

STATE OF MICHIGAN
COURT OF APPEALS

CHRISTOPHER MILLER,

Plaintiff/Counter-
Defendant/Appellant,

v

PM ENTERTAINMENT, INC., a/k/a ROCKMAN
ENTERPRISES, INC., d/b/a SHARKS CLUB,

Defendant/Cross-Plaintiff/Appellee,

and

MICHAEL MAZZA,

Defendant/Cross-
Defendant/Appellee,

and

BRIAN BURGESS,

Defendant/Counter-Plaintiff,

and

ROBERT KIDD and DOUGLAS ELLISON,

Defendants.

Before: Saad, P.J., Bandstra, C.J., and Whitbeck, J.

PER CURIAM.

In this case arising from a bar brawl, plaintiff Christopher Miller appeals as of right from the circuit court's order reflecting a jury verdict of no cause of action. We affirm.

UNPUBLISHED
November 30, 2001

No. 225073
Wayne Circuit Court
LC No. 98-800007-NO

I. Basic Facts And Procedural History

The evidence indicates that defendants Burgess, Kidd, and Ellison were patronizing the Sharks Club, but were asked by the latter's employees to leave after tensions arose between the three and another patron. Miller and two companions, who were also patronizing the bar at the time, ended up fighting with those defendants in the bar's parking lot. Miller sustained serious injuries to his face requiring reconstructive surgery. Miller sued, stating various claims, but in time Burgess, Kidd, and Ellison, were dismissed, along with defendant Mazza in his personal capacity. The jury was called upon to decide only Miller's negligence claim against the defendant Sharks Club and its corporate parents.¹

II. Affirmative Defenses

A. Standard Of Review

Miller asserts that the trial court erred in allowing the jury to consider an affirmative defense pursuant to MCL 600.2955a, on the grounds that the defense was not adequately set forth in the pleadings and did not appear in the final pretrial order. We review a trial court's general conduct of a trial for an abuse of discretion.² We also review a trial court's evidentiary decisions for an abuse of discretion.³

B. MCL 600.2955a(1)

MCL 600.2955a(1) provides, in pertinent part, as follows:

It is an absolute defense in an action . . . for injury to a person . . . that the individual upon whose . . . injury the action is based had an impaired ability to function due to the influence of intoxicating liquor . . . and as a result of that impaired ability, the individual was 50% or more the cause of the accident or event that resulted in the . . . injury.

The trial court instructed the jury in accordance with this legislation and also admitted a copy of the above statutory language into evidence.

C. MCR 2.111(F)(2) and (3)

MCR 2.111(F)(2) requires that "[a] party against whom a cause of action has been asserted . . . must assert in a responsive pleading the defenses the party has against the claim" and further that "[a] defense not asserted in the responsive pleading . . . is waived[.]" MCR 2.111(F)(3) in turn governs affirmative defenses specifically:

¹ For the remainder of this opinion the phrase "the Sharks Club" will refer collectively and exclusively to those business entities.

² *In re King*, 186 Mich App 458, 466; 465 NW2d 1 (1990).

³ *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993), citing to *Rodriguez v Solar of Michigan*, 191 Mich App 483, 487; 478 NW2d 914 (1991).

Affirmative defenses must be stated in a party's responsive pleading, either as originally filed or as amended Under a separate and distinct heading, a party must state the facts constituting

(a) an affirmative defense, such as contributory negligence; . . . assumption of risk

* * *

(c) a ground of defense that, if not raised in the pleading, would be likely to take the adverse party by surprise.

D. Miller's Amended Complaint

The answer to Miller's original complaint included among its affirmative defenses that "the Plaintiff may have assumed the risk of injury by his actions," and that "the damages of the Plaintiff may be limited in whole or in part by the Statutes and Common Laws of the State of Michigan." The Sharks Club also stated that it reserved the right to add any affirmative defenses that the process of discovery brought to light.

However, Miller filed an amended complaint in order to increase the demand for damages, and, in answering the first amended complaint, the Sharks Club's enumerated affirmative defenses include the following: "Pursuant to the Tort Reform Act, MCL 600.2955a, if it is shown that Plaintiff was impaired by alcohol . . . and use or consumption of the . . . alcohol was 50% or more responsible for the accident, Plaintiff is by law not entitled to recovery of damages from these Defendants." Because the original answer alleged that Miller might face a statutory bar to recovery, and also reserved the right to add defenses as discovery brought them to light, and because the first responsive pleading to Miller's first amended complaint expressly set forth the affirmative defense here at issue, Miller's argument that the trial court should have disallowed that defense for failure to present it in the pleadings must fail.

E. The Final Pretrial Order

Miller's framing of this issue additionally asserts that the affirmative defense in question should have been kept from the jury because it was not included within the final pretrial order. However, Miller does not otherwise develop this issue, and thus offers no authority for the proposition that a pleaded defense that does not appear in the final pretrial order is extinguished.⁴ Miller's failure to cite authority or provide cogent argument in support of this claim of error waives this Court's consideration.⁵ As the First Circuit has put it, "It is not enough merely to

⁴ We note that the order includes, among the Sharks Club's defenses, that "the proximate caus[is] of the plaintiff's injuries were as a result of his own belligerent, drunken, volitional acts," and that "the sole and proximate cause of anyages [sic] sustained by the Plaintiff were as a direct and proximate result of his own intoxicated belligerence."

⁵ *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992), citing to *Goolsby v Detroit*, 419 Mich 651, 655, n 1; 358 NW2d 856 (1989).

mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument and put flesh on its bones.”⁶

In any event, we observe that the verdict form in this instance included special inquiries concerning the extent of Miller's negligence and intoxication as contributors to his injuries, but that the jury never reached those questions because it concluded initially that the Sharks Club was not negligent at all. Thus, even if the affirmative defense at issue had been introduced in error, we conclude that the error was harmless.

III. Discovery Violations

A. Standard Of Review

Miller argues that the trial court abused its discretion by denying his motion for a default judgment as a remedy for a discovery violation by Sharks Club. This Court reviews a lower court's decisions concerning discovery for an abuse of discretion.⁷ Similarly, we review a trial court's decision on whether to hold an evidentiary hearing for an abuse of discretion.⁸

B. The Sharks Club's Discovery Violations

The Sharks Club rebuffed Miller when he sought to depose one of its employees. The Sharks Club explained that it could not produce the witness because she had moved away to Canada, but on the eve of trial Miller discovered that the witness had moved back to Michigan and was again working for the Sharks Club. The trial court correctly ruled that this was a violation of the Sharks Club's continuing discovery obligations. To remedy the violation, the trial court did not allow the defense to call that witness, allowed Miller to depose the witness, and additionally offered to let Miller depose another employee of the Sharks Club whom the witness indicated had been on duty on the night in question. Because the trial court afforded Miller every opportunity to gain the information that he needed from those two belatedly disclosed employees, and additionally did not allow the Sharks Club, the violating party, to use to its advantage the one witness whom it wished to call, we are satisfied that the trial court fairly remedied the discovery violation. We conclude that the trial court did not abuse its discretion in eschewing the drastic remedy of default.

IV. Jury Instructions

A. Standard Of Review

Miller takes issue with several of the trial court's decisions concerning jury instructions. “There is some dispute in the case law concerning what standard of review applies to

⁶ *United States v Sannino*, 895 F2d 1, 17 (CA 1, 1990) (dismissing appellant's claim of error below).

⁷ *Baker v Oakwood Hosp Corp*, 239 Mich App 461, 478; 608 NW2d 823 (2000), citing to *Mercy Mt Clemens Corp v Auto Club Ins Ass'n*, 219 Mich App 46, 50; 555 NW2d 871 (1996).

⁸ *Bielawski v Bielawski*, 137 Mich App 587, 592-593; 358 NW2d 383 (1984).

instructional issues. However, the Supreme Court has most recently stated that review de novo is the standard of review that applies to ‘claims of instructional error.’”⁹ Nonetheless, “[a] trial court may be entitled to some level of deference under the abuse of discretion standard of review if the decision to give or withhold a certain jury instruction depends on a factual determination, i.e., whether the evidence will support the instruction.”¹⁰ We review jury instructions in their entirety to determine whether the parties’ theories and the applicable law were fairly presented.¹¹

B. Legal Standards

Jury instructions “should not omit material issues, defenses, or theories if the evidence supports them.”¹² “The trial court has discretion to give additional instructions not covered by the standard jury instructions as long as they are applicable and accurately state the law”¹³ However, “[a] supplemental instruction need not be given if it would add nothing to an otherwise balanced and fair jury charge and would not enhance the ability of the jury to decide the case intelligently, fairly, and impartially.”¹⁴

C. Duty Of A Tavern Owner

Miller argues that the trial court erred in declining to instruct the jury specifically that when a fight breaks out in a tavern, the tavern operator has a specific duty to call the police and stop the fight. Although such an instruction would have comported with the evidence and theories before the jury, the trial court was nonetheless within its rights in eschewing such a specific instruction in favor of the standard jury instructions concerning a business invitor’s duties to invitees.¹⁵ Having delivered the latter, and having further summarized the rules of the state Liquor Control Commission against a tavern operator allowing an intoxicated person to loiter, fight or brawl on the premises, we conclude that the trial court adequately covered the subject matter concerning which Miller requested the supplemental instruction.

D. Consent

Miller argues that the trial court should have instructed the jury to consider the possibility that his drunkenness prevented him from being able to consent to a fight. The public policy of this state favors holding persons responsible for the results of their voluntary intoxication. As

⁹ *Hilgendorf v St John Hospital & Medical Center Corp*, 245 Mich App 670, 694; 630 NW2d 356 (2001), quoting *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

¹⁰ *Hilgendorf*, *supra* at 694-695, citing *Isagholian v Transamerica Ins Corp*, 208 Mich App 9, 16; 527 NW2d 13 (1994).

¹¹ *Zinchook v Turkewycz*, 128 Mich App 513, 520-521; 340 NW2d 844 (1983).

¹² *Case*, *supra* at 6.

¹³ *Mull v Equitable Life Assurance Soc*, 196 Mich App 411, 422-423; 493 NW2d 447 (1992), *aff’d* 444 Mich 508 (1994), citing to *Houston v Grand Trunk W R Co*, 159 Mich App 602, 609; 407 NW2d 52 (1987).

¹⁴ *Mull*, *supra* at 422-423.

¹⁵ *Mills v White Castle Systems, Inc*, 199 Mich App 588, 592; 502 NW2d 331 (1992).

discussed above, MCL 600.2955a imposes a limitation on a plaintiff's ability to collect damages for injuries to which the plaintiff contributed through intoxication. Further, the trial court correctly instructed the jury as follows, mirroring SJ12d 13.02:

Now, according to the law, one who voluntarily impaired his or her abilities by drinking is held to the same standard of care as a person who's [sic] abilities have not been impaired by drinking.

It's for you to decide whether plaintiff, . . . whether his conduct was, in fact, affected by drinking and whether as a result he failed to exercise the care of a reasonably careful person under the circumstances which you find existed in this case.

Miller relies on *Hollerud v Malamis*¹⁶ in which this Court held that a jury should have been allowed to consider whether intoxication negated consent where the plaintiff was injured in an "Indian wrestling contest" with a bartender.¹⁷ To the extent that this 1970 case is at variance with the other authorities that militate against excusing a party from responsibility for the consequences of that party's voluntary intoxication, we conclude that the former must yield to the latter.¹⁸

E. Reasonableness Of Conduct And Self-Defense

Miller argues that the trial court should have instructed the jury to consider the reasonableness of his conduct in entering the affray. Miller admits that no Michigan authority requires such an instruction, and we decline the invitation to take a new direction in this regard. Miller points to no evidence to suggest that he became involved in the fight at the request of an employee of the Sharks Club or that he was acting in his own or another's defense. Miller himself had no memory in the matter and the tavern's manager testified that he never asked Miller or any other patron to intervene. Conversely, two of the participants in the affray testified that Miller himself started the physical altercation. Because the evidence is either ambivalent in this regard or suggests that Miller had acted with undue aggression, the question of his having acted reasonably was a matter of speculation. The evidence thus did not support an instruction on Miller's reasonableness and we conclude the trial court did not abuse its discretion in declining to provide one. Miller was similarly not entitled to an instruction on self-defense. Only by speculating beyond the evidence could one suppose that Miller was compelled to fight in his own defense.

F. Mutual Affray

Miller argues that the trial court should have denied the Sharks Club's request for an instruction on mutual affray. The trial court instructed the jury as follows:

¹⁶ *Hollerud v Malamis*, 20 Mich App 748, 763; 174 NW2d 626 (1969).

¹⁷ *Id.* at 751.

¹⁸ Because *Hollerud* was issued before November 1, 1990, this Court need not follow it. MCR 7.215(I)(1).

Now, where a plaintiff and the defendant or a non party — A non party being like people who are not named in this lawsuit. Where a plaintiff and a defendant or a non party engage in a mutual affray, you may properly find that the plaintiff's injuries were attributable to the plaintiff and or to the defendant and or to Brian Burgess, Robert Kidd, of [sic] Douglas Ellison.

You may mitigate and apportion the fault for the injuries using the principals [sic] of comparative fault among them.

Miller argues that the court erred in granting the Sharks Club's request for an instruction on mutual affray while denying the various instructions of which he here makes issue. Miller does not argue that the instruction on mutual affray was not supported by the evidence or theories before the jury. Because on its face the instruction on mutual affray was reflective of the evidence of record and the law of comparative negligence, we reject Miller's summary assertion that it was error to deliver it.

Affirmed.

/s/ Henry William Saad
/s/ Richard A. Bandstra
/s/ William C. Whitbeck