IN THE COURT OF APPEALS OF IOWA

No. 0-40 / 89-665

TONY R. ELDRENKAMP and JEANINE L. ELDRENKAMP, and TONY R. ELDRENKAMP on behalf of his minor children, CASONDRA ELDRENKAMP, ANTHONY ELDRENKAMP, and CHRISTINA ELDRENKAMP,

Appellants,

vs.

ED OBERMILLER, KEN PLUM, RON HELLWEG, JACK RAMSER, and TOMMY BARNES,

Appellees.

FILED
MAR 27 1990
CLERK SUPREME COURT

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Appeal from the Iowa District Court for Clinton County, L. D. Carstensen, Judge.

Plaintiff appeals the judgment of the district court granting a directed verdict in favor of defendants. **AFFIRMED.**

Michael E. Sheehy of the Shea Law Office, Cedar Rapids, for appellants.

Thomas N. Kamp and Maria Mihalakis Waterman of Lane & Waterman, Davenport, for appellees.

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

SCHLEGEL, J. 92

Plaintiff appeals the judgment of the district court granting defendants' motion for a directed verdict. We affirm.

Tony Eldrenkamp, an employee of a feed plant, was seriously burned in a fire at the plant. He later filed this lawsuit against several supervisory employees of the same plant, alleging gross negligence against coemployees as permitted by Iowa Code section 85.20 (part of the workers' compensation statute). Eldrenkamp alleged, in essence, that the defendants had been grossly negligent by allowing feed dust to accumulate to the point it would fuel a fire.

At the close of the plaintiff's evidence, the district court granted the defendants a directed verdict. The district court held the plaintiff's evidence was insufficient to permit a jury to find gross negligence by any defendant.

Eldrenkamp has appealed the directed verdict in favor of the defendants. He contends his evidence was sufficient to generate a jury question on gross negligence.

A directed verdict or judgment notwithstanding the verdict is appropriate if there is no substantial evidence in support of each element of the plaintiff's claim. Woodruff Construction Co. v. Mains, 406 N.W.2d 787, 789 (Iowa 1987). Appellant's right to maintain an action

against the defendants, as coemployees, is governed by section 85.20 of the Iowa Code. See Thompson v. Bohlken, 312 N.W.2d 501, 504 (Iowa 1981). Worker's compensation is the exclusive remedy against a coemployee 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. Id. The trial court granted the motion for directed verdict holding that plaintiff's evidence was insufficient as a matter of law to permit a jury to find gross negligence by any defendant.

Our review must therefore focus on the elements necessary to establish gross negligence and how it applies in this case. The term "gross negligence" was refined by the Iowa legislature by providing it must amount to wanton neglect for the safety of another. Id. The scope of a claim against a coemployee is severely restricted, particularly by adding the requirement of wantonness in defining gross negligence. Woodruff Construction Co., at 789. Wanton conduct lies somewhere between the mere unreasonable risk of harm in ordinary negligence and intent to harm. Thompson, at 504. The specific elements necessary to establish gross negligence are: (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. Woodruff Construction Co., at 789. This case turns on the second of

these elements. Whether or not sufficient evidence existed to show the injury was a probable result rather than merely possible.

The court in Thompson did not allow the claim to proceed. The facts in Thompson were that the defendant/coemployee knew a certain press guard was high enough to allow entry of a hand, and that the press was easily operable and accessible. There was also evidence that the coemployee knew of these dangers and yet he failed to respond by enforcing safety rules. And finally, there had been several previous injuries on the press, one of which ended in a loss of fingers. The court held the coemployee could not have known the injury was probable.

In Woodruff Construction Co., a foreman ordered an employee to come to him knowing that an large hole existed between them. The employee fell down this hole. The court held there was insufficient evidence of gross negligence.

A case that did allow the question to proceed to the jury was Larson v. Massey-Ferguson, Inc., 328 N.W.2d 343 (Iowa App. 1982). In Larson a foreman told several employees to put weight on an auger which placed the plaintiff close to an unshielded power take-off (PTO) shaft. The foreman knew about the danger associated with a PTO shaft and yet disregarded the peril and ordered the employees to get dangerously close.