

IN THE COURT OF APPEALS OF IOWA

No. 5-473 / 94-1321

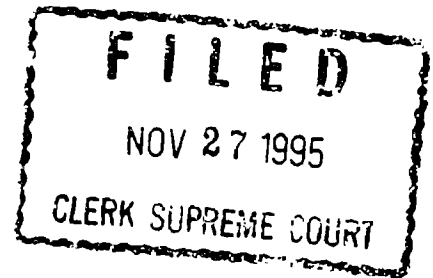
DONALD BUCKNER,

Appellant,

vs.

JACK VOGT,

Appellee.



Appeal from the Iowa District Court for Polk County, Jack D. Levin. Judge.

Appeal from grant of summary judgment on the issue of the gross negligence of a coemployee. **AFFIRMED.**

Robert DuPuy of LaMarca & Landry, P.C., West Des Moines, for appellant.

Richard G. Book and Patrick D. Smith of Huber, Book, Cortese & Happe, Des Moines, for appellee.

Heard by Sackett, P.J., Cady, J., and McCartney, S.J.*

*Senior judge from the Second Judicial District serving on this court by order of the Iowa Supreme Court.

McCARTNEY, S.J.

At issue is whether the district court erred in granting the motion of the defendant for summary judgment.

We affirm.

The plaintiff and appellant, Donald Buckner, was a press operator at Ryko. The defendant and appellee, Jack Vogt, was the foreman in charge of maintenance. The press upon which Buckner was injured was operated by a foot pedal switch which was surrounded by a protective housing or guard. The plaintiff alleges Vogt had been informed that objects falling onto the housing triggered the press to cycle. Buckner contends this happened on December 5, 1990, and he was injured when his hand was caught in the press. He filed suit against Vogt arguing Vogt's failure to maintain the press constituted gross negligence. Iowa Code § 85.20 (1993). The district court granted motion of the defendant for summary judgment..

Our review of a successful motion for summary judgment is for correction of errors at law. *Hernandez v. Midwest Gas Co.*, 523 N.W.2d 300, 302 (Iowa App. 1994).

We, like the district court, view the record in the light most favorable to the party opposing summary judgment. *Id.* Summary judgment is appropriate when the entire record before the court shows there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law. *Id.* at 303.

The disposition of gross negligence cases by summary judgment is not unusual. *See Johnson v. Farmer*, ___ N.W.2d ___, ___ (Iowa 1995) (“We have previously approved the determination of the gross negligence issues by a motion for summary judgment.”); *see also Allied Mut. Ins. Co. v. State of Iowa*, 473 N.W.2d 24 (Iowa 1991); *Hernandez v. Midwest Gas Co.*, 523 N.W.2d 300 (Iowa App. 1994); *Konz v. Ehly*, 451 N.W.2d 504 (Iowa App. 1989).

The elements necessary to establish a coemployee’s gross negligence are: 1) knowledge of the peril to be apprehended; 2) knowledge that the injury is a probable, as opposed to a possible, result of the danger; and 3) a conscious failure to avoid the peril. *Hernandez*, 523 N.W.2d at 305. Allegations of gross negligence carry a high burden of proof. *Johnson v. Interstate Power Co.*, 481 N.W.2d 310, 321 (Iowa 1992). All three elements must be proven before liability can attach. *Id.*

In his brief in support of his motion for summary judgment, Vogt conceded there was conflicting evidence with respect to the first element and he based his motion on the absence of evidence to support the second element--knowledge that the injury is a probable, as opposed to a possible, result of the danger. This element of gross negligence requires more than a showing of a defendant’s actual or constructive knowledge of the “actuarial foreseeability” that accidents will happen. *Hernandez*, 523 N.W.2d at 305. A plaintiff must show the defendant knew his actions “would place his coemployee in imminent danger, so that someone would

more likely than not be injured by the conduct.” *Id.* 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. *Id.*

We have reviewed the record and find the only disputed issue of material fact pertains to the first element, Vogt’s knowledge of the peril to be apprehended. Buckner has failed to establish there was a genuine issue of material fact with respect to the second element. There was no evidence of prior injuries with this press, a factor found significant in prior cases. See *Henrich v. Lorenz*, 448 N.W.2d 327, 333 (Iowa 1989); *Taylor v. Peck*, 382 N.W.2d 123, 128 (Iowa 1986); *Thompson v. Bohlken*, 312 N.W.2d 501, 505 (Iowa 1981). The plaintiff cites an alleged history of problems with the press, but none of the past problems involved inadvertent cycling caused by objects falling on the foot pedal housing.

Even assuming Vogt was aware of the foot pedal problem, there is no evidence to indicate he knew injury was a probable, as opposed to possible, result of the danger. Both Vogt and Buckner indicated the operation of the press did not require employees’ hands to be in a position where they could be crushed by the press. There was no showing a probability of harm was manifest and that Vogt’s conduct

placed Buckner in a zone of imminent danger. The district court did not err in granting summary judgment.

AFFIRMED.