IN THE COURT OF APPEALS OF IOWA

FILED
APR 23 1996
CLERK SUPREME COURT

No. 5-573 / 94-1881

OWEN B. CATRON,

Plaintiff-Appellant.

vs.

DAVID JOHNSTON,

Defendant-Appellee.

Appeal from the Iowa District Court for Tama County, L. Vern Robinson, Judge.

In this co-employee gross negligence action, Owen B. Catron challenges the order granting his co-employee's motion for summary judgment. **AFFIRMED.**

C. Jean Pendleton and Donald J. Charnetski of Charnetski, Olson, Lacina, Pendleton & Garland, L.L.P., Grinnell, for appellant.

Charles E. Cutler and Coreen K. Bezdicek of Patterson, Lorentzen, Duffield, Timmons, Irish, Becker & Ordway, Des Moines, and Anders J. Norgaard, Belle Plaine, for appellee.

Considered by Habhab, P.J., and Cady and Huitink, JJ.

PER CURIAM

This is an appeal by an employee claiming his injury resulted from the gross negligence of a co-employee. The district court granted the employee's motion for summary judgment. We affirm on appeal by memorandum opinion pursuant to Iowa Supreme Court Rule 9.

Plaintiff Owen Catron worked at Dieomatic, Inc., doing business as Benco Manufacturing, as a punch press operator. On July 24, 1992, the machine performed a double hit, which meant the machine struck the same piece twice when operated. Catron told his supervisor, David Johnston, the machine had double hit. Johnston told Catron to be careful. About forty-five minutes later, the machine completely malfunctioned so that it kept striking over and over again. Catron's hand was struck, severing his thumb and severely injuring his index finger.

Catron filed suit against Johnston on a theory of gross negligence under Iowa Code section 85.20(2) (1991). Section 85.20(2) provides an exception to the exclusive remedy against co-employees under the workers' compensation scheme where a co-employee engages in "gross negligence amounting to such lack of care as to amount to wanton neglect for the safety of another." *Gerace v. 3-D Mfg. Co., Inc.*, 522 N.W.2d 312, 315 (Iowa App. 1994).

The elements necessary to establish a co-employee's gross negligence are: (1) knowledge of the peril to be apprehended; (2) knowledge that the injury is a

probable, as opposed to possible, result of the danger; and (3) a conscious failure to avoid the peril. *Thompson v. Bohlken*, 312 N.W.2d 501, 505 (Iowa 1981). This test is stringently applied. *Hernandez v. Midwest Gas Co.*, 523 N.W.2d 300, 305 (Iowa App. 1994). A plaintiff must prove all three elements to establish a claim. *Walker v. Mlakar*, 489 N.W.2d 401, 403 (Iowa 1992).

The district court granted summary judgment for Johnston. Catron now appeals. We note the supreme court has previously approved the determination of gross negligence issues by a motion for summary judgment. *Johnson v. Farmer*, 537 N.W.2d 770, 773 (Iowa 1995). Our review of a successful motion for summary judgment is for correction of errors at law. Iowa R. App. P. 4.

We conclude summary judgment was appropriate in this case. We find Catron failed to allege facts which would show Johnston knew injury was probable. There was no evidence any machines at the plant had ever double hit prior to July 24, 1992. Furthermore, even if we assume Johnston knew the machine double hit that day, nothing in the evidence suggests that a double hit would later lead to complete machine failure. Johnston's statement to Catron telling him to be careful does not show he knew injury was probable.

After carefully considering all issues raised in this appeal, we affirm the decision of the district court. Costs of this appeal are assessed to plaintiff.

AFFIRMED.