MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Joseph Rizzo,

Appellant-Defendant,

v.

Midwest Training and Ice Center, Inc.,

Appellee-Plaintiff

July 9, 2021

Court of Appeals Case No. 21A-CT-126

Appeal from the Lake Superior Court

The Honorable Bruce D. Parent, Judge

Trial Court Cause No. 45D11-1603-CT-119

Tavitas, Judge.

Case Summary

[1] Joseph Rizzo ("Rizzo") appeals the trial court's grant of summary judgment to Midwest Training & Ice Center, Inc. ("Midwest Training"). We affirm.

Issue

[2] Rizzo raises one issue: whether the trial court properly granted Midwest Training's motion for summary judgment.

Facts

[3] On September 6, 2015, Rizzo and Nicholas Wedster ("Wedster") participated in an amateur hockey game at Midwest Training in Dyer, Indiana. Rizzo played for the "LC Dads" team and Wedster for the "Your Mom" team. The league incorporated USA Hockey rules, which prohibit fighting. Midwest Training also established penalties for fighting: a one-game suspension for the participant's first transgression and a three-game suspension for the second. Fighting, however, was not common or condoned in the league.

[4] The game was evenly matched between the teams and not "super heated." Appellant's App. Vol. II p. 103. In the middle of the third period, Rizzo received a roughing penalty after running into an opposing player, Camille Schoop ("Schoop"). Later, with less than a minute left to play, Rizzo and a member of the Your Mom team were vying for the puck near the LC Dads' goal. Although Wedster, a defensive member of Your Mom, had "no reason"

to be on that side of the ice, he skated "all the way across" the ice to Rizzo and crashed into him from behind, causing him to fall. *Id.* at 132. When Rizzo stood up, Wedster punched him in the eye. Rizzo sustained injuries from the punch, including a detached retina, and underwent several corrective surgeries.

[5] In March 2016, Rizzo sued Midwest Training in Lake Superior Court, alleging Midwest Training committed negligence in failing to provide him "protection against third party criminal attacks while he was on [its] premises." *Id.* at 21.[1] In July 2020, Midwest Training filed a motion for summary judgment and argued it did not have a duty to protect Rizzo from Wedster's unforeseeable criminal conduct. Rizzo argued Wedster's conduct was foreseeable because there was "ongoing conflict" between the teams during the game and because Wedster had been involved in a fight at Midwest Training just a few months before this incident. *Id.* at 185.

[6] The trial court entered summary judgment in favor of Midwest Training, finding "[p]hysical contact of the nature that took place in this instance could not have been . . . foreseen or prevented by [Midwest Training]" and, therefore, Midwest Training "did not have a duty to take precautions to protect [Rizzo] from the type of harm that occurred to him." *Id.* at 18.

[7] Rizzo now appeals.

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[1] Rizzo also filed suit against Wedster. However, after the parties came to an agreement, Wedster was dismissed from the suit with prejudice.

Analysis

[8] Rizzo challenges the trial court's entry of summary judgment in favor of Midwest Training. Summary judgment is appropriate only when the moving party shows there are no genuine issues of material fact for trial and the moving party is entitled to judgment as a matter of law. *Erie Indem. Co. for Subscribers at Erie Ins. Exch. v. Estate of Harris by Harris*, 99 N.E.3d 625, 629 (Ind. 2018), *reh'g denied*; *see also* Ind. Trial Rule 56(C). Once that showing is made, the burden shifts to the nonmoving party to designate appropriate evidence to demonstrate the actual existence of a genuine issue of material fact. *Schoettmer v. Wright*, 992 N.E.2d 702, 705-06 (Ind. 2013). When ruling on the motion, the trial court construes all evidence and resolves all doubts in favor of the non-moving party. *Id.* at 706. We review the trial court's ruling on a motion for summary judgment de novo, and we take "care to ensure that no party is denied his day in court." *Id.* "We limit our review to the materials designated at the trial level." *Gunderson v. State, Ind. Dep't of Nat. Res.*, 90 N.E.3d 1171, 1175 (Ind. 2018).

[9] The issue here is whether Midwest Training owed a duty to Rizzo to protect him from Wedster's criminal act. To recover in negligence in general, the plaintiff must establish: (1) a duty on the part of the defendant to conform his conduct to a standard of care arising from his relationship with the plaintiff; (2) a failure on the part of the defendant to conform his conduct to the requisite standard of care; and (3) an injury to the plaintiff proximately caused by the breach. *Goodwin v. Yeakle's Sports Bar & Grill, Inc.*, 62 N.E.3d 384, 386 (Ind. 2016). Absent a duty, there can be no breach and, therefore, no recovery in

negligence. *Id.* Whether a duty exists is a question of law for the court to decide. *Id.* at 389.

[10] Generally, with respect to business invitees, landowners owe a duty to exercise reasonable care to protect them from dangerous activities on the land.[2] *Rogers v. Martin*, 63 N.E.3d 316, 320 (Ind. 2016). But "before extending this duty to a particular situation," courts must "analyze the foreseeability of harm." *Id.* at 324. The analysis of the foreseeability component of duty is a "lesser inquiry" than that of the foreseeability component related to the proximate cause of an injury. *Goodwin*, 62 N.E.3d at 390. In the duty analysis, foreseeability "requires a more general analysis of the broad type of plaintiff and harm involved." *Id.* at 391. "When considering these categories, courts should determine whether the defendant knew or 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 Sports Bar & Eatery. Ltd. v. Porterfield*, 140 N.E.3d 837, 838 (Ind. 2020). Because almost any outcome is possible, or is "sufficiently likely," that is not enough to give rise to a duty. *Goodwin*, 62 N.E.3d at 392. Instead, we assess "whether there is some probability or

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[2] Although the trial court applied the analysis for dangerous activities on the land—often applied when the harm involves the criminal act of a third party—outlined in *Rogers* and *Goodwin*, Midwest Training asserts the proper analysis here is that which is laid out in *Burrell v. Meads*, 569 N.E.2d 637, 639 (Ind. 1991), *reh'g denied*, and applies to harms caused by conditions on the land. However, Midwest Training does not support its assertion with any argument or citation to authority. And the cause of harm here—a punch by a third party—seems to fall into the category of "criminal act" or "dangerous activity" rather than "condition on the land." *See Poppe v. Angell Enters., Inc.*, 2021 WL 1522499, *2 (Ind. Ct. App. 2021) (discussing which analysis to apply where parties dispute whether the injuries "resulted from a condition on the premises or the criminal act of a third person."), *reh'g denied*, *trans. pending*.

likelihood of harm that is serious enough to induce a reasonable person to take precautions to avoid it." *Id.* (citation omitted)

[11] Our Supreme Court adopted this analysis in companion cases *Goodwin* and *Rogers*. In *Goodwin*, a bar patron sued the bar for injuries he sustained after another patron shot him with a handgun. The Court held the bar owed no duty because this action was not foreseeable, noting "that although bars can often set the stage for rowdy behavior, we do not believe that bar owners routinely contemplate that one bar patron might suddenly shoot another." *Goodwin*, 62 N.E.3d at 394. Similarly, in *Rogers*, the Court held a homeowner had no duty to protect a party guest from injuries he sustained after a fistfight broke out. Again, the Court noted that although "parties can often set the stage for raucous behavior, we do not believe that hosts of parties routinely physically fight guests whom they have invited." *Rogers*, 63 N.E.3d at 326.

[12] Our Supreme Court recently addressed this analysis again in *Cavanaugh's*. There, a bar patron sued the bar for injuries he sustained in a fight with another customer in the parking lot. The Court, applying *Goodwin* and *Rogers*, held there was no duty owed to the patron and stated:

> Cavanaugh's had no reason to foresee a bar patron blinding another during a sudden parking lot fight. Unlike the cases where courts have found a duty when a landowner knew or should have known about likely looming harm, [the plaintiff] does not show that Cavanaugh's had any reason to believe the fight would occur. The skirmish occurred suddenly and without warning: for hours before the fracas, [the plaintiff] and his friend socialized with bartenders and had no animosity with any other customers.

> Indeed, no evidence suggests any tension in the bar before the fight. And the bar had no reason to think that Porterfield, his assailants, or any of their affiliates were particularly suited to committing the specific criminal acts they perpetrated.

Cavanaugh's, 140 N.E.3d at 843-44 (citations omitted).

[13] The same can be said here. As part of our analysis regarding the duty Midwest Training owes to its patrons, we look at both the broad type of plaintiff and harm. The broad type of plaintiff is an amateur hockey player, and the broad type of harm is a punch to the face. While hockey games—like bars or parties—may be a common atmosphere for aggression, we do not believe sports facilities hosting amateur leagues have reason to foresee a fight of this nature. Wedster, a defensive player with no game-related reason to approach Rizzo, abruptly skated to the opposite side of the ice, slammed into Rizzo, and punched him in the face, causing him serious injury. As in *Goodwin* and *Cavanaugh's*, this fight occurred suddenly and without warning. And as Rizzo himself admits, a "deliberate and unprovoked physical assault is not at all a rough-and-tumble injury from the accepted nature of the game," and generally matches do not "involve violent attack and permanent injury." Appellant's Br. p. 12.

[14] Rizzo, however, argues this case is more in line with *Singh v. Singh*, 155 N.E.3d 1197 (Ind. Ct. App. 2020), *trans. not sought*, and *Hamilton v. Steak 'n Shake Operations Inc.*, 92 N.E.3d 1166 (Ind. Ct. App. 2018), *trans. denied*. In *Singh*, the

plaintiff sued the owner of his gurdwara[3] after a physical dispute arose and he was stabbed. The court held this action was foreseeable because the owner had knowledge of present and specific circumstances that would cause a reasonable person to recognize the risk of imminent harm and accordingly the gurdwara owed a duty to Singh for the foreseeable harm. Specifically, we noted that the owner knew tensions were high due to an anticipatory change in leadership occurring that day, that law enforcement was called the prior weekend after a "disturbance" occurred over these changes, that the gurdwara hired extra security that day in anticipation of people being "argumentative," and that members arrived that day carrying weapons. *Singh*, 155 N.E.3d at 1208.

[15] In *Hamilton*, our court held the restaurant had a duty to a patron who was injured in a fight that began in the restaurant and continued in the parking lot. Again, we noted the restaurant was aware of "escalating tension that intensified over the course of approximately thirty minutes" including verbal threats, blocking of the exits, and pounding on the windows. *Hamilton*, 92 N.E.3d at 1173. As such, the restaurant had knowledge of facts creating "some likelihood that one of [the] patrons could be harmed and that the potential harm could be serious." *Id.* Accordingly, we found the restaurant owed a duty to its patrons for this foreseeable harm.

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[3] A Sikh place of worship.

[16] Here, we have no evidence of "looming harm" or "escalating tensions." The record instead suggests this was a random act of aggression outside the normal course of hockey participation. Rizzo argues his foul against Schoop is evidence of the tensions between the two teams. This foul, however, occurred earlier in the period and did not involve Wedster. Nor is there any mention of continuing anger between the teams after the foul, or that Midwest Training should have taken this to be anything more than a normal foul in a hockey game. We cannot find that the harm suffered by Rizzo out of the blue is foreseeable. To conclude otherwise would impose a duty on such facility operators any time there is foul or other aggressive game maneuver. Such a result would also go against Indiana public policy, which "favor[s] the encouragement of participation in athletic activities and the discouragement of excessive litigation of claims by persons who suffer injuries from participants' conduct."[4] *Pfenning v. Lineman*, 947 N.E.2d 392, 403 (Ind. 2011).

[17] Rizzo further argues that Midwest should have foreseen Wedster's aggressive act because Wedster had been in a fight previously at the facility. This is "historical evidence," which is not to be considered regarding the foreseeability analysis in the duty context. *See Cavanaugh's*, 140 N.E.3d at 844 (evidence of amount of police runs made to the bar in the year before the fight is "historical

[4] We acknowledge the premises-liability analysis laid out in *Pfenning* is not applicable to this case because Midwest Training is not a sports participant. *Pfenning*, 947 N.E.2d at 405 (noting its "new formulation does not extend to persons or entities other than the athlete whose conduct allegedly caused a claimed injury.") Nonetheless, we believe its public-policy reasoning is relevant here.

evidence" that plays "no role" when evaluating foreseeability in the duty context.) And Rizzo presented no evidence that Wedster exhibited behavior during the hockey game that would have made his behavior foreseeable to Midwest Training. *Cf. Buddy & Pals III, Inc. v. Falaschetti*, 118 N.E.3d 38, 43 (Ind. Ct. App. 2019) (bar had a duty to protect patrons from tortfeasor when bar employees knew from his behavior that night that he was in "a fighting mood"), *trans. denied*. Because Wedster's action was not foreseeable, Midwest Training did not have a duty to protect Rizzo from an unforeseeable and unfortunate act.

Conclusion

[18] The trial court properly granted summary judgment.

[19] Affirmed.

Bradford, C.J., and Brown, J., concur.