MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Cedric Woods,

Appellant-Plaintiff,

v.

Fitz Simon, Inc. d/b/a Bar 145, Halo Media, Inc., John Doe #1 Juan Escarbro, John #2 Phillip Johnson, and John Doe #3 Carlos Flores,

Appellees-Defendants.[1]

July 26, 2021

Court of Appeals Case No. 21A-CT-300

Appeal from the Allen Superior Court

The Honorable Craig J. Bobay, Judge

Trial Court Cause No. 02D01-1709-CT-531

[1] Fitz Simon, Inc. d/b/a Bar 145 is the only defendant participating in his appeal, but since the remaining defendants are parties of record in the trial court, they are parties on appeal. *See* Ind. Appellate Rule 17(A).

Kirsch, Judge.

[1] Cedric Woods ("Woods") appeals the entry of summary judgment in favor of Fitz Simon, Inc. d/b/a Bar 145 ("Bar 145") and raises one issue, which we restate as whether the trial court failed to consider "present and specific circumstances" when it concluded the injuries to Woods caused by security guards were not reasonably foreseeable.

[2] We affirm.

Facts and Procedural History

[3] In April of 2015, Bar 145 opened its Fort Wayne, Indiana location as a gastropub serving food and offering live entertainment. *Appellant's App. Vol. II* at 81; *Appellee's App. Vol II* at 7-9, 85. Bar 145 hosted many live events, including cover band concerts, "Battles of the Bands," karaoke, open mic nights, and "Music Lover's Lounge." *Appellee's App. Vol. II* at 14-19, 22-23, 48. For a while, Bar 145 employed security guards, but in 2016, it decided to hire security guards as independent contractors as needed. *Appellant's App. Vol. II* at 82; *Appellee's App. Vol. II* at 11, 13, 24, 30.

[4] In late 2016, a local Fort Wayne radio station ("the radio station) contacted Bar 145 about hosting a New Year's Eve party ("the NYE Party") at Bar 145, and on December 7, 2016, Bar 145 and the radio station formally agreed to do so. *Appellant's App. Vol. II* at 86, 100. The radio station agreed to provide entertainment, and Bar 145 agreed to provide food, drinks, staff, and security. *Id*. at 86, 88-89; *Appellee's App. Vol. II* at 31, 34, 82.

[5] Bar 145 hired the Sons of Ares Motorcycle Club ("the Sons of Ares") to provide security for the NYE Party. *Appellee's App. Vol. II* at 13, 34-35, 37-38. Bar 145 had worked with the Sons of Ares before; they had provided security for an earlier event at Bar 145 and had helped Bar 145 with a charity event. *Id*. at 35, 47-48, 50-51. The Sons of Ares agreed to provide twelve people for security because Bar 145 wanted to have "ample security" to control the anticipated crowd size and to protect Bar 145's staff and patrons. *Id*. at 39, 45-46, 49, 52, 77. Bar 145 provided only "general" instructions to the Sons of Ares about what Bar 45 wanted the security guards to do at the NYE Party. *Id*. at 47, 77. During her deposition, Rebekah Knox ("Knox"), the Bar 145 manager, stated she could not recall what time she told the security guards to arrive at the NYE Party and whether twelve security guards actually showed up to the NYE Party. *Id*. at 93-95. Knox also stated she did not ask if the security guards would be trained. *Id*. at 93. Knox also testified that her contact person at the Sons of Ares was a man named "Ticketz." *Appellant's App. Vol. II* at 93, 97.

[6] Pierre McGee ("McGee") from the radio station was the host for the NYE Party, and he arrived at Bar 145 around 9:30 p.m. *Appellant's App. Vol. II* at 107. When he arrived, McGee noticed there were no security guards either inside or outside Bar 145. *Id*. at 107-10. Therefore, Angel Suttle ("Suttle") from the radio station checked IDs and collected tickets at the door. *Id*. at 107-09. McGee worried about the lack of security because "[t]he place was filled, was filling up, the place was packed." *Id*. at 109.

[7] At approximately 10:00 p.m., McGee and Suttle called Knox to tell her that there were no security guards at Bar 145. *Id*. at 111-13. Knox told Suttle and McGee that she was not scheduled to work that night but would come in to address the situation. *Id*. at 108, 111-13. Knox also said the security guards would be arriving soon. *Id*. at 116-17. Shortly after speaking to Knox on the phone, McGee observed a fight break out between two women, and there were no security guards to break up the fight. *Id*. at 112. The security guards eventually arrived at Bar 145 at an indeterminate time; they wore black t-shirts bearing the word "Security." *Appellee's App. Vol. II* at 77, 95-97.

[8] Woods arrived at the NYE Party with several friends and family members between 11:00 p.m. and midnight. *Appellant's App. Vol. II* at 121; *Appellee's App. Vol. II* at 102. By that time, the security guards had arrived. *Appellant's App. Vol. II* at 123-24. The security guards patted down Woods and his companions. *Id*. at 124. At some point past midnight, Woods saw a fight break out between other patrons, which security guards broke up immediately. *Id*. at 103-05, 109-10, 124. Although he considered leaving the NYE Party after witnessing the first fight, Woods stayed because "security had it under control." *Id*. at 111-12. Between fifteen and twenty minutes later, Woods witnessed a second fight, which was also broken up by security guards. *Id*. at 113, 116-17, 124-25.

[9] Around the same time that Woods observed the second fight, McGee witnessed a fight and saw security guards "grabbing," throwing," and "slamming" patrons to the ground. *Id.* at 114-16. McGee also observed security guards grab a woman "by the back of her neck, [and] slam[] her to the ground" and "put two

guys in a headlock, [and] slam them on the ground, [while] moving through the crowd." *Id*. at 118-19.

[10] About ten minutes after the second fight ended, Woods and his companions decided to leave Bar 145. *Id*. at 125-26. As they exited through the main entrance, security guards rushed from behind them to also exit Bar 145. *Id*. at 126. One of the guards elbowed Woods, knocking him off balance, and as Woods stumbled to regain his footing, he reached for the security guard's arm. *Id*. at 126-27. Security guards then placed Woods in a headlock and punched him twice in the face. *Id*. at 127.

[11] Meanwhile, before Knox arrived at the NYE Party, she was in contact with Bar 145's acting manager, Dominique Espinoza, and Ticketz. *Id*. at 91, 94. It is unclear when Knox arrived at the NYE Party; she could have arrived as early as 11:00 p.m. and as late as 1:00 a.m. *Id*. at 94, 111. After Knox witnessed three fights within thirty minutes of her arrival, she shut down the NYE Party. *Id.* at 95-96; *Appellee App. Vol. II* at 62. Several hours later that same New Year's morning, Bar 145 closed its doors permanently. *Appellee's App. Vol. II* at 88-90.

[12] On September 28, 2017, Woods filed his complaint, claiming Bar 145 was vicariously liable for the actions of the Sons of Ares security guards who had punched Woods at the NYE Party. *Id*. at 143-44. On July 16, 2019, Woods amended his complaint to add additional claims, including premises liability, and to add additional defendants. *Id*. at 153-56.

[13] On January 21, 2020, Bar 145 filed its motion for summary judgment, supported by memorandum and designated evidence, and argued, in part, that it had no duty under Indiana's premises liability law to prevent the assault on Woods by the security guards because the attack was unforeseeable. *Appellant's App. Vol. II* at 42-59; *Appellee's App. Vol. II* at 2-161. On March 23, 2020, Woods filed his memorandum in opposition and designated evidence, claiming, in part, that the security guards' actions were foreseeable. *Appellant's App. Vol. II* at 60-77. On April 22, 2020, Bar 145 filed its reply in support of motion for summary judgment, and on May 20, 2020, the trial court held a hearing on Bar 145's motion for summary judgment. *Id*. at 21-22.

[14] On June 10, 2020, the trial court granted Bar 145's motion for summary judgment. *Appellant's App. Vol. II* at 137-50. It ruled, inter alia, that Bar 145 did not owe a duty to Woods under a premises-liability theory because the harm to Woods was not foreseeable under the standard articulated in *Barnard v. Menard, Inc.*, 25 N.E.3d 750 (Ind. Ct. App. 2015). In *Barnard*, a patron of a Menard store sued Menard because a security guard, working as an independent contractor for Menard, assaulted the patron by grabbing the patron's arm, slamming the patron into his van, and then throwing the patron to the ground. *Id*. at 752. We affirmed the trial court's entry of summary judgment for Menard, ruling, in part: "[I]t is [not] reasonably foreseeable . . . that an independently contracted loss prevention officer would physically attack a customer . . . . " *Id*. at 755.

[15] On June 16, 2020, Woods filed a motion to correct error, and June 22, 2020, the trial court denied the motion. *Appellant's App. Vol. II* at 151-59. On July 8, 2020, Woods filed his notice of appeal. However, on December 18, 2020, we dismissed Woods's appeal without prejudice because his appeal did not arise from final judgment as the trial court had not yet ruled on Woods's claims against the other defendants. *Id*. at 162-63. On January 25, 2021, following Woods's motion to dismiss the remaining defendants, the trial court entered final judgment. *Id*. at 160-63. On February 19, 2021, Woods filed a subsequent notice of appeal and now appeals.

Discussion and Decision

[16] Woods contends the trial court erred in granting Bar 145's motion for summary judgment because Bar 145 owed a duty to protect him from being physically assaulted by the security guards because the actions of the security guards were foreseeable. When reviewing the grant of summary judgment, we stand in the shoes of the trial court and apply a de novo standard of review. *FLM, LLC v. Cincinnati Ins. Co.*, 973 N.E.2d 1167, 1173 (Ind. Ct. App. 2012), *trans. denied*. Our review of a summary judgment motion is limited to those materials designated to the trial court. Ind. Trial Rule 56(H); *Thornton v. Pietrzak*, 120 N.E.3d 1139, 1142 (Ind. Ct. App. 2019), *trans. denied*.

[17] Summary judgment is appropriate only where the designated evidence shows there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. T.R. 56(C). We view the pleadings and

designated materials in the light most favorable to the non-moving party. *Id*. The initial burden is on the moving party to demonstrate the absence of any genuine issue of fact as to a determinative issue, at which point the burden shifts to the non-movant to come forward with contrary evidence showing an issue for the trier of fact. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). When a trial court grants summary judgment, we carefully scrutinize that determination to ensure that a party was not improperly prevented from having his or her day in court. *Henderson v. Reid Hosp. and Healthcare Servs.*, 17 N.E.3d 311, 315 (Ind. Ct. App. 2014), *trans. denied*.

[18] Woods's negligence claim against Bar 145 is grounded in premises liability. To prevail on a claim of negligence, a plaintiff must show, inter alia, that the defendant owed a duty to the plaintiff. *Certa v. Steak 'n Shake Operations Inc.*, 102 N.E.3d 336, 339 (Ind. Ct. App. 2018), *trans. denied*. A person entering upon the land of another comes upon the land as an invitee, a licensee, or a trespasser. *Id*. at 338. The status of the person entering the land of another determines the duty the landowner owes to him. *Id*. at 339. Here, the parties agree that Woods was an invitee of Bar 145, meaning that Bar 145 owed Woods a duty to exercise reasonable care for his protection. *See Christmas v. Kindred Nursing Ctrs. Ltd. P'ship*, 952 N.E.2d 872, 880 (Ind. Ct. App. 2011) (stating that landowner owes to invitee highest duty of care, which is duty to exercise reasonable care for invitee's protection while he is on premises).

[19] Whether a duty exists is a question of law for the courts to decide. *Certa*, 102 N.E.3d at 339. "[T]he duty a landowner owes to an invitee is well established:

a landowner must exercise reasonable care for the invitee's protection while the invitee is on the premises." Foreseeability is the central issue when deciding whether the landowner's duty of reasonable care extends to the particular circumstances at issue. *Rogers v. Martin*, 63 N.E.3d 316, 323 (Ind. 2016). *Rogers* held that in the context of duty,

> foreseeability is a general threshold determination that involves an evaluation of (1) the broad type of plaintiff and (2) the broad type of harm. In other words, this foreseeability analysis should focus on the general class of persons of which the plaintiff was a member and whether the harm suffered was of a kind normally to be expected -- without addressing the specific facts of the occurrence.

Id. Under this analysis, *Rogers* held that it was not foreseeable that a party host would fight guests whom he had invited. *Id*. at 326.

[20] In fashioning the broad test for foreseeability – the general class of persons to which the plaintiff belonged and the broad type of harm – *Rogers* drew on our reasoning in *Barnard*. *See Rogers*, 23 N.E.3d at 325. As noted above, *Barnard* held that it was not foreseeable that a security guard, hired as an independent contract by Menard, would physically assault a customer in the Menard parking lot. 25 N.E.3d at 755. Like *Barnard*, we conclude – as did the trial court – that "[a]s a general matter, we do not believe that it is reasonably foreseeable to a business entity that an independently contracted loss prevention officer would physically attack a customer, causing injury to that customer." *Barnard*, 25 N.E.3d at 755. In other words, it is not reasonably foreseeable to a

bar/restaurant hosting a party that the independently contracted security guards it had hired would physically assault patrons. Thus, under the *Rogers* and *Barnard* analysis, it was not reasonably foreseeable to Bar 145 that the security guards would assault Woods.

[21] However, Woods is correct that *Rogers* and *Barnard* do not end our analysis. As Woods notes, Bar 145 would be liable for Woods's injuries if Bar 145 had reason to know of any "present and specific circumstance that would cause a reasonable person to recognize the probability or likelihood of imminent harm." *Cavanaugh's*, 140 N.E.3d at 838. Woods claims the record establishes that Bar 145 did have reason to know of such circumstances because Knox was aware that several fights had broken out among patrons during the NYE Party.

[22] Woods is correct that the record shows several fights had broken out and, at some point later in the evening, Knox became aware of those fights. *Appellant's App. Vol. II* at 95-96. In fact, Knox shut down the NYE Party because of the fights. *Id*. However, as Bar 145 points out, there is no evidence that Knox or any other Bar 145 employee knew or had reason to know that there was imminent danger that *the security guards* were going to assault Woods. In fact, there is no evidence that Knox or any other Bar 145 employee even knew about the assault on Woods by the security guards as the assault occurred during or in the immediate aftermath of the assault. And even if Knox arrived at the NYE Party as early as 11:00 p.m., there is no evidence she was aware of any "present and specific circumstances" that would cause her to "recognize the probability or likelihood of imminent harm," i.e., there was no evidence of specific

circumstances that caused her to recognize the probability of the security guards assaulting Woods. *See Cavanaugh's*, 140 N.E.3d at 838.

[23] The cases that Woods relies on to claim Bar 145 owed him a duty to prevent him from being assaulted by the security guards are distinguishable because in those cases, the defendants did, in fact, have knowledge of "present and specific circumstance that would cause a reasonable person to recognize the probability or likelihood of imminent harm." *Cavanaugh's*, 140 N.E.3d at 838. For example, in *Hamilton v. Steak 'n Shake Operations Inc.*, 92 N.E.3d 1166 (Ind. Ct. App. 2018), *trans. denied*, we found that the actions of a restaurant patron were foreseeable but only because Steak 'n Shake was clearly aware of escalating tensions between two groups of restaurant patrons that resulted in one patron shooting another patron. *Id*. at 1167, 1173. The employees observed an escalating thirty-minute encounter between the two groups, which included "verbal threats and taunts, blocking of the [restaurant] exit, and pounding on windows in an effort to incite a physical altercation." *Id.* at 1167, 1173.

[24] In *Certa*, we found that Steak 'n Shake should have foreseen that one patron would commit a violent act against another patron – driving over the other patron in the Steak 'n Shake parking lot – but only because a restaurant employee witnessed a heated encounter between two groups spill into the restaurant from outside, and the employee was told by a member of one group that there would be a fight and then alerted the Steak 'n Shake manager "that the two groups might be trouble." 102 N.E.3d at 337, 341. And finally, in *Buddy & Pal's III, Inc. v. Falaschetti*, 118 N.E.3d 38 (Ind. Ct. App. 2019), *trans.*

denied, we found that a bar should have foreseen that an intoxicated patron might attack another bar patron but only because the bar knew that the intoxicated patron "was a loose cannon who was not taking his ejectment [from the bar] well" and was "in a fighting mood." *Id*. at 43.

[25] In contrast to the foregoing cases, the undisputed evidence shows that Bar 145 had no advance knowledge suggesting the likelihood that the security guards would assault Woods. Because the security guard's actions were not foreseeable as a matter of law, Bar 145 did not owe a duty to Woods to prevent the security guards from assaulting him. *See Certa*, 102 N.E.3d at 339 (foreseeability is central issue when deciding whether the landowner's duty of reasonable care extends to the particular circumstances at issue). And since duty is an essential element of a negligence action, *see Certa*, 102 N.E.3d at 339, Woods's negligence action is not viable as a matter of law. Accordingly, the trial court did not err in entering summary judgment in favor of Bar 145.

[26] Affirmed.

Altice, J., and Weissmann, J., concur.