FILED
MAY 20 1977
CLERK SUPREME COURT



IN THE COURT OF APPEALS OF IOWA

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| WALTER G. KOENEN, As Administrator of the Estate of SCOTT LYNN KOENEN, Deceased, | ) | Filed May 20, 1977 |
| Appellant, | ) | |
| vs. | ) | |
| STEVEN BRUCE KOCH, DONALD F. DIRKS, d/a/a BONNIE & CLYDE'S, and KIRNED, LTD., d/b/a SPARE TIME LOUNGE, | ) | 119<br>2-58511 |
| Appellees. | ) | |

Appeal from Clay District Court - Richard W. Cooper, Judge.

Plaintiff appeals from the sustaining of defendant's motion for summary judgment in a dramshop case. - Reversed and remanded.

Richard H. Montgomery, of James, Greer, Hoover, Nelson, Bertell, Montgomery & Barry, of Spencer, for Appellant.

Gerry M. Rinden and Allan Hartsock, of Klockau, McCarthy, Ellison & Rinden, of Rock Island, and Marvin F. Heidman, of Gleysteen, Harper, Kunze, Eidsmoe & Heidman, of Sioux City, for Appellees.

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

PER CURIAM

Plaintiff, as administrator of the estate of Scott Lynn Koenen, brought an action under the provisions of section 123.92, The Code, commonly referred to as the Iowa Dramshop Law. Plaintiff alleged that the death of plaintiff's decedent was caused by the intoxication of defendant, Steven Koch. Plaintiff further alleged that defendants Donald F. Dirks, d/b/a Bonnie & Clyde's, and Kirned Limited, d/b/a Spare Time Lounge, gave or sold intoxicating beverages to defendant Koch which caused his intoxication and was the proximate cause of the automobile accident in which plaintiff's decedent was killed. Defendants Dirks and Kirned Limited filed a motion for summary judgment supported by depositions of several people. The trial court sustained that motion.

Plaintiff filed an application for interlocutory appeal. The supreme court deferred ruling on the application until argued on full submission of the case. Plaintiff then took this appeal.

This court has no jurisdiction to entertain an appeal where no final judgment was entered and no permission to appeal from an interlocutory order was obtained. Johnson v. Iowa State Highway Commission, 257 Iowa 810, 812, 134 N.W.2d 916 (1965). At the outset a determination is necessary whether the sustaining of the motion for summary judgment in this case constituted a final judgment. The judgment to be final must dispose of the entire case. Where there are several distinct causes of action united in the same suit a ruling on one cause may be final though the entire case is not terminated. McGuire v. City of Cedar Rapids, 189 N.W.2d 592, 596-97 (Iowa 1971).

In *McGuire*, the petition was in four divisions. The claimed basis of liability asserted against one defendant was not dependent on or intertwined with the claimed basis of lia-

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bility asserted against another. Such is the case here. In division I of plaintiff's petition, liability is based on defendant Koch's recklessness while driving under the influence of alcohol. Divisions II and III assert liability under the dramshop act against the owners of the establishments allegedly providing intoxicating liquor to Koch. The sustaining of the motion regarding divisions II and III was a final judgment and therefore appealable.

The burden is upon the party moving for summary judgment to show absence of any genuine issue of a material fact. All material facts properly before the court must be viewed in the light most favorable to the resisting party. Daboll v. Hoden, 222 N.W.2d 727, 731 (Iowa 1974); Shulte v. Mauer, 219 N.W.2d 496, 500 (Iowa 1974). In ruling on motions for summary judgment, the court must examine the entire record including the pleadings, admissions, depositions, answers to interrogatories and affidavits, if any, to determine what evidentiary facts are presented which disclose a genuine issue of fact. Daboll, *supra* and Shulte, *supra*. In Daboll v. Hoden, 222 N.W.2d at 735, the court stated:

> "Even in cases where the judge is of the opinion that he will have to direct a verdict for one party or the other on the issues that have been raised he should ordinarily hear the evidence and direct the verdict rather than attempt to try the case in advance on a motion for summary judgment * * * ."

Defendants assert plaintiff's action under the dramshop act is barred because of plaintiff's decedent's complicity in the intoxication of defendant Koch. The complicity rule in essence is "A party who participates in the drinking activities during which the injured party becomes intoxicated cannot recover under the dramshop act for injuries sustained as a result of such intoxication." Berge v. Harris, 170 N.W.2d 621, 625

(Iowa 1969). The reasons for the rule are twofold: one cannot profit from his own wrong and a person participating in the drinking activities is not an innocent person entitled to protection under the dramshop act. Berge, *supra*.

*Berge* held the defense of assumption of risk was available to defendants in a dramshop case. In distinguishing the rule of complicity the court stated "the jury could find plaintiff had no part in causing the driver to become intoxicated but did voluntarily and willingly assent to ride with him knowing he was intoxicated and appreciated the perils to which she was thereby subjecting herself." 170 N.W.2d at 625. The court then held the evidence raised a jury question as to recklessness, intoxication and plaintiff's assumption of the risk.

In Baker v. Beal, 225 N.W.2d 106 (Iowa 1975), defendants in a dramshop case contended the record disclosed complicity as a matter of law. In reversing, the supreme court stated that it is only in an exceptional case that the affirmative issue will be decided as a matter of law in favor of the one who has the burden. The court held in *Baker* that the issue of complicity was plainly one for the fact-finder. 225 N.W.2d at 114.

In examining the record in the light of the aforesaid authorities we believe that the issue of complicity was a matter for jury determination. Where reasonable minds could draw different inferences and reach different conclusions from the facts, even though undisputed, the issue must be reserved for trial. Daboll v. Hoden, 222 N.W.2d 727, 733 (Iowa 1974). Defendant's motion for summary judgment should have been overruled.

Reversed and remanded.