IN THE COURT OF APPEALS OF IOWA

No. 7-008 / 95-1776

DOUGLAS D. McDONALD and
KRISTINA A. McDONALD,
Plaintiffs-Appellants,

vs.

THOMAS J. FRIEND and
LARRY C. YOUNG,
Defendants-Appellees.

Appeal from the Iowa District Court for Hardin County, Carl Peterson, Judge.

Plaintiffs challenge the order granting the defendants' motion for summary judgment. **AFFIRMED.**

William R. King and Kris Holub Smith of Davis, Brown, Koehn, Shors, & Roberts, P.C., Des Moines, and Larry A. High, Iowa Falls, for appellants.

Daniel B. Shuck, John D. Ackerman, and Charles Trullinger of Heidman, Redmond, Fredredgill, Patterson, Schatz & Plaza, L.L.P., Sioux City, for appellees.

Heard by Sackett, P.J., and Cady and Streit, JJ., but decided by Cady, Huitink and Streit, JJ. Sackett, P.J., takes no part.

STREIT, J.

The plaintiffs challenge the order granting the defendants' motion for summary judgment. The plaintiffs claim the trial court erred in finding no genuine issues of material fact existed regarding whether the co-employee defendants' gross negligence was the cause of Douglas's injuries.

Friend Electric, Inc. hired Douglas McDonald to aid in electrical work it was doing at a new high school in Eldora. Thomas Friend and his wife Donna are sole shareholders and officers of Friend Electric. Larry Young was the project lead man or supervisor of the high school project.

As part of his duties, McDonald installed conduit and junction boxes in the ceiling of the gymnasium. The high ceilings required the use of a scissor lift, which had been purchased by Friend Electric specifically for this job.

Previously installed duct work interfered with the placement of certain junction boxes, and McDonald utilized a six-foot step ladder on top of the lift. He would raise the lift as close to the duct work as possible and then would use the ladder to get around the duct work. It is disputed whether Thomas Friend or Young knew McDonald was using a ladder in this manner.

While working on a particular junction box obstructed by duct work, McDonald raised the lift and climbed the ladder to reach it. He straddled the ladder and sat on top of it while doing his work. While he usually worked with the power

off, the power remained on while he did this work. McDonald apparently touched a live wire with his hand or his pliers causing a flash of light. He fell backward off of the lift down to the gymnasium floor. He suffered severe injuries to his back, wrist and feet. He also suffered nerve damages. As a result of his injuries he received workers' compensation benefits. Thomas Friend was out of town when the accident occurred. Young was on the job site, but was apparently not in the gymnasium at the time.

McDonald and his wife sued Thomas Friend and Young, arguing their gross negligence was a proximate cause of his injuries. He claimed Friend and Young knew of the dangers associated with utilizing a ladder on top of the lift and that they were negligent in, inter alia, allowing him to use a ladder on the lift, to use the lift in such a manner without a safety harness and to install the high voltage power box with the power on. The defendants filed a motion for summary judgment.

The district court granted the defendants' motion. It determined Young and Friend lacked knowledge of the specific peril McDonald faced and thus could not consciously avoid it. The McDonalds appeal.

Our scope of review is for errors at law. Iowa R. App. P.4. Summary judgment is appropriate only if there exists no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 237(c); *See Farm Bureau Mut. Ins. Co. v. Milne*, 424 N.W.2d 422, 423 (Iowa 1988). The

moving party has the burden to show the nonexistence of a material fact, *Milne*, 424 N.W.2d at 423. A fact issue is generated if reasonable minds can differ on how the issue should be resolved, but if the conflict in the record consists only of the legal consequences flowing from undisputed facts, entry of summary judgment is proper. *Milne*, 424 N.W.2d at 423; *Gott*, 387 N.W.2d at 343. If the motion is properly supported, however, the resisting party "must set forth specific facts showing that there is a genuine issue for trial." Iowa R. Civ. P. 237(e).

Douglas claims there is a genuine issue of material fact whether his injuries were caused by the gross negligence of defendants, Young and Friend. The elements required to establish a co-employee's gross negligence are: (1) knowledge of the peril to be apprehended; (2) knowledge the injury is a probable, as opposed to a possible, result of the danger; and (3) a conscious failure to avoid the peril. *Smith v. Air Feeds, Inc.*, 556 N.W.2d 160, 164 (Iowa App. 1996). The test is stringent, and an injured worker must prove all of its elements to establish a co-employees's gross negligence. *Walker v. Mlakar*, 489 N.W.2d 401, 405 (Iowa 1992).

I. Defendant Larry Young. McDonald claims Young knew he was using a six-foot step ladder in the scissor lift to reach the junction box to make the connections when he fell. He stated in his deposition that Dave Swart, a co-employee, used the ladder when he went up to the junction box before McDonald. McDonald and Young observed Swart take the scissor lift as high as it would go and

then climb up a ladder in the lift to look at the box. Swart came down because he was unable to make the connection, then Young asked McDonald if he could make the connection and left the room. Young states he never saw a ladder and Swart claims he used a ladder, but he laid the ladder down in the lift so it could not be seen when he came down. Swart stated the ladder could not be seen from the floor when it was up in the lift by the junction box.

In a motion for summary judgment the evidence must be viewed in the light most favorable to the resisting party. *Thorp Credit, Inc. v. Gott*, 387 N.W.2d 342, 343 (Iowa 1986). The procedure is functionally akin to a directed verdict, and every legitimate inference that reasonably can be deduced from the evidence should be afforded the resisting party. *Id.*; *Sherwood v. Nissen*, 179 N.W.2d 336, 339 (Iowa 1970).

A. Knowledge of the Peril. There is some dispute between the facts given by McDonald and the facts given by Swart and Young whether Young knew McDonald was using a ladder in the lift at the time of the fall. In addition to plaintiff's statements that Young knew he was using a ladder in the lift, Young stated in his deposition he was told a ladder was not used in work previously done on the box. Requirements of actual knowledge of peril may be shown by circumstantial evidence. *Walker*, 489 N.W.2d at 406. We find for the purposes of deciding a motion for summary judgement, there is circumstantial evidence defendant Young had

knowledge Plaintiff used a step ladder in the scissor lift and had knowledge of the threatened peril--falling from the lift because plaintiff was outside the safety railing in the lift.

B. Imminent Danger. The second element requires plaintiffs to show that Young knew his action would place McDonald in imminent danger, so that McDonald would more likely than not be injured by the conduct. *Hernandez v. Midwest Gas Co.*, 523 N.W.2d 300, 305 (Iowa App. 1994).

> The requisite showing of a "zone of imminent danger" can be made in two ways: (1) proving defendant's actual or constructive knowledge of a history of accidents under similar circumstances or, (2) showing a high probability of harm is manifest even in the absence of a history of accidents or injury.

Alden v. Genie Indus., 475 N.W.2d 1, 2-3 (Iowa 1991).

Questions of negligence are rarely decided in a summary judgment adjudication. Iowa R. App. P. 14(f)(10). After reviewing the record, however, we find Plaintiffs failed to show defendant Young knew or should have known his conduct placed McDonald in a zone of *imminent* or impending danger. There is no history of similar accidents in the operation of the lift by any other employees. The lift had just been purchased by Friend Electric specifically for this project. Using a ladder with the lift did not manifest a high probability of harm and Young did not have knowledge injury was probable. At best, Young's conduct created a possibility

of harm to McDonald. This is an insufficient risk of harm to constitute gross negligence.

C. "Consciously fail to avoid" a peril. Young walked out of the gym after he instructed McDonald to go up on the lift and make the connections. We have already determined Young knew McDonald was going to use a ladder in the lift to reach the junction box and make the connections. We determine Young consciously failed to avoid the peril when he walked out of the gym. McDonald had only been working for Friend Electric thirteen weeks. He was making connections to a junction box that was more than twenty-five feet above the gym floor. Duct work had just been added to the ceiling, making it even more difficult to reach the junction box to make the connection. Another employee had just come down from the lift and said he could not make the connection. As supervisor of the site, we find Young should have been in the gym to observe McDonald while he was making the connection. He could have told McDonald not to use a ladder or made him put on a safety belt, which may have prevented the peril. However, in that we have determined that the peril was not sufficiently threatening, gross negligence cannot be found.

II. Defendant Tom Friend. Friend received the manufacturer's operation manual when the scissor lift was purchased. He read the manual which included several specific safety warnings pertaining to the operation of the lift. One of the warnings said employees should not use a ladder on the lift platform to gain additional

height when performing work using the lift. McDonald claims Friend ordered employees to use a four-foot step ladder instead of standing on the lip of the scissor lift if additional height was needed. He claims Friend knew employees were using ladders with the lift and therefore had knowledge of the peril to be apprehended by McDonald when he was injured.

Friend was not at the Eldora project site on the day of McDonald's accident. Gross negligence requires *actual* knowledge of the peril to be apprehended. *Walker*, 489 N.W.2d at 405. Although Friend may have known employees used a ladder in the past he had no actual knowledge McDonald was using a six-foot ladder to make connections on the day of his accident. Since there was no actual knowledge, there was no conscious failure to avoid the peril. *Id.* There is also a complete absence of any probability of harm manifest in the circumstances surrounding the accident. We find there was no gross negligence committed by Friend.

We affirm the district court's decision.

AFFIRMED.