FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

22

DANIEL CHYMA,	)	
Plaintiff-Appellant,	)	Filed February 25, 1987
vs.	)	
LEONARD TAYLOR, Individually, and **LEONARD TAYLOR d/b/a KING'S TOWER RESTAURANT,**	)	6-463 85-1479
Defendants-Appellees.	)	

Appeal from the Iowa District Court for Tama County (No. 1464) - August F. Honsell, Jr., Judge.

The plaintiff in a civil action for assault and battery has appealed, contending the evidence did not support the district court's findings that the restaurant owner had neither committed the tort of assault and battery nor breached a duty to protect the plaintiff from the acts of the other patron. **AFFIRMED.**

Daniel Chyma, pro se.

Paul E. Horvath of Davis, Grace, Harvey, Horvath, Gonnerman & Rouwenhorst, Des Moines, for defendant-appellee.

Considered by Oxberger, C.J., and Donielson and Snell, JJ.

PER CURIAM 23

On July 5, 1984, the appellant, Daniel Chyma, initiated the present action via a two-count petition alleging that Leonard Taylor had committed an assault and battery on him while Chyma was a customer in Taylor's restaurant on or about August 7, 1983. Chyma also charged that Taylor negligently allowed him, Chyma, to be assaulted by an unknown patron of Taylor's restaurant during the same evening. Trial to the court commenced on July 9, 1985. On October 1, 1985, the district court filed its findings, conclusions, judgment and decree which dismissed the petition. Chyma brings this appeal, challenging the district court's determinations that Taylor lacked the intent requisite to an assault and battery and that Taylor could not have reasonably anticipated the assault on Chyma by the unknown patron.

As this case is a law action that was tried to the court, our review is limited to the correction of errors at law. R.E.T. Corporation v. Frank Paxton Co., Inc., 329 N.W.2d 416, 418 (Iowa 1983); Iowa R. App. P. 4. The district court's findings of fact have the force of a special verdict and are binding on us if supported by substantial evidence. R.E.T. Corporation, 329 N.W.2d at 419; Iowa R. App. P. 14(f)(7). We view the evidence in the light most consistent with the judgment. R.E.T. Corporation, 329 N.W.2d at 419. Our deference to the district court's findings of fact does not extend, however, to its determinations of law. Blunt, Ellis & Loewi, Inc. v. Ingram, 319 N.W.2d 189, 192 (Iowa 1982).

In his first assignment of error, Chyma challenges the district court's determination that Taylor lacked the intent requisite for an assault and battery. An assault is committed when a person does an act intending to cause either a harmful or offensive bodily contact with another or to place another in fear of immediate harmful or offensive bodily contact and damage results. I Uniform Jury Instructions (Civil) No. 33.1 (1984); Restatement (Second) of Torts § 21

(1965). A battery is committed when a person does any act which qualifies as an assault but which actually results in a harmful or offensive bodily contact. I Uniform Jury Instructions (Civil) No. 33.4 (1984); Restatement (Second) of Torts §§ 13, 18 (1965). The intent which is relevant to the assault and battery issue refers to the consequences of actions which the actor desires to cause, or acts with the purpose of bringing about, or believes are substantially certain to result from his actions. I Uniform Jury Instructions (Civil) No. 33.7 (1984); Restatement (Second) of Torts § 8A (1965).

The record evidence, when reviewed in the light most favorable to the district court's judgment, discloses the following factual situation. During the early morning hours of November 8, 1985, Taylor was assisting in the kitchen of the Tower Inn, a twenty-four hour truck stop and restaurant at which he has worked since 1949 and which he has owned since 1966. The restaurant was busy, nearing its capacity of 170 people. The area of the restaurant with which we are concerned here is approximately 50 feet long and 30 feet wide. While in the kitchen, Taylor was informed by employees that a fight had broken out in the restaurant. Emerging from the kitchen, Taylor saw a young man engaged in an argument with a woman. Although aware that this was not the fight to which his employees were referring, Taylor told the young man that he would have to leave the restaurant, grabbed his arm, and began to escort him outside. As Taylor and the young man, who was never identified, neared the booth in which Chyma was sitting with his wife and another couple, Chyma rose and began throwing his fists at, assumably, the young man. Sometime prior to Taylor emerging from the kitchen, the young man and Chyma were engaged in a physical altercation during which Chyma was struck several times and knocked down. It appears the young man, probably intoxicated, initiated the confrontation. During this earlier scuffle, a gumball machine on a nearby counter was knocked

over. Following Chyma's attack on the young man, Taylor grabbed Chyma and began to escort both men out of the restaurant. The young man broke away from Taylor and ran out of the restaurant. Taylor, while escorting Chyma outside, broke a glass pane with his elbow while trying to open the door.

We believe that these facts, which may well have been believed by the trial court, provide substantial evidence in support of that court's finding that Taylor intended to cause neither a harmful nor an offensive bodily contact to Chyma. Chyma himself testified at his deposition that he did not think Taylor intended to harm him. Although he changed that testimony when he testified at trial, his earlier deposition testimony was properly a matter for the trial court's consideration. Neither do we believe we must reverse the district court because of the injuries which Chyma contends he received that night. Those injuries, contusions of the head and skull and a possible cracked rib, could reasonably be attributed to the altercation which took place between Chyma and the unknown young man at the restaurant. In fact, Chyma's medical progress notes indicate the source of his rib pain as "[g]ot kicked in the rib by another person one week ago." While Chyma testified that the young man had kicked him during their brawl, he at no time accused Taylor of doing so. We find no error in the district court's determination as to intent.

Chyma next contends that the district court erred in finding that Taylor could not have reasonably anticipated the unidentified young man's attack on Chyma. The controlling legal principle is summarized at Restatement (Second) of Torts section 344 (1965) as follows:

> 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

(a) discover that such acts are being done or are likely to be done, or

(b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

See also Foust v. Kinley, 254 Iowa 690, 693, 117 N.W.2d 843, 845-48 (1962).

In his position as owner of the Tower Inn restaurant, Taylor was not an insurer of the safety of his patrons. See Foust, 254 Iowa at 694, 117 N.W.2d at 846; Restatement (Second) of Torts § 344 comment d at 225 (1965). He owes his patrons only what, under the circumstances, is ordinary and reasonable care. Foust, 254 Iowa at 694, 117 N.W.2d at 846; Restatement (Second) of Torts § 344 comment d at 225 (1965).

From the facts presented by the record evidence in this case, we find no error in the district court's conclusion that Taylor did not breach the duty of care which he owed to Chyma. There is no dispute on this record but that the attack on Chyma by the young man happened very quickly. Taylor was at the scene as soon as possible. Although Chyma contends that Taylor should have reasonably anticipated the altercation, we are not so convinced. We note that no intoxicated beverages are sold by the Tower Inn and that Taylor testified he did not know the young man. In addition, Taylor testified that during the twenty years he has owned the restaurant, there have been, at most, five occasions when he has had to physically remove someone from the premises.

We find no error in the district court's findings and therefore its decree dismissing the petition is affirmed.

AFFIRMED.