IN THE COURT OF APPEALS OF IOWA

No. 1-585 / 11-0085
Filed November 9, 2011

CURTIS GENE HOYT,
Plaintiff-Appellant,

vs.

GUTTERZ BOWL & LOUNGE, L.L.C.,
Defendant-Appellee,

CURTIS JAMES KNAPP,
Defendant.

Appeal from the Iowa District Court for Guthrie County, Brad McCall, Judge.

Curtis Hoyt appeals the district court's grant of summary judgment. **REVERSED AND REMANDED.**

Gary Dickey of Dickey & Campbell Law Firm, P.L.C., Des Moines, for appellant.

Mark J. Wiedenfeld and James W. Russell of Wiedenfeld & McLaughlin, L.L.P., Des Moines, for appellee Gutterz Bowl & Lounge, L.L.C.

Heard by Sackett, C.J., and Vaitheswaran and Tabor, JJ.

TABOR, J.

This interlocutory appeal involves a question of premises liability. In particular, we must decide whether any genuine issue of material fact exists regarding two elements of a customer's negligence claim against a bowling alley lounge. First, did the lounge owner exercise reasonable care to protect one customer from another? Second, did the harm that occurred fall within the owner's scope of liability? Because we conclude reasonable minds could differ in answering these questions, we reverse the district court's grant of summary judgment for the lounge owner.

I. Background Facts and Proceedings

Curtis Hoyt and several members of his construction crew finished work around 3:30 p.m. on March 20, 2009, and then stopped for beers at Gutterz Bowl & Lounge (Gutterz) in Guthrie Center.[1] Hoyt noticed Curtis Knapp also was drinking at the bar that afternoon. Hoyt thought Knapp was "mean mugging" him, that is glaring at him without saying anything. Hoyt and Knapp knew each other well, having often fished together, but Knapp was angry with Hoyt for domestically abusing the sister of Knapp's friend.[2]

After drinking a few beers, Hoyt and co-worker Chris Brittain became loud and taunted Knapp. Disapproving of their verbal harassment of another customer, the waitress warned Hoyt and Brittain that she would "cut them off"

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[1] We take these facts from the summary judgment record. Defendant Gutterz acknowledges in its motion for summary judgment that "there are multiple versions of the altercation—ranging from Hoyt being attacked from behind to Hoyt starting the fight and getting knocked out," but maintains that it is not liable under any of the versions.

[2] Nothing in the record indicates the owner or employees of Gutterz knew about the negative history between Knapp and Hoyt.

from additional drink service unless they quieted down. When her warning did not work, the waitress secured approval from her boss, Gutterz owner Rodney Atkinson, to refuse the men service. Atkinson, who was busy cooking in the kitchen, came out to the bar area to check on the situation. Hoyt and Brittain complained to him about the waitress's decision to stop serving them alcohol.

After Hoyt and Brittain continued their name-calling, Atkinson told them they needed to leave the bar. According to Atkinson's account, he escorted them to their trucks in the parking lot and returned to his work in the kitchen. Several minutes later he learned about the fight in the parking lot. According to Hoyt, somebody struck him on the back of the head as he was walking out of the bar, dropping him to the ground. Witness statements gathered by the police indicate that Knapp stepped outside to smoke and Hoyt encouraged him to come across the lot—before the physical fight ensued. Knapp admitted to police that he struck Hoyt, but wrote in his statement that he was "defending" himself.

Hoyt recalled waking up in the parking lot, trying to stand up, and going "right back down." Hoyt suffered a compound fracture in his ankle that required surgery to insert a steel rod and six screws. The police charged both Hoyt and Knapp with disorderly conduct.

On September 25, 2009, Hoyt filed suit against Knapp and Gutterz, alleging the business was liable for Knapp's assault committed in its parking lot. On November 24, 2010, Gutterz moved for summary judgment and filed a brief and statement of undisputed facts. On December 17, 2010, Gutterz

supplemented its statement of undisputed facts, including citations to applicable portions of witness depositions.

On December 23, 2010, the district court granted Gutterz's motion for summary judgment. Relying on the Restatement (Second) of Torts, Section 344, the district court wrote: "In construing the duty of the possessor of land the Iowa Supreme Court, in *Martinko v. H-N-W Associates*, 393 N.W.2d 320 (Iowa 1986), observed that the ultimate issue for determining liability is one of foreseeability."

The court concluded:

> Even viewing the evidence in a light most favorable to the Plaintiff, there is insufficient evidence to generate a genuine issue of material fact on the question of whether Gutterz employees failed to exercise reasonable care to discover the likelihood of harm or failed to provide an adequate warning after discovering a potential danger to Hoyt.

After the district court dismissed Gutterz as a party to the lawsuit, Hoyt sought interlocutory appeal, alleging the grant of summary judgment was "at odds with the evidence in the record" as well as the holding of *Regan v. Denbar, Inc.*, 514 N.W.2d 751 (Iowa Ct. App. 1994). The Supreme Court granted Hoyt's request for review. On appeal, Hoyt asks us to reverse the district court's grant of summary judgment and remand for a trial on the merits.

II. Scope and Standard of Review

We review the grant of summary judgment to correct errors at law. *Lobberecht v. Chendrasekhar*, 744 N.W.2d 104, 106 (Iowa 2008). Summary judgment is appropriate

> "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that

> there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law."

Id. at 106 (citation omitted); *see also* Iowa R. Civ. P. 1.981(3). The moving party must show it is entitled to judgment as a matter of law; we view the evidence in the light most favorable to the nonmoving party. *Hunter v. City of Des Moines Mun. Hous. Auth.*, 742 N.W.2d 578, 584 (Iowa 2007). We also consider on behalf of the nonmoving party

> every legitimate inference that can be reasonably deduced from the record. An inference is legitimate if it is "rational, reasonable, and otherwise permissible under the governing substantive law." On the other hand, an inference is not legitimate if it is "based upon speculation or conjecture." If reasonable minds may differ on the resolution of an issue, a genuine issue of material fact exists.

Peak v. Adams, 799 N.W.2d 535, 543 (Iowa 2011) (citation omitted).

"It is well-settled that 'questions of negligence or proximate cause are ordinarily for the jury,' and 'only in exceptional cases should they be decided as a matter of law.'" *Thompson v. Kaczinski*, 774 N.W.2d 829, 832 (Iowa 2009) (citation omitted). Likewise, "questions of foreseeability are ordinarily for the fact finder." *Galloway v. Bankers Trust Co*., 420 N.W.2d 437, 440 (Iowa 1988) (quoting *Prosser and Keaton on the Law of Torts* § 43, at 299 (5th ed. 1984) for the proposition that "'what is required to be foreseeable is only the 'general character' or 'general type' of the event or the harm, and not its 'precise' nature, details, or above all [the] manner of [its] occurrence'").

III. Analysis

A. Choosing an analytical framework

Our first step is to decide whether this premises liability case should be analyzed under the Restatement (Second) of Torts or the Restatement (Third) of Torts: Liability for Physical & Emotional Harm [hereinafter Restatement (Third)]. In *Thompson v. Kaczinski*, our supreme court adopted the principles of the Restatement (Third), which provide that "the assessment of the foreseeability of a risk" is no longer part of the duty analysis, but is "to be considered when the [fact finder] decides if the defendant failed to exercise reasonable care." *Thompson*, 774 N.W.2d at 835 (citing Restatement (Third) § 7 cmt. j); *see also Brokaw v. Winfield-Mt. Union Cmty. Sch. Dist.*, 788 N.W.2d 386, 391 (Iowa 2010).

In its December 23, 2010 ruling, the district court analyzed Gutterz's liability for Hoyt's injuries under Restatement (Second) of Torts, section 344, at 223–24 (1965), which provides:

> 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
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> (a) discover that such acts are being done or likely to be done, or
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> (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise protect them against it.

Restatement (Second) of Torts § 344, at 223–24 (1965).

Comment f to section 344 discusses the circumstance of an injury to a visitor caused by a third party:

> 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, at 225–26.

Iowa courts have traditionally used section 344 as a framework for deciding if a possessor of land may be held liable to visitors for acts committed by third parties. *See, e.g.*, *Summy v. City of Des Moines*, 708 N.W.2d 333, 340–42 (Iowa 2006); *Galloway*, 420 N.W.2d at 438; *Martinko*, 393 N.W.2d at 321; *Regan v. Denbar*, *Inc.*, 514 N.W.2d 751, 752–53 (Iowa Ct. App. 1994). In *Martinko*, the court observed that the "nub of this section" was foreseeability. *Martkinko*, 393 N.W.2d at 321. In *Tenney*, the court noted that premises liability under section 344 "arguably presupposes foreseeability." *Tenney v. Atlantic Assocs.*, 594 N.W.2d 11, 18 (Iowa 1999). *Tenney* cited to Justice Carter's dissent in *Martinko*, where he offered the following position:

> The rule of liability stated in section 344 of Restatement (Second) of Torts (1965) . . . . accepts as a given that the risk of third persons causing physical harm to business invitees is sufficiently foreseeable that the business invitor must take reasonable precautions to alleviate this danger. Accordingly, the *existence* of the duty which imposes this type of liability is not dependent upon foreseeability of harm. Foreseeability only bears on the question of whether the duty has been breached.

Martinko, 393 N.W.2d at 323 (Carter, J., dissenting).

In granting summary judgment, the district court discussed Iowa case law concerning the "duty of the possessor of land" and the "foreseeability of third party aggression"—including *Martinko*, *Regan*, and *Morgan v. Perlowski*, 508 N.W.2d 724, 728 (Iowa 1993) (analyzing the duty imposed under section 318 of Restatement (Second) of Torts). The district court concluded:

> In contrast to the factual situations in *Regan*, *Wood*, *and Morgan*, . . . the only information *Gutterz* had available to it regarding a possible altercation was that plaintiff's own behavior created the potential of harm to Knapp, not that Knapp posed a potential danger to plaintiff.
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> . . . .
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> The issue is not just whether a fight was foreseeable, but whether harm to Hoyt was foreseeable. The circumstances may have made it foreseeable that Hoyt might harm Knapp. The circumstances did not make it foreseeable that Knapp might harm Hoyt.

In asking us to uphold that ruling, Gutterz argues it "owed no duty of protection to Hoyt," citing *Martinko*, which concluded that a shopping mall had no duty to protect plaintiff's daughter from the criminal conduct of third persons in the parking lot. *Martinko*, 393 N.W.2d at 323 (relying on section 344 of Restatement (Second) of Torts to affirm the summary judgment). Gutterz argues in the alternative that even if it owed a duty to Hoyt, the owner's conduct was reasonable as a matter of law. Gutterz also contends the district court's ruling can be affirmed under section 40 of the Restatement (Third), if that framework offers the proper analytical approach.[3]

Section 40(a) of the Restatement (Third) provides: "An actor in a special relationship with another owes the other a duty of reasonable care with regard to

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[3] At oral argument, both parties agreed that we should scrutinize this case using the Restatement (Third).

risks that arise within the scope of that relationship." Restatement (Third) § 40(a) (proposed final draft 2011). "The duty described in this Section applies regardless of the source of the risk. Thus, it applies to risks created by the individual at risk as well as those created by a third party's conduct, whether innocent, negligent, or intentional." *Id.* § 40 cmt. g. Moreover, "[b]usinesses . . . who hold their land open to the public owe a duty of reasonable care to persons lawfully on their land who become ill or endangered by risks created by third parties." *Id.* § 40 cmt. j.

Because our courts presupposed foreseeability as a part of premises liability even before our adoption of the Restatement (Third) analysis in *Thompson*, we do not believe that adopting the analytical framework supplied by section 40 of the Restatement (Third) represents a dramatic departure from the traditional approach under section 344 of the Restatement (Second). But to emphasize that the assessment of the foreseeability of a risk is no longer part of the duty determination (generally a legal question assigned to the court as gatekeeper), and is now considered part of the reasonable care and scope of liability elements (generally fact-laden questions left for the jury), we follow the Restatement (Third). *See Brokaw*, 788 N.W.2d at 391 (applying Restatement (Third) despite district court's reliance on cases decided under Restatement (Second)). As we explain below, the analytical shift in the Restatement (Third), which places questions of foreseeability more squarely within the province of the jury, raises doubts about the propriety of granting summary judgment.

B. Applying the Restatement (Third) of Torts

Turning then to the Restatement (Third), this formulation of tort law measures foreseeability for its impact on the negligence determination, not as part of the threshold inquiry whether a duty exists. Restatement (Third) § 7 cmt j ("Determinations of no duty are categorical while foreseeability cannot be determined on a categorical basis."). Under the Restatement (Third), a plaintiff establishes a defendant's negligence by showing the following: (1) the existence of a duty, (2) failure to exercise reasonable care, (3) factual cause, (4) physical harm, and (5) harm within the scope of liability (previously called "proximate cause"). *Hill v. Damm*, 804 N.W.2d 95, 99 (Iowa Ct. App. 2011) (citing Restatement (Third) § 6 cmt. b, at 67–68). The first element, duty, is a question of law for the court. *Id*. The next four elements are factual questions to be determined by the fact finder. *Id*. In this case, the parties do not dispute the factual cause and physical harm elements. Accordingly, we are left to decide if Hoyt has generated a genuine issue of material fact on the reasonable care and scope of liability elements.

1. Reasonable care

The Restatement (Third) explains that a person

> acts negligently if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.

Restatement (Third) § 3, at 29.

Section 19 of the Restatement (Third) discusses conduct that is negligent because of the prospect of improper conduct by the plaintiff or a third party: "The conduct of a defendant can lack reasonable care insofar as it foreseeably combines with or permits the improper conduct of the plaintiff or a third party." *Id.* § 19, at 215.

Under the definition of negligence,

> whether a defendant's conduct lacks reasonable care and is therefore negligent often depends on the foreseeable likelihood of the actions of other persons. . . . Even when the actions are themselves improper, so long as they are foreseeable they remain relevant to the defendant's possible negligence.
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> The improper actions or misconduct in question can take a variety of forms. It can be negligent, reckless, or intentional in its harm-causing quality. It can be either tortious or criminal, or both.

Id. § 19 cmt. a, at 215. One example of a situation where the defendant has created or increased the likelihood of injury by a third person is where "the defendant's business operations may create a physical environment where instances of misconduct are likely to take place." *Id*. § 19 cmt. e, at 218.

Another comment to this section of the Restatement (Third) makes it clear that a plaintiff's contributing negligence does not preclude the defendant's liability. In fact, "[i]n many situations, the foreseeable risk that renders the defendant's conduct negligent is the risk that potential victims will act in ways that unreasonably imperil their own safety." *Id.* § 19 cmt. b, at 216. Similarly,

> in many situations, the defendant's conduct foreseeably brings about the misconduct of a third party, which results in an injury to the plaintiff. While the foreseeability of this misconduct raises an issue of the defendant's negligence, it also raises an issue of whether the plaintiff's harm is within the defendant's scope of liability. . . . However, the issues of defendant negligence and scope of liability often tend to converge. If the third party's

> misconduct is among the risks making the defendant's conduct negligent, then ordinarily plaintiff's harm will be within the defendant's scope of liability.

Id. § 19 cmt. c, at 216.

2. Scope of liability

Section 29 of the Restatement (Third) limits an actor's liability to "those harms that result from the risks that made the actor's conduct tortious." *Id.* § 29, at 493. This "risk standard" is intended to prevent the unjustified imposition of liability by "confining liability's scope to the reasons for holding the actor liable in the first place." *Id.* § 29 cmt. d, at 496. The term "scope of liability" is used to distinguish between "those harms that fall within this standard and, thus, for which the defendant is subject to liability and, on the other hand, those harms for which the defendant is not liable." *Id.* § 29 cmt. d, at 496.

In determining scope of liability, we must apply "an appropriate level of generality" to the risks that made the actor's conduct tortious and determine whether plaintiff's harm resulted from any of those risks. *Id.* Risk consists of "harm occurring with some probability." *Id.* When a defendant seeks a determination—as a matter of law—that the plaintiff's harm is beyond the scope of liability, courts must compare plaintiff's actual harm to the range of harms posed by the defendant's conduct that a jury could find as the basis for determining the conduct was tortious. *Id.* cmt. d, at 496.

3. *Foreseeability of misconduct by both Hoyt and Knapp resulting in harm to Hoyt.*

We must decide whether reasonable minds could find that Gutterz failed to exercise reasonable care by permitting the physical encounter between Knapp and Hoyt in the lounge parking lot and whether the harm suffered by Hoyt fell within Gutterz's scope of liability. *See Thompson*, 774 N.W.2d at 835 (explaining "'[a] lack of foreseeable risk in a specific case may be a basis for a no-breach determination, but such a ruling is not a no-duty determination'" (citation omitted)).

The district court found, as a matter of law, that Gutterz could not have foreseen Knapp causing harm to Hoyt in the parking lot because Hoyt was the verbal aggressor when both customers were inside the bar. The court distinguished these circumstances from *Regan* where the plaintiffs expressed fear to the bartender after an altercation inside the bar, but the bartender declined to call the police or hold back the "attackers." *See Regan*, 514 N.W.2d at 753.

In *Regan*, which was decided under the Restatement (Second) of Torts, the critical fact precluding a directed verdict was the occurrence of a fight inside the bar, which spilled outside with the knowledge of the bartender. Our court concluded there was "sufficient evidence of the foreseeability of this incident" to allow the issue to go to the jury. *Id.* We believe the district court read *Regan* too narrowly. And even if *Regan* is inapposite, we find a genuine issue of material

fact when Knapp's assault on Hoyt is viewed through the lens of the Restatement (Third).

It is true that Hoyt did not tell Gutterz's staff that he was afraid of Knapp. But Gutterz's owner Atkinson knew that Hoyt had been drinking and was harassing Knapp inside the bar. It is a disputed issue of fact whether Atkinson walked Hoyt and Brittain out to the parking lot or whether he simply told them to leave and did not check further to find out whether Knapp, the target of their taunts, was waiting outside.

The question is: does the owner's knowledge of Hoyt's aggressive nature and harassment of Knapp give rise to genuine questions of material fact concerning the foreseeability that the tables would turn and Knapp would assault Hoyt. When the risk in this case is given the "appropriate level of generality," as directed by the Restatement (Third), we believe that a jury could find the prospect of a confrontation between Hoyt and Knapp was reasonably foreseeable to Gutterz's staff and the harm suffered by Hoyt as a result of the confrontation was within the range of harm a jury could find that would render Gutterz's conduct tortious.

Atkinson testified in his deposition that he walked Hoyt out to his truck because he wanted to be sure Hoyt and Brittain were leaving.[4] He continued in this exchange with Hoyt's attorney:

> Q. Why did you want to make sure that they were leaving?
> A. So I was not to have a problem.

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[4] Other witnesses did not agree with Atkinson's version. Brittain did not remember being asked to leave the bar or being escorted to the lot. Hoyt testified in his deposition Atkinson asked them to leave, but did not walk out with them.

> Q. What type of problem would you have had? A. A problem with them two having an altercation.
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> Q. Were you concerned that there might be an altercation with Mr. Knapp? A. No.
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> Q. What type of altercation were you concerned about? A. I was afraid they were going to—The reason I took them out was to defuse the situation that I thought I could see happening.
>
> Q. And what situation did you think you could see? A. A fight.
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> Q. A fight between whom? A. Curt Hoyt, Chris Brittain, and Curt Knapp.
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> Q. Why didn't you call the police? A. The reason the police weren't called is because I walked them to the truck knowing the situation was taken care of.
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> Q. Did you see them leave your premises? A. I took them to their truck. I turned around and walked back inside, went to the kitchen and proceeded cooking.

Based on Atkinson's own articulation of the expected trouble, a jury could have found Gutterz was negligent because it permitted the improper conduct of the plaintiff and a third party to occur on its property.

Our court recently analyzed a somewhat similar liability issue in *Hill v. Damm*. In that case, the family of a murdered teenager sued a bus company for negligently allowing her to get off at the wrong bus stop, which resulted in her contact with a known sex offender who orchestrated her kidnapping and death. *Hill*, 804 N.W.2d at 99. The school bus company argued that the identifiable risk at the time of its allegedly tortious conduct was that Damm would sexually abuse the girl, not that he would hire a third party to kidnap and eventually kill her. Our court decided the appropriate level of generality with which to describe the type of harm a defendant could reasonably anticipate should be left to a jury.

In *Hill*, we quoted the following passage from the Restatement (Third):

> "Many cases will pose straightforward or manageable determinations of whether the type of harm that occurred was one

> of those risked by the tortious conduct. Yet in others, there will be contending plausible characterizations that lead to different outcomes and require the drawing of an evaluative and somewhat arbitrary line. *Those cases are left to the community judgment and common sense provided by the jury*."

Id. at 99 (quoting Restatement (Third) § 29 cmt. i, at 504–05 (emphasis added)).

In the instant case, the district court determined: "The circumstances may have made it foreseeable that Hoyt might harm Knapp. The circumstances known to Atkinson did not make it foreseeable that Knapp might harm Hoyt."

We grant that this would be an easier case for finding a genuine issue of material fact if the customer whose conduct became boisterous and aggressive was the individual who injured another customer. *See, e.g.*, *Bartosh v. Banning*, 59 Cal. Rptr. 382, 384 (Cal. Ct. App. 1967) (finding it reasonably foreseeable that patron "mouthing obnoxious and provocative language" toward another patron would harm a bystander); *Windorski v. Doyle*, 18 N.W.2d 142, 145 (Minn. 1945) (finding fact question of negligence for not maintaining order and sobriety inside bar). But we believe reasonable minds could perceive a foreseeable risk, that is, some probability that a loud and inebriated customer who persistently harasses another customer for staring at him would become the victim of retaliation.

Gutterz's duty of care applies regardless of the source of the risk of harm to Hoyt. *See* Restatement (Third) § 40 cmt. g. Accordingly, Hoyt's own conduct in egging on a third party to fight with him does not absolve Gutterz of its duty to protect Hoyt while on its premises. Moreover, the fact Hoyt acted to his own detriment in harassing Knapp, and perhaps in initiating the encounter in the parking lot, does not negate Gutterz's potential negligence. *See Id.* § 19 cmt. b,

at 216 ("In many situations, the foreseeable risk that renders the defendant's conduct negligent is the risk that potential victims will act in ways that unreasonably imperil their own safety.").

The summary judgment record does not show exactly what steps the Gutterz owner and employees took to ensure the safety of their customers, knowing that one had harassed another inside the bar. The waitress who eventually refused to serve Hoyt more alcohol was aware that Hoyt's verbal barbs were directed at Knapp. The record does not reveal the extent to which the waitress was aware of Knapp's response to Hoyt's incitement. In his deposition, Hoyt asserted that Knapp was "mean mugging" him from across the room and would not respond to Hoyt's questions as to why he kept staring. Reasonable minds could differ as to whether Knapp's combative appearance was obvious to Gutterz staff or would have foreshadowed his assault on Hoyt in the parking lot. As mentioned above, Atkinson's recollection of walking Hoyt out to his truck in the parking lot is a disputed fact. The events leading up to Knapp leaving the bar are not spelled out in the summary judgment record. It is undisputed that Atkinson went back to his work in the kitchen without determining whether Hoyt left the parking lot and without calling police.

The facts in the record, viewed in the light most favorable to Hoyt, establish a genuine issue of material fact as to whether Gutterz breached the duty of reasonable care it owed to Hoyt, as a customer of its business, and as to whether Hoyt's harm fell within Gutterz's scope of liability. Because we see it as the function of the fact finder to determine whether Gutterz took sufficient steps

to prevent the brewing confrontation between two customers, we reverse the grant of summary judgment and remand for a trial.

REVERSED AND REMANDED.

Vaitheswaran, J., concurs; Sackett, C.J., dissents.

SACKETT, C.J. (dissenting)

I dissent. I would affirm the district court.

I agree there are instances where the possessor of land owes a duty to a third party where there is a foreseeability of danger to the party. The majority here has held, "[W]e believe reasonable minds could perceive a foreseeable risk, this is, a probability that a loud and inebriated customer who persistently harasses another customer for staring at him would become a victim of retaliation." I disagree with the majority that there is sufficient evidence here, which if believed, would cause a reasonable person to believe that Knapp would harm Hoyt.

First, I don't think the facts here, if believed, would cause a reasonable person to believe there would be physical violence. Secondly, even if there were sufficient facts, I would be inclined to agree with the district court that this evidence does not make it foreseeable Knapp, who was causing no trouble, would harm Hoyt.[5]

[5] I do not infer from this statement that Knapp started this fight. For while not an issue here, the more credible evidence would make it appear he did.