IN THE COURT OF APPEALS OF IOWA

FILED
JUN 28 1983
CLERK SUPREME COURT

MIKE TSCHUDI,

Plaintiff-Appellant,

vs.

DON PANNELL and MID-AMERICA PIPELINE COMPANY,

Defendants-Appellees.

DON PANNELL and MID-AMERICA PIPELINE COMPANY,

Third-Party Plaintiffs/ Cross-Appellees,

vs.

ANCO MANUFACTURING AND SUPPLY COMPANY,

Third-Party Defendant/ Cross-Appellant.

Filed June 28, 1983

3-155
2-69269

Appeal from Dubuque District Court - Thomas H. Nelson, Judge.

Plaintiff appeals from the judgment entered on a jury verdict in favor of defendants in her personal injury action. Third-party defendant appeals from adverse ruling on third-party plaintiffs' motion to adjudicate law points. REVERSED AND REMANDED.

James Lawyer and Channing L. Dutton, Des Moines, Iowa, for plaintiff-appellant.

Brendon T. Quann and Chad C. Leitch, Dubuque, Iowa, for defendants-appellees and third-party plaintiff/cross-appellee.

Roger Lathrop, Davenport, Iowa, for third-party defendant/cross-appellant.

Heard en banc.

PER CURIAM

Plaintiff, Mike Tschudi, appeals from the judgment entered on a jury verdict in favor of defendants, Don Pannell and Mid-America Pipeline Company ("MAPCO") in his personal injury action. Third-party defendant, ANCO Manufacturing and Supply Company, ("ANCO") appeals from the ruling on MAPCO's motion for adjudication of law points that it is required to indemnify MAPCO for a verdict in favor of plaintiff's wife, Connie Tschudi. No appeal is taken from the judgment in favor of Connie. We reverse and remand.

MAPCO, the owner and operator of a storage-terminal facility near Dubuque, Iowa, contracted with ANCO for the installation of a new propane storage vessel at that facility. Plaintiff was employed by ANCO as a welder on the installation. After the work had progressed for approximately two weeks, plaintiff and his co-workers were engaged in the final placement of certain pipe for attachment to the new vessel when an explosion occurred, after plaintiff began welding, from which he claims injury. It is undisputed that sometime before the date and time of the explosion, defendant Don Pannell ("Pannell") had pumped approximately fifty gallons of flammable methanol into the new vessel.

Plaintiff brought this action against the defendants, claiming that the explosion was the result of negligence on their part. Trial resulted in a verdict for the defendants. In answer to interrogatories, the jury found defendants negligent and that such negligence was a proximate cause of injury to plaintiff who, however, was found to be contributorily negligent. On the judgment on such verdict, plaintiff appeals.

I. We find that the issue of comparative negligence is dispositive of this appeal, and we therefore address that claimed error at the outset.

Plaintiff contends the court erred in failing to instruct the jury on the doctrine of comparative negligence, rather than upon the theory that his contributory negligence would bar recovery. Error on this issue was preserved at trial for consideration on appeal.

Defendants do not dispute that this is a case in which contributory negligence was, under prior law, a complete defense, nor is it defendants' contention that plaintiff did not preserve the issue for appeal. Rather, defendants urge the court to reconsider its ruling in Goetzman v. Wickern, 327 N.W.2d 742 (Iowa 1982), to the effect that its holding applies to all cases pending in which the issue has been preserved.

> We hold that in all cases in which contributory negligence has previously been a complete defense, it is supplanted by the doctrine of comparative negligence. In such cases contributory negligence will not bar recovery but shall reduce it in the proportion that the contributory negligence bears to the total negligence that proximately caused the damages.
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> * * *
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> We conclude that the doctrine shall apply to (1) the present case (2) . . . and (3) all pending cases including appeals in which the issue has been preserved.

327 N.W.2d at 754. Defendants give us no reason to ignore the clear mandate in Goetzman, and we find none. Accordingly, we agree with plaintiff that this case must be reversed and remanded for new trial under the doctrine of comparative negligence.

II. Plaintiff also claims the court erred in failing to give certain requested instructions and in giving certain erroneous instructions to the jury. He also complains of the court's refusal to allow the introduction of a fifty-five gallon drum, which had contained methanol, into evidence.

Since this case must be remanded for new trial on plaintiff's claims, a discussion of these issues will facilitate a more orderly trial if, as is probable, such issues arise at that trial. Krueger v. Noel, 318 N.W.2d 220, 224 (Iowa 1982).

An additional discussion of certain facts may add clarity to the further discussion of these issues.

Plaintiff's employer, ANCO, was an independent contractor on the job here involved. Its supervisor of the project was one Al Dlugosielski. Plaintiff worked

under his supervision, as did the other employees of ANCO. MAPCO, the owner-operator of the storage-terminal facility, employed defendant Pannell as supervisor of its facility, in addition to other duties, and at the time of the installation under consideration, he was MAPCO's supervisor of the project. There is evidence from which it could be found that the methanol that was placed in the new vessel was the probable cause of the explosion.

A. Plaintiff complains of the court's failure to instruct the jury that the negligence of ANCO could not be imputed to him. He argues that since defendants asserted that the negligence of ANCO was the sole proximate cause of plaintiff's injuries or in the alternative, plaintiff's contributory negligence was a proximate cuase of his injuries, his requested instruction number one should have been given. This requested instruction stated:

> During the trial of this case, Defendants Pannell and Mid-America Pipeline Company have raised many allegations of negligence against ANCO Manufacturing and Supply Company. You are instructed that all allegations against ANCO Manufacturing and Supply Company relate solely to that corporate entity and the negligence of ANCO Manufacturing and Supply Company may not be imputed to the plaintiff, Mike Tschudi. The negligence of ANCO Manufacturing and Supply [sic] may not be used against its employee, Mike Tschudi, so as to bar his recovery against Mid-America Pipeline Company.

Defendants urge that plaintiff failed to preserve error as to this instruction, alleging that plaintiff's objection did not adequately alert the trial court as to that which plaintiff claimed was error.

From a review of the requested instruction and the record in this matter, we believe the objection taken by plaintiff was sufficient to alert the trial court to the error urged here. State v. Lewis, 242 N.W.2d 711, 716 (Iowa 1976), Pose v. Roosevelt Hotel Co., 208 N.W.2d 19, 25 (Iowa 1973). We hold that error was adequately preserved as to this instruction.

The trial court rejected the requested instruction for the reason that it believed the grounds therein urged were covered in the instructions finally

submitted. "When the matters raised in a requested instruction are substantially incorporated in the court's instructions, no error results from a failure to submit the issues in the form requested." Porter v. Iowa Power and Light Company, 217 N.W.2d 221, 235 (Iowa 1974); McCarthy v. J.P. Cullen & Son Corp., 199 N.W.2d 362, 367-368 (Iowa 1972).

The principle stated in plaintiff's requested instruction one does not appear in the court's instructions, although it is a correct statement of the law, and under the circumstances was properly requested. While it need not have been given in the language requested, plaintiffs were entitled to have the principle of law embodied in the instruction submitted to the jury by appropriate instruction. Porter, 217 N.W.2d at 234; supra; Adam v. T.I.P. Rural Electrical Cooperative, 271 N.W.2d 896, 901 (Iowa 1978).

B. Plaintiff's requested instruction three correctly set out the law concerning defendants' duty to warn. That duty has been defined as follows:

> The fact the particular injury which resulted to him was not foreseeable [by the defendants] does not eliminate the duty [of the owner of the land] to warn of known dangers. All defendant need know is that the condition of the premises [where plaintiff was working] may result in some injury to some person and the duty to exercise reasonable care is imposed.

Greenwell v. Meredith Corporation, 189 N.W.2d 901, 906 (Iowa 1971). The concept of defendants' duty to warn was not covered in the court's instructions. Plaintiff's requested instruction three correctly stated the law. The principle embodied in that request should have been submitted to the jury.

C. Plaintiff claims error by the court in that it failed to give the substance of requested instruction four concerning MAPCO's failure to exercise control over the cleaning of the new vessel with reasonable care. The evidence showed that MAPCO engaged the services of an independent contractor (ANCO), but it is not disputed that MAPCO retained control of that part of the project concerned with the purging of the vessel and the insertion of methanol into the

vessel for that purpose. Under the circumstances, MAPCO and its employees had a duty to use ordinary care in exercising such control and a failure to do so would constitute negligence. Plaintiff was entitled to an instruction setting forth that principle. Porter, 217 N.W.2d at 229; Giarratano v. The Weitz Co., Inc., 259 Iowa 1292, 1301, 147 N.W.2d 824, 830 (1967); Iowa Uniform Jury Instructions No. 25.7; Restatement (Second) of Torts § 414. The principle embodied in plaintiff's requested instruction four is a correct principle of the law. No instruction given to the jury included that principle. Plaintiff was entitled to such an instruction. An instruction containing the substance of Iowa Uniform Instruction No. 25.7 would have properly submitted this principle.

D. Plaintiff raises additional issues regarding the court's instructions. Obviously, the inclusions of instruction on the doctrine of comparative negligence will result in a number of changes, some of which will eliminate specific objections of the plaintiff. We cannot presume what the condition of the record will be upon retrial, and consequently, we cannot prejudge the propriety of giving or failing to give specific instructions upon the future submission of this case to the jury. Plaintiff's observations, in certain instances, are well taken. The instructions leave some doubt as to the duties of the defendants in light of the claims of plaintiff that defendants were negligent in a breach of some duties. To simply state plaintiff's claim is not sufficient to advise the jury of the duties of the parties in connection with that claim. Plaintiff complains of the failure of the court to give certain of the Iowa Uniform Jury Instructions. Instructions in chapter 22 of those instructions would seem to be helpful in understanding the duties of a possessor of land in a case such as this, as would Instruction 25.7 previously referred to.

While it is not mandatory that such uniform instructions be given in lieu of other proper statements of the law, such instructions usually provide clarity, and are a reasonable point of departure for the drafting of instructions.

III. Plaintiff complains of the court's refusal to allow the receipt in evidence of the fifty-five gallon drum that had contained methanol, and from which Pannell had pumped methanol into the new vessel.

Reception of exhibits in evidence is within the sound legal discretion of the trial court. Perry v. Eblen, 250 Iowa 1338, 1345-46, 98 N.W.2d 832, 836 (1959). "It is the general rule demonstrative evidence, . . . which tends to explain or prove any issue in the case is admissible. Permitting an experiment and introduction of demonstrative evidence is discretionary with the trial court." Davis v. Walter, 259 Iowa 837, 842, 146 N.W.2d 247, 250 (1966).

> The admission or exclusion of real or demonstrative evidence rests largely within the discretion of the trial court, it being primarily within its discretion to determine the relevancy of such evidence and its value in assisting the jury in understanding the issues in the case.

Id., quoting 32 C.J.S. Evidence § 602 (1964). In the discussion of the exhibit in question, the parties argued the matter in chambers, prior to any offer being made in open court. On the basis of the record, the court was confronted with an exhibit whose condition was in dispute, and where the question of its worth in assisting the jury in understanding the issue concerning which it was proffered was not addressed. No witness appeared to testify to the relevance of its condition at the time of discussion, as it bore upon the condition of the exhibit at the time of the incident in question.

On the basis of the record made, we cannot rule that the court abused its discretion in refusing to allow the admission of the exhibit. This ruling, however, need not exclude the exhibit on retrial, assuming the record is adequately made to show its relevancy, and its relative condition. Such condition may well be important only as it bears upon the weight of the exhibit as evidence.

For the reasons stated in Division I of this opinion, the judgment in favor of defendants MAPCO and Pannell, and against plaintiff, must be reversed, and that cause must be remanded for new trial.

IV. Third-party defendant, ANCO, appeals from the judgment entered against it, and in favor of Pannell and MAPCO for indemnity for the sums awarded by the jury to Connie Tschudi, and from the order entered upon MAPCO's application for adjudication of law points, ruling that ANCO is required to indemnify and defend MAPCO in this cause.

On this cross-appeal, ANCO claims the court erred in ruling on the application for adjudication of law points, filed by MAPCO, for the reason that there were disputed facts bearing upon the issue raised by the application, and that the issue before the court needed to be decided by a determination of facts by trial on the merits of the controversy.

MAPCO and ANCO entered into a written contract for the installation of a new vessel upon the property owned and operated by MAPCO. There is no dispute as to the existence of the contract under discussion. There is no dispute as to the contents of the contract, so far as the provision relating to indemnity is concerned. That language was as follows:

> Contractor shall indemnify and hold Company and any owner of any property involved harmless from any and all claims, liability and causes of action to or by third persons, including Contractor, his or its subcontractors or the employees of either, for injury to or death of any person and for damage to or destruction of any property resulting directly or indirectly from any and all acts or omissions of Contractor, his or its subcontractors or of anyone indirectly employed by either in the performance of any work hereunder and regardless of whether such injury, death, damage and or destruction is contributed to by the negligence of Company, its agents, servants or employees, and on behalf of Company and in Company's name will defend at his or its sole expense any claim or litigation in connection therewith.

By pretrial stipulation and order, the interpretation of this provision was directed to be submitted by application for adjudication of law points under Iowa R. Civ. P. 105. That rule states:

> The court may in its discretion, and must on application of either party, made after issues joined and before trial, separately hear and determine any point of law raised in

> any pleading which goes to the whole or any material part of the case. It shall enter an appropriate final order before trial of the remaining issues, adjudicating the point so determined, which shall not be questioned on the trial of any part of the case of which it does not dispose. If such ruling does not dispose of the whole case, it shall be deemed interlocutory for purposes of appeal.

The parties apparently recognized that the issue of the indemnity provision of the contract was a proper issue for determination as a question of law, and submitted it as such. The issue went to the whole of the case between MAPCO and ANCO, for it was the very issue that prompted the filing of the third-party petition in the first instance. Following hearing on the application for adjudication of law points, the court held that the provision of the contract was unambiguous, and that it provided for indemnity by ANCO to MAPCO, even if the loss was occasioned by MAPCO, either alone or as a contributor to the cause of the loss.

A. We believe the application for adjudication of law points was a proper vehicle for the determination of the question raised by the contract. The application sought determination of the legal effect of uncontroverted pleadings. Porter v. Porter, 286 N.W.2d 649, 652 n.3 (Iowa 1979). No facts outside the pleadings were required or determined to make the ruling with respect to the effect of the contract terms.

B. It is ordinarily not contrary to public policy for parties to contract for freedom from liability for negligence. Sears, Roebuck and Company, Inc. v. Poling, 248 Iowa 582, 587, 81 N.W.2d 462, 465 (1957). Contract provisions that are subject to construction, which a party claims relieve him from liability for his own negligence, are strictly construed against him. They are not held to cover such negligence unless the intention to do so is clearly expressed. "It is also elementary that an instrument which is subject to construction is construed most strongly against the party who prepared it." Id. at 588, 81 N.W.2d at 465.

It is conceded that the contract was prepared by MAPCO, and not ANCO. The trial court, in ruling upon the clause involved in this issue, held that MAPCO

sought indemnity arising out of anything ANCO did, and that the injury resulted "directly or indirectly from the act of one of ANCO's employees." The court went on to state: "This is what MAPCO wanted protection against." The trial court did not rule upon the specific question raised on this appeal. The question to be answered is whether MAPCO can recover indemnity from ANCO for any claim arising from acts of ANCO, whether MAPCO contributes to the injury by its own negligence. It is upon this question that the Iowa cases require strict construction of the contract, and construction against the preparer thereof.

ANCO claims that it was error for the court to decide that ANCO owed MAPCO indemnity if the sole proximate cause of the injury was the negligence of MAPCO. The contract provided that indemnity was due "whether such injury, death, damage and or destruction is contributed to by the negligence of Company [MAPCO]." Under the rule of strict construction required in such cases (where parties seek indemnity for losses occasioned by their negligence) it would seem that the contract would only provide for such indemnity if it stated: "whether such injury, death, damage and or destruction is contributed to by the negligence of Company, or is solely caused by the negligence of Company."

Since the contract does not specify that MAPCO is entitled to indemnity if it alone is responsible for the injury, that issue should be determined following trial on the merits, when it has been decided whether MAPCO's negligence was the sole proximate cause of the injury or whether MAPCO's negligence merely contributed to the injury. If it contributed to the injury, under the clear wording of the contract, MAPCO is entitled to indemnity. See Trushcheff v. Abell-Howe Co., 239 N.W.2d 116, 134 (Iowa 1976). The case of Evans v. Howard R. Green Co., 231 N.W.2d 907 (Iowa 1975), involved an appeal from the allowance of indemnity to an architect, from the contractor. In reversing the judgment, the court stated:

> It might be noted [the architect's] position may well be untenable under the rule an indemnity agreement generally will not be construed to cover losses to the indemnitee

> caused by his own negligence. In order to do so the agreement must be clear and unequivocally expressed. General, broad and all-inclusive language is insufficient for the purpose. [citations] . . .
>
> Although [the architect] might well be barred from claiming the right of indemnity under the foregoing rule we rely on the limitations of the contractual provision itself.

231 N.W.2d at 916 (emphasis added).

We hold that the court was in error in ordering indemnity under all circumstances, including an instance where the sole proximate cause of the injury was the negligence of MAPCO. ANCO was entitled to have that issue determined by a trial on the merits wherein the fact question of the sole proximate cause of the injury could be submitted to the trier of fact. If the negligence of MAPCO is determined to be contributory only, indemnity is due. If the injury was caused solely by the negligence of MAPCO, then, under the contract and the rules of construction peculiarly applicable to such contracts, MAPCO cannot receive indemnity from ANCO.

This matter is reversed and remanded for a new trial in conformity with the rulings herein.

REVERSED AND REMANDED.