

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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VIVIAN SHEPHERD,

Plaintiff-Appellant,

v

HAMILTON POINT, INC., d/b/a THE POINT  
BAR,

Defendant-Appellee.

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UNPUBLISHED

July 21, 2015

No. 321712

Kent Circuit Court

LC No. 12-006629-NO

Before: SERVITTO, P.J., and BECKERING and BOONSTRA, JJ.

PER CURIAM.

Plaintiff, Vivian Shepherd, appeals as of right the trial court's denial of her motion for a new trial or judgment notwithstanding the verdict (JNOV) after the jury returned a no-cause-of-action verdict in favor of defendant, Hamilton Point, Inc, d/b/a The Point Bar. We affirm.

On October 1, 2010, plaintiff, her boyfriend Robert Henning, and Henning's brother Ron went to The Point Bar, located in Grand Rapids, Michigan. Upon arrival, Henning and Ron met a woman named Patty Schaafsma. Henning and Schaafsma sat at a table while plaintiff and Ron danced. After dancing, plaintiff decided that she wanted to leave. She asked Henning to leave with her, but he wanted to stay and have another drink. Plaintiff testified that she went outside to smoke a cigarette, and when she came back into the bar, Henning still did not want to leave. Plaintiff went outside a second time, then returned to the table where Henning and Schaafsma were sitting, but Henning did not want to leave. Henning testified that plaintiff sat across from him at the table, and that he was sitting next to Schaafsma. Plaintiff testified that she knocked over Henning's glass. She heard Schaafsma say, "[w]hy don't you just get rid of her? I like younger men," to which plaintiff started laughing, but then knocked over a second glass. According to plaintiff, Schaafsma stood up and pushed the table into her, which caused a book of karaoke song lyrics to fall off the table and onto the floor. Henning testified that he and plaintiff began to argue, and then plaintiff and Schaafsma began to argue, which prompted bartender Christina Black to ask plaintiff and Henning to leave the bar.

Plaintiff testified that Black grabbed her from behind, and as a result, she became alarmed and picked the karaoke book up off the floor, holding it over her head in order to defend herself before throwing it back on the table. Contrastingly, Black testified that plaintiff threw the karaoke book over Black's head. Jerry Maul, a bouncer working at the bar at the time, also

testified that plaintiff threw the book at Black. Maul told plaintiff to leave the bar, but she did not comply. In response, Maul grabbed plaintiff in an effort to remove her, and she continued to act aggressively by screaming and behaving violently. Plaintiff initially testified that Maul put her in a headlock; however she later testified that she could not remember who put her in a headlock. Maul testified that bar surveillance video, which was admitted into evidence and played for the jury, shows Ron putting plaintiff in a headlock and then both Ron and Maul escorting plaintiff toward the exit of the bar.

Maul testified that Ron released plaintiff from the headlock before she exited the bar, and that Maul was the only person who exited the bar with plaintiff. Maul testified that outside the bar, plaintiff

yelled, don't touch me, don't put your hands on me. Then she, like, started flailing and going crazy again like someone was trying to hold her. I put my arms out to get my space from her, because I'm backed up against the wall. Then she takes a step back; she falls and hits her head really hard.

Maul testified that when plaintiff fell, she struck her head on the root of a tree that was located next to the sidewalk right outside the bar. There is no testimony indicating that Maul or anyone else caused plaintiff to fall and strike her head. Henning testified that when he walked outside the bar, he saw plaintiff lying on her back, with Maul standing about six feet away from her and Black kneeling by her side.

Plaintiff testified that her last memory of the event was being forced toward the door of the bar. As for her alcohol consumption, plaintiff testified that she had approximately three drinks while at the bar, as well as some gelatin shots. After being forced toward the exit of the bar in a headlock, plaintiff's next memory was of waking up the following morning feeling dizzy and not being able to get out of bed. Dr. David Albrecht, whose deposition testimony was admitted at trial, testified that he examined plaintiff after the incident and concluded that she had suffered a serious head injury caused by a significant amount of force.

Plaintiff sued defendant for negligence, claiming that its agents used unreasonable force when removing her from the bar, resulting in her injuries. The jury found that defendant was not negligent; thus, it did not reach the issues of proximate cause, damages, or comparative negligence. Plaintiff moved the trial court for a new trial or JNOV pursuant to MCR 2.610(A)(1), which the trial court denied.

On appeal, plaintiff argues that the trial court erred by denying her motion for a new trial or JNOV. We review a trial court's decision on a motion for a new trial for an abuse of discretion. *Heaton v Benton Const Co*, 286 Mich App 528, 538; 780 NW2d 618 (2009). "An abuse of discretion occurs when a court chooses an outcome that is outside the range of principled outcomes." *Id.* "We review de novo a trial court's ruling on a motion for JNOV." *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 302 Mich App 7, 15; 837 NW2d 686 (2013).

A new trial may be granted when a "verdict or decision [was] against the great weight of the evidence or contrary to law." MCR 2.611(A)(1)(e). When deciding a motion for new trial, "the trial court's function is to determine whether the overwhelming weight of the evidence

favors the losing party.” *Severn v Sperry Corp*, 212 Mich App 406, 412; 538 NW2d 50 (1995). “This Court gives substantial deference to the conclusion of a trial court that a verdict was not against the great weight of the evidence.” *Id.* “Further, this Court recognizes the unique opportunity of the jury and the trial judge to observe witnesses and the fact-finder’s responsibility to determine the credibility and weight of the testimony.” *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 491; 668 NW2d 402 (2003).

When reviewing a motion for JNOV, this Court reviews “the evidence and all legitimate inferences in the light most favorable to the nonmoving party . . . .” *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998) (citation and quotation omitted). “A motion for JNOV should be granted only if there was insufficient evidence presented to create a jury-triable issue.” *Amerisure Ins Co v Auto-Owners Ins Co*, 262 Mich App 10, 18-19; 684 NW2d 391 (2004). “If reasonable jurors could honestly have reached different conclusions, the jury verdict must stand.” *Zantel Mktg Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005) (citation and quotation marks omitted).

Plaintiff claimed that defendant was liable in negligence for the acts of its employees. Under a negligence theory, plaintiff was required to prove that: (1) defendant owed her a legal duty; (2) defendant breached that duty; (3) she suffered damages; and (4) defendant’s breach was a proximate cause of her damages. *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; 809 NW2d 553 (2011). “Under the doctrine of respondeat superior, an employer may be vicariously liable for the acts of an employee committed within the scope of his employment.” *Helsel v Morcom*, 219 Mich App 14, 21; 555 NW2d 852 (1996). Here, the primary dispute at trial was whether defendant’s employees breached a duty owed to plaintiff.

Concerning plaintiff’s motion for new trial, the overwhelming weight of the evidence does not favor plaintiff. It is undisputed that defendant had a responsibility to act with “due care,” which in this case would imply using appropriate and proportional force when dealing with recalcitrant patrons and generally maintaining order and safety for patrons and employees. See *Case v Consumers Power Co*, 463 Mich 1, 7; 615 NW2d 17 (2000) (“Ordinary care means the care that a reasonably careful person would use under the circumstances.”). Additionally, in determining the specific standard of care expected of defendant, the jury needed to weigh the risk created by the conduct against the social utility of the conduct. *Id.* at 9. Plaintiff offered little evidence to suggest that defendant’s employees acted without ordinary care. According to trial testimony, defendant’s employees acted within the scope of their duties and undertook to maintain order and safety for fellow bar patrons, employees, and plaintiff herself by forcibly removing plaintiff when she began behaving aggressively and violently. Maul testified that he removed plaintiff from the bar and that she thereafter lost her balance on her own accord, which caused her to fall and hit her head. Plaintiff’s testimony did not refute as much, as she claimed she was unable to remember what occurred outside the bar. Although plaintiff attempts to rely on medical testimony and argues that the nature of her injuries prove that she was subject to a significant amount of force, her argument at best suggests that there was at least *some* evidence that could have supported her position. However, such evidence does not establish that the verdict was against the great weight of the evidence. The jury could have concluded that, as per Maul’s testimony, plaintiff flailed around after being removed from the bar, and in her agitated state, she fell and hit her head. As such, the trial court did not abuse its discretion when it denied plaintiff’s motion for a new trial. For similar reasons, the trial court did not err in denying

plaintiff's motion for JNOV. Viewed in a light most favorable to defendant, there was more than sufficient evidence to support the jury's findings. See *Amerisure Ins Co*, 262 Mich App at 18-19.

Finally, defendant argues that plaintiff's appeal is frivolous and, therefore, defendant should be awarded fees and costs. However, defendant did not file a separate motion for sanctions pursuant to MCR 7.211(C)(8); rather, it requested sanctions in its brief on appeal. This was contrary to the requirement under MCR 7.211(C)(8). Moreover, defendant cites no legal authority for its argument. Therefore, we deny defendant's request. MCR 7.211(C)(8); *In re Daniels Estate*, 301 Mich App 450, 460-461; 837 NW2d 1 (2013).

Affirmed.

/s/ Deborah A. Servitto  
/s/ Jane M. Beckering  
/s/ Mark T. Boonstra