COURT OF APPEALS
DECISION
DATED AND FILED

January 20, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 98-1269-FT

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

DUANE G. CARPENTER AND JODI L. CARPENTER, HIS WIFE,

PLAINTIFFS-APPELLANTS,

V.

RONALD J. BUELOW, D/B/A DOUBLE VISION, AND WISCONSIN AMERICAN MUTUAL INSURANCE COMPANY, FORMERLY LISTED AS ABC INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

JOHN DOE, JAY ALAN TESCHKE, FORMERLY LISTED AS "J" (JAY) ROE, SHAWANO COUNTY DEPARTMENT OF SOCIAL SERVICES AND WISCONSIN PHYSICIANS SERVICE INSURANCE CORPORATION,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Shawano County: THOMAS G. GROVER, Judge. *Reversed and cause remanded.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Duane and Jodi Carpenter appeal a summary judgment that dismissed their tort lawsuit against Ronald Buelow, owner of the Double Vision bar.[1] Jay Teschke, a patron of the Double Vision, assaulted Duane in a bar fight in the bartender's presence. The Carpenters' suit claimed that Buelow was vicariously liable for the torts of his bartender, who the Carpenters alleged negligently failed to stop the fight from starting. The trial court ruled that the bartender had no warning of the fight and that the bar owner was therefore entitled to judgment as matter of law. Summary judgment was proper if there was no dispute of material fact and the bar owner deserved judgment as a matter of law. *See* ***Powalka v. State Life Assur. Co.***, 53 Wis.2d 513, 518, 192 N.W.2d 852, 854 (1972). Because we conclude that the record contains disputes of material fact, we reverse the summary judgment and remand the matter for further proceedings.

Business owners have a duty to exercise ordinary care to protect their patrons. *See* ***Weihert v. Piccione***, 273 Wis. 448, 455-57, 78 N.W.2d 757, 761 (1956). Also, they must act if they could have foreseen such harm and could have either stopped it or given adequate warning of the danger. *See* ***id.*** at 455-56, 78 N.W.2d at 761. Although business owners are not insurers of the premises, they do have a duty to use reasonable care to keep customers free of danger. *See* ***id***. If danger is likely, they must employ a reasonably sufficient number of servants to protect customers. *See* ***id***. Negligence issues like these are almost never appropriate for summary judgment, s*ee* ***Ceplina v. South Milwaukee***

[1] This is an expedited appeal under RULE 809.17, STATS.

Sch. Bd., 73 Wis.2d 338, 342-43, 243 N.W.2d 183, 185 (1976), but are uniquely jury questions. *See* ***LePoidevin v. Wilson***, 111 Wis.2d 116, 124, 330 N.W.2d 555, 559 (1983). We must view the evidence on the bar owner's liability in a light favorable to the Carpenters, taking all inferences against the party seeking summary judgment. *See* ***Delmore v. American Family Ins. Co.***, 118 Wis.2d 510, 512, 348 N.W.2d 151, 153 (1984).

While at the bar, Carpenter and his wife were trying to reconcile their marriage, and Teschke was eavesdropping on that conversation. Teschke, who was smaller than Carpenter, then interjected himself into the conversation. At first, Teschke mimicked and mocked Carpenter, evidently outside the bartender's presence, repeating word for word everything that Carpenter was saying to his wife. After Carpenter told Teschke that the matter was not his business, things escalated. Teschke slammed a soda water bottle down on the bar. According to Carpenter's wife, this got the bartender's attention and brought him to the scene. According to Carpenter, the bartender did and said nothing to calm the situation. Carpenter again told Teschke that he had no business in the discussion. Seconds later, Teschke lunged at Carpenter, slamming him into the pool table and then to the floor where he then started to choke Carpenter. Moments later, Carpenter's friend, with the bartender's help, stopped the fight. After the lawsuit was filed, the parties could not locate the bartender, and he provided no information for discovery. Although Carpenter's deposition differed from his wife's concerning when the bartender came near the scene of the dispute, this is a matter of factual dispute for the jury to resolve.

Viewing the facts most favorably against the moving party, Buelow, we conclude that these facts do not conclusively absolve the bar owner of liability. A reasonable jury could infer from these facts that the bartender, in the exercise of

ordinary care, could have intervened in the dispute at the bottle-slamming stage, thereby avoiding injury to Carpenter. The bartender was in physical proximity and took note of the bottle slamming. This was an aggressive act that a jury could infer gave fair warning of potential trouble. Instead, the bartender took no action to have Teschke leave Carpenter alone. A jury could also infer that the bartender had the means to stop the dispute from getting out of control which would have avoided injury to Carpenter. Moreover, even if the bartender could not have stopped the fight, a jury could conceivably infer that the bar owner had not employed a sufficient number or the right kind of servants needed to make the premises safe. The bar owner did not show that he had taken all reasonable precautions under the circumstances, and a failure in that duty could furnish an independent basis for liability. While a jury could also reach opposite inferences on these matters, such competing reasonable inferences were for the jury, not the trial court on summary judgment. The trial court had to draw all such inferences against the moving party. In short, the Carpenters furnished sufficient facts to have a jury resolve the bar owner's liability.

By the Court.—Judgment reversed and cause remanded for proceedings consistent with this opinion.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.