and not upon the segment of the citizenry which is least able to bear it.[150]

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[149] *McNeal*, *supra* at 90, n 1.

[150] *Goldberg*, 186 A.2d at 589-90.

Certainly, this concern as expressed in *MacDonald* applies with equal measure to the landlord and property management company in this case.

2. *Vagueness is Conspicuous in All Aspects of the Negligence Analysis as Applied to this Case*

a. Breach. How will trial courts measure a breach of the duty articulated in *MacDonald*? In addressing what a "reasonable response" was the Court in *MacDonald* held "the duty to respond requires only that a merchant make reasonable efforts to contact the police."[151] But this vaguely stated and limited *duty to respond* that was articulated in *MacDonald* hardly suffices to achieve any just goal in the context of the landlord-tenant relationship – one that is dependent on the extraordinarily diverse multitude of variables attendant to the random and unpredictable nature of individual conduct of tenant and guest over which a landlord has no control. As noted by Judge Weintraub in the *Goldberg* decision:

> [I]f the duty springs from a combination of tenancies and prior unlawful events, what kind of offense will suffice, and in what number, and will crimes next door or around the corner or in the neighborhood, raise the obligation? And if a prescient owner concludes the duty is his, what measures will discharge it? It is an easy matter to know whether a stairway is defective and what repairs will put it in order. Again, it is fairly simple to decide how many ushers or guards suffice at a skating rink or a railroad platform to deal with the crush of a crowd and the risks of *unintentional* injury which the nature of the business creates, but how can one know what measures will protect against the thug, the narcotic addict, the degenerate, the psychopath and the psychotic? We doubt that any police force in the friendliest community has achieved that end. How then can the owner know what is enough to protect the tenants in their persons and property?[152]

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[151] *MacDonald*, *supra* at 336.

[152] *Goldberg*, *supra* at 589.

Thus, it is one thing to articulate a duty to respond, and define that simply as taking reasonable measures to involve the police, but what standard of performance is the landlord to look for guidance?

b. Foreseeability. There is no *foreseeability*. Generally, tort-based actions for negligence, gross negligence, wanton misconduct, and intentional and negligent infliction of emotional distress may be maintained only if a legal duty exists that requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm.[153] One of the fundamental elements of imposing tort liability upon a person is the extent to which he or she can be said to have foreseen the injury complained of.[154] The existence of a duty depends in part on foreseeability, i.e., whether it was foreseeable that the actor's conduct may create a risk of harm to the victim.[155]

Allegations that a business invitor is liable for criminal acts committed upon invitees by third parties with no relation to the owner are inherently unable to satisfy the requisite elements of a tort action because such acts are seen as an intervening cause of harm to the plaintiff.[156] "[I]f intervening events are of such a kind that no foresight could have been expected to look out for them, the defendant is not to blame for having failed to do so."[157] In short, sudden criminal acts perpetrated by individuals upon others are not the sort of harm that can be protected against. With this fundamental element lacking, it is seen as unjust and arbitrary to impose a duty on one

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[153] *Maiden v. Rozwood*, 461 Mich. 109, 131-32 (1999).

[154] *Moning v. Alfono*, 400 Mich. 425, 438-39 (1977).

[155] *Id.* at 439, citing *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 1050 (1916) (Cardozo, J.).

[156] *Ford v. Monroe*, 559 S.W.2d 759, 762 (Mo. App. 1977).

[157] Holmes, The Common Law (1881), at 92.

party for an act that he or she is in no better position to guard against.[158] In this regard, grocers, merchants, landlords, etc., are as likely to be the victim of criminal acts as are their patrons or tenants, respectively.[159]

Crime is a risk inevitably faced everywhere by everyone.[160] Private parties should not be forced to take measures or accept responsibility for actions of other individuals which are beyond their control. Thus, business owners should not be viewed as the insurers of their patrons' safety.[161] The lack of foreseeability is particularly prevalent when discussing these occurrences in the community at large. As one jurist noted:

> Everyone can foresee the commission of crime virtually anywhere and at any time. If foreseeability itself gave rise to a duty to provide 'police' protection for others, every residential curtilage, every shop, every store, every manufacturing plant would have to be patrolled by the private arms of the owner. And since hijacking and attack upon occupants of motor vehicles are also foreseeable, it would be the duty of every motorist to provide armed protection for his passengers and the property of others. Of course, none of this is at all palatable.[162]

Indeed, in such situations, *control* over the situation is precisely what is lost by the merchant or the landlord faced with such circumstances.[163] In this regard, merchants and landlords are, along with their invitees and tenants, respectively, equally vulnerable to crime.[164]

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[158] Zacharias, *The Politics of Torts*, 95 Yale L.J. 698, 702 (1986). See also Haines, *Landlords or Tenants: Who Bears the Costs of Crime*, 2 Cardozo L. Rev. 299 (1981).

[159] *MacDonald*, *supra* at 337 and n 12.

[160] *MacDonald*, *supra* at 335.

[161] *Williams*, 429 Mich. at 499.

[162] *Goldberg*, *supra* at 293.

[163] *Id.*

[164] *Id.*

The question of "duty", and when to impose one, is largely a choice in competing policy interests.[165] Yet, "'[n]egligence' is not 'foresight', but precisely the want of it – if foresight were presumed, the ground of the presumption and therefore the essential element, would be the knowledge of the facts that made foresight possible."[166] Precisely because a person has no idea that a sudden, criminal violent act will occur, it is impossible to expect him to have knowledge of the fact that makes the incident preventable, absent extraordinary circumstances that would put him in a position to both foresee the event and the harm, and, more importantly to prevent it. Randomly occurring criminal acts are simply not foreseeable.[167] A merchant or landlord simply "cannot control crime in the community."[168]

c. ***Causation.*** How will trial court's and juries determine causation?

> [T]here would also be exceptional uncertainty with respect to the issue of causation. This is so because of the extraordinary speculation inherent in the subject of deterrence of men bent upon criminal ventures. It would be quite a guessing game to determine whether some unknown thug of unknowable character and mentality would have been deterred if the owner had furnished some or some additional policemen. It must be remembered that police protection does not, and cannot, provide assurance against all criminal acts, and so the topic presupposes that inevitably crimes will be committed notwithstanding the sufficiency of the force. Hence the question of proximate cause is bound to be of exceptional difficulty.[169]

Are landlords to be penalized for having security guards and private entities patrolling their premises because they fail to summon the police, perhaps exercising some rational *or*

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[165] *Buczkowski v. McKay*, 441 Mich. 96, 102-03 (1992), citing *May v. Goulding*, 365 Mich. 143, 155-56 (1961).

[166] Holmes, supra at 407.

[167] *MacDonald, supra.*

[168] *Mason, supra* at 401, citing *Williams, supra* at 501-02.

[169] *Goldberg*, 186 A.2d at 590-91.

irrational discretion not to in a given circumstance among a myriad of unpredictable possibilities? Are landlords to be penalized for *not having* security guards at all because this will automatically be the catalyst to conclude that the harm could have been prevented but was not?

It is remarkable that the landlord in the instant case had, in fact, provided tenants with a courtesy service, though he was under no legal obligation to do so. Incidentally, it is the presence of this company's employees that has created the question of whether to extend the ostensible duty articulated in *MacDonald* to the landlord in the first place, and whether that duty was breached. The case law is clear that under the circumstances of this case, had there been no such service, no duty and therefore no liability could be imposed.

3. Courts Are Loathe to Encourage Private Policing and Vigilantism

Under traditional precepts of "individual responsibility," the common law shrank from imposing upon the ordinary citizen the duty to protect other members of the public; protection of the citizenry is the duty of the government and not of individual members of society.[170] This Court has consistently rejected the notion that business invitors should act as private policing agencies as it is the primary and sole duty of government to provide for the public's safety.[171] To impose liability on landlords in the instant case raises the same policy concerns about encouraging, indeed, obligating landlords to engage in vigilantism and private policing.

In *MacDonald*, this Court soundly rejected the proposition addressed in *Williams* that a merchant should be obligated to provide "armed, visible security guards to deter criminal acts by

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[170] Prosser, Law of Torts (4th ed) § 56, at 336. See also *Nappier v. Kincade*, 666 S.W.2d 858, 860 (Mo. App. 1984).

[171] *Williams*, 429 Mich. at 503-04.

third parties."[172] "[S]uch a duty," the Court explained, "is vested in the government alone; and to shift the burden to the private sector 'would amount to advocating that members of the public resort to self-help,'" which "contravenes public policy."[173] As the Court stated in *Williams*, "neither the Legislature nor the constitution has established a policy requiring that the responsibility to provide police protection be extended to commercial businesses."[174] "It is unreasonable to expect a merchant to provide police protection, a duty vested in the government."[175] Even where business proprietors *do voluntarily* undertake security measures, they can never guarantee their invitee's personal safety.[176]

It is worth pointing out that this Court in *Scott* held that it will not hold business invitors liable where security that is provided fails to prevent a criminal act.[177] To impose a duty in the present case is the equivalent of penalizing the landlord for having additional support on the property when he was under no particular legal obligation to provide such protective measures.[178]

If a duty is imposed on landlords to protect against or respond to criminal attacks upon tenants and guests under the circumstances of this case, an extension of the law heretofore not made by this Court, the unfortunate consequence could be that the landlord simply *contractually*

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[172] *MacDonald*, *supra* at 336, citing *Williams*, *supra* at 501.

[173] *Id.*, quoting *Williams*, *supra* at 503-04.

[174] *Williams*, *supra* at 499.

[175] *Mason*, *supra* at 401, citing *Williams*, *supra* at 501-02.

[176] *Scott*, *supra* at 443, 448, 450-51.

[177] *Id.*

[178] *Scott*, 444 Mich. at 452 (stating "even where a merchant voluntarily takes safety precautions…[s]uit may not be maintained on the theory that the safety measures are less effective than they could or should have been").

absolves himself of any and all liability in a lease provision, leaving tenants and their guests with *less* rather than *more* protection. Or, the landlord could, at great expense to himself and concomitant inflation of rent for his tenants provide *too much* security. In the latter case, the higher rent will inevitably make safe housing unaffordable, and in the former case, no safe housing will be available.

Or, a landlord may risk liability for acting too diligently. A direct byproduct of the "duty to respond" as it is described in *MacDonald*, coupled with civil liability suits for civil rights violations, malicious prosecution, etc., forces merchants to make difficult and sometimes costly choices. Sensing that there *might be* a threat of criminal harm perpetrated upon an invitee on his premises, merchants are said to have a duty to call the police. Yet, this very act exposed the merchant to a civil liability suit in the case of *McFadden v. Walmart*,[179] which this author briefed and argued in the Court of Appeals.

Several unruly minors were roaming through the store shouting, creating a ruckus, and, by the accounts of some of the store employees, making threats of bodily harm.[180] The store employees also suspected these individuals may have been shoplifting.[181] After one of the employees heard one of the individuals make a threat of physical harm she notified the store manager, who then called the police.[182] The manager testified at her deposition that when she was notified of this threat she called the police because she did not want to be responsible for

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[179] *McFadden, et al. v. Wal-Mart Stores East, L.P., et al.*, Unpublished Opinion of the Michigan Court of Appeals, January 20, 2011 (Docket No. 293306) (**ATTACHMENT D**).

[180] *Id.*, Slip Op. at 1-2.

[181] Recent incidents of shoplifting had been reported to store management and personnel and a message was put out to all employees to be aware of groups of individuals coming into the store and creating disturbances and distractions so that they could steal.

[182] *Id.* at 3-4.

having failed to protect someone (an employee or a customer) from harm. In other words, the merchant fulfilled its duty under *MacDonald*.

The police arrived, removed the individuals from the store, and ultimately released them into the custody of their parents. No charges were filed. A representative of the minors then filed suit against the merchant for assault and battery, false arrest and imprisonment, intentional infliction of emotional distress, negligence, denial of equal public accommodations under MCL 750.147, and violation of the Michigan Civil Rights Act, MCL 37.2101 *et seq.*[183] The plaintiffs claimed that in fulfilling its *duty* under *MacDonald*, the merchant had breached a duty of care to them by notifying the police.[184] Thus, for fulfilling the duty imposed by this Court in *MacDonald*, the merchant was sued and had to expend considerable monies in defending itself.

There is no reason that imposing the same duty on landlords to protect their tenants and guests from potential criminal attacks would not lead to the same dilemma. Indeed, having to discern who, among a crowd of guests at a party hosted by tenants, might pose a threat of harm to other guests or tenants is fraught with even greater uncertainty. Imposing a duty to exercise the necessary and appropriate degree of discretion in every such circumstance is impossible. This case highlights the dilemma that is now faced by merchants forced at once to undertake the duty to protect patrons but, at the same time risk a liability suit for acting on that duty.

It is also noteworthy to point out that at least law enforcement officers, who are charged with the duty of protecting the public and keeping the peace, are immune from liability for performing their discretionary duties, even negligently so, when that decision results in some

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[183] *Id.* at 1.

[184] *Id.* at 5-6, citing *MacDonald, supra.*

harm.[185] Private entities, regardless of the measures they might undertake to protect invitees, are offered no such relief.

4. The Duty Imposed by the Court of Appeals Creates Vicarious Criminals

Finally, as a matter of fundamental fairness, it is wrong to impose upon a landlord a duty to compensate the victim of criminal conduct, when it is not the landlord who has committed the conduct. It bears mention, once more, that the criminal alone is responsible for his crime. As it currently stands in the Court of Appeals opinion, this new-found legal duty imposed on merchants and landlords to protect patrons and tenants (or their guests), respectively, extrapolated as it has been from the original common-law duty of innkeepers and tavern owners, runs contrary to basic truths about individual responsibility that lay at the foundation of the common law. There is no such thing as a "vicarious" criminal. Imposing liability in this case for the criminal act of an unknown and unrelated third party is an arbitrary shifting of the moral, social and financial blame from the perpetrator to the landlord and property management company.[186]

CONCLUSION

The commercial or residential landlord's control over his tenants and their guests is far too attenuated to serve as a rationale for finding a common-law "special relationship" in the instant case. The Court of Appeals reasoning that there is a greater degree of control in the case

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[185] MCL 691.1401 *et seq.*, the Governmental Tort Liability Act provides immunity to governmental entities and individuals performing discretionary functions. See MCL 691.1407(2); *Odom v. Wayne County*, 482 Mich. 459 (2008); *Robinson v. City of Detroit*, 462 Mich. 439 (2000).

[186] Baker & Cole, *Property Owners' Liability for Criminal Acts on Their Premises: Are There Foreseeable Limits?*, Contemporary Legal Notes Series, No. 26 (Nov. 1997), at 2.

of the landlord-tenant relationship than that found in the ordinary merchant-customer relationship is erroneous.

Judge Souris' remarks in the *Frederick* case perhaps best highlights the importance of this Court's analysis concerning duty in this case. It is the law that informs prudent decision making and it is the law, therefore, that must be clearly stated so that it can guide progress rather than detract from it.[187] Put simply, knowledge of the law allows people to make appropriate decisions in going about their daily affairs. "Fairness requires that if a [landlord]...could be held liable for the failure to [perform a new duty], he should be able to ascertain in advance of a jury's verdict whether the duty is his and whether he has performed it."[188]

More importantly, perhaps, as noted by Justice Souris, respect for the province and function of the jury requires that the law, which is a constant and overarching principle applicable to a multitude of everyday factual circumstances in the particular case, be clearly articulated and established so that it may be correctly applied in each case. Courts, especially this Court, can best guarantee that a plaintiff's case will be judiciously *and* justly administered if a jury, given full access to the facts, is appropriately guided as to the applicable law. "[I]n exercising [its] common-law authority [this Court's] role is not simply to 'count heads' but to determine which common-law rules best serve the interests of Michigan's citizens."[189] *Amicus curiae*, MDTC, urges the Court to reverse the Court of Appeals decision.

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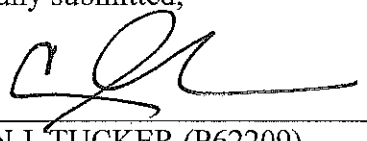
[187] *Frederick v. City of Detroit Dep't of St. Railways*, 370 Mich. 425, 435-437 (1963). See also *Williams*, 429 Mich. at 503 and n 18, citing Holmes, The Common Law, Lecture III (1923), p. 111 .

[188] *Williams, supra* at 502-03.

[189] *Stitt v. Holland Abundant Life Fellowship*, 462 Mich. 591, 607 (2000).

Respectfully submitted,



CARSON J. TUCKER (P62209)
LACEY & JONES, LLP
Attorney for *Amicus Curiae*
Michigan Defense Trial Counsel

Dated: November 28, 2012

EXHIBIT A

STATE OF MICHIGAN

COURT OF APPEALS

BONNIE FLANIGAN, Personal Representative of the Estate of PATRICK C. FLANIGAN, Deceased,

Plaintiff-Appellant,

v

ANDREW NEIL VICHUNAS, AIRWAY ENTERPRISES, d/b/a AIRWAY LANES, IDA BENNING, and FRANK P. BENNING,

Defendants-Appellees.

UNPUBLISHED
August 6, 2002

No. 231419
Oakland Circuit Court
LC No. 96-524992-NO

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

PER CURIAM.

Plaintiff appeals as of right from the order granting summary disposition to defendants on her premises liability claim. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff's decedent initiated this suit seeking to recover for injuries suffered as a result of a fight in a bowling alley bar parking lot in the early morning hours of June 29, 1995. Although he had arrived with his friends at the bar at approximately 10:30 p.m., he became tired and went out to sleep in the car at around 12:30 or 1:00 a.m. As the bar was closing, a disturbance erupted between his friend and defendant Vichunas in the parking lot. Plaintiff's friend woke him to aid in the fight. Vichunas knocked plaintiff down and kicked him in the head several times. Plaintiff suffered closed head injuries that resulted in short-term memory impairment and other neurological problems. Plaintiff lost his job and committed suicide six months after filing suit. The complaint was subsequently amended to include a claim for wrongful death.

Defendants other than Vichunas (who defaulted) moved for summary disposition of the premises liability action pursuant to MCR 2.116(C)(10), arguing that they could not be held liable for plaintiff's injuries as a matter of law because the injuries were not reasonably foreseeable. The trial court agreed, granted the motion, and subsequently dismissed the complaint after the portion of the complaint alleging dramshop liability was sent to binding arbitration by stipulation of the parties.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). MCR 2.116(C)(10) provides that summary disposition is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. In ruling on the motion, the court must consider the pleadings, affidavits, depositions, and other documentary evidence submitted by the parties. *Smith*, *supra*, 460 Mich 455. The party moving for summary disposition must support its position with documentary evidence. *Id.*; MCR 2.116(G)(4) and (5); *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). The opposing party must then counter the motion with evidentiary materials demonstrating the existence of a genuine issue of disputed fact. MCR 2.116(G)(4); *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994).

Mason v Royal Dequindre, Inc, 455 Mich 391; 566 NW2d 199 (1997), involved facts virtually identical to those presented in this case. In *Mason*, the Supreme Court held that a merchant could not be held liable for injuries to a bar patron because there was no contact between the assailant and the plaintiff that would have placed the bar staff on notice that the plaintiff was in danger when he left the bar. *Id.*, 455 Mich 403-404. Similarly, in this case, it is undisputed that there was no contact whatsoever between Vichunas and plaintiff inside the bar. Defendants had no way of knowing that plaintiff remained on the premises sleeping in the car in the parking lot, that a fight would spontaneously erupt as Vichunas was leaving the bar, or that plaintiff's friend would involve him in the altercation. Because plaintiff was not therefore identifiable as an invitee at risk of harm, no duty arose on the part of defendants. *Mason*, *supra*, 455 Mich 405.

Plaintiff's argument is primarily a contention that defendants should have anticipated trouble. However, in *MacDonald v PKT, Inc*, 464 Mich 322; 628 NW2d 33 (2001), the Supreme Court stated conclusively that merchants have "no obligation to . . . anticipate the criminal acts of third parties" and are "not obligated to do anything more than reasonably expedite the involvement of the police" once criminal activity becomes apparent. *Id.*, 338. The Court acknowledged that criminal acts are "irrational and unpredictable" and held that "it is unjustifiable to make merchants, who not only have much less experience than the police in dealing with criminal activity, but are also without a community deputation to do so, effectively vicariously liable for the criminal acts of third parties." 464 Mich 335.

To the extent that previous decisions of this Court state a different standard, such as *Gorby v Yeomans*, 4 Mich App 339; 144 NW2d 837 (1966), on which plaintiff relies, it must be concluded that such cases have been impliedly overruled by *Mason* and *MacDonald*. Furthermore, *Gorby* is distinguishable on its facts, because the altercation in that case occurred inside the tavern in view of the staff and the staff unreasonably failed to summon the police or do anything at all once the disturbance became obvious. *Id.*, 344. Consequently, we must conclude that the trial court in this case did not err in granting summary disposition to defendants with regard to plaintiff's premises liability claim.

Affirmed.

/s/ Christopher M. Murray
/s/ David H. Sawyer
/s/ Brian K. Zahra

EXHIBIT B

STATE OF MICHIGAN

COURT OF APPEALS

TIMOTHY P. CUOLAHAN, as Personal Representative of the Estate of NICHOLAS J. CUOLAHAN, Deceased,

Plaintiff-Appellee,

v

CHRISTOPHER LEE STAMPER,

Defendant-Appellant,

and

MARK LUDWIG, JOHN PAUL MERCER, DAVID ADAMS, GREGORY FRAUNHOFFER, d/b/a COUNTRY HERITAGE MOBILE HOME COMMUNITY PARK, ROBERT VILCEK, and COUNTRY HERITAGE MOBILE, LLC, d/b/a COUNTRY HERITAGE MOBILE HOME,

Defendants.

UNPUBLISHED
November 9, 2004

No. 249244
Monroe Circuit Court
LC No. 01-013389-NZ

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

PER CURIAM.

Defendant Christopher Stamper (defendant) appeals as of right following entry of a consent judgment that preserved his right to challenge the trial court's denial of his motion for summary disposition. We reverse. This appeal is being decided without oral argument under MCR 7.214(E).

This case arises from the tragic death of plaintiff's decedent Nicholas Cuolahan (Nicholas). At the time of the incident, Mark Ludwig, evidently believing his shotgun was unloaded, aimed it at Nicholas and pulled the trigger, apparently in an attempt to scare him as a practical joke. Unfortunately, the gun was actually loaded and fired a bullet that fatally injured Nicholas. At the time, Ludwig and Nicholas were both residing in defendant's home.

Defendant argues that the trial court erred by denying his motion for summary disposition under MCR 2.116(C)(10). We agree. A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim and a trial court's decision on such a motion is reviewed de novo on appeal. We consider the facts in the light most favorable to the nonmoving party. *Dressel v Ameribank,* 468 Mich 557, 561; 664 NW2d 151 (2003).

Plaintiff's complaint asserted a claim against defendant based on a premises liability theory framed in terms of defendant's failure to protect Nicholas from Ludwig. The parties do not dispute that defendant's duty to Nicholas was as an invitee because Nicholas was to contribute financially to help pay the household bills, thus conferring a pecuniary benefit on defendant. *Stanley v Town Square Coop,* 203 Mich App 143, 149; 512 NW2d 51 (1993). Both defendant and the trial court relied on our Supreme Court's decision in *MacDonald v PKT, Inc,* 464 Mich 322; 628 NW2d 33 (2001), regarding the duty owed to an invitee vis-à-vis the criminal acts of a third party. However, the rules cited in *MacDonald* pertain to merchants' (business invitors) duty to commercial invitees and are inapplicable to this case where the parties' relationship is essentially one of landlord-tenant.[1]

Stanley, supra, remains the authority regarding a landlord's duty to a tenant with regard to third-party criminal acts. The duty a possessor of land owes to his invitees is not absolute, as he is not an insurer of their safety. A landlord must exercise reasonable care to protect their tenants from foreseeable criminal activities in common areas inside the structures that the landlord controls. *Id.* at 149. And this duty "exists only when the landlord created a dangerous condition that enhances the likelihood of exposure to criminal assaults." *Id.* at 150. The landlord's duty is limited to the common areas because "a landlord exercises exclusive control over the common areas of the premises," and thus, is the only one who can take reasonable precautions to ensure these areas are safe. *Id.* at 146.

The essential facts of this case are not in dispute. Ludwig and Nicholas were long-time friends and moved in with defendant approximately two weeks before the shooting incident, the specific third-party criminal act at issue. Ludwig kept his gun under the couch in the living room. There is no evidence that the living room of defendant's home was a common area as the couch also served as Ludwig's bed. And the shooting actually occurred in a bedroom. Even if we were to assume that all rooms in defendant's home were common areas, defendant owed no duty to Nicholas because defendant did not create the condition which led to the criminal act.

Moreover, a landowner owes no duty to an invitee to protect him from known dangers unless the landowner should anticipate the harm despite such knowledge. *Id.* at 148-149. The evidence showed that Nicholas had been present on at least one prior occasion where Ludwig had been playing with the gun pretending to shoot people and was aware of this proclivity. And

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[1] In *MacDonald, supra* at 326, 334-335, our Supreme Court reaffirmed the limitations placed on a merchants duty in *Scott v Harper Recreation, Inc,* 444 Mich 441; 506 NW2d 857 (1993), and *Williams v Cunningham Drug Stores, Inc,* 429 Mich 495; 418 NW2d 381 (1988). In *Williams, supra* at 502 n 17, the Court specifically noted the differences regarding the duty owed by a merchant and a landlord as to their respective invitees. *Stanley, supra* at 149.

despite the fact that Ludwig had been playing with the gun in the moments before approaching Nicholas, Ludwig's act of shooting Nicholas was not foreseeable. Ludwig had brought the gun out on previous occasions without incident and there was no reason for defendant to foresee that the gun was actually loaded. Accordingly, the trial court erred in denying defendant's motion for summary disposition. Because the terms of the consent judgment provide that reversal of the court's decision would not result in a trial, but rather in defendant not being liable for the judgment amount, a remand is unnecessary.

Reversed.

/s/ Christopher M. Murray
/s/ David H. Sawyer
/s/ Michael R. Smolenski

EXHIBIT C

STATE OF MICHIGAN

COURT OF APPEALS

THOMAS LOPER,

Plaintiff-Appellant,

v

JOHN DOE,

Defendant,

and

PL & L INVESTMENTS II, L.L.C., TOWN LIMOUSINE, d/b/a GM LIMO and MOTOWN LIMO, and CONCEPT MOLD,

Defendants-Appellees.

UNPUBLISHED
May 19, 2005

No. 252675
Macomb Circuit Court
LC No. 03-000960-NO

Before: Saad, P.J., and Zahra and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition to defendants PL & L Investments II, L.L.C. ("PL & L"), Town Limousine ("Town Limo") and Concept Mold. We affirm.

I. Facts and Procedure

On December 31, 2002, plaintiff hired Town Limo to transport him and friends and family members of his to parties and other events celebrating New Year's Eve. After midnight, the limousine driver took plaintiff and the other revelers to Town Limo's offices to get champagne promised to plaintiff in the contract. PL & L owned the warehouse in the industrial park that housed both Town Limo's offices and Concept Mold's factory. The limousine driver pulled into the parking lot outside the warehouse that contained the offices for Town Limo and stopped the limousine near the entry doors to Concept Mold, where a party was in progress. The party was sponsored by Scott Fleury, the son of Concept Mold's owner. Fillipo Leone, PL & L's owner and the landlord for the warehouse leased to Town Limo and Concept Mold, was unaware of the party. The limousine driver walked into the warehouse, and plaintiff and several other party members got out of the limousine. Shortly thereafter, several unidentified men associated with the Concept Mold party exchanged heated words with plaintiff and his party members.

While in the parking lot, an unidentified assailant approached plaintiff from behind and kicked him in the leg, knocking plaintiff to the ground and injuring his leg and knee. When the limousine driver returned, he took plaintiff to the hospital. Plaintiff later underwent surgery for injuries sustained from the assault.

Plaintiff filed suit, asserting a claim of assault and battery against his unidentified assailant, identified only as "John Doe," and negligence against PL & L, Town Limo, and Concept Mold. The trial court granted summary disposition for defendants.

II. Analysis

A. Standard of Review

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Adair v Michigan*, 470 Mich 105, 119; 680 N 386 (2004). The existence of a legal duty is a question of law that this Court also reviews de novo. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004).

> A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* at 163. When deciding a motion brought under this section, a court considers only the pleadings. MCR 2.116(G)(5).
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> * * *
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> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. 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), (G)(4). *Quinto v Cross & Peters Co*, 451 Mich 358; 547 NW2d 314 (1996). [*Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999)].

B. Discussion

Plaintiff contends that defendants were negligent in contributing to the creation of a dangerous situation that exposed him to harm. Plaintiff asserts that Concept Mold's liability arises from its illegal provision of alcohol to minors, which caused plaintiff to be assaulted. Plaintiff argues that PL & L is liable as the owner of the property where plaintiff was assaulted and through their relationship with Concept Mold. Plaintiff argues that Town Limo is liable because it breached its duty to plaintiff as a common carrier by taking plaintiff and his companions to a location where the potential for harm to plaintiff was foreseeable.

"In order to establish a prima facie case of negligence, the plaintiff must prove: '(1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached that duty; (3) that the defendant's breach of duty was a proximate cause of the plaintiff's damages; and (4) that the plaintiff suffered damages.' " *Terry v Detroit*, 226 Mich App 418, 424; 573 NW2d 348 (1997), quoting *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 203; 544 NW2d 727 (1996). "The threshold question in a negligence action is whether the defendant owed a duty to the plaintiff." *Fultz, supra* at 463. "Duty is an obligation that the defendant has to the plaintiff to avoid negligent conduct." *Terry, supra* at 424. "[A] negligence action may be maintained only if a legal duty exists that requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm." *Graves v Warner Bros*, 253 Mich App 486, 492; 656 NW2d 195 (2002). Courts evaluate different variables to determine whether a duty exists, including

> "foreseeability of the harm, existence of a relationship between the parties involved, degree of certainty of injury, closeness of connection between the conduct and the injury, moral blame attached to the conduct, policy of preventing future harm, and the burdens and consequences of imposing a duty and the resulting liability for breach." [*Id.* at 492-493, quoting *Krass v Tri-County Security, Inc*, 233 Mich App 661, 668-669; 593 NW2d 578 (1999).

"If a court determines as a matter of law that a defendant owed no duty to a plaintiff, summary disposition is appropriate under MCR 2.116(C)(8)." *Terry, supra* at 424.

Generally, there is no legal duty obligating one person to aid or protect another. *Graves, supra* at 493. "Moreover, 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.* The basis for this rule is the recognition that " '[c]riminal activity, by its deviant nature, is normally unforeseeable.' " *Id.*, quoting *Papadeimas v Mykonos Lounge*, 176 Mich App 40, 46-47; 439 NW2d 280 (1989). " ' "[U]nder all ordinary and normal circumstances, in the absence of any reason to expect the contrary, the actor may reasonably proceed upon the assumption that others will obey the criminal law." ' " *Graves, supra* at 493, 499, quoting *Papadeimas, supra* at 47, quoting Prosser & Keaton, Torts (5th ed), § 33, p 201.

1. PL & L's Liability

Plaintiff argues that the trial court erred in concluding that PL & L was not liable for his injury. PL & L was the owner of the property where the assault occurred, and was leasing the property to Town Limo and Concept Mold. "[T]he same duty that a landlord owes to its tenants also is owed to their guests, because both are the landlord's invitees." *Stanley v Town Square Cooperative*, 203 Mich App 143, 148; 512 NW2d 51 (1993). Owners and occupiers of land have a special relationship to their invitees, giving rise to a duty to reasonably respond to situations that occur on the premises that pose a risk of imminent and foreseeable harm to identifiable invitees. *Graves, supra* at 494, 496-497, citing *MacDonald v PKT, Inc*, 464 Mich 322; 628 NW2d 33 (2001). "[T]he duty that a possessor of land owes his invitees is not absolute. He is not an insurer of the safety of an invitee. His duty is only to exercise reasonable care for their protection." *Stanley, supra* at 150. "The duty exists only when the landlord created a dangerous condition that enhances the likelihood of exposure to criminal assaults." *Id.* While this duty includes taking reasonable measures in response to an ongoing situation that is taking place on

the premises, it does not include an obligation to otherwise anticipate the criminal acts of third parties. *MacDonald, supra* at 338.

Here, PL & L was unaware of Concept Mold's hosting of a social event on the premises. Further, this party did not pose a risk of imminent and foreseeable harm to plaintiff. PL & L did not have a duty to anticipate the assault on plaintiff by a third party. Further, the danger or potential of plaintiff's falling victim to a criminal assault in the parking lot was not the result of a dangerous condition that was created by the landlord. As such, the trial court correctly granted summary disposition in favor of PL & L.

2. Concept Mold's Liability

Plaintiff also contends that the trial court erred in granting summary disposition in favor of Concept Mold. Plaintiff contends that Concept Mold proximately caused his injuries by creating a dangerous situation on the property where the assault took place by violating the statutory proscription against the unauthorized sale and provision of alcohol to minors, MCL 436.1701. This Court has ruled that "[s]erving alcohol to an underage person . . . creates a rebuttable presumption of negligence; however, a plaintiff must still demonstrate that the furnishing of alcohol proximately caused the plaintiff's injury." *Nichols v Dobler*, 253 Mich App 530, 532; 655 NW2d 787 (2002). "Proximate cause ' "normally involves examining the forseeability of consequences, and whether a defendant should be held legally responsible for such consequences." ' " *Id.*, quoting *Haliw v Sterling Heights*, 464 Mich 297, 310; 627 NW2d 581 (2001), quoting *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994). In *Nichols, supra* at 537, this Court held that where the plaintiff was "an innocent victim of an unprovoked attack that occurred on the premises where the alcohol was served and that was an outgrowth of a dispute that developed at the party," the "issue of proximate causation" was "properly left to the jury."

Plaintiff alleges that Concept Mold proximately caused his injuries by providing alcoholic beverages to minors at the party where he was assaulted. However, Contest Mold submitted evidence that, although minors were present at the party, the alcohol was monitored and dispensed only to individuals wearing wristbands verifying that they were of a legal age to consume alcohol. Plaintiff failed to rebut this evidence by providing evidence that minors were furnished with alcohol at the party. Plaintiff further failed to demonstrate that the individual who assaulted him was either a minor or had consumed alcohol. "[A] party opposing a motion brought under MCR 2.116(C)(10) may not rest upon the mere allegations or denials in that party's pleadings, but must by affidavit, deposition, admission, or other documentary evidence set forth specific facts showing there is a genuine issue for trial." *Marlo Beauty Supply, Inc v Farmers Ins Group of Companies*, 227 Mich App 309, 321-322; 575 NW2d 324 (1998), mod on other grounds *Harts v Farmers Ins Exchange*, 461 Mich 1; 597 NW2d 47 (1999). "Allegations unsupported by some basis in fact may be viewed as sheer speculation and conjecture and, therefore, ripe for summary disposition." *Easley v University of Michigan*, 178 Mich App 723, 726; 444 NW2d 820 (1989). Thus, plaintiff failed to create a rebuttable presumption of negligence.

Further, the party did not pose a risk of imminent and foreseeable harm to plaintiff, as Concept Mold could not anticipate a third party's assault on plaintiff. The danger or potential of plaintiff's falling victim to a criminal assault in the parking lot was not the result of a dangerous

condition that was created by Concept Mold. As such, the trial court correctly granted summary disposition in Concept Mold's favor.

3. Town Limo's Liability

Plaintiff next argues that the trial court erred in granting summary disposition in favor of Town Limo. Plaintiff contends that Town Limo, because of its status as a common carrier, had a special relationship to him and thus had a duty to protect him from the criminal acts of a third party. Town Limo disputes plaintiff's characterization of its status as a common carrier and plaintiff's status as a passenger. However, even assuming the status of Town Limo as a common carrier[1] and plaintiff as a passenger,[2] we conclude that the trial court properly granted summary disposition for Town Limo. A common carrier has the duty "to exercise such diligence as would be exercised in the circumstances by a reasonably prudent carrier." *Frederick v Detroit*, 370 Mich 425, 437; 121 NW2d 918 (1963). A common carrier has a special relationship with its passengers that imposes an obligation to take reasonable action to protect those passengers against an unreasonable risk of harm. *Mason v Royal Dequindre, Inc*, 455 Mich 391, 397 n 2, overruled in part on other grounds *MacDonald, supra* at 334 n 10; *Graves, supra* at 494. A common carrier also has a duty to its passengers to give them first aid after its knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others. *Mason, supra* at 397 n 2.

Here, plaintiff has failed to demonstrate that Town Limo breached this alleged duty. The limousine driver for Town Limo pulled into the parking lot of the Town Limo offices to retrieve champagne to fulfill the contract with plaintiff. While the driver was in the office, plaintiff got out of the limousine and was physically assaulted by the unidentified individual, who was apparently from the Concept Mold party. Although the driver for Town Limo took plaintiff to its offices and left plaintiff unsupervised in the limousine, he did not leave plaintiff for an

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[1] " ' "A common carrier is one who, by virtue of his calling, undertakes, for compensation, to transport personal property from one place to another for all such as may choose to employ him, and every one who undertakes to carry compensation the goods of all persons indifferently, is as to liability, to be deemed a common carrier." ' " *G & A Truck Line, Inc v Pub Service Comm*, 337 Mich 300, 307; 60 NW2d 285 (1953), quoting *Michigan Pub Utilities Comm v Krol*, 245 Mich 297, 302-303; 222 NW 718 (1929), quoting *Jackson Architectural Iron Works v Hurlbut*, 158 NY 34; 52 NE 665 (1899). "[A] common carrier must accept and transport personal property for all who choose to employ it." *G & A Truck Line, supra* at 307. A private carrier, in contrast, is not obligated to serve all who apply for passage. *Krol, supra* at 303. Town Limo's status as a common carrier is in question because it is a private transportation company that contracts with individual customers for service.

[2] "A person's status as a passenger of a street car or automobile continues 'until he has safely stepped therefrom and had a reasonable opportunity to leave the place at which he alights.' " *Burch v A & G Assoc, Inc*, 122 Mich App 798, 806; 333 NW2d 140 (1982), quoting 13 CJS, Carriers, § 565, p 1073. Plaintiff's status as a passenger is in question because he was not injured by the manner in which the limousine was driven or in the process of alighting from the limousine, but was injured outside the limousine after it had stopped.

unreasonable length of time in a situation that posed a foreseeable or unreasonable risk of harm. The driver had no reason to think that leaving plaintiff in the limousine with a party going on nearby would pose a risk of harm to plaintiff. Plaintiff had stepped out of the limousine and been assaulted between the time the driver went into the office and returned to the limousine. Thus, the driver could have done nothing to prevent the assault. When the driver found plaintiff injured upon his return to the limousine, he took plaintiff to the hospital for treatment. Thus, he fulfilled his duty of caring for plaintiff after he knew that plaintiff was injured. The trial court did not err in granting Town Limo's motion for summary disposition.

Affirmed.

/s/ Henry William Saad
/s/ Brian K. Zahra
/s/ Bill Schuette

EXHIBIT D

STATE OF MICHIGAN

COURT OF APPEALS

KIM MCFADDEN, as Next Friend for MARSHON MCFADDEN and MARCEL MCFADDEN, Minors, ANDREA BEARD, as Next Friend for DELPRIS BEARD, a Minor, ALBERT ASHE and ANNETTE ASHE, as Co-Next Friends for MARCUS ASHE, a Minor, and MICHAEL BURTON, as Next Friend for TYREE BURTON, a Minor,

Plaintiffs-Appellants,

v

WAL-MART STORES EAST, L.P., KIMBERLY A. SEIDENSTUCKER, and CANDACE SIMPSON,

Defendants-Appellees.

UNPUBLISHED
January 20, 2011

No. 293306
Eaton Circuit Court
LC No. 08-000119-NZ

Before: METER, P.J., and M. J. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

In this suit for assault and battery, false arrest and imprisonment, intentional infliction of emotional distress, negligence, denial of equal public accommodations, MCL 750.147, and violation of the Civil Rights Act (CRA), MCL 37.2101 *et seq.*, plaintiffs appeal as of right the trial court's order dismissing their claims under MCR 2.116(C)(10). Because we conclude that there were no errors warranting relief, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

In March 2007, the Wal-Mart store in Delta Township was undergoing renovations, which temporarily compromised several of the store's alarms and security systems. As a result, the store had recently experienced an increase in losses from theft, including the theft of two laptop computers earlier in the day at issue. During the evening, the five minor plaintiffs entered the store and divided into smaller groups. Although no one reported seeing them attempting to steal any merchandise, defendants Kimberley Seidenstucker and Candace Simpson, who were assistant managers in the store, became concerned that plaintiffs' activities fit the pattern of recent shoplifting incidents. Therefore, they decided to implement a store procedure known as

"aggressive hospitality," which is intended to discourage shoplifting by making store personnel highly visible and active in the presence of suspected shoplifters. According to defendants, plaintiffs responded negatively when staff members approached them to offer assistance. Plaintiffs cursed at the staff members, walked away and demanded that the staff leave them alone. Darius Burton, a Wal-Mart employee on duty that day and cousin to four of the minor plaintiffs, warned plaintiffs that they were being watched and asked them if they intended to steal. One of the plaintiffs denied planning to steal and told Darius Burton that he would "fire on" any employee who approached him. Although all five plaintiffs denied making that statement, plaintiff Marcus Ashe admitted that he heard the statement.

Seidenstucker and Simpson decided to call the police. Seidenstucker informed the operator about the recent shoplifting incidents and reported that plaintiffs' activity appeared to fit the pattern of previous thefts. Deputy Casey Tietsort and other officers responded to the call. Simpson and Seidenstucker informed him of the "fire on" remark, which they had interpreted as a threat of gun violence. Darius Burton told Tietsort that the phrase "fire on" meant to hit someone, not to shoot them. The officers conducted pat-down searches of the five minor plaintiffs, but did not find guns or stolen merchandise. The deputies then escorted plaintiffs outside the store.

Plaintiffs, who are African-American, sued defendants through their next friends. They alleged claims for racial discrimination in the provision of public accommodations, contrary to the CRA and MCL 750.147. They also asserted claims for assault and battery, false arrest and imprisonment, intentional infliction of emotional distress, and negligence. The trial court dismissed all plaintiffs' claims on defendants' motion for summary disposition under MCR 2.116(C)(10) and later denied plaintiffs' motion for reconsideration. This appeal followed.

II. SUMMARY DISPOSITION

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Meridian Twp v Ingham Co Clerk*, 285 Mich App 581, 586; 777 NW2d 452 (2009). A motion under MCR 2.116(C)(10) tests the factual sufficiency of a complaint and should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Driver v Naini*, 287 Mich App 339, 344; 788 NW2d 848 (2010). In reviewing a motion under MCR 2.116(C)(10), a court must consider the evidence submitted by the parties in a light most favorable to the nonmoving party to determine whether there is a genuine issue regarding any material fact. *Meridian Twp*, 285 Mich App at 586.

Initially, there is no merit to plaintiffs' claim that the trial court violated MCR 2.504(B)(2) and MCR 2.517(A)(1) by failing to make findings of fact on the record in support of its decision. Those rules do not apply to motions for summary disposition. MCR 2.517(A)(4). And it is well-settled that a court may not assess the credibility of the witnesses or resolve questions of fact in reviewing a motion for summary disposition. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Rather, the court's task is to determine only whether there is a genuine issue of fact for trial.

A. PLAINTIFFS' STATUTORY CLAIMS

The CRA prohibits any person from "deny[ing] an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service" because of race. MCL 37.2302(a). Defendants' business is a place of public accommodation within the meaning of MCL 37.2302(a). MCL 37.2301(a). To establish a prima facie case of intentional discrimination under § 302, a plaintiff must establish four elements: "(1) discrimination based on a protected characteristic, (2) by a person, (3) resulting in the denial of the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations (4) of a place of public accommodation." *Haynes v Neshewat*, 477 Mich 29, 35; 729 NW2d 488 (2007). The essence of a claim under § 302 is that the plaintiff was treated differently based solely on his or her membership in a protected class. See *Schellenberg v Rochester Mich Lodge No 2225 of the Benevolent & Protective Order of Elks of USA*, 228 Mich App 20, 33; 577 NW2d 163 (1998).

In this case, there is no direct evidence of unlawful discrimination. See *Harrison v Olde Fin Corp*, 225 Mich App 601, 609; 572 NW2d 679 (1997). Accordingly, plaintiffs had to establish their claims under the burden-shifting approach. Under that approach, the plaintiff must present evidence of intentional discrimination or disparate treatment. The burden then shifts to the defendant to show that he or she had a legitimate reason for his or her actions. If the defendant presents evidence of a legitimate reason for his or her actions, the plaintiff then has the burden of coming forth with evidence that the proffered reason is merely a pretext. See *Clarke v K Mart Corp*, 197 Mich App 541, 545; 495 NW2d 820 (1992); see also *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 133-134; 666 NW2d 186 (2003); *Hazle v Ford Motor Co.*, 464 Mich 456, 462; 628 NW2d 515 (2001).

Plaintiffs contend that defendants' implementation of the "aggressive hospitality" procedure and their decision to contact the police to report suspected criminal activity was racially motivated. However, defendants countered plaintiffs' evidence with evidence of legitimate, nondiscriminatory reasons for their decisions. Specifically, defendants presented evidence that there were heightened concerns about store security in light of the compromises to the store's security system during the renovation period and the recent increase in merchandise theft, and further, that plaintiffs' pattern of activity within the store on the evening in question was consistent with that associated with recent incidents of theft. Plaintiffs failed to present evidence to show that defendants' security concerns were not legitimate, or were not the real reasons for their decisions to implement the "aggressive hospitality" procedure or to contact the police. Thus, defendants were entitled to summary disposition of plaintiffs' statutory claims for discrimination.

We disagree with plaintiffs' argument that the trial court improperly resolved a disputed issue of fact by stating that one of the plaintiffs used the expression "fire on" in the presence of a Wal-Mart employee. Although the person who made that statement was never identified, and each of the five minor plaintiffs denied making the statement, plaintiff Ashe admitted hearing one of the other plaintiffs use that expression. Further, Seidenstucker testified that Darius Burton repeated the "fire on" statement to her after the police had arrived or were on the way, and he testified that he reported the remark to the assistant managers. He also included the remark in his written statement to the police. Even if there was a question of fact concerning who made the

statement, there was no question of fact that defendants Seidenstucker and Simpson received a report that one of the plaintiffs made it.

The trial court did not err in granting defendants' motion for summary disposition with respect to plaintiffs' statutory claims premised on unlawful discrimination.

B. ASSAULT AND BATTERY

Plaintiffs argue that the trial court erred in dismissing their claim for assault and battery because, although defendants did not personally commit an assault or battery, and although the police may have been justified in conducting a pat-down search based on the information they received from defendants, the evidence showed that defendants falsely informed Deputy Tietsort that plaintiffs had a weapon or had threatened to shoot anyone who approached them. Accordingly, plaintiffs argue, it was defendants' conduct that led to the offensive touchings of plaintiffs against their will.

In *Lewis v Farmer Jack Div, Inc*, 415 Mich 212; 327 NW2d 893 (1982), our Supreme Court rejected a similar argument in the context of a claim for false arrest. In *Lewis*, an employee of the defendant supermarket mistakenly identified the plaintiff as a person who had committed an armed robbery in another store five months earlier. The employee and store manager contacted the police, who arrested the plaintiff based on the employee's identification. After the police determined that the employee was mistaken in her identification, the plaintiff brought an action against the defendant supermarket for false arrest. *Id.* at 217. The Supreme Court held that no false arrest was committed because, "looking at the arrest from the point of view of whether the police, who made the arrest, had the legal right or justification to act as they did, the arrest was legal and justified and was not a false arrest." *Id.* at 218. In addressing the plaintiff's contention that the defendant could be liable because the employee "instigated the arrest" by identifying the plaintiff as the robber, the Court concluded that the defendant's agents did nothing more than provide information, and that the "police acted on and in the exercise of their own judgment and not at the direction of" the defendant's employees. *Id.* at 218-219. In a footnote, the Court quoted 1 Restatement Torts, 2d, § 45A, comment c, p 70:

> It is not enough for instigation that the actor has given information to the police about the commission of a crime, or has accused the other of committing it, so long as he leaves to the police the decision as to what shall be done about any arrest, without persuading or influencing them. [*Lewis*, 415 Mich at 219 n 3.]

Similarly, the evidence in this case showed that defendants merely provided information to the police and then left it to them to act on that information in their own discretion. There is no evidence that defendants urged the police to employ physical force against any plaintiff or deliberately misled the officers to influence them to do so. Plaintiffs attempt to minimize the significance of the "fire on" statement by emphasizing that Darius Burton had advised defendants that the phrase was slang for hitting someone, not shooting them. However, there was undisputed evidence that Burton's understanding of this phrase was conveyed to Deputy Tietsort, thereby leaving it to him to determine what type of police response, if any, might be warranted.

Under these circumstances, the trial court properly determined that there was no genuine issue of material fact in support of plaintiffs' claim for assault and battery.

C. FALSE ARREST AND FALSE IMPRISONMENT

Plaintiffs also argue that the trial court erred in dismissing their claim for false imprisonment and false arrest.[1] They argue that the trial court committed an error of law in concluding that there could be no false arrest if defendants acted in good faith, and improperly resolved a disputed issue of fact in finding that defendants acted in good faith. Plaintiffs contend that good faith is relevant only where a governmental defendant claims governmental immunity. Plaintiffs also argue that the trial court erroneously found that defendants did not act without legal justification or probable cause to intentionally cause plaintiffs' arrest.

Plaintiffs' assertion that a private actor can be held liable for a wrongful arrest regardless of the actor's good faith is erroneous. Plaintiffs rely on a statement in Justice WILLIAMS'S dissenting opinion in *Lewis*, 415 Mich at 234, in which he remarked that "it is possible that an arrest could be adjudicated lawful as between the arrestee and the police, yet a private citizen, acting through the police without legal justification, would be subject to liability for false arrest." Apart from the fact that this statement was made in a dissenting opinion, plaintiffs misinterpret the statement as authority for the proposition that a private citizen can be held liable for false arrest for innocently reporting incorrect information that results in an arrest. Plaintiffs' argument, taken to its logical conclusion, would impose on private citizens who contact the police the same probable cause standard that restrain police officers in effecting an arrest.

As previously explained in the analysis of plaintiffs' assault and battery claim, the evidence showed that defendants merely provided information to the police and left it to them to decide how to act on that information. There was no evidence that defendants requested that the police arrest or detain plaintiffs, or deliberately misled the officers to influence them to do so. Accordingly, there was no genuine issue of fact with respect to plaintiffs' claim for false arrest or imprisonment, and the trial court properly dismissed that claim. *Lewis*, 415 Mich at 221-222.

D. NEGLIGENCE

Plaintiffs also argue that the trial court erred in dismissing their negligence claim. A negligence claim requires that a plaintiff prove the following elements: (1) a duty owed to the plaintiff by the defendant, (2) a breach of that duty, (3) causation, and (4) damages." *Bialick v Megan Mary, Inc*, 286 Mich App 359, 362; 780 NW2d 599 (2009). Here, plaintiffs do not clearly identify a duty of care that was breached. They seem to suggest that defendants acted

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[1] False imprisonment is an unlawful restraint on a person's liberty or freedom of movement. False arrest is an illegal or unjustified arrest, and the guilt or innocence of the person arrested is irrelevant. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 17-18; 672 NW2d 351 (2003). Although the terms are technically distinguishable, a false arrest necessarily involves false imprisonment. *Id.* at 17 n 15.

negligently by calling the police when it was not necessary to do so to protect other invitees in the store. They rely on case law addressing a business owner's duty to protect third parties from criminal harm on the business premises, and cite the principle that an invitor should not be expected to assume that others will disobey the law. *MacDonald v PKT, Inc*, 464 Mich 322, 335; 628 NW2d 33 (2001). However, this case does not involve a claim that defendants failed to protect plaintiffs from known criminal activity by third parties. The pertinent question here is not whether defendants might have been liable to a third party if they had failed to call the police and plaintiffs committed a violent act, but whether defendants breached a duty of care to plaintiffs. To the extent plaintiffs suggest that defendants had a duty to protect them from unreasonable interference by the police, as discussed previously, the evidence established that defendants merely notified the police of a perceived security concern and relied on the police to handle the situation. There is no basis for finding that defendants breached a duty of care to plaintiffs. Thus, the trial court did not err in dismissing plaintiffs' negligence claim.

III. MOTION FOR RECONSIDERATION

Plaintiffs also argue that the trial court erred in denying their motion for reconsideration. We review a trial court's ruling on a motion for reconsideration for an abuse of discretion. "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Corporan v Henton*, 282 Mich App 599, 605-606; 766 NW2d 903 (2009).

In order to warrant relief, the party seeking reconsideration "must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." MCR 2.119(F)(3). Here, plaintiffs failed to establish any palpable error that misled the court. As already discussed, the trial court properly dismissed plaintiffs' claims under MCR 2.116(C)(10); therefore, it did not abuse its discretion in denying plaintiffs' motion for reconsideration.

There were no errors warranting relief.

Affirmed. As the prevailing parties, defendants may tax costs. MCR 7.219(A).

/s/ Patrick M. Meter
/s/ Michael J. Kelly
/s/ Amy Ronayne Krause