FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

311

GREGG A. TALLMAN,

Plaintiff-Appellant,

vs.

ROBERT WRIGHT,

Defendant-Appellee.

8-624
88-286

Appeal from the Iowa District Court for Polk County (No. CL50-29590), George W. Bergeson, Judge.

Plaintiff appeals the ruling granting defendant summary judgment pursuant to Iowa Rule of Civil Procedure 237(c). **AFFIRMED.**

Gregg A. Tallman, pro se, for plaintiff-appellant.

Thomas W. Foley of Nyemaster, Goode, McLaughlin, Emery & O'Brien, P.C., Des Moines, for defendant-appellee.

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

HABHAB, J. 312

After collecting worker's compensation benefits from his employer, American Can Company, plaintiff-appellant Gregg Tallman filed suit for additional compensation alleging two supervisory employees, Robert Wright and Norm Rosak, and American Can were grossly negligent as defined by Iowa Code section 85.20 (1987). American Can was dismissed for the reason appellant's remedy against American Can lies under the Worker's Compensation Act, and Mr. Rosak was dismissed because of plaintiff's failure to serve notice on him. The trial court later granted defendant-appellee Wright summary judgment pursuant to Iowa Rule of Civil Procedure 237(c), and plaintiff appeals that ruling. We affirm.

The principles applied by this court when reviewing such a grant of summary judgment were recently stated in Hertz Farm Management, Inc. v. Twito, 434 N.W.2d 907, 908-09 (Iowa App. 1988), as follows:

> Summary judgment is proper when there is no genuine issue of fact and the moving party is entitled to the judgment as a matter of law. The burden of showing the nonexistence of a material fact is upon the moving party. While an adverse party generally cannot rest upon his pleadings when the moving party has supported his motion, summary judgment is still not proper if reasonable minds could draw different inferences and conclusions from the undisputed facts. In this respect, summary judgment is functionally akin to a directed verdict; every legitimate inference that reasonably can be deduced from the evidence should be afforded the nonmoving party, and a fact question is generated if reasonable minds could differ on how the issue should be resolved. (citations omitted).

Plaintiff's evidence, when viewed with every legitimate inference, would establish that on February 17, 1981, plaintiff injured his right shoulder while employed by American Can Company. At the time of the injury, plaintiff was operating a large machine called a "sheet line" extruder, which produces a continuous sheet of plastic that moves from the die through a carriage to be cooled, trimmed, and wound into rolls. Occasionally the sheet breaks, causing the machine to malfunction. The operator is supposed to shut off the machine and mechanically move the carriage away from the die so the sheet can be rethreaded.

In his deposition, plaintiff said a hydraulic oil leak often caused the carriage rollers to just spin on the tracks. The carriage would then have to be moved away from the die manually by pushing the carriage. Plaintiff admitted performing this maneuver many times without incident. Defendant, plaintiff's foreman at the time of the injury, had been told of the oil leak. Plaintiff argues the company refused to fix the leak because of the losses which would result if the machine was shut down for such a repair. He does not attach the responsibility of repair to the defendant.

Plaintiff stated when he and another employee tried to manually move the carriage on the day of the injury, he could not do so because a steel tube called a "trim chute"

was blocking the way. It was plaintiff's contention a cable, which prevents this obstruction, had been removed by maintenance workers approximately a week before and not replaced. Plaintiff did not come forward with any facts that would support a finding defendant knew or was aware of the missing cable or possible obstruction of the carriage by the trim chute prior to the accident.

Plaintiff's deposition testimony was that he suffered lumbar disk damage, whiplash, cervical damage, ruptured scapular muscle, and compressed vertebra in the thoracic region of his spine requiring five surgical procedures, traction, and extensive physical therapy. He also claims cancerous cysts and tumors developed on the back of his injured shoulder due to his exposure to toluene fumes from glue at American Can.

In his deposition, plaintiff conceded that defendant had no control over the amount of toxic chemicals used by American Can. The defendant produced no evidence of other American Can employees who developed tumors or cysts. The American Can nurse and defendant filed affidavits stating they are not aware of any employees with such problems. Plaintiff produced no evidence of other employees injured while manually pushing the carriage of the machine involved.

Defendant's motion for summary judgment was supported by affidavits of defendant, American Can's nurse, and

portions of plaintiff's own deposition testimony. During the hearing, plaintiff did not produce additional testimony or affidavits from doctors or witnesses in support of his claim defendant's acts or omissions were grossly negligent and were the proximate cause of his injuries.

The trial court correctly found the provisions of the Iowa's Worker's Compensation Act, Chapter 85, Code of Iowa (1987) is plaintiff's sole source of compensation for an injury arising out of and during his employment at American Can Company. The trial court also was correct, and the parties agree, Iowa Code section 85.20 (1987) requires plaintiff prove defendant, a coemployee, was grossly negligent and such behavior was the proximate cause of plaintiff's injury before recovery is allowed.

The term "gross negligence" is statutorily defined as "such lack of care as to amount to wanton neglect of the safety of another." Iowa Code § 85.20(2) (1987). Case law regarding these claims states plaintiff must prove three elements to establish gross negligence: (1) fellow employee's knowledge of the peril to be apprehended, (2) fellow employee's knowledge that injury is a probable, as opposed to a possible, result of the danger, and (3) fellow employee's conscious failure to avoid the failure. Eister v. Hahn, 420 N.W.2d 443, 446 (Iowa 1988); Riessen v. Neville, 425 N.W.2d 665, 668 (Iowa App. 1988); Taylor v. Peck, 382 N.W.2d 123, 126 (Iowa 1986); Thompson v. Bohlken, 312 N.W.2d 501, 505 (Iowa 1981).

The trial court's ruling granting defendant summary judgment states plaintiff failed to come forward with specific facts sufficient to create a genuine issue of material fact regarding all three elements. We agree.

As to the first element, plaintiff did not present any evidence defendant actually knew a cable securing the trim chute was not replaced by the maintenance personnel prior to the accident. Defendant did know of the oil leak prior to the injury. Plaintiff presented no evidence of previous injuries to employees while manually moving the carriage, although his deposition testimony indicated he and others frequently performed this maneuver with the oil leak present. Defendant's knowledge of the leak alone does not satisfy the element requiring his knowledge of the peril.

It is clear from the record that there is not a genuine issue of material fact as to the second element. There is no evidence whatever that defendant was aware by observation or experience that such injury as claimed by the plaintiff would be a probable consequence of the operational practices of which he was claimed to be aware. Nor is there any evidence that any other employee similarly situated had been injured. Like in Thompson, the most the evidence establishes under the circumstances is a want of ordinary care. Thompson, 312 N.W.2d at 505.

Plaintiff's deposition testimony indicated that operators of this machine who could not manually push the

carriage would get mechanized dollies or help to do the job. One could possibly imagine a slip and fall situation involving the oil leak, but plaintiff was injured pushing the carriage which was blocked by the trim chute. The other employee helping plaintiff push the machine that day was not injured.

As to the third element, we find the lack of proof most obvious. The substance of plaintiff's pleadings, motions, deposition testimony, and hearing testimony was that defendant had a duty to "inspect, discover, and prevent unsafe and hazardous employment conditions." Plaintiff admitted the company, rather than defendant, had made the decision not to repair the oil leak. The only evidence of defendant's actual knowledge of the cause of plaintiff's accident was plaintiff's testimony defendant took him back to the machine, pointed to the trim chute, and said a cable was missing. There was no allegation defendant had actual knowledge of the missing cable before the injury occurred and still ordered plaintiff to manually attempt pushing the carriage.

Plaintiff also contended he had doctors and government officials whose testimony would link his exposure to toxic fumes while working at American Can to his development of cancerous growths. He presented no affidavits or other credible evidence to support his allegations that the Occupational Safety and Health Administration (OSHA) or the

Iowa Occupational Safety and Health Administration (IOSHA) standards were being violated, defendant had actual knowledge of such violations, or that such violations could be controlled by defendant who failed to do so. See Eister v. Hahn, 420 N.W.2d 443, 445 (Iowa 1988). In plaintiff's deposition testimony and one of his pleadings, he stated the allegations regarding the toxic chemicals "was not really related to [defendant]" who had no control over the situation.

The trial court's granting of a summary judgment in defendant's favor is affirmed. Costs of the appeal are taxed to plaintiff.

AFFIRMED.