IN THE COURT OF APPEALS OF IOWA

No. 6-700 / 06-0242
Filed November 30, 2006

BRUCE LAFLEUR,
Plaintiff-Appellant,

vs.

SANDRA CAMPOS,
Defendant-Appellee.

Appeal from the Iowa District Court for Woodbury County, Dewie J. Gaul, Judge.

Plaintiff appeals following a bench trial denying his claim to recover damages based on the gross negligence of defendant, a co-employee. **AFFIRMED.**

Daniel Galvin of O'Brien, Galvin & Moeller, Sioux City, and Joe Cosgrove, Sioux City, for appellant.

Thomas W. Foley and Debra Hulett of Nyemaster, Goode, West, Hansell & O'Brien, P.C., Des Moines, for appellee.

Heard by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

SACKETT, C.J.

Plaintiff-appellant, Bruce LaFleur, sued his coworker, defendant-appellee, Sandra Campos, for an injury arising out of his employment. Plaintiff contended his injury was the result of defendant's gross negligence. The matter was tried to the district court and plaintiff's claim was denied. On appeal this court found the district court erred in its application of the law and we reversed and remanded to the district court to reconsider plaintiff's claim on the existing record consistent with the standards articulated in our opinion. The district court again denied plaintiff's claim. Plaintiff urges that the district court again erred in failing to find he proved the necessary elements of his claim. We affirm.

SCOPE OF REVIEW. We review this action for correction of errors at law. Iowa R. App. P. 6.4 (2005). Findings of fact in jury-waived cases have the effect of a special verdict and are binding on the appellate court if supported by substantial evidence. *Id.*; Iowa R. App. P. 6.14(6)(*a*).

APPLICABLE LAW. Iowa Code section 85.20 (1999) allows an employee to recover damages from a co-employee if he can show the co-employee's conduct amounted to gross negligence amounting to such lack of care as to amount to wanton neglect for the safety of another." "As interpreted by our courts, it is very difficult to prove a case of gross negligence under section 85.20(2)." *Gerace v. 3-D Mfg. Co., Inc*., 522 N.W.2d 312, 315-316 (Iowa Ct. App. 1994) (citing *Swanson v. McGraw,* 447 N.W.2d 541, 543 (Iowa 1989); *Woodruff Const. Co. v. Mains,* 406 N.W.2d 787, 790 (Iowa 1987)). In order to prevail on a gross negligence claim pursuant to section 85.20, a plaintiff must show the co-

employee had (1) knowledge of the peril to be apprehended; (2) knowledge that injury is probable, rather than just possible; and (3) consciously failed to avoid the peril. *Thompson v. Bohlken*, 312 N.W.2d 501, 505 (Iowa 1981). All requirements of this test must be met or the plaintiff's claim fails. *Taylor v. Peck*, 382 N.W.2d 123, 126 (Iowa 1986).

BACKGROUND. At the initial non-jury trial the district court made the following factual findings, which we in plaintiff's first appeal determined to be supported by substantial evidence in the record:

> On December 8, 1999, the plaintiff came to work about 6:30 a.m. He was moved sometime after 8 a.m. to a machine where his job was to take coarsely-ground meat from a combo, and cause the meat to go down a chute where an auger ground the meat more finely. When plaintiff was moved to that job, the defendant, a line leader, spent 20 or 25 minutes showing the plaintiff how to do the job. He was instructed to drop bunches of meat into the chute. The plaintiff proceeded to do the work. The defendant then noted that he was using his hand to push the meat down into the chute. The defendant stopped the line and told the plaintiff he should not use his hand inside the chute, pointing out to him the auger some eleven inches below the tray on which the meat was deposited, and that the auger was dangerous if one's hand got into it. After this admonishment the defendant noted the plaintiff put the meat into the chute correctly, avoiding using his hand to push meat within the chute . . . . At about 2 p.m. the plaintiff put his hand into the chute, and was seriously injured, losing his right hand.
>
> The machine at which the plaintiff was working was dangerous to one who placed his hand into the chute or who so placed his hand that it could be drawn so as to come in contact with the auger. Defendant knew of the danger of having a hand get into the chute and warned the plaintiff of that danger. It does not appear, however, that defendant knew that plaintiff was in danger if he avoided having his hand get into the chute.

The district court then found plaintiff was not entitled to recover because defendant "did not know that injury was a probable result of the situation as it existed at and prior to the injury." On appeal this court found the district court

placed on the plaintiff the burden to show not only that defendant knew the auger plaintiff was using presented a danger to plaintiff but that the auger presented a danger to plaintiff even if known precautions were taken. We determined this went beyond what was contemplated by the "peril to be apprehended" and found the district court erred in requiring plaintiff to make the additional showing. We reversed and remanded for reconsideration of plaintiff's claim based on the existing record.

On remand the district court found plaintiff (1) proved defendant knew of the peril to be apprehended, (2) failed to show she had knowledge that injury was probable as opposed to a possible result of the peril, and (3) failed to show she consciously failed to avoid the peril.

Plaintiff contends (1) it was error for the district court to find plaintiff failed to prove defendant knew or should have known injury to plaintiff was probable and (2) it was error for the district court to find plaintiff failed to prove defendant's conscious failure to avoid the peril.

We first address plaintiff's argument that it was error for the district court to find he failed to prove defendant knew injury to plaintiff was probable. In making this argument plaintiff relies heavily on *Larson v. Massey-Ferguson, Inc.*, 328 N.W.2d 343 (Iowa Ct. App. 1982). He claims the facts of that case are analogous to his situation. However, we do not find this case to be determinative as the circumstances surrounding defendants' warning were different than those in *Larson*. In *Larson*, the plaintiff was injured while operating a post-hole digger, or "vertical auger." The plaintiff's supervisor, the defendant, had instructed the

plaintiff how to operate an auger and ordered him to put weight on it, even after warning him to stay clear of the moving portions of the implement. *Larson*, at 344. Essentially, the defendant in *Larson* ordered the plaintiff to work closer to the danger. In this case, the evidence supports the district court finding that defendant not only "recognized that plaintiff could be injured if he pressed down on the meat or placed his hands in the chute of the grinder," but "specifically instructed [him] not to operate the grinder in that manner." This is unlike *Larson*, where defendant instructed plaintiff to operate the auger in a way which made the risk of injury probable.

Furthermore, additional facts support the district court's finding defendant had no knowledge that the injury was probable. Defendant, as well as another employee, had operated the grinder earlier that day without any complication by using the method defendant instructed plaintiff to use. *See Henrich v. Lorenz*, 448 N.W.2d 327, 333 (Iowa 1989) (stating "[h]ad the defendants known that these conditions and instructions would probably result in injury to the . . . operator, we doubt that they would have endangered themselves or [the plaintiff]"). Defendant was not aware of any similar accidents. *Id.* (indicating a low historical incidence of injuries gave defendants no cause to realize imminent danger associated with machine); *Thompson*, 312 N.W.2d at 505 (noting defendant could not be aware by observation or experience that injury would be probable where defendant was unaware of similar accidents). Finally, there was evidence defendant was unaware the grinder's safety features had been modified and removed. Defendant's supervisors had not told her the grinder was

missing a guard or that a stopper should be used. Nor did defendant have any special training in plant or machine safety which would have aided her in evaluating the risk. The district court's conclusion that defendant did not know injury to plaintiff was probable is supported by substantial evidence and the district court correctly applied the law to its factual findings.

We next address plaintiff's contention it was error for the district court to find plaintiff failed to prove defendant's conscious failure to avoid the peril. The district court made a finding supported by substantial evidence that defendant consciously took steps to avoid the peril and these steps show she consciously sought to insulate plaintiff from the peril she knew existed. Therefore, the third element of gross negligence was not demonstrated.

AFFIRMED.