FILED
JAN 29 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

174

DENISE LETA LOCKEY, JACOB LEE LOCKEY, and JARED SCOTT LOCKEY, By DENISE LETA LOCKEY, Mother and Next Friend,

Plaintiffs-Appellees,

vs.

CIRCLE PRODUCTIONS CO., LTD. a/k/a CIRCLE PRODUCTION CO., INC. d/b/a THE CIRCLE LOUNGE,

Defendant-Appellant.

Filed January 29, 1986

5-566
85-603

Appeal from the Iowa District Court for Black Hawk County - L. John Degnan, Judge.

Defendant tavern appeals a jury verdict and judgment under the dram shop act for an injury occurring to a patron who was involved in a motorcycle accident with an intoxicated bar patron. **AFFIRMED.**

Gerry M. Rinden of Klockau, McCarthy, Ellison & Rinden, Rock Island, Illinois, for defendant-appellant.

Thomas W. Langlas of Gallagher, Langlas & Gallagher, P.C., Waterloo, for plaintiffs-appellees.

Heard by Donielson, P.J., and Schlegel and Sackett, JJ.

Defendant-tavern appeals a jury verdict and judgment under the dram shop act for injury occurring to a patron who was involved in a motorcycle accident with an intoxicated bar patron. Defendant claims the trial court erred and abused its discretion on two grounds: (1) by refusing to grant a mistrial after allegedly prejudicial opening statements by other defendants who subsequently settled the claims before evidence was taken; and (2) by overruling the motion for directed verdict on the defense of complicity as a matter of law and in failing to separately address the motion on the issues of complicity and assumption of risk. We affirm.

Plaintiff, Denise Lockey, was in Circle's tavern the night of the accident. Testimony differed as to how much alcohol she consumed, how well she actually knew Robert Clay, the intoxicated bar patron, and the circumstances which prompted Clay to sit at her table that night. Lockey left with Clay, riding on the back of his motorcycle, and was injured when he collided with a jeep driven by the Zeys.

Originally, Lockey and her children brought this action against Clay, who was dismissed from the case before trial, the Zeys, the Jeep's driver and owner, and Circle. In opening statements Mr. Walsh, the Zeys' attorney, made repeated reference to the upcoming testimony of the officer who had investigated the accident, because he was planning to depose the officer in St. Paul and offer his testimony into evidence. However, the Zeys settled before further proceedings took place. Officer Smith was never deposed and did not testify.

Circle moved for a mistrial on the basis that the alleged prejudicial opening statements could not be removed from the minds of the jurors by any admonition the court might give. The court overruled the motion and orally cautioned the jury that statements made by lawyers are not evidence.

Because it was undisputed that plaintiff drank some alcohol at the tavern, defendant further claims a directed verdict on the issue of complicity should have been granted as a matter of law. Defendant finally contends the court should have ruled separately on the issues of complicity and assumption of risk when the motion for directed verdict was overruled.

I.

Several days before the trial was scheduled to commence, the Zeys gave notice of their intent to take the evidentiary deposition of the police officer who investigated the accident. Even though the trial commenced on December 11, 1984, the parties agreed to recess on December 12th so that the Zeys' counsel could depose the investigating police officer who was residing in St. Paul, Minnesota. The deposition was to be admitted into evidence.

On December 11th, the jury was selected and opening statements were made. The Zeys' counsel allegedly made numerous references to the investigating officer's observations at the scene of the accident. Such testimony was apparently relevant to establish the credibility of Clay's testimony as to the events which transpired during the evening in question.

During the evening of December 11th, Lockey and the Zeys entered into a settlement agreement. The relevant consequence of this agreement was that the investigating officer was not deposed on December 12th.

On December 12th, Circle moved for a mistrial on the basis that the opening statement of the Zeys' counsel was prejudicial because it made reference to the investigating officer's purported testimony. The trial court denied the motion.

On December 13th, Circle moved again for a mistrial which was denied. Before testimony was offered, the trial court made the following cautionary instruction to the jury:

> I would call the jury's attention to the fact that the party Roger Franklin Zey and Harry Zey are no longer a party to this lawsuit, so there will be no information from that side of the case.
>
> Also, at the time of the lawyers' statements made to you--opening statements, Mr. Walsh [counsel for the Zeys] was here and of course he represented Mr. Zey in this lawsuit. And during his opening statements, he told you of things that were going to happen that are not going to happen now as far as they are concerned, because they are no longer in this lawsuit.
>
> So you are instructed and admonished not to pay or give any attention to the fact that he is no longer in the lawsuit, and to the fact of any of the statements he made to you in opening statement.
>
> As you already know, the statements made by the lawyers to you at that time are not evidence. Anything the lawyers said is not evidence. The evidence will come, as one of the lawyers stated, from this chair and from the exhibits and testimony that you will hear in this courtroom. But what the lawyers have to say, again is not evidence, so you will not pay any attention and try and ignore anything that you heard from Mr. Walsh at the time he made an opening statement.

The trial court also instructed the jury, in relevant part, as follows:

> It is your duty as jurors to follow the instructions of the Court. In your jury room you should not refer to or consider any testimony that has been stricken out, or anything, except the evidence received upon the trial and the instructions.
>
> * * *
>
> You are instructed as was earlier mentioned by this Court, that you not give any consideration to anything said by Attorney James E. Walsh at the time he made an opening statement at the beginning of this lawsuit.
>
> You are advised that anything said by the lawyers including statements made in opening statements and closing arguments, are not evidence and cannot be considered as evidence as you deliberate to find your verdict.

As to opening statements under Iowa Rule of Civil Procedure 191, Iowa law provides "counsel should only tell the jury about evidence that counsel has a good faith belief will be offered and admissible." Kester v. Bruns, 326 N.W.2d

279, 281 (Iowa 1983). At the time opening statements were made, Walsh's comments were made in good faith. Subsequent events, however, made his comments problematic.

Our inquiry is to determine whether prejudice resulted to Circle from Walsh's remarks. Prejudice means that a different result was probable if such remarks had not been made. Rasmussen v. Thilges, 174 N.W.2d 384, 391 (Iowa 1970). To reverse the trial court's decision to deny the motion for a mistrial, we must find the court abused its discretion. Yeager v. Durflinger, 280 N.W.2d 1, 8 (Iowa 1979).

Absent cautionary instructions before testimony was introduced and when the case was submitted to the jury by the trial court, the remarks made in the opening statement could have been prejudicial. Our review of the records leads us to conclude that, even if the remarks should not have been made, the prejudicial effect was obviated by the trial court's admonitions to the jury. See Turner v. Jones, 215 N.W.2d 289, 291 (Iowa 1974). We are unwilling to indulge in an inference that the jury disregarded the trial court's instruction not to consider any remarks made by Walsh in his opening statement. See Fleener v. Board of Supervisors of Poweshiek County, 246 N.W.2d 335, 338 (Iowa 1976). The trial court did not abuse its discretion in denying the motions for a mistrial.

Lockey has also raised preservation of error allegations against Circle. While there is no dispute Walsh did refer to the investigating officer's prospective testimony, the opening statements were not recorded. Although Circle had no reason to object to such remarks when they were made, a bill of exceptions should have been filed pursuant to Iowa Rule of Civil Procedure 241 to preserve this issue.

II.

A. Circle moved for a directed verdict because Lockey admitted she

drank some amount of alcohol at the tavern and was present with the intoxicated party. Circle contends that if Lockey drank any amount of alcohol at the tavern she "participated" in the drinking activities and was entitled to judgment as a matter of law on the complicity defense. We disagree.

In considering the propriety of a motion for directed verdict, the court views the evidence in the light most favorable to the party against whom the motion was made. Iowa R. App. P. 14(f)(2). It is only in exceptional cases where an affirmative defense, as a matter of law, will be decided in favor of the party who bears the burden. Baker v. Beal, 225 N.W.2d 106, 114 (Iowa 1975); Bessman v. Harding, 176 N.W.2d 129, 130 (Iowa 1970).

For purposes of a directed verdict, Circle's interpretation of "participation" is too broad. The Iowa Supreme Court recently surveyed the law from other states on this issue and found:

> Participation is a relative term and, in order for it to amount to complicity, it should be more than passive. Authorities from other states are in accord. Parsons v. Veterans of Foreign Wars Post 6372, 86 Ill. App. 3d 515, 41 Ill.Dec. 722, 724, 408 N.E.2d 68, 70 (1980) (complicity existed where plaintiff "voluntarily participated to a material and substantial extent in the drinking which led to the intoxication"); Heveron v. Village of Belgrade, 288 Minn. 395, 181 N.W.2d 692, 695 (1970) (recovery barred only to those who "voluntarily and affirmatively" participated in the activity leading to intoxication); Dahn v. Sheets, 104 Mich.App. 584, 305 N.W.2d 547, 550 (1981) (participation was not shown to be sufficiently active by evidence "only tending to show that plaintiff drank with intoxicated driver").
>
> The instruction should have included the rejected language in order to exclude incidental or casual conduct from the definition of participation.

Martin v. Heddinger, 373 N.W.2d 486, 490-91 (Iowa 1985). Cf. Baker v. Bell, 225 N.W.2d at 114; Berge v. Harris, 170 N.W.2d 621, 625 (Iowa 1969).

Testimony was offered that on the night in question Lockey grudgingly went to the tavern, she did not order a drink (a friend did), she only had a few

sips from two drinks the entire time she was in the tavern, she never purchased a single drink at the tavern, she did not go to the tavern with Clay, she did not intend to see Clay at the tavern, Clay was not in the tavern when she arrived, and she eventually sat at a table with possibly eight people, one of whom was Clay. This evidence is sufficient to conclude, for purposes of a directed verdict, that Lockey did not voluntarily and affirmatively participate in intoxicating Clay.

B. In denying Circle's motion for a directed verdict, the trial court did not rule separately on each division of the motion containing the issues of complicity and assumption of the risk as required in Iowa Rule of Civil Procedure 118. Circle contends this constitutes reversible error.

It is well settled that the requirements of Rule 118 apply only to motions that are sustained, but not to motions that are overruled. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 193 (Iowa 1980); Lewis v. State, 256 N.W.2d 181, 196 (Iowa 1977). Thus, we affirm the trial court's ruling on Circle's motion for directed verdict.

AFFIRMED.