

NOTICE
Decision filed 03/09/11. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

NO. 5-09-0330
IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

FREDRICK WARE,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Madison County.
)	
v.)	No. 04-L-1383
)	
WIWI, INC., d/b/a ACE'S BAR & GRILL,)	
)	
Defendant-Appellee,)	
)	
and)	
)	
JERMAINE LOVETT and LARRY LOVETT,)	Honorable
)	Barbara L. Crowder,
Defendants.)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Stewart and Spomer concurred in the judgment.

RULE 23 ORDER

Held: Although defendant assumed a duty to provide security, the record supports the finding of the jury that defendant was not negligent.

Plaintiff, Fredrick Ware, filed suit against WiWi, Inc., doing business as Ace's Bar & Grill (defendant), and Jermaine Lovett and Larry Lovett, in the circuit court of Madison County. After a trial, a jury returned a verdict in favor of defendant and the court entered a judgment on the verdict. On appeal, plaintiff raises issues regarding (1) whether the facts overwhelmingly establish defendant's liability, (2) whether defendant's liability was established as a matter of law, and (3) whether the trial court erred in denying plaintiff's motions for a directed verdict and posttrial motions for a judgment notwithstanding the verdict or for a new trial. We affirm.

FACTS

Plaintiff filed suit against defendant, alleging that their negligence led to his being shot while at Ace's Bar & Grill on August 1, 2004. At the trial, plaintiff testified that he arrived at Ace's Bar & Grill at approximately 11 p.m. for a birthday party in his honor. Later that evening, plaintiff was dancing with his girlfriend, Kimberly King, when he was told that someone was flipping over the birthday cake, and an altercation ensued. During the melee, plaintiff saw Larry Lovett swing a punch at his girlfriend, and plaintiff grabbed Larry Lovett and wrestled him to the floor. Plaintiff heard two gunshots and was hit in the leg with the second. The establishment emptied of patrons on the sound of the shots, with plaintiff himself hopping out to the parking lot. Plaintiff testified he fell in the lot when he placed weight on the leg and was helped into a car by friends. His girlfriend drove him to a hospital.

Kimberly King testified that she threw a birthday party for plaintiff. She described the melee, stating that plaintiff stepped in to protect her from being struck and that shots were then fired. Kimberly testified that she arrived with seven other women, none of whom were checked by security.

Plaintiff presented opinion testimony from Patrick McCarthy, an expert in the logistics of security and protective services. McCarthy reviewed police reports, along with deposition testimony from several witnesses. McCarthy testified that handheld wands were an effective tool in detecting weapons and that funneling entry through a checkpoint effectively prevents the entry of weapons. He concluded that the security was inadequate. McCarthy testified that "had security been diligent the pistol would not have gotten in."

Several employees of defendant testified for both plaintiff and defendant. On appeal, plaintiff lists numerous statements from these employees.

Plaintiff listed several statements from Derrick Williams. Plaintiff points out that Derrick Williams testified he was trying to break up a fight inside the club when he heard

two or three shots and that he was present when police found shell casings inside the club. Plaintiff also points out that Derrick Williams told his security guard Ulysses Williams that his "searching wasn't good enough because there was a weapon inside the club." Plaintiff also listed the following quotes from Derrick Williams:

"It is necessary to have security."

"The principal concern of security was to check everyone for weapons, and its job was to make sure people did not get in with weapons."

"It's dangerous not to have security."

Plaintiff contended that numerous admissions were made by the owner and manager, Shawndell Williams. In his appellate brief, plaintiff characterized the testimony of Shawndell Williams with the following list:

"She saw a girl hit Ghetto and then Larry and [plaintiff] started fighting.

She heard a couple of gun shots and [plaintiff] got up and ran out of the club.

She heard the gun shots contemporaneously to the struggle between [Larry Lovett] and [plaintiff].

[Defendant's] bar had scanning wands for security the night of the incident, and while operational, security did not use them.

At the time Kim King slapped Ghetto, Ulysses was still at the front door.

Her husband Derrick was the one trying to break up the fight between [Larry Lovett] and [plaintiff].

If security did its job at the front door 'nobody could have gotten into the club with a gun.' "

Similarly, plaintiff provided a list in his appellate brief characterizing the testimony of Harelyn Wilson:

"On the night in question there was a fight and gunshots fired in the back of the club

while she was at the front door.

She saw [plaintiff] and 'his lady' leave the club when everyone was running out right after the fight on the dance floor.

She remembers [plaintiff] being held up by a woman.

[Plaintiff] said he had been hit.

[Plaintiff] was bracing himself against the door and was limping.

[Plaintiff] fell down and got up and exited the door.

She watched [plaintiff] and his girlfriend go out into the parking lot, get in his car and leave.

There is no doubt two shots were fired in the building.

[Plaintiff] was making it obvious he was shot.

Neither she nor Ulysses were using the security wands."

Plaintiff provided the following characterizing statements from Ulysses Williams:

"He and Harelyn were in the best position to keep individuals with weapons from entering the club.

He had access to the security wands but did not use them that night.

In the past there were occasions when patrons would come to the door and then leave when they saw the security wand being used.

The security wand was a deterrent.

He heard someone yell 'gun' and then heard what he thought was [*sic*] shots being fired during the fight on the dance floor.

[Defendant] had a security policy that once he caught someone trying to get in with a gun, they were barred and couldn't come back.

There were many times when people tried to enter with firearms.

He called 9-1-1 that night reporting shots fired.

When the police arrived he showed them inside the club and when the police asked him 'where it was supposed to have happened at, and I told them right there on the dance floor.'

He told the cops that [plaintiff] was supposedly shot on the dance floor.

He knew Ghetto and the Lovett brothers.

He paid special attention to them because they were often trouble.

They were known for carrying weapons.

He believed them to be a 'bad, troubled crowd in the hood.'

He had problems with them before trying to get in the club with guns and knives.

When he came back to the dance floor to respond to the fight, [plaintiff], Ghetto and the Lovett brothers were there."

At the conclusion of the trial, the jury returned a verdict in favor of defendant. The circuit court denied a motion for a directed verdict and posttrial motions for a judgment notwithstanding the verdict or for a new trial. The circuit court entered a judgment on the verdict. Plaintiff appeals.

ANALYSIS

Plaintiff contends that the verdict is not supported by the record. Plaintiff criticizes the verdict by claiming, alternatively, that the facts overwhelmingly establish defendant's liability, that liability was established as a matter of law, and that the trial court erred by denying his motions for a directed verdict and his posttrial motions.

In the end, the answer to each of these alternatives is that the record supports the verdict. A verdict should not be set aside merely because the jury could have reached a different conclusion or because an alternative result is seen as more reasonable in the eyes of the court. *Ford v. Grizzle*, 398 Ill. App. 3d 639, 650, 924 N.E.2d 531, 542 (2010).

In particular, plaintiff asserts that the trial court erred by denying his motion for a

judgment notwithstanding the verdict. A judgment notwithstanding the verdict is proper only when the evidence, viewed in the light most favorable to the opposing party, so overwhelmingly favors the movant that no contrary verdict could stand. *Wisniewski v. Diocese of Belleville*, No. 5-08-0615 (Ill. App. Jan. 13, 2011). A judgment notwithstanding the verdict should not be entered if reasonable minds could differ regarding the inferences or conclusions from the facts presented at the trial. *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 132, 720 N.E.2d 242, 257 (1999). Likewise, a motion for a directed verdict or for a new trial should not be granted merely because another result is possible. *Ford*, 398 Ill. App. 3d at 650, 924 N.E.2d at 542. A directed verdict or a new trial should not be granted unless the jury's verdict is against the manifest weight of the evidence. *Moller v. Lipov*, 368 Ill. App. 3d 333, 341, 856 N.E.2d 664, 672 (2006).

Plaintiff contends that the evidence overwhelmingly establishes liability. Specifically, plaintiff asserts that management of the establishment testified to binding admissions fixing liability. The inadequacy of plaintiff's claim can be viewed from two perspectives. First, a review of the subject testimony reveals that if defendant made any admissions, they were limited in scope. Second, if the record is viewed in terms of the elements of a claim of negligence, the record supports the verdict.

Any admissions were insubstantial. A judicial admission is a formal act of conceding for purposes of litigation that a proposition of fact is true. *Dauen v. Board of Fire & Police Commissioners of the City of Sterling*, 275 Ill. App. 3d 487, 491, 656 N.E.2d 427, 430 (1995). The admission must be a deliberate, clear, unequivocal statement by a party concerning a concrete fact within that party's particular knowledge. *In re Estate of Rennick*, 181 Ill. 2d 395, 406, 692 N.E.2d 1150, 1156 (1998).

Plaintiff lists several statements that he asserts were judicial admissions. Plaintiff incorrectly asserts that these statements constitute admissions establishing the elements for

a claim of negligence. In particular, he points to conclusory statements regarding a breach of a duty. In terms of the potential impact before a jury, the strongest of these statements were Derrick Williams' statement to Ulysses Williams that his "searching wasn't good enough because there was a weapon inside the club" and Shawndell Williams' statement that if security did its job "nobody could have gotten into the club with a gun."

The majority of the statements listed by plaintiff do not constitute judicial admissions for several reasons. First, most of the statements do not relate to concrete facts. See *Serrano v. Rotman*, No. 1-09-2028 (Ill. App. Feb. 4, 2011); *JP Morgan Chase Bank, N.A. v. Earth Foods, Inc.*, 238 Ill. 2d 455, 475, 939 N.E.2d 487, 499 (2010). For example, the statements by Derrick Williams and Shawndell Williams about the security not being "good enough" are, at best, unclear summaries derived from matters of inference. See *Poelker v. Warrensburg Latham Community Unit School District No. 11*, 251 Ill. App. 3d 270, 286, 621 N.E.2d 940, 952 (1993). Furthermore, at no point did plaintiff state with specificity that he was seeking a judicial admission. See *Pryor v. American Central Transport, Inc.*, 260 Ill. App. 3d 76, 85, 629 N.E.2d 1205, 1211 (1994).

The statements that have the strongest claim to binding defendant concerned the security wands. Plaintiff points to testimony from several employees that the security wands were not used. These statements were uncontroverted and established by the record. Nonetheless, these statements fail to establish as a matter of law any of the elements for the claim of negligence.

In terms of the elements for a claim of negligence, the record supports the jury's verdict. In correlation with his claim that the court erred by not granting a judgment notwithstanding the verdict, plaintiff asserts that liability was established as a matter of law because defendant failed to follow its own security procedures. Undoubtedly, defendant had a duty to provide adequate security. See *Sameer v. Butt*, 343 Ill. App. 3d 78, 89, 796 N.E.2d

1063, 1072 (2003); *Wakulich v. Mraz*, 203 Ill. 2d 223, 228, 785 N.E.2d 843, 846 (2003); *Ignarski v. Norbut*, 271 Ill. App. 3d 522, 527, 648 N.E.2d 285, 290 (1995); *Martin v. McDonald's Corp.*, 213 Ill. App. 3d 487, 489, 572 N.E.2d 1073, 1076 (1991); *Vaughn v. Granite City Steel Division of National Steel Corp.*, 217 Ill. App. 3d 46, 52, 576 N.E.2d 874, 878 (1991). In other words, "[O]nce [defendant] assumed the duty to provide security and protection to plaintiffs, it had the obligation to perform this duty with due care and competence, and any failure to do so would lead to a finding of breach of duty." *Martin v. McDonald's Corp.*, 213 Ill. App. 3d 487, 492, 572 N.E.2d 1073, 1078 (1991).

Whether defendant breached this duty was a matter for determination by the jury. Although the existence of a duty is a matter of law, the issue of whether there was a breach was a question of fact. See *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 430, 856 N.E.2d 1048, 1053 (2006). The fact that the security guards did not use wands did not conclude the issue of whether defendant had breached a duty to provide security with due care and competence. Plaintiff's expert opined that the security was inadequate for several reasons, including a failure to maintain a checkpoint and use security wands. On the other hand, defendant presented evidence that security was diligent on the night in question. For example, the record indicates that defendant hired both a male bouncer and a female bouncer to work that evening. Defendant also presented evidence that the screening process was executed with due care, including Ulysses' testimony that the pat-downs he performed were superior to using a wand. The thoroughness of security, which the use of wands addresses, was a matter to be decided by the jury. From the record, the jury could have found that defendant performed security with due care and competence.

The difficulties in plaintiff's case become most apparent in the context of causation. At the center of causation remains the question of how the weapon involved in the incident ever entered the establishment, assuming that it actually did. Plaintiff points to no evidence

showing the manner the gun entered the establishment or for that matter who exactly was in control of the gun. *Cf. Martin v. McDonald's Corp.*, 213 Ill. App. 3d 487, 492, 572 N.E.2d 1073, 1078 (1991) (a jury verdict was upheld because of a great deal of circumstantial evidence that robber entered through a rear door unlocked in violation of procedure). Indeed, defendant is able to point to testimony that the shooting might have occurred outside. Defendant points to evidence that there was no blood on the floor and to testimony from Shawndell Williams that she did not believe the gunshots occurred inside the club. *Cf. Loomis v. Granny's Rocker Nite Club*, 250 Ill. App. 3d 753, 755, 620 N.E.2d 664, 666 (1993) (a jury finding of liability for the failure of security to intervene in a fight on a parking lot lasting five minutes).

This court cannot say that the evidence conclusively establishes that the actions of defendant were a material element and substantial factor in order to overturn the verdict of the jury. See *Krywin v. Chicago Transit Authority*, 238 Ill. 2d 215, 225, 938 N.E.2d 440, 446 (2010). Proximate cause must rest on a reasonable certainty that the defendant's acts caused the injury. *Sameer v. Butt*, 343 Ill. App. 3d 78, 89, 796 N.E.2d 1063, 1072 (2003). Plaintiff's proof of proximate causation is tenuous. Assuming the shooting occurred inside the building, the record leaves open many questions including what weapon was used, how the weapon entered the establishment, and who fired shots. The verdict was not against the manifest weight of the evidence.

CONCLUSION

Accordingly, the judgment of the circuit court is hereby affirmed.

Affirmed.