

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000003-MR

PAUL JOSEPH DYAR

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 03-CI-010665

OUTLOOK INN, INC. AND
RALPH BRIDGERS

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: TAYLOR AND VANMETER, JUDGES; EMBERTON, SENIOR JUDGE.¹

TAYLOR, JUDGE: Paul Joseph Dyar brings this appeal from a November 30, 2004, summary judgment of the Jefferson Circuit Court dismissing his personal injury action.

On December 13, 2002, appellant and several friends met after work at the Jefferson Club for drinks. After socializing for about two hours, the group moved to another club

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

on Baxter Avenue called Atmosphere, where additional alcohol was consumed. After about an hour, all members of the group but one went across the street to another bar, the Outlook Inn, Inc. (Outlook Inn). While at the Outlook Inn, appellant and several friends played pool. Some thirty minutes later, appellant was approached by Aiden Gallic.² According to appellant, Gallic was "loud and obnoxious," drinking beer, and intoxicated. Appellant stated that Gallic insisted on playing pool with appellant and his friend, Aaron Zibart. The pool game went on for about ten minutes without incident. After finishing his turn, appellant sat down at a table with several of his friends. While sitting, appellant glanced across the pool table and it appeared that Gallic and Zibart were involved in an argument. Appellant testified that he saw Gallic turn the pool stick "fat side up" and threaten his friend. At this point, appellant testified that he turned toward Lisa Stephenson, one of the friends with whom he was sitting, and that she also noticed the apparent disagreement. Thereupon, appellant immediately got between Zibart and Gallic, when Gallic, without any provocation, struck appellant in the face with the pool stick. As a result of the blow, appellant's eye was completely destroyed and had to be surgically removed.

² Throughout the record, Aiden Gallic is referred to as both Aiden Gallic and Aiden Gillic. We shall refer to him as Aiden Gallic, which is consistent with the complaint.

Appellant filed a civil action in the Jefferson Circuit Court against Gallic, Outlook Inn, and Ralph Bridgers, the primary owner and operator of Outlook Inn, for injuries arising out of the attack. Appellant subsequently settled his claim against Gallic. Appellant alleged that Outlook Inn was negligent in failing to prevent Gallic's attack. The Outlook Inn and Ralph Bridgers (collectively referred to as appellees) filed a motion for summary judgment, and on November 30, 2004, the circuit court entered summary judgment in favor of appellees, effectively dismissing appellant's claims. This appeal follows.

Appellant contends the circuit court committed error by entering summary judgment in favor of appellees. Specifically, appellant contends that genuine issues of material fact exist that precluded entry of summary judgment.

Summary judgment is proper where there exists no genuine issue as to any material fact and movant is entitled to judgment as a matter of law. Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476 (Ky. 1991). In reviewing a summary judgment, the evidence must be viewed in a light most favorable to the nonmoving party with all doubts resolved in his favor. Id.

It is well-established that an owner of a business must exercise ordinary care to protect its customers from

injury. Sidebottom v. Aubrey, 267 Ky. 45, 101 S.W.2d 212 (1937). To determine whether a business owner has a legal duty to prevent an assault upon a patron, this Court in Murphy v. Second Street Corporation, 48 S.W.3d 571, 574 (Ky.App. 2001) outlined the following two part test:

A plaintiff must show either: (1) that the proprietor had knowledge that one of his patrons was about to injure the plaintiff and he failed to exercise ordinary care to prevent such injury; or, (2) that the conduct of some of the persons present was such as would lead a reasonably prudent person to believe that they might injure other guests.

The Court noted the question of legal duty revolves around whether the assault was foreseeable. Additionally, the Court stated that "[a] proprietor is not the insurer of the safety of its guests." Id. at 574.

In rendering its summary judgment, the circuit court concluded that appellees could not have reasonably foreseen the assault upon appellant and that there existed no legal duty upon appellees to prevent the assault:

Clearly, Defendant Bridges[sic] and the staff at Outlook Inn had no knowledge of Defendant Gallic's belligerent nature. While the Plaintiff testified that Gallic was "loud and obnoxious" he did not complain to anyone.

[I]n the case at bar, the Plaintiff has testified that there were mere seconds between the time he intervened between his friend and Defendant Gallic and the time he

was struck with the pool cue. Under these circumstances, the Court cannot find that these defendants could have known that Defendant Gallic posed a danger to their patrons.

In his brief, appellant argues the circuit court overlooked material facts and misapplied the law:

In the case at bar the Appellant's testimony clearly shows that there was conduct by Mr. Gillic that could lead a prudent person to believe that he may injury other guests. Mr. Dyar testified that Mr. Gillic entered the pool room and was loud, obnoxious, and intoxicated. Mr. Gillic insisted that someone from Mr. Dyar's party play him in pool for money. Most importantly, the Trial Court ignored that fact that Mr. Gillic and Mr. Zibart were having a disagreement and that both Mr. Dyar **and** Ms. Stephenson were concerned because during this argument, Mr. Gillic had turned his pool cue around with the fat end up. That is why Mr. Dyar approached Mr. Gillic. The idea that there was no warning for the attack is demonstrably false. Mr. Dyar reacted to the behavior of Mr. Gillic because he was concerned that he may use the pool cue against Mr. Zibart. If a single person from Outlook Inn had been in the room, he could have reacted in the same way Mr. Dyar and Ms. Stephenson reacted. The Trial Court ignored the fact that there was not a single employee of Outlook Inn present in the room when the assault occurred.

. . . .

[T]he Trial Court limited its analysis of this incident to the few seconds that elapsed when Mr. Gillic physically struck the plaintiff. This is erroneous because almost all attacks occur in only a mater of seconds. The Court ignored what transpired prior to the attack. It ignored the

previously cited testimony of Mr. Dyar. The defendant has alleged that the entire incident in question took place in only a few seconds. This is not supported by the testimony. As stated above, Mr. Dyar testified that Mr. Gillic was loud, obnoxious, intoxicated, and drinking a beer upon entering the pool room. At some point Mr. Dyar noticed an argument between Mr. Gillic and Mr. Zibart. Additionally, Mr. Harshaw testified that Mr. Gillic was in the pool room for about 15 minutes prior to the assault. (Harshaw depo., p. 20). Therefore, the actions of Mr. Gillic are relevant over that entire 15-minute period, not just the few seconds it took to strike Mr. Dyar. It is possible that a jury could reasonably believe that the assailant had been steaming for a sufficient amount of time that Outlook Inn should have foreseen a growing danger.

Appellant's Brief at 7-9.

Viewing the facts most favorably to appellant, Gallic's loud, obnoxious, and intoxicated behavior, in and of itself, would not lead a reasonably prudent person to conclude that Gallic might injure another guest at the bar. Most bars are noisy and are frequently occupied by patrons under the influence of alcohol. This would not normally trigger a belief that a patron might injure other guests. There is simply no evidence in the record that any of Outlook Inn's employees had knowledge that Gallic was about to injure appellant. Even when Gallic brandished the pool stick, the evidence indicates that only a matter of seconds transpired between such brandishing and

when appellee was actually struck by the pool stick.³ This is simply not enough time to justify imposing a duty upon appellees to prevent the assault. See Heathcoate v. Bisig, 474 S.W.2d 102 (Ky. 1971). Upon the whole, we conclude there existed no genuine issues of material fact and appellees were entitled to judgment as a matter of law. Hence, we view summary judgment as appropriately entered in this case.

For the forgoing reasons, the summary judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Jonathan A. Dyar
Louisville, Kentucky

BRIEF FOR APPELLEE:

Robert J. Rosing
EWEN, KINNEY & ROSING
Louisville, Kentucky

³ Appellant testified at his deposition that approximately ten seconds elapsed from the time he left his seat to intervene between Aaron Zibart and Aiden Gallic and the time that Gallic struck him with the pool stick. However, appellant further testified that he and Lisa Stephenson, with whom he was sitting, both observed Zibart and Gallic arguing before appellant left his seat to intervene.