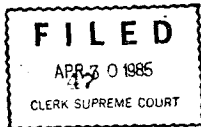


IN THE COURT OF APPEALS OF IOWA



JAMES E. CANNON, and
PATRICIA A. CANNON,

Plaintiffs-Appellants.

vs.

THOMAS STRAMER, and
LAWRENCE LEE,

Defendants-Appellees.

Filed April 30, 1985

5-99
84-938

Appeal from the Iowa District Court for Linn County, William R. Eads,
Judge.

The plaintiffs appeal from judgment directing a verdict in favor of the
defendants in a coemployee negligence action. **AFFIRMED.**

J. R. Norris of J. R. Norris and Associates, Cedar Rapids, for plaintiffs-appellants.

John M. Bickel and Diane Kutzko of Shuttleworth & Ingersoll, Cedar Rapids,
for defendants-appellees.

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

OXBERGER, C.J.

The court below directed verdict in defendant's favor at the close of plaintiff's presentation of evidence in this coemployee negligence action. Plaintiff has appealed and we affirm.

Plaintiff James Cannon worked as a "relief man" for Swiss Valley Farms Dairy in Cedar Rapids in 1980 and 1981. His duties included moving trucks and loading and unloading goods. Part of the job required lifting overhead doors of trailers on semitrailer trucks. Plaintiff says at some point prior to December 1980 he told the production manager Thomas Stramer, a defendant, that there was a problem with the overhead doors sticking when opened. December 12, 1980, he was lifting a door on a trailer when it jammed and plaintiff felt pressure in his back. He was treated by Dr. Stark for his pain. Cannon says he reported the injury to several people, including defendant Larry Lee, production supervisor at the plant. According to Cannon, Lee told him he would check on the problem of sticking doors and Stramer indicated it would be "taken care of." On January 20, 1981, plaintiff again felt pain in his back when he lifted a trailer door and the door jammed. Stark testified he conducted a test on Cannon which was positive for possible sacroiliac strain and advised plaintiff he should be careful lifting objects and to get a "pencil job." Stark also said he did not feel plaintiff's preexisting condition of spina bifida occulta was a significant factor in his injury. Dr. Verdeck testified the plaintiff would be prone to have problems with his back with heavy activity.

Plaintiff brought this action pursuant to section 85.20 of our Code which provides workmen's compensation benefits shall be exclusive against:

Any other employee of such employer, provided that such injury... is not caused by the other employee's gross negligence amounting to such lack of care as to amount to wanton neglect for the safety of another.

Iowa Code §85.20(2)(1985). In order to prevail on a claim of gross negligence amounting to wanton neglect on part of the coemployee, he must prove: (1) knowledge of the peril to be apprehended; (2) knowledge that the injury is probable, as opposed to a possible result of the danger; (3) a conscious failure to avoid the peril. Thompson v. Behlken, 312 N.W.2d 501, 505 (Iowa 1981). The court concluded that the plaintiff's evidence was insufficient on element two to warrant sending the question to the jury.

In reviewing grant of a directed verdict, we view the evidence in a light most favorable to the party moved against and give every favorable inference to those facts. Rodgers v. Baughman, 342 N.W.2d 801, 803-04 (Iowa 1983). If the evidence in favor of plaintiff is insufficient as a matter of law to support the cause of action, then a directed verdict will be granted. Id. at 804. Plaintiff says the trial court erred in deciding the evidence on element two, knowledge that the injury is probable, is insufficient.

Defendants were aware that plaintiff had been injured when one of the doors jammed. If there had been evidence in addition to plaintiffs' experience that a large number of people opened the doors, the doors jammed, but no injury occurred, it could be said that the defendants could not know that injury was probable, but only possible. However, the evidence presented shows only that the defendants were aware the plaintiff was hurt when this happened. In this event, a jury question would be presented that defendants should have been aware that subsequent injury was probable. We believe the court erred in deciding, as a matter of law, the defendants did not have knowledge injury was probable, based on the facts presented.

As a result of its ruling, the court did not reach the question of whether defendants were personally responsible for the safety of plaintiff and failed to avoid peril to him. While we disagree with the trial court's conclusion that there was no knowledge injury was probable, if the directed verdict may be sustained on

other grounds, we will affirm the trial court's ruling. See, Kelly v. Iowa Valley Mutual Insurance Association, 332 N.W.2d 330, 333 (Iowa 1983); Citizens First National Bank v. Hoyt, 297 N.W.2d 329, 332 (Iowa 1980).

The supreme court has outlined several criteria prior to finding liability in a coemployee negligence action, including the following:

With regard to the personal (as contrasted with technical or vicarious) fault, personal liability cannot be imposed upon the officer, agent, or employee simply because of his general administrative responsibility for performance of some function of the employment. He must have a personal duty towards the injured plaintiff, breach of which specifically has caused the plaintiff's damages. If the defendant's general responsibility has been delegated with due care to some responsible subordinate or subordinates, he is not himself personally at fault and liable for the negligent performance of this responsibility unless he personally knows or personally should know of its nonperformance or malperformance and has nevertheless failed to cure the risk of harm.

Kerrigan v. Errett, 256 N.W.2d 395, 397 (Iowa 1977). In this case plaintiff has failed to show a personal duty owed to him by defendants. The entire testimony on the subject consists of the following statements from Stramer:

Q. Mr. Stramer, is it within your job duty or responsibility to make repairs on doors? A. No, it is not.

Q. Do you have any direct responsibility for the working conditions and safety of the Plaintiff James Cannon? A. No direct responsibility.

Q. Does Mr. Lee work for you or under your supervision and control? A. Yes, he does.

Q. And did he in 1980 and 1981 work under your supervision and control? A. Yes, he did.

Q. Does Mr. Lee have any direct responsibility for the working conditions and safety of James Cannon? A. No direct responsibility.

Q. In December of 1980 and January of 1981, were you in total charge of the operation of Swiss Valley Farms at F Avenue, N.W., in Cedar Rapids, Iowa? A. No.

Q. What part were you in charge of? A. I was in charge of the receiving, processing, packaging, storing, and loading of dairy fluid products, as you see it in the store.

Q. You were in charge of the loading of the dairy products, you said? A. Yes, I was.

Q. With respect to Mr. Cannon, could you tell the jury who was in charge of his working conditions and was responsible for the safe working environment for him in December of 1980 and January of 1981? A. The second shift foreman.

Q. And what was that person's name? A. John Wilkinson.

Although the evidence generates a jury question as to whether the defendants personally knew of the problem with sticking doors, and of resulting injury, the record does not show any personal duty on the part of defendants.

We find that the evidence does not establish that there was any personal duty on the part of the defendants, nor that they failed to cure any problem they were personally aware of. As the court in Kerrigan indicated, the improper acts "must be acts constituting direct negligence for the Plaintiff, tortious acts in which he participated, or which he specifically directed others to do." Id.

Since plaintiff has failed to show a personal duty on the part of defendants, we affirm the trial court grant of a directed verdict.

AFFIRMED.