

STATE OF MICHIGAN
COURT OF APPEALS

SCOTTIE L. WALLER,

Plaintiff-Appellant,

v

FRED MOODY,

Defendant,

and

ELKS CHARITY LODGE #1397,

Defendant-Appellee.

UNPUBLISHED

September 19, 1997

No. 195550

Muskegon Circuit Court

LC No. 95-033850 NO

Before: O'Connell, P.J., and White and C. F. Youngblood*, JJ.

MEMORANDUM.

Plaintiff appeals by right summary disposition under MCR 2.116(C)(8), as to defendant Elks Lodge on a complaint for tavernkeeper liability based on injuries inflicted on plaintiff by an assaultive patron. This case is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff's complaint pleads a cause of action in accordance with the principles of tavernkeeper liability set forth in *Gorby v Yeomans*, 4 Mich App 339, 343; 144 NW2d 837 (1966). However, defendant Elks Lodge and the trial court maintain that *Gorby* no longer represents good law, as suggested in *Scott v Angie's, Inc*, 153 Mich App 652, 664-665; 396 NW2d 429 (1986). In *Scott*, this Court quoted *Manuel v Weitzman*, 386 Mich 157, 163; 191 NW2d 474 (1971), for the proposition that the 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.

Gorby is not inconsistent with this principle from *Manuel v Weitzman*, which explains why *Gorby* was cited and applied in *Schneider v Nectarine Ballroom, Inc (On Remand)*, 204 Mich App

* Circuit judge, sitting on the Court of Appeals by assignment.

1, 4-5; 514 NW2d 486 (1994), and treated as valid in *Alexander v American Multi-Cinema*, 450 Mich 877, 880; 540 NW2d 674 (1995) (Levin, J., dissenting from denial of leave to appeal). As explained in this Court's opinion in *Mason v Royal DeQuindre, Inc*, 209 Mich App 514, 517; 531 NW2d 797 (1995), *lv gtd* 451 Mich 898, the key distinction between the two lines of authority is whether the patron's injuries result from the criminal acts of a third party under circumstances in which "the merchants therein had specific knowledge of a substantial danger to their patrons." *Schneider, supra*; *Jackson v White Castle System, Inc*, 205 Mich App 137; 517 NW2d 286 (1994). Where, however, it is not foreseeable that the particular patron is at risk of being assaulted, the invitor does not owe such a duty. *Mason, supra*; *Perez v KFC National Management Co, Inc*, 183 Mich App 265, 270-271; 454 NW2d 145 (1990). Additionally, a tavernkeeper may be liable on a dramshop theory if the assault was proximately caused by the serving of alcoholic beverages to a visibly intoxicated person. *Weiss v Hodge*, 223 Mich App ____; ____ NW2d ____ (Docket No. 182881, issued 5/27/97).

Whether plaintiff can prove the facts alleged is an issue not presently before this Court. Plaintiff's complaint does state a cause of action on which relief may be granted, and summary disposition was therefore erroneously awarded.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell

/s/ Helene F. White

/s/ Carole F. Youngblood