IN THE COURT OF APPEALS OF IOWA

No. 2-365 / 91-2005

JONATHAN NARCISSE,

Plaintiff-Appellant,

vs.

SUPER VALU STORES, INC., d/b/a SMITTY'S SUPER VALU,

Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Arthur E. Gamble, Judge.

Jonathan Narcisse appeals a district court decision denying his motion for summary judgment and granting the defendant's motion for summary judgment. **AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.**

Thomas Mann, Jr., Austin, Texas, for appellant.

William F. Fanter and Barbara A. Hering of Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, for appellee.

Considered by Donielson, P.J., and Hayden and Sackett, JJ.

SACKETT, J.

Plaintiff-appellant Jonathan Narcisse was arrested by the Des Moines Police Department for criminal trespass and incarcerated after he was removed from the defendant-appellee Super Valu Stores, Inc., store where plaintiff had gone to return Pepsi-Cola containers for a refund. As a result of the incident, plaintiff sued defendant for false arrest, false imprisonment, negligence, and invasion of privacy. The trial court dismissed all of plaintiff's claims on a motion for summary judgment. Plaintiff filed a motion for summary judgment contending he was entitled to summary judgment on all his claims. The trial court overruled plaintiff's motion. Plaintiff has appealed the dismissal of his action and the trial court's refusal to sustain his motion for summary judgment. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact, and that the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 237(c); see Farm Bureau Mut. Ins. Co. v. Milne, 424 N.W.2d 422, 423 (Iowa 1988). In considering a motion for summary judgment the evidence is viewed in the light most favorable to the resisting party. See Thorp Credit, Inc. v. Gott, 387 N.W.2d 342, 343 (Iowa 1986). Every legitimate inference that reasonably can be deduced from the evidence should be afforded the resisting party. Id.; see Sherwood v. Nissen, 179 N.W.2d 336, 339 (Iowa 1970). We review the facts in the light most favorable to the plaintiff in considering whether the trial court correctly sustained defendant's motion for summary judgment and dismissed plaintiff's action.

There are facts in the record which, if believed, would prove that defendant is a grocery store that sells Pepsi-Cola products. Defendant grocery store is open to the public from six in the morning until twelve o'clock midnight. Plaintiff went to defendant grocery store on June 6, 1990, after 10 p.m., but before midnight, seeking to redeem containers on which he had paid an Iowa deposit. Defendant's manager refused plaintiff's request to redeem the containers contending defendant store's policy provided that containers would only be redeemed on a one-for-one basis after 10 p.m. That is, to redeem a container, the customer had to purchase a beverage from the store and pay the deposit on that container for each container redeemed. Defendant's manager told plaintiff the store would not redeem his containers because of the store policy. Plaintiff told the manager in his view the policy might not be legal. The manager advised plaintiff the store had received a ruling from the Iowa Attorney General's office that the policy was legal. Plaintiff left the store without having his containers redeemed.

Plaintiff then checked with the Iowa Attorney General's office and the Iowa Department of Natural Resources. Plaintiff learned that these departments had advised defendant in January 1986 that its redemption policy, providing among other things, no containers would be redeemed after 10 p.m., violated the state beverage law. On June 14, 1990, the Iowa Department of Natural Resources sent a letter to defendant advising it of the provisions of Iowa Code section 455C.3.

Plaintiff returned to the store on June 18, 1990, about 10:30 p.m., seeking to return the sixteen empty Pepsi-Cola containers. Plaintiff was respectful and presented copies of the letters defendant had received on the redemption law from the Attorney General and the Department of Natural Resources to defendant's manager. Defendant's manager refused to redeem the containers and give plaintiff the required refund. Plaintiff said he would not leave the store until he was given the refund. At 11:30 p.m., defendant's manager called the Des Moines Police Department. The police promptly came to the store. Plaintiff showed the police officers copies of the letters from the state agencies. Plaintiff was asked by the police officer to leave the store, but plaintiff did not leave. Defendant's manager was told by the police officers the only way to remove plaintiff from the premises was to arrest him for criminal trespass. Defendant's manager did not suggest or request the arrest, but told the officers he wanted plaintiff removed from the store so he could close. When plaintiff was told he would have to be arrested if he did not leave the store, plaintiff put his hands behind his back and told the officer to do what he had to do. Plaintiff was arrested about 11:52 p.m. Plaintiff was taken to headquarters and placed in a holding cell. The criminal trespass charges against plaintiff were subsequently dropped.

As a dealer in Pepsi-Cola products, defendant is bound by Iowa Code section 455C.3 that provides in relevant part as follows:

> 1. A dealer shall not refuse to accept from a consumer any empty beverage container of the kind, size and brand sold by the dealer, or refuse to pay to the consumer the refund value of a beverage container as provided under section 455C.2.

There is evidence in the record to support a finding that defendant was in violation of this section and had been advised it was in violation.

The first question is whether the record would provide substantial evidence to support a finding for plaintiff on his allegation that defendant was responsible for his arrest and subsequent imprisonment.

A false arrest is one way of committing the tort of false imprisonment--restraining the freedom of movement.

Children v. Burton, 331 N.W.2d 673, 678 (Iowa 1983). False arrest is indistinguishable from false imprisonment. Kraft v. City of Bettendorf, 359 N.W.2d 466, 469 (Iowa 1984).

The essential elements of the tort of false arrest are (1) detention or restraint against one's will, and (2) unlawfulness of the detention or restraint. See Valadez v. City of Des Moines, 324 N.W.2d 475, 477 (Iowa 1982); see also Kraft, 359 N.W.2d at 469.

A person is entitled to maintain an action for false imprisonment, where another person deprives him or her of his or her liberty, and it is for the defendant to justify his or her proceeding by showing that he or she had legal authority for doing that which he or she has done. See Fox v. McCurnin, 205 Iowa 752, 759, 218 N.W. 499, 502 (1928). The burden was upon defendant to justify the imprisonment, and all plaintiff needed to do, to make a prima facie case, was to prove the imprisonment and his damages, the defendant is then called upon to assume the burden of proving justification. See id.

The trial court sustained defendant's motion for summary judgment on the grounds there was no evidence defendant instigated or directed plaintiff's arrest. If plaintiff's alleged false imprisonment was brought about by the acts and conduct, or at the instance and request of defendant or its employees or agents, then defendant would be liable for the arrest and false imprisonment. See Fox, 205 Iowa at 759, 218 N.W. at 502.

Taking the evidence in the light most favorable to plaintiff, there is evidence from which a fact finder could find plaintiff's arrest and subsequent incarceration were at the request or the direction of defendant's manager. There was evidence plaintiff entered defendant grocery store when it was open for business. This evidence would support a finding that plaintiff entered the store as an invitee, one who when he or she enters a store is expected to be attracted to the store and when he or she enters it, to do so for the store's purpose. _See generally_ _Sullivan v. First Presbyterian Church, Waterloo_, 260 Iowa 1373, 1376, 152 N.W.2d 628, 630 (1967); _Smith v. Cedar Rapids Country Club_, 255 Iowa 1199, 1203, 124 N.W.2d 557, 560 (1964); _Crouch v. Pauley_, 254 Iowa 14, 17, 116 N.W.2d 486, 488 (1962); _Warner v. Hansen_, 251 Iowa 685, 688, 102 N.W.2d 140, 145 (1950).

There also is evidence one of the purposes of the store was to sell Pepsi-Cola products. A statutory duty connected with the sale of these products was the statutory responsibility to redeem the Pepsi-Cola containers. _See_ Iowa Code § 455C.3(1). There was evidence plaintiff was not creating a disturbance and, other than his refusal to leave until he received his refund, plaintiff was not creating any problems in defendant store. Defendant's manager, aware of these facts, called the Des Moines Police Department and when the Des Moines police officers arrived, communicated his wish to have plaintiff removed from the store property. This was before twelve midnight, and the store was still open to the public. The affidavit of the supervising sergeant who came to the store stated that the officer told the manager the only way the officer could remove plaintiff from the store was to arrest plaintiff for criminal trespass. While there is no claim the manager specifically told the officer to arrest plaintiff, after the manager was told the only way to remove plaintiff was through arrest, the officer's affidavit was that the manager told the officer he wanted plaintiff out of the store. We look at these facts collectively: (1) the manager called the police to the store to remove plaintiff, (2) the manager was told by the police the only way they could remove plaintiff was by arresting him, (3) after being advised by the officer the only way plaintiff could be removed was through arrest, the manager still told the officer he wanted plaintiff out of the store, and (4) the manager acquiesced in the arrest. A fact finder could infer from these collective facts that plaintiff's arrest was the direct result of the action of defendant's manager.

The trial court should not have dismissed plaintiff's claims of false arrest and imprisonment. We reverse on this issue.

The next question is whether the trial court should have sustained defendant's motion on plaintiff's negligence claim. Plaintiff contends that because he showed defendant's refusal to redeem his containers in accordance with Iowa Code section 455C.3, he has shown defendant was negligent per se. The trial court ruled defendant did not owe a statutory duty of care to plaintiff based on Iowa Code section 455C.3 and, therefore, defendant's violation of this statute was not negligence per se. We recognize that an intent to protect the particular party is a prerequisite to a claim of negligence based on a violation of a statute. See Stennett Elevator, Inc. v. State, 430 N.W.2d 122, 124 (Iowa 1988); Seeman v. Liberty Mut. Ins. Co., 322 N.W.2d 35, 37-38 (Iowa 1982).

We disagree with the trial court's conclusion that defendant did not have a statutory duty to plaintiff under Iowa Code section 455C.3. That section creates a duty on the part of a dealer, the defendant in this case, to accept and refund empty beverage containers presented by consumers. Iowa Code section 455C.1 defines the words used in Iowa Code chapter 455C. Iowa Code section 455C.1(3) states "consumer" means any person who purchases a beverage in a beverage container for use or consumption. Iowa Code section 455C.1(1) states "beverage" means wine as defined in section 123.3, subsection 7, alcoholic liquor as defined in section 123.3, subsection 8, beer as defined in section 123.3, subsection 10, mineral water, soda water and similar carbonated soft drinks in liquid form and intended for human consumption. Plaintiff is a consumer of beverages. Iowa Code section 455C.1(2) states, "beverage container" means any sealed glass, plastic, or metal bottle, can, jar or carton containing a beverage. Plaintiff was attempting to return a beverage container. Plaintiff is a person the statute intended to protect.

Defendant correctly advances that even if we disagree with the trial court's reason for dismissing the negligence claim, we may affirm the trial court decision on any proper basis appearing in the record. See Stennett Elevator, 430 N.W.2d at 124; Langner v. Mull, 453 N.W.2d 644, 647 (Iowa App. 1990).

Defendant argues even though not used as a basis for dismissal, the trial court ruling can be supported on the ground that plaintiff presented no evidence that defendant's violation of the statute was a proximate cause of plaintiff's arrest and subsequent incarceration. We agree. We affirm the trial court on this issue.

The last question is whether the trial court properly sustained defendant's motion for summary judgment on plaintiff's claim that defendant had invaded his privacy.

The Iowa court first recognized the right of privacy in Bremmer v. Journal-Tribune Publishing Co., 247 Iowa 817, 821-22, 76 N.W.2d 762, 764-65 (1956). The right to privacy is defined as the right of an individual to be let alone, to live a life of seclusion, to be free from unwarranted publicity. Stessman v. American Black Hawk Broadcasting Co., 416 N.W.2d 685, 686 (Iowa 1987); Bremmer, 247 Iowa at 821; 76 N.W.2d at 764. To recover under this theory, plaintiff must show (1) defendant intentionally intruded upon the seclusion plaintiff has thrown about his or her person or his or her affairs, and (2) that the intrusion would be highly offensive to a reasonable person. See Stessman, 416 N.W.2d at 687; Winegard v. Larsen, 260 N.W.2d 816, 822 (Iowa 1977).

However, defendant is not liable to plaintiff if plaintiff is already in public view. See Stessman, 416 N.W.2d at 687. Plaintiff's arrest occurred in a building open to the public, the grocery store. By plaintiff's own admissions, he was an activist. Plaintiff had taken a friend with him to video tape his attempted container return. There is nothing in this record to suggest the arrest occurred in such a way as to further throw plaintiff in an additional public view. The trial court was correct in sustaining defendant's motion for summary judgment on these grounds.

We reverse the motion for summary judgment dismissing plaintiff's claim for false arrest and false imprisonment.

We affirm the trial court's dismissal of plaintiff's claim for negligence and invasion of privacy. We affirm the trial court's denial of plaintiff's motion for summary judgment.

Costs on appeal are taxed one-half to plaintiff and one-half to defendant.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Hayden, J., concurs; Donielson, P.J., partially dissents.

DONIELSON, P.J. (dissenting in part)

I respectfully dissent to the majority's reversal of the motion for summary judgment which dismissed Narcisse's claim for false arrest and false imprisonment. I do not agree Narcisse's arrest was the direct result of the defendant store or the store manager, and I would affirm the district court on this issue.

To be liable for the tort of false arrest, the defendant must have instigated or directed the unlawful arrest of the defendant. Fox v. McCurin, 205 Iowa 752, 759 218 N.W. 499, 502 (1928). Here, there is no evidence that the store manager either instigated or directed Narcisse's arrest. Rather, Narcisse's arrest was the direct result of his own actions and the decisions of the police on the scene.

Narcisse voluntarily entered the store, remained on the premises after the store had closed, was asked on more than one occasion to leave the store, and ultimately, refused to leave. His refusal to leave was a conscious decision, made with the knowledge that refusing to leave would result in his arrest. The supervising police sergeant, Sergeant Dunn, arrived on the scene at 11:52 p.m. and by the time she was able to ascertain the situation and speak with both the store manager and Narcisse, it was past midnight. It was only after the store was closed, when Narcisse was given his final ultimatum to leave or be arrested. At that point, Narcisse did not leave and he was consequently arrested.

Narcisse's own statements bolster the perception that the decision to arrest him was made by the police, and not by the store manager. At his deposition, Narcisse testified: "I felt that the police officers were being completely unreasonable. . . . They knew what they were going to do. I believe they wanted to take me to jail." (Emphasis added).

In Sergeant Dunn's affidavit, she stated the store manager "just wanted Mr. Narcisse removed from the store so that he could close the store and go home." Although the police did inform the store manager that the only way to remove Narcisse from the premises was to arrest him, the store manager's knowledge that Narcisse would be arrested if he did not leave is not enough to proximately cause Narcisse's arrest. Even after closing time had passed, the store manager did not suggest or request that the police arrest Narcisse. I agree with the finding of the district court: "Asking the police to remove someone is not equivalent to directing the police to arrest."

I concede Narcisse's arrest may have evolved from the dispute over the defendant store's unlawful policies. However, even taken in the light most favorable to the plaintiff, these collective facts do not establish Narcisse's arrest was a direct result of the defendant's policies and actions. The actual arrest of Narcisse was solely a consequence of Narcisse's own decisions and police decisions on the scene.

I would affirm the judgment of the district court.