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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

JEROME BRIGGS,

Appellee,

vs.

HAROLD ZIMMERMANN and
CLIFFORD SKOGSTROM,

Appellants.

Filed November 10, 1977

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2-59299

Appeal from Kossuth District Court - Joseph Hand, Judge.

Defendants appeal from jury verdict in favor of plaintiff who sustained injuries in a work-related accident and assign as error various trial court rulings on evidence, jury instructions, and motions for judgment notwithstanding the verdict and for new trial.

AFFIRMED.

James L. Kramer of Johnson, Burnquist, Erb, Latham & Gibb, of Fort Dodge, counsel for appellants.

Richard J. Barry and John J. Greer of James, Greer, Hoover, Nelson, Bertell, Montgomery & Barry, of Spencer, counsel for appellee.

Heard by Albee, C. J., Donielson, Snell, Oxberger and Carter, JJ.

DONELSON, J.

Defendants-Harold Zimmermann and Clifford Skogstrom appeal from a jury verdict in favor of plaintiff-Jerome Briggs and an award of damages in the amount of \$159,581.67. They assign as error adverse rulings by the trial court on various objections to the admission of evidence and testimony, and objections to jury instructions which were also incorporated in their motions for judgment notwithstanding the verdict and for new trial.

Plaintiff sustained injuries in a work-related accident on October 18, 1973 while working as a laborer at Everds Bros., Inc. He was assigned to help set up an asphalt plant in Boone County. Briggs was normally employed as a truck driver and had not previously worked in an asphalt plant operation. At the time of the injury, defendant-Zimmermann was foreman of the asphalt plant and the person in charge, and defendant-Skogstrom served as vice-president and safety director of the company.

As part of the setting up of the plant, it was necessary to install a 24,500 pound charging hopper. The hopper was raised in the air several times in order to attach legs and add dirt so that it would sit in a level position. A crane with a cable sling on the south end of the hopper was utilized to raise it. The north end was raised by using a Caterpillar payloader as a hoist. A one-half inch chain was hooked to the two hooks inside the bucket of the payloader and wrapped around the fifth wheel at the north end. The hopper was then lifted by raising the bucket of the payloader into the air in such a position that the chain draped over the cutting edge of the bucket on the payloader.

Briggs was directed by Zimmermann to place a block under one of the legs while the hopper was suspended off the ground by the payloader. While doing so, the chain broke at the point where the chain draped over the cutting edge of the bucket, and the hopper fell, pinning Briggs' hand beneath the leg and the block. As a result of his injuries, plaintiff commenced this action.

I. Sufficiency of Evidence to Justify Instructions

A. Insufficient Chain Strength

Initially, defendants contend that the court erred in instructing the jury that they were to find the defendants negligent if they found that the chain used was of insufficient strength, because there was no evidence before them regarding the strength

of the chain. We agree with defendants that it is reversible error for the court to instruct upon an issue not substantially supported by the evidence or which is supported only by speculation or conjecture, *Walker v. Sedrel*, 260 Iowa 625, 632, 149 N.W.2d 874 (1967), and that in determining whether support exists for the giving of an instruction, the evidence must be given the most favorable construction it will bear in favor of the instruction. *Schneider v. Swaney Motor Car Co.*, 257 Iowa 1177, 1182, 136 N.W.2d 338 (1965); *Coppola v. Jameson*, 200 N.W.2d 877, 879 (Iowa 1972). A review of this record, especially the testimony regarding the break in the chain and the conclusions of plaintiff's expert based upon that testimony, convinces us that there was sufficient support in the record to warrant the giving of this instruction.

B. Failure to Inspect the Chain

Defendants similarly argue that there was no evidence in the record to justify the instruction that defendants were guilty of negligence if they failed to inspect the chain. They contend that there was no evidence that an inspection would have revealed a defect. However, the evidence regarding the nature of the break and the point of failure of the chain logically leads to the inference that an inspection would have revealed the existence of a defect.

Defendant-Skogstrom individually argues that although he was safety director, there was no evidence that he was aware of any potentially dangerous situation regarding this chain or had undertaken a personal obligation to inspect the chain. In so arguing, he attempts to draw a distinction between himself and the safety director held subject to liability in *Craven v. Oggero*, 213 N.W.2d 678 (Iowa 1973).

Our analysis of this issue is somewhat complicated by the fact that subsequent to plaintiff's injury, the trial of this cause, and the submission of briefs on appeal, the supreme court decided *Kerrigan v. Errett*, 256 N.W.2d 394 (Iowa 1977), in which Craven was distinguished and standards for imposing individual liability on a co-employee were formally adopted.¹ Although the issues discussed in Kerrigan are identical to the ones raised by Skogstrom, we are initially confronted with the dilemma of deciding whether

¹ As the Kerrigan court noted, *supra*, at 396, by statutory amendment enacted subsequent to both the Craven accident and the events of this case, the legislature has provided a limited liability immunity for a co-employee. Section 85.20, The Code; see Acts 65 G.A. ch. III, § 1 (1974).

Kerrigan is applicable to the instant case since it was decided subsequent to the trial proceedings and submission of appellate briefs. Ordinarily, when the court has announced new legal standards, it has specified whether they were to be applied prospectively only. *State v. Williams*, 244 N.W.2d 577, 578 (Iowa 1976); *State v. Leonard*, 243 N.W.2d 75, 82-84 (Iowa 1976). However, in Kerrigan the court did not do so.

The general rule is that in the absence of any directions by the court to the contrary, all judicial decisions operate retrospectively as well as prospectively. *State v. Knox*, 186 N.W.2d 641, 642 (Iowa 1971); Note, "Limitation of Judicial Decisions to Prospective Operation," 46 Iowa L. Rev. 600 (1961); Annot., 10 A.L.R.3d 1371, 1377-1378. This rule applies to a situation in which a judicial decision overrules or reverses a prior case or rule during the pendency of an appeal, *Farm Bureau Service Co. of Maynard v. Kohls*, 203 N.W.2d 209, 211 (Iowa 1972); 21 C.J.S. Courts § 194, page 326 (1940); 20 Am.Jur.2d Courts § 233, page 562 (1965), and to one in which the court announces a new rule of law or change in the state of the law. *Berghammer v. Smith*, 185 N.W.2d 226, 232-233 (Iowa 1971). Consequently, we hold that Kerrigan applies retrospectively and must be considered here.

The court in Kerrigan examined the record in order to determine whether the evidence was sufficient to support a jury finding that personal duties for Kerrigan's safety were assigned to and accepted by Errett, manager of the industrial relations department, and concluded that the evidence was not sufficient to support a conclusion that Errett had accepted a "personal duty to formulate inspection procedures and policies to reveal physical weaknesses in the components of production-line equipment." Kerrigan, supra, at 399. In reaching this result, the court noted that the testimony only reflected an acknowledgment of authority, not duty.

In reviewing the record, the Kerrigan court noted that Errett spent much of his time in negotiating and interpreting union contracts and in grievance proceedings, had the duty to supervise and oversee subordinates in the operation of several departments, including medical, safety, and plant production, developed policies and procedures relative to employee discipline, plant safety, plant production, etc, for this large Firestone Tire and Rubber Co. plant in Des Moines, and had no responsibility for the installation or inspection of the equipment in question.

In distinguishing Craven, the Kerrigan court, supra, at 396, stated:

"Two supervisory co-employees were held liable in the Craven case. Safety director Oggero had the duty to tour job sites to inspect for safety hazards. He acknowledged at trial he had an obligation to inspect the bridging device which caused the disaster, but did not inspect. . . .

"In Craven the supervisory employees were on-the-scene and not remote management personnel. Each had been delegated a first-hand, direct and personal duty to inspect the situation and device which caused the fatality."

A review of the record in the instant case convinces us that Skogstrom fits the description of the safety director in Craven much more closely than the Firestone industrial relations manager in Kerrigan. The record reflects that Skogstrom was vice-president and chairman of the safety committee and frequently used the title "Safety Director" after his name. He was given that position subsequent to the enactment of the Occupational Safety and Health Act of 1970 (OSHA).

In his capacity as Safety Director, he tried to formulate a safety policy and attend safety meetings along with others. He also chaired approximately 20 meetings of the safety committee which consisted of all Everds Bros., Inc., full-time employees. At those meetings general safety policy and recent accidents were discussed, and suggestions were made as to the proper steps to be taken in order to prevent such accidents from reoccurring. Not only did the committee conduct post-accident investigations, but efforts were made to prevent as many accidents as possible "before-the-fact" as well.

Skogstrom testified that the committee had previously discussed the overall process of setting up an asphalt plant and he assumed that the procedures being followed by the foreman were reviewed. In describing his duties, Skogstrom stated "... I think what my duties as safety director were, were to set up general policy and to make people aware that they should act safely—and I think I did that." He met with the foreman of this particular project and with the other foremen and employees as well, in an attempt to carry out these duties. He also distributed packets of material containing safety guidelines to all company foremen and instructed them that they were responsible for giving all employees safety task assignments. In an attempt to ensure compliance with these guidelines, Skogstrom testified that frequent safety meetings were held with both the foremen and other employees and that he personally participated on occasion.

Skogstrom also testified that he had seen the charging hopper in place and would have approved the use of a one-half inch chain had he been consulted about this decision. He further stated that after the Briggs accident, he conducted a personal investigation although he did not inspect the broken chain.

After a review of these factors, we conclude that Skogstrom's duties are more analogous to those of safety director Oggero in Craven than to industrial relations manager Errett in Kerrigan. Consistent with Kerrigan, we hold that a jury question was generated as to the potential liability of Skogstrom and consequently, the trial court did not err in its instructions in this regard.

II. Instructions Regarding the Reasonably Prudent Person

Defendants argue that the trial court erred in a number of its instructions by treating the acts or failures to act of the defendants as negligence per se instead of ordinary negligence. They contend that the Instructions compelled the jury to find them negligent if they did or failed to do certain things, without making any reference to the reasonable person standard.

The instructions properly informed the jury that each instruction should be construed in the light of and in harmony with every other instruction, and applied as a whole to all the evidence admitted at trial. See Iowa Uniform Jury Instructions, Vol. 1, Civil No. 1.4; Dickman v. Truck Transport, Inc., 224 N.W.2d 459, 464 (Iowa 1974); State v. Johnson, 243 N.W.2d 598, 604 (Iowa 1976). Furthermore, the jury was instructed that if it found from the evidence that the common employer had placed a duty on the defendants, then they were required to use reasonable care to avoid risk of injury or bodily harm to persons reasonably anticipated to be using equipment in the ordinary manner. Similarly, Instruction No. 8 provides:

"'Ordinary care' is that degree of care which an ordinary careful and prudent person would exercise under the circumstances.

"'Negligence' is the want or omission of ordinary care; the failure to do something which a reasonably prudent person, guided by those considerations which ordinarily regulate the conduct of human affairs, under the circumstances would do, or the doing of something which such a person, under such circumstances, would not do." (emphasis added)

Reading the instructions as a whole, we not only conclude that the reasonable person standard was sufficiently delineated, but we are convinced that the instructions

sufficiently complied with the requirements set forth in Craven, and the more rigorous standards of Canter v. Koehring Co., 283 So.2d 716, 721 (La. 1973) adopted by our court in Kerrigan, supra, at 397. See also, Jorgensen v. Horton, 206 N.W.2d 100, 102 (Iowa 1973); Koll v. Manatt's Transp. Co., 253 N.W.2d 265, 269-271 (Iowa 1977).

III. Admissibility of Opinion of Plaintiff's Expert

Defendants argue that the trial court erred in allowing plaintiff's expert, Kenneth Olson, to give expert testimony in response to a hypothetical question when the facts upon which the question was based were not established by the evidence. The hypothetical question asked Olson to assume certain facts and to limit his opinion to the facts assumed and his personal observation of the equipment involved.

Hypothetical questions must only assume facts which are supported by evidence. Anderson v. Sheuerman, 232 Iowa 705, 708, 6 N.W.2d 125 (1942). In general, the admission or exclusion of expert opinion testimony rests largely in the discretion of the court and its ruling will only be reversed upon a clear abuse of discretion. Dougherty v. Boyken, 261 Iowa 602, 607, 155 N.W.2d 488 (1968); Ganrud v. Smith, 206 N.W.2d 311, 314 (Iowa 1973). With regard to hypothetical questions, the court in Dickinson v. Mailliard, 175 N.W.2d 588, 594 (Iowa 1970), indicated:

"... 'At least some latitude must be showed in the choice of facts stated in such a [hypothetical] question and the trial court has considerable discretion in ruling on an objection thereto. Contestants were entitled to frame the question according to their theory of the case, as their construction of the evidence showed the facts to be or as the jury would have a right to find them.' "

Based upon the physical facts and the logical inferences derived therefrom, we are convinced that the plaintiff had the right to have his expert assume that the bottom of the bucket of the payloader was parallel with the ground at the time the chain snapped. Consequently, we conclude that the trial court did not abuse its discretion in overruling defendants' objection.

Skogstrom and Zimmermann also claim that Olson failed to state a sufficient factual basis for his opinions. Bernal v. Bernhardt, 180 N.W.2d 437, 441 (Iowa 1970). They argue that the questions he was asked were unanswerable unless Olson had personal knowledge of the tensile strength and general condition of the chain and the condition of the lip of the payloader.

The opinion questions were proper if the assumed hypothetical facts were sufficient to allow an adequately qualified individual to render an opinion which would constitute something more than mere conjecture. *Ganrud v. Smith*, supra, at 314. *Bernal v. Bernhardt*, supra, at 441. The supreme court has adopted a liberal rule regarding the admission of opinion testimony. *Tiemeyer v. McIntosh*, 176 N.W.2d 819, 824 (Iowa 1970). In *Bengford v. Carlem Corporation*, 156 N.W.2d 855, 865-866 (Iowa 1968), the court explained its rationale for such a posture:

"The admission of opinion evidence rests largely in the sound discretion of the court and considerable leeway is allowed in this field of evidence for the reason that no matter how the opinion question is phrased or formulated, it remains an opinion which the trier of facts is at liberty to reject. Therefore, only in clear cases of abuse would admission of such evidence be found prejudicial." (citations omitted)

We conclude that Olson was unquestionably well-qualified to answer the particular questions asked and there was a sufficient factual foundation in the record to enable him to render a valid opinion. Consequently, we are unable to say that the trial court abused its discretion in allowing his testimony.

IV. Admissibility of OSHA Regulation

As their final argument, defendants contend that it was error for the court to admit an OSHA regulation, subpart "N", No. 1518.550(a)(1), as evidence of negligence against the defendants. They argue that this regulation is only applicable to employers and not to employees such as the defendants, and therefore, the defendants cannot be held to a standard which is not directed to them.

We agree that OSHA regulations are initially directed at an employer. However, the record in this case reflects that the requirements embodied in the regulations are implemented through employees of the corporate employer, notably at the management and supervisory level. Furthermore, each employee has a duty to comply with all occupational safety and health standards, rules, regulations and orders issued pursuant to OSHA which are applicable to his own actions and conduct. Occupational Safety and Health Act of 1970, § 5(b), 29 U.S.C.A. § 654(b); see § 88.4, The Code. This language from OSHA is consistent with plaintiff's theory and evidence that defendants had a duty to insure safe working conditions at the plant, but failed to perform it.

In Koll v. Manatt's Transp. Co., supra, at 270, the court reaffirmed the following principle:

"'A general statutory duty is ordinarily for the benefit of all persons who are likely to be exposed to injury from its non-observance. (Authorities).'"
(citations omitted)

In Koll, the court went on to hold that violation by an employer of an OSHA standard is negligence per se as to his employee and evidence of negligence as to all persons likely to be exposed to injury as a result of the violation. In view of the evidence adduced at trial regarding implementation of OSHA standards, the language of § 5(b) of the Act itself, and the unequivocal holding and dicta in Koll, we hold that sufficient competent evidence existed to justify the admission of the OSHA regulation as evidence of negligence, at the very least. See Jorgensen v. Horton, supra, at 102; Cronk v. Iowa Power & Light Co., 258 Iowa 603, 612, 138 N.W.2d 843 (Iowa 1966). Consequently, we find that the court did not err in admitting the OSHA regulation.

Finding no error, we affirm the district court.

AFFIRMED.

All judges concur except Carter, J., who dissents.

CARTER, J. (dissenting)

I dissent. I find reversible error in instruction no. 15 which was preserved by timely and proper exception thereto taken in the trial court.

Instruction no. 15 provides:

You are instructed that if you find from the evidence that Everds Brothers, Inc., placed a duty on the defendants, or either of them, to do any of the specified items as alleged by the plaintiff in Instruction No. 1, then you are instructed that the defendants, or either of them, were required to use reasonable care in so doing, or in causing same to be done, as to avoid risk of injury or bodily harm to persons that the defendants, or either of them, could reasonably anticipate to be using said equipment in the ordinary manner, and the failure on their part, or the part of either of them, to inspect, maintain, or warn, would constitute negligence on the part of such defendants, or either them.

But if you find from the evidence that the Plaintiff has failed to prove by a preponderance or greater weight of the evidence that the defendants, or either of them, had a duty to inspect, maintain, or warn, then in that event the failure on their part, or his part, to do so or cause others to do so would not be negligence on their part, or the part of either of them.

The vice in this instruction is that it tells the jury, in effect, that if they find defendants' employer placed the requisite duty upon defendants, then any failure on their part to inspect, maintain, or warn would constitute negligence. Obviously any such failure should be considered negligent only if the omission was a failure to exercise ordinary care as defined elsewhere in the instructions. But the jury is not told this. There is a reference to "reasonable care" in instruction no. 15 but its juxtaposition in the instruction makes it appear that the failures to inspect, maintain or warn, are examples of lack of reasonable care rather than claimed omissions which are to be measured by a standard of reasonable care in deciding the case.

The vice of the instruction is compounded by the fact that the final paragraph thereof, which seeks to balance the instruction by telling the jury what would not be negligence, suggests to the jury that the failure of defendants to inspect, maintain, or warn would not be negligence only if the jury found no duty imposed on them to do so by their employer. This reinforces the idea conveyed by the prior portion of the instruction that failure of the defendants to inspect, maintain or warn would be negligence per se if such duties had been imposed by defendants' employer.

I would hold the giving of this instruction prejudiced defendants' case and grant a new trial on all issues.