

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

JOSEPH J. BOLUS, JR.,

Plaintiff-Appellant,

v

LICKME, INC., d/b/a CAL'S PIZZA,

Defendant-Appellee,

and

JOHN DOE 1, JOHN DOE 2 and JOHN DOE 3,

Defendants.

---

UNPUBLISHED

January 8, 1999

No. 201204

Wayne Circuit Court

LC No. 96-600519 NS

Before: O'Connell, P.J., and Gribbs and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant's motion for summary disposition. We affirm.

The general facts are not disputed. Plaintiff was a firefighter with the City of Detroit, and on May 19, 1995, while off duty, he went to defendant's establishment and ordered a meal. An altercation erupted in the back of defendant's establishment. A woman started spraying what was believed to be mace into the fray. Plaintiff saw a woman grab her throat and appear to have difficulty breathing. Plaintiff helped the woman outside of the building, as several people were exiting. After exiting, he saw the woman who had been spraying the substance in the bar. In an effort to assist the injured woman, he went over to the woman who had been spraying the substance and told her that he was an off duty fire fighter, and asked what was in the spray can. The woman shoved plaintiff, and he told her that, because she was getting physical, she could go to jail. A voice from behind plaintiff said, "[w]ho is going to jail? We are kicking your ass." Three intoxicated men then attacked plaintiff. Plaintiff tried to reenter defendant's establishment, however, the door had been locked. Plaintiff was injured as a result of the attack. Plaintiff sued defendant arguing that defendant violated the dram shop act and, although he did

not name and retain the three alleged intoxicated persons, he used due diligence to name and retain them and, therefore, should be exempt from the name and retain provision of the dram shop act. Plaintiff also claimed that defendant breached its duty to protect plaintiff from foreseeable dangerous conditions.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10) on three grounds: plaintiff failed to comply with the dram shop provision to name and retain alleged intoxicated persons, and failed to use due diligence to name and retain them; plaintiff's claim was barred by the fireman's rule because plaintiff, at the time he was attacked, was operating as a firefighter; and plaintiff's assault was due to a sudden and unexpected assault by individuals not under the control of defendant, therefore defendant did not breach any duty it owed plaintiff as a business invitee. The trial court granted defendant's motion for summary disposition on all counts without specifying the grounds for summary disposition or its reasons for granting the motion.

Plaintiff argues that the trial court erred in granting defendant's motion for summary disposition on the dram shop claim because plaintiff exercised due diligence in attempting to name and retain the alleged intoxicated persons and, therefore, was exempt from the name and retain provision. Generally, a failure to name and retain the intoxicated defendant terminates the dram shop action. *Green, v Wilson*, 455 Mich 342, 353; 565 NW2d 813 (1997). Moreover, in addition to not knowing the assailants' identity, plaintiff has not come forward with evidence that he ever saw the assailants inside defendant's establishment or that defendant served them alcohol. The trial court did not err in granting summary disposition on this basis.

Plaintiff also argues that the trial court improperly granted summary disposition on the ground that plaintiff's claim was barred by the fireman's rule and that defendant did not owe plaintiff a duty to protect him against the three John Does. We agree that summary disposition on this ground would have been improper. Plaintiff was at defendant's establishment as a private citizen, and his presence was not related to his duties as a firefighter. *Mariin v Fleur, Inc*, 208 Mich App 631, 633; 528 NW2d 218 (1995); *Miller, supra*, 223 Mich App 163.

Finally, plaintiff argues that summary disposition was improper because defendant owed him a duty to protect him from injury by third parties. We disagree. The assault of plaintiff was sudden and unexpected, committed by individuals not under defendant's control. We find that the trial court properly concluded that defendant had no duty here.

A prima facie case of negligence requires proof of four elements: (1) a duty owed to the plaintiff by the defendant; (2) a breach of that duty; (3) causation; and (4) damages. *Schneider v Nectarine Ballroom*, 204 Mich App 1, 4; 514 NW2d 486 (1994).

The duty of a tavern keeper to protect a patron from injury by another arises only when one or more of the following circumstances exists: (1) a tavern keeper allowed a person on the premises who has a known propensity for fighting; (2) the tavern keeper allowed a person to remain on the premises whose conduct had become obstreperous and aggressive to such a degree the tavern keeper knew or ought to have known he endangered others; (3) the tavern keeper had been warned of danger from an

obstreperous patron and failed to take suitable measures for the protection of others; (4) the tavern keeper failed to stop a fight as soon as possible after it started; (5) the tavern keeper failed to provide a staff adequate to police the premises; and (6) the tavern keeper tolerated disorderly conditions. [*Id.*, 4-5.]

The question whether a duty exists is one of law for the court's resolution. *Id.*

Here, plaintiff voluntarily left defendant's establishment, went outside and held the door open for several other patrons who were also going outside into the fresh air. There is no evidence that defendant knew that plaintiff was outside. This is not a case, like *Schneider, id.*, where defendant "affirmatively ejected plaintiff into a known, obvious, and imminently dangerous situation." Unlike *Goodman v Fortner*, companion case to *Mason v Royal Dequindre, Inc.*, 455 Mich 391, 395; NW2d (1997), plaintiff was not in danger when he went outside and nothing happened prior to the attack to put defendant on notice that plaintiff would be in danger. Nor did defendant force plaintiff into danger; indeed, plaintiff approached a woman who was part of the earlier altercation inside defendant's establishment and who "maced" the crowd. Summary disposition was properly granted.

Affirmed.

/s/ Peter D. O'Connell

/s/ Roman S. Gribbs

/s/ Michael J. Talbot