IN THE COURT OF APPEALS OF IOWA

No. 3-359 / 92-1270

FILED
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CLERK SUPREME COURT

IN THE MATTER OF THE ESTATE OF MICHAEL J. SOYER, Deceased,

KAREN M. SOYER, Administrator of the Estate of Michael J. Soyer, Deceased,

Appellee/Cross-Appellant,

vs.

GREG SIMONS,

Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Carroll County, Timothy J. Finn, Judge.

The defendant appeals a judgment of the district court finding him grossly negligent in the death of Michael Soyer. **REVERSED AND REMANDED.**

Ronald Rankin of Patterson, Lorentzen, Duffield, Timmons, Irish, Becker & Ordway, Des Moines, and Joseph Halbur, Carroll, for appellant.

James R. Van Dyke of Van Dyke & Werden, P.C., Carroll, for appellee.

Considered by Habhab, P.J., and Cady and Huitink, JJ.

HUITINK, J.

On December 5, 1988, Michael Soyer was killed in a one-vehicle accident in the course of his employment with, and while driving a truck owned by, H.S. Farms, Ltd. of Carroll. The defendant, Greg Simons, was a co-employee of Soyer's and also served as president of H.S. Farms, Ltd.

The accident occurred while Soyer was returning to Carroll from Cedar Rapids. Soyer lost control of the truck when a tire on the left front steering axle suddenly deflated. The truck crossed the median, flipped over into a ditch, and killed Soyer immediately.

Karen Soyer, Michael's widow, brought suit against Simons, both individually and as the representative of their four minor children. She also brought suit as the administrator of the estate. The petition alleged Simons's gross negligence proximately caused Soyer's death.

Simons filed a motion for summary judgment. He alleged, among other things, he was not grossly negligent as a matter of law. Simons argued the exclusivity provisions of Iowa Code section 85.20 precluded recovery. The court overruled the motion, and the matter proceeded to a bench trial.

At trial, the plaintiffs argued Simons knew the tires on the steering axle of the truck were in need of replacement. The evidence presented included the testimony of an Iowa Department of Transportation inspector who had issued a warning to Soyer on December 2, 1988, for

"defective steering axle tires on sides." The plaintiffs expert testified that the deflation of the left front tire was the sole cause of the accident.

The court found Simons grossly negligent in failing to take precautions to avoid the danger associated with the defective tire. The court determined Simons's gross negligence was the proximate cause of Soyer's death. The court refused to apportion fault to Soyer.

The court awarded total damages in the amount of $169,905.46. The court denied Simons's motion for new trial. It granted a portion of the plaintiffs' motion for expanded ruling by itemizing the past and future damages. The court refused to award the plaintiffs interest on the wrongful death damages. Simons appeals, and the plaintiffs cross-appeal.

Our review is for correction of errors at law. Iowa R. App. P. 4. The trial court's findings of fact shall have the effect of a special verdict. Id. The court's findings are binding on us if they are supported by substantial evidence. Iowa R. App. P. 14(f)(1).

Iowa Code section 85.20 provides the exclusive remedy for compensation from a co-employee for "gross negligence amounting to such lack of care as to amount to wanton neglect for the safety of another." Iowa Code § 85.20 (1987). The three elements necessary to establish gross negligence under this section are: (1) knowledge of the peril to be apprehended; (2) knowledge that injury is a

probable, as opposed to a possible, result of the danger; and (3) a conscious failure to avoid the peril. Thompson v. Bohlken, 312 N.W.2d 501, 505 (Iowa 1981).

Upon our review of the record in this case, we conclude the plaintiffs failed to produce substantial evidence that the defendant had knowledge that injury was a probable result of the condition of the tire. We find several facts to be significant in our determination. First, Officer Mitchell Richardson of the Iowa Department of Transportation performed a complete inspection of the 1970 GMC truck on December 2, 1988. He issued a warning for "defective steering axle tires" and a citation for a defective tire on the pup trailer of the truck. The inspection report noted all violations needed to be corrected within fifteen days.

Officer Richardson testified he had the authority to remove the vehicle from the road if he believed an accident was imminent. He testified further that there were no conditions which warranted removing the vehicle from service. Michael Soyer was allowed to continue his run to Cedar Rapids and then return to Carroll. There was no imminent danger warranting immediate removal of the vehicle from the road. As a result, Simons was not placed on notice that injury was a probable result from the continued operation of the truck.

Second, Simons was notified of the citation and warning when he called from Oklahoma on December 2. His wife

Connie, the company dispatcher, also informed him the vehicle was allowed to continue on its run. At that time Simons directed Connie to have the tire which was the subject of the citation repaired over the weekend. He also requested that Michael Soyer contact Roger Lynn's Tire Service in Cedar Rapids prior to his arrival at the ADM plant on December 5, 1988, so the steering axle tires could be checked while he was at the plant. It was a practice of H.S. Farms, Ltd. to call ahead to Roger Lynn's so that any service necessary could be done while the trucks were loaded at the ADM plant. Soyer never contacted Roger Lynn's Tire Service.

While the defendant's decision to have the steering axle tires checked in Cedar Rapids rather than Carroll could be found to amount to negligence in view of the condition of the tire, we do not believe the requisite showing of probability of injury required by section 85.20 was established. See Woodruff Constr. Co. v. Mains, 406 N.W.2d 787, 790 (Iowa 1987).

Third, there is no evidence of any prior complaints, accidents or injuries involving this particular truck or any other vehicle of H.S. Farms, Ltd. to show the defendant knew or should have known of any condition which indicated injury was probable, as opposed to possible. See Henrich v. Lorenz, 448 N.W.2d 327, 334 (Iowa 1989).

We also conclude the plaintiffs failed to produce substantial evidence that there was a conscious failure by

Simons to avoid the peril presented by the tires. Our review of the record indicates Simons took affirmative steps to remedy the problems with the vehicle.

Simons ordered the tire which was the subject of the citation repaired immediately. This was done on the morning of December 3, 1988. He also ordered Michael Soyer to call Roger Lynn's Tire Service before Soyer's arrival in Cedar Rapids so the tires which were the subjects of the warning could be checked. Randy Lynn testified he was waiting for a call from a driver from H.S. Farms, Ltd. on Monday, December 5, 1988, but the driver never called for service. These facts and testimony indicate Simons made a conscious effort to have the vehicle repaired immediately.

Therefore, for the above-stated reasons we find the evidence was insufficient as a matter of law to show gross negligence. In view of this holding, it is unnecessary to consider the remaining issues raised by defendant on his appeal or by the plaintiffs on their cross-appeal. Finally, the court has considered plaintiffs' motion to strike a portion of defendant's reply brief and denies this motion.

Accordingly, we reverse the judgment of the district court and remand the case for entry of judgment in accordance with this opinion.

REVERSED AND REMANDED.