

IN THE IOWA COURT OF APPEALS

FILED

MAY 26 1981

CLERK SUPREME COURT

SEAN McCARRON and
SALLY MORELOCK,

Plaintiffs-Appellants,

vs.

Filed May 26, 1981

CLARENCE L. BREITBACH d/b/a
SHORTY'S TAP; BERNARD J.
FEATHERSTON d/b/a BLUE JAY TAP;
HELEN K. WUERTZER d/b/a HELEN'S
BAR; MILDRED A. FELDMANN, Executor
of the Estate of Raymond P. Feldmann,
Deceased; and DUBUQUE COUNTY,
IOWA,

Defendants-Appellees.

1-66 & 1-67
2-65211 & 2-65229

Appeal from Dubuque District Court - Thomas Nelson, Judge.

Plaintiffs appeal from trial court's rulings in their separate actions sustaining defendant's motion for summary judgment in these dram shop actions. REVERSED.

Thomas L. Staack and James E. Gritzner of Mosier, Thomas, Beatty, Dutton, Braun & Staack, Waterloo, Iowa, for plaintiffs-appellants.

William Fuerste and Douglas M. Henry of Fuerste, Carew, Coyle, Juergens & Sudmeier, Dubuque, Iowa, for defendants-appellees.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Plaintiffs appeal from trial court's rulings in their separate dram shop actions sustaining defendant Breitbach's motion for summary judgment. Permission to appeal in advance of final judgment has been granted pursuant to Iowa R. App. P. 1(c). Because the same facts and issues are present in both cases, they were consolidated for appeal purposes.

Plaintiffs Morelock and McCarron filed their petitions on October 8, 1979 and October 12, 1979, respectively, and made nearly identical allegations. McCarron was the driver of a car in which Morelock was a passenger on May 4, 1979. On this occasion, the McCarron car was struck by a truck driven by Raymond Feldmann. Feldmann died as a result of the accident. Morelock and McCarron allegedly sustained injuries therefrom. The defendants include Clarence Breitbach (appellee herein), Bernard Featherston and Helen Wuertzer (proprietors of various taverns), sued under section 123.92, The Code; Mildred Feldmann (executrix of her husband's estate) sued under a negligence theory; and Dubuque County, alleged to be liable for various deficiencies in the intersection where the accident occurred. Both plaintiffs requested general damages from all defendants and punitive damages against Feldmann's estate; however, the punitive claims were later struck pursuant to defendant Feldmann's motion alleging that the right to recover such damages does not survive the death of the alleged wrongdoer.

On April 1, 1980, defendant Breitbach filed motions for summary judgment under Iowa R. Civ. P. 237. Plaintiffs filed separate resistance to Breitbach's motions on April 16, 1980. On April 30, 1980, the trial court granted the motion for summary judgment in each case. The effect of this ruling was an adjudication on the merits that defendant Breitbach was not liable to the plaintiffs.

I. On appeal, plaintiffs assert that the trial court erred in sustaining Breitbach's motion for summary judgment because the record reflects substantial issues of material fact which bear upon the liability of said defendant under section 123.92, The Code. In determining this issue it is first necessary to determine the scope and theory of the motion upon which the trial court's summary adjudication of Breitbach's nonliability was based. The material portion of the summary judgment reads as follows:

[The] [s]aid undisputed material facts reveal that there was no sale, gift, or service of any beer or intoxicating liquor [by defendant Breitbach] to Raymond G. Feldman[n], the individual who is alleged in Plaintiff's Petition to have been the intoxicated person who caused the damages of the Plaintiff, at any time on May 4, 1979, so as to have caused or contributed to the intoxication of said Raymond P. Feldman[n], if any, at the time of the accident giving rise to this claim.

Appended to this motion is the following "supporting statement of undisputed material facts":

1. Raymond R. Feldman[n] was in Shorty's Tap on only one occasion on May 4, 1979, and on that occasion he consumed only one bottle of 7-Up, left, and did not return on that date, and at no time on May 4, 1979, was Raymond P. Feldman[n] given, sold or served any intoxicating beverage or beer by the Defendant Clarence L. Breitbach, d/b/a Shorty's Tap.

2. The intoxication, if any, of Raymond P. Feldman[n] at the time of the accident which is the subject matter of this lawsuit was in no way caused by the gift, sale or service of any intoxicating beverage or beer by this Defendant.

As support for said statement of undisputed material facts, Breitbach relies upon his own sworn testimony given during a discovery deposition wherein he denies serving Feldmann any beer or liquor on May 4, 1979, the date of the accident. In addition, he relies on the fact that plaintiffs have stated in their answers to certain interrogatories propounded to them by Breitbach that the type and amount of alcoholic beverage consumed by Feldmann in Breitbach's tavern on May 4, 1979, "is unknown at this time."

I. Review of the motion and statement of supporting facts, when read in conjunction with the trial court's ruling on the motion, leaves some doubt as to the precise issues of fact which were embraced thereby. The motions might be interpreted as calling for an adjudication of Breitbach's nonliability to plaintiffs solely on the basis that it appears without dispute that he gave or sold no beer or liquor whatsoever to Feldmann at times material to the case. On the other hand, the motions might be interpreted as seeking to raise the broader issues of whether plaintiffs can produce sufficient evidence concerning (a) whether any gift or sale of beer or liquor to Feldmann by Breitbach at said time was while Feldmann was intoxicated or to a point where Feldmann became intoxicated; or (b) whether any beer or liquor served Feldmann at that time produced the state of intoxication which existed later in the day. If we were to consider only the motion papers, we would resolve this issue by holding that the motion only speaks to the matter of whether Feldmann was served any beer or liquor by Breitbach on May 4, 1979. The only hesitancy we have in so limiting the issues on this appeal stems from the fact that it is quite apparent that the trial court viewed the motion in the broader perspective which we have suggested. Any dilemma which we experience in determining the scope of the motion is resolved, however, by the fact that Breitbach, in his written argument on appeal, only seeks to sustain the trial court's ruling on the basis that his sworn statement that he served no beer or intoxicants to

Feldmann stands unchallenged. We therefore conclude that any claim that the motion was properly sustainable on the broader grounds which we have indicated has been waived by appellee in accordance with Iowa R. App. P. 14(a)(3).

II. In ruling on a motion for summary judgment, the trial court must examine all of the material before it in the light most favorable to the nonmoving party (here plaintiffs). Brody v. Ruby, 267 N.W.2d 902, 904 (Iowa 1978). Even when the facts are not in dispute, a jury question is engendered if reasonable minds might draw different inferences from them. Iowa R. App. P. 14(f)(17). The movant has the burden of proving the absence of any genuine issue of material fact. Daboll v. Hoden, 222 N.W.2d 727, 731 (Iowa 1974). " 'Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented.' " Notes of Advisory Committee on 1963 Amendment to F. R. Civ. P. 56(e), quoted in Mead v. Lane, 203 N.W.2d 305, 307 (Iowa 1972).

In light of these principles, we conclude that the trial court erred in granting Breitbach's motion for summary judgment. Plaintiffs presented evidence by affidavit and through depositions that Feldmann stopped in different taverns and drank some beer and other alcoholic drinks both before and after he was in Breitbach's establishment sometime in the morning. Feldmann was known to be a frequent drinker and was undergoing treatment for cirrhosis of the liver. Following the accident, which occurred late in the afternoon, he was taken to a hospital where blood tests revealed a blood alcohol content of .215. Breitbach admitted that Feldmann had stopped in his tavern that morning at a time which the record shows was between Feldmann's drinking in other establishments. Breitbach further admitted that Feldmann almost always drank beer or liquor when he visited Breitbach's place of business, that such occasions were regular, and that this was the only time he could remember when Feldmann had drunk a soft drink rather than beer or liquor. Although the evidence of Feldmann's drinking in Breitbach's tavern is all circumstantial, it is settled that direct and circumstantial evidence are equally probative. Iowa R. App. P. 14(f)(16). We conclude that this evidence is sufficient such that reasonable minds might draw different inferences on the question whether Breitbach served Feldmann any alcoholic beverages. We intimate no opinion, of course, on the strength of the evidence; we merely find that the drastic remedy of summary judgment is inappropriate at this stage of the case. The judgment of the trial court is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.