2017 IL App (2d) 170207-U
No. 2-17-0207
Order filed December 6, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

JACK D. ELSTON, Plaintiff-Appellant, v. THOMAS L. HANNAH, JR., JOSEPH A. CALDERONE a/k/a JOSEPH A. BUSTAMANTE and LATHAM TAP, INC., an Illinois corporation d/b/a LATHAM TAP, Defendants. (Latham Tap, Inc., an Illinois corporation, d/b/a Latham Tap, Defendant-Appellee)	)	Appeal from the Circuit Court of Winnebago County. No. 2014-L-75 Honorable Eugene G. Doherty Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Hutchinson and Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted defendant-bar owner's partial motion for summary judgment based upon common law negligence when the victim failed to prove that the bar had a duty to protect him from an unforeseeable criminal attack by another patron of the bar.

¶ 2 Plaintiff Jack Elston (Elston) appeals from the trial court's order granting partial summary judgment in favor of defendant Latham Tap (the bar) on a common law negligence

count. The cause of action stemmed from an attack on one of the bar's patrons by another patron in the bar's parking lot. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 The record reflects that Elston filed this lawsuit against the bar and two bar patrons, Thomas Hannah and Joseph Calderone, after he was hit in the head with a baseball bat and seriously injured at the bar. Elston sued both Hannah and Calderone for battery and negligence. Both Calderone and Hannah defaulted. Elston sued the bar under the Illinois Dram Shop Act (235 ILCS 5/6-21 (West 2008)) and for common law negligence, alleging that the bar had a duty to protect him from a third party criminal attack. The bar filed a motion for partial summary judgment on the common law negligence claim. The trial court granted the bar's motion and concluded that the bar did not owe a duty to protect Elston from an unforeseeable criminal attack by Calderone as a matter of law.

¶ 5 The fight between Elston and Calderone was not witnessed. Therefore, the evidence about how it occurred came from police reports and depositions of some of the bar's patrons and employees.

¶ 6 The bar's owner, Gabriel Yates (Gabe) testified in his deposition that the bar has three entrances. There is a door for a liquor store, a main entrance opening to the street, and a door in the back by the parking lot. There is a breezeway located between the back parking lot entrance and the bar area. Separating the breezeway and the bar area is a swinging door. When the swinging door is shut, any activity in the breezeway is blocked from view. Gabe said that he used to act as a bouncer at the bar, but when he opened up another bar in town four months before the instant attack he did not have a bouncer replaced at the bar.

¶ 7 In his deposition Elston testified that in December 2008 he considered himself a regular at the bar. The bar is around five blocks from his house and it's considered a neighborhood bar. Although he had never been in a physical altercation at the bar, he said that there were always "scuffles" breaking out there and words were always exchanged. The regular patrons at the bar had to keep the order with people that "got out of line." Elston had seen over 20 fights in the bar. He never had a concern for his own safety before the attack; however, he did speak to Gabe about the need for bouncers at the bar. He also spoke to several bartenders about the need for more security. However, the bartenders and the bar owner would say nothing when Elston told them they needed bouncers at the bar. Instead, they would "turn a blind eye to it." Elston estimated that in 10 out of the 20 fights he had witnessed at the bar the police were called half of the time.

¶ 8 Elston testified that he got to the bar around midnight on Saturday, December 6, 2008. He entered through the back door and took a seat at the end of the bar and closest to the breezeway. There were about 40 people in the bar at that time. He recognized about 30 of the people. Hannah was in the bar, but he did not recognize him. Hannah was sitting with "a Mexican guy" at the end of the bar closest to the main entrance. Alla and Carrie were the bartenders. Trish, another bartender, and Gabe, the owner, were not there. Elston ordered a beer and Alla served it to him. Carrie was doing shots with two other patrons. He drank about half of his beer and was trying to talk to his girlfriend on his phone but he could not hear her with the music on, so he went into the breezeway to talk to her. He was talking to his girlfriend around five minutes when Hannah walked into the breezeway. Elston was not paying attention to Hannah; he thought Hannah just came into the breezeway to smoke. Hannah then started "slandering" him and making accusations against him. Again, Elston said he was not paying any

attention to Hannah and the only reason he recognized him from the bar was that Hannah was drinking with Carrie the bartender. Without any warning, Hannah then punched him in the face. Elston said that he "let it go" the first time, but then Hannah hit him again. He told Hannah to stop hitting him, and as Hannah tried to hit him again he knocked Hannah out with a punch to the face. Hannah fell through the kitchen door, maybe with a little help from Elston. Elston was so angry by that time that he jumped on Hannah in the kitchen and "beat his face in." He then got up and went back to his phone. Hannah then got up, ran out the kitchen door and charged at Elston again when he was in the breezeway. When Hannah charged at Elston again, Elston picked up Hannah and threw him out the back door of the bar and into the parking lot. Elston had just stepped out into the parking lot when he guessed that he was "jumped" by one of Hannah's buddies. He did not see who hit him because the attacker was either behind him or on his side. After being hit he did not remember anything for months and was in a coma.

¶ 9 Elston said that Hannah could not have been the person who hit him with a baseball bat. Instead, he thinks that the person who hit him with the bat exited the bar out a door other than the back entrance, went to their car and got the instrument to hit him with and was waiting for Elston outside.

¶ 10 Elston testified that if the bar had security the night of the attack it probably would not have happened, and even if it did, the situation would not have escalated to the point where he was eventually badly beaten. Security should have been there to watch the doors, look outside, keep an eye out and not drink with the patrons. Also, the bar should not have been playing the music so loud so that no one could hear him being attacked in the breezeway.

¶ 11 Ramiro Martinez, an acquaintance of Elston's, testified that he was in the breezeway at the time the fight between Hannah and Elston when it started. Elston asked Martinez to hold his

phone while he fought Hannah. Martinez admitted that he never told anyone in the bar that there was a fight taking place. He just stood in the corner of the breezeway and watched until the fight spilled outside, at which point he returned inside the bar.

¶ 12 Alla Bayko, a former bartender at the bar, testified that she had been working at the bar for about a year before Elston was attacked. She did not remember that many fights in the bar before this incident. Maybe a couple of fights, and once in a while there would be two customers who would get into each other faces, but it never actually got as far as a fight. There were verbal arguments about once a week, just like at every other bar.

¶ 13 Alla said if someone threw a punch then the other customers would break it up and ask both parties to leave. Joe Goethe, a cook and bartender, was usually at the bar and he would also break up the fight or even stop it from happening. On the night of the attack she and Trisha were bartending and Joe was there earlier, but he left the bar before the attack. She and Trisha were in charge of security that evening. Carrie might have also been working on the night of the attack, but primarily Alla only worked with Trisha that night. The owner told them if there was a fight to call 911. Fights were not common because the owner always told them to make sure fights do not happen by "cutting people off" if they saw a problem. Most of the time when there was a fight it was usually someone new in the bar.

¶ 14 Alla testified that she also saw Carrie break up about three fights between the bar's patrons between 2007 and 2008. Carrie was the toughest one; she would be the fastest one to leave the bar and jump into the middle of a fight. She did not recall ever seeing Elston in a fight at the bar. After Carrie stopped working that evening she sat down with Hannah and his friends and had a couple of drinks and maybe a pitcher of beer.

¶ 15 Carrie Furman testified that she was a manager at the bar. She was working at the bar earlier on the evening of the attack and she stayed after her shift ended. She remembered Martinez handing her a cell phone and explaining that the person whose cell phone it was went outside. Carrie did not know whose cell phone it was and Martinez did not tell her that Elston needed help or that he had been in a fight. She went outside to see whose phone it was and found Elston lying on the ground. She went to get Elston's friends for help and she believed that the police were called after Elston was taken to the hospital by his friends.

¶ 16 Carrie did not recall Hannah or any of his friends being belligerent or out of control the night of the attack, and Hannah was also not out of control the Friday evening before the attack. She heard that on Friday night, Hannah touched another patron's hair and commented on it. If she had seen that take place she would have told him to leave the bar. She remembered telling Trish and Alla that they had over served Hannah and his friend on the night of the attack and they responded, "You're not working. We got it." Carrie also thought that the music in the bar was too loud that night.

¶ 17 Carrie testified that she was concerned because the door going from the bar to the kitchen and the rear exit was closed and she could not see what was happening in that hallway. She said that in the past someone came in the bar and went through the kitchen and stole things from the kitchen. She was not necessarily worried about fighting in that area as much as theft.

¶ 18 Carrie said that there were no bouncers at the bar or any paid security personnel. When she was working she was in charge of security and she did her best. The owner was not present when Carrie was working; he just came in to drop off money or inventory. He would leave before the bar opened and he would only come back later in the day to bring money or food to the bar. She did not think the bar needed a full-time security guard when she was on duty.

However, when she was not at the bar the atmosphere was different. One time a patron got punched in the mouth and had all of his teeth knocked out. In 2006 or 2007 a female patron picked up an employee at the bar and threw him out the door. However, during the eight years that Carrie worked at the bar she only had to call the police once.

¶ 19 Carrie saw Hannah and his friend drink at least two glasses filled with vodka and a pitcher of beer. They were drinking the vodka from rock glasses held over four ounces. She saw Hannah walking funny when he got up from his chair and went through the door where Elston was talking on his phone.

¶ 20 Brandon Mengelt, a regular patron at the bar, testified that in his opinion, every day there was the potential of punches being thrown at the bar. Hannah had been at the bar on the Friday before the attack. He had been loud and Carrie stopped serving him alcohol, but he did not get into any physical altercations that night. That Friday night Hannah approached him and touched his hair and started making fun of him, implying that he was gay. However, Hannah did not do anything else that made Mengelt think that a fight was going to break out.

¶ 21 Mengelt said that the next night, the night of the attack, he heard Carrie tell two bartenders not to serve Hannah and his friend too much and not to let them get drunk like they had been the night before. Carrie also told the bartenders to keep an eye on them. Mengelt saw that Hannah and his friend each had glasses filled with a clear liquid in front of them as well as two partially finished pitchers of beer. However, Mengelt also testified that he did not believe that a fight was going to break out on the night of the attack and he did not hear anyone else at the bar say that they thought a fight was going to break out.

¶ 22 Tory Cooper, one of Hannah's friends, also testified about Hannah's behavior in the bar on the night of the attack. He said that Hannah was rhetorically asking other patrons, "What are

you looking at?" Cooper could not recall another example where Hannah was acting rude or aggressive, though. Hannah was warned by the bartenders about the way he was talking and they stopped serving him. However, Hannah was not removed from the bar because he stopped being disruptive. Hannah never interacted with Elston or Elston's friends.

¶ 23 Cooper said that he and Hannah had many shots of alcohol together on the night of the attack. Later when their friend Joe Calderone arrived, they drank more shots. However, Calderone did not drink the same amount as he and Hannah because he arrived at the bar later, between 10:00 and 10:30 p.m. Calderone may have had four or five shots with Cooper. Calderone was 6'1" tall and weighed 205 pounds. Cooper said that Calderone was not intoxicated. Eventually Cooper left the bar because he was worried that a fight might break out because of Hannah's conduct.

¶ 24 Trish Starr, a bartender, testified that she cut Hannah off from alcohol on the night of the attack because he and his friends were getting "mouthy" and "rowdy" towards other patrons. Trish saw Hannah and his friends "disturbing" other people about 30 minutes before the fight.

¶ 25 During the criminal investigation into Hannah and Calderone, the Rockford Police Department detectives spoke to Calderone's wife, Betina Rinella, at 7:45 a.m. on December 7, 2008. Rinella gave the police permission to search Calderone's vehicle. During the search Rinella told the police that she kept a Louisville slugger in that car. After searching the vehicle, no bat was found.

¶ 26 Sergeant Stevens testified that the police did not have a lot of problems at the bar. It was a neighborhood bar with a lot of regular customers. Detective Mastroianni testified that most of the bar's customers were working class people just drinking beer and getting something to eat while watching a sporting event. With regard to crime, Mastroianni said that in the last 13

years, the entire time he had been a detective, he had not investigated any major crimes at the bar before the instant attack.

¶ 27 Donald Decker, a former security guard and state police officer, testified that he had been retained by Elston to review the facts of this case. Decker opined that assaults in bars are not always reported to the police. According to Decker, the female bar tenders did not call the police when fights broke out due to Gabe's influence on them. He said that Gabe was afraid that if he gave up surveillance footage it would have an impact on his license. Decker believed that this bar was a troubled bar with a history of assaultive, unreported behavior. The security cameras were inadequate and, in his opinion, Gabe deviated from the standard of care by failing to have adequate security in a bar that was known to have "security vulnerability." The fact that the bar had suffered a theft in the past was an indication that it was vulnerable to violent crime. Also, loud music made it impossible for anyone to hear a fight in the breezeway. Decker further opined that a reasonable bar manager would have had security surveillance of the breezeway either through active monitoring or by employee monitoring. Decker also said that it was not reasonable for Gabe to rely on his bartenders to break up fights. Finally, Decker noted Gabe's testimony that he used to act as a bouncer at the bar but that when he opened up another bar in town he did not find a security replacement for himself at the bar.

¶ 28 On September 12, 2016, the bar filed a motion for partial summary judgment, asserting that it owed no duty to Elston. Elston responded to the motion and the bar replied to his response. In Elston's response, he included a description of other incidents that occurred before his attack where the police were called to the bar as well as other physical altercations that were identified by patrons and employees of the bar but the police were not called. The descriptions were as follows:

"2/16/06: Disorderly conduct: A patron was loud and rude to other patrons. While outside the building, the patron was locked out and was banging on the exterior windows and door of the building;

9/2/06: A patron was punched by the pool table inside the building;

3/31/07: Battery. A disturbance by the pool table where the patron went outside and was struck by another patron;

7/26/07: Aggravated battery: A patron was hit by a previously ejected patron by the pool tables inside the building. A fight started and continued outside the building;

During the approximate 13 years before this incident, there were 10 or 12 physical fights;

During the approximate four years before this incident, there were fights that may have included pushing;

During the approximate one year before this incident, there were arguments between patrons about once a week and two physical fights;

During the five months before the incident in 2008 there were two physical fights where people got rowdy."

¶ 29 The trial court heard argument on the motion on November 18, 2016, and issued its written decision on January 12, 2017.

¶ 30 In its ruling the trial court broke up the issue of whether the bar owed Elston a duty into three time frames: (1) the day before the fight; (2) the day of the fight; and (3) the day after the fight. As for Elston's claim that the bar failed to employ sufficient security or train its personnel in security matter, the court found that evidence of prior arguments or "disorderly conduct" was irrelevant. As for evidence of prior altercations between customers, the court found that Elston

failed to explain how additional security would have prevented the fight at issue. The court explained that the bar's employees only learned of the fight after it had begun, it would be unreasonable to impose a duty on a bar owner to hire enough security to "have every foot of the premises under near constant watch."

¶ 31 With regard to duties arising on the day of the fight, the court found, "events occurring an hour or two before the confrontation began could not be sufficient to trigger a duty to hire more security or to better train Latham Tap's personnel." The court also found that the bar did not owe a duty to Elston to protect him from a physical attack by a person who was a "non-regular," who was vaguely rude or aggressive to other customers and who was intoxicated. It said that it was reasonably foreseeable that tavern customers may become intoxicated and that some of them may become rude or aggressive to other patrons. However, it is not reasonably foreseeable that such patrons will physically attack another patron.

¶ 32 Finally, as to Elston's claim that the bar was improperly monitored after the fight began, the court wrote:

> "The court does not believe that the law imposes on tavern keepers such as Latham Tap the duty to 'monitor' every square foot of their premises without so much as a four to six minute interval. Remember, the law does not generally impose a duty to anticipate a criminal assault absent some specific reason which gives rise to such a concern. Imposing a duty on tavern owners is patently unreasonable."

On February 2, 2017, the trial court entered a finding under Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016), that there was no just reason to delay enforcement or appeal.

¶ 33 II. ANALYSIS

¶ 34 On appeal, Elston argues that the trial court erred in granting partial summary judgment for the bar on the common law negligence count. He contends that the trial court misconstrued the evidence in favor of the bar, which led to its erroneous finding that the bar owed no duty to him. Specifically, Elston claims that the court erred in granting partial summary judgment to the bar when: (1) arguments and fights at the bar were regular events; (2) the bar owner knew that he needed security at the bar; (3) there was grossly inadequate security provided at the bar; and (4) the bartenders knew that Hannah was intoxicated and aggressive 30 minutes prior to the onset of the fight such that they should have asked him to leave, or ejected him, before the fight began.

¶ 35 Within his brief, however, Elston also argues that the trial court erred in finding that: (1) the evidence of prior arguments and fights at the bar was irrelevant; (2) he failed to explain how additional security would have prevented the attack; and (3) since the bar employees only learned of the fight after it began, it would be unreasonable to impose a duty on a bar owner to hire enough security to "have every foot of the premises under near constant watch."

¶ 36 We review a trial court's ruling on a motion for summary judgment *de novo*. *U.S. Bank National Trust Association v. Hernandez*, 2017 IL App (2d) 160850, ¶ 14 (citing *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 42–43 (2004). *De novo* consideration means that we perform the same analysis that a trial judge would perform. *Arient v. Shaik*, 2015 IL App (1st) 133969, ¶ 18. As such, we are not concerned with the trial court's findings. Therefore, we will not address Elston's arguments that the trial court erred in finding that: (1) the evidence of prior arguments and fights at the bar was irrelevant; (2) Elston failed to explain how additional security would have prevented the attack; and (3) since the bar employees only learned of the fight after it began, it would be unreasonable to impose a duty on a bar owner to hire enough security to "have every foot of the premises under near constant watch."

¶ 37 Summary judgment is appropriate where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2–1005(c) (West 2016). Therefore, the purpose of summary judgment is not to try a question of fact but rather to determine whether a genuine issue of material fact exists. *U.S. Bank Trust National Association v. Hernandez*, 2017 IL App (2d) 160850, ¶ 14 (citing *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 42–43 (2004)). In determining whether such a question exists, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent. *Id.* "A triable issue precluding summary judgment exists where the material facts are disputed, or where, the material facts being undisputed, reasonable persons might draw different inferences from the undisputed facts." *Id.* Summary judgment is appropriate only where the right of the movant is clear and free from doubt. *Id.*

¶ 38 Generally, Illinois does not impose a duty on a landowner to protect others from criminal attacks by third parties. *Simmons v. Homatas*, 236 Ill. 2d 459 (2010). However, an exception to this rule exists when: (1) the parties had a "special relationship"; and (2) the attack was reasonably foreseeable. *Id.* at 475. A "special relationship" has been recognized where the parties are in a position of business invitor and invitee. *Rowe v. State Bank of Lombard*, 125 Ill. 2d 203, 216 (1988).

¶ 39 Section 344 of the Restatement (Second) of Torts provides, in relevant part:

> "A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally

harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to

(a) discover that such acts are being done or are likely to be done, or

(b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it." Restatement (Second) of Torts § 344 (1965).

¶ 40 To recover in a negligence action against a tavern, a plaintiff "must establish that the defendant owes a duty, has breached that duty, and that plaintiff has been injured as a proximate result of defendant's breach of duty." *Davis v. Allhands*, 268 Ill. App. 3d 143, 150 (1995). A bar owner is not an insurer of its customers' safety. *Id*. at 152. "Although a tavern operator has a duty to protect its patrons from foreseeable dangers caused by third parties, there is no duty to protect against the criminal attacks of third persons unless circumstances such as prior incidents charge the owner or occupier of land with knowledge of the danger." *Id*. at 151. When determining if a duty arises in these types of cases, it is for the court to determine, as a matter of law, whether the criminal attack was reasonably foreseeable. *Id*. A criminal attack is reasonably foreseeable when a prudent person would have foreseen the event as likely to happen. *Id*. Reasonable foreseeability "must be judged by what was apparent to defendant at the time of the complained-of conduct, and not by what may appear through hindsight." *Id*. Foreseeability must be determined upon the facts and circumstances of each case. *Getson v. Edifice Lounge, Inc*., 117 Ill. App. 3d 707, 711 (1983). When a court determines whether a legal duty exists, in addition to the foreseeability of the injury, it must also weigh the likelihood of the injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden on the defendant. *Lutz v. Goodlife Entertainment, Inc.*, 208 Ill. App. 3d 565, 569 (1990).

¶ 41 Before we address the merits of Elston's issues on appeal we must initially note that in its brief, the bar brings to our attention that several pages in Elston's appendix entitled "10 Crucial Duties of a Security Guard or Bodyguard" were not a part of the record below and as such should be disregarded by this court. In a footnote in his reply brief, Elston disagrees with the bar. Specifically, he argues that since Decker, his security expert, "certainly opined that security was required at this bar and court [*sic*] can take judicial notice of the authority plaintiff cited in support of the position."

¶ 42 "An appellate court may take judicial notice of readily verifiable facts if doing so will aid in the efficient disposition of a case, even if judicial notice was not sought in the trial court." (Internal quotation marks omitted.) *Bank of America, N.A. v. Kulesza*, 2014 IL App (1st) 132075, ¶ 21,

¶ 43 Here, Elson's counsel did not request that this court take judicial notice of the documents in question. Instead, counsel simply placed the documents in the appendix along with all the other documents that were in the trial court record. Such a practice is strongly disfavored, and counsel is cautioned to avoid such a practice in the future. For this reason, we will not take judicial notice of these documents and they are stricken from the record.

¶ 44 Turning to the merits of this case, we first note it is undisputed that a special relationship exists between the bar and Elston based upon a business invitor-invitee relationship. Therefore, we need only to determine whether Calderone's actions were foreseeable such that the bar had a duty to protect Elston from his criminal act as a matter of law.

¶ 45 A. Fights at Bar Were Regular Events/Inadequate Security

¶ 46 We have combined Elston's first and third arguments together because they are related. Here, Elston argues that the bar had a duty to protect him from Calderone's actions because there

was a history of altercations and problems at the bar and the owner knew about these problems and simply directed its bartenders to "deal with them." However, Elston claims, the owner did nothing about security. He contends there was evidence that fights were a weekly occurrence at the bar, and Carrie testified that when she was not working, the bar could get rough and needed a security officer. Elston argues that it is reasonable to infer that had a security guard been present at the bar on the night of the fight, either it would not have started at all, or it would have been stopped before it got out of control.

¶ 47 Within this argument, in a footnote, Elston claims that these facts would have given rise to a negligence claim under a voluntary undertaking theory. However, as the bar points out, Elston did not raise the issue of voluntary undertaking to the trial court and it is therefore waived. *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536 (1996) (issues and arguments not raised in the trial court are deemed waived and may not be raised for the first time on appeal).

¶ 48 After a careful review of the record we find that the prior fights that occurred at the bar were not so often or so violent that they created a duty on the part of the bar to provide security personnel.

¶ 49 In *Davis v. Allhands*, 268 Ill. App. 3d 143 (1995), the plaintiff lost an eye in a bar fight. Among other issues, the court addressed the bar's liability for negligence based upon the fact that the defendant-bar did not provide additional security, even when four fights occurred in the first 90 days the bar was open. The *Davis* court cited the case of *Mealey v. Pittman*, 202 Ill. App. 3d 771, (1990), wherein that court found that a history of problems at a bar, including fights, did not constitute notice of a danger as a matter of law. *Id*. at 777. With regard to the four fights in the bar that occurred within the first 90 days of opening the bar, the *Davis* court found that there was no indication that the fights involved more than a scuffle, they were immediately handled by

employees of the bar and that the first instigator of the fight was not involved in any of the fights. *Davis*, 268 Ill. App. 3d at 152.

¶ 50 A review of Elston's list of altercations that he provided in his response to the bar's motion for summary judgment does not unearth any truly violent altercations like the one that Elston himself suffered. In 2006, a patron was punched in the bar. In 2007, two incidents occurred; a patron was struck *outside* the bar after a disturbance in the bar, and a patron was hit in the bar and the fight continued outside the bar. During the last four years before Elston was attacked, there were fights that may have included pushing along with a couple of fights, with one where the instigator of the fight was knocked out. Finally, during the last 13 years before Elston was attacked, there were 10 or 12 physical fights.

¶ 51 Additionally, Sergeant Stevens and Detective ~~Mastrioianni~~ Mastroianni testified that the bar required a response from the police department very infrequently. ~~In fact, the police had not been called in the 17 months prior to the incident in question~~. In fact, Detective Mastroianni testified that in the last 13 years he had never been called to the bar for a serious injury before the instant attack. Also, there is no evidence to support Decker's opinion that the female bartenders did not call the police when fights broke out at the bars "due to Gabe's influence on them." Carrie, Starr and Bayko all testified that it was a rare occasion when someone would get out of control at the bar. The few fights at ~~Latham Tap~~ the bar were normally broken up by the bartenders with little incident. In fact, with regard to the night Elston was attacked, Elston's friend, Brandon Mengelt, testified that he did not believe that a fight was going to break out and he did not hear anyone else at the bar say that they thought a fight was going to break out. With regard to the Carrie's testimony that the bar needed security when she was not working, the fact remains that any fights that occurred at the bar never resulted in the life-threatening injury that

Elston sustained when Calderone hit him in the head with a bat. Also, like in *Davis*, here, neither Calderone nor Hannah had ever been in a fight at the bar.

¶ 52 We also reject Elston's argument that it is reasonable to infer that had a security guard been present at the bar on the night of the fight, either it would not have started at all, or it would have been stopped before it got out of control. Again, a criminal attack is reasonably foreseeable when a prudent person would have foreseen the event as likely to happen. *Davis*, 268 Ill. App. 3d at 151. It is a huge stretch of the imagination to infer that because Hannah was intoxicated and started punching Elston that Calderone, who was not intoxicated, would leave the bar, get a baseball bat from his car and walk up to Hannah and smash his head in. For all these reasons, it was not foreseeable that Calderone would have so viciously attacked Elston on the evening in question.

¶ 53 Elston claims that the *Davis* case is inapplicable to the instant case because: (1) in *Davis*, the bar had a history of only four fights prior to the fight at issue, whereas in this case fights were commonplace in the bar; (2) unlike in *Davis*, the bartenders at the bar here had actual knowledge of Hannah's rowdiness and aggressiveness before the fight with Elston began and the bar owner knew that he needed security but chose to ignore the need once he stopped doing the job himself; and (3) in *Davis*, the plaintiff sought to hold the bar liable based on the instigator having a reputation as a criminal but Elston did not rely on that theory of liability.

¶ 54 In Elston's attempt to distinguish *Davis* he fails to provide record cites for any facts he refers to as being in the record in violation of Supreme Court Rule 341(h)(7) (eff. Jan. 1, 2016) (the argument section of the brief shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on.) Our "rules of procedure are rules and not merely suggestions." *Ryan v. Katz*, 234 Ill. App. 3d 536, 537 (1992).

Consequently, Rule 341's mandates detailing the format and content of appellate briefs are compulsory. See *Voris v. Voris*, 2011 IL App (1st) 103814, ¶ 8. We have also noted other locations in Elston's brief where he has failed to cite the record when stating facts that were allegedly contained therein. We strongly caution Elston's counsel to cite to the record when appropriate in the future or face the possibility that her brief will be stricken. See *Marriage of Petrik,* 2012 IL App (2d) 110495, ¶ 38 (where an appellant's brief contains numerous Rule 341 violations and, in particular, impedes our review of the case at hand because of them, it is our right to strike that brief and dismiss the appeal.)

¶ 55 With are not persuaded by Elston's attempt to distinguish *Davis* by claiming that only four fights occurred in *Davis* before the fight at issue in this case, as opposed to the fights that were "commonplace" in the bar in this case. In *Davis*, the court noted that four fights had occurred *within 90 days of the bar opening up*. *Davis*, 268 Ill. App. 3d at 151. To the extent that the plaintiff in *Davis* claimed that four fights in 90 days gave rise to a duty to protect him from the criminal acts of others, the *Davis* court rejected that theory. *Id*. at 152. Here, the numbers cited by Elston in his reply to the bar's motion for partial summary judgment that in the last 13 years, about 10 or 12 fights had occurred. Even if other bartenders said that fights were "commonplace" at the bar, again, no evidence was ever presented that any of those fights resulted in the severe, permanent damage that Elston sustained in this attack. Also, even if some bartenders had actual knowledge of Hannah's rowdiness and aggressiveness, the fact remains that it was *Calderone*, not Hannah, who caused Elston to sustain such devastating injuries. Finally, the fact that the plaintiff in *Davis* provided an additional theory of liability that Elston did not here is completely irrelevant to our analysis.

¶ 56 Elston finally argues that *Lutz v. Goodlife Entertainment, Inc.*, 208 Ill. App. 3d 565 (1990) is instructive here. In that case, the plaintiff was injured at a nightclub when another patron at the club hit him in response to being bumped by the injured party while on the dance floor. The nightclub was granted summary judgment on the ground that it owed plaintiff no duty. *Id*. at 567. On appeal, the judgment was affirmed. The reviewing court found that given that there was no evidence that the attacker was intoxicated, or that he had caused problems previously at the nightclub, and that his behavior prior to the incident that evening was not such to put a reasonable person on notice of his dangerous propensities, the nightclub's duty of reasonable care could not be extended to guard against a sudden criminal attack by a third party. *Id*. at 571. Elston argues that here, unlike in *Lutz*, Hannah was intoxicated and had had caused problems at the bar before Calderone attacked him.

¶ 57 We are not persuaded. Again, although Hannah did punch Elston several times, it is undisputed that Elston sustained his injuries at the hands of Calderone. There was no evidence that Calderone was intoxicated or that he had caused any problems before he attacked Elston. In fact, Cooper specifically testified about how much alcohol that Calderone had to drink that evening, along with his height and weight, and that in his opinion Calderone was not intoxicated that evening. Elston does not dispute this fact. Therefore, *Lutz* is only instructive as further proof that an attack by a person in a bar who was not intoxicated and did not show any signs of aggressiveness before the attack is not a foreseeable for purposes of determining whether a tavern has a duty to protect its patrons from that person.

¶ 58 Based upon the facts of this case, we cannot find as a matter of law that a prudent person would have found that Elston's attack was likely to happen. Again, in order to make such a finding that person would have to find that Calderone, who was not a regular at the bar, was not

intoxicated and who did not demonstrate any aggressive behavior in the bar before the fight, would exit the bar by himself, retrieve a baseball bat and wait for Elston outside the bar and then hit Elston in the head with the bat and flee the scene. Such a finding defies logic. Therefore, we find that the bar did not have a duty to protect Elston from Calderone's criminal acts on this ground.

¶ 59 B. Bar Owner's Knowledge That Security Was Needed

¶ 60 Next, Elston argues that the bar had a duty to protect him from Calderone's actions when the bar owner knew that security was needed at the bar. Specifically, he argues that the owner used to serve as a bouncer, but then he stopped acting as bouncer and instead asked his bartenders to tell the patrons to stop fighting, or to call the police.

¶ 61 We reject Elston's argument that a duty to protect him arose when the bar owner "knew" he needed security when no evidence was presented that the owner made such a statement. Again, Elston provides no record cites proposition in violation of Supreme Court Rule 341(h)(7) (eff. Jan. 1, 2016).

¶ 62 We also will not infer that the owner knew that he needed security because fights had broken out in the past, he used to be a bouncer at the bar but now was not, and that he told his bartenders to either break up a fight or to call the police. Like in *Davis*, there was no indication that a majority of the prior fights in the bar involved more than a scuffle, the fights were immediately handled by employees of the tavern, and Hannah or Calderone were not involved in any prior fights at the bar. See *Davis*, 269 Ill. App. 3d at 152. Accordingly, we reject this argument.

¶ 63 C. Hannah's Intoxicated State

¶ 64 Finally, Elston argues that the bar had a duty to protect him from Calderone's actions because the bartenders knew that Hannah was intoxicated and aggressive 30 minutes prior to the onset of the fight such that they should have asked him to leave, or ejected him, before the fight began.

¶ 65 Again, we find the *Davis* case instructive here. In *Davis*, when the perpetrator was asked for identification at the bar he threw his wallet on the bar, showed the bartender the middle finder and then shook his fist at her. *Id*. at 146. Later, while playing pool with the plaintiff's nephew, the perpetrator became loud after losing and began swearing and complaining about losing. *Id*. at 147. When plaintiff's nephew said that he was done playing pool, the perpetrator struck him with a pool ball on the side of his head. All of this occurred inside the bar and in the presence of the bar owner and the bartender. *Id*. The court in *Davis* said, "[k]nowledge of an aggressor's intoxication, and knowledge that the aggressor may have given the employees some 'back talk' has been held not sufficient to give rise to a duty to take affirmative action to protect a tavern's patrons." *Id*. at 154 (citing *Yangas v. Charlie Club, Inc.*, 113 App. 3d 398, 401-02 (1983)).

¶ 66 In *Getson v. Edifice Lounge, Inc.*, 117 Ill. App. 3d 707 (1983), the court held that absent evidence that the aggressor was belligerent and violent, or another indication that he was not in control of himself because of anger or intoxication, and therefore likely to commit wrongful, injurious act, the bar had no duty to take affirmative action to protect its patrons. The same is true for the bar in the instant case. Again, there is no evidence that Calderone was intoxicated, belligerent or violent before he attacked Elston with a baseball bat.

¶ 67 There was also no evidence in the record that the bar knew that Calderone, or Hannah, for that matter, were troublemakers, and neither had been involved in any prior fights or arguments at the bar. Carrie testified that she did not recall Hannah or his friends being belligerent or out of

control the night of the attack or the night before. Although Elston's friend, Brandon Mengelt, testified that Hannah had been loud on Friday night and had touched his hair on Saturday night, Mengelt admitted that Hannah did not do anything that made Mengelt think that Hannah would get into a fight.

¶ 68 Elston refers to Tory Cooper's testimony that Hannah was rude to other patrons at the bar before Elston was attacked. However, the record reflects that the only comment Cooper construed as rude was Hannah's comment to other people at the bar when he said, "[w]What are you looking at?" This comment alone was insufficient to put the bar on notice that Hannah would later punch Elston, and that Calderone would go to his car, get a bat and smash in Elston's head. As we have repeatedly found, it was Calderone's behavior, and not Hannah's behavior, that we are reviewing to determine if the bar had a duty to protect Elston from the devastating results of Calderone's attack.

¶ 69 D. Duty to Intervene

¶ 70 Finally, the bar argues that although Elston does not directly argue on appeal that the bar had a duty to intervene, he does incidentally say that a security guard or a bar employee could have seen or heard the fight and stopped it before it became too dangerous to Elston. Therefore, in its brief the bar argues that it had no duty to intervene under the facts of this case.

¶ 71 In its reply brief, Elston notes that it did not argue that the bar had a duty to intervene in the attack. Accordingly, we need not address this issue.

¶ 72 III. CONCLUSION

¶ 73 In sum, the trial court properly granted the bar's motion for partial summary judgment on this common law negligence count because the bar did not have a duty to protect Elston from Calderone's criminal attack on him when it was not foreseeable that such an attack would occur.

Although the bar had a history of fights occurring there, most of the fights were resolved by the bar's employees without physical injury. Also, there was no evidence presented that additional security would have prevented this vicious, unprovoked attack that occurred in the bar's parking lot. When physical injury did occur at the bar on occasion, those injuries could not be compared to the devastating injury that Elston sustained when Calderon hit him in the head with a baseball bat. Also, Calderone was not intoxicated when he attacked Elston and he had never displayed any aggressive behavior in the bar before. Finally, the fact that Hannah was intoxicated and aggressive thirty minutes before Calderone attacked Elston is irrelevant to our analysis. Although Hannah did punch Elston several times, it was undisputed that Elston's injuries were caused by Calderone. Furthermore, simply because Hannah hit Elston first does not mean that we look to Hannah's actions to determine whether the bar had a duty to protect Elston from Calderone's criminal act.

¶ 74 For all of these reasons, the judgment of the circuit court of Winnebago County is affirmed.

¶ 75 Affirmed.