COURT OF APPEALS
DECISION
DATED AND FILED

September 9, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0754-FT **Cir. Ct. No. 02-CV-000257**

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

KIMBERLY K. HAWKES,

PLAINTIFF-APPELLANT,

V.

MICHAEL M. BAGAIN AND BLUECROSS BLUESHIELD OF ILLINOIS,

DEFENDANTS,

DOMINIQUE J. NAVARRO AND SOCIETY INSURANCE,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Eau Claire County: BENJAMIN D. PROCTOR, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Kimberly Hawkes appeals a summary judgment granted to Dominique Navarro and Society Insurance (collectively, Navarro).[1] The circuit court determined Navarro was not liable for injuries Hawkes sustained as a bystander at a bar fight in which Michael Bagain participated. Hawkes argues that there are genuine issues of material fact precluding summary judgment. We disagree with Hawkes and affirm the judgment.

¶2 Navarro owns a bar called She-Nannigans. Hawkes was injured during an altercation involving other bar patrons when a piece of glass from a beer bottle, thrown by Bagain and broken on a bartender's head, struck her eye. There is little dispute over the sequence of events leading up to Hawkes' injury. The real dispute is over Navarro's liability. The trial court concluded that Navarro's employees could not have foreseen Bagain's actions. The court also stated, "I'm not sure under any circumstances … whether anyone could have done anything." The court granted Navarro's motion for summary judgment and Hawkes appeals.

¶3 We apply the same summary judgment methodology as the trial court. ***Preloznik v. City of Madison***, 113 Wis. 2d 112, 115-16, 334 N.W.2d 580 (Ct. App. 1983). Thus, our review of the circuit court's decision to grant summary judgment is de novo. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-16, 401 N.W.2d 816 (1987). Summary judgment must be granted if the evidence demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2).

[1] This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶4 Proprietors of businesses have a common law duty to protect patrons from negligent and intentional acts of third persons. ***Beyak v. North Cent. Food Sys.***, 215 Wis. 2d 64, 68, 571 N.W.2d 912 (Ct. App. 1997). This duty was codified in ***Kowalczuk v. Rotter***, 63 Wis. 2d 511, 513-14, 217 N.W.2d 332 (1974):

> [T]he proprietor of a place of business who holds it out to the public for entry for his business purposes is liable to members of the public while on the premises for such purpose for harm caused by the accidental negligence or intentional acts of third persons, *if the proprietor by the exercise of reasonable care could have discovered that such acts were being done or were about to be done* and could have protected the members of the public by controlling the conduct of the third persons, or by giving a warning adequate to enable them to avoid harm. (Emphasis added.)

Proprietors are not, however, required to guarantee the safety of patrons against injuries inflicted by others on the premises. WIS JI—CIVIL 8045.

¶5 Navarro's employees testified that, until the altercation actually took place, they had no reason to believe Bagain was intoxicated or otherwise likely to cause a disturbance. Hawkes presents no evidence to show otherwise.[2] Indeed, Hawkes also testified that she was not aware of his presence until the fight began. Thus, we agree with the circuit court, which essentially concluded that the employees could *not* "have discovered that such acts were being done or were about to be done."

[2] Although Hawkes argues that Bagain was "clearly intoxicated," this argument is based on the employees' observations of him after he had been removed from the bar. Prior to the altercation, Bagain gave no indication of his intoxication and therefore no reason for the employees to worry about his conduct.

¶6 Moreover, from the time Hawkes first noticed the altercation to the time she was injured, no more than sixty seconds had passed. The degree of care required by employees fluctuates with the facts and circumstances of each particular case. ***Weihert v. Piccione***, 273 Wis. 448, 456, 78 N.W.2d 757 (1956). As the group of individuals involved in the altercation migrated closer to the bar where Hawkes was sitting, at least one of the bartenders moved to restrain Bagain.[3] Bagain was partially pinned against a wall when he threw the bottle. Moreover, Hawkes was not the initial target; the bottle it hit the bartender's head. Hawkes was hit by debris from the bottle. The undisputed evidence demonstrates that Navarro's employees acted immediately, reasonably, and sufficiently to diffuse the altercation.[4] Success of intervention is not a factor for consideration.

¶7 Hawkes nonetheless presents us with six theories from which we should draw competing factual inferences, rendering summary judgment inappropriate:

1. Failure to properly train and instruct bartenders and bouncers;

2. Granting unlimited discretion to bartenders and bouncers as to when the police should be called to diffuse an incident;

[3] It is undisputed that other employees also intervened, but a detailed description of their actions is irrelevant.

[4] Compare, for example, ***Beyak v. North Cent. Food Sys.***, 215 Wis. 2d 64, 571 N.W.2d 912 (Ct. App. 1997). A security guard directed fighting patrons out of a restaurant. Rather than leaving the property, the fight moved to the parking lot. The guard, rather than ensuring the individuals left the property or monitoring the situation, apparently disappeared for twenty minutes. Beyak was subsequently injured when aiding the victim of the fight. There was therefore a factual question regarding the reasonableness of the guard's actions.

3. Failing to properly bring Bagain under physical control so as to prevent him from throwing the second bottle thereby injuring Kimberly Hawkes;

4. Delaying the call to 911 thereby preventing the well-trained police department from arriving and diffusing the scene prior to the injury to Kimberly Hawkes;

5. Failure to warn patrons in the tavern that an intoxicated patron was preparing to throw missiles;

6. Failing to observe that a patron had become so intoxicated that he was "wild" and to anticipate that he may create a dangerous situation.

¶8 We reject each of these arguments. Hawkes fails to show that the employees were improperly trained, but also fails to show how proper training would have prevented either the altercation or her injury.

¶9 Hawkes fails to show that limited discretion regarding when to call police would have prevented the situation. We will assume, for argument's sake, that Navarro should have required his employees to call for police immediately—at the zero second. Although it only took the police thirty seconds to arrive when they were called, the entire length of the altercation was only thirty to sixty seconds. It is mere speculation to say that had the police been called immediately, they would have arrived in time to prevent the fight, stop the fight, or prevent Hawkes' injury.

¶10 Hawkes also fails to show that if Bagain were restrained differently, he would not have been able to throw the bottle that injured her. She fails to show that the employees, prior to the altercation, knew Bagain was intoxicated or preparing to throw things such that they had an opportunity to warn her. She also fails to show that Bagain was behaving wildly. Again, she testified that she did

not notice him until the brief altercation began, and she does not explain why the employees should have had a different observation.[5]

¶11 Although summary judgment is to be used rarely in negligence cases, it is sometimes appropriate. We are faced with a situation that transpired in seconds, not minutes. It is difficult to parse out a second-by-second transcript of what happened, or what should have happened. We agree with the trial court that on the facts of this case, however, Navarro's employees could not have foreseen that Bagain would do anything to injure Hawkes. Moreover, as soon as Bagain became a threat, Navarro's employees moved immediately to diffuse the situation and protect the other patrons in the bar. Their actions were reasonable under the circumstances, and they did not fail to meet their duty of ordinary care. Summary judgment was appropriate.[6]

By the Court.—Judgment affirmed.

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

[5] Hawkes also, but tangentially, argues that the employees should have been more aware of the likelihood of a fight, considering the bar's history of calls to police and ejection of patrons. However, unless Bagain was the instigator of the previous events, Hawkes provides no explanation why the employees should have anticipated the behavior of that night's group of patrons to be consistent with the behavior of any previous group.

[6] We note that default judgment was entered against Bagain on the issue of liability.