IN THE COURT OF APPEALS OF IOWA

No. 2-1123 / 12-0640
Filed February 13, 2013

JESSE ANDERSON,
Plaintiff-Appellant,

vs.

REX BUSHONG, JOHN BUSHONG, and GREG LONG,
Defendants-Appellees.

Appeal from the Iowa District Court for Poweshiek County, Lucy J. Gamon, Judge.

Jesse Anderson appeals a partial grant of summary judgment and a defense verdict on his co-employee gross negligence claims. **AFFIRMED.**

Jeffrey Lawrence Goodman of Goodman & O'Brien, P.C., West Des Moines, for appellant.

Patrick Roby and Robert Hogg of Elderkin & Pirnie, P.C., Cedar Rapids, for appellees.

Considered by Potterfield, P.J., and Danilson and Tabor, JJ.

TABOR, J.

This action involves Jesse Anderson's claims of co-employee gross negligence under Iowa Code section 85.20 (2009). Anderson shattered his heel bones after falling eleven feet from the deck of a construction site onto a concrete basement floor. He alleges his coworkers were liable for not following federal regulations or the construction company manual regarding safe practices for covering stairwell holes.

On appeal, Anderson contends the district court erred by granting summary judgment in favor of two coworkers, John Bushong and Greg Long, where material fact questions existed that would allow a jury to find each was grossly negligent. As for the trial of the sole remaining defendant, foreman Rex Bushong, Anderson challenges the court's submission of comparative fault instructions to the jury. Last, Anderson argues the court improperly excluded the foreman's statements regarding his post-accident conduct.

Because we find the two coworkers could not have known Anderson's injuries would be a probable, as opposed to a possible, result of the unmarked plywood hole covering—even when taking each contested fact in the light most favorable to Anderson—we affirm the summary judgment ruling. We also conclude the district court's submission of comparative fault instructions did not cause Anderson prejudice. Finally, because the foreman's statements that he would not change the manner in which he covered holes was not relevant to Anderson's co-employee gross negligence claim, the district court did not err in excluding them from the record. Finding no error, we decline to order a new trial.

I. Background Facts and Proceedings

Jesse Anderson began working as a general laborer for the Bushong Construction Company on September 2, 2009. The company was building a 39,000 square foot warehouse in Montezuma, Iowa, which included a concrete deck elevated approximately eleven feet above a concrete basement. Anderson worked full-time on the construction site and helped pour the concrete deck.

On November 2, 2009, the work crew cut two holes in the deck to be used for stairwells; each hole measured roughly four foot, three inches by fifteen foot, one-half inch. Foreman Rex Bushong directed workers to place several four-foot by eight-foot plywood boards over the holes. The plywood boards were unmarked and unsecured, and no warnings, guardrails, or barricades highlighted the location of the holes.

One week later, on November 9, 2009, the foreman instructed the workers to prepare the deck for application of a chemical sealer. Although parties dispute the language the foreman used and whether he meant for the crew to remove the hole coverings along with the deck debris, they agree the foreman did not specifically state whether the plywood should be removed or left in place. The foreman then left the jobsite.

Anderson lifted one of the plywood boards and, intending to push the wood off the edge of the deck to the ground below, stepped forward into the hole. He fell into the basement, shattering both heel bones. Anderson filed a workers' compensation claim.

On November 12, 2010, Anderson filed suit for co-employee gross negligence, naming Rex Bushong and "John Doe" as defendants. Anderson amended his petition on March 28, 2011 to include John Bushong. On June 10, 2011, he added Greg Long, Mike Bushong and John Van Roekel. John Bushong and Greg Long were responsible for devising and implementing safety practices and training for the construction company. John Bushong and Long each had visited the worksite and observed the covered holes before Anderson's fall, but were not on site at the time of the accident. Van Roekel and Mike Bushong were Anderson's co-workers who were designated as "foremen pro tem" when Rex Bushong was not on site. In his final amended petition filed on October 11, 2011, Anderson listed coworkers Rex Bushong, John Bushong, Mike Bushong, Greg Long, and John Van Roekel as defendants for his gross negligence claim. On October 24, 2011, the five defendants denied liability and asserted comparative fault as an affirmative defense.

Anderson filed a motion for summary judgment. His co-workers resisted and filed their own motion for summary judgment. After hearing arguments on both motions, the district court dismissed four of the five defendants, finding the summary judgment record did not support a material issue of fact on their alleged gross negligence. Because the court found material facts in dispute regarding Anderson's claim against foreman Rex Bushong, it denied the defense motion pertaining to him. The court denied Anderson's motion in full.

Trial began on January 24, 2012, and on February 1, 2012, the jury found Rex Bushong was not grossly negligent. Following the district court's denial of his post-trial motions, Anderson timely filed his notice of appeal.

II. Scope and Standard of Review

We review summary judgment rulings for correction of legal error. *Koeppel v. Speirs*, 808 N.W.2d 177, 179 (Iowa 2011). Summary judgment is appropriate when no genuine issues of material fact exist and the movant is entitled to judgment as a matter of law. *Employers Mut. Cas. Co. v. Van Haaften*, 815 N.W.2d 17, 22 (Iowa 2012). "An issue of fact is 'material' only when the dispute involves facts which might affect the outcome of the suit, given the applicable governing law." *Wallace v. Des Moines Indep. Sch. Dist. Bd. of Dirs.*, 754 N.W.2d 854, 857 (Iowa 2008).

We review the record in the light most favorable to the nonmoving party to determine whether the movants have met their burden. *C & J Vantage Leasing Co. v. Outlook Farm Golf Club, LLC*, 784 N.W.2d 753, 756 (Iowa 2010). We allow all legitimate inferences that can be reasonably deduced from the record in favor of the nonmovant. *Feld v. Borkowski*, 790 N.W.2d 72, 75 (Iowa 2010). If reasonable minds could differ on resolution of that fact, summary judgment should be denied. *Id.*

We review whether a comparative-fault defense was properly submitted to the jury for correction of errors at law. *Mulhern v. Catholic Health Initiatives*, 799 N.W.2d 104, 110 (Iowa 2011).

We typically use an abuse-of-discretion standard to review evidentiary rulings. *Hall v. Jennie Edmonson Mem'l Hosp.*, 812 N.W.2d 681, 685 (Iowa 2012) (applying standard to subsequent-remedial-measure analysis). But where a challenge to an evidentiary ruling implicates the interpretation of a statute, our review is for errors at law. *Keefe v. Bernard*, 774 N.W.2d 663, 667 (Iowa 2009).

In this case, while section 85.20 is the subject of the litigation, that statute does not address the admissibility of evidence, and therefore a legal-error analysis would not be the proper standard of review. *See State v. Stone*, 764 N.W.2d 545, 548 (Iowa 2009) ("[W]hen the admission turns on the interpretation of a statute, this court reviews the district court decision for errors at law."); *cf. Pavone v. Kirke*, 801 N.W.2d 477, 491 (Iowa 2011) (reviewing admissibility under statute of frauds for legal error); *Keefe*, 774 N.W.2d at 667–76 (applying legal error review to statutorily-protected privileges). We review Anderson's evidentiary claim for an abuse of discretion. *See Hall*, 812 N.W.2d at 685. Reversal is proper only if exclusion resulted in prejudice to Anderson's case. *See Scott v. Dutton-Lainson Co.*, 774 N.W.2d 501, 503 (Iowa 2009).

III. Analysis

Because Anderson's appeal arises from a claim of his coworkers' gross negligence, an overview of that cause of action will aid in our review.

Our workers' compensation law provides an injured worker's exclusive and sole remedy for employment-based injuries unless the injury is "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." Iowa Code § 85.20;

Hernandez v. Midwest Gas Co., 523 N.W.2d 300, 305 (Iowa Ct. App. 1994). The legislature intended this section to be a narrow exception to common law tort immunity. *See Walker v. Mlarkar*, 489 N.W.2d 401, 405 (Iowa 1992) ("An injured worker generally is entitled to workers' compensation for injuries without regard to the fault of the worker, employer, or the worker's co-employees [and in] exchanged the employer and co-employees are given immunity from common law tort liability.").

Gross negligence implies conduct that, "while more culpable than ordinary inadvertence or unattention, differs from ordinary negligence only in degree, not kind." *Thompson v. Bohlken*, 312 N.W.2d 501, 504 (Iowa 1981). To prevail on a claim of gross negligence, the plaintiff must prove: "(1) a 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." *Id.* at 505.

Allegations of gross negligence carry a high burden of proof, and a plaintiff must satisfy all three elements before liability can attach. *Johnson v. Interstate Power Co.*, 481 N.W.2d 310, 321 (Iowa 1992). "Simple or ordinary negligence will not justify recovery." *Henrich v. Lorenz*, 448 N.W.2d 327, 332 (Iowa 1989); *see Dudley v. Ellis*, 486 N.W.2d 281, 283 (Iowa 1992) (listing cases in which plaintiffs failed to present substantial evidence of gross negligence to submit to jury).

For an action under section 85.20, we define wantonness as "an act of an unreasonable character in disregard of a risk known to or so obvious that he

must be taken to have been aware of it, and so great as to make it highly probable that harm would follow." *Thompson*, 312 N.W.2d at 504–05. Wanton conduct falls

> somewhere between the mere unreasonable risk of harm in ordinary negligence and intent to harm. The usual meaning is that the actor has intentionally done an act of an unreasonable character in disregard of a risk known to or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow.

Hernandez, 523 N.W.2d at 305 (internal quotations and alternations omitted); *see also Thompson*, 312 N.W.2d at 505 (holding wantonness "implies an indifference to whether the act will injure another"). "We have said that 'wanton' conduct involves, among other things, a realization of *imminent* danger." *Walker*, 489 N.W.2d at 405 (emphasis in original).

A. Did the District Court Err by Granting Summary Judgment on Behalf of John Bushong and Greg Long?

1. Did the Record Include a Genuine Issue of Material Fact?

Anderson contends several questions of material fact defeat the summary judgment dismissing defendants John Bushong and Greg Long. Although both workers claimed they believed the plywood coverings provided adequate protection, Anderson argues the extent of their knowledge, training, and experience with regard to the Occupational Safety and Health Administration (OSHA) standards and the Bushong safety guidelines are factual questions to

submit to a jury, and that evidence on record shows each knew the coverings did not comply with those regulations.[1]

The defendants contend that even if a jury found they knew the plywood coverings violated both OSHA standards and the Bushong safety manual, and disbelieved their claim that they thought the coverings were safe, those findings still would not prove either of them knew Anderson was in "imminent" risk of danger. The defendants assert any fact issue, even if resolved in Anderson's favor, shows they realized at most that an injury was "possible"—not "probable."

Although violations of OSHA regulations can show negligence per se in ordinary negligence cases, those same violations do not necessarily amount to gross negligence. *Eister v. Hahn*, 420 N.W.2d 443, 445 (Iowa 1988). And when defendant coworkers are unaware of the potential harm, those regulations are irrelevant and have no effect on the claim of gross negligence. *Walker*, 489 N.W.2d at 407. The same can be said for company-enacted policies. *Id.*

Because a jury could infer John Bushong and Greg Long were aware of the hazard and noncompliance, violations of OSHA or company standards would

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[1] Anderson asserts, "A reasonable jury could conclude that John Bushong and Greg Long should have known through training and experience that the hole cover employed on [the worksite] would probably lead to injury and that they consciously failed to remedy the situation." But constructive knowledge is insufficient to satisfy the first and third elements of the tripartite test under section 85.20. *See Walker*, 489 N.W.2d at 404. The threshold issue is whether the coworker "'has intentionally done an act of an unreasonable character in disregard of a risk *known to or so obvious* that he *must* be taken to have been aware of it, and so great as to make it highly probable that harm would follow.'" *Id.* (quoting *Thompson*, 312 N.W.2d at 504–05 and adding emphasis). To allow a coworker's constructive knowledge—that he or she should have known—of the hazard to satisfy the first element would eviscerate the third element that the coworker consciously fails to avoid the peril. *Id.* Accordingly, Anderson must show both workers actually knew of the danger.

have been admissible.[2] *See Gerace v. 3-D Mfg. Co.*, 522 N.W.2d 312, 319 (Iowa Ct. App. 1994). But even if the unmarked plywood boards did not comply with OSHA regulations or company safety standards, Anderson must show more to satisfy the heightened standard in section 85.20.

Anderson argues these violations, plus the defendants' knowledge the plywood did not comply with safety regulations, created a jury question on the element of "probable" injury.[3] We disagree that the defendants' knowledge of the violations satisfied the high hurdle posed by the second requirement under section 85.20—that either coworker knew Anderson's injury was a "probable" consequence of the failure to enforce safety rules. *See Thompson*, 312 N.W.2d at 505.

To satisfy the action's second element, a plaintiff must show more than the defendant's actual or constructive knowledge of the actuarial foreseeability or even certainty that "accidents may happen.'" *Alden v. Genie Indus.*, 475 N.W.2d 1, 2 (Iowa 1991). The defendants must know their conduct would place a coworker in imminent danger, that an injury would probably—more likely than not—be a result of their conduct. *Id.* A plaintiff can show a zone of imminent danger in two ways: first, by proving the "defendant's actual or constructive

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[2] In his reply brief, Anderson reminds us that the district court denied the defendants' motion in limine to exclude the OSHA standards as inadmissible. He argues because neither defendant appealed the ruling, that issue is not properly before us. Rather than determining whether the standards were admissible, we analyze the case law to consider the effect of OSHA violations on the gross negligence claim.

[3] Anderson argues a jury could have found both coworkers knew falls are one of the leading causes of injury and death in the construction industry. While falling may be the most frequent form of harm, knowledge of that statistic alone does not prove that Anderson would "probably" fall as opposed to "possibly" fall.

awareness of a history of accidents under similar circumstances," or second, "where the high probability of harm is manifest even in the absence of a history of accidents or injury." *Id.* at 2–3.

Neither John Bushong nor Greg Long was on the jobsite when Anderson fell into the stairwell. They each visited the site before November 9, 2009 and saw the plywood-covered holes. Anderson contends their culpability lies in failing to instruct coworkers to cover stairwell holes in a manner that complied with OSHA and Bushong safety regulations. Anderson additionally notes both coworkers took a ten-hour OSHA course that included instruction on the dangers of improperly covered holes, while he and other workers had not.

We find the failure of these coworkers to ensure workplace safety compliance did not place Anderson in the zone of imminent danger. First, witnesses testified that bare plywood boards were the typical manner in which holes were covered and that in the thirty-year history of the construction company no employee had been injured as a result. Without a history of falls, Anderson must show the high probability of injury was obvious.

On the point of obvious dangerousness, Anderson directs us to *Swanson v. McGraw*, 447 N.W.2d 541, 545 (Iowa 1989), a split decision by our supreme court reversing a trial court's directed verdict for the defendants on the plaintiff's gross negligence claim. In *Swanson*, the employee was responsible for using highly caustic chemicals to clean a meat-processing "smoke" room. *See* 447 N.W.2d at 542. Even when wearing rubber boots, gloves, aprons, goggles, sheets of long plastic, and rain suits, several employees suffered chemical burns

from cleaning the room. *Id.* at 541–42. Days before his accident, the plaintiff told his supervisor his rain suit had a hole in it. *Id.* at 542. His supervisor told him to "protect himself the best he could." *Id.* On the night of the incident, the employee reminded his supervisor and the plant manager of the hole in his suit; both co-employees told him to "take care of himself." *Id.* While cleaning, the hole allowed the chemicals to burn his skin, requiring him to undergo multiple skin graft operations. *See id.*

After discussing a claimant's high burden under section 85.20, the *Swanson* court found a jury could infer substantial evidence that injury was probable: other employees had previously been burned; the plaintiff twice warned his coworkers of the tear; the plastic sheets "more often than not" would slide down to the cleaner's ankles, which was common knowledge among the workers; and because the plaintiff previously found his pants to be wet from the hole, the probability of an injury increased each day he was required to work with the defective gear. *Id.* at 545 ("Observation, experience, and common sense should have told these defendants that the longer the dangerous situation persisted, the chance of injury passed from the realm of possibility to the realm of probability.").

Anderson compares the faulty gear in *Swanson* to the inadequate hole covering at the Bushong worksite and argues in both cases the coworkers knew the risk of injury. Despite his coworkers' knowledge the covering did not meet safety standards, we agree with the district court's assessment that the instant

facts do not demonstrate either coworker knew Anderson's injuries would be probable rather than merely possible.

In *Swanson* the defendants knew several coworkers previously had been burned using the same gear. By contrast, here no witness could recall anyone ever being injured on a worksite using the plywood coverings. *See Gerace*, 522 N.W.2d at 319 ("Indeed, repeated use of such belt movers in [employer's] three plants without incident could cause the defendants to believe the belt mover was safe to use."); *Dudley*, 486 N.W.2d at 284 (holding because there was evidence that workers followed same procedure "many times before without incident," co-worker could not have thought injury would be probable result of actions). While the plaintiff in *Swanson* warned coworkers of the defective suit and defendant coworkers acknowledged the danger, no evidence shows any worker, including Greg Long and John Bushong, had any inkling someone, more likely than not, would be injured by the noncompliant covering. *See Alden*, 475 N.W.2d at 2.

Although both scenarios would allow a jury to infer the co-employees' knowledge of some risk, the probability of an injury distinguishes *Swanson* from the case at hand. Without more, the evidence, taken in the light most favorable to Anderson, could prove—at most—that Greg Long and John Bushong knew the plywood coverings could possibly result in a harmful fall, not that such a consequence was the probable result of the safety breach. Because the summary judgment record fell short of showing a factual question of wantonness, we affirm the district court.

2. Did the District Court Apply the Correct Legal Standards?

Anderson argues the district court wrongly required him to "conclusively" prove elements of his cause of action at the summary judgment stage and misinterpreted section 85.20 cases as requiring a co-employee to issue an "affirmative command" to satisfy the "gross negligence" standard. We do not read the summary judgment order as misapprehending either standard. Anderson takes isolated statements from the twenty-two page ruling out of context to support his argument that the district court misapplied the law.

In addressing Anderson's claim the defendants failed to comply with OSHA and company safety rules, the district court acknowledged both were likely violated. It continued:

> Obviously, safety practices such as mandating employee safety training, screwing down hole covers, marking hole covers with the words "HOLE" and "COVER", and installing guard rail systems are prudent procedures for reducing the **possibility** of injury on a construction job site. However, these safety regulations and requirements are not conclusive to the court with respect to whether injury is **probable** when the holes are simply covered with multiple pieces of plywood.

Anderson contends the district court applied an improper standard of proof by finding the defendants' failure to follow OSHA rules or company policies did not "conclusively" prove injury was probable rather than merely possible. The district court was not suggesting Anderson must offer "conclusive" proof of his claims to survive the defendants' motion for summary judgment. The court was merely saying proof of rule violations was not enough, standing alone, to show the co-employees knew injury was a probable result of the violations. As noted above, that statement accurately reflected Iowa law. *Hahn*, 420 N.W.2d at 445.

In its conclusion, the district court properly articulated the standard that Anderson failed to meet: "Although these Defendants were directly or indirectly responsible for safety training and compliance, there is not substantial evidence in the record that any of these four Defendants knew injury was a 'probable' as opposed to 'possible' result of their actions." The court's use of the word "conclusive" did not place an undue burden on Anderson.

We also reject Anderson's argument that the district court misread the case law on section 85.20 to require a plaintiff to prove the defendants delivered an affirmative order to encounter a known hazard. In its summary judgment ruling, the district court stated: "None of the Defendants directly instructed the Plaintiff to remove the plywood from the hole. None of them were supervising him at the jobsite at the time."

While a defendant's affirmative order is common in cases establishing gross negligence under section 85.20, it is not necessary. *See Smith v. Air Feeds, Inc.*, 556 N.W.2d 160, 165 (Iowa Ct. App. 1996) (allowing plaintiff's gross negligence claim to be submitted to jury absent affirmative order by coworker). The district court's analysis does not run counter to this rule. Anderson cites an excerpt of the court's order reciting facts which fall short of gross negligence; it was not a statement of the standard itself.

The court later concludes that with the exception of the foreman, there is no dispute that the remaining four defendants did not instruct Anderson "to enter a 'zone of imminent danger.'" Again, we find this statement recounts undisputed facts rather than articulating an absolute measure of the cause of action. When

read as a whole, the summary judgment order does not misperceive an affirmative order as a requirement to prove a co-employee's gross negligence. The district court properly applied the legal standards and its summary judgment order need not be disturbed on appeal.

B. Did the Court Err in Instructing the Jury on Comparative Fault?

Anderson next contends comparative fault under Iowa Code chapter 668 should not apply to co-employee gross negligence cases under section 85.20. He asserts our case law has not definitively addressed the application of comparative fault in this context and that statutory construction supports excluding the chapter 668 defense in co-employee gross negligence cases.

Rex Bushong disagrees that the application of comparative fault is an open question in section 85.20 cases. He contends a co-employee's "gross negligence" falls under the statutory definition of fault as "one or more acts or omissions that are in any measure negligent or reckless toward the person . . . ." Iowa Code § 668.1(1). He contends our courts have repeatedly compared a plaintiff's negligence to a co-employee's gross negligence under that provision. He alternatively argues that even if the district court erred by instructing on comparative fault, because the jurors did not find he was grossly negligent, they never reached the issue of comparative fault. Moreover, Rex Bushong asserts any evidence admitted to show Anderson's comparative fault would have been otherwise properly admitted on the question whether he knew Anderson's injury was probable.

Anderson is correct that no Iowa authority outright holds that comparative fault under chapter 668 can be invoked as a defense in a co-employee gross negligence claim under section 85.20. In *Smith v. Air Feeds*, 556 N.W.2d at 163, our court allowed the gross negligence of a coworker, who was a released party in a lawsuit, to be compared to the manufacturer's responsibility and the worker's own negligence when allocating fault under chapter 668 in a products liability action. Our court found substantial evidence existed to submit the co-employee's gross negligence to the jury to diminish the plaintiff's recovery from the manufacturer under comparative fault principles. *Id.* at 165. It is true that *Smith* does not broach the more basic question—whether the plaintiff's own fault can reduce his recovery from a grossly negligent co-employee—though the principles would seem transferrable.

In addition, our supreme court has reviewed verdicts where the district court instructed juries on comparative fault, but has not expressly approved nor disapproved the practice. *See, e.g., Dudley*, 486 N.W.2d at 284 (holding insufficient evidence to submit gross negligence instructions to jury, but remaining silent on the district court's comparison of defendant's alleged gross negligence with plaintiff's ordinary negligence); *Woodruff Const. Co. v. Mains*, 406 N.W.2d 787, 791 (Iowa 1987) (reversing trial court's finding that substantial evidence existed to submit co-employee gross negligence claim to the jury, but not addressing whether court erred in considering the comparative fault of the plaintiff).

Anderson argues that *Smith*, *Dudley*, and *Woodruff* do not provide a clear directive whether the legislature intended chapter 668 to cover section 85.20 actions. He urges us to review the history of the statutes.[4] He asserts that because contributory fault was not a defense in gross negligence cases under common law, the legislature did not intend for the comparative fault statute to be applied to section 85.20 cases. Anderson also likens an action under section 85.20 to Iowa's dramshop cause of action. *See Slager v. HWA Corp*., 435 N.W.2d 349, 354–55 (Iowa 1989) (declining to apply comparative fault to "sui generis" dram shop liability). Finally, Anderson argues public policy would be served by allowing a plaintiff to recover in full from a co-employee's gross negligence because holding otherwise would "undermine the assignment of responsibility for deviant conduct."

We decline to reach the merits of Anderson's comparative fault argument given the jury's verdict finding defendant Rex Bushong was not grossly negligent as defined in the instructions. The jury did not reach the question: "Was Plaintiff Jessie Anderson's fault a cause of any damages to the Plaintiff?" Likewise, the jury did not assign percentages of fault to the parties. Accordingly, the district court's submission of the comparative fault instructions, even if an error, did not cause Anderson any prejudice. *See Everhard v. Thompson*, 202 N.W.2d 58, 61 (Iowa 1972) (noting because jury found defendant was "free from negligence" it

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[4] Anderson asked the supreme court to retain this case, contending the question whether comparative fault applies to co-employee gross negligence cases is "a substantial issue of first impression," but the supreme court transferred the appeal to our court.

"became unimportant whether either plaintiff or her husband were contributorially negligent").

Anderson argues the comparative fault instructions and associated argument by counsel "fatally tainted jury deliberations" requiring a new trial. A new trial is warranted only if an erroneous instruction materially affected the movant's substantial rights. *See* Iowa R. Civ. P. 1.1004. Under the court's instructions, the jury first considered whether Rex Bushong was grossly negligent; only if the jurors found Anderson proved all the necessary elements were they directed to consider the defense of comparative fault. Because they did not find gross negligence, the jurors did not consider Anderson's fault. We agree with the district court's conclusion that the comparative fault instructions did not "materially affect" the plaintiff's substantial rights.

C. Did the District Court Improperly Exclude Evidence of the Foreman's Post-Accident Statements?

Anderson's final assignment of error relates to the district court's exclusion of statements made by foreman Rex Bushong in his deposition regarding his post-accident conduct. In his deposition, the foreman stated that he has not worked on a jobsite requiring a hole covering since Anderson's fall, but that even if he did, he would continue to use plywood boards as he did leading up to the November 9, 2009 incident. Rex Bushong stated he would probably mark the board with a warning, but would not erect railings.

At trial, Anderson's counsel tried to ask the defendant about these statements, but the district court sustained an objection. At a hearing outside the

presence of the jury, the plaintiff argued the deposition statements were offered to show "even in the face of an accident, they're sticking to their story. They're not doing anything different." Counsel for Rex Bushong argued Iowa Rule of Evidence 5.407 on subsequent remedial measures required exclusion of the statements.

Rule 5.407 reads:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered in connection with a claim based on strict liability in tort or breach of warranty or for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

The purpose of the rule is two-fold: (1) subsequent repairs are usually irrelevant or hold little probative value as to a defendant's negligence, and (2) as a matter of public policy, excluding such evidence may encourage parties to make improvements to a dangerous condition without fear that the improvements will later be used against them. Iowa R. Evid. 5.407 official cmt.

The district court prohibited Anderson from offering the foreman's deposition statements, reasoning:

> I am not going to allow evidence with respect to subsequent remedial measures, whether they occurred or didn't occur. I understand Rule 5.407 refers to measures taken after an event, and in this case, the argument is – or the proffered testimony is that there weren't any such measures. I would just note the official comment to that rule says: "In negligence actions the focus is on the defendant's conduct prior to or at the time of the accident, thus rendering post accident conduct of little probative value." And I think post accident conduct in this case is of little probative value. This case is not about willfulness. It's not about duties. It's about

> three elements of gross negligence which refer to knowledge and a conscious failure to avoid a peril; not willfulness, not duties.

In denying Anderson's post-trial motions, the district court stated: "The Court continues to consider irrelevant any of Rex Bushong's statements after the accident as to how he would intend to cover holes in the future. Such statements have no bearing on any of the elements of co-employee gross negligence, which refer to defendant's knowledge immediately preceding the accident."

On appeal, Anderson contends the foreman's statements were relevant to his conscious failure to avoid the danger—the third element in a claim of gross negligence. He also argues the excluded evidence undermined the credibility of the foreman's trial testimony that had his supervisors instructed him to properly cover a hole before the accident, he would have done so.

Rex Bushong compares the district court's ruling to that in *Hall*. In that case, the district court excluded evidence that a hospital and accreditation agency did not change their credentialing policies or procedures after a surgeon's failed procedure. *See Hall*, 812 N.W.2d at 687. The district court characterized the evidence as a subsequent remedial measure and also sustained an objection on relevance grounds. *See id.* The *Hall* court found the district court did not abuse its discretion because the evidence was not relevant to any issue in the controversy. *See id.*

Similar to *Hall*, the district court here excluded the evidence by reference to rule 5.407 and as irrelevant. We agree with the district court that post-accident actions, or here the foreman's post-accident statements, have no bearing on whether the foreman's conduct leading up to November 9 constituted "a

conscious failure to avoid the peril." *See Thompson*, 312 N.W.2d at 505. Even if the district court initially based its exclusion on the subsequent remedial measure rule, because the statements were not relevant to his claim, Anderson was not prejudiced by their exclusion. See *Scott*, 774 N.W.2d at 503.[5]

We disagree with Anderson's arguments for admissibility. The foreman's deposition statement that he did not plan to use railings around hole coverings on *future* building sites sheds little light on whether he showed a deliberate disregard for an imminent risk to Anderson *before* the accident. The deposition statement did not contradict the foreman's trial testimony that if his supervisors had told him to take additional safety measures with the plywood coverings, he would have been willing to comply. If anything, the deposition statement discounting the necessity of railings bolstered the foreman's trial testimony that he did not believe the unmarked plywood coverings created an imminent danger to Anderson or the other workers. The district court did not abuse its discretion in concluding Rex Bushong's deposition statement was not probative of the issues at trial.

Having determined the district court properly granted partial summary judgment, the jury never reached the issue of comparative fault, and the court did not abuse its discretion in excluding the deposition statement, we affirm.

AFFIRMED.

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[5] Anderson also argues that because the jury was instructed on punitive damages, the depositional statement was admissible to show the foreman's post-accident intent to continue using noncompliant covers. Even if the statement was relevant on the issue of punitive damages, because the jury found Rex Bushong was not grossly negligent, Anderson was not prejudiced by the exclusion.