IN THE COURT OF APPEALS OF IOWA

No. 8-481 / 07-1952
Filed August 27, 2008

ERMA WILLIAMS,
Plaintiff-Appellant,

vs.

DAVID E. RICE, RANDY ZORN,
ED BELL, SILVANNA B. HEILMANN,
NATHAN MARRIOT, STEVE TROXEL,
CHRIS SHEEHAN AND KEVIN NORRIS,
Defendants-Appellees.

Appeal from the Iowa District Court for Wapello County, Daniel P. Wilson, Judge.

Erma Williams appeals from the district court order granting summary judgment in favor of the defendants on her gross negligence claim. **AFFIRMED.**

Philip F. Miller and Pamela G. Dahl of Philip Miller Law Firm, West Des Moines, for appellant.

Christian S. Walker of Faegre & Benson, L.L.P., Des Moines, for appellees.

Considered by Miller, P.J., and Vaitheswaran and Eisenhauer, JJ.

VAITHESWARAN, J.

Erma Williams sustained injuries in an on-the-job accident and sued several co-employees for gross negligence. The district court granted summary judgment in favor of the defendants. On appeal, Williams contends genuine issues of material fact precluded summary judgment.

I. Background Facts and Proceedings

The summary judgment record reveals the following essentially undisputed facts. Williams worked at Cargill Meat Solutions Corp. (also referred to as Excel/Cargill), a meat packing plant in Ottumwa. The plant was organized by "lines" that processed specific parts of the carcasses. These lines were equipped with different types of machines that removed skins from the carcass parts.

On the day of her injury in 2004, Williams was working on the "rib and belly line." This line had a skinning machine that was designed to remove the skin from the "fatback" portions of the animals' bellies.[1] The machine was sometimes altered to process the fatbacks with the skins on.

Williams was a designated "utility" person on the rib and belly line. She was responsible for performing a variety of jobs, as needed. When Williams began her shift, she was told to perform "edible janitor" duties, which required her to "pick meat off the floor and recondition it." She was to wear mesh gloves for this job. Williams donned her gloves and was about to begin the job when her supervisor, Nathan Marriot, told her to find and instruct employee Steve Troxel to

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[1] Randy Zorn testified "[i]t's a cover of fat that's over the loin and then separated or removed from the loins and asided, and we either produce a skin-on or skinless."

remove parts from the fatback skinning machine so a “skin-on” order could be processed. Williams found Troxel, told him what to do, and proceeded to another task assigned by her supervisor.

Meanwhile, Troxel removed the blades from the fatback skinning machine. After he did so, slabs of meat began piling up in the machine. Williams went to check on the source of the problem. She saw that certain prongs inside the machine were “hanging down,” preventing the fat backs from coming through. As she moved to shut the machine off, one of her mesh gloves was pulled into the machine and Williams’s fingers were injured.[2]

Williams sued Troxel and Marriott as well as David Rice, the general supervisor of the plant; Randy Zorn, plant manager; Kevin Norris, supervisor of the picnic and butt line; Christopher Sheehan, superintendent of the cut floor department; Silvanna Heilmann, the safety director; and Ed Bell, a supervisor. She and the defendants filed cross-motions for summary judgment. The district court denied Williams’s motion, granted the defendants’ motion, and dismissed the petition. This appeal followed.

II. Applicable Standard

Summary judgment is properly granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3).

[2] The fact that Williams was injured by the fatback skinner is undisputed. The circumstances surrounding the injury are disputed. One of Williams’s coworkers confirmed Williams’s account. Randy Zorn, however, attested that, according to an investigation into the accident, Williams reached into the machine to remove clogged product.

III. Analysis

A. General Principles

An injured worker is not limited to the rights and remedies under our statutory workers' compensation scheme if the injury is "caused by the other employee's gross negligence . . . ." Iowa Code § 85.20 (2005). In this instance, the worker may maintain a common-law tort action against a co-employee. *Walker v. Mlakar*, 489 N.W.2d 401, 403 (Iowa 1992).

Gross negligence is defined as:

> (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.

Thompson v. Bohlken, 312 N.W.2d 501, 505 (Iowa 1981). The worker must establish all three elements to prevail. *Walker*, 489 N.W.2d at 405. We find it unnecessary to address the first or third elements because the material facts relating to the second element are undisputed and entitled the defendants to judgment as a matter of law.

B. Element Two

To prove knowledge that the injury is a probable result of the danger, a plaintiff must show that (a) there was a "zone of imminent danger" and (b) "the defendant[s] knew or should have known that their conduct caused the plaintiff to be in that zone." *Alden v. Genie Indus.*, 475 N.W.2d 1, 2-3 (Iowa 1991).

1. Zone of Imminent Danger. On the zone of imminent danger prong, Williams first points to evidence of "numerous injuries on the skinner machines at Excel/Cargill during the years prior to [her] injuries."

Prior accidents are relevant to establishing a zone of imminent danger. *Id.* It is undisputed, however, that all but one of the prior injuries cited in the summary judgment record occurred on machines other than the fatback skinning machine that injured Williams. It is also undisputed that the single prior injury on the fatback skinning machine occurred under different circumstances.[3] Specifically, employee Amy Vannoni attested that she injured her right hand at one job, was told to work on the fatback skinner instead, was given no information by her supervisor about how to operate the machine, and injured her arm when the sleeve of a company-provided frock got caught in the rollers of the machine. Vannoni later learned that the fatback skinning procedure was a two-handed job.

In contrast to Vannoni's situation, Williams had worked on the fatback skinning machine prior to her injury. She also was trained on a procedure to lock the machine in the event of a problem.

We conclude Vannoni's experience is sufficiently dissimilar from Williams's accident that it does not create a genuine issue of material fact on whether there was a zone of imminent danger around the fatback machine. *See Heinrich v. Lorenz*, 448 N.W.2d 327, 333 (Iowa 1989) (noting "only four skinner-related hand cuts in the year preceding Heinrich's accident"); *Taylor v. Peck*, 382 N.W.2d 123, 128 (Iowa 1986) (noting no previous accidents on the particular

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[3] In her deposition, Williams mentioned that a "new hire" was injured on the fatback machine in "'99 or '98." It is unclear whether she was referring to a woman named Amy Vannoni who filed a lawsuit for injuries sustained on the same fatback skinner and who signed an affidavit on behalf of Williams's motion for summary judgment or whether she was referring to another person. The record does not contain documentation of an injury on the fatback skinning machine in addition to Vannoni's.

punch press machine that injured the plaintiff); *Justus v. Anderson*, 400 N.W.2d 66, 68 (Iowa Ct. App. 1988) (noting no evidence of previous similar injuries).

Williams next argues a zone of imminent danger was created because "the skinner job itself was considered 'high risk' and dangerous."

It is true that a zone of imminent danger may be created where "the high probability of harm is manifest even in the absence of a history of accidents or injury." *Alden*, 475 N.W.2d at 3. However, the defendants' knowledge that someone eventually will be injured when using these machines is not sufficient to satisfy this element. *Heinrich*, 448 N.W.2d at 334 n.3 (stating "the defendants' knowledge of the actuarial foreseeability-even certainty-that 'accidents will happen' does not satisfy" the *Thompson* standard of gross negligence).

Williams maintains the summary judgment record contains more. She asserts (1) the fatback skinner machine was modified contrary to the manufacturer's specifications, (2) the modification was performed by Troxel, "an unqualified and untrained employee," (3) the modification was in violation of company policy, and (4) Troxel expressed his discomfort about working on the machine and Williams reported his reservations to her supervisors.

The record is indeed undisputed that the modification of the fatback skinner was contrary to manufacturer specifications. However, it was also undisputed that the fatback skinner had been modified to process fatbacks with the skin on for at least several months, if not several years. Additionally, it was undisputed that, in its modified form, the skin-on fatbacks generally moved smoothly down the line. Plant manager Randy Zorn testified by deposition that, in this form, the machine was essentially used as a conveyor belt to transfer the

fatbacks from one point to another. Williams testified by deposition that "when the parts were tooken [sic] out, the skin-on fatbacks came on down the line and would not get clogged up."

With respect to Troxel's experience and qualifications, the record is disputed. Incongruously, Williams testified by deposition that Troxel had removed the parts from this machine "quite a few times" before her accident, whereas Troxel testified by deposition that he could not remember taking apart that machine at any other time. At first blush, this contradictory testimony may appear to generate an issue of material fact. However, Troxel's lack of experience with taking apart the machine, even if proven, was not material to the question of whether there was a zone of imminent danger around the fatback skinning machine at the time of Williams's accident. That is because both Williams and Troxel agreed he was shown how to take apart the machines. Williams specifically testified that, by the date of her accident, she thought he knew how to modify the machine.

Third, while there is no question that the modification was contrary to manufacturer specifications, it is undisputed that the modification was routinely made with the knowledge of the company. Plant manager Zorn attested that the parts were "regularly and ordinarily removed" before Williams's injury. Williams did not dispute this assertion. *Heinrich*, 448 N.W.2d at 334 (noting company, not individual defendants responsible for creating possibly dangerous working conditions).

Turning to the final factor cited by Williams, she testified by deposition that she told her supervisors of Troxel's initial hesitance to modify the fatback

skinning machine. However, she conceded that his hesitance and her conversation took place several months before her accident.

Williams did not generate any issues of material fact on whether the skinner job itself created a zone of imminent danger. *Alden*, 475 N.W.2d at 3.

2. Knowledge. Even if Williams generated an issue of material fact on the "zone of imminent danger prong" of the second gross negligence element, she did not generate an issue of material fact on whether "the defendant[s] knew or should have known that their conduct caused the plaintiff to be in that zone." *Id.*

In *Alden*, the court found a genuine issue of material fact on this issue because there was a dispute about whether an employee instructed *Alden* to operate a lift in a clearly unsafe manner. *Id.* Here, in contrast, Williams does not contend that her co-employees instructed her to perform an unsafe function on the date of her accident. The modification to the machine had been made prior to her accident without incident and Williams herself conceded that, in the past, the modification allowed the slabs to move freely through the machine. *Cf. Swanson v. McGraw*, 447 N.W.2d 541, 545 (Iowa 1989) (concluding defendants knew injury was probable to plaintiff, where they were twice told plaintiff had tear in his pants that would expose him to caustic chemicals and defendants told him to keep on working); *Larson v. Massey-Ferguson, Inc.*, 328 N.W.2d 343 (Iowa Ct. App. 1982) (concluding defendant knew of danger created by unshielded rotating shaft of auger, yet instructed plaintiff to perform function that required working close to the moving parts).

IV. Disposition

Williams did not generate an issue of material fact on the question of whether the defendants knew the injury was a probable, as opposed to a possible, result of the danger. As Williams could not prove this element of her gross negligence claim, the defendants were entitled to judgment as a matter of law.

AFFIRMED.