COURT OF APPEALS
DECISION
DATED AND FILED

September 19, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 99-1612

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

MICHAEL MONTEY,

PLAINTIFF-APPELLANT,

V.

STEVE'S ON BLUEMOUND AND WILSON MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

BENITO S. JUAREZ, EMCASCO, A FOREIGN CORPORATION, WAUSAU PREFERRED HEALTH INSURANCE COMPANY AND EMPLOYEE BENEFIT CLAIMS OF WISCONSIN,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: DIANE S. SYKES, Judge. *Affirmed.*

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

¶1 PER CURIAM. Michael Montey appeals from the judgment granting summary judgment to Steve's on Bluemound and its insurer, Wilson Mutual Insurance Company (collectively, "Steve's"), dismissing his action for Steve's alleged violation both of its duty to protect, and of the safe-place statute. Montey argues that, under ***Kowalczuk v. Rotter***, 63 Wis. 2d 511, 217 N.W.2d 332 (1974), Steve's had a duty to protect him outside the tavern premises. He contends, therefore, that the trial court erred in concluding that his action was foreclosed by ***Delvaux v. Vanden Langenberg***, 130 Wis. 2d 464, 387 N.W.2d 751 (1986). Montey also challenges the trial court's conclusion that Steve's had no liability under Wisconsin's safe-place statute. We affirm.

I. BACKGROUND

¶2 Although the summary judgment submissions provided various accounts of the incident leading to the underlying suit, it is undisputed that on August 4, 1996, inside Steve's on Bluemound, a Milwaukee tavern, Montey and Benito Juarez became involved in a verbal altercation. Steve Salaja, one of the tavern owners, and a tavern employee told Montey and Juarez to "take it outside, there's no fighting in here." Montey and Juarez went outside and immediately began fighting. Montey was holding Juarez in a headlock when Salaja and at least one of his employees intervened to separate them. Montey maintained that before releasing Juarez from the headlock, he requested safe passage to his car.

¶3 As soon as he was released, Juarez and another man went to his (Juarez's) van. Montey and a companion crossed the street to get to his (Montey's) car to leave. As Montey stepped onto the curb on the side of the street

opposite the tavern, he was struck from behind by the van driven by Juarez. Montey sued Steve's[1] for the damages arising out of the resulting injuries.

¶4 Steve's moved for summary judgment, contending that any injuries Montey suffered resulted from events that occurred off the tavern's premises, where it had no duty to protect Montey. The trial court agreed, explaining:

> [T]he ***Delvaux*** case controls, and the tavern can not be held responsible for the acts of Mr. Juarez under these circumstances. The ***Delvaux*** case took pains not to extend the ruling of the ***Kowalczuk*** case …. And it is [sic] seems very clear to me, based on the language used by the [s]upreme [c]ourt in the ***Delvaux*** case, that the [s]upreme [c]ourt was racheting back liability in this area and severely restricting the holding of ***Kowalczuk*** and dis[]inviting litigants seeking liability based upon its language.

The trial court also concluded that the safe-place statute did not apply. In both respects, the trial court was correct.

II. DISCUSSION

¶5 Applying the well-known methodology that need not be repeated here, this court reviews *de novo* a trial court's summary judgment determination. *See* ***Park Bancorporation, Inc. v. Sletteland***, 182 Wis. 2d 131, 140, 513 N.W.2d 609 (Ct. App. 1994).

A. Duty to Protect

¶6 Montey argues that, under ***Kowalczuk***, the trial court erred. He points out that in ***Kowalczuk***, where the supreme court reversed the trial court's dismissal of the plaintiff's action against a tavern owner for injuries suffered in an attack by other tavern patrons, the plaintiff was attacked approximately eighty feet

[1] Montey also sued Juarez and others who are not parties to this appeal.

away from the tavern. *See* ***Kowalczuk***, 63 Wis. 2d at 512-13. Thus, Montey maintains, Steve's may be liable for injuries he suffered across the street outside the tavern. Montey, however, minimizes the significance of the fact that in ***Kowalczuk***, the plaintiff first "was attacked while at the bar in the presence of a bartender." *See* ***id.*** at 514.

¶7 In ***Delvaux***, the supreme court rejected the very argument Montey presents here. Addressing the plaintiffs' contention that "[i]n the event an owner by exercise of ordinary care becomes aware of the potential of harm to a patron and is in a position to avoid such harm, 'the tavern owner's duty transcends the walls of the tavern,'" *see* ***Delvaux***, 130 Wis. 2d at 483, the supreme court noted that in ***Kowalczuk***, the victim "was initially attacked by two men" inside the tavern, *see* ***id.*** at 484. The court declared that "***Kowalczuk*** does not extend a tavern owner's duty beyond the owner's premises." ***Id.*** at 486. Thus, the supreme court reiterated its approval of the standard articulated in WIS JI—CIVIL 8045, which provided, in part, that under some circumstances a proprietor "has a duty to exercise ordinary care to protect members of the public *while on the premises* from bodily harm caused to them by the … intentionally harmful acts of third persons." *See* ***Delvaux***, 130 Wis. 2d at 484, 487 (emphasis added in ***Delvaux***).

¶8 Montey fairly argues that, in several ways, the facts of his case differ from those in ***Delvaux***. He contends that, as a matter of sound public policy, these distinctions should make a difference, and he points to other jurisdictions where, he maintains, courts have embraced his theory. Thus, he asks this court to reject the "bright line rule" that, he says, "[t]he trial court's decision creates." The flaw in Montey's argument, however, is that the trial court did not create the bright line rule; the supreme court did.

¶9 Montey, unlike the plaintiff in ***Kowalczuk***, was not physically attacked inside the tavern. The physical attack that caused Montey's injuries occurred across the street outside the tavern. Thus, even if Salaja was "aware of the potential of harm" to Montey and was "in a position to avoid such harm," *see* ***Delvaux***, 130 Wis. 2d at 483, ***Delvaux*** controls and precludes Montey's claim.

B. Safe-Place Statute

¶10 Montey also argues that Steve's had a duty under the safe-place statute. He concedes that the safe-place statute does not create a separate cause of action, but explains that his position is that "a violation of the safe[-]place statute can occur if a frequenter is injured as a result of unsafe methods or processes of doing business which result in injury to a frequenter." Thus, Montey contends, the tavern owner's and employees' failure to follow sound procedures in dealing with "the string of events originating with the verbal altercation inside [the tavern] continu[ing] in a continuous sequence leading up to the striking of … Montey with … Juarez's vehicle" violated Steve's duty to maintain the premises in a safe fashion. Montey is mistaken.

¶11 "Interpretation of the safe-place statute is a question of law which we review de novo." ***Geiger v. Milwaukee Guardian Ins. Co.***, 188 Wis. 2d 333, 336, 524 N.W.2d 909 (Ct. App. 1994). In ***Stefanovich v. Iowa National Mutual Insurance Co.***, 86 Wis. 2d 161, 271 N.W.2d 867 (1978), the supreme court explained:

> The Wisconsin safe-place statute provides that it is an employer's duty to provide safe employment, premises and equipment for the protection of his employees and frequenters. This court has held that the safe-place statute does not make the employer an insurer of the safety of a frequenter on the premises. Rather, the statute deals with unsafe *conditions* of the employer's premises and not with

> negligent or inadvertent *acts* of employees or *activities* conducted on the premises.

Id. at 166. Here, clearly, Montey's claim aims at the "negligent or inadvertent *acts* of employees" of the tavern, not at "unsafe *conditions*" of the tavern premises. Thus, the trial court correctly determined that the safe-place statute was inapplicable.

¶12 Therefore, we conclude that the trial court was correct in granting summary judgment to Steve's.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1997-98).