

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 16, 2008

David R. Schanker
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. 2007AP2970

Cir. Ct. No. 2006CV406

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STEVEN A. KOLSTAD AND SUSAN M. KOLSTAD,

PLAINTIFFS-APPELLANTS,

V.

**WHITE BIRCH INN, LLC, DONALD A. KLUKUS AND
ALEA LONDON, LTD.,**

**DEFENDANTS-THIRD-PARTY
PLAINTIFFS-RESPONDENTS,**

V.

**JOSH I. FRANK, DUANE A. JOHNSON, JR., JESSE W. FEDIE,
RYAN C. CALKINS, JUSTIN M. NORTH AND CURTIS J. NORTH,**

THIRD-PARTY DEFENDANTS,

**WILSON MUTUAL INSURANCE COMPANY AND AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,**

INTERVENING-DEFENDANTS.

APPEAL from a judgment of the circuit court for Chippewa County:
RODERICK A. CAMERON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Steven and Susan Kolstad appeal a summary judgment dismissing their personal injury action against White Birch Inn, its owner and its insurer.¹ Their action is premised on injuries Steven sustained in a fight in the Inn’s parking lot with members of a wedding party that had a reception at the Inn. The Kolstads argue the Inn breached its duty to protect patrons from harm by not employing a bouncer and by serving alcohol to intoxicated and underaged assailants. Because the supporting papers establish no issue of material fact and the defendants are entitled to judgment as a matter of law, we affirm the judgment. *See* WIS. STAT. § 802.08(2).²

¶2 To the extent any facts are in dispute, we utilize the facts most favorable to the Kolstads. *Stone v. Board of Regents*, 2007 WI App 223, ¶9, 305 Wis. 2d 679, 741 N.W.2d 774. The supporting papers show the Inn remained open to the general public in addition to hosting the wedding reception for approximately 100 people. The reception purchased a half barrel of beer and possibly an additional quarter barrel. The beer was poured into pitchers that were placed on the bar and reception guests took the pitchers to tables.

¹ Because we affirm the judgment dismissing the Inn and its owner, we need not address issues relating to insurance coverage.

² All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶3 Kolstad was not a part of the wedding party. He arrived at the Inn, intoxicated, at approximately 11:00 p.m. There is no evidence that the Inn served him additional beverages at that time. When a wedding guest bumped into Kolstad, his friend, Kevin Katzbahn, grabbed Fedie and threatened to snap the guest's neck or shoot him if he bumped into him again. Witnesses standing as close as ten feet in the noisy and crowded bar could not hear specific threats and there was no physical altercation. Approximately one hour later, another verbal altercation involving wedding guests, Kolstad and Katzbahn occurred in the same area. Moments later, Kolstad, Katzbahn and thirty other people went into the parking lot where the fight ensued. After the Inn's owner was informed of the fight, he called 911 and told the participants that he had called the police. The crowd immediately disbursed.

¶4 The Kolstads argue the Inn was negligent by breaching its duty to protect patrons from harm by not having security personnel to prevent the assault. A tavern keeper has a duty to protect patrons under certain circumstances. *See Weihert v. Piccione*, 273 Wis. 448, 456, 78 N.W.2d 757 (1956). A tavern is subject to liability to members of the public for intentional harmful acts of third persons if the proprietor, by the exercise of reasonable care, could have discovered that such acts were being done or were about to be done, and could have protected the members of the public by controlling the conduct of the third persons or by giving an adequate warning. *Id.* The Kolstads presented no evidence that the Inn's personnel were aware or should have been aware of the verbal altercations that preceded the fight. The absence of security does not constitute a breach of the Inn's duty to protect patrons. Prior to that night, there had never been any incidents at the Inn requiring a police response. The Inn had no reason to believe a wedding reception would result in a bar brawl. Once informed of the fight, the

bartender took reasonable steps to stop it by calling 911 and informing the participants the police were called.

¶5 The Kolstads also fault the Inn for serving intoxicated persons and underage persons. Under WIS. STAT. § 125.035(2), the bar and its owner are immune from civil liability arising out of the sale of alcohol beverages. An exception is made for sale to an underage person. *See* WIS. STAT. § 125.035(4)(b). However, the Kolstads identify only one underage participant in the fight, twenty-year-old Josh Frank, who testified he may have had one beer. There is no evidence that Frank was intoxicated or that his consumption of alcohol played any role in the fight.

By the Court.—Judgment affirmed.

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

