IN THE COURT OF APPEALS OF IOWA

No. 9-331 / 88-1292

FILED
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CLERK SUPREME COURT

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LOIS HUNT, as Administrator of the Estate of FRANK D. HUNT, et al.,

Plaintiff-Appellee/Cross-Appellant,

vs.

FS GRAIN AND FEED, LTD., an Iowa Corporation,

Defendant-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Ringgold County, Dale B. Hagen, Judge.

Plaintiff's decedent died when a grain elevator located on the defendant's premises collapsed on him. The district court granted plaintiff's motion for partial summary judgment. Defendant contends summary judgment on this issue was improperly granted. **AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.**

William F. Fanter and Marsha K. Ternus, of Bradshaw, Fowler, Proctor & Fairgrave, Des Moines, and Arlen Hughes, for defendant-appellant/cross-appellee.

George A. LaMarca and Robert K. DuPuy, of LaMarca & Landry, P.C., West Des Moines, and Thomas S. Evans, of Boettcher & Ryan, Ponca City, Oklahoma, for plaintiff-appellee/cross-appellant.

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

SCHLEGEL, J.

The plaintiff's decedent died when a grain elevator located on the defendant's premises collapsed on him. A suit was filed by the administrators of his estate alleging failure to discover the defects and failure to warn. Plaintiff filed a motion for partial summary judgment. Upon hearing, the district court granted the plaintiff's motion for partial summary judgment on the issue of liability, ruling that the defendant was negligent as a matter of law.

On interlocutory appeal, the defendant contends that summary judgment on this issue was improperly granted because reasonable minds could draw different inferences and conclusions from the testimony offered. On cross-appeal, the plaintiff raise two additional issues, arguing that the trial court erred by denying their motion for summary judgment based on the doctrine of res ipsa loquitur and by refusing to disqualify an attorney for the defendant who had previously represented the deceased and the plaintiff.

Frank Hunt was killed in October 1986 when a grain elevator in Mt. Ayr, on the premises of the defendant FS Grain and Feed, Ltd. (FS Grain), collapsed on him. A subsequent investigation showed that the grain elevator was poorly designed and constructed. At the time of the accident, Hunt was on the premises as a customer. His wife

and daughters, the plaintiffs in this case, filed a petition alleging that FS Grain was negligent in failing to discover the defective condition of the elevator prior to its collapse and either remedying it or warning invitees of it. Before trial, the plaintiff filed a motion for partial summary judgment on the issue of liability. The district court granted the motion, ruling that FS Grain was negligent as a matter of law.

Our task in this interlocutory appeal is to determine only whether a genuine issue of material fact exists and whether the trial court correctly applied the law. Adam v. Mount Pleasant Bank & Trust Co., 355 N.W.2d 868, 872 (Iowa 1984).

Appellant contends the trial court erred in granting the plaintiff's motion for summary judgment on the issue of negligence. In a motion by a plaintiff for summary judgment the court must examine the entire record before it including the pleadings, admissions, depositions, answers to interrogatories, and affidavits, if any, to determine whether evidentiary facts are presented, which if decided in defendant's favor, would amount to a good defense to the action. Daboll v. Hoden, 222 N.W.2d 727, 731-32 (Iowa 1974). The summary judgment issued by the trial court held the defendant negligent as a matter of law. A summary judgment on the issue of negligence is not lightly granted in Iowa courts. As the Iowa Supreme Court stated in Daboll:

> It is the court's view the general rule that issues of negligence, contributory negligence and proximate cause, the resolution of which requires determination of the reasonableness of the acts and conduct of the parties under all of the facts and circumstances of the case, are ordinarily not susceptible of summary adjudication either for or against the claimant but should be resolved by trial in the ordinary manner is the proper one to be followed in this jurisdiction.

Id. at 734.

> Even in cases where the judge is of opinion that he will have to direct a verdict for one party or the other on the issues that have been raised, he should ordinarily hear the evidence and direct the verdict rather than attempt to try the case in advance on a motion for summary judgment.

Id. at 735.

There is no question that the disposition of this case will turn on the reasonableness of the acts and conduct of the appellant. There is a factual dispute as to whether the appellant should have been on notice to inspect the grain elevator. Even if we accept the facts set forth by the appellee as undisputed, there is still a disagreement as to the interpretation of those facts. The appellant argues that the swaying of the elevator did not put him on notice and the appellee argues otherwise. This is the type of question which juries are supposed to resolve. It cannot be successfully maintained that a jury would not be at liberty to disbelieve the contentions set forth by the appellant. The order granting summary judgment is reversed and remanded for trial.

The appellee cross-appeals a related issue. The appellee contends the trial court should have granted the summary judgment under the doctrine of res ipsa loquitur. This is not a proper case for the application of that doctrine. Res ipsa loquitur is a rule of evidence which, when applied, permits but does not compel an inference that defendant was negligent. Fosselman v. Waterloo Comm. School Dist., 229 N.W.2d 280, 283 (Iowa 1975). Under the doctrine the happening of an injury permits an inference of negligence where plaintiff produces substantial evidence that (1) the injury is caused by an agency or instrumentality under the exclusive control and management of defendant and (2) the occurrence is such as in the ordinary course of things would not happen if reasonable care had been used. Id. There is no question that negligence of some sort has occurred. However, the question still remains as to who committed that negligence. The faulty design of the elevator was not within the control of the appellants. The doctrine was primarily intended to place the burden on the defendant in situations where negligence is clear and no one other than the defendant has had access to the instrumentality. Negligence is clear in this instance, however the injury could have been entirely the fault of the designer of the elevator. The trial court was correct in failing to grant a summary judgment based on the doctrine or res ipsa loquitur.

Appellee next contends the trial court should have granted the motion to disqualify attorney Arlen F. Hughes. Appellee argues that due to Mr. Hughes' prior representation of the deceased Frank D. Hunt, he should not be allowed to represent the appellant in an action against the Hunt family. It is clear from the record that the work done by Arlen Hughes for the Hunt family involved financial matters. These dealings could have revealed information concerning damages which would certainly be adverse to the Hunts' interests. The rule impressing the seal of confidence upon communications between attorney and client is not only for the good of the profession, but for the safety of clients. Kluht v. Mitchell, 199 Iowa 1163, 1168, 199 N.W. 294, 296 (1924). The court in Kluht went on to state that an attorney should never change sides in the same case. This is not an instance of an attorney changing sides, however, the same dangers that would exist in that situation exist here also. Mr. Hughes learned information during his relationship with the Hunts that could be very prejudicial to them in an action involving damages. The proper action would have been for Mr. Hughes to resist being employed against his former client, but since he was unable to do so, we will take action for him. The motion requesting the disqualification of Mr. Hughes should be granted. We remand to the trial court for action consistent with this opinion. The costs of this appeal are to be divided equally between the parties.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.