IN THE COURT OF APPEALS OF IOWA

FILED
TO
CLERK OF APPEALS COURT

No. 1999-214 (9-438) / 98-2196
Filed November 10, 1999

JAMES WOOD,
Appellee,

vs.

DANCERS, INC.,
Appellant.

Appeal from the Iowa District Court for Black Hawk County, George L. Stigler, Judge.

The defendant appeals the district court's entry of judgment for plaintiff in this premises liability suit based on the actions of a third party. **AFFIRMED.**

Todd P. Forsythe, Cedar Rapids, for appellant.

Thomas C. Verhulst of Gallagher, Langlas & Gallagher, P.C., Waterloo, for appellee.

Considered by Huitink, P.J., Mahan, J., and Habhab, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1999).

HABHAB, S.J.

The defendant appeals the district court's entry of judgment for plaintiff in this premises liability suit based on the actions of a third party. Defendant claims the district court erred in: (1) failing to grant its motion for judgment notwithstanding the verdict (n.o.v); (2) barring it from introducing certain evidence; (3) failing to instruct the jury on justification, self-defense, and assumption of the risk; and (4) taxing as costs plaintiff's witness charges. We affirm on appeal.

On August 26, 1995, a Saturday, James Wood went to Dancers Zodiac in Waterloo, Iowa. Dancers Zodiac is a bar featuring topless female dancers. The bar was owned by Dancers, Inc. Wood arrived at the bar between 3:00 and 3:30 p.m. During his time at the bar Wood consumed about six bottles of beer.

At approximately 7:30 p.m., Wood told the bartender, David Lyons, he did not care for another patron, Gary Fleming, who was at the bar that evening. One of the dancers, Teresa Rowan, who was also known as Dominique, overheard this remark and took exception to Wood's comments. She began yelling at Wood, who yelled back at her. The argument was fairly loud for about one minute. None of the bar employees did anything to stop the fight. Wood decided to walk away and go to another part of the bar. Rowan kept yelling at him. As Wood started to turn back, Rowan threw a beer bottle at him. The bottle hit Wood in the mouth, causing injuries to his lips and teeth.

After the incident, Wood gave a statement to police officers. The bar manager, Jackie Reed, then took him to the emergency room, where he received stitches to the cuts on his lips. Wood lost two of his teeth. He was told to see a dentist as soon as possible.

Wood saw a dentist, Dr. Larry Lenth, on Monday, August 28, 1995. Dr. Lenth removed two more of Wood's teeth. After the swelling in his mouth went down, Wood saw Dr. T. Mark Trunnell about getting a dental bridge. Wood did not have the work done because he did not have sufficient money. Wood continued to have pain in his mouth.

In July 1997, Wood filed suit against Dancers, Inc., alleging it was negligent for failing to provide for his safety while he was a patron at its establishment. The case was tried to a jury. The jury assigned all of the fault to defendant and none to Wood. The jury awarded Wood damages of $30,036.50.

Defendant filed a motion for judgment n.o.v. The district court denied the motion. On plaintiff's motion, the court assessed defendant costs for the depositions of Dr. Lenth and Dr. Trunnell, expert witness fees, the costs of obtaining Wood's medical records, and mileage costs for certain witnesses. Defendant appealed.

I. In assessing a motion for judgment n.o.v., this court's only inquiry is whether there is sufficient evidence to justify submitting the case to the jury. *Vogan v. Hayes Appraisal Assocs., Inc.*, 588 N.W.2d 420, 423 (Iowa 1999). If there is substantial evidence to support a plaintiff's claims, a motion for judgment n.o.v.

should be denied. *Id.* Evidence is substantial when a reasonable mind would find the evidence presented adequate to reach the same findings. *Tredea v. Anesthesia & Analgesia, P.C.*, 584 N.W.2d 276, 280 (Iowa 1998). The court views the evidence in the light most favorable to the party against whom the motion was made and takes into consideration every legitimate inference that may fairly and reasonably be made. *Roling v. Daily,* 596 N.W.2d 72, 74 (Iowa 1999).

II. Defendant claims Wood did not meet his burden to show it was negligent. It asserts it did what it could to prevent fights at the bar by having a bouncer present. It states the fight in this case happened too quickly for the bouncer or the bartender to be able to stop the fight before it escalated into violence. It also states it was not foreseeable Rowan would throw a bottle at Wood.

Where a plaintiff's claim involves negligence predicated on the act of a third party on the premises, the proper standard is found in Restatement (Second) of Torts section 344. *Young v. Gregg,* 480 N.W.2d 75, 79 (Iowa 1992). This section provides:

> 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
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> (a) discover that such are being done or are likely to be done, or
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> (b) give a warning adequate to enable the visitors to avoid the harm or otherwise protect them against it.

Restatement (Second) of Torts § 344 (1965).

Thus, under Restatement section 344, a duty of care is owed by a possessor of land who holds it open to the public for business purposes to members of the public to protect them against physical harm caused by the acts of third persons. *Fiala v. Rains*, 519 N.W.2d 386, 389-90 (Iowa 1994); *Morgan v. Perlowski*, 508 N.W.2d 724, 728 (Iowa 1993). Premises liability under Restatement section 344 presupposes foreseeability. *Tenney v. Atlantic Assocs.*, 594 N.W.2d 11, 18 (Iowa 1999).

In considering the motion for judgment n.o.v. we must ask, was there sufficient evidence to generate a jury question? *Morgan*, 508 N.W.2d at 726. Generally, questions of negligence are for the jury; only in exceptional cases should they be decided as a matter of law. *Regan v. Denbar, Inc.*, 514 N.W.2d 751, 752 (Iowa App. 1994). There was sufficient evidence to generate a jury question in this case. Lyons, the bartender, testified he asked the bouncer to keep an eye on the situation, but the bouncer did not do anything. Lyons also admitted he or the bouncer could have done something more to stop the figh . . .nother patron at the bar, Mark Simmons, testified usually the bouncer would quiet people down if there was an argument, but in this case he did not. Furthermore, defendant could have foreseen a loud shouting match could escalate until it resulted in violence. The district court properly denied the motion for judgment n.o.v.

III. A. On appeal, defendant asserts for the first time it should have been permitted to introduce evidence of defendant's prior conviction for domestic abuse. Defendant, however, did not attempt to introduce evidence of Wood's domestic abuse

conviction. Therefore, that issue is not preserved for our review. *See Johnson v. State Farm Auto. Ins. Co.*, 504 N.W.2d 135, 138 (Iowa App. 1993).

Defendant also claims it should have been permitted to introduce evidence of Wood's prior conviction for operating while intoxicated (OWI). Defendant argues this evidence was probative to show Wood had a habit of consuming alcohol to excess. Defendant claims Rowan could have known of this propensity, which could have caused her to fear Wood and led her to act as she did.

The district court sustained plaintiff's objection to the admission of the OWI conviction on the ground the evidence was not admissible under Iowa Rule of Evidence 609. Under rule 609, evidence of a prior conviction is admissible if the court determines the probative value of admitting the evidence outweighs its prejudicial effect. *State v. Axiotis*, 569 N.W.2d 813, 815 (Iowa 1997). The court's ruling will be disturbed only when its discretion has been abused. *State v. Frazier*, 559 N.W.2d 34, 38 (Iowa App. 996). The district court did not abuse its discretion by ruling evidence of Wood's OWI conviction was inadmissible. The evidence of Wood's OWI conviction was not probative as to any issue before the court because there was no evidence to show Rowan knew of the conviction.

B. Defendant contends plaintiff's damages were exacerbated because emergency room physicians did not call in a dentist or oral surgeon to fix his teeth. Defendant asserts some of Wood's teeth might have been saved if he had received

earlier dental assistance. Defendant argues some fault should have been assigned to the emergency room physicians.

The general rule is that, assuming there was no negligence in selecting the doctor, the tort-feasor is responsible for the negligence of an attending physician in treating the injured party. *Casey v. Koos,* 323 N.W.2d 193, 197 (Iowa 1982); *Ichelson v. Wolfe Clinic, P.C.,* 576 N.W.2d 308, 310 (Iowa 1998). Restatement 457 provides:

> If the negligent actor is liable for another's bodily injury, he is also subject to liability for any additional bodily harm resulting from normal efforts of third persons in rendering aid which the other's injury reasonably requires, irrespective of whether such acts are done in a proper or a negligent manner.

Restatement (Second) of Torts § 457 (1965). Under Restatement section 457, the district court properly excluded any evidence of alleged negligence by the emergency room physicians.

C. Defendant sought to introduce the police report of this incident. The report included statements from Rowan, who was not available to testify at the trial. The district court determined the police report was inadmissible hearsay. Iowa Rule of Evidence 803(8)(B)(i) provides the hearsay exception allowing public records or reports into evidence does not include investigative reports by police and other law enforcement personnel. *See State v. Curry,* 436 N.W.2d 371, 373 (Iowa App. 1988). The district court did not abuse its discretion in finding the police report was not admissible.

IV. Defendant contends the court should have instructed the jury on its defenses of justification and self-defense. It claims Rowan might have feared for her safety during her argument with Wood, so that her actions were justified. It also claims she might have been acting in self-defense if she felt threatened by Wood. Defendant further asserts Wood unreasonably encountered and assumed a known risk when he began arguing in a tavern. Defendant claims the jury should have been instructed on assumption of risk.

We review a trial court's formulation of jury instructions for errors of law. *Waits v. United Fire & Cas. Co.*, 572 N.W.2d 565, 575 (Iowa 1997). A court may properly refuse to give an instruction when it is not supported by substantial evidence. *Bangs v. Pioneer Janitorial of Ames, Inc.*, 570 N.W.2d 630, 632 (Iowa 1997). Evidence is substantial if reasonable minds could accept it as adequate to reach a conclusion. *Weems v. Hy-Vee Food Stores, Inc.*, 526 N.W.2d 571, 573 (Iowa App. 1994). If the trial court errs in submitting or refusing to submit an instruction, we will reverse only if the error has caused prejudice. *Kessler v. Wal-Mart Stores, Inc.*, 587 N.W.2d 804, 806 (Iowa App. 1998).

There was insufficient evidence in the record to support jury instructions on justification, self-defense, and assumption of risk. The parties were unable to locate Rowan to have her testify at the trial. Thus, there was no evidence concerning whether she felt afraid or threatened by Wood. There was also no evidence Wood

knew he faced a risk if he entered the bar on August 26, 1995. We determine the district court properly refused to give these instructions.

V. Defendant asserts that if we reverse or remand the case, the charges of Wood's witness should not be taxed as costs against it. We affirm the decision of the district court, and therefore, we do not modify the assessment of costs.

We affirm the decision of the district court. Costs of this appeal should be assessed to defendant.

AFFIRMED.