[Cite as *McRae v. Icon Entertainment Group, Inc.*, 2009-Ohio-5119.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Steven McRae et al.,	:	
Plaintiffs-Appellants,	:	
v.	:	No. 08AP-820 (C.P.C. No. 07CVC-05-6523)
Icon Entertainment Group, Inc. et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on September 29, 2009

Thomas F. Vivyan, for appellants.

Lavelle, Jurca & Lashuk, LLC, Beth Anne Lashuk and *Jeffrey J. Jurca*, for appellees.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶1} On May 13, 2006, plaintiffs-appellants, Steven McRae ("appellant") and several of his friends entered Kahoots, a bar and restaurant, to celebrate a bachelor party. In the early morning hours of May 14, 2006, as the group was exiting the establishment, a bouncer allegedly grabbed appellant without warning and pushed him through the front doors. Appellant landed face down on the pavement outside, and then someone jumped on his leg, breaking his femur.

{¶2} Appellant and his wife, Sarah McRae ("appellants"), filed a complaint in the Franklin County Court of Common Pleas against defendants-appellees Icon Entertainment Group, Inc. and John Does #1, #2, and #3 ("appellees") alleging assault and battery, negligence, negligence per se, respondeat superior, negligent supervision, negligent hiring and training, loss of consortium and punitive damages. The complaint alleged permanent injury from a fractured femur, medical bills in excess of $10,000, and lost wages. The trial court awarded summary judgment to appellees on August 21, 2008. Appellants timely filed this appeal on September 18, 2008.

{¶3} Appellant assigns the following six errors for our consideration:

> [I.] It is error for the trial court as a matter of law to grant summary judgment to defendant appellee without employing the required criteria of Civ. R 56C to construe the evidence most strongly in appellant's favor.
>
> [II.] It is error for the trial court as a matter of law to grant summary judgment to defendant appellee on the issue of a battery by defendants against plaintiff when evidence was presented creating a genuine issue that a battery occurred, and use of force exhibited was not justified.
>
> [III.] It is error for the trial court as a matter of law to grant summary judgment to defendant appellee on the issue of a civil assault by defendants against plaintiff when evidence was presented creating a genuine issue that an assault occurred.
>
> [IV.] It is error for the trial court as a matter of law to grant summary judgment to defendant appellee on the issue of a negligence by defendants against plaintiff when evidence was presented creating a genuine issue that defendants John Does #1, #2, #3 were negligent and their negligence in the scope their employment by Kahoots of proximately causing plaintiff's injuries.
>
> [V.] It is error for the trial court as a matter of law to grant summary judgment to defendant appellee on the issues of a

> negligent hiring, supervision, and training of its employees when the underlying torts of battery, assault, and negligence by the employees proximately cause plaintiff's injuries, by the requisite proof required of appellant to defeat summary judgment and appellee did not contest this issue directly but derivatively.
>
> [VI.] It is error for the trial court as a matter of law to grant summary judgment to defendant on the issue of punitive damages when the underlying torts of battery and assault, and negligence by defendant employees proximately caused plaintiff's injuries, by the requisite proof required of appellant to defeat summary judgment and the requirements for Punitive Damages, both directly and vicariously, have been met. The appellant did not contest punitive damages directly but derivatively.

{¶4} In his first, and overriding, assignment of error, appellant challenges the trial court's grant of summary judgment. He argues that the trial court failed to construe the evidence most strongly in appellant's favor and instead construed the evidence in favor of appellees. Regardless of whether the trial court construed the evidence unfavorably to appellant, our de novo standard of review renders the assignment of error moot.

{¶5} Our review of summary judgment is de novo. *Helton v. Scioto Cty. Bd. of Commrs.* (1997), 123 Ohio App.3d 158, 162. "When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court." *Mergenthal v. Star Banc Corp.* (1997), 122 Ohio App.3d 100, 103. Civ.R. 56(C) provides that summary judgment may be granted when the moving party demonstrates that: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the party against

whom the motion for summary judgment is made. *State ex rel. Grady v. State Emp. Relations Bd.* (1997), 78 Ohio St.3d 181, 183; Civ.R. 56(C).

> * * * [T]he moving party must be able to specifically point to some *evidence* of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. However, if the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial. * * *

Dresher v. Burt (1996), 75 Ohio St.3d 280, 293. (Emphasis sic.)

{¶6} "On summary judgment, the inferences to be drawn from the underlying facts contained in such materials [the affidavits, exhibits and depositions] must be viewed in the light most favorable to the party opposing the motion." *U.S. v. Diebold, Inc.* (1962), 369 U.S. 654, 655, 82 S.Ct. 993, 994.

{¶7} With this standard in mind, we must analyze whether appellees were entitled to summary judgment on appellant's claim of battery.

{¶8} To establish a claim for civil battery, a plaintiff must demonstrate that the defendant acted intending to cause a harmful or offensive contact and, in fact, a harmful contact resulted. *Love v. Port Clinton* (1988), 37 Ohio St.3d 98, 99. A defendant possesses the requisite level of intent to commit a battery if he " 'desires to cause [the] consequences of his act, or * * * he believes that the consequences are substantially certain to result from it.' " *Harasyn v. Normandy Metals, Inc.* (1990), 49 Ohio St.3d 173, 175, quoting Restatement (Second) of Torts (1965), Section 8A. "Contact which is offensive to a reasonable sense of personal dignity is offensive contact." *Love* at 99,

citing Restatement (Second) of Torts (1965), Section 19. See also *Brooks v. Lady Foot Locker*, 9th Dist. No. 22297, 2005-Ohio-2394, ¶63.

{¶9} The trial court found that Mr. Henry did not use any unnecessary or unreasonable force in ejecting appellant from the bar. This conclusion was based upon Mr. Henry's testimony that he escorted appellant out using minor force. (Henry Depo., at 59.) However, the depositions of both appellant and Christopher Nemeth contradict that of Mr. Henry's, alleging that appellant was grabbed, pushed, and propelled out the front door, "absolutely he was not coming out on his own power." (Nemeth Depo., at 39.) Despite the fact that Mr. Nemeth did not actually see the means by which appellant was being "propelled," he did say, "the big guys are just coming after him. And I don't know how they all got in through the door all at once." (Nemeth Depo., at 21.) Mr. Henry himself admitted to putting his hand under or on appellant's bicep and using "minor force." (Henry Depo., at 59-60.) Whether Mr. Nemeth actually saw a bouncer's hands on appellant is immaterial, as we can infer that if appellant did not come out under his own power, he came out under someone else's, which had to have involved contact with his body.

{¶10} Appellant testified that it was the bouncer that threw him out the door, and that as the bouncer was throwing him out the door, appellant was "trying to catch [him]self," landed awkwardly on the pavement as a result, and then "blacked out for a second." (McRae Depo., at 49-50.) It is hard to understand how this force can be construed as necessary or reasonable, given the fact that, in all three depositions, it was reported that appellant was neither involved in a fight nor violent acts, did not expose Kahoots' employees, patrons or premises to danger, was already moving to exit

the building, and was, in fact, assisting another bouncer in convincing a member of appellant's party to exit peacefully. (McRae Depo., at 45.)

{¶11} Mr. Nemeth testified that one bouncer was "out of control," had to be "held back" by the other bouncers, and "wanted to hurt somebody." (Nemeth Depo., at 44, 27, and 50.) This same bouncer had to be physically restrained by his fellow bouncers after the group was outside. Mr. Nemeth testified that it "[s]eemed like there was a guy taking responsibility for [the kick], which, like I said before, made a statement that, 'Your friend wouldn't have got his leg broke or kicked if you guys weren't acting up.' " (Nemeth Depo., at 33.) When this evidence is construed in appellant's favor, the inference can be drawn that one of the bouncers, apparently Mr. Henry, was out of control and caused harm to appellant.

{¶12} Any reliance on Mr. Henry's testimony, as proof against appellant's claims, is troubling due to its own contradictory nature. While Mr. Henry, contrary to the statements of appellant and Mr. Nemeth, at first testified that appellant simply "fell out" of the front door (Henry Depo., at 52), he later contradicted himself by stating that he "threw [appellant] out." (Henry Depo., at 54.) Mr. Henry then testified that after he "threw him out," he did not go back inside Kahoots, but stood outside looking in. (Henry Depo., at 54.) This testimony would place Mr. Henry outside Kahoots with appellant, between appellant and the other members of the bachelor party inside Kahoots, when appellant's leg was broken. Later in his deposition, however, Mr. Henry denied that he could have heard appellant's leg break, because he claimed he was inside Kahoots when appellant's leg was broken. (Henry Depo., at 56.) Indeed, if Mr. Henry's

deposition were the only deposition in evidence, the contradiction found there would itself present genuine issues of material fact.

{¶13} Appellees assert that bouncers were not the only ones in close proximity to appellant when his leg was injured. However, according to Mr. Nemeth's deposition testimony, it was only the "big guys" coming after appellant through the doors (Nemeth Depo., at 23), and they were "swarming" (Nemeth Depo., at 28) around appellant in a circle. (Nemeth Depo., at 49.) Mr. Nemeth testified that there were two unrelated men behind Mr. Nemeth (Nemeth Depo., at 29) as he was facing appellant, and he saw other members of the bachelor party "come out after the fact." (Nemeth Depo., at 22.) Mr. Nemeth, who was about ten feet away when he saw appellant come through the front door, quickly advanced to five feet away from appellant (Nemeth Depo., at 22), and entered the circle that the bouncers had formed around appellant. (Nemeth Depo., at 49.) In the intervening seconds between the time that Mr. Nemeth saw appellant propelled through the doors and the time Mr. Nemeth "ran towards this situation" (Nemeth Depo., at 21) to arrive in the circle of swarming bouncers, appellant's leg was already injured. (Nemeth Depo., at 25.) After appellant was already on the ground and holding his leg is when Mr. Nemeth reports that other members of their group were outside. (Nemeth Depo., at 27.)

{¶14} Appellees claim that Mr. Nemeth testified that Mr. Christian George, known as C.J. (Nemeth Depo., at 28; McRae Depo., at 45) was near appellant when the injury to appellant's leg occurred. Mr. Nemeth actually testified, however, that after appellant was already outside on the ground and holding his leg, "C.J. eventually came out." (Nemeth Depo., at 28.)

{¶15} Mr. Henry's own deposition testimony supports a conclusion that appellant's friends were not around him when Mr. Henry "threw him out." Mr. Henry testified that once appellant was on the ground in front of the front door, he did not see anyone else around appellant. Mr. Henry then turned back around towards the inside of the establishment to "[make] sure that Nick [the bouncer in the argument with other members of the bachelor party] was okay, because he had like five other dudes, you know, around him." (Henry Depo., at 53.) Mr. Henry said he stood there at the front door, in between appellant and the other members of the bachelor party that were arguing with Nick, and did not go back inside. (Henry Depo., at 54.) He said that he turned back around towards appellant about ten seconds later, saw no one else around appellant (Henry Depo., at 54), and saw appellant lying "in a little more painful position." (Henry Depo., at 55.) Henry testified that the bachelor party group was still in the lobby area when appellant's leg was hurt, and "calmed down" when they realized that appellant was hurt. After that, the group went out to where appellant was and stood there. (Henry Depo., at 62-63.)

{¶16} In addition, appellant testified that, as he was lying facedown on the pavement, "someone kicked me." (McRae Depo., at 50.) When his leg was kicked, it "hurt like hell," and then he screamed and tried, unsuccessfully, to get up. It was at this point, "after all this happened," that appellant remembers grabbing onto what he thought was one of his friend's pants legs. (McRae Depo., at 49-51.) This statement would not indicate that appellant's friends were near him at the moment of the leg injury.

{¶17} Mr. Nemeth testified that two independent witnesses came up behind him and said they saw appellant get kicked. They said that the bouncer with the buzz cut (Mr. Henry) did the kicking. (Nemeth Depo., at 29.)

{¶18} Appellees argue for the first time on appeal that the independent witness statements are inadmissible hearsay. There was no objection to this testimony at the time of the deposition, and no mention of it in the summary judgment proceedings before the trial court. If a party fails to object to the admissibility of the testimony before the trial court, the argument is waived on appeal. *Nationwide Mut. Ins. Co. v. Am. Elec. Power*, 10th Dist. No. 08AP-339, 2008-Ohio-5618, ¶28. Thus, we may consider the statements in determining the issue of summary judgment.[1]

{¶19} As to the issue of whether a battery was committed, construing all the evidence in a light most favorable to appellant, we conclude that the conflicting testimony does, indeed, create genuine issues of material fact as to whether a Kahoots employee or employees used excessive force to grab and push appellant, causing him to hit the pavement. The testimony also creates a genuine issue of material fact as to whether Mr. Henry was out of control to the point of having to be restrained by his fellow bouncers, was in close enough proximity to appellant to have broken his femur, did in fact kick appellant, and took responsibility for the kick, saying "[y]our friend wouldn't have got his leg broke or kicked if you guys weren't acting up." (Nemeth Depo., at 33.)

{¶20} Appellant's second assignment of error is sustained.

---

[1] Although we do not decide this issue, it is possible that the statements could be admissible as excited utterances pursuant to Evid.R. 803(2). See *Gardner v. Drozdowicz*, 6th Dist. No. L-04-1084, 2004-Ohio-6310, ¶17-19.

{¶21} In appellant's third assignment of error, he contends that evidence was presented creating a genuine issue that an assault occurred. We cannot, however, find any evidence that supports appellant's claim of civil assault.

{¶22} In order to establish a claim of civil assault, one must demonstrate a "willful threat or attempt to harm or touch another offensively, which threat or attempt reasonably places the other in fear of such contact." *Vandiver v. Morgan Adhesive Co.* (1998), 126 Ohio App.3d 634, 638; *Coyle v. Stebelton* (June 15, 2001), 5th Dist. No. 00CA74, quoting *Smith v. John Deere Co.* (1993), 83 Ohio App.3d 398, 406. Here, Mr. Nemeth testified in his deposition that the bouncers' behavior was alarming enough for him to be reasonably placed in fear of harmful contact. (Nemeth Depo., at 44.) However, Mr. Nemeth's fear cannot be imputed to appellant. Appellant testified in his deposition that he did not have any words with any bouncer immediately before Mr. Henry grabbed him. (McRae Depo., at 47.) In addition, appellant does not recall if anything was said to him while he was being pushed out the door (McRae Depo., at 48), and reports no words being said to him immediately before his leg was kicked. (McRae Depo., at 50.) Appellant, therefore, could not have been placed in fear of harmful or offensive contact before the contact occurred. The third assignment of error must be overruled.

{¶23} In appellant's fourth assignment of error, he argues that evidence was presented creating a genuine issue that defendants John Does #1, #2, and #3 were negligent and their negligence in the scope of their employment proximately caused appellant's injuries.

{¶24} To prove negligence, a plaintiff must prove that: 1) the defendant owed the plaintiff a duty of care; 2) the defendant breached that duty of care; and 3) as a direct and proximate result of the defendant's breach, the plaintiff sustained injury. *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77.

{¶25} The duty of care that appellees owed to appellant is one of property owner to business invitee:

> Business invitees are persons who come upon the premises of another, by invitation, express or implied, for some purpose which is beneficial to the owner. * * * It is the duty of the owner of the premises to exercise ordinary care and to protect the invitee by maintaining the premises in a safe condition. * * * Conversely, a person who enters the premises of another by permission or acquiescence, for his *own* pleasure or benefit, and not by invitation, is a licensee. A licensee takes his license subject to its attendant perils and risks. The licensor is not liable for ordinary negligence and owes the licensee no duty except to refrain from wantonly or willfully causing injury.

Provencher v. Ohio Dept. of Transp. (1990), 49 Ohio St.3d 265, 266. (Emphasis sic.)

{¶26} Because appellant was a business invitee, appellees owed appellant a greater duty of care than to merely refrain from wantonly or willfully causing appellant injury; appellees had the duty to protect appellant from injury by exercising ordinary care to protect him from unsafe conditions.

{¶27} Appellees argue that under this standard, Mr. Henry had a privilege to eject appellant. In determining the issue as to whether appellees used reasonable force and means to eject appellant and whether appellees had a privilege to eject appellant under the circumstances, appellees cite *Shadler v. Double D. Ventures, Inc.,* 6th Dist. No. L-03-1278, 2004-Ohio-4802, ¶20-22, as persuasive authority.

{¶28} In *Shadler*, an altercation broke out in a bar, and Shadler and another patron were locked in combat. The bar manager pulled Shadler off the other woman. While holding Shadler he took a couple of steps and fell causing Shadler to sustain a broken ankle. The court found that the bar manager had a privilege to remove Shadler as she was involved in the fight, and the manager had a duty to remove patrons in the course of maintaining the bar premises in a reasonably safe condition. Nothing in the record indicated the force used to remove Shadler was excessive or that the manager intended to cause harmful or offensive contact.

{¶29} Appellees fail, however, to distinguish the facts in that case from those in the present case, namely that: (1) the deposition testimony by Mr. Henry, Mr. Nemeth, and appellant indicates that appellant was neither involved in a fight nor engaged in violent acts, nor exposed appellees' employees, patrons, or premises to danger; (2) appellant recalls nothing being said to him by any employee of Kahoots before Mr. Henry grabbed him (McRae Depo., at 47); and (3) the deposition testimony by appellant and Mr. Nemeth indicates that the force used by one of the bouncers may have been excessive, and that he may have intended to cause harmful or offensive contact with appellant.

{¶30} There is no indication in the record that Mr. Henry was legitimately trying to prevent any injury to appellant by ejecting him from the premises. There is no testimony that appellant had argued or had contact with any of the bouncers prior to ejection, and there is no testimony claiming that appellant was being threatened with injury or attacked by another patron. We can find no evidence to support a contention that appellant was in danger while inside Kahoots prior to being ejected. Nor, as we

have stated before, can we find evidence that appellant was involved in a fight or violent acts, or exposed Kahoots' employees, patrons, or premises to danger.

{¶31} On the contrary, when construing the evidence in a light most favorable to appellant, we can infer that, but for the willful and wanton actions of Mr. Henry, appellant would not have ended up outside face down on the concrete hard enough to have "blacked out for a second." (McRae Depo., at 49.) Because Mr. Henry had no privileged reason for ejecting appellant in a violent manner, and because Mr. Henry's actions towards appellant were not necessary to protect Kahoots' employees, premises, or patrons, it can be found that Mr. Henry's actions unnecessarily and unreasonably exposed appellant to danger. Whether appellant's injury occurred as a direct and proximate result of appellees' actions is a matter for the jury to decide. The fourth assignment of error is sustained.

{¶32} Appellant's fifth and sixth assignments of error are derivative of the underlying torts of battery and negligence argued in assignments of error two and four, which we have sustained. Appellees made no separate argument concerning those claims. We, therefore, also sustain appellant's fifth and sixth assignments of error.

{¶33} For the foregoing reasons, we overrule appellant's first assignment of error as moot, overrule appellant's third assignment of error, and sustain appellant's second, fourth, fifth, and sixth assignments of error. The judgment of the Franklin County Court

of Common Pleas is affirmed in part and reversed in part, and this cause is remanded to the trial court for further proceedings.

Judgment affirmed in part,
reversed in part; cause remanded.

BROWN, J., concurs.
McGRATH, J., concurs separately.

_____

McGRATH, J., concurring separately.

{¶34} I am in agreement with the majority that sufficient issues of fact exist in this case to permit a reasonable jury to infer that appellant suffered serious injury by a battery at the hands (or should I say feet) of an employee of appellees' establishment. However, I would find that to be the case without consideration of the statements offered by two independent witnesses who identified a bouncer as the person kicking appellant's leg. Those statements are referred to in the majority opinion and considered in the majority's decision. The majority notes that the statements were not objected to below and, thus, cannot be objected to on appeal.

{¶35} However, our review in this case is de novo, and in so making a de novo review, we must consider the requirements of Civ.R. 56 as they exist, not as they were treated or ignored by the parties below. Civ.R. 56 requires that all affidavits or testimonial evidence submitted in support of, or opposing, a motion for summary judgment be based upon personal knowledge. The statements of the two witnesses are clearly offered as hearsay and, thus, violate the dictates of being competent Civ.R. 56 evidence. Therefore, I do not consider them in making this decision. Nevertheless, I concur with the majority that genuine issues of fact exist and, therefore, I concur in its judgment.