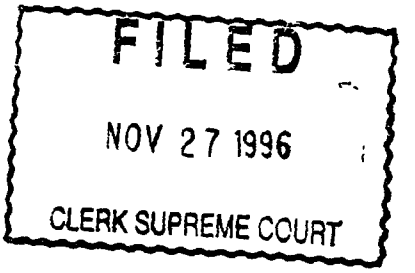
IN THE COURT OF APPEALS OF IOWA

No. 6-174 / 95-746



JOSEPH D. MAYFIELD,

Plaintiff-Appellee,

vs.

KILE TRANSFER CORP., an Iowa corporation,

Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, George W. Bergeson, Judge.

Kile Transfer challenges the district court order entering judgment on the jury verdict finding it was at fault for injuries sustained by Joseph Mayfield in its trucking yard. **REVERSED.**

Douglas A. Haag of Patterson, Lorentzen, Duffield, Timmons, Irish, Becker & Ordway, L.L.P., Des Moines, for appellant.

Ronald W. Kuntz of Kuntz, Keenan & Laughlin, Des Moines, for appellee.

Decided en banc.

HABHAB, J.

Plaintiff Joseph Mayfield has been employed as a truck driver by C&M Cartage, Inc. (which is located in Kansas City, Kansas) since May 1992. Defendant Kile Transfer Corp. is an agent for C&M and makes local deliveries and pickups of freight in Des Moines and central Iowa.

On the evening of October 28, 1992, Mayfield delivered a truckload of goods to the Kile Transfer yard. The truck Mayfield was operating had two 28-foot trailers which were attached by a "bogey axle." The axle consisted of a tongue which was used to hitch the unit to the rear of the first trailer and an axle with two wheels which had a hitch attached to it for the second trailer. The axle weighed approximately two thousand pounds. Mayfield always unhooked his trailers and hooked them up upon arriving or leaving the Kile Transfer yard. Kile Transfer was to unload the trailers and Mayfield was to return to retrieve the tractor and trailers and return to Kansas.

The following evening Mayfield returned to pick up the tractor and trailer. He discovered the coupler tongue on the bogey axle was not hooked up to the trailer. The tongue of the axle was left in an upright position instead of flush with the ground in a "down" position as he had left it.

Mayfield needed to hook the bogey axle up to the trailer. He attempted three times to move the bogey axle alone. He first attempted to lower the axle by pulling down on the tongue with his hand, exerting a minimal amount of effort. Unsuccessful in that attempt, Mayfield grabbed the tongue with both hands and pulled down as hard

as he could. Still unsuccessful, Mayfield grabbed the tongue, again using both hands, and hung onto it, wrapping his legs around the base of the tongue so as to use his full weight to lower it. It was at this time Mayfield injured his back. Ultimately, Mayfield got on his CB and reached another trucker, who then came to the Kile Transfer yard and used a chain to lower the tongue of the axle for Mayfield.

Mayfield brought suit against Kile Transfer[1] arguing its negligence in leaving the tongue of the bogey axle up was a cause of his injuries. Following the presentation of all the evidence, Kile Transfer moved for a directed verdict arguing the evidence showed Mayfield knew of the dangers of attempting to lower the tongue without assistance and that recovery should be precluded. The district court denied the motion and submitted the matter to the jury. The jury determined Mayfield suffered $142,582.06 in damages. It found Kile Transfer fifty-four percent at fault and Mayfield forty-six percent at fault. The court denied Kile Transfer's motion for judgment notwithstanding the verdict. Kile Transfer appeals.

A court ruling on a motion for directed verdict must view the evidence in the light most favorable to the nonmoving party. *Beitz v. Horak*, 271 N.W.2d 755, 757 (Iowa 1978); Iowa R. App. P. 14(f)(2). Movant is considered to have admitted the truth of all evidence offered by nonmovant and every favorable inference that may be deduced from it. *B & B Asphalt Co. v. T. S. McShane Co.*, 242 N.W.2d 279, 284

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[1] Mayfield was covered under worker's compensation by C&M.

(Iowa 1976). To overrule the motion, the court must find substantial evidence in support of each element of nonmovant's claim. *Beitz*, 271 N.W.2d at 757. If reasonable minds could differ, an issue is for the jury. *Harvey v. Palmer College of Chiropractic*, 363 N.W.2d 443, 444 (Iowa App. 1984).

Kile Transfer argues the trial court erred in overruling its motions for directed verdict and judgment notwithstanding the verdict as Mayfield failed to provide substantial evidence in support of each element provided in the jury instruction. We agree and reverse the order entering judgment on the jury verdict finding Kile Transfer was at fault for injuries sustained by Mayfield.

Under Iowa law, the scope of the duty of care which a possessor of land owes to an entrant is based[2] upon the entrant's status as either a trespasser, licensee, or invitee. *Morgan v. Perlowski*, 508 N.W.2d 724, 727 (Iowa 1993). An invitee is a person who enters or remains on land open to the public by invitation or permission and is owed the highest standard of care. *Id.* A licensee is one who may enter or remain on land only with the possessor's consent. The jury was given an instruction, without objection, as to the duties owed to Mayfield by Kile Transfer based on Mayfield's status as a licensee.[3]

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[2] This case, without objection, was tried and submitted to the jury under this theory of law. We have not been asked nor do we decide whether the facts generate a question of "the duty of care which a possessor of land owes to an entrant." We resolve only those issues properly preserved for our review under the legal theory submitted by the court and consented to by counsel.

[3] Again, we need not decide whether Mayfield is properly classified as a licensee.

The instruction reads as follows:

> The plaintiff must prove all of the following propositions:
> 1. The defendant knew or in the exercise of reasonable care should have known of a condition on the premises and that it involved an unreasonable risk of injury to a person in the plaintiff's position.
> 2. The condition was one that a person in the defendant's position should have expected would not have been discovered or realized by the plaintiff.
> 3. The plaintiff did not know or have reason to know of the condition and the risk involved.
> 4. The defendant was negligent in failing to make the condition safe or warn the plaintiff of the condition and the risk involved.
> 5. The negligence was a proximate cause of the plaintiff's damage.
> 6. The amount of damage.
> If the plaintiff has failed to prove any of these propositions, the plaintiff is not entitled to damages. If the plaintiff has proved all of these propositions, then you will consider the defense of comparative fault as explained in Instruction No. 12.

In reversing, we find Mayfield failed to provide substantial evidence to support the element that he did not know or have reason to know of the condition and the risk involved in his attempt to lower the bogey axle. A directed verdict is appropriate in cases where each element of the claim is not supported by substantial evidence. *Oberreuter v. Orion Indus., Inc.*, 398 N.W.2d 206, 209 (Iowa App. 1986).

Mayfield argues that at the time he sustained the injury he did not know there were two types of bogey axles. Apparently there is an older model bogey axle that must be pulled down with a chain and a new model which is easily pulled down by hand. Mayfield further asserts he never received any training nor did he possess any

special knowledge regarding lowering bogey wheels and, therefore, could not have foreseen the risk of injury in his attempt to lower the bogey axle.

The record also reveals that Mayfield testified he had seen bogey axles lowered with minimal effort and he has also seen them lowered with the use of a chain. His testimony also established he was aware that injury could result from attempting to move heavy objects and he had, in fact, been injured in the past for attempting to move an object of significant weight. After Mayfield's first two attempts to lower the bogey axle, it was not reasonable for him to attempt to lower it by wrapping his body around it and using his full strength to return the axle to a down position.

On his third attempt, Mayfield surely knew or had reason to know of the condition and the risk involved. He testified that if his efforts in lowering the bogey axle would have succeeded after wrapping himself around the tongue, he could have been crushed if unable to move out of the way. Mayfield also stated part of the reason for his behavior in not attempting to secure assistance with lowering the bogey axle was because it was late in the evening when he arrived at the Kile Transfer yard and he was in a hurry to leave.

In holding as a matter of law that the plaintiff knew or had reason to know of the condition and the risk involved in attempting to lower the tongue of the axle, we limit our decision to the particular facts of this case where the plaintiff on two

previous occasions attempted to lower the tongue without success. Clearly Mayfield, on his third attempt, knew of the condition of the bogey axle and the risk involved in moving it. After his first two attempts failed, he was in a position to make an intelligent choice as to whether the advantages to be gained were sufficient to justify incurring the risk of proceeding a third time to forcibly lower the tongue. As stated at comment *l* of section 342 of the Restatement (Second) of Torts:

> [E]ven though a dangerous condition is concealed and not obvious and the possessor has given the licensee no warning, if the licensee is in fact fully aware of the condition and the risk, there is no liability to him.

Kile Transfer's motion for judgment notwithstanding the verdict should have been granted and the order denying the motion is reversed. Plaintiff's petition is dismissed.

REVERSED.