NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 CA 0239

PAUL BROUSSARD

VERSUS

ANTHONY GALLO, THE CADILLAC CAFÉ, INC., LANCE MEADERS, FOREST INSURANCE FACILITIES & XYZ INSURANCE COMPANY

DATE OF JUDGMENT: NOV - 2 2012

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
NUMBER 558,971, SECTION 8, PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE WILSON FIELDS, JUDGE

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Todd C. Comeaux
Baton Rouge, Louisiana

Counsel for Plaintiff-Appellee
Paul Broussard

James R. Clary, Jr.
Baton Rouge, Louisiana

Counsel for Defendant-Appellant
The Cadillac Café, Inc.

Nicholas J. Chauvin
Alan J. Yacoubian
George L. Lamaraca
Scott R. Huete
New Orleans, Louisiana

Isaac H. Ryan
New Orleans, Louisiana

Counsel for Defendant-Appellant
Alea London, Ltd.

John N. Samaha
Baton Rouge, Louisiana

Counsel for Defendant-Appellee
Benjamin Meadors

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BEFORE: KUHN, PETTIGREW, AND McDONALD, JJ.

Disposition: **REVERSED IN PART; AFFIRMED IN PART; AND RENDERED.**

KUHN, J.

Defendants-appellants, the Cadillac Café, Inc. (Cadillac Café), and Alea London, Ltd. (Alea), appeal a district court judgment finding the Cadillac Café sixty percent at fault for injuries sustained by plaintiff, Paul Broussard (Broussard), in an altercation that occurred outside the Cadillac Café. Finding that the Cadillac Café did not owe a duty to protect Broussard against the criminal acts of a third party, we reverse that portion of the judgment allocating it with sixty percent fault and render judgment dismissing Broussard's claim against the Cadillac Café and Alea. The judgment of the trial court is affirmed in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

At approximately 12:30 a.m. on September 9, 2006, Broussard, Steven Akers, and several other friends arrived at the Cadillac Café, a bar located in Baton Rouge, Louisiana. Shortly before 2:00 a.m., Akers interjected himself into a conversation that another patron, Benjamin Meadors (Meadors), was having with Melissa Ware (Ware), a bartender at the Cadillac Café. As a result, Meadors and Akers exchanged words, including profanities. Broussard was sitting several feet away. He claims he walked over and stood between the two men, telling Akers it was not worth it. According to Broussard, Meadors called him a "n _ _ _ _ r" before walking away. Meadors denied making such a racial slur, but admitted that he told Akers to "f _ _ k off" before he turned and walked away. Ware, who was a friend of Broussard, denied seeing him speak to Meadors during the exchange of words.

The incident between Meadors and Akers lasted less than a minute. Ware testified that the exchange of words was not loud, disruptive, or violent in nature, and it did not cause her any concern. Paul Gallo, Jr., the owner of the Cadillac Café, was standing approximately four feet away at the time and did not notice any disturbance. Broussard admitted that he could not tell if any voices were raised

during the exchange. Moreover, Ware, Meadors and Broussard each testified that they considered the matter resolved or closed when Meadors walked away.

Subsequently, Meadors left the bar either shortly before or as it was closing at 2:00 a.m. No one could state definitively how much time had elapsed at that point since the exchange of words between Meadors and Akers. Various estimates ranged from five to twenty minutes. Regardless, Ware, Meadors and Anthony Gallo, III, who was working the exit door at the Cadillac Café, each testified that Broussard and Akers quickly followed Meadors out of the bar. Ware additionally testified that, as Broussard and Akers hurried out behind Meadors, she told them to "settle it down now." In contrast, Broussard testified that Meadors left the bar immediately after the exchange of words with Akers, and that he and Akers remained inside for another five to twenty minutes.

In any event, when Broussard and Akers exited the bar, Broussard saw Meadors in the parking lot approximately eight feet away from the door. Although Broussard could have gone either right or left to reach his vehicle, he admitted that he instead chose to approach Meadors, despite his assumption that Meadors wanted to continue the earlier disagreement with Akers. The situation escalated quickly as Meadors and Akers again exchanged words. According to Meadors, Broussard also repeatedly demanded an apology from him, to which he responded that Broussard had the wrong person. Broussard then placed his hand on Meadors' chest, asserting that he did so in order to keep Meadors and Akers separated and because Meadors had gotten into Broussard's space. Regardless of Broussard's motive, Meadors instantly responded by hitting Broussard on the left side of his face with a beer bottle that Meadors had carried out of the Cadillac Café. The bottle broke and badly cut Broussard's face. Meadors attempted to flee on foot, but was quickly

apprehended. Broussard sustained a facial laceration that required approximately fifty-four stitches and left him with a scar.

On September 6, 2007, Broussard filed a personal injury suit against Anthony Gallo, Jr.,[1] the Cadillac Café, Cadillac Café insurer, and Meadors. As insurer, Alea filed a motion for summary judgment seeking to be dismissed from the suit on the basis that the insurance policy it issued to the Cadillac Café excluded coverage for injuries resulting from assault and battery. The trial court denied the motion for summary judgment.[2]

Following a bench trial, the trial court rendered judgment in favor of Broussard and against the Cadillac Café, Alea, and Meadors, finding the Cadillac Café sixty percent at fault, Meadors thirty percent at fault, and Broussard ten percent at fault. The court fixed Broussard's general damages at $35,000.00 and his past medical expenses at $5,108.91. In view of its allocation of fault, the trial court rendered judgment in favor of Broussard and against the Cadillac Café and Alea, *in solido*, for $24,065.35 and in favor of Broussard and against Meadors for $12,032.67. Additionally, the defendants were cast for all costs.

The Cadillac Café now appeals, arguing the trial court erred: (1) in finding it liable for Broussard's injuries; (2) alternatively, in allocating it with too much fault; and (3) in awarding excessive general damages. Alea has also appealed, contending the trial court erred: (1) in finding the Cadillac Café breached a duty owed to Broussard; (2) in failing to find coverage was excluded under its policy's assault and battery exclusion; (3) in imposing greater fault to the Cadillac Café than to the actual participants in the altercation; and (4) in awarding excessive damages.

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[1] Gallo was eventually dismissed from the suit in his individual capacity.

[2] Alea filed a writ application seeking review of the denial of its motion for summary judgment, but this Court refused to consider the application because it was filed untimely. See ***Broussard v. Gallo***, 09-1877 (La. App. 1st Cir. 12/21/99) (unpublished).

DUTY OF CADILLAC CAFÉ

In imposing liability on the Cadillac Café, the trial court stated in its oral reasons for judgment that it found the bar owed "a duty to this plaintiff [Broussard] of not allowing Mr. Meadors to leave the premises with an open container ... the beer bottle that was used to strike the plaintiff in his face." The court indicated that it also considered the earlier incident inside the bar in allocating fault between the parties.

On appeal, Cadillac Café and Alea argue that the trial court erred in concluding the Cadillac Café breached a duty it owed to Broussard under the City of Baton Rouge's "open container law," which was not intended to protect against assault and battery. Moreover, they note that the Cadillac Café took reasonable measures to enforce compliance with the open container law and that it was not cited for any violation thereof. Additionally, appellants contend that the Cadillac Café had no duty under Louisiana law to protect Broussard against the assault by Meadors that occurred outside in the parking lot, because it was not reasonably foreseeable and, in any event, occurred too quickly for intervention. Cadillac Café also asserts that Broussard was, in fact, the initial aggressor in the confrontation with Meadors.

In response, Broussard argues that the Cadillac Café violated the open container law, as well as its own policies, by allowing Meadors to walk past the bar's doorman with a beer bottle, which Meadors testified he made no effort to conceal. Thus, Broussard contends that the Cadillac Café, by allowing Meadors to leave with the beer bottle, negligently breached the duty of care it had assumed to protect his safety. Broussard also maintains that the employees of the Cadillac Café breached its assumed duty to protect patrons exiting the bar because it was

reasonably foreseeable, given the earlier incident between Akers and Meadors, that an altercation might occur outside the bar between them.

In Louisiana, a duty-risk analysis is utilized to resolve the issue of a business establishment's liability to a patron for injuries sustained in a criminal assault by a third party.[3] The first prong of this analysis is whether there was a duty on the part of the defendant to protect against the risk involved. Duty is a question of law. ***Green v. Infinity International, Inc.***, 95-2356 (La. App. 1st Cir. 6/28/96), 676 So.2d 234, 236. In ***Fredericks v. Daiquiris & Creams of Mandeville, L.L.C.***, 04-567 (La. App. 1st Cir. 3/24/05), 906 So.2d 636, 640, writ denied, 05-1047 (La. 6/17/05), 904 So.2d 706, this Court summarized the duty a business proprietor owes to his patrons as follows:

> A business proprietor owes his patrons the duty to provide a reasonably safe place. The proprietor's general duty toward his patrons has been construed to encompass a number of more specific obligations. First, the proprietor must himself refrain from any conduct likely to cause injury to a guest. He must maintain his premises free from unreasonable risks of harm or warn patrons of known dangers thereon. Beyond these measures, the proprietor must exercise reasonable care to protect his guests from harm at the hands of an employee, another guest, or a third party.
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> Reasonable care in the context of the threat of harm presented by the enumerated parties has been interpreted, in turn, to embrace certain sub-duties. First, should a disturbance or a likely disturbance manifest itself, the proprietor, if time allows, must attempt to prevent injury to his patrons by calling the police. Second, should the business owner or manager become aware of impending or possibly impending danger, he must warn his patrons of the potential danger.
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> **As to criminal acts performed by third parties, there is generally no duty to protect others from the criminal acts of those parties. In other words, the general duty of reasonable care does not extend to protecting patrons from the unanticipated criminal**

[3] In order for liability to attach under a duty-risk analysis, a plaintiff must prove: (1) the defendant had a duty to conform his conduct to a specific standard of care (the duty element); (2) the defendant failed to conform his conduct to the appropriate standard (the breach element); (3) the defendant's substandard conduct was a cause-in-fact of the plaintiff's injuries (the cause-in-fact element); (4) the defendant's substandard conduct was a legal cause of the plaintiff's injuries (the scope of protection element); and (5) actual damages (the damage element). ***Pinsonneault v. Merchants & Farmers Bank & Trust Company***, 01-2217 (La. 4/3/02), 816 So.2d 270, 275-76.

> **acts of third parties. Only when the proprietor has knowledge of, or can be imputed with knowledge of, the third party's intended conduct is the duty to protect invoked, triggering the sub-duties discussed above. This duty only arises under limited circumstances, when the criminal act in question was reasonably foreseeable to the owner of the business.**

[Emphasis added; citations omitted.]

Duty is a question of law; the relevant inquiry is whether the plaintiff has any law (statutory, jurisprudential, or arising from general principles of fault) to support the claim that the defendant owed him a duty. Moreover, as a question of law, duty is a legal question subject to *de novo* review on appeal. ***Perkins v. Entergy Corporation***, 98-2081 (La. App. 1st Cir. 12/28/99), 756 So.2d 388, 404, affirmed, 00-1372, 00-1387, 00-1440 (La. 3/23/01), 782 So.2d 606. In the present case, we conclude that the trial court legally erred in its conclusion that the Cadillac Café owed a duty to Broussard to prevent Meadors from leaving the premises with a beer bottle and to protect Broussard from the criminal assault by Meadors.

The Code of Ordinances of the City of Baton Rouge and the Parish of East Baton Rouge 13:1018 provides, in pertinent part, that:

> (g) ***For the purpose of discouraging public drinking***, it shall be unlawful for any person to remove an open container containing alcoholic beverages, as defined herein, from any business, lounge, restaurant or establishment which is licensed under the provisions of title 9 of this Code.

[Emphasis added.]

At trial, Gallo testified that, although it is not required to do so, the Cadillac Café attempts to enforce compliance with the open container ordinance. In addition to posting a doorman at the exit during peak hours to inform patrons that they cannot leave with open containers, the Cadillac Café provides trash receptacles both inside and outside the exit door for patrons to dispose of open containers.

Nevertheless, Gallo testified that the doorman would not physically restrain a patron from leaving with an open container if the patron chose not to comply.[4]

In the instant case, the doorman on duty at the Cadillac Café testified that he did not see Meadors holding a beer bottle as he exited. Nevertheless, the trial court committed legal error in concluding that the Cadillac Café owed a duty to Broussard to prevent Meadors from leaving with the bottle. Ordinance 13:1018(g) imposes a duty on individuals not to remove open containers containing alcoholic beverages from a licensed business establishment. Thus, Meadors was the party that violated the open container ordinance, not the Cadillac Café.[5] Even more significantly, the ordinance expressly states that its purpose is *to discourage public drinking*, as opposed to preventing individuals from assaulting one another with glass bottles.

Moreover, even assuming *arguendo* that the Cadillac Café had or assumed a duty to prevent patrons from leaving the premises with an open container, that duty was not one owed to Broussard individually. Nor was the risk of the injuries that occurred to Broussard within the scope of any such duty. Given its stated purpose, the scope of any duty to enforce the open container ordinance did not encompass the risk that a patron leaving the bar with a glass bottle would criminally assault Broussard with the bottle. The fact that the ordinance is not directed at preventing such assaults is demonstrated by its broad prohibition against the removal of *all* open containers from a bar, not merely glass bottles. Accordingly, the Cadillac Café did not owe any duty to Broussard to prevent Meadors from leaving the premises

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[4] Rhett Whitty, a legal investigator/compliance officer with the Alcohol Beverage Control Office, a division of the East Baton Rouge Parish Attorney's Office, testified that it is not advisable for a bar's employees to pursue a patron who chooses to defy the open container ordinance.

[5] Under Section 6.A.2 of the Baton Rouge Wine, Beer and Liquor Ordinance No. 12279, the holder of a license issued under that ordinance has a duty not to "permit, allow or encourage" any person, without a proper license, *to consume* any alcoholic beverage "on any parking lot or open or closed parking space within or contiguous to the licensed premises." The record is devoid of any indication that the Cadillac Café permitted, allowed, or encouraged the consumption of alcoholic beverages in the parking lot outside its premises.

with an open beer bottle.

Additionally, business owners are not the insurers of the safety of their patrons. See ***Posecai v. Wal-Mart Stores, Inc.***, 99-1222 (La. 11/30/99), 752 So.2d 762, 766. The duty of a business owner to take reasonable care for the safety of its patrons does not extend to unforeseeable or unanticipated criminal acts of third parties. Consequently, a duty to protect a patron against criminal acts by a third party arises only in limited circumstances when the criminal act in question was reasonably foreseeable to the business owner. ***Fredericks***, 906 So.2d at 640. In the present case, the record does not support a conclusion that it was reasonably foreseeable that Meadors would criminally assault Broussard in the parking lot outside the Cadillac Café.

The earlier incident inside the bar occurred between Meadors and Akers, rather than between Meadors and Broussard. The incident was of extremely short duration, less than a minute. Additionally, it was not disruptive or violent in nature. The fact that the exchange of words was not particularly loud or disruptive is evidenced by the fact that Broussard could not tell if any voices were raised and the owner of the Cadillac Café was standing a few feet away and was unaware that it had occurred until after the attack on Broussard. Even though Broussard testified that Meadors made a racial slur to him, everyone considered the matter closed when Meadors walked away, including Broussard. Based on Broussard's express testimony that he did not feel threatened or in danger, the incident evidently was not of a nature to cause him concern that he might be attacked by Meadors. Consistent with this conclusion, Broussard did not report the incident or request assistance from any employee of the Cadillac Café.

Under these circumstances, the Cadillac Café had no basis for anticipating that the violent attack on Broussard would occur. Since the criminal assault by

Meadors was not reasonably foreseeable, no duty was imposed on the Cadillac Café to protect Broussard. See ***Fredericks***, 906 So.2d at 645; ***Taylor v. Stewart***, 95-1743 (La. App. 1st Cir. 4/4/96), 672 So.2d 302, 309. Therefore, that portion of the trial court judgment imposing liability upon the Cadillac Café and its insurer, Alea, must be reversed.[6]

CONCLUSION

For the reasons assigned, that portion of the trial court judgment finding defendants, the Cadillac Café, Inc. and Alea London, Ltd., liable to plaintiff, Paul Broussard, for damages and costs is reversed and judgment is hereby rendered dismissing Broussard's claims against those defendants with prejudice. The judgment of the trial court is affirmed in all other respects. All costs of this appeal are assessed to plaintiff, Broussard.

REVERSED, IN PART, AMENDED IN PART, AND RENDERED.

[6] In view of this result, we pretermit the additional assignments of error raised by the Cadillac Café and Alea relating to the allegedly excessive percentage of fault allocated to the Cadillac Café, the assault and battery exclusion in the Alea policy, and quantum. Moreover, this Court cannot consider reallocation to Meadors of any portion of the sixty percent fault originally allocated to the Cadillac Café, since Broussard neither appealed, nor answered the defendants' appeals. See La. C.C.P. art. 2133; ***Matthews v. Consolidated Companies, Inc***, 95-1925 (La. 12/8/95), 664 So.2d 1191, 1191-92.