

IN THE COURT OF APPEALS OF IOWA

FILED

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CLERK SUPREME COURT

DAVID ANDREW KRIEG and
PAMELA M. KRIEG,

Plaintiffs-Appellants,

vs.

MAYLO J. TURNER, d/b/a
LUCKY LADY SALOON,

Defendant-Appellee.

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8-427
87-1422

Appeal from the Iowa District Court for Dubuque County
(No. 45770), Alan L. Pearson, Judge.

Plaintiffs-appellants appeal the jury verdict denying
them recovery in a dram shop action. **AFFIRMED.**

Joseph J. Bitter, Dubuque, for the
plaintiffs-appellants.

Gerry M. Rinden, of Wintroub, Rinden & Okun, Des
Moines, for the defendant-appellee.

Heard by Oxberger, C.J., and Donielson and Sackett, JJ.

OXBERGER, C.J.

Plaintiffs-appellants David Andrew and Pamela M. Krieg appeal the jury verdict denying them recovery in a dram shop action.

David Krieg was injured during a fight taking place outside defendant-appellee Maylo Turner's bar called the Lucky Lady Saloon. The jury returned a special verdict finding the elements of dram shop liability existed but denying recovery on the ground David Krieg had assumed the risk of injury.

The Krieges appeal contending the district court erred in (1) allowing defendant to amend her answer to include the special defense of assumption of risk and submitting this issue to the jury, (2) failing to instruct the jury as to the specific risk it must find David Krieg assumed, (3) not allowing additur to the damage award for David Krieg's future medical expenses, and (4) not granting plaintiffs' motion for new trial due to jury's failure to compensate for future damage.

On July 14, 1987, the day of the trial, defendant presented to the plaintiffs and the judge a pretrial brief and a proposed jury instruction including the assumption of risk special defense. Both were file stamped July 20, 1987, after the trial was completed. Plaintiffs made no objection, motions for continuance, or prejudice arguments regarding the inclusion of assumption of risk issues at the

time. Plaintiff made relevancy and materiality objections to defendant's witnesses' testimony indicating David Krieg encouraged the blows causing his injuries. At the close of all the evidence, defendant made an oral motion to amend his answer to conform to the proof by adding the specific defense of assumption of risk. Plaintiff objected to the amendment and the jury instruction relating to this doctrine on numerous grounds. The trial court overruled plaintiffs' objections and allowed the amendment.

Iowa Rule of Civil Procedure 88 provides in part:

. . . Leave to amend [the pleadings], including leave to amend to conform to the proof, shall be freely given when justice so requires.

Iowa Rule of Civil Procedure 106 states in part:

Amendments to conform to the evidence. . . . If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice that party in maintaining the action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Leave to amend is generally granted when there is no substantial change in the defense or issue of the case. Ellwood v. Mid States Commodities, Inc., 404 N.W.2d 174, 179 (Iowa 1987) (citing Chao v. City of Waterloo, 346 N.W.2d 822, 825-26 (Iowa 1984)). A trial court's allowance of an amendment to a pleading will not be disturbed on appeal in the absence of an abuse of discretion. Ellwood

at 179; Beneficial Fin. Co. of Black Hawk County v. Reed, 212 N.W.2d 454, 456-57 (Iowa 1973). We have reviewed the testimony and arguments pertaining to the assumption of risk defense and can find no abuse of discretion. Plaintiffs have failed to show such an amendment to conform to the proof substantially changed the issues of the trial or that any prejudice caused by such an amendment outweighed the interest of the court in having the controversy decided on the full merits. See generally 3 Moore's Federal Practice, § 15.02 [1], 15.08 [2] 2 ed. (discussing the purpose of federal rules of civil procedure 15(a) & (b) which parallel Iowa Rules of Civil Procedure 88 and 106).

Plaintiffs contend failure of the trial court to enforce amendment deadlines in the pretrial order and the failure of defendant to amend interrogatories regarding possible defenses made it impossible for them to prepare for trial of this issue. We find no abuse of trial court discretion on this issue.

Also, plaintiffs were put on notice defendants intended to use the assumption of risk defense before trial began. No motion for continuance or any other objections were made at that time. Assertion of this special defense is not new

to dram shop actions or to the attorneys of these parties who tried the case of Gremmel v. Junnie's Lounge, Ltd., 397 N.W.2d 717 (Iowa 1986), which held this defense could be used as a complete bar to recovery against plaintiffs who mutually assent to fighting with persons they believe are intoxicated. See also Martin v. Heddinger, 373 N.W.2d 486, 488 (Iowa 1985); Rippel v. J.H.M. of Waterloo, Inc., 328 N.W.2d 499, 501 (Iowa 1983); Berge v. Harris, 170 N.W.2d 621, 627 (Iowa 1969). A review of the direct and cross-examination of David Krieg shows his involvement in the fighting and knowledge of the intoxication of the other combatants was already an issue before defendant presented her witnesses.

Plaintiffs assert the jury instruction submitted on the issue of assumption of risk insufficiently described the specific risk David Krieg assumed, when the risk was assumed or ends, and the "incident" involved. The instruction given on this issue was as follows:

Concerning David's claim for damages, Ms. Turner has asserted an affirmative defense that David knowingly assumed the risks of the incident with Dan Muntz. It is her burden to establish this defense by a preponderance of the evidence. If Ms. Turner succeeds with her proof on this point, David Krieg cannot recover.

When a person unreasonably chooses a course of action knowing of certain inherent dangers of those actions, the person is said to have assumed the risk of injury from those dangers. In order to establish assumption of risk in this case, Ms. Turner must prove by a preponderance of the evidence both of the following facts:

1. David Krieg knew of Dan Muntz's intoxication and any dangers inherent in that intoxication, and

2. He nevertheless voluntarily and unreasonably engaged in the incident with Muntz.

If Ms. Turner has proved both facts then David Krieg cannot recover.

If Ms. Turner has failed to prove either one or both of these facts then this affirmative defense does not bar Mr. Krieg's recovery.

The trial court is not required to word jury instruction in any particular manner so long as the instruction correctly states the applicable law. Schuller v. Hy-Vee Food Stores, Inc., 407 N.W.2d 347, 351 (Iowa App. 1987). After reviewing the case law regarding this doctrine as applied in dram shop actions we find the instructions given correctly stated the applicable law. Gremmel at 720; Martin at 490.

Plaintiffs requested and were denied a jury instruction based on Iowa Code section 668 (1980), the comparative fault statute. The Iowa Supreme Court recently affirmed a trial court's decision not to allow comparative fault as a defense in dram shop cases in Slager v. HWA Corporation, No. 87-1696, filed Jan. 25, 1989. See also Martin v. Hedding, 373 N.W.2d 486, 489 (Iowa 1985). This decision is binding on this issue and the trial court's refusal to submit the instruction is affirmed.

We further conclude the finding of the jury that David Krieg's assumption of the risks bars his recovery to be supported by substantial evidence. Baty v. Binns, 354 N.W.2d 777, 780 (Iowa 1984). Two witnesses testified regarding David Krieg's behavior of "leading with his chin"

and clinching his fist prior to the first blow. David Krieg testified that prior to the altercation he formed the opinion the man who later hit him was intoxicated. The same two witnesses testified they had seen David Krieg drinking earlier that evening.

Having upheld the jury verdict, we need not address plaintiffs' remaining arguments.

Costs on appeal are taxed to plaintiffs.

AFFIRMED.