STATE OF MICHIGAN

COURT OF APPEALS

KELLY WEIDNER and RANDY WEIDNER,

Plaintiffs-Appellants,

v

MIAMY, INC., d/b/a WOODEN SHOE BAR,

Defendant-Appellee

and

BILL X and LADY Y,

Defendants.

UNPUBLISHED
March 28, 2000

No. 215276
Gladwin Circuit Court
LC No. 96-012670-NO

Before: Holbrook, Jr., P.J., and Smolenski and Collins, JJ.

HOLBROOK, JR., P.J. (dissenting).

I agree that there was no evidence prior to Lady Y's initial attack that would have made the assault reasonably foreseeable. However, contrary to the position taken by the majority, I believe that once the assault began, defendant Miamy, Inc. (hereinafter "defendant bar") was under a duty to use reasonable care to protect plaintiff Kelly Weidner from the harm caused by the subsequent acts of Bill X and Lady Y. *Mason v Royal Dequindre, Inc*, 455 Mich 391, 400; 566 NW2d 199 (1997); 2 Restatement Trots, 2d, § 344, comment f.[1] I also believe that a genuine issue of material fact existed on whether the steps taken by defendant bar to prevent the harm were reasonable under the circumstances. Accordingly, I respectfully dissent.

While the operator of a bar is not an insurer of the safety of the bar's patrons, he does have a duty to use reasonable care to protect those patrons from the foreseeable criminal acts of third parties. *Mason, supra* at 405. After reviewing the record, I believe that while the initial assault by Lady Y was sudden and unforeseeable, all subsequent acts by her and Bill X were reasonably foreseeable. *Shorthall v Hawkeye Bar & Grill*, 670 NE2d 768, 711 (Ill App, 1996). It is reasonable to conclude that those subsequent acts did not occur so suddenly that defendant bar was denied the opportunity to respond so as to prevent further injury. Not only had the fight not broken up by the time the bouncer

arrived on the scene, *Boone v Martinez*, 567 NW2d 508, 511 (Minn, 1997), but the evidence indicates that the major injuries suffered by plaintiff Kelly Weidner occurred sometime after she was first struck by Lady Y.

Part of the duty imposed in such situations is the duty to intervene as soon as reasonably possible once an assault begins. *Mason, supra* at 400, citing *Manuel v Weitzman*, 386 Mich 157, 167; 191 NW2d 474 (1971). See also *Christen v Lee*, 780 P2d 307, 1321 (Wash, 1989); 43 ALR 4th, § 7(a). Defendant bar must also undertake reasonable and sufficient measures to protect its patrons from the potential harm presented. *Mason, supra* at 400. Viewing the evidence in a light most favorable to plaintiffs, I conclude that they have established that a genuine issue of material fact existed regarding whether defendant bar's response to the assault was reasonable. Plaintiffs presented evidence that, if believed by a jury, would support the conclusion that although defendant bar had sufficient time and opportunity, it failed to promptly and adequately intervene to protect plaintiff Kelly Weidner from further harm once the fight broke out.

I also believe a genuine issue of material fact existed regarding whether, on the night of the assault, defendant bar provided sufficient staffing to afford its patrons reasonable protection. Comment f to § 344 states, in pertinent part:

> If the place or character of [the possessor's] business . . . 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*. [*Id.*, p 226 (emphasis added).]

I believe it is generally acknowledged that given the character of the business, the operator of a bar has a duty to provide adequate staff to afford reasonable protection to the bar's patrons. In the case before us, plaintiffs provided evidence that the presence of a single bouncer on the night of the attack was not sufficient to protect plaintiff Kelly Weidner from the harm caused by the foreseeable criminal acts of Lady Y and Bill X. Given the layout and size of the bar, as well as the bouncer's assigned duties, I believe a genuine issue of fact existed on the question of adequate security. *MacDonald v PKT, Inc*, 233 Mich App 395, 401; 593 NW2d 176 (1999).

For these reasons, I conclude that the trial court erred when it granted defendant bar's motion for summary disposition under MCR 2.116(C)(10).[2]

/s/ Donald E. Holbrook, Jr.

[1] Comment f reads in pertinent part: "since the possessor [of land held open to the public for business purposes] 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." 2 Restatement Torts, 2d, § 344, comment f, p 225.

[2] For the reasons cited by the majority, I agree with its decision not to review plaintiffs' duty to aid argument. However, I note that, if true, defendant bar's refusal to allow plaintiffs to use their telephone to summon medical assistance was unreasonable under the circumstances.