STATE OF MICHIGAN

COURT OF APPEALS

CATHERINE STERLING,

Plaintiff–Appellant,

v

DASS INCORPORATED, doing business as, RAILROAD CROSSING,

Defendant–Appellee,

and

RHONDA WHEELER and DOUGLAS WARREN,

Defendants.

UNPUBLISHED
August 2, 1996

No. 180533
LC No. 94-404015-AV

Before: Michael J. Kelly, and Markman and J. L. Martlew,* JJ.

PER CURIAM.

Plaintiff appeals by leave granted the trial court order granting defendant's motion for a judgment notwithstanding the verdict in this premises liability action. We affirm.

Defendant Dass operates a bar heavily frequented by lesbian patrons in the City of Detroit. On January 23, 1989, about 12:30 a.m., plaintiff and two of her friends went to defendant's bar for drinks. Around 1:00 a.m. that evening, two men entered the bar, ordered drinks, and began playing pool with plaintiff and her friend. Rhonda Wheeler, the bar's bouncer, was off duty at that time and inside the bar drinking when, at the behest of the manager, she apprised the two men that they were in a lesbian bar and could stay as long as they did not cause problems. Later, Wheeler noticed that the two men were arguing with plaintiff and her friend at the bar's pool table. Wheeler approached the two men to remind them of her initial caution and asked them to leave the bar. One of the men became incensed at Wheeler's comments and punched her in the face. A group of women, including plaintiff's two friends,

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

attacked the man who had punched Wheeler and threw him outside of the bar. As plaintiff walked outside to retrieve her friend from the fight, one of the two men pulled out a gun and shot plaintiff in the leg. Plaintiff then sued defendants for negligence.

When plaintiff's case mediated for $6,000, the case was transferred to the 36th District Court. On September 24, 1992, a jury returned a verdict in plaintiff's favor in the amount of $930,249.61. Dass's motion for a judgment notwithstanding the verdict (JNOV) was denied by the district court on January 26, 1994. Dass appealed the district court's decision to the Wayne Circuit Court which reversed the district court and entered an order granting Dass's motion for a JNOV. We granted plaintiff's motion for leave to appeal.

Plaintiff's sole argument on appeal is that the circuit court erred in reversing the district court's denial of Dass's motion for a JNOV. In reviewing a motion for a judgment notwithstanding the verdict, this Court reviews all of the evidence and all legitimate inferences in the light most favorable to the nonmoving party. *Orzel v Scott Drug Co*, 449 Mich 550, 557; 537 NW2d 208 (1995). If reasonable jurors could honestly have reached different conclusions, neither the trial court nor this Court may substitute its judgment for that of the jury and the jury verdict must stand. *Hamann v Ridge Tool Co*, 213 Mich App 252, 254;539 NW2d 753 (1995).

The general rule is that business invitors owe a duty to their customers to maintain their premises in a reasonably safe condition and to exercise ordinary care and prudence to keep the premises reasonably safe. *Perez v KFC Nat'l Mgmt Co*, 183 Mich App 265, 268; 454 NW2d 145 (1990). The duty, however, does not extend to conditions from which an unreasonable risk cannot be anticipated. *Douglas v Elba*, 184 Mich App 160, 163; 457 NW2d 117 (1990). A business invitor does not owe a duty to his customers to protect them from the criminal acts of third parties, *Williams v Cunningham Drug Stores Inc*, 429 Mich 495, 501; 418 NW2d 381 (1988). A business invitor is not the insurer of the safety of its customers. *Id*.; *Perez*, *supra*.[1] Nevertheless, he may owe a duty to protect his invitees from danger if he knows that an unruly situation exists on his premises, is in a position to control the unruly situation, and does nothing about it. *Jackson v White Castle*, 205 Mich App 137, 142; 517 NW2d 286 (1994); *Green v Shell Oil Co*, 181 Mich App 439, 442; 450 NW2d 50 (1989); see also *Gorby v Yeomans*, 4 Mich App 339, 343; 144 NW2d 837 (1966).

In the present case, defendant did not have a duty to protect plaintiff from the unforeseeable criminal act of a third party. *Williams*, *supra*, at 501. Despite the fact that some of the patrons in defendant's bar felt uncomfortable that two men were in the bar, especially since there was testimony that one of the men had asked a patron if she were a "fag," the evidence reveals that after entering the bar the two men played pool with plaintiff and her friend in a peaceful fashion. Only after Wheeler approached the men did a disturbance arise. This made several of the bar's patrons upset because they felt that Wheeler was belligerent and had no reason to ask the men to leave. No prolonged disturbance was caused on defendant's premises by the men. Defendant could not have anticipated the fight and certainly could not have anticipated that one of the men would pull out a weapon and shoot plaintiff. The entire episode in which plaintiff was shot was random and instantaneous and provided defendant with no notice that an unruly situation was imminent. *Jackson*, *supra*, at 141.

Even if we accept the premise that Wheeler was intoxicated, as plaintiff asserts, when she approached the men the second time, and that it was reasonably foreseeable that her intoxication was likely to cause ensuing problems,[2] we do not believe that the particular injury suffered by plaintiff was of the type that could have reasonably have been anticipated by defendant.

Criminal activity, by its deviant nature, is naturally unforeseeable. *Papadimas v Mykonos Lounge*, 176 Mich App 40, 46-47; 439 NW2d 280 (1989). Consequently, even though defendant owed a duty of reasonable care to plaintiff as a business invitee, that duty did not extend to protecting plaintiff from the unforeseeable criminal act committed by the man who was ejected from the bar. *McNeal v Henry*, 82 Mich App 88, 90; 266 NW2d 469 (1978). Defendant did not actively create or maintain the criminal activity nor did it fail to act reasonably to end the criminal activity once it took place. Within minutes after the two men were ejected from the bar, the bar's manager called 911 to request police assistance. In such a situation, there is no liability for injuries that plaintiff received as a result of the unforeseeable criminal act of a third party. *Gouch v Grand Trunk W R Co*, 187 Mich App 413, 417; 468 NW2d 68 (1991); *Perez, supra*, at 268-271; *Holland v Deleware McDonald's Corp*, 171 Mich App 707, 710; 430 NW2d 776 (1988).

The shooting of plaintiff by the ejected patron was an act not intended by defendant nor one which he could have reasonably foreseen and, therefore, one for which neither defendant nor his manager were legally responsible. The man who *shot* plaintiff was legally responsible and one hopes that he will be apprehended someday. His continued absence, however, does not make defendant nor his manager any more culpable for this tragic occurrence.

We believe that the evidence presented in this case was insufficient to create a question for the jury. *Clemens v Lesnek*, 200 Mich App 456, 461; 505 NW2d 283 (1993). Viewing the evidence presented in the light most favorable to plaintiff, we believe the trial court properly reversed the district court and granted defendant's motion for a JNOV. *Orzel, supra*, at 557.

Affirmed.

/s/ Michael J. Kelly
/s/ Stephen J. Markman
/s/ Jeffrey L. Martlew

[1] There is no greater duty on the part of a business invitor in a high crime neighborhood. Papadimas v Mykonos Lounge, 176 Mich App 40, 47-8; 439 NW2d 280 (1989).

[2] The trial court granted a directed verdict against Wheeler on plaintiff's allegations that she had breached a duty to plaintiff by her conduct in dealing with the two men. That decision is not at issue in the instant appeal.