IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

TANYA OSHATZ, a single person, Appellant, v. GINSING, LLC, dba WILD GINGER and THE TRIPLE DOOR; Respondents, and BRADLEY AARON CROSSEN and JANE DOE CROSSEN, and the marital community composed thereof, Defendants.	)	No. 66101-9-I DIVISION ONE UNPUBLISHED OPINION FILED: May 14, 2012

Becker, J. — Appellant Tanya Oshatz appeals a grant of summary judgment in favor of GinSing LLC, parent company to Wild Ginger restaurant and The Triple Door bar in downtown Seattle. Soon after she had dinner at Wild Ginger, Oshatz was assaulted on the sidewalk outside of The Triple Door by Bradley Crossen, a man who had just been ejected from the bar because of his aggressive and assaultive behavior inside the bar. Oshatz does not establish the existence of a legal duty owed to her by GinSing in these circumstances.

We affirm the order of dismissal.

On appeal, the appellate court reviews a summary judgment order *de novo* and therefore engages in the same inquiry as the trial court. Christiano v. Spokane County Health Dist., 93 Wn. App. 90, 93, 969 P.2d 1078 (1998), review denied, 163 Wn.2d 1032 (1999). Summary judgment is appropriate if, after viewing the pleadings and record and drawing all reasonable inferences in favor of the nonmoving party, the court finds there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Higgins v. Stafford, 123 Wn.2d 160, 168-69, 866 P.2d 31 (1994).

Viewed in the light most favorable to Oshatz, the record shows that Bradley Crossen drank great quantities of alcohol of various kinds after work on Sunday, June 21, 2009. Later, Crossen and a companion ended up at The Triple Door bar in downtown Seattle. Crossen recalls that he was drunk when he arrived and that he had some more to drink at The Triple Door, but he does not remember how he got the drinks. The record contains no evidence that any drinks were supplied to Crossen by employees of The Triple Door. A bartender recalls that she nearly served him when he attempted to buy his own drink at the bar, but she says she poured the drink out when she realized that he was becoming rude and aggressive.

Crossen became angry after the bartender denied him a drink. Bar employees observed Crossen physically push a patron and make physically assaultive threats to another bar patron. Bar employees quickly intervened.

Two or three of them "isolated Crossen so he could not go after anyone." They led him to the exit and escorted him outside. According to the bar employees, Crossen became calm and nonaggressive after being taken outside.

This was about 11:15 p.m. Around this same time, Tanya Oshatz and her mother were leaving the Wild Ginger restaurant after having eaten dinner there. Wild Ginger and The Triple Door are contiguous, co-owned businesses located at the intersection of Third Avenue and Union Street in downtown Seattle. The two businesses share employees, supplies, materials, and equipment. Wild Ginger prepares food and beverages which are served at The Triple Door.

As Oshatz and her mother walked down the sidewalk on Third Avenue in front of The Triple Door, they paused to read the inscription on the side of Benaroya Hall across the street. They had not yet decided whether to go into The Triple Door or return to their car parked on First Avenue. Suddenly, Crossen stepped in front of Oshatz, approximately six inches from her face, and said loudly, "Whoa . . . where did YOU come from?" Crossen bent down, grabbed Oshatz around the knees, lifted her up, and threw her over his shoulder. Oshatz fell to the pavement on her right shoulder and was injured.

The bar's doorman and another bar employee witnessed the incident and ran over to help Oshatz. The doorman states that Crossen began pushing him and shouting at him. Bar employees kept Crossen on the scene after the police were called. The police arrived and arrested Crossen. Oshatz was taken away by ambulance for medical treatment. Crossen was later prosecuted and

convicted of third degree assault.

On October 16, 2009, Oshatz filed a complaint against GinSing and Crossen. On May 12, 2010, Oshatz transmitted discovery requests to GinSing. She sought information concerning the identity of all employees on duty on the night in question; any written policies, procedures or guidelines relating to controlling and/or ejecting intoxicated or unruly customers and calling police to the premises; any information concerning previous complaints or lawsuits concerning similar incidents, inside or within 50 feet outside the entrance to the premises; and any receipts for food or beverages purchased by Crossen or his companion on the night in question.

On June 4, 2010, GinSing moved for summary judgment on several theories, including absence of duty. Oshatz, responding, argued that GinSing owed her a duty as a business invitee. She also asked for extra time under CR 56(f) on the basis that GinSing had failed to respond to her discovery requests. The court entered an order requiring GinSing to provide complete discovery answers within 7 days and allowing Oshatz 21 days thereafter to provide additional briefing on "material issues raised thereby." GinSing answered the discovery requests. Oshatz submitted additional evidentiary materials and a supplemental brief, none of which related to the newly supplied discovery answers.

The court granted summary judgment in favor of GinSing on September 7, 2010. Oshatz filed this appeal.

Negligence has four elements: duty, breach, causation, and damages. Harbeson v. Parke-Davis, Inc., 98 Wn.2d 460, 468, 656 P.2d 483 (1983). At issue in this case is the element of duty.

In her complaint, Oshatz alleged various theories of negligence against GinSing, including negligent overservice of alcohol; negligent failure to enact or follow policies or procedures designed to control intoxicated customers; and negligent failure to cure or warn business invitees of dangerous conditions "on or near business property." Oshatz alleged GinSing acted negligently when its employees failed to escort Crossen "out of and away from the premises" before he became assaultive and when they failed to respond to Crossen's increasingly belligerent behavior by contacting the police "or otherwise detaining him in a way that he no longer posed a threat to others."

We first address the allegation of negligent overservice of alcohol. Oshatz contends that GinSing served liquor to Crossen when he was "apparently under the influence," thereby incurring liability under Faust v. Albertson, 167 Wn.2d 531, 539, 222 P.3d 1208 (2009). We reject this theory for two reasons. First, it was not presented to the trial court. RAP 2.5(a). "On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court." RAP 9.12. Second, while it is undisputed that Crossen was very drunk when he arrived at The Triple Door, there is no evidence that Crossen was actually served alcohol by any employee of GinSing. His own testimony

does not support an inference that he was served; he testified only that he consumed drinks at The Triple Door and that he did not recall how he got them.

We next address the theory that GinSing, by failing to protect Oshatz from Crossen, breached a duty owed to Oshatz as a business invitee or as a member of the public. Oshatz contends GinSing's employees breached a duty owed to her when they ejected Crossen from The Triple Door onto the sidewalk, knowing that he had been pugnacious and assaultive inside the bar, yet failing to ensure that he did not continue that behavior to the detriment of customers or others who were lingering just outside the door.

As a preliminary step in our analysis of this issue, we disagree with GinSing's contention that because Crossen was an intentional tortfeasor, GinSing has an absolute defense under Tegman v. Accident & Medical Investigations, Inc., 150 Wn.2d 102, 75 P.3d 497 (2003). Tegman prevents a negligent defendant from being held jointly and severally liable with a co-defendant whose intentional actions were a proximate cause of the same injury. Tegman, 150 Wn.2d at 115-19. Because the Tegman rule comes into play only *after* a defendant's liability for negligence has been established, it is irrelevant to the issue in this appeal.

Reading somewhat between the lines, we discern that what GinSing actually means to argue is that Crossen's criminal act was a superseding cause breaking the chain of causation as a matter of law. The criminal or intentional misconduct of a third party does not act as a superseding cause when the

plaintiff is proceeding under a theory of duty that permits a defendant to be held liable for damage caused by the intentional misconduct of third parties. For example, it is well established that a bar can be liable to a customer who is assaulted by another patron, if the assault was reasonably foreseeable in light of what the bar knew or should have known about the assailant's violent tendencies. Christen v. Lee, 113 Wn.2d 479, 504-05, 780 P.2d 1307 (1989). In such a case, the intentional criminal act of assault is not a superseding cause precluding liability on the part of the bar. And in any event, such an argument does not implicate Tegman.

Because we regard the Tegman argument as irrelevant, we do not address the parties' debate about whether Crossen's mental state should be described as intentional or as negligent. Instead, our focus is to determine whether GinSing owed Oshatz a duty, either as an invitee or as a member of the public.

One way in which Oshatz attempted to establish such a duty was by submitting a declaration by an expert witness, restaurateur Gordon Naccarato. Naccarato declared that the duty of a restaurant and bar to exercise reasonable care for the safety of its customers extends to the area immediately outside the establishment, "at least where the restaurant owner or operator has specific knowledge of an actual danger which the customers lack."

One problem with using Naccarato's declaration is that it was not submitted to the trial court along with Oshatz's initial response to GinSing's

motion for summary judgment. It was submitted after the court gave Oshatz extra time to brief matters related to GinSing's belated answers to discovery. The declaration of Naccarato did not relate to the discovery answers. Oshatz has not explained why the declaration could not have been submitted at the time of her initial response. A second problem is that while the standard of care can be established by expert testimony such as Naccarato's, the existence of a duty cannot. The existence of a duty is a question of law which must be determined by the court. See Keates v. City of Vancouver, 73 Wn. App. 257, 265, 869 P.2d 88, review denied, 124 Wn.2d 1026 (1994).

A serious difficulty with Oshatz's briefing is that her theories of duty vary and multiply with each iteration. Her theories before the trial court can generally be separated into three categories: the bar owed a duty to (1) protect Oshatz in her capacity as an invitee—both from "dangerous conditions" and from criminal actions of third parties "on or near business property"; (2) control Crossen as someone with whom the bar had a special relationship; and (3) protect the public from criminal actions by third parties where the business's own actions affirmatively bring about an especial temptation and opportunity for criminal misconduct.

Oshatz's briefs on appeal do not mention the third theory. Accordingly, we regard it as abandoned. In any event, the theory is a weak one. We observe no facts in the record suggesting that the bar did anything to create a special opportunity for criminal misconduct by simply removing Crossen from the bar

and placing him back on the street where he originally came from.

In her reply brief on appeal, Oshatz does mention the second theory, that the bar was subject to a "take charge" duty to control Crossen and prevent him from injuring others. We find this argument unpersuasive in addition to being late. For a "take charge" duty to exist, there must be a "'definite, established and continuing relationship between the defendant and the third party.'" Taggart v. State, 118 Wn.2d 195, 219, 822 P.2d 243 (1992), quoting Honcoop v. State, 111 Wn.2d 182, 193, 759 P.2d 1188 (1988). No such established and continuing relationship exists between a bar and the patrons who choose to enter it on any given night.

This leaves the theory that Oshatz was a business invitee. In the trial court, she cited Nivens v. 7-11 Hoagy's Corner, 133 Wn.2d 192, 943 P.2d 286 (1997). Oshatz has not cited Nivens on appeal, but it is fair to recognize that Nivens was the beginning point for her argument below about duty. What can be learned from Nivens is that as a general rule, a person has no legal duty to prevent a third party from intentionally or criminally harming another. Nivens, 133 Wn.2d at 199. The relationship between a business owner and an invitee is a special relationship that creates an exception to this general rule. A business owes an invitee a duty to control the business premises, not only with respect to keeping them free of physical hazards, but also with respect to preventing the invitee from being harmed by third persons:

> What we have impliedly recognized in earlier cases, we now explicitly hold: a special relationship exists between a business and an invitee because the invitee enters the business premises

> for the economic benefit of the business. As with physical hazards on the premises, the invitee entrusts himself or herself to the control of the business owner over the premises and to the conduct of others on the premises. . . . We discern no reason not to extend the duty of business owners to invitees to keep their premises reasonably free of physically dangerous conditions in situations in which business invitees may be harmed by third persons.

Nivens, 133 Wn.2d at 202-03 (footnote omitted).

Assuming that a jury could find that Oshatz was an invitee of GinSing at the time of the assault, her injury took place *off* of the owned premises. Nowhere in the opening appellate brief submitted by Oshatz in January 2011 is there any argument presented for expanding the duty described in Nivens so that the owner is responsible for injuries occurring off the owned premises.

After Oshatz filed this appeal and both parties submitted their initial briefs, Oshatz sought and received a default judgment against Crossen. Oshatz then sought leave to file an amended opening brief in this appeal. A commissioner of this court granted her request on June 6, 2011, but limited the amended briefing to "no more than an additional 10 pages addressing what impact, if any, the entry of the default judgment has upon the assignments of error raised in the initial opening brief." Oshatz then submitted an amended opening brief in which she included six new pages under the existing heading of "The Moving Party's Burden In A Motion For Summary Judgment." Appellant's Amended Opening Brief, June 20, 2011, pp. 29-34. The content added by these new pages had nothing to do with the impact of the default judgment against Crossen. Instead, Oshatz cited cases primarily from other jurisdictions indicating that the duty

owed to a business invitee may under some circumstances extend to injuries that occur on adjacent premises, *off* of the owned premises. The inclusion of pages 29-34 in Oshatz's amended opening brief was a clear violation of the scope of this court's order permitting amended briefing as their content does not relate to the issue on which amended briefing was permitted. Even if we were to view these pages as a submission of additional authorities under RAP 10.8, we would decline to consider them because Oshatz has not made an argument that stakes out a position on the issue of off-premises liability. Merely supplying a collection of cases is too amorphous to define the contours of the duty Oshatz would have us recognize. It would be unfair to expect GinSing to respond to an unstated argument, especially when responding to a brief that was supposed to be limited to the impact of the default judgment against Crossen.

In her reply brief, Oshatz continued to expand her theories by citing Groves v. City of Tacoma, 55 Wn. App. 330, 777 P.2d 566 (1989). In Groves, the court held that an abutting landowner who uses a public sidewalk for his or her own "special purpose" and creates a dangerous condition by virtue of that use, can be held liable to one foreseeably injured by that dangerous condition. Groves, 55 Wn. App. at 333. Oshatz raises this "special purpose" theory for the first time in her reply brief on appeal. This is simply too late to merit consideration.

Affirmed.

Becker, J.

WE CONCUR:

Dwyer, J.

Leach, J.