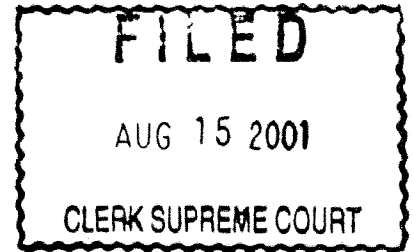


IN THE COURT OF APPEALS OF IOWA

No. 0-734 / 00-0184
Filed August 15, 2001



GENE RAYMOND RIFE, JR.,
Plaintiff-Appellant,

vs.

**D.T. CORNER, INC., d/b/a PAPA'S PLANET, Unknown Employees of
PAPA'S PLANET, CENTURION SECURITY SERVICES, INC., a/k/a CSSI,
TODD HABICK and DAN KITE,**
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

Plaintiff nightclub patron appeals following a defense verdict in an action brought against a nightclub and a firm providing security for the club.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED FOR NEW TRIAL.

Zorica Ilic of the Sporer Law Firm, P.C., Des Moines, for appellant.

Gerry M. Rinden of Wintroub, Rinden, Sens & McCreary, Des Moines, for appellee Centurion Security Services, Inc.

Thomas I. Henderson and John F. Fatino of Whitfield & Eddy, P.L.C., Des Moines, for appellee D.T. Corner, Inc.

Considered by Streit, P.J., and Hecht and Vaitheswaran, JJ.

HECHT, J.

Plaintiff, Gene Rife, appeals following a verdict for the defense in an action brought against a nightclub, Papa's Planet, Centurion Security Services, Inc., a firm providing security services for the club, and certain employees of Centurion, alleging false imprisonment among other claims. On appeal, Rife contends the court erred in (1) allowing the defendants to amend their answers at a late date; (2) failing to grant his motion for directed verdict on the citizen's arrest defense; and (3) denying his motion for directed verdict on the defense of self-defense. We affirm in part, reverse in part, and remand for new trial against Papa's Planet on the issue of false imprisonment.

I. Factual Background and Proceedings.

Gene Rife and a friend went to Papa's Planet, a nightclub in the Court Avenue district of downtown Des Moines, on the evening of August 13, 1998. An altercation occurred between Rife, employees of Papa's, and employees of Centurion. Although the accounts of the conflict varied, it is undisputed Rife, his friend, and defendants' employees engaged in some shouting and some physical contact after Rife and his friend were asked to leave the nightclub. After being sprayed with "mace" outside the bar, Rife fled the scene of the altercation on foot, and employees of Papa's and Centurion pursued him. Wharff, an employee of Papa's, caught and tackled Rife several hundred feet from the nightclub. Habick, a Centurion employee, approached and applied handcuffs to assist in restraining Rife on the ground until a police officer arrived. Rife sued Papa's and Centurion, alleging assault and battery and false imprisonment.

One week before trial, the court granted, over Rife's objection, the defendants' motions for leave to amend to assert several additional defenses including self-defense and citizen's arrest. Rife's motion for a directed verdict on the defenses was subsequently denied. After a jury verdict in favor of the defendants, Rife's combined motions for JNOV and a new trial also were denied. Rife contends the district court abused its discretion in granting defendants leave to amend their answer. He also contends the district court erred in overruling his motions for directed verdict and his post-trial motions.

II. Leave to Amend Answer to Allege Defense of Citizen's Arrest.

Our review is for correction of errors at law. Iowa R. App. P. 4. We review rulings on motions for leave to amend pleadings for abuse of discretion. *Ellwood v. Mid States Commodities, Inc.*, 404 N.W.2d 174, 178 (Iowa 1987).

Papa's originally pled acquiescence, assumption of risk, and defense of property in its answer. One week before trial it sought and was granted leave to add the following defenses: comparative fault; good faith; reasonable belief and reasonable force; citizen's arrest; self-defense; and defense of others. Centurion originally alleged only a general denial and comparative fault, but was permitted, over Rife's objection, to add several affirmative defenses on the eve of trial: acquiescence; assumption of risk; defense of property; good faith; reasonable belief and reasonable force; self-defense; defense of another; and citizen's arrest. Rife contends the "eleventh hour" addition of the citizen's arrest defense substantially changed the issues for trial and prejudiced him. Papa's and

Centurion assert no surprise resulted from the late amendments because they did not substantially change the issues to be tried.

A trial court has considerable discretion to allow parties to amend their pleadings. *Grace Hodgson Trust v. McClannahan*, 569 N.W.2d 397, 399 (Iowa Ct. App. 1997). The trial court's ruling on the motions for leave to amend pleadings will be reversed where there is clear abuse of discretion. *Ellwood*, 404 N.W.2d at 179. Discretion is abused when it is exercised on clearly untenable grounds or to a clearly unreasonable extent. *Davis v. Ottumwa YMCA*, 438 N.W.2d 10, 14 (Iowa 1989). Discretionary rulings of the district court are presumptively correct and will be disturbed on appeal only upon a clear showing of abuse of discretion. *Sheer Constr. Inc. v. W. Hodgman & Sons, Inc.*, 326 N.W.2d 238, 334 (Iowa 1982).

By rule and case law, the district court is to grant motions to amend pleadings freely, and denial of these motions is the exception rather than the rule. *Ellwood*, 404 N.W.2d at 179. Iowa Rule of Civil Procedure 69(d) includes the admonition that "[l]eave to amend, including leave to amend to conform to the proof, shall be freely given when justice so requires." The timing of an attempt to amend is not the determinative factor. Instead, the critical determination is whether the proposed amendment substantially changes the issues before the court. *Kitzinger v. Wesley Lumber Co.*, 419 N.W.2d 739, 741 (Iowa 1987). The relevant issues are established either by the initial pleadings, or by those matters on which the parties have "consented" to litigate, either expressly or impliedly. *Davis*, 438 N.W.2d at 14-15.

Although the district court granted the defendants leave to add several defenses on the eve of trial, Rife challenges the ruling only with respect to the citizen's arrest defense. He contends Papa's and Centurion had the burden of pleading and proving the defense. See *Fox v. McCurnin*, 205 Iowa 752, 758, 218 N.W. 499, 502 (Iowa 1928) (noting plaintiff proves a prima facie case by proving the fact of imprisonment and his damages, and assigning to defendant the burden of proving justification). In his petition, Rife alleged his detention by the employees of Papa's and Centurion was without justification. See *Zohn v. Menard, Inc.*, 598 N.W.2d 323, 326 (Iowa Ct. App. 1999) (noting unlawfulness of the detention or restraint is an element of plaintiff's claim).

We need not resolve in this case the apparent inconsistency between *Fox* and *Zohn* with respect to the allocation of the burden of proving justification. Whether it was plaintiff's burden to establish the absence of justification as an element of his claim, or the defendants' burden to plead and prove the detention was justified as a citizen's arrest, the formal addition of the defense to defendants' pleadings did not substantially change the issues to be tried. Rife's petition conclusively establishes his knowledge justification was a central issue in the case. Even before filing their motion for leave to amend their answers, Papa's and Centurion had generally denied their detention of Rife was without justification. We also note the subject of citizen's arrest was expressly mentioned in a deposition of Centurion's employee, Habick, taken some three months before trial. Under these circumstances, we conclude the district court did not abuse its discretion when it granted defendants leave to add the citizen's

arrest defense because the amendment did not substantially change the issues to be tried.

III. Motion for Directed Verdict on Self-Defense.

We review the denial of motions for directed verdict for correction of errors of law. *Top of Iowa Co-op v. Sime Farms, Inc.*, 608 N.W.2d 454, 466 (Iowa 2000). Rife contends the self-defense issue should not have been submitted to the jury because the uncontroverted evidence established as a matter of law he retreated from the conflict by wresting free from the grasp of Papa's bouncer and fleeing the nightclub on foot. He asserts on appeal his flight from the fight was interrupted only because defendants' employees chased and apprehended him approximately five hundred feet from Papa's premises. Under the circumstances, Rife claims self-defense is unavailable to Papa's and Centurion as a defense because they did not attempt to retreat. See *Savage v. Employment Appeal Bd.*, 529 N.W.2d 640, 642 (Iowa Ct. App. 1995) (noting one who relies upon self-defense must establish his attempt to retreat from the affray unless there is no mode of escape or the peril will increase). We do not consider this contention on appeal, however, because we find no statement in Rife's brief documenting how this issue was preserved for review. See Iowa R. App. P. 14(a)(5).

IV. Motion for Directed Verdict on Citizen's Arrest Defense.

A. Evidence a crime was observed -- Iowa Code section 804.9.

Rife argues Papa's did not present evidence on each element of citizen's arrest, so the court should have granted his motion for a directed verdict. One

who seeks to justify the detention of another by claiming a citizen's arrest for a non-felony must establish a public offense was committed or attempted in his presence.¹ Rife contends Papa's failed to generate substantial evidence supporting a finding its employee, Wharff, saw him commit or attempt a crime. We find merit in this contention. Wharff did not testify about his observations of Rife's pre-chase conduct, and no substantial evidence was offered from which a reasonable person could find Wharff did observe it. Accordingly, we conclude the district court erred in overruling Rife's motion for directed verdict on Papa's citizen's arrest defense.

B. Proper procedure under Iowa Code section 804.14.

Rife further contends the district court erred in overruling the motion for directed verdict on the citizen's arrest defense against both defendants because the record is devoid of evidence they followed the procedure for invoking a citizen's arrest by (1) informing him of their intent to make an arrest and the reason for the arrest, and (2) directing him to submit to their custody. See Iowa Code § 804.14.² Although we do not find substantial evidence supporting a finding defendants' employees provided the information and issued the directive called for by section 804.14 before chasing and apprehending Rife, the district court correctly declined to direct a verdict in Rife's favor as a result of

¹ Iowa Code section 804.9 authorizes a private person to make an arrest "[f]or a public offense committed or attempted in the person's presence."

² Iowa Code section 804.14 provides, in pertinent part:

The person making the arrest must inform the person to be arrested of the intention to arrest the person, the reason for arrest, and that the person making the arrest is a peace officer, if such be the case, and require the person being arrested to submit to the person's custody, . . .

Id.

noncompliance with the statute. Section 804.14 excuses a citizen making an arrest for any failure to advise the arrestee of the intent to make an arrest and the reason for the arrest if "the person to be arrested . . . escapes, so that there is no time or opportunity to do so." In this case, Rife escaped the grasp of an employee of Papa's and fled on foot. A reasonable juror could find on this record after Rife escaped he was chased, apprehended, tackled, handcuffed, and promptly informed law enforcement authorities had been summoned to take him into custody. Under these circumstances, the district court properly concluded a jury question had been engendered with respect to the issue of whether Papa's and Centurion complied with the procedural requirements set forth in section 804.14 for making a citizen's arrest.

C. Proper procedure under Iowa Code section 804.24.

Rife next argues the district court should have directed a verdict in his favor on the citizen's arrest defense because the employees of Papa's and Centurion failed as a matter of law to comply with the procedural requirements of Iowa Code section 804.24.³ Although he was not promptly taken before a magistrate following the detention, the district court properly overruled the motion for directed verdict on this statutory ground. A reasonable juror could have found the employees of Papa's and Centurion delivered Rife without unnecessary delay

³ Iowa Code section 804.24 provides:

A private citizen who has arrested another for the commission of an offense must, without unnecessary delay, take the arrested person before a magistrate, or deliver the arrested person to a peace officer, who may take the arrested person before a magistrate, but the person making the arrest must also accompany the officer before the magistrate.

Id.

to a peace officer who concluded Rife should not be charged with a crime. Under these circumstances, the district court properly concluded a jury question was not presented on Rife's claim defendants failed to comply with section 804.24.

V. Conclusion.

We affirm the district court's ruling on the defendants' motions for leave to amend their answers. We also affirm the district court's ruling on Rife's motion for directed verdict against Centurion on the defenses of citizen's arrest and self-defense. We reverse the district court's ruling on Rife's motion for directed verdict against Papa's on the false imprisonment claim and remand for new trial on that claim only.

**AFFIRMED IN PART; REVERSED IN PART; AND REMANDED FOR
NEW TRIAL.**