IN THE COURT OF APPEALS OF IOWA

FILED
SEP 26 1990
CLERK SUPREME COURT

No. 0-301 / 89-362

WILLARD JAMES HOWSER,

Appellant,

vs.

RICK REISETTER d/b/a REISETTER ELECTRIC,

Appellee.

Appeal from the Iowa District Court for Hamilton County, Newt Draheim, Judge.

Howser appeals a jury verdict in favor of Reisetter, contending Reisetter was negligent as a matter of law. **AFFIRMED.**

Dan T. McGrevey, Fort Dodge, for appellant.

Kurt T. Pittner, Fort Dodge, for appellee.

Considered by Oxberger, C.J., and Donielson and Schlegel, JJ.

OXBERGER, C.J.

On October 23, 1986, Willard Howser was an employee of Louis Rich Co. responsible for watching the corn dryers. On that date Rick Reisetter, an independent contractor, was hired by Louis Rich Co. to replace and repair an auger motor. After the completion of Reisetter's work, Howser turned the auger on. When Howser returned from switching the auger on he stepped into the uncovered inspection hole over the auger and his foot and leg came in contact with the running auger. As a result of his injuries Howser's leg was partially amputated.

Howser brought an action for damages against Reisetter, the Henning Construction Company, and Vern Lauffer. The case proceeded to trial against Reisetter only. Howser dismissed his claims against the other two parties, and they do not participate in this appeal. The court instructed the jury on two allegations of negligence: 1) Reisetter's failure to cover the inspection hole; and 2) Reisetter's failure to warn Howser of the uncovered hole. The jury returned a verdict in favor of Reisetter. Howser appeals.

Howser contends that Reisetter was negligent as a matter of law. In response, Reisetter argues that this issue cannot be raised for the first time on appeal. Reisetter also claims that Howser failed to preserve error for review by failing to object to the submission of the negligence issue to the jury. Reisetter also points out

that Howser failed to ask for a new trial, directed verdict, or a judgment notwithstanding the verdict. Lastly, Reisetter contends that the evidence created a jury question on the issue of negligence.

Our review of this case is for correction of errors at law. Iowa R. App. P. 4. We will not consider on appeal a theory of relief not asserted in the district court. Karthridge Pak Co. v. Department of Revenue, 362 N.W.2d 557, 561 (Iowa 1985). Additionally, we will not consider claims not properly preserved as error during the trial court proceedings. Woods v. Schmitt, 439 N.W.2d 855, 867 (Iowa 1989). We searched appellant's brief as well as the appendix and found no references, prior to the filing of this appeal, to the theory of negligence as a matter of law before, during or after the trial.

Negligence, contributory negligence, and proximate cause usually represent jury questions. Only in exceptional cases are these issues decided as matters of law. Casey v. Koos, 323 N.W.2d 193, 198 (Iowa 1982).

Negligence as a matter of law ordinarily has only been found when the conduct in issue involves violation of a statute or ordinance. Howser failed to show any breach of a statutory duty on the part of Reisetter. Howser also failed to sufficiently establish Reisetter's actions or failure to act contributed to, or were the proximate cause of his injuries such that Reisetter's liability was proven as a matter of law. Ackerman v. James, 200 N.W.2d 818, 824

(Iowa 1972). Negligence in this case involves what a reasonable person in Reisetter's situation would or would not have done. The question of negligence was properly placed before the jury.

As a consequence of the appellant's failure to preserve the issue of negligence as a matter of law, we will not consider the issue for the first time on appeal. Accordingly, we affirm the judgment entered by the trial court in favor of Reisetter.

AFFIRMED.