

IN THE COURT OF APPEALS OF IOWA

No. 9-483 / 89-331

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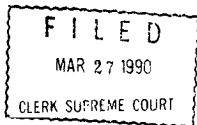
MYRNA L. BREHMER, Executor of the Estate of Julian Brehmer,
Deceased,
Plaintiff-Appellant,

vs.

ERNEST HENKEL,
Defendant,

and

MID-AMERICA PIPELINE COMPANY, a Delaware Corporation,
Defendant-Appellee.



Appeal from the Iowa District Court for Cedar County,
Max R. Werling, Judge.

In this negligence action, the district court granted a summary judgment to one of the defendants. Plaintiff has appealed. Plaintiff contends summary judgment was unwarranted because there were genuine issues of material fact regarding the extent of each party's negligence.
AFFIRMED.

Rand S. Wonio of Lane & Waterman, Davenport, for the appellant.

W. Michael Shinkle, Davenport, for the appellee.

Heard by Donielson, P.J., and Sackett and Habhab, JJ.

DONIELSON, P.J.

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Julian Brehmer was excavating a trench for the placement of drainage tile on farmland owned by Ernest Henkel. His trenching machine struck an underground natural gas pipeline owned by Mid-America Pipeline Company (MAPCO). Brehmer was killed in the resulting explosion.

Brehmer's executor filed the present wrongful death action against MAPCO and Henkel. The district court granted MAPCO summary judgment. The district court concluded: 1) Julian Brehmer had been negligent per se by violating Iowa Code section 479.47, which directs a person performing excavation within 300 feet of a pipeline to notify the pipeline company by calling a telephone number listed on roadside markers; and 2) MAPCO was not negligent.

Brehmer's executor has appealed from the summary judgment in favor of MAPCO. The estate contends genuine issues of material fact existed with regard to the visibility of the pipeline markers and the allegedly-negligent nature of the aerial surveillance conducted on MAPCO's behalf. It also argues any violation of section 479.47 by Brehmer was merely evidence of negligence and not negligence per se.

I. Scope of Review. Summary judgment is properly granted only when there is no issue as to any material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 237; Froning & Deppe v. South Story Bank & Trust Co., 327 N.W.2d 214, 215 (Iowa 1982). A court

must examine the entire record (i.e. pleadings, motions, affidavits and testimony) to determine if it discloses a genuine issue as to any material fact. City of Ankeny v. Armstrong Co., 353 N.W.2d 864, 867 (Iowa App. 1984).

The burden is upon the moving party to establish the absence of any genuine issue of material fact. Colton v. Branstad, 372 N.W.2d 184, 188 (Iowa 1985). The court must view the record in the light most favorable to the party against whom summary judgment is sought. Id. 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. Knapp v. Simmons, 345 N.W.2d 118, 121 (Iowa 1984).

Once the moving party has met its burden, the opposing party may not rest on the mere allegations or denials of its pleading. It must set forth specific facts showing there is a genuine issue. Bauer v. Stern Finance Co., 169 N.W.2d 850, 853 (Iowa 1969), cert. denied, 396 U.S. 1008 (1970).

In reviewing the grant or denial of a summary judgment motion, this court is guided by the same principles utilized by a trial court in making that determination. Adam v. Mt. Pleasant Bank & Trust Co., 355 N.W.2d 868, 872 (Iowa 1984). Our task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied. Id. From our review of the

record, it is apparent the trial court did not ⁶¹err in granting summary judgment in this matter.

II. Negligence Per Se v. Evidence of Negligence. The parties devote much of their argument to the issue of whether Brehmer's violation of section 479.47 constituted negligence per se or mere evidence of negligence. Section 479.47 in relevant part provides:

Before performing earthwork, tiling, or excavation within three hundred feet of an existing pipeline, a . . . , contractor, . . . shall notify the pipeline company or its representative by calling the pipeline company telephone number listed on the roadside right-of-way marker. The pipeline company shall mark the location of the existing pipeline within forty-eight hours of notification Excavation, earthwork, or tiling shall not be commenced in that area until the markers are in place and the pipeline company representative is present and has notified the contractor of the depth at the site of crossing.

Iowa Code § 479.47 (1987) (emphasis added).

It is undisputed Brehmer never called MAPCO prior to beginning excavation on the Henkel property. However, we do not find it necessary to determine whether this violation amounts to negligence per se or mere evidence of negligence.

Prior to the adoption of comparative fault in Iowa, finding a plaintiff negligent per se would bar any recovery based on the party's contributory negligence. Under our comparative fault system, "fault" means an act which is "in any measure negligent" or subjects a person to strict tort liability, Iowa Code § 668.1(1) (1987), and contributory fault is no longer an absolute bar to recovery. Iowa Code

§ 668.3(1) (1987). Even if Brehmer was negligent per se, it would still be within the fact finder's purview to determine if his fault was the proximate cause of the injury sustained and what percentage of fault should be attributed to him. See 57B Am. Jur. 2d Negligence § 1174 (1989) (comparative fault statute still applicable even if violation of statute may be negligence per se).

The dispositive issue for this court in review of the grant of summary judgment is whether a genuine issue of material fact existed to submit to the fact finder the issue of MAPCO's alleged negligence. Plaintiff has focused on two aspects of this case in claiming a genuine issue existed, and we shall address them separately.

III. Markers. Plaintiff presented affidavits from Brehmer's son and employee claiming people at the scene of the explosion had not seen the roadside right-of-way markers required by section 479.47. It is important to note plaintiff never challenges the existence of the markers; in fact, the record reveals the roadside markers were in place at the time of the accident.

Instead, plaintiff obscures the issue by claiming the fence line markers on the Henkel property were not visible because of crops and weed growth. MAPCO had a duty to place roadside markers adjacent to property on which it had a pipeline. It did so, and Brehmer, as a contractor, had a duty pursuant to section 479.47 to check for such signs before he began any excavation. The fact that Brehmer took

a route to work which did not include the road on which the markers were placed did not excuse him from this duty. The fact that MAPCO placed additional fence line markers on the property does not make it negligent in this matter.

Brehmer's failure to see the markers and call MAPCO is not evidence of MAPCO's negligence. No genuine issue of material fact exists with regard to MAPCO's placement or maintenance of the roadside markers.

IV. Aerial Surveillance. Plaintiff contends a genuine issue of fact exists with regard to the aerial surveillance performed on June 25, 1987. It appears aerial surveillance was performed on MAPCO's behalf on the day before the explosion. The surveillance report revealed no observations of activity on the Henkel farm which might have threatened the pipeline.

Plaintiff argues the presence of excavation equipment and trenching on the Henkel farm should have been observed and reported to MAPCO. Plaintiff contends there is a genuine issue of whether MAPCO knew or should have known activity potentially hazardous to the pipeline existed on the day before the explosion.

Plaintiff must set forth specific facts showing there is a genuine issue. Bauer, 169 N.W.2d at 853. The record in this case reveals no evidence of whether the extent of trenching done prior to June 25th would have been visible by aerial surveillance. It also does not reveal the

proximity of any visible trenching to the pipeline⁸¹¹. Nor is there any evidence of the size or location of the equipment plaintiff claims would have been visible by aerial surveillance.

Without any evidence of specific facts in the record to sustain plaintiff's claim, it is not possible to find MAPCO negligent in connection with the aerial surveillance. The trial court properly awarded summary judgment, and its decision is affirmed.

AFFIRMED.

1. The duty to alert a pipeline company of excavation arises when the work is performed within 300 feet of an existing pipeline. Iowa Code § 479.47 (1987).