IN THE COURT OF APPEALS OF IOWA

No. 1-355 / 90-1850

FILED
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CLERK SUPREME COURT

ROY LAMANSKY and **BEVERLY LAMANSKY,**

Appellants,

vs.

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KATHLEEN NELSON, EXECUTOR OF THE ESTATE OF ERNEST ELMER NELSON, Deceased,

Appellees.

Appeal from the Iowa District Court for Jefferson County, James Jenkins, Judge.

Plaintiffs challenge the district court's directed verdict in defendant's favor. Plaintiffs had sought recovery based on injuries sustained by Roy Lamansky in an automobile accident. The district court found that the worker's compensation statute provided plaintiffs' exclusive remedy; that there had been no showing of gross negligence on the part of the driver, Lamansky's coemployee; and that Beverly Lamansky's loss of consortium claim was likewise barred. **AFFIRMED.**

Bruce Walker of Phelan, Tucker, Boyle, Mullen, Bright & Walker, Iowa City, for appellants.

Jerome M. Beaver of Kiple, Kipel, Denefe, Beaver & Gardner, Ottumwa, for appellees.

Heard by Oxberger, C.J., and Donielson and Habhab, JJ.

DONIELSON, J.

Ernest Nelson, Roy Lamansky, and Richard Simmons were all members of the Jefferson County, Iowa, Board of Supervisors. The County owned and operated a facility to which the Board of Supervisors traveled on a regular basis as part of their official duties. On the morning of Monday, March 16, 1987, Lamansky and Simmons were working in the Jefferson County Courthouse. Nelson arrived about 7:55 a.m., announcing that the three of them were to go to the facility for a meeting. Nelson then left the room to get his paycheck, gave his paycheck to the Treasurer to pay his real estate taxes, and went to get his car.

The board members normally used one of their own vehicles for transportation to the facility. Consistent with this practice, the three men left the courthouse, taking Nelson's car. Nelson drove; Simmons sat in the front passenger seat; Lamansky sat in the rear. As usual, the driver chose the route.

Of the infinite possible routes, there are four well-established, direct routes from the courthouse to the facility: (1) the most common was Highway 1 to County Road H43, (2) a city street to County Road H43, (3) State Highway 34 to County Road H33 (Suburban Heights Road), and (4) the least traveled was Highway 34 to County Road V64 (referred to as the Libertyville route). These four routes varied by only a couple of miles in distance and were all within the jurisdiction of the Board of Supervisors. There

is no established county policy as to what route to take, and the men typically chose different routes to provide a change of scenery. They were considered to be on county business no matter which route they took.

The route chosen by Nelson that day was the Libertyville route. When the car passed Suburban Heights Road, Lamansky asked Nelson where he was going. Nelson replied that he was "going by the bank like Pete [Pearce] used to do (chuckle, chuckle)." Lamansky had been present on occasion when Pete Pearce, a former member of the board of supervisors, would stop at a certain bank during working hours to conduct his personal banking business. It is unclear whether Nelson had been present on such occasions. Neither Lamansky nor Simmons objected to the route Nelson had chosen.

The bank is located on the corner of the intersection in Libertyville at which the men would turn to proceed toward the facility. The bank is one-half block to the right of the intersection; the men would turn left at the intersection to drive toward the facility. Nevertheless, the collision happened well before the men reached the intersection. One would follow the same route to the scene of the collision whether one planned to stop at the bank or not.

As Nelson's vehicle traveled westbound on Highway 34, it crested a hill, veered gradually into the eastbound lane, and collided head-on with a gravel truck driven by

Jackie Cook. Nelson's car collided with the truck approximately three feet into the eastbound lane. Nelson was killed; Lamansky was severely injured.

Prior to the collision, Nelson had been driving in a normal manner and at a usual highway speed of approximately 55 to 60 miles per hour. Lamansky and Simmons had been looking to the right, and only Simmons had glanced to the front an instant before the impact. Simmons testified that he may have felt the car swerve before impact, but when he looked back toward the road, he saw the gravel truck and Nelson with both hands on the wheel, his eyes open looking straight ahead. Lamansky heard Simmons yell "look out" immediately before the two vehicles collided.

Jackie Cook, the driver of the gravel truck, testified that he saw Nelson's car begin to cross the center line, but when Nelson continued in the same path, Cook was unable to steer toward the shoulder to avoid the collision. Cook testified that Nelson did not swerve to avoid the accident and that there was no apparent decrease in the car's rate of speed.

Roy Lamansky and his wife, Beverly, sued Nelson's estate. Roy's claim was based on ordinary and gross negligence. Beverly sought to recover based on a loss of spousal consortium claim. After Roy and Beverly had rested their case, the district court granted the defendant's motion for a directed verdict. As to Roy's theories of recovery, the court held that there had been no showing of

gross negligence and that Roy's exclusive remedy for ordinary negligence was provided by the worker's compensation statute. Accordingly, the court found Beverly's claim to be barred as well due to its derivative character.

The Lamanskys have appealed. The first question presented in the appeal is whether the Iowa Worker's Compensation Act is Roy's exclusive remedy and thereby bars his ordinary negligence claim against Nelson's estate. Roy concedes that at the time of the accident he was in the course of employment. Thus, in order for Roy to sue Nelson's estate in tort and avoid the exclusivity of the worker's compensation statute, Roy asserts that he must prove one of two theories.

The first of these theories is that Nelson was not a coemployee within the meaning of Iowa Code section 85.20. To successfully proceed under this alternative, Roy asserts that he must show that Nelson's injury did not arise out of and in the course of Nelson's employment. Essentially, he asserts that he must show that Nelson was on a personal errand taking him outside the course of his employment. The second alternative is to prove that Nelson acted with gross negligence.

The second general question presented in the appeal is whether Beverly Lamansky is entitled to recover on her loss of spousal consortium claim even if it is found that Nelson was in the course of his employment and despite the fact

that her husband, Roy, has already received worker's compensation benefits. Beverly asserts that at the core of this question is the issue of whether her spousal consortium claim is independent of or derivative of her husband's claim.

Finally, if a new trial is granted on one or more of the claims, we must address the questions raised by the Lamanskys with regard to whether the trial court abused its discretion on several evidentiary rulings.

Our scope of review is for correction of errors of law. Iowa R. App. P. 4. In determining whether a jury question has been engendered when a party appeals from a directed verdict, we apply the same principles as the trial court. Kilker v. Mulry, 437 N.W.2d 1, 2 (Iowa App. 1988). A court ruling on a motion for directed verdict must view the evidence in the light most favorable to the nonmoving party. Beitz v. Horak, 271 N.W.2d 755, 757 (Iowa 1978); Iowa R. App. P. 14(f)(2). Movant is considered to have admitted the truth of all evidence offered by nonmovant and every favorable inference that may be deduced from it. B & B Asphalt Co. v. T. S. McShane Co., 242 N.W.2d 279, 284 (Iowa 1976). To overrule the motion the court must find substantial evidence in support of each element of nonmovant's claim. Beitz, 271 N.W.2d at 757. If reasonable minds could differ, an issue is for the jury. Harvey v. Palmer College of Chiropractic, 363 N.W.2d 443, 444 (Iowa App. 1984).

I. **Ordinary Negligence.** Roy Lamansky's negligence claim against Nelson's estate is governed by section 85.20 of the Iowa Worker's Compensation Act, which provides in pertinent part:

> The rights and remedies provided in this chapter, . . . for an employee on account of injury, . . . shall be the exclusive and only rights and remedies of such employee, . . . against:
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> * * *
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> 2. any other employee of such employer, provided that such injury, . . . arises out of and in the course of such employment . . . .

Iowa Code § 85.20 (1989).

Roy concedes that an employer-employee relationship existed. He also concedes that his injury arose out of and in the course of his employment. However, he contends that the exclusivity provision of section 85.20 applies only when both of the employees are in the course of their employment for the same employer at the time of the injury. Roy's first theory relies on the allegation that Nelson was not his coemployee at the time of the accident, within the meaning of the statute. Roy argues that Nelson's actions immediately prior to the accident constituted a personal deviation from the course of his employment.

Therefore, we need only address the statutory construction issue if we find that, under the facts of this case, construed in their light most favorable to Roy, a reasonable juror could find that Nelson had deviated from the course of his employment.

We first address the controlling question of whether it can be said as a matter of law that Nelson's acts did not take him outside the course of his employment. If the route chosen and the intent expressed by Nelson did not take him outside the course of his employment, then Nelson remained in the course of his employment until the collision occurred. As such, Roy's claim of ordinary negligence would be barred by Iowa Code section 85.20.

For an injury to fall within the scope of the worker's compensation statute, it must have occurred "in the course of" the employment. Sheerin v. Holin Co., 380 N.W.2d 415, 417 (Iowa 1986). This requirement refers to the time, place, and circumstances of the injury. Id. (citing Buehner v. Hauptly, 161 N.W.2d 170, 171 (Iowa 1968)). The injury must also "arise out of" the employment. Id. This requirement relates to the cause and origin of the injury. Id. (citing McClure v. Union County, 188 N.W.2d 283, 287 (Iowa 1971)). "The 'arising out of' requirement is satisfied by showing a causal relationship between the employment and the injury, but the 'in the course of' requirement is not." Id.

An injury occurs in the course of the employment when it occurs within the period of the employment at a place where the employee reasonably may be in performing his duties and while he is fulfilling those duties or engaged in doing something incidental to those duties. Crees v. Sheldahl Telephone Co., 258 Iowa 292, 298, 139 N.W.2d 190,

194 (1965). "If an employee deviates sufficiently from the line of duty so that his or her actions are foreign to the employer's work, this may take the employee outside the course of employment." Sheerin, 380 N.W.2d at 417 (citing Crees, 258 Iowa at 300, 139 N.W.2d at 195; Walker v. Speeder Machinery Corp., 213 Iowa 1134, 1145-46, 240 N.W. 725, 730 (1932)).

A. Traveling Employee Doctrine. An employee who is traveling on a business trip for his employer is, in most circumstances, under continuous worker's compensation coverage from the time he leaves the employer's premises until the time he returns. However, there are exceptions to this general rule. Both the rule and its exceptions are described in 1A Larson, Workmen's Compensation Law § 25 (1990):

> Employees whose work entails travel away from the employer's premises are held in the majority of jurisdiction[s] to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown.

The relevant facts, when viewed in their light most favorable to Roy, establish that the three men were on a business trip to the facility. In driving to the facility, Nelson had chosen a route which was less direct than three other well-established routes. The facts also could establish, although less clearly, that Nelson intended to stop at a bank located a short distance from the route in order to conduct personal business.

Thus the question at the core of this issue is whether it can be said, as a matter of law, that Nelson did not make a distinct departure from the business trip. We answer this question in the affirmative, and we affirm the trial court's judgment to direct the verdict for the defendant on Roy's ordinary negligence claim. We need not reach the statutory construction issue.

It is undisputed that the underlying purpose of the trip was business. The manager of the facility had called Nelson on Sunday, the day before the accident. The manager had asked the supervisors to travel to the facility on Monday for a meeting. The supervisors were responsible for the supervision and operation of the facility. County business required Nelson to be on the way to the facility.

A reasonable juror may have found that Nelson intended to stop at the bank to conduct personal business as well. To stop at the bank, Nelson would have had to deviate from the established route by turning right instead of left at an intersection which was five to six miles beyond the scene of the accident. Nelson, at the time of the collision, had not yet reached the intersection. He was still proceeding along one of the four well-established routes to the facility on a road under the supervisors' jurisdiction. As such, he was well within the course of his employment at the time of the collision.

Even assuming that a stop at the bank for personal reasons would constitute a personal errand, Nelson had not

yet made the distinct departure from the route. Lamansky apparently argues that Nelson made the departure when he passed the Suburban Heights Road and took the least direct of the four established routes with the intent to deviate from the route later. We disagree. We find that Nelson would have had to turn right at the intersection in order to make such a distinct departure. He had not yet reached the intersection.

His intent to make such a departure in the future is not determinative. One does not make a departure merely by intending to do so. Rather, one must have in fact acted on his or her intentions. Neither does Nelson's choice of the least direct of the four established routes constitute a departure. Had Nelson chosen a route that was not considered to be an established route to the facility in order to stop at the bank, his acts may have constituted a departure. This, however, was not the case.

There are not, as Roy states, four routes to the facility. There are clearly an infinite number of routes. The four routes described by the witnesses are the most direct routes. Nelson had chosen one of the four most direct routes. Nelson's employer had no policy directing the men to take the most direct of the possible routes, and, indeed, they frequently chose not to. We find as a matter of law that, at the time of the collision, Nelson was within the course of his employment.

Nelson was, therefore, one of Lamansky's coemployees within the meaning of Iowa Code section 85.20. This relationship gives effect to the exclusive remedy provision of the statute barring Lamansky's ordinary negligence claim against Nelson's estate.

II. **Gross Negligence**. Roy Lamansky's second theory of recovery is based on Nelson's alleged gross negligence. Gross negligence is statutorily defined under the worker's compensation statute as "such a lack of care as to amount to wanton neglect for the safety of another." Iowa Code § 85.20(2) (1989). In Thompson v. Bohlken, the Iowa Supreme Court established a three-part test for coemployee gross negligence under section 85.20(2). 312 N.W.2d 501, 505 (Iowa 1981). The three elements necessary to show gross negligence under the test are as follows:

> (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.

See id.

We find that the third element of the test has not been proven. Roy asserts that one reasonable inference to be drawn from the evidence, viewed in its light most favorable to Roy, is that Nelson consciously drove his car at 50 to 60 miles per hour head-on into a 27,000 pound, fully loaded, gravel truck traveling at approximately 50 miles per hour. We disagree.

Applying the Thompson test to the facts of this case, we must find substantial evidence establishing that Nelson was aware of the impending danger, had time to avoid it, and consciously failed to veer from the path of the oncoming gravel truck. See Beitz, 271 N.W.2d at 757. This is tantamount to finding that Nelson intentionally drove into the truck.

To make such a finding, one must be able to reasonably infer an intent on the part of Mr. Nelson to place him and his coemployees in a position where they would likely be killed. No evidence was presented which would tend to suggest that Nelson was of such a state of mind. The statements made and actions taken by Nelson before the collision cannot be interpreted as indicating such an intent. On the contrary, the only inference that may reasonably be drawn from Nelson's statements and actions is that Nelson was in a jovial mood on his way to conduct the day's business.

Roy relies entirely on the evidence presented describing the physical circumstances of the collision to prove that Nelson drove intentionally into the truck or that he consciously failed to veer from the path of the truck once he found himself in its path. He asserts that the circumstances of the collision are such that reasonable minds could conclude that Nelson intentionally drove his car head-on into the truck. We disagree.

Roy must not only prove that the collision occurred, he must also present substantial evidence that the collision was the result of Nelson's conscious conduct. The fact that the collision occurred does not tend to prove that the collision was intentional or that the collision was the result of Nelson's conscious failure to veer from the truck's path.

The facts describing the physical circumstances of the collision are consistent with either an intentional or an accidental collision. In the absence of a showing as to Nelson's state of mind, the only reasonable inference to draw is that the collision was an accident. As such, Roy must show the existence of substantial evidence supporting the inference that the collision was intentional or the result of Nelson's conscious failure to avoid the peril.

Under the evidence presented in this case, any inference that Nelson was of such a state of mind would be mere speculation and, thus, unreasonable, being unsupported by substantial evidence. We therefore affirm the trial court's directed verdict on Lamansky's claim of gross negligence.

III. Loss of Spousal Consortium. Beverly Lamansky contends the trial court erred in directing the verdict on her loss of spousal consortium claim. She argues that her claim is not derivative of Roy's worker's compensation claim, and therefore, her claim is not barred by Iowa Code section 85.20.

Again, Iowa Code section 85.20 (1989) states:

> The rights and remedies provided in this chapter, . . .for an employee on account of injury, . . . shall be the exclusive and only rights and remedies of such employee, the employee's personal or legal representatives, dependents, or next of kin, at common law or otherwise, on account of such injury, . . . against:
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> * * *
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> 2. any other employee of such employer . . . .

See id. (emphasis added).

The worker's compensation act was enacted in 1913. 1913 Laws of Iowa, ch. 147, (codified at Iowa Code § 2477-m2 (1913)). The exclusivity provision, now contained in section 85.20, has always been an integral part of the statute. See id. ch. 147, § 3. The 1913 act provided:

> Sec. 3. Employee's rights--(a) The rights and remedies provided in this act for an employee on account of an injury shall be exclusive of all other rights and remedies of such employee, his personal or legal representatives, dependents or next of kin, at common law or otherwise on account of such injury . . . .

See id. (emphasis added).

The question presented is one of statutory interpretation--whether the spousal loss of consortium claim is a right or remedy on account of the employee-spouse's injury. The issue centers on the interpretation to be given to the phrase "on account of such injury." Did the legislature intend to abolish a spouse's right to sue, be it derivative or independent?

We find that the spouse's right to sue for loss of consortium is not derivative; but rather, is separate and independent. Nevertheless, we hold that section 85.20 abolishes an employee's spouse's right to sue a coemployee, at common law or otherwise, for loss of consortium caused by injuries suffered by the employee as a result of negligence on the part of the coemployee.

In Ziegler v. United States Gypsum Co., 251 Iowa 714, 102 N.W.2d 152 (1960), the Iowa Supreme Court held that a wife cannot "recover for consequential damages as a result of injury to the husband where his right of action has been taken from him by [Iowa Code] section 85.20." Id. 251 Iowa at 717, 102 N.W.2d at 153. Beverly concedes that the Iowa Supreme Court's decision in Ziegler squarely addresses the issue presented in this case.

However, Beverly argues that the rationale used in the Ziegler case is no longer viable. She contends that the supreme court, in the more recent case of Schwennen v. Abell, 430 N.W.2d 98 (Iowa 1988), abandoned the reasoning used by the court in Ziegler.

As such, Beverly argues, the rationale used by the court in Ziegler cannot be used to bar her claim. We agree, but we, nevertheless, find her claim to be barred. While the reasoning of the Ziegler case no longer applies, the result still does.

Instead of referring to the derivative nature of the loss of consortium claim, the court in Ziegler could have

reasoned that the Act creates rights in favor of the spouse in substitution of the spouse's right to sue for damages.

Indeed, Schwennen and its predecessors, Madison v. Colby, 348 N.W.2d 202 (Iowa 1984), and Fuller v Buhrow, 292 N.W.2d 672 (Iowa 1980), have refused to apply the reasoning of the court in Ziegler to non-worker's compensation cases. Iowa law no longer characterizes a spouse's loss of consortium claim as a derivative claim. The court in Schwennen, quoting with approval the language of Christie v. Maxwell, 40 Wash. App. 40, 696 P.2d 1256 (1985), described the loss of consortium claim as follows:

> [T]he injury incurred can neither be said to have been "parasitic" upon the [injured spouse's] cause of action nor can it be properly characterized as an injury to the marital unit as a whole. Rather, it is comprised of [the deprived spouse's] own physical, psychological and emotional pain and anguish which results when her [spouse] is negligently injured . . . . From the vantage point of the negligent defendant, [the deprived spouse] is simply a foreseeable plaintiff to whom he owes a separate duty of care.

Christie, 40 Wash. App. at 47, 696 P.2d at 1260.

However, the rationale for barring Beverly's claim is statutorily supplied in worker's compensation cases by Iowa Code section 85.20.

In Hilsinger v. Zimmerman Steel Co., 193 Iowa 708, 187 N.W. 493 (1922), the Iowa Supreme Court addressed the question of whether a father's right to recover for the loss of services of a minor child is affected by the worker's compensation act. Id. 193 Iowa at 712, 187 N.W. at 495. While working, the child was injured as a result

of another's negligence. See id. The court held that the act was exclusive of the father's right to maintain a claim for loss of services against the employer, despite the language of Iowa Code section 3471 (1897). Id., 193 Iowa at 713, 187 N.W. at 493. Section 3471 had provided the child's father the statutory right to recover for the loss of services of his minor child caused by injury to the child. See Iowa Code § 3471 (1897). The court found that the Act "does purport to provide a complete and exclusive remedy for all injured employees and their beneficiaries" and held that the Act abrogated the parent's section 3471 rights. Hilsinger, 193 Iowa at 712, 187 N.W. at 495.

As the holding of the court in Hilsinger demonstrates, the question of whether or not the loss of consortium claim is derivative is irrelevant for the purposes of determining whether the claim is barred. See Hilsinger, 193 Iowa at 712, 187 N.W. at 495. That is, the statute not only bars the employee's claims, but also specifically bars the claims of the employee's dependents. See Iowa Code § 85.20 (1989). Thus, despite the fact that Beverly's loss of consortium claim is independent of any claim Roy may have had, her claim is, nevertheless, expressly barred by the statute.

Iowa Code section 85.30 is among the broadest and most common types of exclusive remedy clauses. 2A A. Larson, Worker's Compensation Law § 66, at 12-70, 12-71 (1990). Iowa Code section 85.20 closely resembles the exclusive

remedy provisions in the Georgia, Minnesota, Missouri, New York, Tennessee, and Texas worker's compensation acts. Id. Under this type of statute, "the cases with near-unanimity have barred suits by . . . wives for loss of the husband's services and consortium. . . ." Id. (citing cases); see, e.g., Hartman v. Cold Spring Granite Co., 247 Minn. 515, 77 N.W.2d 651 (1956); Ary v. Missouri Portland Cement Co., 612 S.W.2d 840 (Mo. App. 1981); Napier v. Martin, 194 Tenn. 105, 250 S.W.2d 35 (1952); and Garret v. Reno Oil Co., 271 S.W.2d 764 (Tex. Civ. App. 1954)).

We hold in accord with these jurisdictions and with the Iowa Supreme Court's holding in Hilsinger. We interpret the phrase to bar a spouse's claim for loss of consortium and affirm the trial court's directed verdict on Beverly Lamansky's claim. We need not reach the evidentiary issues.

The costs of this appeal are taxed to the appellants, Roy and Beverly Lamansky.

For all the reasons stated, the judgment of the district court is affirmed.

AFFIRMED.