

FILED
SEP 29 1981
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

GREGORY ALLEN and)
BARBARA ALLEN,)

Plaintiffs-Appellants,)

Filed September 29, 1981

vs.)

JACK WALTERS and)
GARY SLAUGHTER,)

1-144
2-64757

Defendants-Appellees.)

Appeal from Muscatine District Court - J. Hobart Darbyshire, Judge.

Plaintiffs appeal from a judgment for defendants, in a suit against co-employees, which arose from a workplace injury. AFFIRMED.

Thomas J. Reilly and William J. Conroy, Jr. of Thomas J. Reilly Law Firm, Des Moines, for plaintiffs-appellants.

Richard M. McMahon and Greg A. Egbers of Betty, Neuman, McMahon, Hellstrom & Bittner, Davenport, and Robert A. VanVooren of Lane & Waterman, Davenport, for defendants-appellees.

Considered by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

DONIELSON, J.

Plaintiffs appeal from a judgment for defendants, in a suit against co-employees, which arose from a workplace injury. On appeal, plaintiffs contend: (1) that defendants waived their motion for a directed verdict by not renewing it at the close of all evidence; (2) that defendants' objection to admission of the deposition of plaintiffs' expert witness was waived when the objection was not renewed at the close of evidence; (3) that the testimony contained in the expert's deposition was relevant; and (4) that plaintiffs produced substantial evidence that safety duties were delegated to defendants.

Our review is limited to correction of errors at law. Iowa R. App. P. 4.

We affirm.

I.

Plaintiff Gregory Allen, an employee of Bandag, Inc., suffered a traumatic amputation of several fingers on October 15, 1973, during the course of his employment. The incident occurred while he was working at a machine known as a calender mill. Plaintiff was employed as "calender mill helper" at the time, which is arguably an apprentice position to a "calender mill operator."¹ The calender mill operators are supervised by a foreman. The foreman is supervised by the plant manager. The defendants were co-employees of the plaintiff. Jack Walters was the plant manager, and Gary Slaughter was the calender mill operator working with plaintiff. Neither the foreman who was supervising defendant Slaughter, nor the safety engineer employed by Bandag, Inc., were named as defendants in this case.

Plaintiffs' petition, filed October 8, 1975, alleged, inter alia, defendants were negligent in failing to properly instruct plaintiff with regard to safe operation of the machine, and in failing to install proper guards on the machine. The case was tried to the court on October 2, and November 30, 1979. Plaintiff Gregory Allen testified on his own behalf, and the depositions of defendants were admitted by stipulation. Defendants objected to the admission of a deposition of plaintiffs' safety expert on several grounds, including, in part, that it was incompetent and lacked proper foundation because the expert's opinion about the delegation of safety duties to defendants was based on hypothetical circumstances and his knowledge of usual industry practices, rather than

¹ Defendants contend that the "helper" job is not an apprentice position; it is merely the job title given to one of the two workers required to operate a calender mill.

on the specific facts of this case. The trial court stated that it could not rule on the objections until it had read the depositions in question and that the court would make the ruling part of its findings and conclusions. Plaintiffs then stated they had no further evidence to present and defendants made motions for a directed verdict and dismissal. Defendants made an extensive oral presentation in support of their motions. Plaintiffs then presented a partial brief and an oral resistance. The case then immediately concluded as follows:

THE COURT: With respect to the motion, I'll take it under advisement. I want to reserve ruling on that. Does that affect how you want to proceed at this point, Mr. McMahon?

MR. McMAHON: Your Honor, under the state of the record, the defendants are not going to offer anything further, and the defendants will rest.

THE COURT: Okay, you are not offering any testimony orally in court then, or from the witness stand here at all?

MR. McMAHON: It is already in by way of deposition, the essential issues, and we feel now it is a matter for the Court.

THE COURT: Okay.

Defendants did not renew their motions at the close of the hearing.

The court filed its findings of fact, conclusions of law, and judgment entry on February 14, 1980. The court made extensive findings of fact and thoroughly discussed the law of co-employee liability as applied to this case. The court held that the plaintiffs had produced no substantial evidence that a duty to assure their co-employees' safety had been delegated to and accepted by the defendants. The court's entry of judgment stated: "It is therefore ordered, adjudged and decreed by the court that defendants' motion for a directed verdict is sustained and that plaintiffs' Petition against defendants be dismissed at plaintiffs' cost."

Plaintiffs then filed this appeal.

II.

The trial court in this case produced a detailed decision which made extensive findings of fact and in our view correctly applied Iowa law to the facts of the case. It then sustained the defendants' motion for a directed verdict and dismissed the case. This created ambiguity as to whether the trial court actually decided the case on its merits or merely sustained defendants' motions. We feel the intent of the trial court, as evidenced by the detailed decision it rendered, was to decide the case on its merits. It

is similar in this respect to Batliner v. Saltee, 254 Iowa 561, 118 N.W.2d 552 (1962), where the supreme court affirmed the trial court's judgment which sustained the defendant's motion to dismiss. The court said:

If the trial court had been ruling only on the motion to dismiss, there would have been no occasion for a detailed finding of fact and conclusion of law. All the evidence was in and the matter ready for the court's final decision. The trial court obviously did more than sustain the motion to dismiss. We interpret the court's ruling to be a finding of fact upon the evidence produced and a judgment in favor of the Defendant. The phraseology used in the judgment entry does not correctly reflect the actual disposition of the case. We have held the use of a particular form of words is not essential to a judgment. Whittier vs. Whittier, 237 Iowa 655, 23 N.W.2d 435. There is no conflict in substance in any of the parts of this ruling. The judgment entry dismissing the action at Plaintiff's cost is entirely consistent with his findings and conclusions. We hold that the decision of the court was a finding of fact and not a ruling as a matter of law.

Id. at 564, 118 N.W.2d at 554. Although we feel this approach deals with the bulk of plaintiffs' assignments of error, and would justify affirming the trial court, we will fully address plaintiffs' remaining allegations below.

III.

Plaintiffs' next contention is that the defendants' objection to the admission of the deposition of plaintiffs' expert witness was waived when the objection was not renewed at the close of evidence. We find this argument without merit. The trial court specifically told the parties it would rule on defendants' objection in its findings and conclusions. It should not have been necessary for defendants to renew the motion. In addition, it is not clear from the record that the trial court did rule on defendants' objection.² If what the trial court said in its decision did constitute a ruling, then the ruling was favorable to defendants and such a ruling was within the trial court's discretion. If there was no ruling on the objection, as defendants contend, then neither plaintiffs nor defendants can complain about it on appeal. The Iowa Supreme Court has noted that where a motion or objection was made at the time of trial, and where the trial court reserved its ruling on that motion or objection, and where it does not appear from the trial court's findings of fact, conclusions of law and judgment entry that the

² The trial court found in its conclusions that "The testimony of plaintiffs' expert that in a hypothetical situation where a given individual has the obligation or duty to train another individual in the operation of a machine, implies or assumes a duty to instruct about safety, is irrelevant."

motion was ever ruled upon by the trial court, the reviewing court is not presented with any question for decision on appeal. Griffith v. Red Oak Community School District, 167 N.W.2d 166 (Iowa 1969).

This analysis also disposes of plaintiffs' allegation that the trial court erred by ruling that the testimony of plaintiffs' expert witness was irrelevant. First, we do not believe that the trial court did, in fact, rule on defendants' objection. Second, we find that if the trial court's action did constitute a ruling, the exclusion of expert opinion testimony was a matter of trial court's discretion, State v. Fuhrmann, 257 N.W.2d 619, 625 (Iowa 1977), and that there was no manifest abuse of discretion that would justify reversal. Shimone, Inc. v. Tasco, Inc., 283 N.W.2d 280, 288 (Iowa 1979).

IV.

Finally, plaintiffs contend that they produced substantial evidence that safety duties were delegated by Bandag, Inc., to defendants. The only testimony which would support that there was a delegation was contained in the deposition of plaintiffs' safety expert. This evidence was properly excluded under Aller v. Rodgers Machinery Manufacturing Co., Inc., 268 N.W.2d 830 (Iowa 1978), because the question posed to plaintiffs' expert requested an opinion as to an issue or question of law; specifically, whether under the facts and circumstances existing at the time of the accident, either or both co-employee defendants had a legal duty to act for the safety of their co-employee, the plaintiff. The alleged admissions made by defendants in their depositions do not constitute substantial evidence in the absence of the expert testimony which was properly excluded.

AFFIRMED.