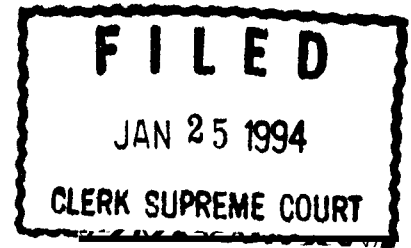


IN THE COURT OF APPEALS OF IOWA

No. 3-426 / 92-1645



DONALD JAMES PINNEY,

Appellant,

vs.

JERRY D. COLLINS,

Defendant,

and

HERAL JENSEN,

Appellee.

65-203

Appeal from the Iowa District Court for Woodbury County, Richard J. Vipond, Judge.

The plaintiff appeals the granting of summary judgment by the district court in favor of defendant Jensen in this personal injury action. **AFFIRMED.**

Roger L. Carter and Ruth M. Carter of Carter & Carter, Sioux City, for appellant.

John C. Gray and Charles T. Patterson of Eidsmoe, Heidman, Redmond, Fredregill, Patterson & Schatz, for appellee.

Considered by Oxberger, C.J., and Habhab, J., and Keefe, S.J.*

*Senior judge from the 1st Judicial District serving on this court by order of the Iowa Supreme Court.

C10204

OXBERGER, C.J.

On July 1, 1989, the plaintiff, Donald Pinney, an employee of Brower Construction Company was instructed by then defendant Jerry Collins to drive truck H-373. This truck is equipped with an automatic transmission and microlock brake system. The system also includes a hand brake. It is also customary to use chock blocks to prevent the truck from moving while parked on an incline.

After loading up with limestone, Pinney testified he stopped the truck by applying the brake pedal, and put the truck into neutral. Pinney stated he applied the microbrake, released the brake pedal, and started to open the door to try to find the chock blocks. He stated he was standing on the scale on the open driver's side when the truck began to roll backwards. His left arm was crushed between the truck door and a steel beam.

Pinney testified defendant Heral Jensen told him the truck did not need chock blocks because he was on a level surface. Jensen testified he was not at work the day of the accident. He also testified there was nothing wrong with the brakes. Collins stated when he pulled the truck away from Pinney's arm, he noticed the microlock brake was not on, nor was the hand brake. Collins also believed Pinney had put the truck in reverse rather than neutral.

Pinney filed suit gainst Jensen and Collins, alleging gross negligence. The defendants filed a motion for summary judgment. Pinney did not file a resistance. A

hearing was held. The district court granted the motion as to both defendants. Pinney has appealed from the grant of summary judgment as to Jensen only.

Pinney claims Jensen knew an injury to Pinney was probable because Jensen knew of the dangerous propensity of the truck to roll. Pinney also contends Jensen earlier admitted the microlock brake system was ineffective for holding trucks stationary for long periods of time. Pinney states these differences in testimony and evidence should have signaled the district court there were genuine issues of material fact.

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). The language of our rule and case law are substantially similar or identical to that of rule 56 of the Federal Rules of Civil Procedure, see, e.g., Matsushita Elec. Indust. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-88, 106 S. Ct. 1348, 1355-56, 89 L. Ed. 2d 538, 551-53 (1986), from which we may draw for guidance in interpreting our own rule, Sherwood, 179 N.W.2d at 339. We now turn to the facts, all of which appear to be undisputed, as viewed in a light most favorable to the party resisting the motion for summary judgment.

In order to prevail on his claim, Pinney must prove he satisfies the exception to the exclusivity rule of worker's compensation law. An injured employee may recover, apart from worker's compensation, only when a coemployee's conduct is grossly negligent "amounting to such lack of care as to amount to such wanton neglect for the safety of another." Iowa Code § 85.20 (1991).

Three elements are necessary to establish a coemployee's gross negligence under Iowa Code section

85.20: (1) knowledge of the peril to be apprehended; (2) knowledge that injury is a probable , as opposed to a possible, result of the danger; and (3) a conscious failure to avoid the peril. Walker v. Mlakar, 489 N.W.2d 401, 403 (Iowa 1992); Thompson v. Bohlken, 312 N.W.2d 501, 505 (Iowa 1981). An injured worker must prove all of the elements of this test in order to establish a coworker's gross negligence for the purpose of section 85.20. Dudley v. Ellis, 486 N.W.2d 281, 283 (Iowa 1992).

We agree with the trial court that no jury question has been raised. Jensen clearly had no knowledge of the peril nor had any knowledge that injury was probable. Jensen did not order Pinney to drive the truck nor had he ever known of anyone who had been hurt as a result of a brake failure on a Bower truck. Since we find Jensen had no knowledge of danger, we also can find no conscious failure to avoid any danger.

AFFIRMED.