IN THE COURT OF APPEALS OF IOWA

No. 1-178 / 00-0823
Filed June 13, 2001

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CLERK SUPREME COURT

WILLIAM BRANDERHORST, JR.,
Plaintiff-Appellant,

vs.

WILLIAM M. BRANDERHORST,
Defendant-Appellee.

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

On appeal from the judgment in favor of the defendant on his negligence action based on an incident in which the defendant burned down the plaintiff's machine shed, plaintiff contends the court erred in failing to submit requested jury instructions regarding a particular specification of negligence. **REVERSED AND REMANDED.**

Steven J. Holwerda of Selby, Updegraff, Smith & Holwerda, Newton, for appellant.

John B. Grier of Cartwright, Druker & Ryden of Marshalltown, for appellee.

Considered by Sackett, C.J., Huitink and Streit, JJ.

SACKETT, C.J.

Plaintiff William M. Branderhorst, Jr., sought damages from his father, William Branderhorst, after a fire consumed a machine shed owned by plaintiff and used by both parties. Plaintiff contended defendant was responsible for the fire because of what he claimed was defendant's negligent use of an oxy-propane cutting torch inside the shed. This torch started a fire which ultimately destroyed the shed. The issue at trial was whether the defendant operator was negligent in handling the torch. At the first trial the district court submitted theories of specific negligence and res ipsa loquitur, and a verdict was returned for the plaintiff. The judgment was later reversed by this court on the basis that plaintiff had failed to establish the foundational facts necessary for the submission of res ipsa. *Branderhorst v. Branderhorst,* No. 8-659 / 98-0383, (Iowa Ct. App. Feb. 24, 1999). On retrial the jury found in favor of the defendant. Plaintiff appeals from this finding, contending he should have a new trial because the district court failed to instruct the jury on the additional specification of negligence that due care included protecting the hoses from flying slag. We reverse and remand for a new trial with that additional specification of negligence.

In his petition the plaintiff alleged the defendant was negligent "in the operation of the cutting torch, including, but not limited to, cutting through the torch hoses." At the close of the evidence after the second trial the plaintiff requested the jury instruction that negligence include "failing to protect the hoses from falling slag or sparks."

The defendant objected to the amendment, contending (1) because the evidence was closed he was denied the opportunity to question testifying experts on the question of whether the hoses were properly protected; (2) there was no evidence showing a standard as to what a welder is required to do to protect the hoses.

The district court determined it was in its discretion to grant or deny the proposed jury instruction/motion to amend. It denied the instruction/motion, ruling that there was no evidence of the standard for the proper use of the cutting torch.

Plaintiff contends that this was error and that the district court should have instructed on the specified standard of negligence, that defendant could be considered negligent for failing to protect the hoses from flying slag or sparks. Plaintiff further contends that this specification was supported by the pleadings because the petition did not limit negligence to cutting through the torch hoses, but included other negligence in the operation of the torch. We do not disqualify plaintiff's specification of negligence on grounds that it was not specifically pleaded. Iowa Rule of Civil Procedure 69(a) requires little specificity in the pleadings. Rule 69(a) requires only a short and plain statement of the claim; it does not require a pleading of the facts. *Doerring v. Kramer,* 556 N.W.2d 816, 818 (Iowa Ct. App. 1996).

Defendant contends that our review is of a denied Application for Leave to Amend and that consequently we review for abuse of discretion. Plaintiff contends our review is of a denied Jury Instruction and is for errors at law. Although plaintiff's request at trial was for an Application for Leave to Amend as

well as a Jury Instruction, and although the court stated it was denying plaintiff's "request to amend," the district court's decision to deny plaintiff's request centered around whether the jury had a standard upon which to determine negligence. Essentially, therefore, the district court's decision was a denial of a Jury Instruction. Our review is therefore for errors at law. *Beyer v. Todd,* 601 N.W.2d 35, 38 (Iowa 1999), Iowa R. App. P. 4.

In reviewing the issuance of jury instructions we look to see whether a proposed jury instruction was supported by substantial evidence in the record. *Guidichessi v. ADM Milling Co.,* 554 N.W.2d 563, 566 (Iowa Ct. App. 1996). Generally, Iowa law requires that a court give a jury instruction when it states a correct rule of law having application to the facts of the case and the concept is not otherwise embodied in other instructions. *Coker v. Abell-Howe Co.,* 491 N.W.2d 143, 150 (Iowa 1992); *Nichols v. Schweitzer,* 472 N.W.2d 266, 274 (Iowa 1991); *Stover v. Lakeland Square Owners Ass'n,* 434 N.W.2d 866, 868 (Iowa 1989). There must be substantial evidence in the record to support the instruction submitted. *Coker,* 491 N.W.2d at 150. Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion. *Id.; Nichols,* 472 N.W.2d at 274; *Dubuque Community Sch. Dist. v. PERB,* 424 N.W.2d 427, 431 (Iowa 1988). In weighing the sufficiency of the evidence, we give it the most favorable construction it will bear in favor of the party seeking submission, which in this case is the plaintiff. *Coker,* 491 N.W.2d at 150; *Hoekstra v. Farm Bureau Mut. Ins. Co.,* 382 N.W.2d 100, 107-08 (Iowa 1986); *Franken v. City of Sioux Center,* 272 N.W.2d 422, 428 (Iowa 1978).

Evidence at trial supporting the submission of this specification of negligence was the testimony of defendant's expert, Wandling. He testified that the fire could have started if flying sparks and slag burned through the hose. He believed, therefore, that the hose should be positioned in the operator's field of vision when the torch was in use to prevent any unnoticed slag from compromising the hose while the operator, unaware, continued using the flame. Wandling also testified that the particular hole position in which defendant was cutting at the time of the accident often produced this ejected, flying slag. Notably, Wandling concluded that, in spite of this additional possible cause (among others) of the fire, and regardless of the various theories as to defendant's position and the direction he faced, the defendant was exercising due care with respect to this flying slag; Wandling concluded that at the time of the accident the hoses and the tank were within defendant's field of vision, satisfying his standard for due care in protecting a hose from flying slag.

We disagree with the district court that there was not sufficient evidence of lack of due care with respect to flying slag and sparks to warrant a jury instruction that the failure to protect the hoses feeding an oxy-propane torch from slag and sparks constitutes negligence. In concluding that there was insufficient evidence to support a jury instruction to that effect, the district court stated:

> . . . although the evidence isn't – the evidence of negligence isn't limited to the testimony of an expert, there does have to be some standard put before the jury upon which they could make a judgment as to whether or not that standard has been breached or violated in any manner, and without having some standard as to what the proper operation of a cutting torch is, I do not think at this point and under this record when the parties and the two experts involved have indicated that as far as they were able to determine in their investigation that there wasn't any improper use, although there is a description of that you shouldn't have the hose under the

> work area, that's probably the only potential area I think which the jury would consider, and under this record there doesn't seem to be any evidence that it was, granted the jury has the opportunity to use their own judgment and interpret a witness' testimony and determine their credibility, but you still have to have some evidence of a breach of that standard, and there isn't any evidence in this case of that other than speculation. . . .

Wandling testified not only that flying slag and sparks may burn through the hose, causing a breach through which gas escapes and may catch fire, but also that in order to prevent a fire due to such a breach, the proper positioning of the hose should be within the operator's field of vision. Wandling testified that the defendant was cutting in a hole, evidence that there may have been a great deal of flying slag.

Evidence regarding the relative positions of the defendant, his work, the hose, the torch, and the tanks, as well as evidence showing defendant's vigilance or lack of vigilance in observing the slag and protecting the hose from it, support an instruction that failure by the defendant to protect the hose from flying slag is negligence. We find sufficient prejudice from the district court's denial of the jury instruction to warrant another trial.

We reverse the district court's ruling that there was insufficient evidence to submit a jury instruction that failure to protect against flying sparks and slag is negligence, and we remand this case to the district court for a new trial.

REVERSED AND REMANDED.