STATE OF MICHIGAN

COURT OF APPEALS

RHONDA ZIMBERG,

Plaintiff-Appellant,

v

METROPOLITAN MUSIC CAFÉ OF ROYAL OAK, INC.,

Defendant-Third-Party Plaintiff-Appellee,

and

HUFFMASTER ASSOCIATES, INC.

Third-Party Defendant.

UNPUBLISHED
December 23, 1997

No. 194911
Oakland Circuit Court
LC No. 95-498406-NS

Before: Sawyer, P.J., and Wahls and Reilly, JJ.

PER CURIAM.

Plaintiff's claims arise from an incident which occurred at a lounge owned by defendant, where plaintiff suffered injuries after being hit in the face with a bottle thrown by an unidentified, allegedly intoxicated person involved in a fight with other unidentified persons at defendant's establishment. Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition of her claims of negligence and liability under the dramshop act. We affirm.

Defendant's motion for summary disposition was based on MCR 2.116(C)(10). In reviewing a trial court's decision regarding a motion for summary disposition brought pursuant to MCR 2.116(C)(10), this Court examines all relevant affidavits, depositions, admissions, and other documentary evidence and construes the evidence in favor of the nonmoving party. *Stevens v Inland Waters, Inc*, 220 Mich App 212, 214; 559 NW2d 61 (1996). The Court then determines whether a genuine issue of material fact exists on which reasonable minds could differ. *Id*. This Court reviews de novo a trial court's grant or denial of a motion for summary disposition. *Id*.

The exclusive remedy against liquor licensees for injuries caused by conduct arising out of the selling of intoxicating beverages is the dramshop act. *Dhuy v Rude*, 186 Mich App 360, 362; 465 NW2d 32 (1990). The dramshop act, MCL 436.22; MSA 18.993, 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). In order to maintain a dramshop action, the plaintiff must prove that (1) he was injured by the wrongful or tortious conduct of an intoxicated person, (2) the intoxication of the principal defendant was the sole or contributing cause of the plaintiff's injuries, and (3) the bar owner sold the visibly intoxicated person liquor which caused or contributed to his intoxication. *McKnight v Carter*, 144 Mich App 623, 629; 376 NW2d 170 (1985). A plaintiff fails to establish his burden of establishing a case under the dramshop act when the evidence is insufficient and leaves the jury to speculation and conjecture. *Lasky v Baker*, 126 Mich App 524, 529; 337 NW2d 561 (1983).

First, plaintiff argues that she has presented evidence of a "legal sale," presumably of liquor to a person while intoxicated, in violation of the dramshop act. We disagree.

Plaintiff's argument that there was evidence of a sale addresses only the third element, the sale of liquor to a visibly intoxicated person. *McKnight*, *supra* at 629. However, plaintiff first must present evidence that she was injured by an intoxicated person, and that the intoxication of that person was the sole or contributing cause of her injuries. *Id*. We find that plaintiff has failed to present sufficient evidence that she was injured by an intoxicated person, that the intoxication of that person was a cause of her injuries, or that defendant sold the already intoxicated person liquor which contributed to his intoxication.

A person is visibly intoxicated when the person's intoxication would be apparent to an ordinary observer. *Miller*, *supra* at 57. Whether a person is visibly intoxicated is an objective standard. *Id*. at 58. Under an objective standard, whether the bar employee serving the allegedly intoxicated person was actually aware of the person's intoxication would be irrelevant. Rather, the question to be answered would be whether an ordinary observer would notice that the person was visibly intoxicated. *Id*. at 57. Therefore, under the objective standard, the bar employee should also have noticed the person's intoxicated condition and refused to serve the allegedly intoxicated person. *Id*. Circumstantial evidence may be used to establish that the allegedly intoxicated person was visibly intoxicated. *Id*. at 58.

We find that plaintiff has failed to present sufficient evidence that she was injured by an intoxicated person. Plaintiff did not know specifically what the allegedly intoxicated person drank that evening. Plaintiff's friend did not have any personal knowledge as to what that person consumed in terms of alcohol that night. The only evidence that the person was visibly intoxicated was plaintiff's testimony that the person slurred his words and was drinking from a beer bottle. Plaintiff's friend stated only that she believed he was intoxicated because he was obnoxious. There was no evidence as to how many drinks the man had consumed, or how many were allegedly served to him by defendant. The evidence that the man was drinking a bottle of beer is not evidence of intoxication. Accordingly, a jury would be required to speculate as to whether the person who injured plaintiff was intoxicated when allegedly served by defendant. Therefore, summary disposition in favor of defendant was proper.

Plaintiff also argues that evidence of a sale of liquor was not required in this case. In support of her argument, plaintiff cited two cases, including one which was reversed by the Michigan Supreme Court. However, this Court clearly stated in both cases that the furnishing of alcoholic beverages to an intoxicated person was required to impose liability under the dramshop act. *Dines v Henning*, 184 Mich App 534, 539; 459 NW2d 305 (1990), rev'd 437 Mich 920 (1991). See also *Heyler v Dixon*, 160 Mich App 130, 143; 408 NW2d 121 (1987).

Next, plaintiff contends that defendant was negligent because it failed to eject intoxicated unruly patrons, and that this was a proximate cause of her injuries. While plaintiff has focused on the causation element, she must first demonstrate that defendant owed her a duty, and breached that duty. *Richardson v Humane Society*, 221 Mich App 526, 528; 561 NW2d 873 (1997). The Michigan Supreme Court recently addressed the issue of a merchant's duty to protect an invitee from criminal conduct by a third party in *Mason v Royal Dequindre, Inc*, 455 Mich 391; 566 NW2d 199 (1997). The general rule is that a person does not have a duty to aid or protect another person endangered by a third person's conduct. *Id*. at 397. An exception to the rule arises where there is a special relationship between a plaintiff and a defendant. *Id*. Owners and occupiers of land have a special relationship to their invitees. *Id*. at 398. At the same time, merchants do not have a duty to protect their invitees from unreasonable risks that are unforeseeable. *Id*. In order for a special-relationship duty to be imposed on a defendant, the invitee must be readily identifiable as being foreseeably endangered. *Id*. "Readily" is defined as "promptly; quickly; easily." *Id*.

We find that plaintiff has failed to show that defendant owed her a duty, because the harm caused to plaintiff by the allegedly intoxicated person was not reasonably foreseeable or preventable by the exercise of reasonable care. Plaintiff was not involved in the pushing altercation which occurred at defendant's bar. In addition, plaintiff did not request assistance or otherwise notify defendant that she was in danger. Plaintiff presented copies of police reports as evidence of prior acts of violence at defendant's bar. However, defendant did not have notice that plaintiff specifically was in danger. Plaintiff testified that she saw the allegedly intoxicated person raise the bottle over his head no more than 30 seconds after the pushing started. The danger of plaintiff being struck by a thrown bottle was not reasonably preventable by defendant where there was no notice that plaintiff was going to be hit with a bottle. Accordingly, plaintiff has failed to establish that defendant owed her a duty.

In support of her argument, plaintiff relied on this Court's holding in *Mills v White Castle System, Inc*, 167 Mich App 202; 421 NW2d 631 (1988). However, in this case, plaintiff did not request defendant to call the police, and plaintiff was not the focus of attack by the unruly patrons. Unlike *Mills*, the facts in this case do not support an inference that defendant had knowledge of "unruly patrons" in time to take action to avoid danger to plaintiff. Plaintiff has failed to establish that defendant owed her a duty. Accordingly, the trial court properly granted summary disposition in favor of defendant.

Next, plaintiff argues that the name and retain provision of the dramshop act does not apply because she exercised due diligence in attempting to identify the allegedly intoxicated person responsible for her injuries. We disagree.

MCL 436.22(6); MSA 18.993(6), known as the "name and retain" provision of the dramshop act, states:

> An action under this section against a retail licensee shall not be commenced unless the minor or 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 settlement.

The purpose behind the name and retain provision is to make certain at each stage of the litigation that the allegedly intoxicated person has a financial stake in the outcome. *Zoll v Brinkerhoff*, 170 Mich App 210, 214-215; 427 NW2d 610 (1988). The name and retain provision and its purpose, to avoid collusion, have been strictly construed. *Id*. at 215.

The "name and retain" amendment only applies to those injured plaintiffs who know the identity of the allegedly intoxicated person. *Salas v Clements*, 399 Mich 103, 110; 247 NW2d 889 (1976). Whether or not an injured plaintiff knows the identity of the allegedly intoxicated person shall be determined by the judge at a hearing. *Id*. The injured plaintiff must show that he did not, in fact, know the identity of the allegedly intoxicated person and that he exercised due diligence in attempting to ascertain the identity of the allegedly intoxicated person. *Id*. This Court has defined "due diligence" as "devoted and painstaking application to accomplish an undertaking." *Woodbeck v Curley (On Remand)*, 107 Mich App 784, 788; 310 NW2d 242 (1981).

We find that plaintiff has not made a devoted and painstaking application to ascertain the identity of the responsible person or persons. Plaintiff had a license number of a car and its make, and had the names of several witnesses at her disposal. However, plaintiff failed to file a police report or question employees of defendant's restaurant, with the exception of the manager, who did not witness the incident. Therefore, plaintiff did not exercise due diligence in ascertaining the identity or identities of the responsible parties and failed to meet the requirements of MCL 436.22(6); MSA 18.933(6). Accordingly, summary disposition in favor of defendant on plaintiff's dramshop liability claim was proper.

Next, plaintiff argues that defendant's defenses of name and retain, visible intoxication, and proximate cause should have been barred by the doctrine of equitable estoppel. We disagree.

Equitable estoppel arises where a party, by representations, admissions, or silence, intentionally or negligently induces another party to believe facts, the other party justifiably relies and acts on that belief, and the other party will be prejudiced if the first party is allowed to deny the existence of those facts. *Soltis v First of America Bank-Muskegon*, 203 Mich App 435, 444; 513 NW2d 148 (1994). Plaintiff argues that equitable estoppel should bar defendant from raising certain defenses. Plaintiff alleges that she has been prejudiced by the alleged fact that defendant knew the identity of the responsible person and helped him escape. We find that under the facts, there is no basis for estoppel. First, the "defenses" plaintiff alleges defendant has raised, name and retain, visible intoxication, and proximate cause, are not defenses, but are elements of a dramshop violation for which *plaintiff* bears the burden of proof. *McKnight, supra* at 629; *Salas, supra* at 110. A plaintiff fails to establish his burden of establishing a case under the dramshop act when the evidence is insufficient and leaves the jury to speculation and conjecture. *Lasky, supra* at 529.

Plaintiff has not presented any evidence which establishes that defendant knew the identity of the responsible person and allowed him to escape. Moreover, plaintiff's argument that the visible intoxication defense should not apply because defendant's bar was crowded has no merit. Even assuming defendant's bar was crowded, that in itself does not justify the application of equitable estoppel. In any event, plaintiff has not demonstrated that defendant induced her to believe certain facts, that plaintiff justifiably relied and acted on that belief, and she will be prejudiced if defendant is allowed to deny the existence of those facts. Accordingly, the doctrine of equitable estoppel does not apply to this case.

Affirmed.

/s/ David H. Sawyer
/s/ Myron H. Wahls
/s/ Maureen Pulte Reilly