IN THE COURT OF APPEALS OF IOWA

No. 0-302 / 99-441
Filed November 8, 2000

NATHAN D. LaDEW and REBECCA JO LaDEW,
Plaintiffs-Appellants,

vs.

MARTY J. CUNDIFF, GLEN D. KUCHENREUTHER, JAY POMERENKE, EARL GARDNER, RUSS JOHNSON, JOHN WILLIAMS, DON KLUVER, and RON MILLER,
Defendants-Appellees.

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CLERK SUPREME COURT

Appeal from the Iowa District Court for Pocahontas County, Allan L. Goode, Judge.

LaDews appeal from the district court order granting summary judgment in favor of defendants on LaDews' personal injury and loss-of-consortium claims. **AFFIRMED.**

Dan T. McGrevey, Fort Dodge, for appellants.

Stuart J. Cochrane, Susan L. Ahlers and James L. Kramer of Johnson, Erb, Bice, Kramer, Good & Mulholland, P.C., Fort Dodge, for appellees Cundiff, Kuchenreuther, Pomerenke, Gardner, Johnson and Miller.

Kristopher K. Madsen of Stuart, Tinley, Peters, Thorn, Hughes, Faust & Madsen, Council Bluffs, for appellees Williams and Kluver.

Considered by Sackett, C.J., and Streit and Vaitheswaran, JJ.

STREIT, J.

A terrible injury at the workplace leaves a man with only one eye. He wants to be paid more than workers' compensation. Plaintiff-appellants, Nathan and Rebecca LaDew, appeal the district court's grant of summary judgment against them in their personal injury and loss-of-consortium claims. They claim the court erred in failing to find genuine issues of material fact existed as to whether gross negligence by defendant co-employees proximately caused their damages.

Background facts: Nathan LaDew was employed at Iowa Industrial Hydraulics as a tester of hydraulic cylinders. As part of the job, he was required to inspect the cylinders for oil leaks while they were pumped full of oil and pressurized. On February 22, 1996, he was injured when a fitting discharged from the cylinder he was testing and struck him in the face, causing him to lose his left eye. He brought this action under Iowa Code section 85.20 (1995) against several co-employees at the plant, alleging their gross negligence contributed to his injury. LaDew's wife, Rebecca, brought a loss-of-consortium claim.

Summary judgment: The district court granted the co-employees' motion for summary judgment. The court found there was no evidence to support any of the elements of the LaDews' gross negligence claim, specifically, that the co-employees: (1) had knowledge of the peril to be apprehended; (2) had knowledge that injury was a probable result of the danger; and (3) consciously failed to avoid the peril.

Appellate claims: The LaDews appeal, contending summary judgment was improper. They point to evidence of other incidents and work-related injuries involving the hydraulic cylinder testing that they contend were similar in nature to LaDew's accident and argue a factual dispute exists as to whether the co-employees had the requisite knowledge. LaDews also claim the co-employees had authority to order placement of safety shields or better training, which would have avoided the accident.

Scope of review: Iowa Rule of Civil Procedure 237(c) provides:

> The [summary] judgment sought should be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

On appeal, we review a summary judgment ruling for error. *Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 354 (Iowa 1995). Summary judgment may be entered if the record shows "no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Iowa R. Civ. P. 237(c). Thus, "we examine the record before the district court to decide whether a genuine issue of material fact exists and whether the court correctly applied the law." *Benavides*, 539 N.W.2d at 354. In doing so, we view the facts in the light most favorable to the party opposing the motion for summary judgment. *Anderson v. Miller*, 559 N.W.2d 29, 31 (Iowa 1997); *Hagen v. Texaco Refining & Mktg., Inc.*, 526 N.W.2d 531, 538 (Iowa 1995).

Analysis: Iowa's Workers' Compensation Statute provides the exclusive remedy for workers injured on the job. The statute protects other employees of

the employer from tort claims so long as the 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) (1997). To prevail in a claim of gross negligence there are three elements that must be proved by a plaintiff to establish that level of negligence on the part of a co-employee-defendant: (1) knowledge of the peril to be apprehended; (2) knowledge that injury is a probable, as opposed to a possible, result of the danger; and (3) a conscious failure to avoid the peril. *Henrich v. Lorenz*, 448 N.W.2d 327, 332 (Iowa 1989). Cases have "severely restricted" co-employee gross negligence claims, "particularly by adding the requirement of wantonness in defining gross negligence." *Woodruff Constr. Co. v. Mains*, 406 N.W.2d 787, 789 (Iowa 1987).

The LaDews claim a factual dispute exists as to all three elements described above. They argue there were several similar accidents over a period of years, so the co-employees must have had knowledge of the peril. The co-employees respond that there has never been an accident where the male fitting blew out of the female fitting in the cylinder. They argue the prior incidents involved hoses coming loose or leaks in installation of the female fitting, not a worn male fitting blowing out of a female fitting. The co-employees also assert the incidents in question were revealed in answers to interrogatories which were not filed and not before the district court when it considered the motion for summary judgment. Assuming, without deciding that the evidence is before us

on appeal, it is insufficient to raise a genuine issue of material fact concerning the co-employees' alleged gross negligence.

The LaDews next argue the co-employees must have had knowledge because they required employees to wear safety glasses and they held safety meetings between employees and management. They also argue that, because their expert witness opined that safety screens should have been installed on the test benches, the potential of injury must have been obvious to the co-employees. The test requires knowledge that injury is *probable*, not that there is a *potential* for injury. *Henrich*, 448 N.W.2d at 332. The wantonness requirement necessitates a "realization of imminent danger." *Walker v. Mlakar*, 489 N.W.2d 401, 404 (Iowa 1992). The company's requirement that its employees wear safety equipment and participate in safety meetings is insufficient evidence the co-employees knew of this particular danger, the probability of injury, or that they consciously failed to avoid the peril. The expert's opinion, at most, suggests that safety screens might have prevented or lessened the injury. It does not prove the co-employees had a "realization of imminent danger," the probability of injury, or that they consciously failed to avoid the peril.

Finally, the LaDews argue the lack of safety shields and the insufficient training of employees constitutes a conscious failure to avoid the peril. Because the evidence does not reveal any previous incident where a worn male fitting blew out during testing, the LaDews cannot show the co-employees had knowledge. We do not impute knowledge; it must be actual for a defendant to

fail to avoid the peril *consciously. See id.* ("one cannot 'consciously fail to avoid' a peril of which one only 'should have been aware'").

Having considered the evidence set forth in the record in the light most favorable to the LaDews, we determine it raises no genuine issue of material fact. With no genuine issue of material fact at issue, summary judgment was proper. We therefore affirm the district court's grant of summary judgment.

AFFIRMED.