IN THE COURT OF APPEALS OF IOWA

No. 1999-494 (9-751) / 99-0259
Filed March 15, 2000

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CLERK SUPREME COURT

MICHEL L. WALLS and CAROL A. WALLS,
Plaintiffs-Appellants,

vs.

JACOB NORTH PRINTING CO., INC. and UNISOURCE WORLDWIDE, INC.,
Defendants-Appellees.

Appeal from the Iowa District Court for Jasper County, Jerrold W. Jordan, Judge.

Plaintiffs appeal from the district court's ruling granting summary judgment in favor of both defendants on plaintiffs' negligence claim. **REVERSED AND REMANDED.**

David S. Wiggins of Wiggins & Anderson, P.C., West Des Moines, for appellants.

Frank A. Comito and Kent A. Gummert of Gaudineer & Comito, L.L.P., West Des Moines, for appellee Jacob North.

Wade R. Hauser III of Ahlers, Cooney, Dorweiler, Haynie, Smith & Allbee, P.C., Des Moines, for appellee Unisource.

Heard by Sackett, C.J., and Vogel and Hecht, JJ.

HECHT, J.

Plaintiffs Michel L. Walls and Carol A. Walls appeal from a summary judgment granted to defendants Jacob North Printing Co., Inc. ("Jacob North"), and Unisource Worldwide, Inc. ("Unisource"), in this personal injury action. We reverse the summary judgment and remand this case to the district court for trial.

I. Factual Background. Substantial evidence in the record would support findings of fact consistent with the following. Michel L. Walls ("Walls") and two Metalfab co-employees, Ratcliff and Dawson, came to the Jacob North business premises located in the Jewell Building in Newton, Iowa, on May 26, 1995, to install gutters and drain spouts. They placed a fiberglass ladder against the building in the alley and extended it approximately twenty-five feet to the roof. They tied the top of the ladder to a chimney with an extension cord. The three men used the ladder without incident to carry their equipment and materials to the roof. Later Dawson and Ratcliff again used it to climb back down to street level to move their vehicles from the alley when requested by Jacob North representatives to do so. They used the ladder again without difficulty to ascend to the roof to resume their work.

An employee of Unisource drove a large red truck to the Jacob North business premises to make a delivery. At the time the truck arrived, Walls, Ratcliff, and Dawson were working on the roof. Dawson noted a skylight on the top of the vehicle and engaged the Unisource driver in a brief conversation about it. From the roof, Dawson also spoke to two representatives of Jacob North who were in the alley below.

The ladder was situated in the alley in a location that obstructed access to the door through which the Unisource driver was to make his delivery to Jacob North. While working on the roof, Dawson observed a forklift exit from the Jacob North premises to unload the truck and heard conversation below in the alley suggesting the need to move the ladder out of the way because it was blocking the doorway. From his vantage point on the roof, Dawson then saw the top of the ladder "slant" as though the people below had kicked the bottom off to the side.

Other evidence tends to prove the Unisource vehicle, a tractor and trailer twenty-seven feet in length, was too large to access the alley without moving the ladder. Randy Vanderleest, Jacob North's production manager at the time of the incident, testified the ladder would have to have been moved in order for the large Unisource truck to access the alley.

Later, Walls approached the ladder intending to return to the ground to cut a piece of downspout. He was not aware the ladder had been moved in order to facilitate the delivery after he last used it to climb to the roof. When he stepped onto the ladder, it leaned or tipped to the side and Walls fell to the ground. Though Walls did not provide a detailed explanation of exactly how the ladder moved at the time of the traumatic incident, his co-employee, Ratcliff, observed it to be "leaning over to the side . . . at like an angle" when he observed it from the roof immediately after the fall. Dawson, who also observed the ladder after Walls fell, testified the bottom of the ladder looked like it had "kicked out."

II. Standard of Review. The principles governing the appeal from a summary judgment are well established:

> We review a summary judgment ruling for error. The district court correctly enters summary judgment when the record shows "no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Iowa R. Civ. P. 237(c). Thus, on review, we examine the record before the district court to decide whether any material fact is in dispute, and if not, whether the district court correctly applied the law. In considering the record, we view the facts in the light most favorable to the party opposing the motion for summary judgment.

General Car & Truck Leasing Sys., Inc. v. Lane & Waterman, 557 N.W.2d 274, 276 (Iowa 1996) (citations omitted). The burden of showing the nonexistence of a material fact is upon the moving party. *Martinko v. H-N-W Assocs.*, 393 N.W.2d 320, 321 (Iowa 1986). We give the party opposing the motion for summary judgment the benefit of every legitimate inference that can be reasonably deduced from the evidence. *See Richardson v. Commodore, Inc.*, 599 N.W.2d 693, 696 (Iowa 1999); *Holsapple v. McGrath*, 575 N.W.2d 518, 519-20 (Iowa 1998). Summary judgment is not proper if reasonable minds could draw different inferences and conclusions from the undisputed facts. *Martinko*, 393 N.W.2d at 415-16.

III. The Merits. The district court ruled Walls failed to generate a jury question on the issue of whether their claimed damages were caused by negligence of the defendants. In its summary judgment ruling, the court observed:

> In order to establish a jury question, the Plaintiff must not only suggest negligence, but must also pin that negligence on an identifiable Defendant. In order to base the claim on circumstantial evidence, that evidence 'must be such as to make a litigant's theory

> reasonably probable, not merely possible, and more probable than any other hypothesis based on such evidence.' (citations omitted)
> . . . .
> Here, a jury would be required to engage in speculation to conclude that the Defendants negligently replaced the ladder and thus proximately caused the Plaintiff's fall. The conversation amongst unidentified individuals to the ultimate fact of consequence, the negligent replacement of the ladder by the Defendants, is too attenuated for the latter to be inferred from the former without lapsing into speculation.

The district court erroneously discounted the probative value of circumstantial evidence that precludes summary judgment in this case. Accordingly, we reverse and remand this case for trial.

Generally, questions of negligence and proximate cause are for the jury. These issues may be decided as a matter of law only in exceptional cases. Iowa R. App. P. 14(f)(10). A survey of the evidence in the record at the time of the district court's entry of summary judgment demonstrates this is not an exceptional case.

Direct and circumstantial evidence are equally probative. Iowa R. App. P. 14(f)(16). Although defendants' agents deny they moved the ladder before Walls fell, the fact finder is free to reject their denials and to accept the direct and circumstantial evidence tending to prove they did move it. *See Burger v. Omaha & C.B. St. Ry. Co.*, 139 Iowa 645, 655, 117 N.W. 35, 39 (1908). Though plaintiffs produced no witness who actually saw defendants' agents move the ladder, they did produce substantial circumstantial evidence tending to prove the fact. The plaintiffs concede they are unable to identify the specific representative(s) of either Jacob North or Unisource who are claimed to have negligently moved and destabilized the ladder. They produced no witness who saw defendants'

representatives touching it. However, Dawson's testimony puts representatives of both companies in the alley in temporal proximity to the time of the incident and in physical proximity to the ladder. His testimony, and that of Jacob North's employee, Randy Vanderleest, would support a finding Unisource was unable to make, and Jacob North was unable to receive, the delivery without moving the ladder obstructing a door through which the delivery was made. Dawson heard voices below in the alley say the ladder must be moved to permit access to the door. Although he was unable to identify the person or persons who actually moved the ladder because he did not see them do it, the evidence is undisputed representatives of both Jacob North and Unisource were in the alley during the delivery; and there is substantial evidence from which a reasonable juror could find those representatives had reason to move it. Photographs taken in the alley after the incident show an unidentified man with no known connection to either Unisource or Jacob North. However, there is no evidence in the record tending to prove the unidentified man was present at any time before the fall, or he had any reason to move, or did move, the ladder.

Other evidence in the summary judgment record tends to prove the ladder was in fact moved by defendants' agents before Walls fell. A rational fact-finder could conclude the Metalfab employees placed the ladder in a stable and proper position against the building when they arrived at the premises. They encountered no difficulty when they used it several times before the Unisource truck arrived to make the delivery to Jacob North. After he heard the conversation indicating a need to move the ladder to complete the Unisource

delivery to Jacob North, Dawson observed the top of the ladder shift as though the bottom had been "kicked out." Ratcliff's description of the position of the ladder ("leaning over to the side at an angle") immediately after Walls fell also permits an inference the bottom of the ladder was, in fact, moved by defendants' agents in a manner that rendered it unstable and unsafe to use. The top of the ladder had been secured with a rope that impeded equal movement of the top and bottom of the ladder. A reasonable juror could find the defendants' chose a "shortcut" which moved only the base of the ladder away from the delivery door, and this act of moving the bottom of the ladder off to the side destabilized its base and created a foreseeable risk of serious injury to those who might use it. After it was moved by defendants in the course of the delivery, the ladder tipped and failed as soon as Walls set foot on it.

Plaintiffs' theory, based upon circumstantial evidence, defendants negligently moved and destabilized the ladder before Walls fell is reasonably probable, not merely possible, and more probable than any other hypothesis based on the evidence. Their theory relies not upon speculation, but upon circumstantial evidence and reasonable inferences from the direct evidence. Viewing the record, as we must, in the light most favorable to Walls, we conclude Walls has generated a genuine issue of material fact as to whether representatives of Jacob North and Unisource moved and destabilized the ladder.

Jacob North and Unisource cite *Hasselman v. Hasselman,* 596 N.W.2d 541 (Iowa 1999), in support of their contention the district court properly

dismissed this action. Plaintiff Hasselman and his co-employees were engaged in the removal of structural steel from the roof of an old commercial building that was being torn down. As the plaintiff climbed to the top of a ladder, it suddenly "telescoped down" and he sustained a severe leg fracture. He sued, alleging a co-employee negligently: (1) failed "to extend the ladder to the proper height with the extension ladder properly seated," and (2) placed the ladder "in such a position and such a manner that it was unsafe to climb." *Id.* at 546. At trial, the plaintiff theorized the C-clamps that fit over the rungs to keep the ladder extended failed. However, he presented no evidence to support his contention the clamps failed because a defendant co-employee neglected to properly secure them when he extended the ladder and placed it against the building prior to Plaintiff's fall. After the jury considered the case and became deadlocked, the district court granted defendants a directed verdict.

Our supreme court affirmed the directed verdict in *Hasselman* on the ground the plaintiff failed to produce substantial evidence the ladder failure was the result of the co-employee's negligence. The court noted the plaintiff had produced no evidence the C-clamps failed because the defendant co-employee neglected to properly secure them. Under the evidence presented to the jury, it was just as likely the ladder telescoped vertically downward because some component of the ladder's clamp mechanism was worn and gave out. Plaintiff could not produce the ladder and presented no evidence of its history or condition. The *Hasselman* case was an exceptional case in which the proximate cause determination could not be left to the jury because the plaintiff presented

no evidence whatsoever the defendants caused his injuries. The jury could not be left to speculate on whether the defendant's conduct in fact caused the plaintiff's damages, and the directed verdict against plaintiff was affirmed. *Id.* at 546.

The case before this court is distinguishable from *Hasselman.* Walls presented direct and circumstantial evidence supporting his claim defendants negligently moved and destabilized the ladder. The theories of negligence and causation pled by Walls are supported by reasonable inferences from the evidence in the summary judgment record, and not upon unsupported speculation as was the case in *Hasselman.*

A. Premises Liability Claim Against Jacob North. Walls contends the district court erred in holding premises liability theories have no application in this case because defendants had no control over the "portion of the premises where the accident occurred" and no "responsibility for the ladder which was being used." As a tenant in the Jewel Building, Jacob North was a possessor of the leased premises. A possessor's duty to keep the premises safe extends to the means of ingress and egress. *Smith v. J.C. Penney Co.,* 260 Iowa 573, 589, 149 N.W.2d 794, 804 (1967) (holding tenant liable for condition created in abutting public alley). A reasonable juror could find the delivery received by Jacob North was received through the doorway off the alley, a means of ingress and egress to its premises; and by moving and destabilizing the ladder standing in the doorway in the course of the delivery, Jacob North exercised control over the portion of the premises where the injury occurred. Accordingly, plaintiffs generated a

genuine issue of material fact as to whether Jacob North exercised control over the location where the injury occurred.

There is also evidence in the record to support a finding Jacob North exercised control over the ladder. Though it was apparently owned by Metalfab, a reasonable juror could determine, from the evidence in the summary judgment record, Jacob North's representatives found the ladder within the area of ingress and egress to the premises and moved its base to the side to facilitate its receipt of the delivery through the doorway. Viewing this evidence in the light most favorable to plaintiffs, we find a genuine issue of material fact as to Jacob North's control of the ladder.

As an employee of an independent contractor on the premises, Walls is entitled to protections afforded by Restatement (Second) of Torts section 343:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
> (c) fails to exercise reasonable care to protect them against the danger.

Restatement (Second) of Torts § 343, at 216 (1965); *see also Greenwell v. Meredith Corp.*, 189 N.W.2d 901, 905 (Iowa 1971).

Walls has produced substantial evidence which could lead a reasonable juror to find: (1) the ladder constituted a dangerous condition within the area of ingress to and egress from Jacob North's premises after its base was kicked aside to facilitate the delivery by Unisource; (2) representatives of both Jacob

North and Unisource spoke to Dawson during the delivery and had reason to know workmen had used the ladder to gain access to the roof; (3) representatives of Jacob North and Unisource knew or should have known a ladder with an unstable base involved an unreasonable risk of harm to those who would likely use it; (4) representatives of Jacob North and Unisource should have expected those on the roof would not discover or realize the base of the ladder had been moved into an unstable position; and (5) representatives of Jacob North and Unisource failed to exercise reasonable care to reposition the base of the ladder in a stable position or warn those who had used it to gain access to the roof that they had not safely repositioned it when the delivery was completed.

We conclude the district court erred in finding as a matter of law Jacob North owed no duty of care to Walls in connection with the condition on the premises created by the movement and destabilization of the ladder. Knowledge of a dangerous condition on the premises is imputed to a possessor of land who has created the condition that causes the plaintiff's injury. *Richardson v. Commodore, Inc.*, 599 N.W.2d 693, 697 (Iowa 1999). As noted above, we think material issues of disputed fact exist as to whether Jacob North's representatives moved and destabilized the ladder, and caused a dangerous condition on the premises.

As a possessor of the premises, Jacob North had a duty to carry on its activities with reasonable care for the safety of invitees who should be expected not to discover or realize the danger or fail to protect themselves against it. *See* Restatement (Second) of Torts § 341A, at 209 (1965). A reasonable juror could

find on this record representatives of Jacob North negligently repositioned the base of the ladder during the delivery in such a way it became unstable for use; and this constituted a failure to exercise reasonable care in carrying on the activity of receiving a delivery. Accordingly, we conclude the district court erred in ruling defendant Jacob North was entitled to judgment as a matter of law.

B. Premises Liability Claim Against Unisource. The rule applicable to the liability of one who does an act or carries on an activity on the premises on behalf of the possessor and causes injury is found in the Restatement (Second) of Torts:

> One who does an act or carries on activity upon land on behalf of the possessor is subject to the same liability, and enjoys the same freedom from liability, for physical harm caused thereby to others upon and outside of the land as though he were the possessor of the land.

Restatement (Second) of Torts §383, at 287 (1965). If the fact-finder determines Unisource negligently participated in the movement and destabilization of the ladder on behalf of Jacob North, it is subject to the same liability as the possessor, Jacob North. *See Coleman v. Monson*, 522 N.W.2d 91, 93 (Iowa App. 1994). We believe a reasonable juror could find Unisource negligently moved and destabilized the ladder on behalf of Jacob North in the course of making the delivery.

Unisource would also have liability as though it were the possessor of the premises if it, on behalf of Jacob North, created a dangerous condition on the premises. Restatement (Second) of Torts § 384, at 289 (1965); *accord Kragel v. Wal-Mart Stores, Inc.*, 537 N.W.2d 699, 707 (Iowa 1995); *Konicek v. Loomis*

Bros., Inc., 457 N.W.2d 614, 617 (Iowa 1990). We believe a reasonable juror could find the Unisource driver's actions contributed to the destabilization of the ladder and the creation of a dangerous condition that was a substantial factor in the causation of plaintiffs' injuries and damages. Accordingly, summary judgment should not have been granted in favor of Unisource on plaintiffs' claim defendants negligently conducted activities and created a dangerous condition on the premises.

IV. Summary. We find substantial evidence in the record to support a finding representatives of Jacob North and Unisource negligently moved and destabilized the ladder, and caused plaintiffs' injuries and damages. Accordingly, the district court erred in granting summary judgment in favor of both defendants.

REVERSED AND REMANDED.

Vogel, J. concurs; Sackett, C.J., dissents.

SACKETT, C.J., (dissenting)

I dissent. I would affirm. Plaintiffs sued both defendants for injuries Michel claims to have sustained when he fell from or off an extension ladder. agree with the district court that the evidence leaves the fact finder to speculate on whether the defendants' conduct caused plaintiffs' damages and would affirm the district court in entering summary judgment dismissing the claim.

At the time of the incident on May 26, 1995, Michel was working on the roof of the Jewell building in Newton, Iowa, installing gutters and downspouts. Defendant, Jacob North Printing Co., leased space in the building. Defendant, Unisource Worldwide, Inc., delivered products to Jacob North and had made a delivery on the day Michel fell. Working with Michel on the roof were Craig Dawson and Steve Ratcliff.

Plaintiffs contend the extension ladder was taken off a truck and placed by Dawson and Ratcliff and tied to a chimney with an extension cord. Michel did not recall seeing it stabilized with anything from the bottom. Plaintiffs further contend it was placed so it partially blocked a garage door.[1] It was this garage door through which plaintiffs contend defendant, Jacob North, received a delivery from defendant, Unisource. Plaintiffs further contend that while Unisource was making a delivery defendants' employee or employees negligently moved the extension ladder in such a way that when Michel stepped on the ladder, the upper portion gave way and slid down or shifted and caused Michel to fall and suffer injuries.

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[1] The ladder extended to about twenty-five to thirty feet. There were two brackets that held the ladder in place and kept it from collapsing when the ladder was extended.

Plaintiffs rely primarily on the testimony of Craig A. Dawson to support their theory of the case. Dawson testified he saw a truck making a delivery. He knew they were unloading a press though he did not see the press. He did see them [unidentified] bringing a fork truck. He believed it was a regular fork truck to get the press off the semi trailer. He said the ladder blocked the garage door a foot or two feet on the south edge of the opening. He did not see anyone move the ladder. He testified, "I just heard them say that they needed to move the ladder out of the way of the doorway so they could get that press through there because it took up most of the doorway." He was further asked, "Did you see the ladder actually being moved?" He answered, "I saw the top of it slant a little bit." He said, "It looked like they just kicked the bottom off to the side a little bit."

Plaintiffs' contention the ladder was moved to facilitate a delivery is refuted by the Unisource driver who made the delivery of what he said was paper, not a press, and stated he did not move, replace or touch a ladder nor did he see anyone do so. It is further refuted by the testimony of employees of Jacob North who denied moving the ladder or seeing anyone other than Dawson do so.

The accident happened about 9:30 in the morning. Michel had been on the roof from about eight o'clock. He testified he fell going down the ladder to measure a piece of downspout. He did not examine the ladder to see if it was in the same position as when he went up. He testified as to its location at the time he started to go down as being where he thought it should be, tied against the chimney. He said in describing what happened, "I stepped on the top rung and I

went to bring my right leg out and around, and just all of a sudden the ladder wasn't there. You, know, it just left me."

Michel does not know if the ladder swung or moved down or to the left or the right. He testified one foot hit the ladder and it was gone.

Ratcliff said after Michel fell, "The ladder was leaning over to the side. It did not fall all the way. It was leaning over to the side of the building at like an angle." Ratcliff also said, "[i]t wasn't latched like the ladder should be." The district court in sustaining defendants' motions concluded:

> We are asked to infer that employees of the two companies later replaced the ladder. This inference is necessary since the ladder was later in the position expected by the roofers and the purported negligence would have to have occurred at the time of replacement. We are finally asked to infer that those employees were, in fact, negligent in their replacement of the ladder.

The defendants, as the moving parties, carry the burden of showing that no issue of material fact exists. *Hoefer v. Wisconsin Educ. Ass'n. Ins. Trust*, 470 N.W.2d 336, 338 (Iowa 1991). The resisting party is afforded every legitimate inference that can be reasonably deduced from the evidence. *Id.* A fact question is generated if reasonable minds could differ on how the issue should be resolved. *Id.*; *Henkel v. R and S Bottling Co.*, 323 N.W.2d 185, 187-88 (Iowa 1982).

In order to recover on a claim of negligence, the plaintiff must establish that the defendants' conduct was a proximate cause of the plaintiffs' injury or damage. *See Hartig v. Francois,* 562 N.W.2d 427, 429 (Iowa 1997); *Blackhawk Bldg. Sys. Ltd. v. Law Firm of Aspelmeier, Fisch, Power, Warner & Engberg*, 428 N.W.2d 288, 290 (Iowa 1988).

The element of proximate cause has two components: (1) the defendant's conduct must have in fact caused the plaintiff's damages, and (2) the policy of the law must require the defendant to be legally responsible for the injury. *See Gerst v. Marshall*, 549 N.W.2d 810, 815 (Iowa 1996). To prove causation in fact, the plaintiff must at a minimum establish that, but for the defendant's negligence, the plaintiff's injury would not have occurred. *See id.* at 817

Plaintiffs' specification of negligence is that Michel's injuries were caused by moving the ladder. That is, the moving of the ladder was the activity that would give rise to liability.

The majority has determined that there is evidence that representatives of defendants both moved and destabilized the ladder. The evidence introduced on the issue of moving the ladder is unclear, confusing and contradictory both as to who allegedly moved the ladder and if it was actually moved. Even if there is substantial evidence to support a finding the ladder was moved, there is not substantial evidence to support a finding the defendant's conduct caused Michel to fall.

The ladder from which Michel fell apparently belonged to Michel's employer. There was evidence it was initially placed and tied to the chimney by Michel and his crew. There is evidence the ladder was used by others after it was placed against the Jewell building. There is no evidence as to the time the ladder was used in relationship to the time defendants were alleged to have moved it. There is no evidence the ladder was inspected following its being placed. Michel was not aware that the position of the ladder had changed when

he stepped on it. Ratcliff said the ladder collapsed. Michel is unsure of what the ladder did when he stepped on it.

In addressing plaintiffs' challenges I find *Hasselman v. Hasselman,* 596 N.W. 2d 541 (Iowa 1999) controlling. The majority calls *Hasselman* an exceptional case and distinguishes it from the case at bar by advancing plaintiffs here presented direct and circumstantial evidence defendant negligently moved and destabilized the ladder. I disagree. The plaintiff in *Hasselman* sought damages after a ladder he was climbing fell. *Id.* at 543. The court there noted that the deficiency in the inference made as to what happened still left the jury to speculate on the cause of the ladder's failure. *Id.* at 546. The court further noted that it was just as likely under the evidence that the ladder could have failed for a reason other than the one the plaintiff alleged. *See id.* The court specifically said, "When a jury is left to speculate on whether the defendant's conduct in fact caused the plaintiff's damages, the evidence is insufficient to support a finding of proximate cause." *Id. See also Gerst*, 549 N.W.2d at 818-19 (the court affirmed the district court's grant of summary judgment for defendants where plaintiffs' evidence required the jury to speculate as to whether the plaintiffs' damages would not have occurred but for the defendants' conduct); *Blackhawk Bldg. Sys.*, 428 N.W.2d at 291 (there the court said, "A jury cannot be left to speculate, but rather, must be provided with facts affording a reasonable basis for ascertaining the loss.").

There is insufficient evidence to support a finding of proximate cause with respect to the defendants' alleged negligence. It is just as likely under the

evidence the ladder could have failed for a reason other than the one alleged by plaintiffs and as the district court noted, there was no testimony or circumstances that indicated the ladder fell because of something that happened when it was moved back. Nor was there testimony to indicate it fell or moved or collapsed because of the position in which it was placed. Not mentioned by the majority was the fact Ratcliff said it folded because it wasn't latched. The fact finder would be left to speculate on whether anything the defendants did with respect to the placement of the ladder caused it to move and fall or whether it folded because it wasn't latched. The district court was correct in dismissing the claims against both defendants on summary judgment.