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IN THE COURT OF APPEALS OF IOWA

**HAROLD D. McLAMB and
PATSY McLAMB,**

Appellants,

v.

**IOWA-ILLINOIS GAS
AND ELECTRIC COMPANY,**

Appellee.

Filed October 7, 1977

$$\begin{array}{r} 231 \\ 2-59 \overline{)157} \end{array}$$

Appeal from Scott District Court - James R. Havercamp, Judge.

Plaintiffs appeal from order granting judgment notwithstanding jury verdict in personal injury action. Affirmed.

Raymond T. Walton and Joseph C. Creen, of Heninger & Heninger, of Davenport,
for appellant.

Dana Michael Craig and Charles W. Brooke, of Lane & Waterman, of Davenport,
for appellee.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

This is an action by an injured employee (plaintiff) and his wife against the owner of the premises upon which the injury was sustained. The injury occurred while plaintiff's employer, Fegles Power Service Corp., was completing a construction project on defendant's power station.

Trial to a jury resulted in a verdict in favor of the plaintiff for \$10,000 and no recovery to plaintiff's wife for loss of consortium. Plaintiffs filed a motion for new trial and defendant a motion for judgment notwithstanding the verdict. The trial court sustained the latter motion and entered judgment for the defendant. This appeal followed. We affirm the trial court.

The only issues which we need consider in disposing of this appeal are (a) whether there was a submissible jury issue as to the single theory of negligence which was submitted to the jury; and (b) if there was no submissible issue on the theory submitted whether there was a jury issue as to plaintiffs' right to recover under other theories of negligence alleged but not submitted by the trial court.

Plaintiff was employed as a boilermaker by Fegles Power Service Corp., an independent contractor engaged by defendant Iowa-Illinois Gas and Electric Company for the construction of a pollution control addition to defendant's power station at Bettendorf, Iowa. Plaintiff was severely injured on the construction site when a 14 ft. x 30 ft., 5 ton piece of steel duct work fell on him. Viewing the evidence most favorably to the plaintiffs, the injury occurred in the following manner.

Large multi-ton sheets of steel duct work were transported to the job site in railroad cars. Later these sections would become the frame of the precipitator addition to the plant located more than 100 feet above ground atop the existing power plant. The unloading of these sheets was accomplished by a team of workmen, two in the railroad car and two on the ground, who attached the duct work to a crane cable. The boilermakers on the ground would direct the crane operator and, by pushing on the still suspended steel, place it accurately on the ground. Each piece of duct work in the car on the day of the accident had two appendages with holes in them called lifting lugs to aid safe connection to the crane cable. In a proper unloading operation, a shackle resembling a "U" is put through the holes in the lifting lug and the choker loop in the crane cable and a large screw pin is placed through the gap in the top of the shackle's "U".

When his injury occurred plaintiff was performing ground duty. Immediately preceding the accident the crew using shackles, had unloaded one piece of duct work without incident. The injury occurred when in attaching the cable to the next piece of duct work the boilermaker in the car, Lawson, used shake-out-hooks, which resemble large "J's", rather than shackles. From his working position plaintiff was unable to see the back of the duct where the cable was attached and therefore could not see that shackles had not been employed. While plaintiff was guiding the duct for proper placement, the shake-out-hooks slipped out of the holes in the lifting lugs causing the steel duct to fall on him.

I. The issue submitted to the jury.

The sole theory of negligence submitted to the jury was, in the trial court's terminology, one of assumed duty. Jury instructions 10 and 12 presented this theory which was adapted from Restatement, Torts (2d) § 323. That section of the Restatement provides:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm, or

(b) the harm is suffered because of the other's reliance upon the undertaking.

Plaintiff urges that the evidence supports a submissible jury issue under this theory as a result of (a) actions of defendant's employees on the job site and (b) an assumption of certain duties in the contract between defendant and plaintiff's employer. We disagree with both claims. The evidence of action taken, if any, by defendant's employees with respect to safety practices on the job shows no more than isolated comments on obviously unsafe practices such as a worker not wearing a hardhat. There is no evidence to show any of defendant's employees undertook to protect plaintiff from the type of incident which caused his injury.

Nor is there any assumption of such responsibility by defendant in the contract documents. These merely provide "The Company reserves the right to demand

correction of any equipment or methods determined by The Engineer to be inadequate to meet specifications, or unsafe." We believe this contract provision shows no more than a reservation of a right by defendant and will not sustain a finding that it assumed a duty such as that urged by plaintiff. See Kerrigan v. Errett, 256 N.W.2d 394, 398 (Iowa 1977).

Lastly, with respect to the claimed "assumed duty," we note the complete absence of evidence or circumstances to support a finding that defendant was aware of or appreciated the danger involved in the incident wherein plaintiff was injured or that plaintiff in any manner relied upon defendant for protection. The essential elements under § 323 of the Restatement are missing and the trial court properly sustained the motion for judgment notwithstanding the verdict.

II. Other theories of negligence withdrawn from jury consideration.

As an alternative to his claim based on "assumed duty" plaintiff urges that a jury issue existed as to defendant's negligence based on other theories of recovery which were alleged but withdrawn from jury consideration by the trial court. We consider such other theories seriatim.

A. Restatement Torts (2d) §§ 416 and 427.

Plaintiff urges that the evidence would support recovery under Restatement Torts (2d) §§ 416, 427. Those sections provide:

§ 416. Work Dangerous in Absence of Special Precautions

One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.

and,

§ 427. Negligence as to Danger Inherent in the Work

One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger.

These sections present theories which have been adopted by our supreme court; they represent exceptions to the general rule that an employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants. *Porter v. Iowa Power and Light Company*, 217 N.W.2d 221, 232-33 (Iowa 1974); *Giarrantano v. The Weitz Co., Inc.*, 259 Iowa 1292, 147 N.W.2d 824 (1967); see also, Restatement, Torts (2d), § 409.

We conclude that these theories were properly withdrawn by the trial court. Comment "a" of § 416 notes that "the two rules [416, 427] represent different forms of statement of the same general rule, that the employer remains liable for injuries resulting from dangers which he should contemplate at the time he enters into the contract." Comment "b" of § 416 refers to Comment "b" under § 413 for explanation of the concepts of "peculiar risk" and "special precautions." Thus, by reference, it is stated that §§ 416 and 427 "are not concerned with the taking of routine precautions, of a kind which any careful contractor could reasonably be expected to take, against all of the ordinary and customary dangers which may arise in the course of the contemplated work. Such precautions are the responsibility of the contractor."

We do not believe that the circumstances which caused plaintiff's injuries were the product of a "special danger" as that term is used in the Restatement. Nor were "special precautions" needed to guard against the injury. The injury occurred as a result of failure to take routine precautions which plaintiff's employer could reasonably have been expected to take. We conclude that no jury issues were presented under §§ 416 or 427. See *Porter v. Iowa Power and Light Company*, 217 N.W.2d 221, 232-33 (Iowa 1974); see also, Restatement, 2d, Torts, § 427, Comment "d", and Restatement, 2d, Torts, § 426, Comments "a" and "b".

B. Restatement, Torts (2d), § 414.

The next specification relied on by plaintiff relates to Restatement, Torts (2d), § 414. This section provides:

One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

While there is some similarity between "retained control" under § 414 and "assumed duty" under § 323, the two doctrines are not the same. An essential element which must be established for recovery under a theory of retained control as provided in § 414 is that the defendant retain control over the "operative detail" of the work. *Porter v. Iowa Power and Light Co.*, 217 N.W.2d 221, 229 (Iowa 1974). We believe that the right to "demand correction of any equipment or methods determined by the Engineer to be inadequate to meet specifications, or unsafe" falls short of the type of retained control contemplated by § 414. Moreover, we do not believe that it can be inferred from the evidence that to the extent defendant did retain the right to correct "unsafe" methods of doing the work it failed to act with "reasonable care." No issue should have been submitted to the jury under the theory embraced in § 414, of the Restatement.

C. Restatement, Torts (2d), §§ 343 and 343A.

Lastly plaintiff urges the trial court erred in withdrawing the theories of recovery based on the obligations of possessors of land to their business invitees. These duties, as embraced in §§ 343 and 343A of the Restatement, Torts (2d), are discussed in *Hanson v. Town and Country Shopping Center*, 259 Iowa 542, 144 N.W.2d 870 (1966). Such duties are based upon a showing of superior knowledge as to the danger or potential danger. Because our review of the entire record reveals no basis upon which defendant knew or should have known of the dangerous condition which caused plaintiff's injury we hold the trial court properly withdrew any issues under §§ 343 and 343A.

We have considered all of those issues necessary to decide the appeal and find no ground for reversal. The judgment of the trial court is affirmed.