IN THE COURT OF APPEALS OF IOWA

No. 3-333 / 92-2028

FILED
APR 26 1994
CLERK SUPREME COURT

ROBERT J. HOLBROOK,

Plaintiff-Appellant,

vs.

GREGORY STEUK, ANTHONY TRIJILLO and MARK NORCOTT,

Defendants-Appellees.

Appeal from the Iowa District Court for Woodbury County, Dewie J. Gaul, Judge.

Plaintiff appeals from the district court's order granting summary judgment and dismissing his claim against appellees. **AFFIRMED.**

Daniel C. Galvin of O'Brien, Galvin, Moeller & Neary, Sioux City, for appellant.

Robert R. Eidsmoe and Rita C. Grimm of Eidsmoe, Heidman, Redmond, Fredregill, Patterson & Schatz, Sioux City, for appellee.

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

PER CURIAM

Plaintiff-appellant Robert J. Holbrook appeals from an order granting summary judgment and dismissing his claim against defendants-appellees Gregory Steuk, Anthony Trijillo, and Mark Norcott. We affirm.

Plaintiff was employed by Allstate Industrial Contractors, Inc. Plaintiff was working at a job site in Perry, Iowa. His foreman was defendant Trijillo. Trijillo asked plaintiff to deliver a brick saw and a concrete saw to the employer's equipment yard in Sioux City the next morning. Two men loaded the brick saw, weighing between 100 to 125 pounds, on plaintiff's pickup. Trijillo used a forklift to place the concrete saw, weighing between 600 to 800 pounds, on the pickup. Trijillo told plaintiff to deliver the saws by 5:00 a.m. on August 18, 1990. Tracy Bohlke, an employee of Allstate Industrial Contractors, Inc., was to be present to help unload the saws.

Plaintiff arrived at the work yard in Sioux City at 4:30 a.m. Bohlke came about 5:45 a.m. Plaintiff contended Bohlke was angry. Bohlke got in the back of plaintiff's pickup and threw the brick saw out, breaking it.

Bohlke tried to unload the concrete saw himself. Plaintiff said he told Bohlke not to unload the saw himself. Bohlke disregarded plaintiff's advice and pushed the saw off the back of the truck. The saw hit plaintiff on the leg and cut him.

Plaintiff brought this action against Trijillo, and defendant-appellees Gregory Steuk, and Mark Norcott seeking to recover for those injuries. Steuk was the foreman at the Norfolk job site where the saws were to be taken. Norcott was the supervisor of the two foremen. Plaintiff claimed defendants were grossly negligent. He contended they failed to have adequate equipment at the work yard, knowing that serious injury would probably result from attempts at manual unloading, and they exposed him to wanton and reckless conduct of a coemployee.

Defendants filed a motion for summary judgment. The court sustained the motion concluding defendants had no knowledge of the peril which caused the injury; they did not know injury was probable; and they did not consciously fail to avoid the peril. The court determined there was no evidence defendants were grossly negligent and granted the motion for summary judgment.

Plaintiff has appealed. He claims there were genuine issues of material fact and summary judgment should not have been granted.

For summary judgment, our scope of review is whether genuine issues of material fact exist and whether the law was correctly applied. Stanfield v. Polk County, 492 N.W.2d 648, 649 (Iowa 1992). On appeal, we examine the record in the light most favorable to the party opposing the motion to determine if the movants have met their burden. Shaw v. Soo Line R.R. Co., 463 N.W.2d 51, 53 (Iowa

1990). Summary judgment is appropriate where there is no material fact in issue and the moving party is entitled to judgment as a matter of law. Id.

To recover from defendants, plaintiff must show gross negligence. Iowa Code section 85.20 allows an injured employee to recover damages from a coemployee only if the injured employee can prove the coemployee engaged in gross negligence which amounted to such lack of care as to amount to wanton neglect for the safety of another and the coemployee's gross negligence caused the injury. Johnson v. Interstate Power Co., 481 N.W.2d 310, 321 (Iowa 1992).

There are three elements necessary to establish gross negligence under section 85.20: (1) knowledge of the peril to be apprehended; (2) knowledge injury is a probable, as opposed to a possible, result of the danger; and (3) a conscious failure to avoid the peril. Thompson v. Bohlken, 312 N.W.2d 501, 505 (Iowa 1981). All three elements must be proven before liability can attach. Johnson, 481 N.W.2d at 321.

Plaintiff first contends there is substantial evidence defendants should have known plaintiff would be in peril because Bohlke had on prior occasions exhibited a bad temper. The fact Bohlke may have exhibited a bad temper on previous occasions is not evidence of a peril or hazard. To recover, plaintiff must show defendants actually knew of a peril or hazard. Walker v. Mlakar, 489 N.W.2d 401, 404 (Iowa 1992).

Plaintiff next contends there is substantial evidence defendants knew or should have known their conduct placed plaintiff in a zone of imminent danger. Alden v. Genie Indus., 475 N.W.2d 1, 2 (Iowa 1991). A zone of imminent danger may be proven by showing defendant's actual or constructive awareness of a history of accidents under similar circumstances, or alternatively, a situation where the high probability of harm is manifest. Id. at 2-3.

Plaintiff contends there is substantial evidence he was put in a situation where there was a high probability he would be harmed because defendants required him to manually unload the concrete saw from his pickup and they knew or should have known this would be dangerous.

Plaintiff testified in a deposition that he knew how to unload the saw by using materials available to him at the Sioux City work yard. There is no issue of material fact on the question of whether defendants had knowledge injury was a probable, as opposed to a possible, result of the danger.

We conclude summary judgment is appropriate because there is no material fact in issue and defendants are entitled to judgment as a matter of law. We affirm the decision of the district court.

AFFIRMED.