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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1278**

James F. Edgar,
Appellant,

vs.

Moose Lodge 2023,
Respondent.

**Filed May 8, 2017
Affirmed
Klaphake, Judge***

Itasca County District Court
File No. 31-CV-15-2271

James W. Balmer, Falsani, Balmer, Peterson, Quinn & Beyer, Duluth, Minnesota (for appellant)

Brian A. Wood, William L. Davidson, Lind, Jensen, Sullivan & Peterson, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Rodenberg, Presiding Judge; Stauber, Judge; and Klaphake, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

KLAPHAKE, Judge

Appellant James Edgar sued respondent Moose Lodge 2023 for negligence after a bar patron injured Edgar, and the district court granted summary judgment for Moose Lodge. On appeal, Edgar argues that the district court erred by refusing to consider an expert affidavit, and by granting summary judgment for respondent. We affirm.

DECISION

I. Consideration of Expert Affidavit

The district court excluded an expert opinion from its summary-judgment consideration because Edgar’s filing was untimely. Edgar admits his filing was late but argues that the district court erred because exclusion was too harsh a penalty. We review the district court’s decision to exclude evidence from its summary-judgment consideration for an abuse of discretion. *Antonello v. Comm’r of Revenue*, 884 N.W.2d 640, 644–45 (Minn. 2016).

Minnesota Rule of General Practice 115.03(b) requires parties responding to dispositive motions to serve and file all supplementary affidavits and exhibits “at least 9 days prior to the hearing.” The district court may waive or modify time limits “[i]f irreparable harm will result absent immediate action by the court, or if the interests of justice otherwise require.” Minn. R. Gen. Pract. 115.07. But the district court has broad discretion when applying Rule 115. See Minn. R. Gen. Pract. 115.06; see also *Am. Warehousing & Distrib., Inc. v. Michael Ede Mgmt., Inc.*, 414 N.W.2d 554, 557 (Minn.

App. 1987) (holding no abuse of discretion for refusal to consider untimely affidavit under rule 56.03), *review dismissed* (Jan. 20, 1988).

Edgar relies on *Dennie v. Metropolitan Medical Center*, 387 N.W.2d 401, 402–04 (Minn. 1986), in which the supreme court determined that the district court abused its discretion by suppressing expert testimony on the day of trial because of plaintiff’s untimely disclosure. Edgar’s reliance on *Dennie* is unpersuasive. That case dealt with suppression of expert testimony on the day of trial that resulted in a judgment of dismissal. *Id.* at 402. Edgar’s case is easily distinguished; this was not a day-of-trial ruling, and exclusion of the expert opinion did not necessitate the dismissal of his case. In addition, Edgar failed to offer the district court any reason for the untimely filing. Under these circumstances, the district court did not abuse its broad discretion.

II. Summary Judgment

Edgar challenges the district court’s grant of summary judgment in favor of Moose Lodge. Summary judgment is appropriate when no genuine issue of material fact exists and either party is entitled to a judgment as a matter of law. Minn. R. Civ. P. 56.03. “[W]e review a grant of summary judgment to determine (1) if there are genuine issues of material fact and (2) if the district court erred in its application of the law.” *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008) (quotation omitted). “We review the evidence in the light most favorable to the nonmoving party.” *Hoff v. Surman*, 883 N.W.2d 631, 633 (Minn. App. 2016).

The district court granted summary judgment for Moose Lodge after it determined “as a matter of law that [Moose Lodge] was not on notice by an act or threat that [Edgar’s

assailant] had vicious or dangerous propensities.” Bar owners owe their patrons a duty to “exercise reasonable care under the circumstances to protect their patrons from injury.” *Alholm v. Wilt*, 394 N.W.2d 488, 490 (Minn. 1986). To prevail on a negligence claim of innkeeper liability, a plaintiff must prove four elements:

(1) the proprietor must be put on notice of the offending party’s vicious or dangerous propensities by some act or threat, (2) the proprietor must have an adequate opportunity to protect the injured patron, (3) the proprietor must fail to take reasonable steps to protect the injured patron, and (4) the injury must be foreseeable.

Boone v. Martinez, 567 N.W.2d 508, 510 (Minn. 1997).

Edgar argues that the district court applied the wrong summary-judgment standard, improperly weighed evidence, and wrongly concluded there were no genuine issues of material fact. Edgar challenges the district court’s statements that “[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial,” and that “a reasonable juror could not conclude that [the assailant’s] tap/poke of [Edgar’s] shoulder would put a bartender on notice that [the assailant] had vicious or dangerous propensities.”

In *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69–71 (Minn. 1997), the supreme court observed that the district court’s proper function on summary-judgment motions “is not to decide issues of fact, but solely to determine whether genuine factual issues exist.” But it also stated that the district court “is not required to ignore its conclusion that a particular piece of evidence may have no probative value, such that reasonable persons could not draw different conclusions from the evidence presented.” *Id.* The supreme court held:

[T]here is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions.

Id. at 71.

The threshold issue here was whether Moose Lodge's bartender was "put on notice of the offending party's vicious or dangerous propensities by some act or threat." *Boone*, 567 N.W.2d at 510. The district court acknowledged its duty to refrain from weighing evidence. But the nonmoving party must produce evidence "sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *DLH*, 566 N.W.2d at 71.

Edgar's assailant had no history of misconduct indicating vicious or dangerous propensities. Throughout the night, Edgar and his assailant would alternate between argument and silence. No testimony indicated that the assailant would suddenly engage in a physical altercation. Edgar and his assailant had known each other for many years. His assailant was intoxicated. The assailant swore at Edgar and tapped/prodded him, eliciting two verbal warnings from the bartender. But the assailant's acts were insufficient as a matter of law to put Moose Lodge's bartender on notice of any "vicious or dangerous propensities." The district court reasoned that "a reasonable juror could not conclude that [the assailant's] tap/poke of [Edgar's] shoulder would put a bartender on notice that [the assailant] had vicious or dangerous propensities." We agree. Edgar failed to produce

sufficient evidence to support an essential element that would permit reasonable persons to draw different conclusions.

Edgar argues that the district court erred by determining that disagreement over the degree of his assailant's intoxication was not a dispute of material fact. The district court concluded that the assailant's level of intoxication had "no bearing on whether [Moose Lodge] was on notice that [the assailant] had vicious and dangerous propensities."

A fact is material if it would affect the result or outcome of the case. *Zappa v. Fahey*, 310 Minn. 555, 556, 245 N.W.2d 258, 259–60 (1976). Edgar argues that the assailant's intoxication was material to the issue of notice. He relies on several cases to support the materiality of intoxication. *See Klingbeil v. Truesdell*, 256 Minn. 360, 364, 98 N.W.2d 134, 138 (1959) (concluding that "there is ample evidence in the record from which the jury could find that both [assailants] were intoxicated to the point where the proprietor or his servant should have been aware of the fact that their conduct would lead to trouble" after observing quarrels, arguments, and inflammatory language); *Priewe v. Bartz*, 249 Minn. 488, 493, 83 N.W.2d 116, 120 (1957) (concluding that district court properly denied motion for judgment notwithstanding the verdict or a new trial because evidence that the bartender "had ample opportunity to observe [the assailant's] manner and condition" and the bartender's subsequent conduct supported jury's verdict); *Alholm v. Wilt*, 348 N.W.2d 106, 109 (Minn. App. 1984) (concluding that there was "considerable evidence" that the bar was put on notice because the assailant was "offensive, drunk, boisterous, and had a history of rowdiness and fighting in that bar itself"), *review denied* (Minn. Sept. 12, 1984).

But in all of these cases, intoxication was accompanied by some other act that put the defendant on notice of an assailant's "vicious or dangerous propensities." The relevant element requires a proprietor to be put on notice of an offending party's "vicious or dangerous propensities" based on an "act or threat." *Boone*, 567 N.W.2d at 510. Intoxication is not, by itself, an "act or threat." If intoxication alone was sufficient to establish notice of vicious or dangerous propensities, we would effectively create strict liability for injuries caused by intoxicated patrons. We decline to do so. And intoxication does not elevate acts otherwise insufficient to provide notice of vicious or dangerous propensities into legally sufficient acts. The district court properly concluded that any dispute over the degree of intoxication was immaterial.

The district court applied the proper summary-judgment standard, did not improperly weigh evidence, and did not ignore a genuine issue of material fact. We therefore affirm the district court's order granting summary judgment for Moose Lodge.

Affirmed.