STATE OF MICHIGAN

COURT OF APPEALS

ROBERT FORD,

Plaintiff-Appellee,

v

WOODWARD TAP, INC., d/b/a SOUTH,

Defendant-Appellant,

and

RONALD TALLEY,

Defendant.

UNPUBLISHED
October 21, 2014

No. 316694
Oakland Circuit Court
LC No. 2012-128348-NS

ROBERT FORD,

Plaintiff-Appellant,

v

WOODWARD TAP, INC., d/b/a SOUTH,

Defendant-Appellee,

and

RONALD TALLEY,

Defendant.

No. 318008
Oakland Circuit Court
LC No. 2012-128348-NS

Before: FITZGERALD, P.J., and WILDER and OWENS, JJ.

PER CURIAM.

In Docket No. 316694, defendant Woodward Tap, Inc. (WTI), d/b/a South, a bar in Birmingham, Michigan, appeals by leave granted from the trial court's opinion and order

denying its motion for partial summary disposition of plaintiff's claim alleging a dramshop violation. In Docket No. 318008, plaintiff appeals by delayed leave granted the trial court's order denying his motion for an adverse inference instruction. We affirm the trial court's denial of plaintiff's motion for an adverse inference instruction, but reverse the trial court's order denying WTI's motion for partial summary disposition with respect to the dramshop claim.

Plaintiff alleged that while a patron at the South bar, he exited the bathroom and was assaulted by defendant Ronald Talley, then a player for the National Football League's Arizona Cardinals. Plaintiff claimed that immediately before the assault, Talley was visibly intoxicated and drinking from a champagne bottle. Plaintiff asserted that Talley struck him over the head with the bottle, which shattered glass into his skull and caused severe injury. He claimed that employees of the South bar did not come to his aid, but instead dragged and threw him headfirst out of the bar, causing further injury. Plaintiff brought this action and alleged claims for assault and battery against Talley and WTI's employees, negligence against WTI and its employees for failing to provide a safe environment and failing to properly train and supervise staff, and dramshop liability against WTI for serving Talley while visibly intoxicated. The trial court denied WTI's motion for summary disposition of the dramshop claim.

Although the bar had a video surveillance system, a videotape of the incident was not preserved by WTI despite a walk-through of the premises by a police officer following the assault. Plaintiff filed a motion requesting entitlement to an adverse inference instruction based on WTI's failure to preserve the videotape evidence, but the trial court denied the motion.

I. DOCKET NO. 316694

WTI first argues that the trial court erred by denying its motion for partial summary disposition. We agree. The decision to grant or deny summary disposition is reviewed de novo. *Ter Beek v City of Wyoming*, 495 Mich 1, 8; 846 NW2d 531 (2014). Summary disposition is proper pursuant to MCR 2.116(C)(10) when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." A motion premised on MCR 2.116(C)(10) tests the factual support of the complaint. *Hanlin v Saugatuck Twp*, 299 Mich App 233, 239; 829 NW2d 335 (2013). "The moving party has the initial burden to support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence." *McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684, 693; 818 NW2d 410 (2012). Once this burden is satisfied, the nonmoving party must demonstrate that a genuine issue of disputed fact exists for trial. *Id*. Affidavits, depositions, and documentary evidence submitted in support of, and in opposition, to the dispositive motion are considered only to the extent that the content or substance would be admissible as evidence. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). Mere conclusory allegations that are devoid of detail are insufficient to create a genuine issue of material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 372; 547 NW2d 314 (1996).

MCL 436.1801 of the dramshop act provides, in relevant part:

> (2) . . . A retail licensee shall not directly or indirectly, individually or by a clerk, agent, or servant sell, furnish, or give alcoholic liquor to a person who is visibly intoxicated.

The dramshop act was enacted by the Legislature "to discourage bars from selling intoxicating beverages to minors or visibly intoxicated persons and to provide for recovery under certain circumstances by those injured as a result of the illegal sale of intoxicating liquor." *Browder v Int'l Fidelity Ins Co*, 413 Mich 603, 611-612; 321 NW2d 668 (1982). "The dramshop act . . . provides a cause of action against tavern owners for the unlawful sale of alcohol to a 'visibly intoxicated person', where the sale is a proximate cause of injuries." *McKnight v Carter*, 144 Mich App 623, 629; 376 NW2d 170 (1985). In *Archer v Burton*, 91 Mich App 57, 60; 282 NW2d 833 (1979), this Court delineated the proofs required for a dramshop action:

> In order to maintain a dramshop action, the plaintiff must prove that 1) he was injured by the *wrongful* or *tortious* conduct of an intoxicated person, 2) the intoxication of the principal defendant was the sole or contributing cause of plaintiff's injuries, and 3) the bar owner sold the visibly intoxicated person liquor which caused or contributed to his intoxication. Therefore a bar owner's liability can only be predicated upon the wrongful activity of the intoxicated person. [Emphasis in original).]

The mere service of alcoholic beverages by employees to a person is insufficient to impose dramshop liability. *Heyler v Dixon*, 160 Mich App 130, 145; 408 NW2d 121 (1987). In *Heyler*, this Court explained:

> [T]he mere fact that the alleged intoxicated person drank alcoholic beverages is not sufficient to establish that he was visibly intoxicated. A 1972 amendment to the dramshop act, 1972 PA 196, substituted "visibly intoxicated" for "intoxicated." Current case law requires that the allegedly intoxicated person must be "visibly" intoxicated at the time of *the sale*.
>
> SJI2d 75.02 defines visibly intoxicated as follows: "A person is 'visibly intoxicated' when his or her intoxication would be apparent to an ordinary observer." This Court has repeatedly held that an action under the dramshop act may be proven by circumstantial evidence and that, if the combination of the circumstantial evidence and the permissible inferences drawn therefrom are sufficient to establish a prima facie case, a directed verdict is improper. [*Id*. at 145-146 (emphasis in original; citations omitted).]

In *Wyatt v Chosay*, 330 Mich 661, 662-664; 48 NW2d 195 (1951), a case not involving the visibly intoxicated standard, the allegedly intoxicated person (AIP) went to a licensed retail liquor dealer between 8:00 and 9:00 p.m. During that hour, he was served three ounces of whiskey and a six-ounce glass of beer. He then drove 1½ miles away from the establishment and ran into the rear of a wagon in which the plaintiff's decedent was riding. The AIP alleged that he did not notice any lights on the rear of the wagon, and the lights from a car approaching in the opposite direction obscured his vision. The AIP denied that he was under the influence, claiming that "on prior occasions he had drunk larger quantities of liquor without noticing any effect therefrom." *Id*. at 664. Additionally, two state police officers testified to arriving at the scene shortly after the accident occurred; they spoke to the AIP and did not notice any evidence of intoxication. A witness who left the establishment with the AIP did not observe any indication that the AIP was intoxicated. *Id*. at 667.

In contrast, the plaintiff presented proof that the wagon in which the decedent was riding displayed a reflector and a lantern. However, one of the plaintiff's expert witnesses testified that the lantern was "a dim light." *Id*. at 663. The plaintiff also presented two medical witnesses to show intoxication was the cause or contributed to the accident, causing the death. However, to reach their conclusions, the medical witnesses answered hypothetical questions. The most favorable testimony by a medical expert opined that if the AIP was not an habitual drinker, the expert thought the influence of intoxication could be observed in the AIP's walk. The expert then acknowledged, "Whether this would be evident in his walk, I don't know, I was not there to see it." On cross-examination, this expert acknowledged that there were factors such as the AIP's physical condition, food consumption, and weather and atmospheric conditions, which contributed to intoxication, but were unknown. *Id*. at 666. Although the jury returned a verdict in favor of the plaintiff, the trial court granted the defendants' motion for judgment notwithstanding the verdict, holding that there was no competent evidence of intoxication to warrant submission of the issue to the jury. *Id*. at 667-668. Our Supreme Court affirmed, holding that the fact that liquor was consumed in proximity to the accident and that an accident occurred were insufficient to conclude that alcohol furnished to the AIP caused the accident. *Id*. at 670. Additionally, although the evidence was construed in favor of the plaintiff, the expert testimony was premised on hypotheticals that were insufficient to express a definite belief in the matter in dispute. *Id*. at 671. In holding that the evidence was insufficient, the *Wyatt* Court stated:

> We may not indulge in speculation or conjecture, nor was the jury at liberty to do so. The burden of proof rested on the plaintiff to establish her case by competent evidence. Opinion testimony based on assumptions rather than on facts established by proof may not be given the effect of outweighing positive testimony. [*Id*.]

In *Lasky v Baker*, 126 Mich App 524, 527-528; 337 NW2d 561 (1983), this Court held that the trial court erred by granting a directed verdict in favor of the individual who owned the bar that served the AIP. In *Lasky*, the plaintiff was struck by a vehicle operated by the AIP. Before the accident, the plaintiff noticed the AIP come out of the bar because he was staggering. She commented to her husband that the AIP was intoxicated because his hand slipped off the door handle of his vehicle, and he had difficultly opening the door. Her husband also testified that the AIP was staggering when he exited the bar and could not walk in a straight line, causing the husband to surmise the AIP's drunkenness. Additionally, the AIP had difficulty getting into his truck and paused between driving maneuvers. After the accident, the plaintiff observed the AIP. She concluded that he was drunk because of his actions; his speech was slurred, and he mumbled. Immediately after the collision, the plaintiff's husband smelled whiskey and beer on the AIP's breath. Another witness testified that she worked as a hostess at an establishment where liquor was served. Based on her experience, this witness testified that the AIP was intoxicated because he did not seem to care about the accident, he had a "goofy" look on his face, and his eyes were glazed. *Id*. at 530-531. Finally, the bar owner acknowledged that he served "drinks" to the AIP, and the accident occurred within minutes of the AIP's departure from the bar. *Id*. at 531. In that case, this Court held that there was sufficient evidence from which the factfinder could reasonably infer that the AIP was an intoxicated person, that the bar sold intoxicating liquor to him, that as a result of the sale, he continued to be in an intoxicated state

until the time of the accident, and that such intoxication was the cause of the plaintiff's injury. *Id*.

In *McKnight*, 144 Mich App at 625, the AIP entered a bar in Flint. He had not consumed alcoholic beverages for at least four to five hours before entering the bar. During his 30 to 45 minute presence in the bar, the AIP consumed "2 Millers" and a "gin and grapefruit," while visiting with three friends. The AIP suggested that they go to his car where he had several bottles of liquor. The men stayed in the car for 90 to 120 minutes where they consumed a couple of quarts of liquor and a quart bottle of Champale. They also consumed an unknown quantity of "Millers" and shared 8 to 10 "joints" of marijuana. The friends left the car, and the AIP began to drive home, when he passed out, his car cross the centerline, and he struck the vehicle of Bennie McKnight, who died from his injuries. The AIP pleaded guilty to negligent homicide. *Id*. at 625-626.

The plaintiff alleged that the trial court erred by granting summary disposition of the dramshop claim. This Court disagreed, holding:

> To the contrary, [the AIP's] and [his friend's] depositions and affidavits indicated that [the AIP] was not visibly or otherwise intoxicated when he left defendant's establishment. In his affidavit and deposition, [the AIP] stated that while in defendant's tavern he had two Millers and one gin and grapefruit juice to drink. [The AIP] stated that when he left defendant's bar for the parking lot he had no difficulty talking and was not slurring his words or staggering. He further asserted that he was not involved in any fights while in the bar and did nothing that would make him look as though he were intoxicated. In addition, he stated that he did not feel the effects of the alcohol he consumed while in defendant's tavern or, if he did, it was "so slight" to be of no consequence. Similarly, [his friend] stated that there was nothing in [the AIP's] manner which indicated that [the AIP] had been drinking alcohol before he began drinking in the car. Plaintiff made no assertion that she knew of any witnesses or evidence which would tend to indicate that [the AIP] was visibly intoxicated *while in defendant's bar*. Therefore, [applying appellate case law], the facts that plaintiff [sic] had consumed alcohol in defendant's bar, that he was intoxicated at the time of the accident, and that there was an intervening source of alcohol were not sufficient to raise a material issue of fact as to whether [the AIP] was visibly intoxicated at the time he was served alcohol by defendant. [*Id*. at 630-631.]

In *Reed v Breton*, 475 Mich 531, 533-534; 718 NW2d 770 (2006), Curtis J. Breton, an intoxicated driver, crossed the center line of US-127 at a high rate of speed and collided head on with a vehicle carrying Adam W. Kuenner and Lance N. Reed. All three men were killed. The plaintiffs, the personal representatives of the estate of Kuenner and Reed, sued the personal representative of Breton's estate, and the two bars that served Breton alcohol, the defendant, Beach Bar, as the second-to-the-last establishment that served him, and the Eagles Nest. *Id*. at 534-535. Breton spent the day consuming alcohol with his friend, John Marsh. At 7:30 p.m., they consumed two beers at the defendant's establishment. Their server, Lindsay Mizerik, was trained to identify visibly intoxicated persons, and Breton did not exhibit any signs such that she would refuse him service. Specifically, Breton did not exhibit slurred speech or a lack of

coordination, act in an aggressive manner, or engage in erratic behavior. *Id*. Breton and Marsh left the defendant's establishment and proceeded to the Eagles Nest where they shared a pitcher of beer. The men encountered their supervisor, Summit Township Fire Department Chief Carl Hendges, who did not believe that either man was intoxicated. Additionally witness Richard Potts, an acquaintance of Breton and owner of a convenience store that sold alcoholic beverages, saw Breton at the bar and noted that Breton's eyes were not bloodshot or glassy and he did not appear to be intoxicated. Marsh also did not observe any difference in Breton's speech, ability to walk, or redness in the eyes during the course of the day. *Id*. at 535.

After Breton drove Marsh home, he crossed the centerline of US-127, killing the plaintiffs' decedents. After the collision, it was discovered that Breton had a blood alcohol content of 0.215 grams per 100 milliliters of blood. The defendant, as the second-to-the-last establishment to serve Breton, sought summary disposition and relied on the rebuttable presumption of nonliability available to all but the last establishment pursuant to MCL 436.1801(8), and the contention that the plaintiffs failed to demonstrate that Breton was visibly intoxicated when served. *Id*. at 535. The plaintiffs alleged that factual issues precluded summary disposition. In support of this contention, the plaintiffs presented the expert opinion of two toxicologists. In their reports, the toxicologists estimated the number of drinks that Breton consumed in light of his age, weight, and alcohol level in his blood and urine after the collision. In light of their calculations, the toxicologists opined that Breton must have been significantly impaired and that manifestations of impairment, including disorientation and lack of coordination, must have been exhibited by Breton. *Id*. at 535-536. The trial court granted summary disposition in favor of the defendant establishment of the dramshop act (DSA) claim, concluding that the circumstantial opinion of the experts was insufficient to rebut the presumption of nonliability with unequivocal evidence. *Id*. at 536. This Court reversed, holding that the experts' testimony was sufficient to create a genuine issue of material fact. *Id*. at 536-537.

Our Supreme Court reversed this Court's decision and reinstated the trial court's order granting summary disposition to the defendant, *id*. at 534, 544, holding that competent and credible proofs to show service to a visibly intoxicated person had not been presented:

> This standard of "visible intoxication" focuses on the objective manifestations of intoxication. While circumstantial evidence may suffice to establish this element, it must be actual evidence of the *visible* intoxication of the allegedly intoxicated person. Other circumstantial evidence, such as blood alcohol levels, time spent drinking, or the condition of other drinkers, cannot, as a predicate for expert testimony, alone demonstrate that a person was *visibly* intoxicated because it does not show what behavior, if any, the person *actually manifested* to a reasonable observer. These other indicia—amount consumed, blood alcohol content, and so forth—can, if otherwise admissible, reinforce the finding of visible intoxication, but they cannot substitute for showing visible intoxication in the first instance. While circumstantial evidence retains its value, such (and any other type of) evidence must demonstrate the elements required by § 801(3), including "visible intoxication."

> Plaintiffs here presented no evidence of Breton's visible intoxication at the time he was served at defendant's establishment in response to defendant's motion for summary disposition. The record reflects that all four eyewitnesses saw no signs that Breton was visibly intoxicated. Plaintiffs further relied on two expert toxicologists' expectations that Breton would have exhibited signs of intoxication. But reports discussing Breton's physical statistics and alcohol consumption, coupled with predictions of his impairment, offer only speculation about how alcohol consumption affected Breton that night. Expert post hoc analysis may demonstrate that Breton was *actually* intoxicated but does not establish that others witnessed his *visible* intoxication. Consequently, no basis for a DSA claim against defendant existed. Because plaintiffs failed to establish a genuine issue of material fact that Breton was visibly intoxicated even under § 801(3), the trial court correctly granted summary disposition for defendant. [*Id.* at 542-543 (emphasis in original; citations and footnotes omitted).]

In the present case, the trial court held that there was sufficient circumstantial evidence to create a genuine issue of material fact, relying principally on the deposition testimony of plaintiff and his friend, Tyrone Applewhite, the photographs of Talley holding a drink, and Talley's bar tab receipt. However, liability is imposed pursuant to the dramshop act only when the retail licensee sells, furnishes, or gives alcoholic liquor to a person who is visibly intoxicated. MCL 436.1081(2).

A. DOCUMENTARY EVIDENCE REGARDING VISIBLE INTOXICATION

In the present case, plaintiff testified as follows during his deposition:

> *Q.* So the most that you saw him drink, if I understand your testimony, sir, would be a champagne bottle that was in his mouth a second or two?
>
> *A.* Yeah.
>
> * * *
>
> *Q.* Well, do you have any other evidence?
>
> *A.* That bottle and how he looked at me. I could look and I could tell that he was buzzed really good from that eye contact.
>
> *Q.* So I want to try to understand, sir. Your evidence that Mr. Talley was visibly intoxicated was that because he was drinking out of a champagne bottle, he must have been doing that all night? That's one segment. And the other segment is when he looked at you, you could tell that he was imbibing; correct?
>
> *A.* Yeah.
>
> *Q.* And that look you're talking about is when you got close to him and he hit you?

A. No.

Q. When you exchanged --

A. When I seen him drinking the bottle, and he was looking at me and me looking at him.

Q. And that lasted for a second or two?

A. Everything was a second.

Q. Do you have any other evidence, sir, that he was visibly intoxicated?

A. That's it.

Q. Now, the other part in the question, sir, is what evidence do you have that he was given alcohol while he was visibly intoxicated? That's part two.

A. I don't know.

Q. You don't have any?

A. No.

Q. What evidence, sir, do you have that the alcohol he consumed from the champagne bottle, which you saw him drinking, that he consumed a second before he hit you, caused him to hit you?

A. I don't know. I just - - I don't know what other reason. I don't know why he did. He wouldn't have done it sober.

Plaintiff also presented the testimony of his friend, Tyrone Applewhite, a bouncer at a strip club. In his capacity as a bouncer, Applewhite had observed individuals consuming alcohol and could determine if someone was drunk. Applewhite testified that he was present at the South bar and observed that Talley and his friends were "rowdy" and "drinking and partying." He observed Talley holding a bottle of champagne and presumably holding a cup of liquor in the other hand. Applewhite saw a waitress serve Talley with the bottle of champagne at the DJ booth in the dance club, but he could not tell if Talley was drunk. In fact, Applewhite opined that Talley was not drunk, testifying that "[h]e had consumed liquor. I don't think I [sic] was drunk due to his size."

Plaintiff also asserted that a factual issue regarding visible intoxication was established because Talley was depicted in photographs from a website holding glasses purportedly of liquor and his bar tab at the South bar showed purchases of 12 "Cirocs," and one Red Bull.

B. APPLICATION OF THE LAW TO THE DOCUMENTARY EVIDENCE

When determining whether summary disposition is appropriate, the trial court does not assess the credibility of the witnesses. *White v Taylor Distrib Co, Inc*, 482 Mich 136, 142; 753

NW2d 591 (2008). "Summary disposition is suspect where motive and intent are at issue or where the credibility of a witness is crucial." *Foreman v Foreman*, 266 Mich App 132, 135-136; 701 NW2d 167 (2005). The evidence must be examined in the light most favorable to the nonmoving party. *Rambin v Allstate Ins Co*, 495 Mich 316, 325; ___ NW2d ___ (2014). However, mere conclusory allegations that are devoid of detail are insufficient to create a genuine issue of material fact. *Quinto*, 451 Mich at 371-372. When the nonmoving party presents evidence comprised of mere conclusions without supporting its position with underlying foundation, summary disposition in favor of the moving party is proper. See *Rose v Nat'l Auction Group*, 466 Mich 453, 470; 646 NW2d 455 (2002).

As indicated, to maintain an action for violation of the dramshop act, a plaintiff must prove that the bar owner sold the visibly intoxicated person liquor which caused or contributed to his intoxication. *Archer*, 91 Mich App at 60. The mere service of alcoholic beverages by employees to a person is insufficient to impose liability. *Heyler*, 160 Mich App at 145. Rather, the person must be visibly intoxicated at the time of the sale. *Id*. at 145-146.

In the present case, plaintiff opined that Talley, the AIP, was visibly intoxicated because Talley drank from a champagne bottle for a second or two and then they made eye contact. Plaintiff testified, "I could tell that he was buzzed really good from that eye contact." However, plaintiff's conclusion that Talley was "buzzed" was without any underlying foundation to explain how the "eye contact" indicated that he was "buzzed." *Rose*, 466 Mich at 470. Plaintiff did not explain whether Talley's eye contact contained signs of intoxication, such as his eyes being glossy or red. Additionally, plaintiff did not testify regarding Talley's demeanor, or whether he was staggering or slurring his speech. Thus, plaintiff was able to testify that Talley was observed consuming alcoholic beverages. However, the contention that "eye contact" established that Talley was "buzzed" was insufficient to meet the burden of establishing a question of fact whether the employees of WTI served alcohol to a visibly intoxicated person. *Reed*, 475 Mich at 542-543; *Rose*, 466 Mich at 470; *Quinto*, 451 Mich at 371-372.

The testimony of Applewhite also indicated that Talley had consumed alcoholic beverages. However, it too failed to establish a question of fact whether employees of WTI served alcohol to Talley when he was visibly intoxicated, contrary to MCL 436.1801(2). *Heyler*, 160 Mich App at 145-146. Applewhite testified that he observed Talley in the bar "rowdy" and "partying." However, Applewhite did not delineate specific conduct by Talley such that employees of WTI would know that they served a visibly intoxicated person. That is, Applewhite did not indicate that Talley had difficulty walking, slurred or loud speech, or smelled of alcohol. Indeed, Applewhite offered his opinion that Talley was not drunk because of his size.

In *Reed*, 475 Mich at 542, our Supreme Court expressly held that the standard of "visible intoxication" focuses on objective *manifestations* of intoxication. In *Reed*, 475 Mich at 543, *Wyatt*, 330 Mich at 671, *McKnight*, 144 Mich App at 630-631, there was no testimony of physical manifestations at the time of the service or in proximity to the service to conclude that the AIP was furnished, served, or sold alcohol while visibly intoxicated. However, in *Lasky*, 126 Mich App at 527-531, the AIP was observed staggering as he exited the bar. He had difficulty opening the door of his vehicle because his hand slipped off the door handle. Immediately after the accident, there was evidence that the AIP was drunk because he smelled of whisky and beer,

his speech was slurred, his eyes were glazed, and he mumbled. The bar owner acknowledged service to the AIP, and the accident occurred within minutes of the AIP's departure from the bar.

In this case, the two witnesses, plaintiff and Applewhite, presented testimony of visible consumption, carrying a champagne bottle and a cup presumably containing alcohol and observing Talley drink from the bottle and cup. However, they failed to testify regarding *manifestations* of visible intoxication, by delineating specific signs of intoxication, such that WTI's employees served Talley while visibly intoxicated. The men failed to testify regarding how "buzzed" based on "eye contact" and "rowdy" and "partying" translated into signs or manifestations of visible intoxication. Because of the lack of foundation of objective manifestations, the trial court erred by denying WTI's motion for partial summary disposition. Accordingly, we reverse the trial court's order denying WTI's motion for partial summary disposition of the dramshop claim.

II. DOCKET NO. 318008

Plaintiff argues that the trial court erred by denying his request for an adverse inference instruction. We disagree. Questions regarding instructional error are reviewed de novo, but whether an instruction is applicable is reviewed for an abuse of discretion. *Freed v Salas*, 286 Mich App 300, 327; 780 NW2d 844 (2009). An abuse of discretion occurs when the decision falls outside the range of reasonable and principled outcomes. *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007).

"[T]here are remedies available to a party claiming prejudice resulting from the loss or destruction of evidence." *Teel v Meredith*, 284 Mich App 660, 666; 774 NW2d 527 (2009). "A trial court has the authority, derived from its inherent powers, to sanction a party for failing to preserve evidence that it knows or should know is relevant before litigation has commenced." *MASB-SEG Prop/Cas Pool, Inc v Metalux*, 231 Mich App 393, 400; 586 NW2d 549 (1998). When it is alleged that a party failed to preserve evidence, the trial court has the discretion to fashion a sanction that deprives the party of the fruits of its misconduct. *Id*. The sanction may be the exclusion of evidence because of prejudice to the other party or an instruction to the jury that it may draw an adverse inference to the culpable party because of the absence of the evidence. *Id*. (Citation omitted.)

The standard jury instruction, M Civ JI 6.01, permits a jury to draw an inference that evidence would have been adverse where a party who is in control of the evidence fails to produce it at trial. *Clark v Kmart Corp*, 249 Mich App 141, 148; 640 NW2d 892 (2002). The instruction provides that the jury may, but is not required to, draw an adverse inference because it is free to decide the issue for itself. *Id*. at 146-147. The trial court should give the instruction when it finds that the evidence was under the party's control and could have been produced by the party, the evidence would have been material, not cumulative, and not equally available to the other party, and a question of fact arises whether a party has a reasonable excuse for failing to produce the evidence. *Id*. at 147. The trial court's factual findings are reviewed for clear error, and legal conclusions are reviewed de novo. *Book-Gilbert v Greenleaf*, 302 Mich App 538, 542; 840 NW2d 743 (2013). The standard jury instruction only allows for an inference that the evidence would have been adverse when the controlling party fails to produce it. *Lagalo v Allied Corp*, 233 Mich App 514, 521; 592 NW2d 786 (1999). "[M]issing evidence gives rise to

an adverse presumption only when the complaining party can establish intentional conduct indicating fraud and a desire to destroy [evidence] and thereby suppress the truth." *Ward v Consol Rail Corp*, 472 Mich 77, 84-85; 693 NW2d 366 (2005) (citations and internal quotations omitted). An adverse presumption is only available when there is evidence of willful fraud or destruction. *Lagalo*, 233 Mich App at 521.

The trial court did not find that a factual issue existed regarding WTI's excuse for failing to produce the evidence, and we cannot conclude that the trial court's decision that an adverse inference instruction was not warranted constituted an abuse of discretion. Although the Birmingham police became involved shortly after the assault, they did not request that WTI preserve the videotape. Officer Christopher Koch testified that he was aware of the South bar because of prior complaints and knew that it had a video surveillance system. Despite that knowledge, he could not recall asking WTI's employees to preserve any video from that evening. Additionally, Officer Gina Potts testified that she could not obtain plaintiff's cooperation, plaintiff did not want to provide his name, and he indicated that he knew who had assaulted him and would handle the matter himself. Detective Michael Lyon, the investigator assigned to the case, tried to reach plaintiff after the assault. He was able to eventually make contact with plaintiff's brother, which allowed the detective to speak with plaintiff. However, this contact did not occur until April 5, 2012. The assault occurred during the early morning hours of March 26, 2012. According to Joseph Spadafore, a co-owner of WTI, and Det. Lyon, a videotape was no longer available because the system was automatically overwritten every 7 to 10 days. When plaintiff's counsel questioned Det. Lyon regarding his failure to go to the South bar in person after the assault and immediately obtain the tape, Det. Lyon testified that he was not investigating the South bar, but the individual who had assaulted plaintiff. Det. Lyon acknowledged that he generally sought to preserve videotape immediately, but explained that plaintiff expressed his desire to handle the matter himself and did not become available to interview until April 5, 2012.

Plaintiff contends[1] that WTI knew or had reason to know of the possibility of litigation and, therefore, had an obligation to preserve the videotape from that evening. However, the obligation to preserve evidence despite the lack of pending litigation has been imposed when the plaintiff was the party in possession and control of the evidence, but failed to preserve it. See *Citizens Ins Co of America v Juno Lighting, Inc*, 247 Mich App 236, 238; 635 NW2d 379 (2001), and *Brenner v Kolk*, 226 Mich App 149, 161-163; 573 NW2d 65 (1997).

[1] Plaintiff alleges that a request to see the videotape by Kevin Maples, a friend of plaintiff's brother, triggered an obligation to preserve it. However, Spadafore testified that WTI preserved video at the request of the police. The trial court did not find, and we are not persuaded, that a mere request from a bar patron could trigger an obligation to preserve evidence. See *Clark*, 249 Mich App at 148. Furthermore, Det. Lyon stated that the focus of any litigation was a criminal investigation in which plaintiff initially refused to participate, thereby creating the delay in seeking the video tape.

Under the circumstances, the trial court did not abuse its discretion by denying plaintiff's request for an adverse inference instruction.[2] Accordingly, we affirm the trial court's order denying plaintiff's request for this instruction.

Affirmed in part, reversed in part, and remanded for further proceedings. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder
/s/ Donald S. Owens

[2] On appeal, plaintiff also argues that the trial court erred by failing to provide an adverse presumption instruction. However, plaintiff did not make this request in his renewed motion for an adverse inference instruction, see *Moody v Home Owners Ins Co*, 304 Mich App 415, 444; 849 NW2d 31 (2014), and failed to present evidence of fraud, *Ward v Consol Rail Corp*, 472 Mich 77, 84-85; 693 NW2d 366 (2005).