

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002537-MR

GARY TINNELL; AND
TOMMY DURBIN

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
ACTION NO. 02-CI-006524

MARTIN B. HOLMAN; BETTY J. READY; SHARON
CAVEN; AND JAMES DUFF

APPELLEES

OPINION AFFIRMING

** ** * ** * ** *

BEFORE: TAYLOR AND WINE, JUDGES; PAISLEY,¹ SENIOR JUDGE.

PAISLEY, SENIOR JUDGE: Gary Tinnell and Tommie Durbin appeal from a summary judgment granted by the Jefferson Circuit Court on October 10, 2005. Tinnell and Durbin were assaulted by another patron at Ready's Liquors, a bar in Louisville. They filed suit against the owner of the bar, Betty J. Ready (individually and d/b/a Ready's Liquors), and the bartenders, Sharon Caven and James Duff, asserting claims of

¹ Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

negligence, statutory liability, negligence *per se*, and seeking punitive damages. The Jefferson Circuit Court granted summary judgment to the defendants on the grounds that the attack on Tinnell and Durbin was not foreseeable as a matter of law. We agree and affirm.

The incident which precipitated the lawsuit occurred at Ready's Liquors around midnight on August 29, 2001. We review the facts in a light most favorable to the party opposing the summary judgment. *Steelvest v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Martin B. Holman had been at Ready's Liquors since the early evening, drinking heavily. The bartenders working that evening were the appellees Duff and Caven; Betty Ready was seated at the bar. Affidavits describing Holman's behavior were submitted by bar patrons Charles Hill and Barbara Childs. They state that Holman frightened a female patron who took refuge behind the bar until Duff made Holman leave her alone. Hill also reported that Holman bumped into Childs, explaining "I am drunk," but Hill believed that he fell on her for the purpose of "feeling her up." Throughout the evening, Holman made repeated passes at Childs, each time making it look as though it were an accident. Hill stated that Holman also complained loudly about the price of the drinks and generally behaved in an obnoxious manner. At one point in the evening Hill decided to play a game of pool. Holman was guarding the pool balls and told Hill that the Q ball was missing. Hill also reported that Holman lined up all the pool balls in a row on the rail. Childs and Hill had left the bar before Holman's assault on Tinnell and Durbin occurred.

Appellant Tinnell arrived at Ready's at around 11:30 p.m. and joined his friend Tommy Durbin. Holman began complimenting Tinnell on his tattoos and started touching him. Tinnell told Holman to stop and go away. Holman next tried to persuade Tinnell to have a drink with him, an offer which Tinnell declined repeatedly. Bartender Duff, who was observing Holman, told him to go to the back of the bar to get him to stop annoying Tinnell. Holman initially complied, but within a few minutes he returned to the front area of the bar where the pool tables were located. He interrupted a game of pool and took several pool balls from the table. He then approached Tinnell, slapped him on the arm and asked him to have a birthday drink. Tinnell declined. Holman then slapped Tinnell on the back of the arm "really hard." Tinnell believed that Holman was picking a fight with him and put his hands up, asking Holman to leave him alone. Holman responded by throwing the pool balls at Durbin and Tinnell. The first ball hit Durbin. Holman then hit Tinnell with the pool balls several times in the chest. Tinnell fell to the floor. As he tried to get up, Holman threw another pool ball at him, striking him in the eye. Durbin then rushed Holman and tripped him as he ran towards the front door. Duff jumped on Holman and held him until police arrived. Tinnell's eye was so badly injured by the pool ball that it had to be removed.

Holman was arrested and charged with assault in the first degree for his attack on Tinnell, and assault in the second degree for his attack on Durbin. Holman claimed that he was defending himself when the assault occurred. He ultimately entered

a plea of guilty to two counts of assault in the second degree, and is currently serving two consecutive five-year prison terms.

Ready, Duff, and Caven submitted affidavits stating that they had personal knowledge of Holman and that he had never caused a problem at Ready's before the night of the incident, and that they were not aware of any prior acts of violence or fighting on his part. The affidavit of patron Barbara Childs, however, stated that she and Hill had a conversation with Caven some time after the assault, and she told them that there had been "drunken misbehavior" involving Holman prior to his attack on Tinnell and Durbin. Hill's affidavit stated that "I did not know who Martin Holman was until I later saw him and made the connection. A person working at the bar named Sharon Caven told me the same guy almost got into it with someone else [and] that is why she quit."

On August 29, 2002, Tinnell and Durbin filed separate civil actions against Holman, Ready (individually and d/b/a Ready's Liquors), Caven and Duff. The two cases were consolidated on February 20, 2004. The circuit court ultimately granted summary judgment to the defendants, and denied the plaintiffs' subsequent motion to alter, amend or vacate the summary judgment.

When we review a grant of summary judgment, our inquiry focuses on whether the trial court correctly found that there was no genuine issue as to any material fact and that the moving party was entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56.03. "[T]he proper function of summary judgment is to

terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor.”

Steelvest, 807 S.W.2d at 480.

For Tinnell and Durbin to meet their burden of proof on the claim of common law negligence, they were required to establish: (1) a duty on the part of the defendant; (2) a breach of that duty; and (3) consequent injury. *Murphy v. Second Street Corp.*, 48 S.W.3d 571, 573 (Ky.App. 2001). The scope and character of a defendant’s duty is largely defined by the foreseeability of the injury: “[E]very person owes a duty to every other person to exercise ordinary care in his activities to prevent foreseeable injuries. Even so, such a duty applies only if the injury is foreseeable.” *Isaacs v. Smith*, 5 S.W.3d 500, 502 (Ky. 1999) (citations and quotation marks omitted).

A proprietor is not the insurer of the safety of its guests. 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.

Murphy, 48 S.W.3d at 574.

The inquiry as to the existence of negligence therefore resolves itself into one regarding the foreseeability of the injuries under the particular factual circumstances of the case.

To state a claim for statutory negligence pursuant to KRS 244.080(2), which prohibits a retail licensee from serving alcoholic beverages to an intoxicated

person, a plaintiff must additionally show (1) that the violation of the statute was a substantial factor in causing the injury, and (2) that the statute was specifically intended to prevent that type of injury. *Isaacs*, 5 S.W.3d at 502.

In granting summary judgment to the defendants, the circuit court concluded that

[t]he facts (taken in a light most favorable to Plaintiffs) show that Holman was intoxicated, disorderly, and bothersome to other patrons. There is, however, no evidence to show that Defendants should have anticipated that Holman would turn violent and throw pool balls at Tinnell seated at the bar. As a matter of law, the Court finds that this type of violence was not a foreseeable consequence of Holman's earlier obnoxious behavior.

Tinnell and Durbin contend that Holman's attack was foreseeable in light of his earlier "belligerent" conduct and was within the "natural range" of what might be expected when someone is served too much alcohol.

In *Murphy v. Second Street Corp.*, 48 S.W.3d 571 (Ky.App. 2001), a common law negligence case, this Court held that it was not foreseeable that one bar patron would suddenly assault another patron who had accidentally stepped on her foot while dancing. This Court deemed the injury unforeseeable because it occurred suddenly and without warning.

Although Holman's conduct throughout the evening had been obnoxious, there was no allegation that he had engaged in any physical violence or threats. His annoying and harassing behavior (which from the record appears to have been directed primarily at female patrons) did not make his sudden physical assault on Tinnell and

Durbin foreseeable. Although we agree the appellants that the precise form of harm (such as throwing pool balls) does not have to be foreseeable for liability to attach, *see Isaacs*, 5 S.W.3d at 53, Holman's sudden act of violence was not foreseeable based on his prior conduct.

The controlling case in the area of statutory negligence is *Isaacs v. Smith*, 5 S.W.3d 500 (Ky. 1999). In that case, two patrons of a bar became involved in a shouting match. Security personnel at the bar broke up the argument, but neither man was asked to leave or to stop drinking. About thirty minutes later, one of the men withdrew a concealed handgun and shot the other man in the back. The Kentucky Supreme Court held that the bar was not liable for the shooting because the injury was not a foreseeable consequence of the sale of liquor to an intoxicated customer, nor was it the type of injury the statute was intended to prevent.

If we apply this reasoning to the present case, we must conclude that Holman's attack on Tinnell and Durbin was not a natural and foreseeable consequence of being served too much alcohol. There was not even a prior altercation between the men as there was in *Isaacs*; Holman had pestered Tinnell to have a drink but there was no "shouting match."

Furthermore, again following *Isaacs*, the assault was not the type of injury that KRS 244.080(2) was intended to prevent. "[A] violation of KRS 244.080 which resulted in an intoxicated person injuring a third person on the premises of the retail

establishment is not foreseeable within the intent of the statute, and as such, liability to the establishment does not attach.” *Id.* at 503.

The appellants nonetheless urge us to interpret the intent of the statute more broadly. They have cited our opinion in *Priest v. Black Cat*, which stated that the Kentucky Supreme Court had not intended the holding of *Isaacs* to limit civil liability arising from violations of KRS 244.080 to only cases involving motor vehicle accidents. *Priest v. The Black Cat*, 74 S.W.3d 769, 775(Ky.App. 2001). In *Priest*, a store that sold liquor to minors in violation of KRS 244.080(1) was held potentially liable for the subsequent drowning death of one of the teenagers. But there is an important distinction between *Isaacs* and *Priest*: as the *Priest* court pointed out, reasonable minds could differ as to whether the drowning death of the teenager was the foreseeable result of the prohibited sale of alcohol to minors whereas an intentional criminal assault in a bar between two feuding parties was not. *Id.* There are significant policy considerations underlying this distinction in assigning liability for accidental injuries and intentional torts:

“[C]ourts have held that, except under extraordinary circumstances, individuals are generally entitled to assume that third parties will not commit intentional criminal acts.”

James v. Meow Media, Inc. 300 F.3d 683, 693 (6th Cir. 2002).

The system of criminal liability has concentrated responsibility for an intentional criminal act in the primary actor, his accomplices, and his co-conspirators. By imposing liability on those who did not endeavor to accomplish the intentional criminal undertaking, tort liability would diminish the responsibility placed on the criminal defendant. The

normative message of tort law in these situations would be that the defendant is not entirely responsible for his intentional criminal act.

Id. at 694.

Finally, the appellants argue that they were entitled to punitive damages.

“In order to justify punitive damages there must be first a finding of failure to exercise reasonable care, and then an additional finding that this negligence was accompanied by a wanton or reckless disregard for the lives, safety or property of others.” *Horton v. Union Light, Heat & Power Co.*, 690 S.W.2d 382, 389-90 (1985).

Since we have already determined that the circuit court did not err in finding that, as a matter of law, there was no negligence on the part of the appellees that would subject them to potential liability for the appellants’ injuries, the circuit court did not err in denying the claim for punitive damages.

The opinion and order the Jefferson Circuit Court granting summary judgment to the appellees is therefore affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Harley N. Blankenship
Louisville, Kentucky

BRIEF FOR APPELLEES READY,
CAVEN AND DUFF:

Michael T. Burns
Gregory L. Smith
Louisville, Kentucky

NO BRIEF FILED FOR APPELLEE
HOLMAN.