

FILED

AUG 29 1985

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

571

**BETTY J. TAYLOR and MARVIN
TAYLOR,**

Plaintiffs-Appellants,

vs.

RONALD PECK,

Defendant-Appellee,

KENNETH LADELY,

Defendant.

Filed August 29, 1985

**5-288
84-1292**

Appeal from the Iowa District Court for Poweshiek County - James D. Jenkins, Judge.

Plaintiff appeals from the trial court's ruling granting defendant judgment notwithstanding the verdict and a new trial. **JURY VERDICT REINSTATED.**

C. M. Manly of the Manly Law Firm, Grinnell, and Robert F. Leonard of Leonard & Johnson, P.C., Sidney, for plaintiffs-appellants.

Albert L. Harvey and David J. Grace of Davis, Grace, Harvey, Horvath, Gonnerman & Rouwenhorst, Des Moines, for defendant-appellee.

Kenneth L. Butters, Des Moines, for defendant Ladely.

Heard by Donielson, P.J., and Snell and Hayden, JJ.

DONIELSON, P.J.

Plaintiff appeals from the trial court's ruling granting defendant judgment notwithstanding the verdict and a new trial. We reverse and remand for new trial.

On September 19, 1975, Betty Taylor, a factory employee at Dieomatic, Inc. in Montezuma, Iowa, was injured on the job when her hand was caught in a punch press. The machine which inflicted Betty's injury was a 100-ton Brown-Boggs punch press. The machine is capable of forming and punching sheets of steel at a rate of up to 70 strokes per minute. The press was set up with a die to form and punch an "Everco cup." While the press could be operated in different modes, the machine was set up to run when two palm buttons were simultaneously pushed. At the time of Betty's injury the left button was weighted, permitting the press to operate when the right button was pushed.

The die had a pin which was causing problems by coming loose. Thus Betty was instructed by her superiors to check the die pin with her hand. While it is unclear how the contact was made with the right button, the press was inadvertently cycled and the die crushed her right hand.

She received worker's compensation benefits from Dieomatic. In addition, she and her husband later sued three supervisory employees of Dieomatic, alleging they had been grossly negligent by instructing Betty to check the malfunctioning punch press periodically by inserting her hand into the press.

The action against one defendant was dismissed at the close of the plaintiffs' evidence. The jury found in favor of a second defendant but awarded the Taylors \$425,000 (\$375,000 for Mrs. Taylor and \$50,000 for loss of consortium for Mr. Taylor) in damages against the third defendant, factory general manager and vice president of Dieomatic, Ronald Peck. However, the trial court then granted

Peck a judgment notwithstanding the verdict and conditionally granted him a new trial. The Taylors have appealed from the trial court's rulings.

The Taylors contend the trial court erred by holding there was not substantial evidence to support the jury's finding that Peck had been grossly negligent and that his gross negligence had amounted to wanton neglect for Betty Taylor's safety. (Pursuant to Iowa Code section 85.20, a part of the worker's compensation statute, an injured person covered by worker's compensation can sue a co-employee only if the co-employee has committed "gross negligence amounting to such lack of care as to amount to wanton neglect for the safety of another.")

The Taylors also contend the trial court erred by holding that Peck was not a co-employee of Betty Taylor, and by holding that because of his executive status he should be entitled to the same immunity from suit accorded to an employer under the worker's compensation statute.

The Taylors alleged the trial court erred by holding there was not substantial evidence to support the jury's finding that Peck's conduct was a proximate cause of Betty Taylor's injury and that the amount of damages awarded by the jury was excessive and unreasonable.

Finally, the Taylors claim there is no merit to several other issues raised in Peck's motions but not addressed by the trial court. These include complaints about instructions, complaints about the admission of an expert opinion, and allegations of juror misconduct.

On review, findings of fact in a law action, which means generally any action triable by ordinary proceedings, are binding upon the appellate court if supported by substantial evidence. Iowa R. App. P. 14(f)(1). It is well-established practice in Iowa that when reviewing the grant of judgment notwithstanding the verdict the appellate court must view the evidence in the light most favorable

to the party against whom the judgment was entered. See Loudon v. Hill, 286 N.W.2d 189 (Iowa 1979); Watson v. Lewis, 272 N.W.2d 459 (Iowa 1978); Champlin v. Walker, 249 N.W.2d 839 (Iowa 1977). With these rules in mind, we turn to the merits of the Taylors' appeal.

I. Employee

An initial issue is whether defendant Peck is a "co-employee" of Mrs. Taylor within the meaning of the Worker's Compensation Act, Iowa Code chapter 85 (1985). The trial court held that Peck, the plant manager of Dieomatic in Montezuma, was not a co-employee of Mrs. Taylor, apparently because Peck is an executive in the corporate structure.

While the term "employee" has different meanings in different contexts, our focus is directed toward the meaning of "employee" in the Worker's Compensation Act. Within the Worker's Compensation Act:

2. "Worker" or "employee" means a person who has entered into the employment of, or works under contract of service, express or implied, or apprenticeship, for an employer, every executive officer elected or appointed and empowered under and in accordance with the charter and bylaws of a corporation, including a person holding an official position, or standing in a representative capacity of the employer,

Iowa Code § 85.61 (1985) (emphasis added). This broad definition of "employee" specifically encompasses executive officers and none of the narrow statutory exceptions apply to Peck¹. Thus, we find Peck is an employee within the meaning of the Worker's Compensation Act and reverse the trial court's holding.

¹Section 85.61(3)(A)-(C) provides exceptions to the definition of "employee" for causal employees, independent contractors, and directors of corporations who are not at the same time employees of the corporation. Under statutory construction, a person who works for a company and does not meet any of the exemptions of section 85.61(3) shall be deemed an employee.

II. Gross Negligence

The worker's compensation statute provides an injured employee exclusive rights and remedies against:

1. his or her employer; or
2. any other employee of such employer, provided that such injury, occupational disease, or occupational hearing loss arises out of and in the course of such employment and 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.

Iowa Code § 85.20 (1985).

Thus, Mrs. Taylor can recover against Peck if Peck's conduct amounts to gross negligence constituting such a lack of care to amount to wanton neglect for Mrs. Taylor's safety.

In Iowa, "gross negligence" requires a showing that a defendant have (1) knowledge of the danger, (2) knowledge that injury is a probable, as opposed to merely a possible, result of the danger, and (3) a conscious failure to avoid the danger. Thompson v. Bohlken, 312 N.W.2d 501, 505 (Iowa 1981); Larson v. Massey-Ferguson, Inc. 328 N.W.2d 343, 345-6 (Iowa Ct. App. 1982). Defendant Peck asserts, as the trial court found, that there was insufficient evidence to show Peck was grossly negligent. Peck relies primarily on the holding in Thompson v. Bohlken, 312 N.W.2d 501, for this proposition.

In Thompson, the plaintiff sued the plant manager for an injury sustained while operating a press. The press could be operated by either hand or foot control. The day before the accident an employee from the tool and die department, not the general manager, instructed Thompson on the operation of the press. The metal coil fed automatically into the press and advanced each time the metal was engaged; however, when the coil was nearly expended, the operator was required to manually advance the metal through the press by using a screw-driver (not his hands). 312 N.W.2d at 503. On the day of the injury, the press

was in the foot-control mode and the guards on the press were raised which exposed the die area and allowed space for a hand to fit into it. While attempting to remove the end of the metal coil with his hand, the press was activated and Thompson's fingers were severed. 312 N.W.2d at 504. The Thompson court held that even though the plant manager knew the presses were operated without adequate guarding that his behavior in the accident was not sufficient to constitute gross negligence.

While this case has facts similar to those in Thompson, the two situations are sufficiently distinguishable so as to lead a jury to reasonably conclude Peck's conduct amounted to gross negligence.

Peck was much more involved in the operation of the press than was the plant manager in Thompson. First, Peck knew the press operators were instructed to place their hands in the machines while the machine operator in Thompson was not required to place his hand in the press. Secondly, Peck walked by Mrs. Taylor's press the day of the injury, making him aware of the danger that existed and apparently directed Mrs. Taylor to put her hand in the press. Third, it is important to recall the fact that the press at issue had a two-hand button system so as to preclude operators from having their hands in the press while using the machine. The combination of the weights being used on one button so as to allow the machine to be operated with only one hand instead of two, along with the instruction to operators to check the die with their hands could have led a jury to conclude that a resulting hand injury was probable and not merely a possibility. Cf. Larson v. Massey-Ferguson, 328 N.W.2d 343 (plaintiff successfully established gross negligence of immediate supervisor in similar-type case). We believe a reasonable jury could have found Peck knew of the danger and consciously failed to avoid danger of an injury which was probable. We reverse

the trial court and hold that sufficient evidence of gross negligence did exist in the record.

III. Comparative Negligence

Defendant contends the trial court erred in failing to instruct the jury that comparative negligence should apply to worker's compensation cases involving gross negligence.

When Iowa followed contributory negligence as a complete bar to negligence actions, this defense was not available when liability was based on gross negligence. Selcher v. State, 340 N.W.2d 759, 762 (Iowa 1983); citing Siesseger v. Putn, 213 Iowa 164, 182, 239 N.W. 46, 54 (1931). In the landmark decision of Goetzman v. Wichern, 327 N.W.2d 742, 745 (Iowa 1982), the court stated "that in all cases in which contributory negligence has previously been a complete defense, it is supplanted by the doctrine of comparative negligence" (emphasis added). Because contributory negligence did not previously apply to gross negligence actions, such cases were not covered by the holding in Goetzman. Comparative negligence does not apply to actions brought under section 85.20. We decline to judicially extend comparative negligence principles to gross negligence actions and affirm the trial court's decision not to instruct the jury about comparative negligence.

IV. Jury Instruction on Damages

Defendant claims the trial court's instruction number 18 regarding the award of damages was erroneous because it failed to instruct the jury to determine present value and pre-judgment interest.

Instruction number 18 was a combination of Uniform Jury Instructions 3.8, 3.8A, 3.9 and defendant's requested instruction 9 regarding deductibility of payroll taxes from an award involving loss of future earnings. A party does not have a right to specific language in the jury instructions if the desired concept

is adequately addressed in the instructions. Clinton Land Co. v. M/S Associates, Inc., 340 N.W.2d 232, 234 (Iowa 1983). Despite defendant's requested instruction as to present value, we find sufficient discussion of present value in instruction 18 so as to convey its meaning to the jury.

V. Other Asserted Errors

Defendant finally maintains that the trial court erred in giving its instruction on the effect of worker's compensation in instruction 1 and by failing to strike testimony offered by an expert witness which would not connect up later in the trial with other testimony.

In evaluating jury instruction 1 in combination with the other instructions in their entirety, we find no error in the trial court's instruction. We also believe sufficient evidence was introduced during the later stages of the trial so as to adequately connect up the prior expert testimony.

The parties should not be forced through another trial at great expense and time just because the trial court conditionally granted a new trial should its ruling on the motion n.o.v. be reversed. The jury verdicts of \$375,000 to Betty and \$50,000 to Marvin are reinstated and costs are assessed to defendant-appellee.

JURY VERDICT REINSTATED.