IN THE COURT OF APPEALS OF IOWA

No. 1-496 / 90-1858

894

BERNARD L. STROUP,

Appellant,

vs.

ROY RENO and **SANDRA RENO,**

Appellees.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Wayne County, William H. Joy, Judge.

Plaintiff appeals the judgment, entered on a jury verdict, for defendants in his tort action pursuant to Iowa Code section 87.21, which allows such actions against employers who fail to provide workers' compensation coverage. **AFFIRMED.**

Robert W. Pratt and Max Schott, Des Moines, for appellant.

Charles E. Cutler and Ronald M. Rankin of Patterson, Lorentzen, Duffield, Timmons, Irish, Becker & Ordway, Des Moines, for appellees.

Considered by Donielson, P.J., and Hayden and Habhab, JJ.

HABHAB, J.

Plaintiff Bernard Stroup was employed as a general farm laborer by defendants Roy Reno and Sandra Reno. The Renos had a farming operation in Iowa and did custom combine work in other states. They also did contract hauling of farm machinery. Stroup worked in all of these operations.

On March 10, 1989, Roy Reno directed Stroup to go to a nearby farm and bring back a tractor, which Reno had agreed to transport to Illinois. Stroup did not have an ignition key for the tractor and he "hot wired" it in order to drive it to the Reno farm. Once at the Reno farm Stroup stopped the engine, but did not take the tractor out of gear. He then arranged ramps for loading the tractor onto a truck. Stroup then "hot wired" the tractor a second time. Because the tractor was still in gear it lurched forward and one of the large rear tires rolled over Stroup. Stroup suffered a fracture of his left wrist. He later experienced bowel and kidney trouble.

Reno did not have workers' compensation coverage. Iowa Code section 87.21 provides that where an employee is injured in the course of and arising out of the employment and the employer does not have workers' compensation coverage, the employee may enforce the liability by an action at law for damages, or may collect compensation as provided by the workers' compensation act. Stroup elected to bring an action at law for damages.

If an employee elects to bring an action for damages under section 87.21, the following rules apply:

> 1. It shall be presumed:
> a. That the injury of the employee was the direct result and growing out of the negligence of the employer.
> b. That such negligence was the proximate cause of the injury.
> 2. The burden of proof shall rest upon the employer to rebut the presumption of negligence, and the employer shall not be permitted to plead or rely upon any defense of the common law, including the defenses of contributory negligence, assumption of risk and the fellow servant rule.
> 3. In an action at law for damages the parties have a right to trial by jury.

The plaintiff in cases of this kind comes into court with the usual burden of establishing the negligence alleged, as well as a resulting injury. Gay v. Hocking Coal Co., 184 Iowa 949, 960, 169 N.W. 360, 364 (1918). Under the statute, however, the employee discharges this burden and presents a prima facie case by showing proof of employment, that he suffered an injury, and that the injury arose out of and in the course of employment. Id.

The employer then has the burden to rebut the statutory presumption of actionable negligence. Id. The employer has the burden of proving that the injury was not the result of its negligence, and that its negligence was not the proximate cause of the injury. Meyer v. Postal Telegraph-Cable Co., 196 Iowa 165, 170, 194 N.W. 273, 275 (1923). The employer must overcome the presumption by a preponderance of the evidence--that is, to negative every fact which would justify a finding of negligence. Casey v. Hansen, 238 Iowa 62, 72, 26 N.W.2d 50, 57 (1947).

The employer here presented evidence to show it had a generally safe workplace and that neither the workplace nor any tools provided by the employer had contributed to the injury. The jury returned a verdict for the employer. Stroup filed a motion for judgment notwithstanding the verdict and motion for new trial. These were denied by the district court. Stroup then appealed.

I. This case was heard as an action at law. Our review is only on assigned errors of law. Iowa R. App. P. 4. Findings of fact in a law action are binding upon the appellate court if supported by substantial evidence. Larson v. Massey-Ferguson, Inc., 328 N.W.2d 343, 345 (Iowa App. 1982). In evaluating the evidence, we view it in the light most favorable to sustaining the court's judgment. Id. We are not, however, bound by the trial court's conclusions and application of the law. Id.

II. Stroup contends the jury verdict should be reversed because the jury was not fairly instructed as to the law. He claims jury instruction number 11 should have instructed the jury that he was not required to prove a specific act of negligence by the employer. Instruction number 11 sets forth the statutory presumption of the employer's negligence.

We recognize an employee is not required to allege or prove specific acts or omissions of a negligent character by the employer. Mitchell v. Mystic Coal Co., 189 Iowa 1018, 1020, 179 N.W. 428, 431 (1920). To sustain a

recovery of damages, the jury need not find affirmatively that defendant was guilty of some specific negligent act or omission, but it is enough if, in view of all the evidence, the jury finds defendant has failed to negative or rebut the statutory presumption. Id.

Stroup admits that instruction number 11 sets forth the statutory presumption found in section 87.21. He does not claim the instructions as given required him to prove specific acts of negligence. He argues only that his requested addition to instruction number 11 would have prevented the jury from improperly considering this element.

Under Iowa law, a court should give a requested instruction when it states a correct rule of law having application to the facts of the case and the concept is not otherwise embodied in the other instructions. Smith v. Smithway Motor Xpress, Inc., 464 N.W.2d 682, 685 (Iowa 1990). However, error in giving or refusing to give a particular instruction does not warrant reversal unless the error is prejudicial. Id. If an instruction correctly states the applicable law, it will be deemed proper even though an alternative is available. Schuller v. Hy-Vee Food Stores, Inc., 407 N.W.2d 347, 351 (Iowa App. 1987).

We find no error in the district court's refusal to give the requested addition to instruction number 11. The jury instructions, as given, provided that once Stroup showed that he was employed by the Renos, that he suffered

an injury, and that the injury arose out of and in the course of his employment, he had presented a prima facie case and needed to do no more to show the employer was negligent. We conclude Stroup's requested addition to instruction number 11 was unnecessary to fairly present the law to be applied in this case.

III. Stroup contends the district court should have granted his motion for judgment notwithstanding the verdict on the ground that the employer did not negate every fact which would justify a finding of negligence. Specifically, he claims the employer had a duty to inspect the tractor for defects. Stroup states the tractor was defective because it did not have an ignition key.

A judgment notwithstanding the verdict is appropriate if there is no substantial evidence in support of each element of plaintiff's claim. Woodruff Construction Co. v. Mains, 406 N.W.2d 787, 789 (Iowa 1987). If reasonable minds can differ on an issue, it is one for the jury. Oberreuter v. Orion Industries, Inc., 398 N.W.2d 206, 209 (Iowa App. 1986). The trial court is vested with considerable discretion in determining whether evidence is sufficient to submit it to the jury. Id. We find the issue of whether the employer rebutted the statutory presumption of negligence was properly presented to the jury. We affirm the district court's denial of Stroup's motion for judgment notwithstanding the verdict.

IV. Finally, Stroup claims the jury's verdict should be reversed because it is contrary to the public policy purposes of Iowa Code section 87.21. The statutory presumption is an inducement to employers not to reject the workers' compensation act. Casey, 238 Iowa at 74, 26 N.W.2d at 57.

We agree with the employer, however, that Stroup is primarily asking us here to substitute our judgment for that of the jury. Generally, the question of whether the statutory presumption has been rebutted is one of fact for the jury. Id. at 73, 55. We find the jury's verdict is supported by substantial evidence and affirm the judgment entered in district court.

AFFIRMED.