RENDERED: SEPTEMBER 16, 2005; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002093-MR

HEATHER SHIMKOWIAK — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DOUGLAS M. STEPHENS, JUDGE
ACTION NO. 02-CI-02614

YUCATAN AT THE LANDING, LTD,
D/B/A/ YUCATAN LIQUOR STAND — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; HENRY AND TACKETT, JUDGES.

TACKETT, JUDGE: Heather Shimkowiak appeals from the entry of summary judgment in favor of appellee Yucatan at the Landing, Ltd., d/b/a Yucatan Liquor Stand (Yucatan), in this action for injuries received in an altercation outside the business between parties who had been drinking there. Shimkowiak's theory of liability was based on the statutory obligation of a seller of alcohol not to continue to serve an intoxicated person, found in

Kentucky Revised Statute (KRS) 244.080. The circuit court held that no liability attached under the statute because it was not foreseeable to Yucatan that Todd Guy, the other person involved in the altercation, and who remains a defendant, would be involved in a fight with appellant. We affirm, holding the case of Isaacs v. Smith, 5 S.W.3d 500 (Ky. 1999) to be controlling.

The altercation occurred after closing time at the Yucatan Liquor Stand in Covington, in a parking garage owned by the City of Covington. The City is not a party to this action. The City is also the successor in interest to Covington Landing Limited Partnership, which was the original landlord for Yucatan, and the lease between them provided that the landlord reserved the right to maintain and police the common areas, including the parking lots.

The conflict grew out of an apparent incident between a companion of defendant Todd Guy and another patron inside the bar. Guy testified that he never saw the plaintiff inside the bar. Guy further said the he was not part of the original argument, but that his friend, Joe, came back from the bathroom and told Guy that he might want to watch his back. Guy also said that "an hour or two" went by before the fight, and that nothing came out of it in the bar itself. Guy and another friend, Dean, left the bar and went to Joe's car without Joe, whom they had lost along the way. A small group of people, two

men and one woman, were waiting outside, and one of the men had his shirt off and came at Guy "with his dukes up." Guy said that the woman in the group started hitting him in the back of the head, so he hit her in return, and then he saw four other people, including the plaintiff, coming at him, and he hit the first person to reach him, who was the plaintiff, and was "loading up for the other three" when they stopped coming, and he took the chance to run away. Guy admitted that he was drunk at the time, since he was not intending to drive, and that he did not remember many details about the faces of the people involved.

The plaintiff advanced multiple theories of how Yucatan could be liable for this incident. First, the plaintiff argued that a number of incidents of violence between patrons had occurred at or near the bar in the months prior to the incident in the subject case. Therefore, plaintiff argued, the bar should have been on notice that violence between its patrons was foreseeable and that it should have taken greater care not to serve already intoxicated patrons. Next, the plaintiff argued that the bar was on notice that it was foreseeable that a fight would erupt between these particular groups of patrons, based on the events inside the bar and the history of violence between patrons. Lastly, Yucatan was alleged to have a "universal duty" to protect patrons from injury inflicted by

other patrons. The circuit court rejected these theories and entered partial summary judgment in favor of Yucatan, leaving only the action against Guy himself. This appeal followed.

On appeal, Shimkowiak advances these same theories, claiming that the circuit court erred in granting summary judgment. The circuit court's holding essentially states that there is no theory under which Yucatan may be held liable for the incident. The circuit court, on review, was quite correct.

The controlling case is Isaacs, supra. In that case, an argument between two patrons at a Lexington bar resulted in one patron's shooting the other in the bar later that evening. In discussing the fact that the bar continued to serve alcohol to the man who would later shoot the plaintiff, the Kentucky Supreme Court stated that "the issue here is simply whether . . . it was foreseeable that Isaacs, given his intoxicated condition, could cause injury to a third party as a result of [the bar's] . . . continuing to sell him liquor, such as would render the establishment liable to the victim under KRS 244.080. We hold that it does not." Id. at 502. In explaining its holding, the Court said that an injury by shooting was not a natural or probable consequence of the sale of liquor. Even though every person owes every other person a duty to exercise ordinary care to prevent foreseeable injury, such a duty only applies if the injury is foreseeable. The Court explained that

it was not foreseeable that a violation of KRS 244.080 would result in an intoxicated patron shooting a third person on the premises of the establishment. The Court went on to say that although the bar did violate the statute by serving an already intoxicated Isaacs, the establishment could not have anticipated what happened, and distinguished the incidence of violence (a volitional act with the specific intent of harming someone) from the act of driving while intoxicated. The assault by Isaacs against Smith was an intervening act, and selling liquor to an already intoxicated Isaacs was not a foreseeable cause of the injury.

This situation is no different, and none of plaintiff's theories avail her. Isaacs is squarely on point and controlling, and clearly the injury to plaintiff was no more foreseeable than Isaacs shooting Smith. The history of incidents at this particular establishment does not change the analysis; there is nothing special about this particular bar or its patrons that makes any individual incident of violence more or less likely. Causation is, if anything, even more attenuated than the situation in Isaacs; here, there was no prior contact between plaintiff and defendant at all, and no particular reason why plaintiff would be at some risk of assault by the defendant due to anything that happened in the bar. In Isaacs, by contrast, the patrons had argued, security had intervened but

did not throw either man out, and later Isaacs's friend distracted Smith while Isaacs pulled out a concealed handgun and shot him in the back. If it were not foreseeable that continuing to serve Isaacs alcohol would result in violence between Isaacs and Smith, then it was certainly not foreseeable that a person who had not himself been involved in an incident inside the bar would assault another person who also had not been involved in the same incident inside the bar.

For the foregoing reasons, the judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ed W. Tranter
Fort Thomas, Kentucky

BRIEF FOR APPELLEE:

Arnold Taylor
Covington, Kentucky