

IN THE COURT OF APPEALS OF IOWA

No. 0-387 / 89-1526

FILED

NOV 29 1990

CLERK SUPREME COURT

RODNEY ALLEN STALTER, by LORI ANN STALTER, His Conservator
and LORI ANN STALTER, Individually,

Plaintiffs,

279

vs.

IOWA RESOURCES, INC., IOWA POWER AND LIGHT COMPANY,
FARMER'S COOPERATIVE EXCHANGE, STATE OF IOWA, and IOWA
INTERSTATE RAILROAD LTD.,

Defendants.

IOWA RESOURCES, INC. and IOWA POWER AND LIGHT COMPANY,

Cross-Petitioners/Appellants,

vs.

IOWA INTERSTATE RAILROAD LTD., SEEDBURO EQUIPMENT COMPANY,
HEARTLAND RAIL CORPORATION, and HAWKEYE LAND COMPANY,

Defendants to Cross-Petition,

and

CHICAGO PACIFIC CORP., f/k/a CHICAGO, ROCK ISLAND AND
PACIFIC RAILROAD COMPANY,

Defendant to Cross-Petition/Appellee.

Appeal from the Iowa District Court for Polk County,
Michael J. Streit, Judge.

Iowa Resources, Inc., and Iowa Power & Light Co. appeal
a ruling sustaining Chicago Pacific Corporation's motion
for summary judgment. The cross-petition sought indemnity

and contribution for damages that might be awarded to plaintiffs Rodney A. Stalter and Lori A. Stalter for injuries sustained by Rodney A. Stalter when he was electrocuted. **REVERSED AND REMANDED.**

Gregory R. Brown, Hugh J. Cain, and Thomas G. Fisher of Duncan, Jones, Riley & Finley, P.C., Des Moines, for appellants.

Henry A. Harmon and Ken A. Winjum of Grefe & Sidney, Des Moines, for appellee.

Considered by Schlegel, P.J., and Hayden and Habhab, JJ.

SCHLEGEL, P.J.

Defendants/cross-petitioners Iowa Resources, Inc., and Iowa Power & Light Co. appeal a district court ruling sustaining third party defendant Chicago Pacific Corporation's motion for summary judgment. The cross-petition sought indemnity and contribution for damages that might be awarded to plaintiffs Rodney A. Stalter and Lori A. Stalter for injuries sustained by Rodney A. Stalter when he was electrocuted. We reverse and remand.

On May 14, 1987, Rodney Stalter was atop a railroad car near the Farmer's Cooperative Exchange (Co-op) in Pella taking grain samples for testing. Stalter used a brass sampling device, made by Seedburo Equipment Co., to collect grain. The car, which was owned or transported by Iowa Interstate Railroad, was on railroad spur siding on land and tracks originally owned by Chicago, Rock Island & Pacific Railroad (Rock Island). Part of the siding crosses beneath electric transmission lines owned by Iowa Resources, Inc., through its subsidiary, Iowa Power & Light Co. (IPALCO). The sampling device came into contact with the transmission lines, and Stalter was electrocuted with 69,000 volts. Stalter has survived, but apparently is incapacitated.

Stalter and his wife, Lori Ann Stalter, both personally and as guardian and conservator, have sued Iowa Resources, IPALCO, the Co-op, the State of Iowa, and Iowa Interstate

Railroad. The Stalters contended Iowa Resources and IPALCO (hereinafter collectively referred to as IPALCO) were negligent in their installation, operation, examination, inspection, and maintenance of the power lines. IPALCO cross-petitioned against Iowa Interstate, Seedburo, Chicago Pacific Corp., Hawkeye Land Co., and Heartland Rail Corp. seeking contribution and indemnity. In a September 6, 1989, ruling on various motions, the trial court sustained motions for summary judgment made by the State, Chicago Pacific, and Hawkeye Land.

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. Miline, 242 N.W.2d 422, 423 (Iowa 1988). The moving party has the burden to show the nonexistence of a material fact, Miline, 242 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. Nissan, 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. Gott, 387 N.W.2d at 343; Miline, 242 N.W.2d at 423. 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 (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 as viewed in a light most favorable to the party resisting the motion for summary judgment.

Rock Island constructed the siding in question under a November 1970 agreement with the Co-op. Under the agreement, the Co-op owned the track on its property, and Rock Island owned the track on its property. The agreement put the burden on the Co-op to "procure . . . all public authority and permission necessary for the construction, maintenance and operation" of the siding and to provide a right-of-way. In constructing the siding, Rock Island allegedly raised the grade beneath the transmission lines. At the time of the accident, the height of the transmission lines was below recognized National Electrical Safety Code Requirements.

Rock Island transferred all of its property to a bankruptcy trustee, who transferred under a June 1, 1984, trustee's deed certain property to Chicago Pacific, including the portion of the siding on which Stalter was injured. In 1984 and 1985, by separate deeds, Chicago Pacific quit claimed all its Iowa real estate either to Heartland Railway Co. or Hawkeye Land Co., reserving to itself the right to convey easements for power line purposes. Chicago Pacific granted such an easement to IPALCO in 1985.

IPALCO argues that Chicago Pacific is accountable for acts or omissions by Rock Island. Thus, it argues Chicago Pacific is responsible for elevating the grade beneath preexisting power lines and for failing to notify IPALCO that the siding had been constructed. Chicago Pacific maintains it is a completely separate and entirely different entity than Chicago, Rock Island & Pacific Railroad, which ceased to exist after bankruptcy.

The trial court sustained Chicago Pacific's motion for summary judgment and dismissed Iowa Power's cross-petition against Chicago Pacific. The court found no grounds for indemnity:

Iowa Power has failed to show that Chicago Pacific had a duty to Iowa Power the breach of which might provide the basis for indemnity. Even if Chicago Pacific had a duty to notify Iowa Power that it was constructing the rail siding, Iowa Power had knowledge of the siding's existence well before the incident that gave rise to the present action.

IPALCO argues Chicago Pacific owed it a duty because Chicago Pacific modified the line clearance by constructing the siding. IPALCO also argues it was owed a duty based on Chicago Pacific's reservation of the power to grant easements. Chicago Pacific responds by contending it has no duty to indemnify IPALCO because (1) it did not construct the siding; (2) it is not liable for the acts of Rock Island; (3) it has no special duty to IPALCO; (4) it owes no duty under the easement; (5) the indemnity claim is barred by Iowa's statute of repose; and (6) IPALCO is responsible to indemnify Chicago Pacific pursuant to the easement.

The trial court also found IPALCO had not shown entitlement to contribution:

Iowa Power has not established that Chicago Pacific owed Rodney Allen Stalter any duty. At most, Iowa Power asserts that Chicago Pacific owed Iowa Power the duty to notify Iowa Power that the rail siding would be constructed. As noted above, however, Iowa Power had knowledge of the existence of the siding well before the incident that gave rise to the present action.

IPALCO contends it has a right to contribution from Chicago Pacific because the companies may have a common liability to Stalter. IPALCO argues Stalter has a remedy against Chicago Pacific based on: (1) its negligent construction of the siding track which decreased the line clearance and (2) premises liability. IPALCO asserts that any transfer by Chicago Pacific to third parties is irrelevant under either theory. In response, Chicago Pacific argues it did not owe Stalter any duty upon which a

negligence claim could be based because: (1) it does not own the property; (2) it is not liable for claims against Rock Island; (3) the claim is barred by Iowa's statute of repose, Iowa Code section 614.1(11); and (4) it cannot be held liable as a builder or contractor. Chicago Pacific also claims it cannot be liable to Stalter based on premises liability because it did not own the land.

IPALCO has alleged numerous theories upon which it claims Chicago Pacific may be held liable to it for contribution or indemnity. IPALCO's arguments rest heavily on a claim of successor corporation liability. Most of IPALCO's arguments start from the premise that Chicago Pacific Corporation is formerly known as Chicago, Rock Island & Pacific Railroad. The precise nature of the relationship Chicago Pacific bears to Rock Island, however, is not clear from the record. All that is before us is IPALCO's bald assertion that Chicago Pacific is the same entity as Rock Island and Chicago Pacific's equally bald assertion that it is not.

Chicago Pacific relies heavily on In re Erie Lackawanna Ry., 803 F.2d 881 (6th Cir. 1986), cert. denied, 481 U.S. 1070 (1987), for the proposition that it cannot be held liable as a successor in interest for the negligence of Rock Island. This most emphatically is not the holding of Erie Lackawanna. See Zulkowski v. Consolidated Rail Corp., 852 F.2d 73, 78 (3d Cir. 1988). The issue in that case was whether the Erie Lackawanna Railway had been "liquidated"

or "reorganized." Relying on specific factual "underlying realities," the United States Court of Appeals determined that the railway had undergone "straight liquidation" and that the plaintiffs could not proceed in their asbestos claim. Id. at 884-85. We can make no such determination on the record before us; therefore, if it is possible that Rock Island owed Stalter or IPALCO a duty of care, Chicago Pacific may remain liable. If this is the case, the relationship between Rock Island and Chicago Pacific remains an unresolved issue of material fact, and we must reverse and remand.

IPALCO alleges Rock Island committed acts or omissions of specific negligence. See Galloway v. Chicago, R. I. & P. R.R., 87 Iowa 458, 468, 54 N.W. 447, 450 (1893). IPALCO argues it has established actionable negligence. See Upp v. Darner, 150 Iowa 403, 406, 130 N.W. 409, 410 (1911). We believe Rock Island owed a duty of care to insure that its construction would not cause harm to people using the siding. That Rock Island may or may not have had a duty to notify IPALCO of the grade change does not change its duty to third parties. That IPALCO may have had knowledge of the reduced line clearance may affect this latter duty, but at most this fact can only reduce Chicago Pacific's relative fault. The question that remains is whether either Rock Island or Chicago Pacific may escape that duty of care by selling the real estate.

In Thomson v. Burke Engineering Sales Co., 252 Iowa 146, 153-56, 106 N.W.2d 351, 355-57 (1960), the Iowa Supreme Court discarded as archaic the notion that one could act negligently and avoid liability by claiming a lack of contractual privity. The Thomson court stated:

There can hardly be any doubt that liability should issue from negligence in the face of a danger to others that may be reasonably foreseen. This principle has been applied successfully in the case of personal property for the last forty years. It is equally applicable in the case of real property and will avoid in this field the confusion and uncertainty which is inherent in the application of the rule of nonliability with its numerous flexible and poorly defined exceptions.

Id. at 154, 106 N.W.2d at 356 (quoting Annotation, Negligence of Building or Construction Contractor as Ground of Liability Upon His Part for Injury or Damage to Third Person Occurring After Completion and Acceptance of Work, 58 A.L.R.2d 847, 872 (1958)). This appears to be in accord with Prosser and Keeton on the Law of Torts § 64 (5th ed. 1984). We conclude that one who negligently creates a condition on real estate may be held liable after that real estate is sold. Further, it appears a vendor may have a duty to disclose defects which a vendee may not discover. Id. Given the existence of this duty, we need look no further and must reverse and remand.

Chicago Pacific raises the "statute of repose," Iowa Code section 614.1(11), as a defense to both of IPALCO's claims. Section 614.1(11) would bar an "action arising out of the unsafe or defective condition of an improvement to

real property" that is "brought more than fifteen years after the date on which occurred the act or omission." The statute also states: "However, this subsection does not bar an action against a person solely in the person's capacity as an owner, occupant, or operator of an improvement to real property." Chicago Pacific's claim is raised for the first time on appeal, and we need not address it. Shill v. The Careage Corp., 353 N.W.2d 416, 420 (Iowa 1984) ("It is the basic rule of appellate practice that questions not presented to and not passed on by the trial court cannot be raised or reviewed on appeal." (citing Cole v. City of Osceola, 179 N.W.2d 524, 527 (Iowa 1970))). We make no finding concerning the applicability or the constitutionality of the statute.

Having found the existence of a duty at least by Chicago, Rock Island & Pacific Railroad and having determined that the relationship between Rock Island and Chicago Pacific remains an unresolved issue of material fact, we must reverse and remand.

REVERSED AND REMANDED.

Hayden, J., concurs; Habhab, J., dissents.

HABHAB, J. (dissenting)

I respectfully dissent. In doing so, I would affirm the trial court.

At the time of the accident, Chicago Pacific Corporation was not the owner or occupier of the property in question and had not been for at least one and one-half years prior to the accident. The general rule is that a vendor of land is not subject to liability for physical harm caused to his vendee (or others while upon the land after the vendee has taken possession) by any dangerous condition, whether natural or artificial, which existed at the time the vendee took possession. § 352 Restatement (Second) of Torts (1968). I realize that this same section of the Restatement refers to an exception; however, I would find that the exception does not apply for a fact question in this regard was not generated.