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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1198**

Michelle Friesen,
Appellant,

vs.

VFW Post 2793,
Respondent,

Jesse F. Lunak, et al.,
Defendants.

**Filed February 10, 2020
Affirmed
Smith, John, Judge***

Pennington County District Court
File No. 57-CV-17-906

Dean M. Salita, Schmidt-Salita Law Firm, Minneapolis, Minnesota (for appellant)

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Considered and decided by Jesson, Presiding Judge; Ross, Judge; and Smith, John,
Judge.

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

UNPUBLISHED OPINION

SMITH, JOHN, Judge

This appeal arises from the death of Bradley Friesen, who was fatally injured outside VFW Post 2793 in Thief River Falls. Appellant Michelle Friesen, Bradley Friesen's wife and next-of-kin, sued respondent VFW Post 2793 (VFW) for wrongful death, pleading an innkeeper-negligence claim. We affirm the district court's grant of summary judgment because VFW lacked notice of any assailant's propensity for violence that made the injuries to the decedent Bradley Friesen foreseeable under a theory of innkeeper negligence.

FACTS

Bradley Friesen and three of his friends were socializing at VFW. Friesen began speaking with an off-duty gaming manager. At some point the conversation became heated. Friesen made derogatory comments and used racial slurs towards the gaming manager. The gaming manager told Friesen to leave and told the commander of the VFW to get Friesen away from him. The commander stood between the gaming manager and Friesen. The gaming manager ultimately walked away from the interaction.

Meanwhile, Friesen continued to be "argumentative and boisterous." The bartender told Friesen to leave the bar and threatened to call the police. Jesse Lunak, the doorman at VFW, saw that Friesen seemed like he wanted to start a fight with "anybody and everybody" in the bar. Lunak asked the commander if he should escort Friesen out. The commander said yes. Shaun Brandt, a bar patron, and Lunak removed Friesen from the bar. Lunak grabbed Friesen from behind and walked him out. Brandt followed.

Once outside, Lunak released Friesen. Lunak feared that Friesen was going to lunge and throw a punch. Lunak did not see what happened next because it “happened so fast.” Brandt pushed Friesen and Friesen fell backwards. Friesen’s head hit the ground and he was knocked unconscious. Friesen died several days later.

Appellant sued VFW, Brandt, and Lunak. Under an innkeeper-negligence theory, appellant claimed that VFW was negligent because it allowed Brandt and Lunak to escort Friesen out of the bar after Friesen became belligerent and that Brandt and Lunak were responsible for the injuries because Brandt pushed Friesen away. The district court granted summary judgment for VFW because “VFW had no indication that Shaun Brandt was aggressive or a violent person.”

D E C I S I O N

Appellant challenges the district court’s grant of summary judgment in favor of VFW. “Summary judgment is appropriate when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law.” *Senogles v. Carlson*, 902 N.W.2d 38, 42 (Minn. 2017). A fact is material if it will affect the outcome of the case. *Zappa v. Fahey*, 245 N.W.2d 258, 259-60 (Minn. 1976). Summary judgment is “inappropriate when reasonable persons might draw different conclusions from the evidence presented.” *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008) (quotation omitted). Appellate courts review a grant of summary judgment de novo. *Commerce Bank v. W. Bend Mut. Ins. Co.*, 870 N.W.2d 770, 773 (Minn. 2015). When conducting this review, “we view the evidence in the light most favorable to the nonmoving party . . . and resolve

all doubts and factual inferences against the moving parties.” *Rochester City Lines, Co. v. City of Rochester*, 868 N.W.2d 655, 661 (Minn. 2015).

The district court granted summary judgment for VFW after it determined that “VFW had no indication that Shaun Brandt was aggressive or a violent person” or that Brandt would cause injury to Friesen. Because VFW did not have notice of Brandt’s violent propensities, the district court determined that the innkeeper-negligence claim failed as a matter of law.

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 claim of innkeeper negligence, a plaintiff must prove four elements:

- (1) notice of the offending party’s “vicious or dangerous propensities” by “some act or threat,”
- (2) adequate opportunity for the innkeeper to protect the injured patron,
- (3) failure on the part of the innkeeper to take reasonable steps to do so, and
- (4) foreseeable injury.

Henson v. Uptown Drink, LLC, 922 N.W.2d 185, 190 (Minn. 2019) (citing *Boone v. Martinez*, 567 N.W.2d 508, 510 (Minn. 1997)). Notice is a prerequisite to foreseeability. *Alholm*, 394 N.W.2d at 491 n.5. If a bar owner had no notice of an assailant’s propensity for violence, “no duty to protect arose,” because the assault would not have been foreseeable to a reasonable bar owner. *Id.*

Appellant argues that the district court wrongly concluded that VFW did not have notice and contends that the “totality of the circumstances” is sufficient to meet the first element of innkeeper negligence. VFW argues that, for a claim of innkeeper negligence,

notice requires a showing of the offending party's vicious or dangerous propensities, not that a "totality of the circumstances" shows a foreseeable injury. We agree.

As a preliminary matter, appellant argues that the correct standard for determining notice for innkeeper liability is to consider the "totality of the circumstances." Specifically, appellant maintains that the totality of the circumstances put VFW on notice that an injury could occur. But the "totality of the circumstances" at issue here is not whether there was a risk of injury under the circumstances. Instead, the threshold issue here is whether VFW had "notice of the offending party's vicious or dangerous propensities by some act or threat." *Boone*, 567 N.W.2d at 510. Of particular importance here are the words "offending party."

Here, the offending party is Brandt. To survive summary judgment, appellant must show that VFW was put on notice that Brandt had vicious or dangerous propensities by some act or threat. *Id.* Appellant does not assert that Brandt had vicious or dangerous propensities. And the record shows that Brandt did not exhibit such behaviors. There is no testimony to indicate that Brandt threatened or acted in any way that would have put VFW on notice that he would assault Friesen. Based on this record, even viewing the facts in the light most favorable to appellant, VFW did not have notice of Brandt's dangerous propensities and no assault by Brandt could have been foreseeable to a reasonable bar owner. *See Bjerke v. Johnson*, 742 N.W.2d 660, 664 (Minn. 2007) (requiring a court to view facts in the light most favorable to non-moving party for summary judgment).

Appellant argues that Friesen's own conduct put VFW on notice that Brandt might injure him. Appellant's argument to substitute the injured-party's actions for the

“offending party” is not persuasive for several reasons. First, the case appellant cites in support of her position, *Henson*, does not actually support her position. Appellant contends that *Henson* supports the notion that Friesen’s conduct in the bar put VFW on notice that an injury was foreseeable, making summary judgment improper. By making this argument, appellant generalizes “foreseeability” to include the foreseeability that any patron might be injured by another patron, not that Brandt might injure Friesen. But *Henson* does not support this generalized view of foreseeability. In *Henson*, the “notice” that leads to a duty based on foreseeability is the “notice of the *offending party’s* vicious or dangerous propensities by some act or threat.” 922 N.W.2d at 190 (quotation omitted) (emphasis added). And in *Henson*, the analysis of the totality of the facts and circumstances that might put the innkeeper on notice and result in a duty based on foreseeability focused on the offending party’s conduct. *See id.* at 192-93 (offending party was in altercations with other patrons, drinking, and threw a punch before the injury to the victim).

Second, the argument is inconsistent with the elements of innkeeper liability. The first element clearly states that the proprietor must be put on notice of the “offending party’s” propensities. *Id.* at 190. The supreme court has denied liability where proprietors have notice of other patrons’ dangerous propensities but not the offending party. *See Filas v. Daher*, 218 N.W.2d 467, 470 (Minn. 1974) (concluding that there was “no reason for [the proprietor] to foresee” the conduct of a third party to a quarrel, and the proprietor “cannot be held liable for failing to anticipate unusual or abnormal conduct”). As VFW points out, there is no precedent for substituting notice of the dangerous propensities of the injured party for that of the offending party.

And finally, asserting that innkeeper liability is premised on any patron's vicious or dangerous propensities essentially creates strict liability, which the supreme court has expressly rejected. *Devine v. McLain*, 306 N.W.2d 827, 831 (Minn. 1981).

In sum, where VFW did not have notice of Brandt's vicious or dangerous propensities, no duty to protect existed because the assault would not have been foreseeable to a reasonable bar owner. *Alholm*, 394 N.W.2d at 491 n.5. Accordingly, the district court did not err in granting VFW's motion for summary judgment because without notice, a claim for innkeeper negligence fails as a matter of law. *Gilbertson v. Leininger*, 599 N.W.2d 127, 130 (stating that "in the absence of a legal duty, the negligence claim fails").¹

Affirmed.

¹ Appellant also argues that VFW failed to take reasonable steps to protect Friesen when it failed to call the police and that an injury was foreseeable. Because we conclude that appellant did not meet the notice requirement for innkeeper negligence, we do not reach these arguments.