

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANDREW PETERSON,)
) No. 39, 2001
 Plaintiff Below,)
 Appellant,) Court Below: Superior Court
 v.) of the State of Delaware in
) and for Kent County
)
 DELAWARE FOOD CORP. t/a THE) C.A. No. 97C-07-050
 TOUCHDOWN LOUNGE,)
)
 Defendant Below,)
 Appellee.)

Submitted: September 17, 2001
Decided: December 6, 2001

Before **VEASEY**, Chief Justice, **HOLLAND** and **STEELE**, Justices.

ORDER

This 6th day of December, 2001, it appears to the Court that:

1. Andrew Peterson appeals the Superior Court's grant of Appellee (Defendant Below) Delaware Food Corp.'s Motion for Judgment as a Matter of Law pursuant to Superior Court Civil Rule 50 and its subsequent denial of Peterson's Motion for a New Trial.¹ Peterson argues that here where the central issue in the case was a business establishment's liability for patrons' physical assault on another patron that the trial judge erroneously removed consideration of

¹ See Super. Ct. Civ. R. 50.

the foreseeability of the attack from the jury's consideration. Peterson also alleges that the trial judge erred when he denied his Motion for New Trial.

2. We conclude that the trial judge erred when he removed from the jury the factual issues relating to foreseeability. He should neither have granted the Motion for Judgment as a Matter of Law nor denied the Motion for a New Trial. Therefore, we REVERSE and REMAND for further action in accordance with this order.

3. A Superior Court decision granting a motion for judgment as a matter of law is a question of law, which this Court reviews *de novo*.² Denial of a motion for a new trial is reviewed on an abuse of discretion standard.³

4. Peterson's complaint alleged that Delaware Food Corp. t/a The Touchdown Lounge breached its duty to provide protection from reasonably foreseeable conduct of third parties. On the evening of August 25, 1995, two other patrons assaulted Peterson at The Touchdown Lounge. At trial, several individuals testified that they had witnessed earlier altercations between patrons at The Touchdown Lounge. Nonetheless, at the close of defendant's case, the trial judge granted Touchdown Lounge's renewed Motion for Judgment as a Matter of Law. The trial judge later denied Peterson's Motion for a New Trial.

² *Triebel v. Sabo*, Del. Supr., 714 A.2d 742, 744 (1998).

³ *Barriocanal v. Gibbs*, Del. Supr., 697 A.2d 1169, 1171 (1997).

5. When considering a Rule 50 motion,⁴ a trial judge, viewing the evidence in the light most favorable to the plaintiff, must determine whether the plaintiff alleged facts sufficient for a reasonable jury to justifiably find in his favor.⁵ A judge has an obligation to submit factual issues to the jury for its determination if the jury could reasonably find in plaintiff's favor.⁶ The judge may decline to submit the issue to the jury only "if no reasonable juror could find in favor of the plaintiff."⁷

6. The central issue in this case is whether there was sufficient evidence for a jury to determine if the defendant could have reasonably foreseen that other patrons might suddenly attack the plaintiff. Several witnesses testified about earlier altercations at the defendant's establishment. In *Jardel Co. v. Hughes*,⁸ this Court "adopt[ed] the Restatement [§ 344] standard,"⁹ which approves the concept

⁴ Super. Ct. Civ. R. 50 (a)(1) provides:

If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the Court may determine the issue against the party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

⁵ *Triebel*, 714 A.2d at 745.

⁶ *Id.*

⁷ *Id.*

⁸ Del. Supr., 523 A.2d 518, 525 (1987).

⁹ Section 344 of the Restatement (Second) of Torts (1965) 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 (a) discover that such acts are being done

that incidents of criminal activity provide a duty to foresee specific criminal conduct. Whether the conduct of a particular property owner meets the standard of reasonable care is, of course, a matter for jury determination.”

7. When he considered both Peterson’s motions, the trial judge focused on the sudden and unprovoked nature of the attack and found it to be unforeseeable. However, Comment f to section 344 of the Restatement¹⁰ states that a duty to exercise care arises where the property owner has “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.” Although the trial judge noted the testimony regarding several past altercations, he wrote, “[t]here was no evidence produced to show that similar incidents having the same characteristics as those which occurred in this isolated incident *even took place.*”

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

¹⁰ Comment f to section 344 provides:

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

In determining whether there is sufficient evidence to submit a matter to the jury, “it is improper for the trial judge to weigh the facts or pass on the credibility of the witnesses.”¹¹ Given the testimony regarding earlier altercations at the defendant’s establishment, and given that questions of whether a standard of care has or has not been met are ordinarily jury questions, the trial judge should have submitted the factual issues relating to foreseeability to the jury.

NOW, THEREFORE, IT IS ORDERED that the orders of the Superior Court granting defendant’s Motion for Judgment as a Matter of Law and denying plaintiff’s Motion for a New Trial be REVERSED and REMANDED for further proceedings consistent with this order.

BY THE COURT:

/s/ Myron T. Steele
Justice

to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.

¹¹ *Triebel*, 714 A.2d at 745.