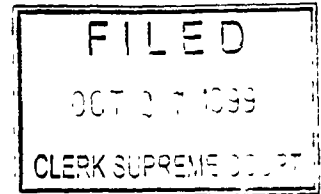


IN THE COURT OF APPEALS OF IOWA

No. 1999-153 (9-369) / 98-1950

Filed October 27, 1999



ALFRED L. JENSEN,
Plaintiff-Appellant,

vs.

RANDY VANDERLEEST,
Defendant-Appellee.

Appeal from the Iowa District Court for Jasper County, Darrell Goodhue, Judge.

Plaintiff appeals from the district court ruling granting summary judgment in favor of defendant on plaintiff's personal injury action. Plaintiff contends the court erred by failing to find there were genuine issues of material fact precluding summary judgment.

AFFIRMED.

Richard R. Schmidt of Hedberg, Ward, Owens & Vonderhaar, Des Moines, for appellant.

Claude H. Freeman and Andrew D. Hall of Grefe & Sidney, P.L.C., Des Moines, for appellee.

Considered by Sackett, C.J., and Zimmer and Miller, J.J.

MILLER, J.

Appellant Alfred L. Jensen was injured while helping co-employee Ross Ford put up drywall in their employer's new building. A drywall jack, whose release mechanism apparently did not work correctly, injured him. He sued co-employees Steve Thomas and Randy Vanderleest, claiming gross negligence, as contemplated in Iowa Code section 85.20, on the part of both. Both defendants sought summary judgment.

Jensen conceded that he could sustain no cause of action based on gross negligence as to Thomas. The district court granted summary judgment to both defendants. It did so as to Vanderleest on two grounds. First, the court concluded there was no evidence that Vanderleest directed Jensen to use the drywall jack or even assist in the drywalling. Second, the court concluded that even if there were evidence that Vanderleest required that Jensen use the drywall jack, there was no evidence that Vanderleest knew or should have known that he was placing Jensen in a "zone of imminent danger," because there was no history of accidents with the drywall jack, no evidence that Vanderleest was informed or knew of what dangers, if any, the jack's defect presented, how or what injury might occur or how to avoid the consequences of the defect, and thus no evidence that Vanderleest was aware of a "high probability of harm," or that there was in fact a high probability of harm.

Jensen appeals the district court's grant of summary judgment to Vanderleest. The issue is whether a genuine issue of material fact exists allowing Jensen's gross negligence claim against Vanderleest to proceed to trial. Otherwise stated, the issue is whether a

genuine issue of material fact exists as to all elements of a section 85.20 gross negligence claim against co-employee Vanderleest. As we believe there is not, we affirm the district court's grant of summary judgment.

I. Scope and standard of review. We review a district court ruling on a motion for summary judgment for correction of errors at law. Summary judgment will be upheld if the moving party shows there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. Thus, we first determine whether there is any genuine issue of material fact. If not, we must then decide whether the moving party is entitled to judgment as a matter of law.

Financial Marketing Services, Inc. v. Hawkeye Bank & Trust of Des Moines, 588 N.W.2d 450, 455 (Iowa 1996).

An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. When the dispute is over fact that might affect the outcome of the suit under the applicable law, the issue is likewise "material."

Id.

We examine the record before the district court to determine whether a genuine issue of material fact exists and whether the district court correctly applied the law. *Anderson v. Miller*, 559 N.W.2d 29, 31 (Iowa 1997). In doing so, we view the facts in the light most favorable to the party opposing the motion for summary judgment. *Id.* The nonmoving party is entitled to every legitimate inference that reasonably can be deduced from the evidence and

summary judgment is inappropriate if reasonable minds can differ on how the issue should be resolved. *Dickerson v. Mertz*, 547 N.W.2d 208, 212 (Iowa 1996).

II. The facts. The district court decided this case on a motion for summary judgment. We therefore review the whole record in a light most favorable to the party opposing the motion, the plaintiff Jensen. *Gerst v. Marshall*, 549 N.W.2d 810, 812 (Iowa 1996). In this case the record for summary judgment consists of the pleadings and numerous affidavits. The record contains the following undisputed facts.

At all times relevant to this lawsuit Jensen, Ed (or Edd) Dean, Ross Ford, and Vanderleest were all employed by Jacob North Printing (JNP). Vanderleest was Jensen's supervisor. Jensen's primary duty was making deliveries. On February 28, 1996, the day of the incident involved in this lawsuit, Jensen had been out making deliveries, returned to a new JNP office in Newton, Iowa, and was informed by Vanderleest there were not any more deliveries for the day.

JNP was involved in a construction project at its new office. It had been going on since early January, 1996. It included putting up drywall. JNP employees were doing some of the drywalling work. Several JNP employees had earlier discussed that they needed a drywall jack to do the drywalling. Dean had a drywall jack that he had built, and brought it to the job the next day after the need for one had been discussed. The drywall jack had been at the JNP office at least one week before the February 28, 1996 incident.

On February 28, 1996, Vanderleest asked Jensen to go to another room and help Ford with the construction. Jensen went in. A sheet of drywall had been put up and secured to the ceiling using the drywall jack. Jensen went to the drywall jack to lower it. As he started to do so, Ross started to yell at him to be careful with the jack, but before he finished his statement the jack lowered rapidly striking Jensen and injuring him. Prior to this incident Jensen had not been informed that there were any problems with the jack or lowering it.

Earlier on the day of February 28, 1996, Dean (and another person or persons other than Jensen) had without incident hung one piece of drywall using the drywall jack. Vanderleest had personally used the jack without incident a number of times during the week prior to Jensen's accident. Dean had used the drywall jack often prior to February 28, 1996, without incident. There is no evidence in the record that prior to the February 28, 1996 accident the drywall jack was ever involved in an accident or incident which caused or threatened to cause personal injury or property damage.

When the record before the district court is viewed in the light most favorable to Jensen, that record further supports the following facts and legitimate inferences that reasonably can be deduced from the evidence. Vanderleest's instructions to Jensen on February 28, 1996 were to go in and help Ford put up drywall on the ceilings. Prior to the drywall jack being used at the JNP office, Dean informed Ford and Vanderleest to be careful with it because the release mechanism did not work correctly. Dean had shown Ford how

to use the jack, whose locking pin did not work correctly. Nobody showed Jensen how to use the jack prior to the February 28, 1996 incident in which Jensen was injured.

III. Analysis. At times relevant to this lawsuit Iowa's workers' compensation statute provided in relevant part at section 85.20 (1995):

The rights and remedies provided in this chapter . . . for an employee on account of injury . . . for which benefits under this chapter . . . are recoverable, shall be the exclusive and only rights and remedies of such employee . . . at common law or otherwise, on account of such injury . . . against:

1. The employee's employer; or
2. Any other employee of such employer, provided that such injury . . . arises out of and in the course of such employment and is not caused by the other employee's gross negligence amounting to such lack of care as to amount to wanton neglect for the safety of another.

Although an employer is always immune from common law tort liability pursuant to this provision, an injured worker may maintain a common law tort action against a co-employee to recover for injuries, but only if the employee can establish that his or her injuries were caused by the co-employee's "gross negligence amounting to such lack of care as to amount to wanton neglect for the safety of another." The Code of Iowa, section 85.20; *Walker v. Mlakar*, 489 N.W.2d 401, 403 (Iowa 1992).

The leading case defining and describing the elements necessary to establish "gross negligence amounting to such lack of care as to amount to wanton neglect for the safety of another" is *Thompson v. Bohlken*, 312 N.W.2d 501 (Iowa 1981). In that case the Iowa

Supreme Court stated that there are three elements necessary to establish such gross negligence, and that they are:

(1) knowledge of the peril to be apprehended;

(2) knowledge that injury is a probable, as opposed to a possible, result of the danger;

and

(3) a conscious failure to avoid the peril.

312 N.W.2d at 505.

The scope of a claim against a co-employee is severely restricted, particularly by adding the requirement of wantonness in defining gross negligence. *Woodruff Const. Co. v. Mains*, 406 N.W.2d 787, 789-90 (Iowa 1987). Policy reasons, as well as the language of the statute itself, suggest a rather restricted scope of claims allowed by section 85.20's exception to the otherwise applicable exclusive remedy provisions of that section. Some of these policy reasons are set forth in *Taylor v. Peck*, 382 N.W.2d 123, 126 n.2 (Iowa 1986).

The district court granted Vanderleest summary judgment on two grounds. The first ground appears to relate to the third element set forth in *Thompson*, and the second ground relates to the second element set forth in *Thompson*. Because we conclude the district court was correct on the second ground, we find it unnecessary to address the first.

The Iowa Supreme Court has stringently maintained that an injured worker must prove all of the elements of the *Thompson* test in order to establish a coworker's "gross negligence"

for purposes of section 85.20. *See, e.g., Mlakar*, 489 N.W.2d at 403, and the cases cited therein.

The second element set forth in *Thompson* requires more than a showing of the defendant's actual or constructive knowledge of the "actuarial foreseeability -- even certainty -- that 'accidents will happen' Unless the defendants [are shown to have known] that their conduct would place their co-employees in imminent danger, so that someone would probably -- more likely than not -- be injured because of the conduct, then the knowledge does not satisfy the essential elements of a section 85.20 gross negligence action... ." *Alden v. Genie Industries*, 475 N.W.2d 1, 2 (Iowa 1991) (quoting from *Henrich v. Lorenz*, 448 N.W.2d 327, 334 n.3 (Iowa 1989)). In short, the plaintiff must show that the defendant knew or should have known that his conduct placed the plaintiff in a zone of imminent danger. *Alden*, 475 N.W.2d at 2.

The requisite showing of a zone of imminent danger is made in one of two ways, the first of which is to show a defendant's actual or constructive awareness of a history of accidents under similar circumstances. *Alden*, 475 N.W.2d at 2. The undisputed evidence shows that earlier on the day of Jensen's accident Dean and another person or persons had without incident hung one piece of drywall using the drywall jack; that Vanderleest had personally used the jack without incident many times during the week prior to Jensen's accident; and that Dean, who had made and owned the jack, had used it often prior to February 28, 1996 without incident. There is no evidence that Vanderleest had actual or

constructive knowledge of any history of accidents or injury with the jack. Jensen has failed to generate a genuine issue of material fact concerning any claim that Vanderleest had actual or constructive awareness of a history of accidents involving the drywall jack.

Alternatively, the requisite showing of a zone of imminent danger may be made by showing that a high probability of harm is manifest even in the absence of a history of accidents or injury. *Alden*, 475 N.W.2d at 3. Viewing the evidence in the light most favorable to Jensen: Vanderleest was told only to be careful with the jack, that the release mechanism did not work correctly; after the jack had been used on the project without incident for over a week Ford, whom Dean had shown how to use the jack, was doing some drywalling using the jack and Vanderleest directed Jensen to assist him; and Vanderleest did not inform Jensen that the release mechanism did not work correctly. There is no evidence that Vanderleest knew or was informed of what danger, if any, existed as a result of the release mechanism not working correctly, and no evidence of whether such danger was thought to be to persons, drywall or other property, or to the drywall jack itself. The district court correctly concluded that Jensen has failed to establish facts from which it could be found that a high probability of harm to a person or persons existed despite the total absence of a history of accidents or injury.

IV. Disposition. In summary we conclude, as the district court did, that the plaintiff has failed to generate a genuine issue of material fact concerning the second *Thompson* element, knowledge on the part of the defendant Vanderleest that injury was a probable, as

opposed to possible, result of the plaintiff working with the drywall jack which had been used on many occasions without accident or injury. Accordingly, we affirm the district court's grant of summary judgment.

Affirmed.