FILED
MAY 22 1984
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

BRADLEY R. JOHNSON,	)	
Plaintiff-Appellant,	)	Filed May 22, 1984
vs.	)	4-111 83-1017
GREAT SOUTHWEST FIRE INSURANCE COMPANY,	)	
Defendant-Appellee.	)	

Appeal from the Iowa District Court for Pottawattamie District Court--Leo J Connolly, Judge.

Plaintiff appeals from a judgment for defendant-insurer in this direct action to collect a judgment plaintiff had obtained against a bar insured by defendant. AFFIRMED.

Lyle A. Rodenburg, Council Bluffs, for plaintiff-appellant.

J. Joseph McQuillan, Omaha, for defendant-appellee.

Considered by Oxberger, C.J., and Schlegel, and Hayden, JJ.

Plaintiff appeals from a judgment for defendant-insurer in this direct action under chapter 516 of the Iowa Code to collect a judgment plaintiff had obtained against a bar insured by defendant. The court concluded that plaintiff had recovered against insured under an assault and battery theory; the policy excluded indemnification for losses based on assault and battery. On appeal, plaintiff asserts that the court's jury instructions in the prior case included negligence instructions, and that the jury's general verdict for plaintiff requires a conclusion that the award was covered by defendant's policy. We cannot agree; therefore, we must affirm.

Appellant's theory is that the cause of the injury to plaintiff was an assault, but the cause of the assault and the basis of the suit was the negligence of Gib's Western Kitchen in failing to protect and safeguard plaintiff from assaults while he was a patron. However, this theory has two fallacies.

First of all, the trial court eliminated the negligence claim at trial. The record reads in part.

> THE COURT: . . . viewing the evidence in the light most favorable to the Plaintiff, there hasn't been any evidence, whatsoever, at this point which would support any allegation of negligence in the hiring of their employees as against the Corporation, and therefore, the Court eliminates that part of the Petition, the claim. Mr. Gibson already being out, that would apply as to the acts of the Corporation in so far as negligence in the hiring of employees is concerned.
>
> MR. McQUILLAN: The Court is of the opinion that there is sufficient evidence to go to the jury on the assault and battery, the conspiratorial theory, or whatever the theory is. . ?
>
> THE COURT: . . . I think it can be gathered from what is left of [the pleadings] that they are suing for assault and battery perpetrated in the public place on an invitee.

According to the record, it appears as though no negligence claim was submitted to the jury. Therefore, we fail to see how negligence could be the basis of the verdict.

Appellant's theory fails for a second reason. Instruction No. 13 states in part·

> In order for the plaintiff to recover against the defendant, Gib's Western Kitchen, Inc., d/b/a The Other Place, he must show by the preponderance or greater weight of the evidence each of the following matters:
>
> 1. That upon the occasion in question, the defendant, Rod Kessler, or other employees, made an assault and battery or aided and abetted an assault and battery upon the plaintiff by striking him in the face or by kicking him substantially as claimed by the plaintiff;
>
> 2. That by reason of such assault and battery and as a result thereof the plaintiff suffered personal injuries.
>
> 3. That the plaintiff has been damaged in some amount.
>
> If each and all of the foregoing matters are shown by a preponderance of the evidence before you, then the plaintiff is entitled to recover against the defendant, Gib's Western Kitchen, Inc.

The plain reading of such instruction is that plaintiff's basis of recovery is on an assault and battery theory.

Appellant Johnson argues that since the trial court gave an instruction on negligence that negligence must have been the basis of the recovery. However, the negligence instruction was not a marshalling instruction; it was a general statement of the law. The rule is that all the elements of a claim that must be proven in order to recover must be incorporated in the marshalling instruction. Cf. State v. Watts, 223 N.W.2d 234, 237 (Iowa 1974). Since the negligence instruction did not do this, we find that instruction to be fatally defective as a basis for recovery. Id. at 237.

The trial court's statement quoted above and the jury instructions are consistent with one another. It seems apparent that the trial court intended the sole basis for recovery to be on an assault and battery theory. If this were not the case, the court would have tailored the negligence instruction to these particular

circumstances, as it did the assault and battery instruction. There was no evidence that a negligence theory was ever presented to the jury; and there was no direct appeal on the original action.

For the foregoing reasons, we must affirm the trial court's ruling that Johnson recovered for assault and battery and that assault and battery is specifically excluded under the policy of insurance which is the subject matter of this action.

AFFIRMED.