

IN THE COURT OF APPEALS OF IOWA

No. 5-012 93-1881

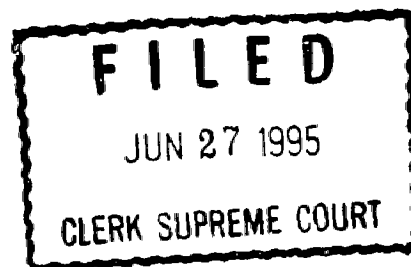
PHYLLIS ROTNICKE and DALE ROTNICKE, Husband and Wife,

Appellees.

vs.

DANIEL PRUETT,

Appellant.



Appeal from the Iowa District Court for Monona County, Terry L. Huitink,
Judge.

In personal injury case, defendant appeals from trial court's granting of
plaintiffs' motion for judgment notwithstanding the verdict and motion for a new trial.

AFFIRMED.

Richard L. Mock, Onawa, for appellant.

Kermit L. Dunahoo of Dunahoo Law Firm, Des Moines, and Thomas R.
Mohrhauser, Mapleton, for appellees.

Considered en banc. Huitink, J., takes no part.

CADY, J.

This is an appeal by defendant Daniel Pruett from a decision by the district court granting a new trial to plaintiffs Phyllis and Dale Rotnicke following a jury verdict in favor of Pruett. On our review, we affirm the district court.

Phyllis and Dale Rotnicke instituted this action against Pruett for personal injuries Phyllis received after Pruett struck her one evening at a bar owned and operated by the Rotnickes in Mapleton. Just prior to the incident, Pruett and Phyllis were sitting at the bar, separated by several other patrons. Pruett had been throwing peanuts at the female bartender for some period of time, prompting the bartender to complain to Phyllis. After observing Pruett throw peanuts at the bartender several times, Phyllis testified she said, "Hey, guy. I bought those peanuts to eat, not to throw." Pruett shoved the plate of peanuts down on the bar and responded, "Stick them up your a__." Pruett then said, "If you don't like it, kick me out." Phyllis responded, "You are out." Phyllis further testified that Pruett said, "No b_ _ _ _ throws me out. Try it if you can."

Phyllis approached Pruett, gestured with her finger to leave the bar, and said, "Out the f _ _ _ ing door." Pruett then pushed or shoved Phyllis and she fell to the floor.

Pruett had not been in the bar before and testified he did not know Phyllis was an owner at the time of the incident. Pruett said he instinctively pushed Phyllis after she pushed him.

Phyllis requested a jury instruction explaining her privilege to use reasonable force to terminate another's intrusion upon her property and the resulting qualifications on Pruett's right of self-defense. The trial court denied the request.

The jury returned a verdict for Pruett, and Phyllis subsequently moved for a new trial and judgment notwithstanding the verdict. The trial court determined its failure to give the requested instruction constituted legal error that materially affected Phyllis' substantial rights, and granted the motions. Pruett now appeals.

The trial court has broad discretion in ruling on motions for judgment notwithstanding the verdict and motions for new trial. *VandenBerg v. Wolfe*, 196 N.W.2d 420, 422 (Iowa 1972). We will disturb the decision on appeal only upon a showing that the trial court's action was clearly unreasonable. *In re Estate of Highbanks*, 506 N.W.2d 451, 453 (Iowa App. 1993).

In this case, Pruett acknowledged it would have been error to omit the requested instruction if Phyllis would have specifically notified him that she was the owner prior to attempting to eject him from the bar. *See State v. Cessna*, 170 Iowa 726, 729-30, 153 N.W. 194, 196 (Iowa 1915); *See Also Restatement (Second) of Torts*, § 63 (1965). He claims, however, that since there was no testimony that this was done, the trial court properly refused to give the requested instruction. We disagree.

Parties to a lawsuit are entitled to have their legal theories submitted to the jury in the form of instructions when they are supported by substantial evidence. *Nichols*

v. Schweitzer, 472 N.W.2d 266, 274 (Iowa 1991); *Baker v. Bower*, 487 N.W.2d 86, 88 (Iowa App. 1991). Furthermore, courts have a duty to give requested instructions if they correctly state the law in the case, are supported by the facts, and are not otherwise embodied in other instructions. *Coker v. Abell-Howe Co.*, 491 N.W.2d 143, 150 (Iowa 1992). Evidence is substantial to justify an instruction when reasonable minds could accept it as adequate to reach the conclusion. *Nichols*, 472 N.W.2d at 274.

In this case, there was substantial evidence in the record to show Pruett should have known Phyllis was the owner of the bar and had authority to evict him. This is derived from the statements exchanged between them, and the surrounding circumstances. Moreover, the requested instruction dealt with a critical issue at the trial, and the failure to properly instruct the jury on the privilege materially affected the substantial rights of Phyllis. The trial court did not abuse its discretion in granting a new trial under the circumstances.

AFFIRMED.

Donielson, C.J., and Habhab, J., concur; Hayden and Sackett, JJ., dissent.

HAYDEN, J. (dissenting)

I respectfully dissent to the majority's holding in this appeal.

I would reverse the trial court's granting of plaintiff's motion for judgment notwithstanding the verdict and motion for new trial.

To give a proposed instruction, the theory or cause must have been pleaded or properly litigated. *Gunnison v. Torrey*, 216 N.W.2d 361, 364 (Iowa 1974). The evidence must be sufficient to warrant submission to the jury. *Id.* The trial court must give the evidence the most favorable construction it will reasonably bear in favor of the party urging submission. *Id.*

All issues which are pled and for which there is substantial support in the evidence must be submitted. It is error not to do so, just as it is error to submit those which do not conform to both these conditions.

Seaway Candy, Inc. v. Cedar Rapids YMCA, 283 N.W.2d 315, 316 (Iowa 1979) (citing *Mora v. Savereid*, 222 N.W.2d 417, 419 (Iowa 1974)) (emphasis added).

Here, the fighting issue is whether a requested jury instruction patterned after the Restatement (Second) of Torts sections 63 and 77 should have been given. The proposed instruction stated:

On the other hand, if the threatened attack is conditioned upon the actor's noncompliance with the demand made upon him, the actor is not privileged to use force to protect himself against the attack so threatened, if the demand is one with which the actor knows or should know that he is under a legal duty to comply, and the force which the other threatens to apply to him is no greater than the other is privileged to apply for the purpose of securing compliance with his demand.

I determine this instruction should not have been given. There was insufficient evidence at trial to show defendant should have known plaintiff was the owner of the bar and thus had legal authority to evict him.

Plaintiff argues to the contrary citing two pieces of evidence. First, it was uncontroverted plaintiff told defendant, "I bought those peanuts to eat, not to throw." Second, as the heated discussion ensued, defendant challenged plaintiff to "kick him out." On this basis, I determine defendant did not have sufficient reason or cause to be aware plaintiff was the owner of the bar. Defendant had never been in the bar before. The actions of plaintiff could well have been taken by an employee of the bar, or even another patron. Under this record, there was insufficient evidence to give the requested instruction.

Plaintiff was not prejudiced by the trial court not submitting plaintiff's requested jury instruction. Under our rules of civil procedure, plaintiff can be granted a new trial based on legal error, "but only if they materially affected [her] substantial rights." Iowa R. Civ. P. 244. Plaintiff was not prejudiced because the jury had been instructed on the issues of justification, self-defense, and duty to retreat or to seek an alternative course of action. "[J]ury instructions must be read together and related to each other to determine the rights of the parties." *Miller v. International Harvester Co.*, 246 N.W.2d 298, 306 (Iowa 1976) (citation omitted).

Failure to submit the requested jury instruction was not legal error. If it was, it did not materially affect the plaintiff's rights. I would reverse the trial court and reinstate the jury's verdict.

Sackett, J., joins this dissent.