STATE OF MICHIGAN

COURT OF APPEALS

MARTEZ TILLMAN, Plaintiff-Appellant,	UNPUBLISHED October 22, 2013
v	No. 309121 Wayne Circuit Court
THE PERFECT PITCHER SPORTS PUB, INC., Defendant-Appellee.	LC No. 11-004876-NO

Before: K. F. KELLY, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff filed suit against defendant-bar alleging that defendant failed to reasonably expedite the involvement of the police to a specific situation that presented a risk of imminent harm. Plaintiff asserts that as a result of defendant's violation of this duty, he was shot in the arm by a bar patron who, along with others, was known to bar employees to be illegally armed and openly creating disturbances on the premises for over an hour before the shooting. Defendant filed a motion to dismiss pursuant to MCR 2.116(C)(10), and plaintiff answered. At the same time, plaintiff moved to amend his complaint to add a claim under the dramshop act, MCL 436.1801 *et seq*. The trial court granted defendant's motion for summary disposition. It also denied the motion to amend and a motion for reconsideration of that denial. We reverse the grant of summary disposition under MCR 2.116(C)(10) because plaintiff submitted sufficient evidence to create a question of material fact whether or not defendant violated its duty to timely contact the police. However, we affirm the trial court's denial of the motion to amend and the motion for reconsideration as plaintiff failed to demonstrate due diligence in attempting to identify his assailant.

Plaintiff argues that the trial court erred in granting summary disposition in favor of defendant because he established a question of fact as to when defendant's duty to summon the police was triggered and whether he was at an imminent and foreseeable risk of harm.[1] We agree.

[1] We review de novo a trial court's grant of summary disposition under MCR 2.116(C)(10). *Sallie v Fifth Third Bank*, 297 Mich App 115, 117; 824 NW2d 238 (2012).

The rule governing a merchant's duty to contact the police due to criminal acts of third parties was set forth in *MacDonald v PKT, Inc*, 464 Mich 322; 628 NW2d 33 (2001):

> [G]enerally merchants have a duty to use reasonable care to protect their identifiable invitees from the foreseeable criminal acts of third parties. The duty is triggered by specific acts occurring on the premises that pose a risk of imminent and foreseeable harm to an identifiable invitee. Whether an invitee is readily identifiable as being foreseeably endangered is a question for the factfinder if reasonable minds could differ on this point. While a merchant is required to take reasonable measure in response to an ongoing situation that is taking place on the premises, there is no obligation to otherwise anticipate the criminal acts of third parties. . . . [A] merchant is not obligated to do anything more than reasonable expedite the involvement of the police. [*Id*. at 338.]

Therefore, under *MacDonald*, plaintiff's burden at trial would be to show that defendant failed to "reasonably expedite the involvement of the police" in response to a "specific situation on the premises that would cause a reasonable person to recognize a risk of imminent harm to an identifiable invitee." *Id*. The question before us is whether a reasonable juror could, viewing the evidence submitted at the time of the motion in the light most favorable to the nonmoving party, conclude that defendant failed to meet this duty. *Ernsting v Ave Maria College*, 274 Mich App 506, 509-510; 736 NW2d 574 (2007). We are not to determine whether a jury would ultimately find defendant liable, or whether a jury might conclude that plaintiff was comparatively negligent. Put another way, we are not to determine what we think a "correct" jury would rule, but rather the range of outcomes a "reasonable" jury could reach. *Id*. "This Court is liberal in finding genuine issues of material fact." *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008).

The record reveals that there were three incidents at the bar on the night in question. That record is composed almost entirely of plaintiff's deposition, the affidavits of two witnesses, and police reports. A review of those items, viewed in the light most favorable to the nonmoving party, indicates that plaintiff arrived at the bar at approximately 11:30 p.m. on March 12, 2011 in order to perform rap songs at the request of the bar's DJ. Plaintiff testified that the first incident occurred about 20 to 30 minutes after he arrived. He saw a patron, who was so intoxicated that "he couldn't even stand up straight," shove another patron. Plaintiff attempted to diffuse the tense situation by telling both individuals that they were there to have fun and that they should relax. No blows were exchanged and tensions seemingly diffused. According to the two affiants, during this first incident, they noticed that the aggressor was carrying a gun. One of these witnesses also stated that the owner of the bar and the aggressor seemed to know each other. Further, both witnesses averred that the owner and bouncer were each in position to see the aggressor's gun at that time.

The second incident occurred at approximately 1:15 a.m. By this time many of the tavern's patrons were so intoxicated that they were having trouble standing up straight and were slurring their speech. Some, including the aggressor from the first incident, were even going behind the bar to serve themselves beverages. These same patrons were displaying gang signs. Several of those displaying gang signs looked displeased and were pointing directly at plaintiff and his cousin. An individual, who the affiants later identified as the person who shot plaintiff,

walked up to plaintiff's cousin in an aggressive fashion. Plaintiff attempted to calm him down. Plaintiff could see a gun in the individual's waistband. Others appeared to be armed as well. Plaintiff and the two other witnesses all stated that the bouncer and the tavern owner were in a position to see the gun. In fact, according to plaintiff, at one point, the individual handed either a gun or a loaded nine-millimeter magazine to the bouncer while the owner watched. Several of the gang members again approached plaintiff and his cousin. They were "still acting crazy and . . . trying to start more problems." The shooter then "really got into it" with plaintiff's cousin. They began "swinging," but plaintiff and a third party restrained them.

The third and final incident occurred at approximately 1:40 a.m. Plaintiff, in the midst of his rap performance, noticed that several individuals were still attempting to instigate and altercation with his cousin. He saw several individuals and his cousin exit the bar. Plaintiff cut short his performance and prepared to leave the bar. As plaintiff exited through the door of the bar, he was shot in his left forearm.

Viewing the facts in the light most favorable to plaintiff, several crimes likely occurred at the bar during the first and second incidents, including an assault on plaintiff's companion, MCL 750.81, the carrying of concealed weapon(s), MCL 750.227, and the possession/use of a weapon while intoxicated, MCL 750.237, as well as the civil infraction of carrying a concealed weapon in a bar, MCL 28.425o(d). More generally, the bar was full of highly intoxicated gang members, many of whom were carrying firearms.

Given these facts, we conclude that a reasonable jury could conclude that the bar's owner and/or employees, having knowledge of criminal acts including: two scuffles involving the same individual, the presence of numerous highly intoxicated gang members serving themselves, and the presence of one or more concealed weapons in possession of intoxicated persons, could conclude that there was a "specific situation occur[ing] on the premises that would cause a reasonable person to recognize a risk of imminent harm[.]" *MacDonald*, 464 Mich at 335. Plaintiff was "an identifiable victim of that harm because he was within the range of the risk of harm created by [the perpetrator's] conduct." *Bailey v Schaaf*, 494 Mich 595, 618; 835 NW2d 413 (2013). Indeed, plaintiff and his companion were directly involved in several of the incidents that escalated to the shooting. Accordingly, we reverse the trial court's grant of summary disposition in favor of defendant.

We reject, however, plaintiff's argument that the trial court erred by denying his motion for leave to amend his complaint to add a claim under the dramshop act.[2] The dramshop act "provides a cause of action against a dramshop that sells alcohol to a visibly intoxicated person where that sale is a proximate cause of the injuries sustained by the plaintiff." *Miller v Ochampaugh*, 191 Mich App 48, 57; 477 NW2d 105 (1991). MCL 436.1801(5) provides that a dramshop action "shall not be commenced unless . . . the alleged intoxicated person is a named defendant in the action and is retained in the action until the litigation is concluded by trial or

[2] We review a trial court's denial of a motion for leave to file an amended complaint for an abuse of discretion. *PT Today, Inc v Comm'r of Office of Financial & Ins Servs*, 270 Mich App 110, 142; 715 NW2d 398 (2006).

settlement." An exception to this "name and retain" requirement exists where "[t]he injured plaintiff [can] show that he did not, in fact, know the identity of the alleged intoxicated person and that he exercised due diligence in attempting to ascertain the identity of the alleged intoxicated person." *Salas v Clements*, 399 Mich 103, 110; 247 NW2d 889 (1976).

A review of the record indicates plaintiff did not know the identity of his assailant, and, therefore, could not name the assailant in his motion for leave to file an amended complaint. However, absent from the record is any evidence that plaintiff exercised "due diligence" in attempting to identify the assailant prior to filing his motion for leave to amend. Accordingly, the trial court did not abuse its discretion by denying plaintiff's motion on the grounds that the proposed amendment was futile. For the same reason, we deny plaintiff's motion for reconsideration.[3]

Reversed in part and remanded. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Amy Ronayne Krause

[3] We review a trial court's denial of a motion for reconsideration for an abuse of discretion. *Sherry v East Suburban Football League*, 292 Mich App 23, 31; 807 NW2d 859 (2011).