2015 IL App (2d) 150300-U
No. 2-15-0300
Order filed December 30, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ALBERT WISZ,	)	Appeal from the Circuit Court
	)	of Boone County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 2012-L-12
	)	
C&D WATERFALL, INC.,	)	Honorable
	)	Brendan A. Maher,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in granting a tavern owner summary judgment on a negligence action brought by a patron for injuries allegedly sustained in a fight outside the entrance.

¶ 2 Plaintiff, Albert Wisz, filed two actions against defendant C&D Waterfall, Inc., alleging that he was a patron at defendant's dram shop ("the Waterfall") and was injured by one or two other patrons in a fight that occurred just outside the entrance to the building. In this appeal, plaintiff challenges the summary judgment entered for defendant on the claim of common law negligence. We affirm.

¶ 3 I. BACKGROUND

¶ 4 A. Procedural History

¶ 5 Plaintiff filed two separate complaints against defendant. One sought to impose liability under section 6-21 of the Illinois Liquor Control Act (234 ILCS 5/6-21 (West 2010) (popularly known as the "Dram Shop Act")). The second complaint, which is the subject of this appeal, sought to impose liability under theories of common law negligence. Defendant filed two separate motions for summary judgment and a motion to consolidate the two cases. The trial court consolidated the cases, and on March 7, 2014, granted defendant summary judgment on the negligence claim and denied defendant summary judgment on the dram shop claim. Plaintiff appealed the order granting summary judgment in the negligence action. Defendant appealed the order denying summary judgment on plaintiff's dram shop claim. We consolidated and dismissed the two appeals based on a lack of appellate jurisdiction. *Wisz v. C&D Waterfall*, Inc., 2014 IL App (2d) 140311-U. On February 27, 2015, the trial court entered in the negligence case a written finding of appealability under Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010), and plaintiff filed a notice of appeal on March 27, 2015.

¶ 6 B. Negligence Claim

¶ 7 Summary judgment is appropriate where the pleadings, affidavits, depositions, and admissions on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. 735 ILCS 5/2 1005(c) (West 2014); *Klitzka v. Hellios*, 348 Ill. App. 3d 594, 597 (2004). As this is an appeal from a summary judgment entered for defendant on the negligence claim, the following facts are taken from those documents in the record.

¶ 8 Plaintiff alleges that, on the night of May 13, 2010, he was seriously injured outside the Waterfall in a fight. Plaintiff has no recollection of what precipitated the fight or the fight itself,

and no one gave eyewitness testimony of what happened, but the complaint alleges that plaintiff's injuries were inflicted by Kai Gustafson, his friend Jesse Trevino, or both. Certain witnesses testified that that Kai consumed strong alcoholic drinks and got into an argument with his girlfriend, Bridget Tinsley, who was working as a bartender that night. Kai allegedly threw a glass on the floor behind the bar during the argument, and Bridget kicked him out. Kai, with or without Jesse, exited the Waterfall and encountered plaintiff, who was outside smoking. A fight ensued for unknown reasons, resulting in serious injuries to plaintiff and Kai.

¶ 9 Plaintiff named Kai and Jesse as respondents in discovery, but it does not appear that either was converted to a direct defendant within the applicable limitations period. This action involves defendant's alleged negligence related to the fight.

¶ 10 In his negligence claim, plaintiff alleges that Kai and Jesse "became belligerent, aggressive, and intoxicated, and acted in a threatening, hostile and menacing manner" and that they "violently assaulted and battered" plaintiff, causing "severe injury" and "great bodily harm." Plaintiff further alleges that the attack by Kai, Jesse, or both was "reasonably foreseeable to a shopkeeper exercising reasonable care to protect the safety of its patrons," and that defendant was "negligent and careless" in, among other things, failing to detect, monitor and supervise its intoxicated patrons. Plaintiff also alleges that defendant was "careless and negligent" in not having sufficient security to protect patrons from its intoxicated patrons, failing to remove Kai and Jesse, failing to warn plaintiff about Kai and Jesse, and failing to intervene when Kai or Jesse attacked him on the premises.

¶ 11 1. Plaintiff

¶ 12 Plaintiff testified that, on the night of the incident, he went out with his fiancé, Julie Gustafson, Julie's sister, Jennifer Gustafson, and Jennifer's husband, Matt Moran. The two

couples went to a tavern called the Backstop for one to two hours and then arrived at the Waterfall after 9 p.m. Plaintiff and Matt played pool while Julie and Jennifer sat at the bar. Plaintiff drank Budweiser. Plaintiff recognized a bartender, "Dee Dee," and Heather Gustafson and Heather's friend, Brandi Neumann.

¶ 13 Plaintiff testified that he spent an hour at the Waterfall and did not have any verbal or physical altercations with anyone before deciding to go home. Plaintiff's group decided to leave because plaintiff had to work the next day and he did not want to stay out late. Plaintiff stepped outside to smoke, which is "when everything happened." Plaintiff remembers smoking a cigarette outside and then waking up in a hospital. Plaintiff does not remember whether anyone was outside when he exited the Waterfall, and he does not recall getting into any argument or fight with anyone outside.

¶ 14 Plaintiff denied knowing Kai or Jesse and testified that he had not seen them before the night of the incident. Plaintiff does not recall seeing Kai or Jesse at the Waterfall that night and has no personal knowledge about what they drank that night.

¶ 15 2. Jesse Trevino

¶ 16 Jesse recalled that he went to the Waterfall after work with his boss around 11:30 p.m. Jesse saw his friends, Kai and Tony Gray. Jesse testified that he did not consume any alcohol that night before the incident. When he arrived, Jesse ordered "a pulled pork and a Pepsi." Jesse spent 45 minutes at the Waterfall.

¶ 17 Jesse characterized Kai as a "good friend." Kai was already at the Waterfall when Jesse arrived, but Jesse does not remember seeing Kai consume any alcohol.

¶ 18 Jesse testified that no "altercations or incidents" occurred inside the Waterfall while he was there. He is unaware of anyone, including Kai, getting "kicked out" and denied being personally involved in any altercations while he was outside the tavern that night.

¶ 19 At some point, Jesse stepped outside to smoke. He testified that he heard screams and saw Kai and another man on the ground. Bridget was screaming at Kai to wake up. Jesse picked up Kai and placed him into Kai's truck. Jesse directed Bridget to take Kai home and then to a hospital if his condition did not improve.

¶ 20 Jesse saw plaintiff still lying on the ground with "some blonde over him." Jesse walked back inside and told Tony that "something happened" and that he did not want to be there. Jesse told a bartender that there was a fight outside, with two people "knocked out." Jesse did not check on plaintiff because he saw the blonde woman taking care of him.

¶ 21 Jesse acknowledged that Brandi Neumann called him the next day and screamed at him and called him "every name in the book." Jesse told Brandi that he had done nothing wrong. Jesse testified that Brandi and Heather had been harassing him since the incident. According to Jesse, Brandi and Heather were inside the Waterfall when he stepped outside to smoke.

¶ 22 3. Brandi Neumann

¶ 23 Brandi testified that Kai was at the Waterfall when she arrived at 9 p.m. Brandi saw Kai consuming alcohol. Based on her experience as a bartender at the Waterfall five years before the incident, Brandi believes Kai usually drinks either "Jack and Coke" or "Captain and Coke." Brandi believes Bridget was the bartender serving Kai that night.

¶ 24 Brandi admitted she has no personal knowledge of how much alcohol Kai consumed, but she believes he had more than two drinks because she saw him there "for a while" before the incident. When asked if Kai appeared intoxicated, Brandi suspected he was because Kai was

being loud and Bridget threw him out. Brandi believes that Kai threw a glass while she was sitting at the end of the bar. Brandi does not recall whether Kai was slurring his speech or stumbling.

¶ 25 Brandi knows Jesse, saw him at the Waterfall, and "assumes" he was drinking that night, but she does not recall him appearing intoxicated. Brandi recalled seeing plaintiff drinking, but she does not remember what he was drinking or him appearing intoxicated. Brandi does not remember having a conversation with Kai or Jesse, though she assumes she said "hi" to Jesse. Besides Kai arguing with Bridget about her request that he leave, Brandi does not remember any other arguments at the Waterfall that night.

¶ 26 Brandi was not outside, did not see plaintiff get injured, and does not know what started the fight. Brandi remembers Julie re-entering the Waterfall and saying that plaintiff had been "knocked out." Brandi went outside with Julie and Jennifer and saw plaintiff lying on the ground, appearing "completely knocked out," and bleeding from his ears, nose, and mouth. Brandi does not know if anyone saw what happened. Brandi recalled seeing Jesse and Kai getting into Bridget's vehicle.

¶ 27 In a telephone conversation the next day, Brandi asked Jesse what happened, and he responded that plaintiff "got what he deserved." Jesse did not elaborate on the comment, but Brandi believes that Jesse "knows exactly what happened."

¶ 28 4. Julie Gustafson

¶ 29 Julie does not know how many drinks Kai consumed, but she testified that she saw him drinking "Jack and Coke" from a tall, stemmed glass and saw the bartender pour a lot of alcohol into his drinks. Julie believes Kai was intoxicated because he was slurring his speech when speaking to Jesse and threw a drink on the floor behind the bar. Julie had seen Kai intoxicated at

the Waterfall at least five times before the night of the incident. Julie did not speak to Kai that night.

¶ 30 Julie testified that she also saw Jesse consuming alcohol, and although she is not certain, she believes he was drinking "Jack and Coke." Julie did not see how many drinks Jesse consumed, but she saw Dee Dee pouring a lot of alcohol into them. Julie believes that Jesse was intoxicated; she saw him and Kai "hanging on each other and slurring their words." Julie does not recall seeing Bridget serve either Kai or Jesse.

¶ 31 Julie did not see plaintiff arguing with anyone at the Waterfall that night and saw Kai arguing only with Bridget. Julie does not know whether plaintiff talked to Kai or Jesse at any time before the incident. Julie was not outside when plaintiff was injured, and she found him on the ground, unconscious and bleeding. The next day, Brandi told Julie that Jesse said that plaintiff "got what he deserved."

¶ 32 The parties made unsuccessful attempts to take Kai's deposition, and there is no indication that any party attempted to depose Bridget.

¶ 33 4. The Trial Court's Ruling

¶ 34 On March 7, 2014, the trial court granted defendant summary judgment on plaintiff's negligence claim. The court concluded that the only evidence that could have put defendant on notice of Kai's potential violence is testimony that Kai threw a glass on the floor while arguing with Bridget, who then ejected him from the premises. Construing the record in the light most favorable to plaintiff, the court determined that the circumstances on the night of the incident did not put a reasonably prudent employee of defendant on notice of the probability of an attack or that a serious physical altercation had already begun.

¶ 35 II. ANALYSIS

¶ 36 The purpose of summary judgment is not to try a question of fact but, rather, to determine whether a genuine issue of material fact exists. *Adams v. Northern Illinois Gas Co*., 211 Ill. 2d 32, 42 43 (2004). In reviewing a grant of summary judgment, this court must construe the pleadings, depositions, admissions, and affidavits strictly against the moving party and liberally in favor of the nonmoving party. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). Where reasonable persons could draw divergent inferences from the undisputed material facts or where there is a dispute as to a material fact, summary judgment should be denied and the issue decided by the trier of fact. *Espinoza v. Elgin, Joliet & Eastern Ry. Co*., 165 Ill. 2d 107, 114 (1995). If a party moving for summary judgment introduces facts that, if not contradicted, would entitle him to a judgment as a matter of law, the opposing party may not rely on his pleadings alone to raise issues of material fact. *Klitzka*, 348 Ill. App. 3d at 597.

¶ 37 The summary judgment procedure is to be encouraged as an aid in the expeditious disposition of a lawsuit. *Adams*, 211 Ill. 2d at 43. However, summary judgment is a drastic means of disposing of litigation and should not be granted unless the movant's right to judgment is clear and free from doubt. *Forsythe v. Clark USA, Inc*., 224 Ill. 2d 274, 280 (2007).

¶ 38 To prevail in an action for negligence, a plaintiff must prove the existence of a duty, a breach of that duty, and an injury proximately caused by the breach. *Haupt v. Sharkey*, 358 Ill. App. 3d 212, 216 (2005). Without a showing from which the court could infer the existence of a duty, no recovery by a plaintiff is possible as a matter of law and summary judgment in favor of the defendant is proper. *Haupt*, 358 Ill. App. 3d at 216.

¶ 39 Generally, an owner or occupier of land has no duty to protect entrants from the criminal acts of third parties, absent a special relationship between the parties. *Haupt*, 358 Ill. App. 3d at 216. One special relationship recognized by Illinois courts is that of business invitor and invitee.

Haupt, 358 Ill. App. 3d at 216. An owner or occupier of land has a duty to protect his or her business invitees against the foreseeable criminal acts of third parties, but only when the circumstances would put a reasonably prudent person on notice of the probability of an attack or when a serious physical altercation has already begun. *Haupt*, 358 Ill. App. 3d at 216; *Osborne v. Stages Music Hall, Inc.*, 312 Ill. App. 3d 141, 147 (2000); *Shortall v. Hawkeye's Bar & Grill*, 283 Ill. App. 3d 439, 442-43 (1996); Restatement (Second) of Torts § 344 (1965) ("A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it").

¶ 40 Comment f to section 344 of the Restatement (Second) of Torts explains that "Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection." Restatement (Second) of Torts § 344, cmt. f (1965).

¶ 41 The existence of a special relationship and foreseeability are not the only factors to be considered in determining whether a duty exists. Our supreme court has repeatedly stated that the factors an Illinois court must consider in determining whether a duty exists in a given negligence case are: (1) the reasonable foreseeability of injury; (2) the reasonable likelihood of injury; (3) the magnitude of the burden that guarding against the injury places on the defendant; and (4) the consequences of placing that burden on the defendant.[1] *Haupt*, 358 Ill. App. 3d at 216-17 (citing *Blue v. Environmental Engineering, Inc.*, 215 Ill. 2d 78, 95 (2005)). These factors apply to negligence cases involving the duty of business owners to their business invitees. *Haupt*, 358 Ill. App. 3d at 216; *Osborne*, 312 Ill. App. 3d at 147.

¶ 42 The business invitor-invitee relationship imposed upon defendant a duty to protect its patrons, including plaintiff, against the foreseeable criminal acts of third parties, but only to the extent that the circumstances would put a reasonably prudent person on notice of the probability of an attack or when a serious physical altercation has already begun. *Haupt*, 358 Ill. App. 3d at 216. Defendant did not breach its duty because the circumstances did not give a reasonably prudent person notice of the probability of an attack or notice that a serious physical altercation had already begun. We agree with the trial court that, under the circumstances known to defendant on the night of the incident, the alleged attack on plaintiff and his resulting injuries were not foreseeable to a reasonable employee of defendant.

¶ 43 Plaintiff alleges that defendant was negligent for failing to detect, monitor and supervise its intoxicated patrons; failing to warn him of potentially violent patrons; failing to employ

[1] The fact-specific analysis of these four factors often results in conflation of the existence of a duty and a breach of that duty. See *Stearns v. Ridge Ambulance Service, Inc.*, 2015 IL App (2d) 140908, ¶ 19.

sufficient security; failing to remove Kai and Jesse from the property entirely, not just from the building; and failing to intervene once the fight started. However, plaintiff has established, at worst, that Kai argued with Bridget, one of defendant's employees, and threw a glass behind the bar, after which she ejected him from the Waterfall. Sometime later, plaintiff stepped out to smoke and eventually encountered Kai, allegedly resulting in plaintiff's injuries.

¶ 44 First, we agree with the trial court that plaintiff has not established any basis for an employee of defendant to be on notice that Kai presented a danger to other patrons, including plaintiff. To the extent that Kai was belligerent inside the Waterfall, Bridget acted reasonably, on behalf of defendant, to remove Kai from the interior of the premises. Second, plaintiff has presented no evidence that an employee of defendant had reason to know that Kai had remained on the premises after he was kicked out or that Kai would be waiting in the parking lot to attack a patron, especially one with whom he had no interaction while inside. Third, plaintiff has not presented any evidence that an employee of defendant knew or had reason to know, from past experience, that there was a likelihood of conduct on the part of third persons at the Waterfall in general that was likely to endanger the safety of patrons.

¶ 45 The evidence in the record shows that, at worst, an allegedly intoxicated Kai raised his voice and threw a glass on the floor behind the bar while arguing with his girlfriend, a bartender, who then kicked him out. No witness testified that Kai was verbally or physically aggressive toward plaintiff or any other patron. No witness testified that an employee of defendant observed or had reason to know that a fight was occurring outside such that defendant might have owed or breached a duty to intervene. Although Kai was apparently a "regular" at the Waterfall, no witness testified that he had a history of violence or belligerence toward patrons such that defendant should have known that Kai was a danger to other patrons on the night of the

incident. Plaintiff cites nothing in the record to show that defendant should have reasonably anticipated careless or criminal conduct of third persons, either generally or at some particular time, that would create a duty to take precautions against it. We agree with the trial court that it was not reasonably foreseeable that Kai would start a fight with plaintiff and inflict serious injury after Kai and plaintiff did not interact inside at all and exited the tavern separately.

¶ 46 Plaintiff alleges that defendant was negligent for failing to detect the intoxication of patrons, train its employees, bar Kai and Jesse from the premises, provide security, and intervene in the alleged fight. However, plaintiff has produced no evidence about what defendant knew or did to address these issues or about the adequacy of defendant's policies and procedures.

¶ 47 Plaintiff cites *Osborne* and *Shortall* for the proposition that defendant owed a duty to remove Kai from the premises entirely, not just eject him from the building. The *Haupt* court reiterated the general rule that a tavern owner has no duty to protect persons from foreseeable dangers caused by third persons off the premises controlled or owned by the tavern owner. *Haupt*, 358 Ill. App. 3d at 218. However, the court, relying on *Osborne* and *Shortall*, concluded that "there is no bright line rule that a tavern owner's duty to protect its patrons from criminal acts of third parties absolutely ends at the precise property line of the tavern." *Haupt*, 358 Ill. App. 3d at 218. Our conclusion is consistent with those cases, which are factually distinguishable from this one.

¶ 48 In *Osborne*, the defendant's bouncers fought with two intoxicated men, forced the men outside the tavern, and locked the doors. *Osborne*, 312 Ill. App. 3d at 143-44. As the plaintiff prepared to leave the tavern, she noticed the two men standing outside the building, pounding on the outside doors and yelling profanities at the bouncers, who appeared not to acknowledge them. *Osborne*, 312 Ill. App. 3d at 144. The bouncers allowed the plaintiff to leave the tavern

through the locked doors and, after she took a few steps outside the tavern, one of the men spun and kicked the plaintiff in the head. *Osborne*, 312 Ill. App. 3d at 144.

¶ 49 The appellate court reversed the directed verdict for the defendant, holding that the defendant's duty to its patrons extended beyond the doors of the premises, especially where the defendant used the sidewalk to control entry by customers. *Osborne*, 312 Ill. App. 3d at 148. The *Osborne* court relied on *Shortall*, among other cases, in concluding that the location of the attack on a public sidewalk just outside the tavern was not dispositive of whether the defendant owed a duty. *Osborne*, 312 Ill. App. 3d at 148.

¶ 50 In *Shortall*, the court determined that the defendant tavern owner owed a duty to protect the plaintiff from injuries sustained in a fight that took place immediately outside the tavern, on the public sidewalk and street, after the plaintiff had left the tavern. *Shortall*, 283 Ill. App. 3d at 443. While inside, the plaintiff and his female companion were repeatedly harassed and shoved by three men who escalated the altercation into a fistfight outside. This court explained that "tavern owners may not avoid application of the duty to act to protect invitees from criminal attack by third parties simply because the disturbance giving rise to the duty occurs just out the front door, especially where the owner contributes to the altercation by sending patrons out into it." *Shortall*, 283 Ill. App. 3d at 444.

¶ 51 The distinguishing fact in *Osborne* and *Shortall* is the defendants' notice that certain customers might attack other patrons, and in each case, the defendants actually increased the risk by sending patrons into the path of potential danger. Again, the only evidence in this case that could have potentially put defendant on notice of Kai's violent tendencies is testimony that Kai threw a glass on the floor while arguing with Bridget, his girlfriend, who then ejected him. There is no evidence that Kai interacted with plaintiff at all before the incident. Unlike in

Osborne and *Shortall*, defendant was not on notice that Kai would attack plaintiff or any other patron, and defendant did not send plaintiff into harm's way.

¶ 52 We agree with defendant that this case is more like *Lewis v. Razzberries, Inc.*, 222 Ill. App. 3d 843 (1991), where two women were repeatedly accosted and threatened by one of the women's former boyfriends in a tavern. When they decided to leave, the women waited for an employee escort, but after a delay, they decided to walk quickly their car, which was parked in an area off the premises. The women entered their car, but the man followed them, began pounding on the driver's window with both fists, and the women locked the doors. The driver opened the car door, and the man pulled a gun and began shooting into the car, killing one of the women. *Lewis*, 222 Ill. App. 3d at 845-46.

¶ 53 The appellate court affirmed the summary judgment for the defendant on a negligence claim based on the failure to protect against reasonably foreseeable criminal acts of third parties. Noting that reasonable foreseeability must be judged by what was apparent to the defendant at the time of the complained of conduct, and not by what may appear through hindsight, the appellate court held that the tavern owner lacked sufficient notice of the potential risk of danger to the victim. *Lewis*, 222 Ill. App. 3d at 851. The court cited evidence that the two women had not alerted the police or the tavern employees that the man had made threatening remarks, including that he would shoot them when they left the tavern. The victim's friend testified that the threats merely aggravated and annoyed her; she was not afraid. A bartender was aware that the man had approached the women several times and that the verbal exchanges had become increasingly heated, but the court held that his conduct did not provide notice that he was armed or would likely become violent, especially in light of the bartender's testimony that the man had not presented a problem prior to that night. *Lewis*, 222 Ill. App. 3d at 851.

¶ 54 This case presents even less evidence that defendant had notice of a potentially dangerous attack. The violent third party in *Lewis* had repeated, loud, negative interactions with the victim inside before following her to the parking lot. In contrast, Kai did not interact with plaintiff at all while inside the Waterfall.

¶ 55 After viewing the pleadings, depositions, and admissions on file in the light most favorable to plaintiff, we agree with the trial court that the circumstances on the night of the incident did not put a reasonably prudent employee of defendant on notice of the probability of an attack or that a serious physical altercation had already begun inside the Waterfall. Even if plaintiff was the victim of an unprovoked attack as he claims, defendant did not owe a duty to protect against or warn of the danger. To the extent that defendant owed a duty to take reasonable steps to insure the safety of its patrons, defendant did not breach that duty under the circumstances.

¶ 56 III. CONCLUSION

¶ 57 For the reasons stated, the summary judgment entered for defendant by the circuit court of Boone County is affirmed.

¶ 58 Affirmed.