COURT OF APPEALS
DECISION
DATED AND FILED

June 5, 2013

Diane M. Fremgen
Clerk of Court of Appeals

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* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP2187 **Cir. Ct. No. 2010CV2550**

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

JENNIFER K. SERKOWSKI,

PLAINTIFF-APPELLANT,

V.

BONNIE AND CLYDE'S HIDEAWAY, LLC,

DEFENDANT-RESPONDENT,

JOHN DOE,

DEFENDANT.

APPEAL from an order of the circuit court for Racine County: CHARLES H. CONSTANTINE, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 NEUBAUER, P.J. This is a review of an order for summary judgment based on WIS. STAT. § 125.035 (2011-12),[1] Wisconsin's "dram shop" law. Jennifer Serkowski sued Bonnie and Clyde's Hideaway, LLC (the Bar) after she was injured in a car accident with her nineteen-year-old friend, Tara Wilson. Serkowski claims the Bar served alcoholic beverages to underage Wilson, who later backed her car into Serkowski. WISCONSIN STAT. § 125.035 grants immunity to tavernkeepers from civil liability arising out of the act of selling alcohol, unless the provider knew or should have known the drinker was underage. When a provider relies in good faith on false identification, immunity is retained if the minor's appearance is such that an ordinary and prudent person would believe that the minor was twenty-one years of age. Here, the circuit court granted summary judgment to the Bar after Serkowski failed to refute the Bar's prima facie case that it was entitled to immunity. We affirm.

BACKGROUND

¶2 Wilson had her Wisconsin driver's license altered by a coworker so that it showed her to be three years older than her actual age. The number "9" on her birth year (1989) was changed to a "6," and the date she turned twenty-one was altered. Serkowski also obtained an altered ID from the same coworker.

¶3 On the night of the accident, Wilson first went to the Bar early in the evening with her boyfriend, Skyler. When Wilson arrived at the Bar, she was required to show identification and presented her altered driver's license to the bartender. The bartender served Wilson alcoholic beverages. Serkowski called

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Wilson while Wilson was at the Bar with Skyler. Wilson, Serkowski and others then met at Wilson's house and drank beer, after which they returned to the Bar. On this visit to the Bar, Wilson told the bartender "I'm back" and handed the bartender the altered driver's license. The group stayed at the Bar until almost closing time, when Wilson left and walked home alone. Once home, she decided to drive to her parents' house. While backing out of the driveway, Wilson hit Serkowski. Serkowski filed suit against the Bar,[2] alleging that the Bar negligently provided alcoholic beverages to the underage Wilson.

WISCONSIN STAT. § 125.035

¶4 WISCONSIN STAT. § 125.035 provides immunity to providers of alcoholic beverages from civil liability arising out of the act of providing such beverages. *See* § 125.035(2). Immunity is not available, however, if a provider furnishes alcoholic beverages to an underage drinker, knew or should have known that the drinker was underage, and the alcoholic beverages provided were a substantial factor in causing injury to a third party. Sec. 125.035(4)(b). In cases involving false documentation of legal drinking age, immunity is retained if all of the following occur:

> 1. The underage person falsely represents that he or she has attained the legal drinking age.
>
> 2. The underage person supports the representation with documentation that he or she has attained the legal drinking age.
>
> 3. The alcoholic beverages are provided in good faith reliance on the underage person's representation that he or she has attained the legal drinking age.

[2] Wilson was not a party to this action. Wilson's case was "resolved," and she stated in her affidavit that Serkowski provided Wilson, her family and her insurer a "Pierrienger Release."

> 4. The appearance of the underage person is such that an ordinary and prudent person would believe that he or she had attained the legal drinking age.

Id.

The Bar's Case for Summary Judgment

¶5 Serkowski's complaint alleged that an employee of the Bar negligently served the underage Wilson alcoholic beverages, after which Wilson negligently operated her motor vehicle and "collided with" and injured Serkowski.

¶6 The Bar moved for summary judgment, arguing that its reliance on Wilson's false identification was in good faith and that an ordinary and prudent person would have believed she was twenty-one. The Bar submitted the affidavit of the Bar's owner, Randy Edwards. Edwards testified that it was the "custom[,] habit and practice" of all bartenders working at the Bar to ask for an ID from any person who appeared to be under the age of thirty-five. In a second affidavit, Edwards stated that this was the Bar's policy and practice. Further, if the person produces an ID that has been visibly altered, the person will not be served and will be asked to leave. The Bar had an "iron clad policy" to terminate any bartender who sold alcohol to an individual under the age of twenty-one. On the night of Serkowski's injuries, the bartender would not have served Wilson if she had not produced a forged, fake, or altered state identification card showing that she was over twenty-one. The Bar also submitted an affidavit of Robert Hansen, a co-owner at the time, and his testimony mirrored that of Edwards' first affidavit. Hansen submitted an additional affidavit stating that it was also the Bar's policy that, even with an apparently legitimate ID, an individual who did not appear to be twenty-one years of age would not be served. "If the physical appearance or actions of Jennifer Serkowski and Tara Wilson on the evening of June 8, 2009

would have led an ordinary and prudent person to conclude they had not attained the legal drinking age, they would not have been served alcohol and would have been asked to leave the establishment."

¶7 The Bar also attached a copy of the transcript of Wilson's deposition, in which she said she could tell her ID had been tampered with, but that was because she knew it had been, "but everyone else was not able to tell." Wilson had displayed the altered ID dozens of times to providers of alcoholic beverages, and she was never questioned concerning its authenticity or asked to supply additional identification. Wilson stated that while the ID "looked a little odd," it "looked very real" and that, based on a review of the license, "it would appear to any reasonable person that [I am] over the age of 21 years." In a supplemental affidavit, Wilson stated that on that night she, "to an ordinary person[,] passed for the age of 21" and that "[my] appearance as of June 8, 2009 would lead a reasonable person to conclude [I was] the age of 21." Wilson iterated that she had used her altered ID on dozens of occasions prior to the night in question and "had never been challenged by any bartender or ID checker … as appearing under the age of 21."

¶8 Serkowski argued that summary judgment should be denied because there is a material fact in dispute as to whether an ordinary and prudent person would have believed Wilson to be twenty-one years of age. But Serkowski's only submissions in support of her brief opposing summary judgment were copies of Wisconsin cases. Serkowski did not submit any factual evidence in opposition to the Bar's motion for summary judgment and supporting affidavits.

¶9 The circuit court granted summary judgment to the Bar. The court found that the Bar set forth a prima facie case establishing the two statutory

elements at issue—good faith reliance and legal drinking age appearance—and that this was undisputed by any evidence from Serkowski. Serkowski appeals.

DISCUSSION

Standard of Review

¶10 We review a motion for summary judgment de novo, using the same methodology as the circuit court. ***Old Tuckaway Assocs. Ltd. P'ship v. City of Greenfield***, 180 Wis. 2d 254, 278, 509 N.W.2d 323 (Ct. App. 1993). First, we examine the pleadings to determine if a claim has been stated and whether a genuine issue of fact has been presented. ***Grams v. Boss***, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980). If issue has been joined, the court examines the moving party's affidavits or other proof to determine if the moving party has made a prima facie case for summary judgment. ***Id.*** To make a prima facie case, the moving party must set forth facts that would defeat the plaintiff's claim. ***Id.*** If the moving party has made a prima facie case, the court examines the nonmoving party's affidavits or other proof to determine whether there exists a genuine dispute of material fact so as to entitle the opposing party to a trial. ***Id.*** Once the moving party has made a prima facie case for summary judgment, "an adverse party may not rest upon the mere allegations or denials of the pleadings but the adverse party's response … must set forth specific facts showing that there is a genuine issue for trial." WIS. STAT. § 802.08(3). Summary judgment "shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Sec. 802.08(2).

¶11 Under WIS. STAT. § 125.035, a tavernkeeper is entitled to immunity in situations involving a false identification if the four elements listed in paragraph (4)(b) are met. The first and second elements are undisputed: Wilson falsely represented that she was twenty-one and supported that representation with documentation that she was twenty-one. The third and fourth elements are at issue on summary judgment. The third element is whether the Bar provided Wilson alcoholic beverages in good faith reliance on Wilson's identification, and the fourth is whether Wilson's appearance was such that an ordinary and prudent person would have believed that she was at least twenty-one years of age.

¶12 The Bar's affidavits established a policy and practice that its bartenders asked for identification from all patrons who appeared to be under thirty-five and only served underage drinkers who both appeared to be over twenty-one and who presented valid and visibly unaltered identification establishing the same. Twice on the night of the accident, Wilson produced a fake ID prior to the bartender serving her alcoholic beverages. Wilson had used the fake ID on dozens of occasions prior to the night in question and had never been questioned about its validity. While she noted that the single altered digit on the year of her birthdate on her identification appeared "odd," she also stated that only she had been able to discern that it was altered. She also averred that at that time she appeared to be twenty-one.

¶13 The Bar's evidence in support of summary judgment was sufficient to support a prima facie case for summary judgment. Serkowski argues that the Bar owners' affidavits do not establish personal knowledge of the actual incident. But the evidence of the Bar's policy and routine business practice, combined with Wilson's testimony that she was in fact carded, supports a prima facie case that the bartender acted in conformity with the Bar's policy. *Cf.* WIS. STAT. § 904.06

("Evidence of the … routine practice of an organization … is relevant to prove that the conduct of the … organization on a particular occasion was in conformity with the … routine practice."); ***Borowski v. Firstar Bank Milwaukee, N.A.***, 217 Wis. 2d 565, 572, 579 N.W.2d 247 (Ct. App. 1998) (bank's undisputed evidence on summary judgment showed that statement and cancelled checks were sent to customer "in due course, consistent with Firstar's custom and practice"); ***American Family Mut. Ins. Co. v. Golke***, 2009 WI 81, ¶¶48-49, 319 Wis. 2d 397, 768 N.W.2d 729 (where no rebuttal evidence was provided, evidence of routine business practice showed conformity therewith).

¶14 Regarding Wilson's testimony, Serkowski did not provide any evidence to dispute Wilson's factual representation that no one else had been able to tell that the identification was altered and that she had been able to pass for twenty-one on dozens of occasions in other bars. While Serkowski lists factual scenarios that could have happened, she provides no evidence that they did: maybe the bartender could tell the ID had been altered, perhaps the Bar was not crowded and the bartender could have taken more time and discovered the alterations in the ID, probably the fact that the women were actually nineteen at the time means they looked nineteen, not twenty-one. But Serkowski did not submit any evidence supporting her arguments that Wilson's ID was noticeably false, that the Bar was careless in its examination of the ID or that Wilson did not look twenty-one. Because Serkowski submitted no evidence in rebuttal, the policy and practice described by the Bar is undisputed and the presumption that the bartender acted in conformity therewith—checked Wilson's ID, determined it did not look altered and determined that she appeared to be twenty-one years of age—remains intact. Wilson's unchallenged use of the ID on dozens of other occasions

supports the conclusion that the ID looked legitimate and that an ordinary and prudent person would have concluded that Wilson appeared to be twenty-one.

¶15 We briefly address Serkowski's argument that Wilson's affidavit should be disregarded because it is self-serving and conclusory. Relying on ***Heiden v. Ray's Inc.***, 34 Wis. 2d 632, 638, 150 N.W.2d 467 (1967), Serkowski urges that Wilson's affidavit is conclusory and therefore inadmissible under WIS. STAT. § 802.08. But in ***Heiden***, the affidavit submitted in support of summary judgment under the Unfair Sales Act described an abstract fear where the statute required damage or a threat of loss. ***Id.*** at 635, 638. Heiden's "statement that he suffered loss was based on 'sheer speculation,'" and did not establish a prima facie case. ***Id.*** at 638. Here, Wilson's statements that her ID looked real and that she looked twenty-one were based on her experience using the ID and procuring service in bars. Furthermore, Wilson is not a party to this case and has nothing to gain or lose financially by her testimony.

¶16 We can rely on all the evidence together to conclude that the Bar established a prima facie case for summary judgment that it was entitled to immunity under WIS. STAT. § 125.035(4)(b) as a matter of law. While the driver's license was altered and may have looked "odd" to Wilson, the only evidence in the record is that no one other than Wilson had ever been able to tell it was altered. While Wilson was only nineteen at the time, the only evidence in the record is that she appeared to be and had passed for twenty-one using the altered driver's license on dozens of occasions. In short, the summary judgment record is devoid of any evidence of bad faith or that an ordinary and prudent person would not have believed Wilson was twenty-one. Serkowski did not submit any evidence to refute the Bar's prima facie case that it employed its described policy and practice, nor did she submit evidence that the bartender that night did not act in conformance

with that policy and practice—in good faith reliance on the ID (because any patron presenting a visibly altered ID would not be served) and after determining that the patron appeared to be twenty-one (because any patron who did not would not be served).

¶17 Because we have ruled that the four conditions in the statute are satisfied and the Bar has immunity, we need not address whether the alcoholic beverages provided to Wilson were a substantial factor in causing injury to a third party. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (we need not address all issues raised when deciding a case on other grounds).

By the Court.—Order affirmed.

Not recommended for publication in the official reports.