STATE OF MICHIGAN

COURT OF APPEALS

ROBERT COLDSNOW,

Plaintiff-Appellant,

v

HAROLD FARRIS, d/b/a JEFFERSON STREET STATION,

Defendant-Appellee.

and

MATT BLAIR, CHRIS LONG, RODNEY CHIRILLI, DANNY ARLEN, FRED ARLEN and BEAR,

Not Participating.

UNPUBLISHED
June 7, 1996

No. 174779
LC No. 93-302265 CZ

Before: Reilly, P.J., and Michael J. Kelly and C. L. Bosman,* JJ.

PER CURIAM.

Plaintiff, Robert Coldsnow, appeals as of right the March 28, 1994, order of Wayne Circuit Court granting defendant, Harold Farris, d/b/a Jefferson Street Station's motion for summary disposition pursuant to MCR 2.116(C)(10) in this dramshop action.

On March 13, 1992, plaintiff and his friend, Gerald Morris, went into defendant's bar in the City of River Rouge. The alleged intoxicated persons (AIPs) inside the bar included co-defendants Matt Blair, Chris Long, Rodney Chirilli, Danny Arlen, Fred Arlen and "Bear," an employee of defendant. Within three minutes of plaintiff's arrival, Morris became involved in a brief, but heated argument with Blair regarding a prior fight between Morris and Blair where Morris got the better of Blair. Thereafter, Blair swung his pool cue at Morris' head. Morris, however, ducked, and plaintiff, who was positioned behind Morris, was struck in the head with the pool cue. The blow to plaintiff's

* Circuit judge, sitting on the Court of Appeals by assignment.

head rendered him unconscious. As a result of the injury, plaintiff has a wandering eye, double vision and headaches.

At his deposition, defendant Farris testified that plaintiff and Morris walked into the bar seeking to purchase alcohol. Defendant's wife was bartending at the time and refused to serve them alcohol because both of them were intoxicated. Morris wanted to use the bathroom and proceeded through the bar. Thereafter, plaintiff started arguing with Fred Arlen so defendant Farris asked all of the individuals to leave. Defendant Farris then escorted plaintiff and Morris outside the bar. Fred Arlen and his friends asked defendant Farris if they could stay to finish the second pitcher of beer that was already purchased and sitting on the table. Defendant Farris agreed, but told them they had to leave thereafter. Defendant stated that no physical exchange occurred inside the bar. Thereafter, defendant was told that people were arguing outside the bar. Defendant called the police. Defendant testified that Fred Arlen and his friends consumed one pitcher of beer before plaintiff and Morris arrived. Defendant testified that Fred Arlen had arguments and a physical confrontation in the past at defendant's bar and, that there has never been a pool table inside the bar.

Plaintiff sued defendant Farris, Blair, Long, Chirilli, Danny, Fred and Bear. In Count I, plaintiff alleged that defendant Farris violated the Dramshop Act, MCL 436.22; MSA 19.993, as defendant served alcohol to Blair, Long, Chirilli, Danny, Fred and Bear, all of whom were visibly intoxicated. In Count II, plaintiff asserted that defendant Farris was negligent in failing to maintain safe and suitable premises as he allowed the AIPs into the bar despite their known propensity for violence. Lastly, in Count III, plaintiff claimed that Blair, Long, Chirilli, Danny, Fred and Bear acted in concert and were negligent in assaulting and battering plaintiff. Defendant Farris answered the complaint and subsequently filed a motion for summary disposition.

At the hearing on defendant Farris' motion for summary disposition, the trial court found that there was insufficient evidence to show visible intoxication at the time AIPs were served the second pitcher of beer. Thus, the court granted summary disposition as to the dramshop claim. Also, the court concluded that a premises owner cannot be held liable for the criminal acts of a third party. Hence, the lower court granted summary disposition on the negligence count as well.

On appeal, a trial court's grant of summary disposition is reviewed de novo, and this Court must determine whether the moving party was entitled of judgment as a matter of law. *Allen v Keating*, 205 Mich App 560, 562; 517 NW2d 830 (1994). We find the trial court did not err in entering summary disposition pursuant to MCR 2.116(C)(10) because no genuine issue of disputed fact existed.

Plaintiff has failed to present evidence that the AIPs appeared visibly intoxicated to an ordinary observer and were served alcohol by defendant Farris while visibly intoxicated. *Miller v Ochampaugh*, 191 Mich App 48, 57-60; 477 NW2d 105 (1991). Prior to plaintiff's arrival, the AIPs had been served two pitchers of beer, the second pitcher of beer having arrived moments before the alleged assault. There was no showing that the consumption of one pitcher among four or five individuals is enough to bring one's blood alcohol level close to the legal limit. Plaintiff has presented no

evidence suggesting that the AIPs consumed any more alcohol than the first pitcher, or that the AIPs were drinking prior to arriving at defendant's bar. The mere fact that the AIPs drank alcoholic beverages in defendant's bar does not establish that they were visibly intoxicated for purposes of finding liability under the dramshop act. *Heyler, supra*. Plaintiff failed to present evidence that the AIPs were visibly intoxicated to an ordinary observer. *Miller, supra*.

Next, plaintiff asserts on appeal that defendant Farris was negligent in allowing defendants to stay and continue drinking.

The Dramshop- Act is the exclusive remedy for money damages against a licensee arising out of the selling, giving, or furnishing of alcoholic liquor. MCL 436.22(11); MSA 18.993(11). *Millross v Plum Hollow Golf Club*, 429 Mich 178; 413 NW2d 17 (1987). The *Millross* Court, however, stated that the act does not control nor abrogate actions arising out of unlawful or negligent conduct of a tavern owner other than selling, giving away, or furnishing of intoxicants, provided the unlawful or negligent conduct is recognized as a basis for a cause of action. The Court recognized that here was no common law negligence claim for the furnishing of alcohol and concluded that to allow such a claim would circumvent the exclusive remedy provision of the dramshop act. *Id.* At 187-188. The same analysis applies here. Plaintiff asserts that defendant was negligent for furnishing and allowing the AIPs to finish the second pitcher of beer. Plaintiff' attempts to circumvent the statute and hold defendant liable for a tort which only the dramshop act covers. Thus, plaintiff's claim fails as a matter of law.

Plaintiff next claims that defendant failed to maintain safe premises as it was foreseeable that Fred Arlen would assault another individual because of his past confrontation. Plaintiff contends that a jury could determine that it was negligent of defendant to continue serving Fred Arlen beer as it created a situation which resulted in plaintiff being harmed.

Merchants ordinarily are not responsible for the criminal acts of third persons. A merchant that undertakes safety measures for the benefit of its patrons will not be held responsible for injuries because those measures were less effective than they could or should have been. *Mason v Royal Dequindre Inc*, 209 Mich App 514, 516; 531 NW2d 797 (1995), lv pending. An exception to this general rule is when the defendant knows or should have known about the presence of unruly patrons on its premises. *Jackson v White Castle System*, 205 Mich App 137, 140-142; 577 NW2d 286 (1994).

Here, defendant owed no duty to protect plaintiff from a spontaneous third party criminal attack. First, plaintiff asserts that he was injured by Blair, and not Fred Arlan. There is no testimony that Fred Arlan physically harmed plaintiff. Second, there was no testimony that defendant Farris was aware of Blair's potential violent tendencies. It appeared that Blair and Morris, plaintiff's friend, had fought in the past and Blair was seeking to get even with Morris. Defendant Farris did not realize that the AIPs were "unruly" until after the confrontation occurred. *Jackson, supra*. Thereafter, defendant attempted to remedy the situation by asking all participants and non-participants to leave. The trial court did not err in granting summary disposition. Plaintiff failed to show that the AIPs appeared visibly

intoxicated to an ordinary observer and were served alcohol by defendant while visibly intoxicated, plaintiff failed to establish a cause of action which is not barred by the dramshop act and plaintiff failed to show that defendant did not maintain safe premises.

Plaintiff next argues that the trial court erred in ruling defendant was not negligent in ordering plaintiff and defendant Arlan to leave the bar into, what defendant should have known would be, a hostile situation. Plaintiff asserts that defendant Ferris was negligent in requiring plaintiff and his assailant to leave the bar at the same time. To support his proposition, plaintiff cites *Schneider v Nectarine Ballroom Inc (On Remand)*, 204 Mich App 2; 514 NW2d 486 (1994).

This case is distinguishable from *Schneider*. First, plaintiff does not allege that he was assaulted outside defendant's bar. Plaintiff specifically alleges that he was assaulted inside defendant's bar when Blair swung a pool cue at him. Second, defendant did not eject plaintiff into a known, obvious and imminently dangerous situation, as plaintiff and the AIPs did not leave the bar at the same time. Although defendant did ask plaintiff, Morris and the AIPs to leave the bar after the argument, defendant allowed the AIPs to remain in the bar to finish drinking the second pitcher of beer. Plaintiff exited the bar while the other AIPs remained inside. Thus, the AIPs were not ejected before plaintiff, nor was plaintiff ejected into the waiting arms of the AIPs. Plaintiff was not ejected into a known, obvious and imminently dangerous situation.

. Affirmed.

/s/ Maureen Pulte Reilly
/s/ Michael J. Kelly
/s/ Calvin L. Bosman