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IN THE  
COURT OF APPEALS OF INDIANA

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BoJak's Bar and Grille,  
*Appellant-Defendant,*

v.

Marcus Henry,  
*Appellee-Plaintiff.*

May 26, 2021

Court of Appeals Case No.  
21A-CT-170

Interlocutory Appeal from the  
Johnson Superior Court

The Honorable Kevin M. Barton,  
Judge

Trial Court Cause No.  
41D01-1810-CT-154

**Bradford, Chief Judge.**

## Case Summary

- [1] In this interlocutory appeal, BoJak’s Bar and Grille (“BoJak’s”) appeals the denial of its motion for summary judgment, claiming that the trial court erred in determining that BoJak’s owed a duty of care to protect a patron from an unforeseeable criminal attack. In denying BoJak’s motion for summary judgment, the trial court applied our conclusion in *Hamilton v. Steak ‘n Shake Operations Inc.*, 92 N.E.3d 1166 (Ind. Ct. App. 2018), finding that an issue of material fact remained as to whether the violence was foreseeable. We affirm.

## Facts and Procedural History

- [2] At some point approximately a week prior to August 19, 2018, Marcus Henry and his friends were involved in a verbal altercation with Keith Knura and Knura’s friends over a hat. On August 19, 2018, both Henry and Knura were at BoJak’s, a bar located in Franklin, with their respective friends.
- [3] Upon arriving at BoJak’s, Henry and his friends informed BoJak’s security about their prior altercation with Knura. Despite never having had any issues with Knura being violent in the past, BoJak’s security observed the two groups throughout the night, and “everything appeared to be fine.” Appellant’s App. Vol. II p. 108. The two groups interacted without incident throughout the evening. However, believing that the groups required extra attention, in the time that both groups were at the bar, BoJak’s security checked on the groups “more than ten times” and kept a “constant watchful eye.” Appellant’s App.

Vol. II p. 125. At some point towards the end of the evening, Knura physically assaulted and injured Henry when he “sucker punched” Henry, hitting him multiple times in the head before running away. Appellant’s App. Vol. II p. 56.

[4] On October 12, 2018, Henry filed suit in Johnson County against both Knura and BoJak’s. BoJak’s filed a motion for summary judgment, arguing that it did not owe a duty to Henry, as the assault was not foreseeable as a matter of law. On November 17, 2020, the trial court denied BoJak’s summary judgment motion. BoJak’s requested and was granted permission to pursue an interlocutory appeal of the trial court’s order.

## Discussion and Decision

[5] BoJak’s contends that the trial court erred in denying its motion for summary judgment, arguing that it did not owe a duty of care to Henry because Knura’s attack on Henry was unforeseeable.

When reviewing a grant or denial of summary judgment the standard of review is the same as the standard governing summary judgment in the trial court: whether there is a genuine issue of material fact, and whether the moving party is entitled to judgment as a matter of law. *Ind. Univ. Med. Ctr., Riley Hosp. for Children v. Logan*, 728 N.E.2d 855, 858 (Ind. 2000). Summary judgment should be granted only if the evidence designated pursuant to Indiana Trial Rule 56(C) shows that there is no genuine issue of material fact and the moving party deserves judgment as a matter of law. *Gunkel v. Renovations, Inc.*, 822 N.E.2d 150, 152 (Ind. 2005). All evidence must be construed in favor of the opposing party, and all doubts as to the existence of a

material issue must be resolved against the moving party. *Tibbs v. Huber, Hunt & Nichols, Inc.*, 668 N.E.2d 248, 249 (Ind. 1996).

*N. Ind. Pub. Serv. Co. v. Bloom*, 847 N.E.2d 175, 180 (Ind. 2006).

[6] Further, to prevail on a claim of negligence “the plaintiff must show: (1) duty owed to plaintiff by defendant; (2) breach of duty by allowing conduct to fall below the applicable standard of care; and (3) compensable injury proximately caused by defendant’s breach of duty.” *Goodwin v. Yeakle’s Sports Bar & Grill, Inc.*, 62 N.E.3d 384, 386 (Ind. 2016) (quoting *King v. Ne. Sec., Inc.*, 790 N.E.2d 474, 484 (Ind. 2003)). “Absent a duty there can be no negligence or liability based upon the breach.” *Id.* (citing *Peters v. Forster*, 804 N.E.2d 736, 738 (Ind. 2004)). “Whether a duty exists is a question of law for the court to decide.” *Id.* at 386–87 (citing *Peters*, 804 N.E.2d at 738).

## I. Foreseeability in the Context of Whether a Landowner Owes a Duty to an Invitee

[7] The Indiana Supreme Court set forth the analytical framework for evaluating foreseeability as it relates to the duty a landowner owes to an invitee in *Goodwin* and *Rogers v. Martin*, 63 N.E.3d 316 (Ind. 2016). This framework provides that

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.

*Rogers*, 63 N.E.3d at 325; *see also Goodwin*, 62 N.E.3d at 390. To give some context, we examine the Indiana Supreme Court’s application of this framework to the facts in *Goodwin*.

[8] In *Goodwin*, a patron at a neighborhood bar overheard what he believed was a derogatory comment about his wife. 62 N.E.3d at 385. That patron produced a handgun and fired it, striking the offending customer as well as two other customers sitting at a separate table. *Id.* There was no prelude to the attack, nor was there any involvement of the bar’s staff preceding the verbal exchange and shooting. One of the injured patrons brought a complaint for damages against the bar alleging negligence in failing to provide security for its patrons. *Id.* at 386. The bar moved for summary judgment, claiming that the shooting was not foreseeable and that it had no duty to anticipate and take steps to prevent the criminal act. *Id.* The trial court granted summary judgment in favor of the bar. *Id.*

[9] On appeal, the Indiana Supreme Court considered whether the bar owed a duty to protect its patrons, focusing on whether the shooting was foreseeable as a matter of law. In concluding that it was not, the Court noted that while foreseeability is most often a component of proximate causation, in some cases, “it is also a component of the duty element of negligence.” *Id.* at 389 (emphasis omitted). In such cases, “whether a duty exists is a question of law for the court to decide.” *Id.* The Court noted that while “the foreseeability component of proximate cause requires an evaluation of the facts of the actual occurrence, ... the foreseeability component of duty requires a more general analysis of the

broad type of plaintiff and harm involved, without regard to the facts of the actual occurrence.” *Id.* at 390 (quoting *Goldsberry v. Grubbs*, 672 N.E.2d 475, 479 (Ind. Ct. App. 1996)). In explaining further, the Court noted that

because almost any outcome is possible and can be foreseen, the mere fact that a particular outcome is “sufficiently likely” is not enough to give rise to a duty. Instead, for purposes of determining whether an act is foreseeable in the context of duty we assess “whether there is some probability or likelihood of harm that is serious enough to induce a reasonable person to take precautions to avoid it.”

*Id.* at 392 (quoting *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 367 (Tenn. 2008)).

[10] Applying this framework to the facts before it, the Indiana Supreme Court noted that the broad type of plaintiff was a patron of a bar and that the harm was the probability or likelihood of a criminal attack, *i.e.*, a shooting inside the bar. *Id.* at 393. The Court stated its belief that bar owners do not “routinely contemplate that one bar patron might suddenly shoot another.” *Id.* at 394. The Court held that “a shooting inside a neighborhood bar is not foreseeable as a matter of law.” *Id.* The Court therefore affirmed the trial court’s grant of summary judgment in favor of the bar. *Id.*

[11] We distinguished the *Goodwin* decision in *Hamilton* on the basis that unlike in *Goodwin*, restaurant employees were aware of the discord and escalating tension between the two groups prior to the altercation. We concluded that Steak ‘n Shake’s knowledge of the events taking place on its premises gave rise to a duty

to take reasonable steps to provide for patron safety. *Hamilton*, 92 N.E.3d at 1173. In reaching this conclusion, we explained:

Here, we define the broad type of plaintiff and the broad type of harm in terms of foreseeability. Hence, the broad type of plaintiff is a restaurant patron who has been subjected to escalating threats and taunts and the broad type of harm is injury resulting after the encounter culminated in physical violence. Steak ‘n Shake did not have to know the precise harm that would befall its customer, only that there was some probability or likelihood that one of its patrons could be harmed and that the potential harm was serious enough that a reasonable person would have been induced to take precautions to avoid it. An escalating thirty-minute encounter that included verbal threats and taunts, blocking of the exit, and pounding on windows in an effort to incite a physical altercation, all of which Steak ‘n Shake had knowledge, clearly created some likelihood that one of Steak ‘n Shake’s patrons could be harmed and that the potential harm could be serious. Given the circumstances, we conclude that Steak ‘n Shake had a duty as a proprietor to take reasonable steps to provide for patron safety once the raucous behavior came to its attention.

*Id.* at 1173–74.

## II. Application of *Goodwin* and *Hamilton* to the Instant Matter

[12] As was the case in *Goodwin* and *Hamilton*, the question presented herein is whether a duty exists. If a duty exists, the trial court properly denied summary judgment; if a duty does not exist, summary judgment should have been granted. We believe that given the facts in this case, which are more akin to

those in *Hamilton* than those in *Goodwin*, BoJak's owed a duty to Henry and, as such, the trial court properly denied BoJak's motion for summary judgment.

[13] The incident in this case was not an unforeseeable sudden act that occurred without warning. The designated evidence clearly establishes that BoJak's staff knew of prior tension between the two groups and had specifically been warned of an altercation that had occurred between the two groups the week before. BoJak's security felt the two groups required extra attention, checking on them more than ten times and keeping a "constant watchful eye." Appellant's App. Vol. II p. 125. We conclude that these facts are sufficient to create a duty for BoJak's to take reasonable steps to provide for Henry's safety while on the premises. This is not to say, however, that BoJak's was negligent, as issues of breach and proximate cause must still be determined by a trier of fact.

[14] The judgment of the trial court is affirmed.

Vaidik, J., and Brown, J., concur.