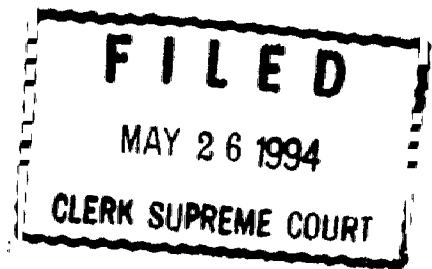


IN THE COURT OF APPEALS OF IOWA

No. 4-122 / 93-1058



MARJORY L. RANDOL,

Appellant,

vs.

ROE ENTERPRISES, INC., a/k/a ROE OIL COMPANY AND CONOCO
CORNER MINI-MART,

Appellee.

Appeal from the Iowa District Court for Clarke County,
Dale B. Hagen, Judge.

Plaintiff appeals from the district court's grant of
summary judgment in favor of defendant. **AFFIRMED.**

Robert M. Benton of Stuyvesant & Benton, Carlisle, and
Thomas P. Slater of Meyer & Slater, Des Moines, for
appellant.

Kenneth R. Munro of Bradshaw, Fowler, Proctor &
Fairgrave, P.C., Des Moines, for appellee.

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

DONIELSON, C.J.

Sixty-six-year-old Marjory Randol slipped, fell, and injured herself in the parking lot of a Conoco gas station. Her injuries resulted in a shoulder replacement operation. She filed a petition against Roe Enterprises, Inc., a/k/a Roe Oil Company and Conoco Corner Mini-Mart (Roe), alleging two counts of negligence.

Randol claimed she fell on a spot where the cement portion of the parking lot met the gravel portion, creating a drop-off. In count I she alleged Roe was negligent in failing to repair or make the drop-off safe and in failing to warn of the drop-off. In count II she alleged Roe was negligent in failing to provide for the safety of invitees who were unlikely to realize the danger created by the drop-off. In a deposition, Randol stated there were no witnesses to the accident and she could not remember how she fell.

Roe filed a motion for summary judgment. The motion was sustained and Randol filed a motion for reconsideration. The district court overruled Randol's motion stating there was no direct or circumstantial evidence showing Randol's fall was caused by a drop-off (the court pointed out that causation must be more than a mere possibility).

Randol appeals. We affirm the decision of the district court.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 237(c); see Farm Bureau Mut. Ins. Co. v. Milne, 424 N.W.2d 422, 423 (Iowa 1988). The moving party has the burden to show the nonexistence of a material fact, Milne, 424 N.W.2d at 423, and the evidence must be viewed in the light most favorable to the resisting party, Thorp Credit, Inc. v. Gott, 387 N.W.2d 342, 343 (Iowa 1986). The procedure is functionally akin to a directed verdict, and every legitimate inference that reasonably can be deduced from the evidence should be afforded the resisting party. Id.; Sherwood v. Nissen, 179 N.W.2d 336, 339 (Iowa 1970). A fact issue is generated if reasonable minds can differ on how the issue should be resolved, but if the conflict in the record consists only of the legal consequences flowing from undisputed facts, entry of summary judgment is proper. Milne, 424 N.W.2d at 423; Gott, 387 N.W.2d at 343. If the motion is properly supported, however, the resisting party "must set forth specific facts showing that there is a genuine issue for trial." Iowa R. Civ. P. 237(e). Even in a case where the main evidence is circumstantial, a jury question may still be raised. In viewing summary judgment as a directed verdict, circumstantial evidence and direct evidence are equally

probative. The substantial evidence rule requires that the circumstances have sufficient probative force to constitute the basis for a legal inference and not for mere speculation. Harsha v. State Sav. Bank, 346 N.W.2d 791, 800 (Iowa 1984). Circumstantial evidence must raise more than a mere suspicion; it must amount to proof. Id. Circumstances are not sufficient when the conclusion in question is based upon surmise, speculation or conjecture. Id. The evidence "must be sufficient to make the theory asserted reasonably probable, not merely possible, and more probable than any other theory. "Wiley v. United Fire & Casualty Co., 220 N.W. 2d 635, 635 (Iowa 1974).

In Iowa, circumstantial evidence may be sufficient to engender a jury question. Schermer v. Muller, 380 N.W.2d 684, 689 (Iowa 1986). However, circumstantial evidence is insufficient to engender a jury question if it merely suggests "a possibility of negligence or shows negligence 'is in the air.'" Id.

Oberreuter v. Orion Indus., Inc., 398 N.W.2d 206, 209 (Iowa App. 1986).

Appellant's testimony is the only evidence in this case. In her deposition, Randol stated she was unaware exactly where she fell or what caused her fall. Her testimony about where and how she fell is insufficient as a matter of law to support the claim. A jury could only speculate about what happened. Therefore summary judgment was appropriate.

AFFIRMED.