

FILED

MAY 31 1988

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

**DOUGLAS E. MINARD and BRENTON
BANK & TRUST COMPANY as
Co-Executors of the Estate of
VELMA E. MINARD, Deceased,**

Plaintiff-Appellant,

vs.

SECURITY SAVINGS BANK,

Defendant-Appellee.

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Filed May 31, 1988

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Appeal from the Iowa District Court for Marshall County (36245), Carl E. Peterson, Judge.

Plaintiffs appeal a district court order granting defendant's motion for summary judgment. **AFFIRMED.**

Theodore R. Hoglan of Fairall, Fairall, Kaplan & Hoglan, Marshalltown, for plaintiff-appellant.

Joel T.S. Greer and John B. Grier of Cartwright, Druker & Ryden, Marshalltown, for defendant-appellee.

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

SCHLEGEL, J.**187**

The plaintiffs appeal a district court order granting the defendant's motion for summary judgment. The plaintiffs' petition alleged that the defendant negligently maintained its stairs, thereby causing Velma Minard to slip and fall, resulting in injury. The plaintiffs contend that the district court erred in refusing to consider their two affidavits presented in resistance to the motion for summary judgment. We affirm.

On May 7, 1985, Velma Minard, age seventy-five, entered the defendant Security Savings Bank and fell on the stairs and broke her hip. She was hospitalized and later died, although there is no claim that her death resulted from the fall. Soon after her fall, Velma told the first two individuals on the scene that she was tired, that she thought she had missed the first step, and that she should not have worn crepe-soled shoes. On May 14, 1985, Velma told an insurance adjustor that she had been confused and tired at the time of her fall, she had been wearing rubber-soled shoes, and she had lost her balance due to diabetes. In addition, she told the insurance adjuster the steps were in good shape and nothing the bank had done contributed to her fall. On May 30, 1986, the plaintiffs, Douglas Minard and Brenton Bank & Trust Company as co-executors of Velma's estate, filed suit against Security Savings Bank.

On October 9, 1986, the defendant moved for summary judgment. It presented the above information by way of affidavits. It also presented affidavits that the weather was dry and that an architect believed that the steps and surrounding area were in a safe condition for their normal expected use. The plaintiffs resisted the motion by filing two affidavits on the day of the hearing on the motion. The affidavits were from Velma's children. They basically stated that Velma had called them from the hospital prior to her hip

surgery and noted that the stairs were rough and uneven and that it was possibly why she had fallen. As noted before, Velma died prior to the hearing.

The district court granted the defendant's motion for summary judgment. The court found that the plaintiffs' affidavits were untimely filed without excuse and that, even if considered, the affidavits were inadmissible hearsay and not from personal knowledge as required by Iowa Rule of Civil Procedure 237(e). Consequently, the court ruled that the plaintiffs failed to present specific facts showing that there was a genuine issue for trial.

Our scope of review is for the correction of errors at law. Iowa R. App. P. 4. Iowa Rule of Civil Procedure 237(c) provides, in pertinent part, for summary judgment as follows:

Summary judgment may be had under the following conditions and circumstances:

* * *

(c) Motion and proceedings thereon. The motion shall be filed at least 10 days before the time fixed for the hearing. The adverse party prior to the day of the hearing may file opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. (Emphasis added.)

Under this rule, the plaintiffs' affidavits should have been filed at least the day before the summary judgment motion hearing. Instead, the plaintiffs filed the affidavits on the day of the hearing. Trial courts have discretion to permit late filing of affidavits in opposition to a summary judgment motion upon motion by the plaintiffs and a showing of excusable neglect. Schroeder v. Fuller, 354 N.W.2d 780, 782 (Iowa 1984). In the instant case, the plaintiffs made no showing of excusable neglect. Based on this violation of Iowa Rule of Civil

Procedure 237(c), it was proper for the district court to not consider the plaintiffs' affidavits.

Even if the district court had granted consideration of the plaintiffs' affidavits, they do not contain admissible evidence as required by Iowa Rule of Civil Procedure 237(e). Rule 237(e) provides:

(e) Form of affidavits; Further testimony; Defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or filed therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, further affidavits, or oral testimony. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

The statements in the affidavits attributable to Velma are hearsay. The plaintiffs contend, however, that such statements are admissible under Iowa Rule of Evidence 804(b)(5), which provides:

(5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

We believe that the statements in the affidavits attributable to Velma are not admissible because several requirements of rule 804(b)(5) are not met. First, the requirement that the proponent of the statement must make known

to the adverse party sufficiently in advance of the hearing, his intention to offer the statement, has not been met. The affidavits were filed the day of the hearing and, thus, adequate advance notice was not given. Second, the statements within the affidavits are not offered as evidence of a "material fact." The plaintiffs' stated purpose for offering the hearsay statements in their affidavits is to impeach Velma's earlier admissions (contained in the defendant's affidavits). If offered for this purpose, the statements do not constitute substantive evidence and thus, are not evidence of a material fact. Finally, the statements in the plaintiffs' affidavits do not have equivalent circumstantial guarantees of trustworthiness as the specific hearsay exceptions. Velma's hearsay statements in the plaintiffs' affidavits are self-serving and favorable to the plaintiffs. There is not a strong propensity for truthfulness as in a dying declaration; there has been no previous opportunity for cross-examination as in former testimony; and the contents of the statements are not of such a nature that one would reasonably conclude that the speaker was telling the truth as in a statement against interest. Because the elements of Iowa Rule of Evidence 804(b)(5) have not been met, the hearsay statements in the plaintiffs' affidavits are inadmissible and would not be proper to consider even if the untimely filing of the affidavits was overlooked.

Having determined that the plaintiffs' affidavits were properly not considered by the district court, we now address whether the court was correct in granting the defendant's motion for summary judgment. As noted before, summary judgment may be granted where there is no genuine issue as to any material fact. Iowa R. Civ. P. 237(c). While we are aware that generally questions of negligence and proximate cause are for the jury and only in exceptional cases may they be decided as matters of law, see Iowa R. App. P. 14(f)(10), this is just such an exceptional case. The Iowa Supreme Court,

in Gruener v. City of Cedar Falls, 189 N.W.2d 577, 580 (Iowa 1971), discussed the purpose of summary judgment as follows:

Involved here is the basic purpose of summary judgment procedure. Every trial court has on its docket some pleaded claims and defenses which are actually without substance and exist only on paper. To obviate the labor and expense of trial to expose those empty vessels, summary judgment procedure was conceived. By proper motion, a party can compel his adversary to come forth with specific facts which constitute competent evidence showing a prima facie claim or defense. Paper cases and defenses can thus be weeded out to make way for litigation which does have something to it.

The language of our rule on summary judgments is very strong. Rule 237(e), Rules of Civil Procedure. Affidavits cannot merely be based on what someone has reported to affiant: "Supporting and opposing affidavits shall be made on personal knowledge". Conclusions and beliefs are insufficient: "shall set forth such facts as would be admissible in evidence". The person making the statements must know whereof he speaks: "shall show affirmatively that the affiant is competent to testify to the matters stated therein." When the motion itself is substantiated, the opposing party cannot simply rely upon his pleadings, for the pleadings are the very instruments that the procedure is designed to pierce: "an adverse party may not rest upon the mere allegations or denials of his pleading". Neither can the opposing party assert only generalities in resistance: "his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

The court further noted that:

The temptation in cases involving the summary judgment rule is to backslide and engage in the old practice of letting every litigant have a trial on his pleadings, whether or not his resistance to the motion measures up to the exacting standards of Rule 237. We cannot do that and still give meaningful effect to this statutory procedural innovation.

Id. at 581.

The party resisting a summary judgment motion may not rely solely on legal conclusions to establish a genuine issue of material fact. See Suss v. Schammel, 375 N.W.2d 252, 254-55 (Iowa 1985). Rather, the plaintiff must present affirmative evidence in order to defeat a summary judgment motion. Anderson v. Liberty Lobby, Inc., ____ U.S. ____, ____ S. Ct. ____, 91 L. Ed. 2d 202, 211 (1986).

We do not believe that the plaintiffs have presented affirmative evidence to create a jury question. Velma Minard is deceased and therefore will be unable to testify. No one observed her fall. As noted in the affidavits filed by the defendant, Velma made no claim that her fall was the result of anything the bank had done or neglected to do. The defendant also presented affidavits indicating that the stairs were not in an unsafe condition for ordinary use. In contrast to this evidence, the plaintiffs have not shown any facts indicating that there was a defect in the stairs design or that they were unsafe and caused Velma's injuries. Because Velma's statements in the plaintiffs' affidavits were properly excluded from consideration, the plaintiffs are left with nothing but the allegations in their pleadings. Without more specific, affirmative evidence creating a genuine fact issue, we hold that the district court correctly granted the defendant's motion for summary judgment.

AFFIRMED.