COURT OF APPEALS
DECISION
DATED AND RELEASED

JULY 8, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1948-FT

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

ANDREA ARENAS, F/K/A ANDREA THURBER,

PLAINTIFF-APPELLANT,

V.

CHAD MATTHEWS AND CAPITOL INDEMNITY CORPORATION,

DEFENDANTS,

ED ABRAMS, SR., INDIVIDUALLY AND D/B/A SPIRIT'S TAVERN,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Milwaukee County: GEORGE A. BURNS, JR., Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Andrea Arenas was injured when, as a patron of Spirit's Tavern, a business owned and operated by defendant Ed Abrams, Sr., she was struck in the face by another patron departing the premises. Among others, she sued Abrams and Spirit's Tavern (together "Abrams"). Abrams moved the circuit court for summary judgment, contending that the punch that injured Arenas was unforeseeable and that Abrams therefore could not be held liable. Arenas opposed summary judgment, arguing that genuine issues of material fact remained to be resolved at trial. The circuit court disagreed with Arenas and granted summary judgment to Abrams. Arenas appeals. By order dated August 7, 1996, this case was submitted to the court on the expedited appeals calendar. We agree with the trial court that summary judgment was appropriate and we therefore affirm.

The relevant facts are largely undisputed. To the extent there is any dispute, we recite the facts in the manner most favorable to Arenas.

Arenas was at Spirit's Tavern in the company of a friend. The bar was crowded, and no bouncer was on duty. There were, however, three bartenders working, among them the owner's son, Ed Abrams, Jr. Arenas's ex-husband, Todd Thurber, was also present at Spirit's that night. Among the persons in Thurber's group was Chad Matthews, a man Arenas had known for six years. Thurber and Arenas engaged in a conversation that led to an argument. Arenas walked away.

Thurber walked back and forth between his table and Arenas's table. Arenas told Thurber that she wished him to leave her alone and that he should return to Matthews' table. Thurber became loud, and Arenas began to feel threatened by his presence. Abrams, Jr., asked Arenas if she wanted Thurber

removed from the bar, but Arenas told Abrams, Jr., that he need not remove Thurber unless the situation continued to "escalate."

Thurber again approached Arenas at her table and screamed in her face. At that point, Abrams, Jr., approached Thurber and told him that he would have to leave the premises. When Thurber attempted to reach Arenas, Abrams, Jr., stood between them and told Thurber he would have to leave. He then escorted Thurber to the door.

Abrams, Jr., then asked Arenas if there were any others in Thurber's group who should be asked to leave, and Arenas pointed out Matthews' table. Abrams, Jr., then asked a patron to "watch his back," and he went to Matthews' table. Abrams, Jr., asked Matthews' group to leave. Arenas observed the conversation, noting that the people at the table seemed a "little upset," but that they appeared to agree to leave the bar.

Arenas acknowledged that, in the time she had known Matthews, she had never known him to be violent. On their way out of the bar, Matthews' group, unaccompanied by any tavern personnel, passed Arenas. One of the women in the group exchanged words with Arenas and gave Arenas a push. Arenas lost her balance but caught herself. She looked up and saw Matthews standing in front of her. Arenas made a comment regarding the other woman's behavior, and Matthews punched Arenas. Arenas fell to the floor. Arenas later called Matthews' punch a "sucker punch." She stated that she and Matthews had had a discussion during the evening about Thurber's behavior, but she admitted that she had not expected Matthews to hit her. She subsequently stated in her deposition that Matthews had not done anything prior to hitting her that would have caused her to believe that Matthews should have been restrained that night.

Arenas sued Matthews and Abrams. In her claim against Abrams, Arenas claimed that Abrams should have foreseen Matthews' assault. She claimed that, under the circumstances, Abrams had had notice that Matthews might commit an assault and that Abrams had failed to remove Matthews from the bar in a safe manner.

Abrams moved the circuit court for summary judgment, contending that, even assuming the truth of all of Arenas's factual allegations, she could not succeed in her claim against him. He noted that neither he, his son, nor any other employee of the bar had anticipated or could have anticipated Matthews' sudden action. Abrams noted that Arenas admitted Matthews' action was a complete surprise to her, and that Arenas herself had never known Matthews to act violently. Abrams also noted that there was no allegation that Matthews had engaged in any disruptive or threatening behavior prior to hitting Arenas.

Arenas opposed summary judgment, contending that the incident occurred at a tavern, and that taverns are places of "extra risk" requiring employment of sufficient staff to protect patrons. She contended that Abrams should have employed a bouncer or security staff, that Abrams was therefore understaffed, and that, in the absence of extra security, Abrams, Jr., should have escorted Matthews and his group to the door because he understood or should have understood the potential danger to her.

The circuit court rejected Arenas's argument and granted Abrams summary judgment. It reasoned that Abrams, Jr., had had no reason to believe that Matthews, who had not been an active participant in the dispute between Arenas and Thurber, would engage in any violent actions. The circuit court also noted that even if Abrams had employed a bouncer or extra security as Arenas claimed

he should have, Matthews' action could not have been stopped by security personnel given its admittedly swift and unanticipated character.

This court reviews summary judgments *de novo*, employing the same methodology as the trial court. *See* ***Green Springs Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *See* § 802.08(2), STATS. We conclude, assuming the truth of all Arenas's factual allegations,[1] that summary judgment was appropriate in this instance.

Resolution of this matter against Arenas is dictated by two cases, ***Weihart v. Piccione***, 273 Wis. 448, 78 N.W.2d 757 (1956), and ***Kowalczuk v. Rotter***, 63 Wis.2d 511, 217 N.W.2d 332 (1974). In ***Weihart***, the supreme court held that the owner of a business is liable to members of the public for injuries caused by the negligent or intentional acts of third parties on the premises "if the proprietor by the exercise of reasonable care could have discovered that such acts were being done or were about to be done." ***Weihart***, 273 Wis. at 455-56, 78 N.W.2d at 761.

This rule was then applied by the supreme court in ***Kowalczuk***, a case involving an attack on a tavern patron that occurred first in the tavern, and then continued outside on the street. There, the supreme court noted that a tavern proprietor could not be held liable for failing to protect a patron when the attack

[1] *See* ***Kraemer Bros., Inc., v. United States Fire Ins. Co.***, 89 Wis.2d 555, 566, 278 N.W.2d 857, 862 (1979) ("[a]ll doubts as to the existence of a genuine material fact must be resolved against the party moving for summary judgment").

against the patron was sudden and could not have been reasonably anticipated by the tavern employees. The supreme court overturned summary judgment for the tavern owner, however, reasoning that a reasonable trier of fact could have concluded that tavern employees, once they observed the attack, should have called police to discourage the continued beating. *See* ***Kowalczuk***, 63 Wis.2d at 514, 217 N.W.2d at 333.

Applying those precepts to the instant case supports the grant of summary judgment. Arenas's allegations do not sustain a claim that Abrams could have discovered, by the exercise of reasonable care, that Matthews was going to hit Arenas. The record at the summary judgment hearing showed that Matthews had not been directly involved in the verbal altercation between Thurber and Arenas, and that Matthews did not object strongly when he was asked by Abrams, Jr., to leave the premises. Thus, there was nothing in Matthews' behavior that night that would have led a reasonable person to believe that there was a need to protect Arenas from Matthews. Indeed, Arenas admitted in her deposition that even she did not anticipate that Matthews would harm her and that she was caught by surprise when he hit her. [2]

Arenas suggests, however, that there is a genuine issue of material fact relating to whether Abrams should have employed a bouncer or extra security personnel. She contends that Abrams and his employees were "on notice" of the

[2] Arenas makes much of the fact that before Abrams, Jr., approached Matthews' table, he asked a customer to "watch his back." She suggests that, by this comment, Abrams, Jr., indicated that he understood the danger and should have anticipated that Matthews could harm her. Even assuming Abrams, Jr., made the comment, however, it does not create a genuine issue of material fact in this instance. The record is devoid of any indication that Matthews or any of the people at his table engaged in any threatening behavior when Abrams, Jr., asked them to leave. Given that undisputed fact, it was not unreasonable for Abrams, Jr., to assume at that point that Matthews and his group would leave the establishment without incident.

possibility of violence "by virtue of the business [they] engaged in," and she points out that there is information in the record to show that there had been problems at the tavern in the past. In rejecting this argument, we note first that a tavern proprietor "is not required to guarantee the safety of patrons against injuries inflicted by other patrons on the premises." WIS J I—CIVIL 8045.[3] In addition, given the undisputed fact that Matthews had not engaged in any threatening behavior prior to hitting Arenas, additional security, even if present, could not have reasonably anticipated Matthews' action in time to prevent its occurrence.

Given the record before the circuit court, summary judgment to Abrams was appropriate

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

[3] That jury instruction incorporates the holdings of ***Kowalczuk v. Rotter***, 63 Wis.2d 511, 217 N.W.2d 332 (1974), and ***Weihert v. Piccione***, 273 Wis. 448, 78 N.W.2d 757 (1956).