FILED
SEP 26 1990
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-145 / 89-801

RICHARD D. OVERTON and JULIE L. OVERTON,

Appellants,

vs.

KEVIN BRISKER, DAVID M. LEWIS and NORTH STAR STEEL COMPANY,

Appellees.

Appeal from the Iowa District Court for Muscatine County, James R. Havercamp, Judge.

The Overtons appeal the district court granting summary judgment in favor of North Star and the directed verdict in favor of Brisker and Lewis. **AFFIRMED.**

David Scieszinski, Wilton, for appellants.

James Shipman of Simmons, Perrine, Albright & Ellwood, Cedar Rapids, for appellees.

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

OXBERGER, C.J.

Richard Overton worked for North Star Steel Company as a millwright. On May 29, 1985, he sustained injuries in the course of his employment when a piece of refractory material fell on his head. Kevin Brisker was the foreman of the millwright crew on which Overton was working at the time of the accident. David Lewis was the safety manager and acting personnel manager at the plant at the time of the accident.

Following his injury, Overton and his wife filed a lawsuit against North Star, Brisker, and Lewis. Division I of their petition pled a claim of gross negligence against Brisker and Lewis. The Overtons alleged that Brisker and Lewis knew that the refractory material was loose, knew it was probable that the refractory material would fall and injure an employee working underneath it, and despite this knowledge, ordered Overton to work under the refractory material. Division II of the Overtons' petition stated a claim for loss of spousal consortium. Division III of their petition alleged that at the time of Overton's injury Lewis was working in a managerial capacity for North Star and acting within the scope of his employment. Therefore, the Overtons claimed entitlement to exemplary damages against North Star.

Prior to trial, the district court granted summary judgment in favor of North Star. The court based its

decision on Iowa Code section 85.20 which makes an injured employee's exclusive remedy against his employer a workers' compensation claim, and not a tort suit.

The case proceeded to trial against Overton's coemployees, Brisker and Lewis. At the close of the Overtons' evidence, the district court directed verdict in favor of Brisker and Lewis. The court found that while Brisker and Lewis were aware that the refractory material was loose, they had no knowledge that injury was probable. Thus, the court concluded that the Overtons failed to produce substantial evidence to support their gross negligence claim. The Overtons appeal the district court's decisions to grant summary judgment and to direct verdict.

The Overtons contend that North Star, an employer, is a proper party in a tort action brought by an employee claiming his coemployees were grossly negligent. They claim that under the common law doctrine of respondeat superior an employer is liable for damages caused by the actions of its employees. According to the Overtons, an employee can bring a tort action against his employer because under the equitable principles of indemnity and the implied contract theory of indemnity, the employer should be required to indemnify the coemployee for any amounts the coemployee would have to pay the injured employee.

Second, the Overtons claim that they can maintain an action against North Star because North Star failed to meet

its burden to show that it maintained workers' compensation insurance in accordance with Iowa Code section 585.21. The Overtons argue that the employer must meet this burden first, and if it fails to do so, the exclusive remedy provisions of Iowa Code section 85.20 do not apply.

Lastly, the Overtons contend the district court erred by directing verdict. First, they state that the ground asserted in the motion for directed verdict was a failure to produce "sufficient evidence" and the court ruled that there was a lack of "substantial evidence." Therefore, the court erred by directing verdict upon a ground not asserted. Second, the Overtons contend that they presented substantial evidence of all three elements of gross negligence.

This case was tried at law and therefore our review on appeal is for correction of errors at law. Iowa R. App. P. 4; Iowa Elec. Light & Power v. General Elec. Co., 352 N.W.2d 231, 234 (Iowa 1984). The trial court's findings of fact bind us if supported by substantial evidence. Iowa R. App. P. 14(f)(1).

Plaintiffs argue that North Star cannot claim the exclusivity of worker's compensation insurance because it failed to prove the existence of such insurance coverage in this instance. The plaintiffs failed to provide us with a record showing preservation of this error, therefore we will not address this contention. Suckow v. Neowa FS,

Inc., 445 N.W.2d 776, 780 (Iowa 1989). Additionally, it appears from the record that the plaintiffs did receive worker's compensation benefits from North Star and therefore the proper insurance coverage indisputably did exist.

Summary judgment is appropriate when:

> there is no genuine issue of facts and the moving party is entitled to the judgment as a matter of law. The burden of showing the nonexistence of a material fact is upon the moving party. While an adverse party generally cannot rest upon his pleadings when the moving party has supported his motion, summary judgment is still not proper if reasonable minds could draw different inferences and conclusions from the undisputed facts. In this respect, summary judgment is functionally akin to a directed verdict; every legitimate inference that reasonably can be deduced from the evidence should be afforded the nonmoving party, and a fact question is generated if reasonable minds can differ on how the issue should be resolved.

Konz v. Ehly, 451 N.W.2d 504, 505 (Iowa App. 1989) (authorities omitted).

Glenn v. Farmland Foods, Inc., 344 N.W.2d 240, (Iowa 1984), discusses the relationship between Iowa Code section 85.20 and the 1974 amendment which granted an injured worker's coemployees limited immunity from suit for injuries caused by ordinary negligence. In that case the court states "[t]he statutory immunity remain[s] unchanged for employers; the amendment created no new cause of action against the employer flowing from an allegation of coemployee gross negligence." Id. at 242. Further, in the case the Court specifically found that Iowa Code section

85.20 makes an injured employee's right to worker's compensation his exclusive remedy against his employer. Id.

We find the trial court's reliance on Glen v. Farmland Foods, Inc., correct and the granting of defendant North Star's motion for summary judgment proper. The plaintiffs reliance on case law relating to torts arising from injuries suffered by third parties as a result of an employee's negligence was inappropriate because the legislature has preempted case law in situations where employees of the same employer injure each other in the course of employment.

We next turn to plaintiffs' contention that the trial court improperly granted Brisker's and Lewis' motion for a directed verdict in their favor. When considering a motion for directed verdict, the court considers the evidence in the light most favorable to the party against whom the motion is directed. Kurth v. Van Horn, 380 N.W.2d 683, 695 (Iowa 1986). If reasonable minds could differ on an issue under the evidence presented, it is properly submitted to the jury. Id.

The three essential elements of 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. Thompson v. Bohlken, 312 N.W.2d 501, 505 (Iowa 1981). The trial court granted the defendant's motion for

directed verdict after finding that the plaintiffs failed to produce "substantial evidence to support items two and three of the requirement for the threshold burden in gross negligence case by a preponderance of the evidence." Evidence is substantial if a jury could reasonably infer from it each element of plaintiff's claim. Schumacher v. McDonald, 320 N.W.2d 640, 642 (Iowa 1982).

We agree with the trial court that plaintiffs failed to produce substantial evidence to support all three required elements of gross negligence. After considering the whole record we agree that the plaintiffs failed to introduce evidence from which a jury could reasonably infer that Brisker and Lewis knew that injury was a probable, not just a possible result of working in the reheat furnace or that they acted in conscious disregard of the peril. Accordingly, we also affirm the trial court's granting of the defendants' motion for directed verdict.

We find plaintiffs' argument that the trial court incorrectly granted a directed verdict because the defendants' motion for directed verdict stated the plaintiffs failed to show "sufficient" instead of "substantial" evidence to support their cause of action without merit. We refuse to place words above substance in this case.

AFFIRMED.