**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**
**COURT OF APPEAL, THIRD CIRCUIT**

**07-208**

**RYAN S. MONTEGUT**

**VERSUS**

**WILKERSON MANAGEMENT, INC.**

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APPEAL FROM THE
FIFTEENTH JUDICIAL DISTRICT COURT,
PARISH OF LAFAYETTE, NO. 2000-2017,
HONORABLE DURWOOD W. CONQUE, DISTRICT JUDGE

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**MICHAEL G. SULLIVAN**
**JUDGE**

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Court composed of Ulysses Gene Thibodeaux, Chief Judge, Marc T. Amy, and Michael G. Sullivan, Judges.

**AFFIRMED.**


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SULLIVAN, Judge.

Ryan Montegut appeals the jury's verdict in favor of Shannon Wilkerson and his insurer in this premises liability suit. For the following reasons, we affirm.

***Facts***

On December 29, 1999, Mr. Montegut went to the Bulldog, a bar in Lafayette owned by Wilkerson Management, Inc., after attending a concert at the Cajundome in Lafayette. Mr. Montegut was denied admission to the Bulldog because he was drinking wine from a wine bottle. After being denied entry, Mr. Montegut and a friend remained outside the bar. A patron of the Bulldog, who had also attended the concert, exited the bar and began discussing the merits of the bands that played at the concert with Mr. Montegut. The patron became annoyed with Mr. Montegut and struck him in the face.

Three witnesses testified regarding the events that occurred that night. James Supple, a Bulldog employee who worked at the entrance, testified that he refused to allow Mr. Montegut to enter because the Bulldog does not allow entry to persons with open containers of alcohol, like Mr. Montegut's bottle of wine. Mr. Supple called the manager on duty at the time, James Gautreaux, to the front because Mr. Montegut was persistent in wanting to enter the bar with his wine bottle. Mr. Gautreaux responded to Mr. Supple's request and went outside the entry of the Bulldog, where he heard the discussion between Mr. Montegut and the other patron regarding the bands. Mr. Gautreaux testified that at that time there was no hostility between the men. Mr. Montegut agreed.

Both Mr. Gautreaux and Mr. Montegut testified that the other patron then stated that he was going to kick Mr. Montegut's a_ _, that Mr. Gautreaux placed himself between Mr. Montegut and the other patron and told the patron to calm down.

According to Mr. Gautreaux, the patron stated at least two times, "I'm not going to hit him. I won't do anything. I'm waiting for my cab." Believing the situation was under control, Mr. Gautreaux removed himself from between the men and instructed Mr. Supple to "watch his back"; Mr. Gautreaux remained outside, monitoring the situation.

In the meantime, a cab arrived for the patron. The patron began walking to the cab. Mr. Montegut followed him, and the patron unexpectedly turned and struck Mr. Montegut in the eye. Mr. Gautreaux immediately restrained the patron. Mr. Supple placed himself on Mr. Montegut and told him to stay down, but Mr. Montegut attempted to rise from the ground; as he did, the patron hit him again. Mr. Montegut testified that he did not hear Mr. Supple tell him to remain on the ground.

Mr. Gautreaux and Mr. Supple testified that before allowing the patron to leave the scene, Mr. Gautreaux asked Mr. Montegut if he wanted to call the police or an ambulance for medical attention. According to Mr. Gautreaux, Mr. Montegut declined police and medical assistance.

As indicated above, Mr. Montegut's description of the events does not differ significantly from Mr. Gautreaux's and Mr. Supple's descriptions. Mr. Montegut affirmed that Mr. Gautreaux initially checked on them, then remained outside monitoring the situation to insure there was no more trouble; he testified that it "seemed like a positive situation." Mr. Montegut explained that the patron got close to him before saying he was going to kick his a_ _ , that he told the patron to get out of his face, and that the patron then turned to walk to his cab. He does not remember getting hit. The only discrepancy between Mr. Gautreaux's and Mr. Montegut's

testimony is that Mr. Montegut denied that Mr. Gautreaux offered to call an ambulance for him.

Mr. Montegut testified that he did not think his injury was serious; therefore, he did not seek medical attention until a few days later. When he did seek treatment, he learned that his injury was serious; it required extensive medical treatment. He sued Wilkerson Management, Inc. d/b/a the Bulldog and its insurer, American Equity Insurance Company, (collectively referred to as "the Bulldog") to recover damages for the injuries he suffered as a result of the altercation.

A jury trial was held December 13 and 14, 2004. The jury denied Mr. Montegut's claims, voting nine to three in favor of the Bulldog. Mr. Montegut appeals, assigning five errors.

## ***Discussion***

### ***Evidentiary Rulings***

Mr. Montegut assigns error with two evidentiary rulings made by the trial court. His first assignment of error is that the trial court erred in ruling that portions of the Bulldog's "Managers' Logs" were inadmissible. He urges that those portions which were not admitted into evidence would have established that:

1. The Bulldog lacked or had inadequate security policies and procedures;
2. Existing security policies and procedures were not enforced;
3. The Bulldog lacked adequate professional management;
4. The occurrence of other events or actions/attitudes of the management and employees of the Bulldog contributed to violence on the premises; and/or
5. The Bulldog lacked adequate documentation and/or reporting and analysis of security issues on its premises.

The trial court is vested with vast discretion in connection with the admissibility of evidence. An evidentiary ruling will not be reversed absent an abuse of that discretion. *Maddox v. Omni Drilling Corp.*, 96-1673 (La.App. 3 Cir. 8/6/97), 698 So.2d 1022, *writs denied*, 97-2766, 97-2767 (La. 1/30/98), 709 So.2d 706.

The Bulldog used an informal system of logs maintained by its managers to monitor the operation of the bar. Managers were supposed to use the logs to record information concerning what occurred during their shifts. However, there was no established format as to what the managers were to include in the logs.

The Bulldog listed "[a]ny log books generated by any employee of defendant" on its pre-trial exhibit list. The morning of trial, it filed a motion in limine, requesting that the trial court limit the logs Mr. Montegut could introduce into evidence to pages which referenced fighting and that those pages be redacted to eliminate entries which do not reference fighting. The trial court granted the motion. Mr. Montegut objected and proffered a full copy of the logs.

We have reviewed the unedited portions of the logs and the redacted pages which were introduced into evidence. We find no error with the trial court's ruling, as the logs are voluminous and include much information which is irrelevant to this proceeding. Furthermore, we cannot say that inclusion of the unedited version of the logs would have changed the outcome of the case. Therefore, even if the trial court committed error, the error was harmless. *Salley v. Salley,* 628 So.2d 1314 (La.App. 3 Cir. 1993); *Johnson v. Morris*, 431 So.2d 429 (La.App. 4 Cir.), *writ denied*, 437 So.2d 1151 (La.1983).

Mr. Montegut next urges that the trial court committed reversible error when it refused to allow him to introduce portions of the logs, which include references to

underage drinking on the premises, to impeach the Bulldog's expert witness regarding his testimony that underage drinking was a prime factor contributing to assaults in bars. Again, we find no abuse of discretion with the trial court's ruling. First, there is no evidence that underage customers were involved in or may have contributed to the incident with Mr. Montegut, and second, there were very few references in the logs to underage customers being in or drinking in the Bulldog.

***Adverse Presumption***

Mr. Montegut requested through discovery the Bulldog's log entry for December 29, 1999. The Bulldog responded that the entry could not be located. Additionally, there were other periods of time for which no entries were produced. Mr. Montegut requested that the trial court give the following instruction to the jury:

> Some portions of the Bulldog manager's logbooks were neither preserved nor presented during trial. You may presume that those missing portions of the logbooks would have been unfavorable to the Bulldog's case if they had been presented during trial.

The trial court refused to give the instruction; Mr. Montegut contends this was error.

If it is "proven that a party had destroyed, altered, concealed, or failed to produce evidence relevant to the pending civil claim, and they could not reasonably explain their actions," an adverse presumption may be imposed as a sanction for its conduct. *Guillory v. Dillard's Dep't Store, Inc.*, 00-190, p. 4 (La.App. 3 Cir. 10/11/00), 777 So.2d 1, 3. In such cases, the jury should be instructed that had the evidence in question been presented, it would have been unfavorable to the party spoliator. *Id.*

Mr. Gautreaux acknowledged that, pursuant to the policies and procedures of the Bulldog, he was supposed to record all fights in the log. However, he testified that typically he did not write such an entry unless a fight occurred *and* the police

were called; although, he admitted that there may have been occasions when he did so. Mr. Gautreaux read the following statement to the jury, which was written by another manager and was produced with the logs:

> To Whom It May Concern: Please be advised that the manager's log at the Bulldog containing information on an incident occurring the evening of December 29th, 1999, cannot be found. The manager's log is a communication tool for managers to inform each other what went on during individual shifts. Although I was not working the evening of December 29th, Chris Jackson, another manager and myself, we remember seeing the December 29th, 1999, entry in the log book. James was the manager that evening and he recorded the information in the log book.

The evidence established that other pages of the logs were missing, that there were periods of time during which managers failed to record shift information in the logs, and that the casual manner in which the logs were maintained may have contributed to the loss of some pages. Thus, the trial court could have reasonably concluded that Mr. Montegut did not establish that management or employees of the Bulldog "had destroyed, altered, concealed, or failed to produce" the December 29, 1999 entry. Accordingly, we find that the trial court did not abuse its discretion in denying Mr. Montegut's request to instruct the jury regarding the presumption of unfavorability.

Mr. Montegut also argues that it was error for the trial court to instruct the jury to apportion fault between the Bulldog and the unknown patron because the patron acted intentionally. The supreme court held in *Dumas v. Louisiana Department of Culture, Recreation & Tourism*, 02-563, p. 11 (La. 10/15/02), 828 So.2d 530, 537, that La.Civ.Code art. 2323 "clearly requires that the fault of every person responsible for a plaintiff's injuries be compared, whether or not they are parties, regardless of

the legal theory of liability asserted against each person." Accordingly, this contention is also without merit.

***Motion to Strike Jury Trial***

Mr. Montegut argues that the trial court erred in denying his motion to strike the jury, which was predicated on the Bulldog not having filed its jury bond timely. The Bulldog requested a trial by jury in its answer, and Mr. Montegut requested a trial by jury in his pleadings. However, neither had a jury order signed before the matter was originally set for trial, and it was set as a bench trial. After the original trial date was continued, the Bulldog filed a jury order in which the trial court ordered that bond be posted ninety days prior to trial. In May 2003, a motion to reset the trial by jury was filed, and on June 2, 2003, pursuant to a jury order filed by the Bulldog, a notice of order granting jury trial was issued. Pursuant to that order, the Bulldog filed a jury bond on June 11, 2003.

Due to bankruptcy proceedings filed by the Bulldog, the matter was stayed for a period of approximately eight months. On April 22, 2004, the Bulldog filed a motion to reset the matter for trial, and a jury trial was scheduled for December 13, 2004. On November 23, 2004, Mr. Montegut filed a motion to strike the jury trial. Immediately preceding the start of trial on December 13, 2004, the trial court heard and denied the motion.

A party whose motion to strike jury was denied must complain prior to trial, either by application for writs or other appropriate means. *Glass v. Magnolia School, Inc.*, 01-1209 (La.App. 5 Cir. 3/13/02), 815 So.2d 143, *writ denied*, 02-1048 (La. 6/7/02), 818 So.2d 776. *See also Eddy v. Litton,* 586 So.2d 670, (La.App. 2 Cir. 1991)*, writ denied*, 590 So.2d 1203 (La.1992); *Windham v. Sec. Ins. Co. of Hartford*,

(La.App. 4 Cir. 1976), 337 So.2d 577, *writ denied*, 341 So.2d 407 (La.1977). One cannot wait until a verdict has been rendered and then decide whether to appeal. *Id.* Pursuant to this jurisprudence, Mr. Montegut is held to have acquiesced in the granting of the jury trial or to have waived his right to object to it because he failed to take appropriate action prior to trial. This is true even if the trial court erred, which we expressly do not determine.

***Jury's Failure to Find Fault***

Following trial, the jury returned a verdict finding no negligence on the part of the Bulldog. Mr. Montegut urges that no reasonable jury could have found the Bulldog free from fault. Our review of this assignment is governed by the manifest error standard. Under this standard, when inferences drawn by the trier of fact from the record are reasonable, those inferences will not be set aside on appeal. *Stobart v. State, through DOTD*, 617 So.2d 880 (La.1993).

Whether a business owner has a duty to protect its patrons from crimes perpetrated on its premises by third parties was considered by the supreme court in *Posecai v. Wal-Mart Stores, Inc.*, 99-1222 (La. 11/30/99), 752 So.2d 762. The court held that such a duty only arises under limited circumstances and determined that foreseeability of such a crime is a critical inquiry. *Id.* It adopted the following balancing test as the criteria for determining liability in such a case:

> The foreseeability of the crime risk on the defendant's property and the gravity of the risk determine the existence and the extent of the defendant's duty. The greater the foreseeability and gravity of the harm, the greater the duty of care that will be imposed on the business. A very high degree of foreseeability is required to give rise to a duty to post security guards, but a lower degree of foreseeability may support a duty to implement lesser security measures such as using surveillance cameras, installing improved lighting or fencing, or trimming shrubbery. The plaintiff has the burden of establishing the duty the defendant owed under the circumstances.

> The foreseeability and gravity of the harm are to be determined by the facts and circumstances of the case. The most important factor to be considered is the existence, frequency and similarity of prior incidents of crime on the premises, but the location, nature and condition of the property should also be taken into account. It is highly unlikely that a crime risk will be sufficiently foreseeable for the imposition of a duty to provide security guards if there have not been previous instances of crime on the business' premises.

*Id*. at 768.

As previously explained, the jury saw those portions of the Bulldog's logs which documented fights at the bar. It heard the testimony of the Bulldog's owner and employees regarding security measures taken by the Bulldog and the training methods it utilized with regard to the security of its patrons, as well as Mr. Gautreaux's, Mr. Supple's, and Mr. Montegut's descriptions of what transpired before Mr. Montegut was hit. The jury also heard the testimony of two expert witnesses, who detailed their investigations of Mr. Montegut's allegations and their opinions as to whether the Bulldog's security measures were sufficient.

Mr. George Armbruster testified as an expert on behalf of Mr. Montegut. Mr. Armbruster has a Bachelor's Degree in criminal justice and twenty-eight years experience in law enforcement and security; he received extensive training during his law enforcement career in various fields of law enforcement. He is currently a consultant in law enforcement and security. Mr. Armbruster was qualified as an expert in security by the trial court. He admitted that he had never been qualified to testify as an expert on the issue of foreseeability but pointed out that some of the issues he addressed in his testimony "branched off" of that topic.

Based on his experience as a former law enforcement officer in Lafayette, Mr . Armbruster was of the opinion that there were many more fights at the Bulldog than recorded. As support for his opinion, he pointed to the Bulldog's near proximity

to the Strip, an area in Lafayette which contains a number of bars with high incidences of intoxication and fights, and to the lack of adequate recordation of fights at the Bulldog. Based on this, he testified that the Bulldog's policies and procedures manual and training were inadequate.

Mr. Armbruster further testified that with proper training Mr. Gautreaux could have prevented the altercation with Mr. Montegut. In his opinion, there should have been specific instructions in the training manual and in the security training procedures which addressed how to handle people who are drinking alcohol and how to physically separate them in such situations so as to prevent physical contact.

Dr. Ed Thornton, a professor in criminology at Loyola University in New Orleans, testified as an expert for the Bulldog. He was qualified as an expert in forensic criminology with a specialty in methods, statistics, and security. Dr. Thornton testified that it is rare to find a business that maintains internal records of criminal activity as the Bulldog does. He also testified that because entries other than the December 29, 1999 entry were also missing, he did not believe the entry was intentionally removed.

Dr. Thornton reviewed calls for service that the Bulldog made to law enforcement and found that calls for service before December 29, 1999, were generally for low level, similar type offenses. In his opinion, two calls in 1996, six calls in 1997, seven calls in 1998, and six calls in 1999 were relevant to this matter. Based on his review, this incident was not foreseeable because it occurred rather quickly. Further, he was of the opinion that Mr. Gautreax and Mr. Supple responded appropriately to the situation, as they took reasonable steps to intervene and monitor

the situation. Dr. Thornton also testified that he believed the Bulldog's policies were adequate and in line with accepted procedures for such establishments.

There is no real dispute as to what occurred the evening of December 29, 1999. The dispute is between the experts as to whether it was foreseeable, whether the Bulldog's security measures were adequate, and whether the incident was handled appropriately. It is the duty of the jury to evaluate the credibility of each witness, including expert witnesses, and to come to conclusions regarding the facts based on these evaluations. In light of the evidence and the experts' opinions, we find that the jury could have reasonably concluded that the Bulldog was not negligent. Accordingly, we cannot set aside the verdict.

## ***Disposition***

The trial court's judgment is affirmed. All costs are assessed to Ryan Montegut.

**AFFIRMED.**

This opinion is NOT DESIGNATED FOR PUBLICATION. Uniform Rules—Courts of Appeal. Rule 2-16.3.