IN THE COURT OF APPEALS OF IOWA

No. 0-990 / 10-1275
Filed February 9, 2011

MEGAN JUAREZ,
Plaintiffs-Appellant,

vs.

BRUCE HORSTMAN and PAULA GROVER,
Defendants-Appellees.

Appeal from the Iowa District Court for Sioux County, James D. Scott, Judge.

Megan Juarez appeals from the district court order granting summary judgment in favor of the defendants. **AFFIRMED.**

Steven C. Jayne, Des Moines, for appellant.

Patrick J. McNulty and Anita L. Dhar of Grefe & Sidney, P.L.C., Des Moines, for appellees.

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

TABOR, J.

A worker injured at an egg processing plant challenges the district court's grant of summary judgment to two coworkers she sued under Iowa Code section 85.20(2) (2009). The district court determined that the worker could not show that her coworkers knew that her injury was probable, rather than just possible, based on the dangerous condition of the egg-breaking machine she was cleaning. Because the worker is unable to meet the rigorous standard for proving gross negligence under this statute, we affirm the district court's grant of summary judgment.

I. Background Facts and Proceedings

Megan Juarez had worked in the egg-breaking room at Sparboe Food Corporation's Boyden plant for five months before she suffered a serious injury to her wrist while cleaning one of the machines. On April 27, 2007, Juarez was hosing down the inside of an egg-breaking machine when her right hand and arm became entangled between the chain and sprocket mechanism, crushing the bones in her wrist. According to a report submitted by Juarez in the district court, the accident happened as follows:

> To gain "slack" in the hose, Ms. Juarez reached behind her with her left hand and yanked on the hose to pull more of it toward her. She is unclear what happened immediately following this action. She either instinctively reached toward the machine with her right hand to balance herself, or toppled toward the machine when the hose suddenly slid toward her.

She underwent surgery to repair her crushed arm and hand. As a result of the injury, she cannot lift more than one pound with her right arm.

On April 15, 2009, Juarez filed a petition at law alleging that fellow Sparboe employees Bruce Horstman and Paula Grover engaged in grossly negligent conduct under Iowa Code section 85.20(2) which proximately caused the injury to her arm.[1] Horstman served as manager for the Boyden plant. Grover worked with Juarez in the egg-breaking room and, by virtue of her seniority, trained newer workers like Juarez how to operate the machines. The petition alleged that a protective shield had been removed from the egg-breaking machine "at the direction" of the defendants.

Defendants Horstman and Grover moved for summary judgment on January 18, 2010, alleging that Juarez was unable to prove the elements required for gross negligence in section 85.20(2) under the test established in *Thompson v. Bohlken*, 312 N.W.2d 501 (Iowa 1981). Juarez resisted the motion, countering that the defendants placed her in a "danger area" by directing her to work in close proximity to a machine with unguarded moving parts due to its missing door. The district court determined the summary judgment record established that Horstman and Grover knew about the dangerous condition of the missing door on the egg-breaking machine, but did not know Juarez's injury was a probable result of that condition. Juarez appeals from the court's grant of the coworkers' summary judgment motion.

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[1] Juarez also named coworkers Hilda Anzaldua and Joyce Umstead in the suit. Juarez was not successful in serving Anzaldua with the petition and ultimately dismissed Umstead as a defendant.

II. Standard of Review

We review the district court's grant of summary judgment to correct legal error. *Frontier Leasing Corp. v. Links Eng'g, LLC*, 781 N.W.2d 772, 775 (Iowa 2010). Under Iowa Rule of Civil Procedure 1.981(3), a party is entitled to summary judgment

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law.

Id.

Like the district court, we view the record in the light most favorable to the party opposing summary judgment. *Hernandez v. Midwest Gas Co.,* 523 N.W.2d 300, 302 (Iowa Ct. App. 1994). We also afford the opposing party every legitimate inference the record will bear. *Feld v. Borkowski*, 790 N.W.2d 72, 75 (Iowa 2010).

III. Analysis

At issue in this case in the gross negligence standard applied to coworkers' conduct under Iowa Code section 85.20(2). That provision allows an exception to the exclusivity of the workers' compensation remedies in chapter 85.

> The rights and remedies provided in this chapter, chapter 85A or chapter 85B for an employee, or a student participating in a school-to-work program as provided in section 85.61, on account of injury, occupational disease or occupational hearing loss for which benefits under this chapter, chapter 85A or chapter 85B are recoverable, shall be the exclusive and only rights and remedies of the employee or student, the employee's or student's personal or legal representatives, dependents, or next of kin, at common law or otherwise, on account of such injury, occupational disease, or occupational hearing loss against any of the following:
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> 1. Against the employee's employer.

> 2. Against any other employee of such employer, *provided that such injury*, occupational disease, or occupational hearing loss 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*.

Iowa Code § 85.20(2) (emphasis added).

A plaintiff bears a substantial burden under this statute to show that his or her coworker acted with wanton neglect, a level of conduct akin to recklessness and which had been characterized as falling "somewhere between mere unreasonable risk of harm in ordinary negligence and intent to harm." *Nelson v. Winnebago Indus., Inc.*, 619 N.W.2d 385, 390 (Iowa 2000). Three elements have emerged as necessary to prove gross negligence amounting to such lack of care as to be wanton neglect under section 85.20(2):

> (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.

Id. (citing *Thompson*, 312 N.W.2d at 504). This tripartite test is necessarily a stringent one because undesirable consequences could result from improvidently holding a co-employee liable to a fellow employee. *Walker v. Mlakar*, 489 N.W.2d 401, 405 (Iowa 1992) (noting "when an employee is held liable to another the main cost of injury to an employee of a business could be unreasonably shifted from the employer, where the workers' compensation act places it, to a fellow employee, where the act does not place it").

The district court determined that a genuine issue of material fact existed as to the first element, the defendants' knowledge of the peril to be apprehended from the missing door on the machine operated by Juarez. The district court

concluded: "Horstman and Grover had knowledge of a dangerous condition in the egg-breaking room."

The second element is the point of contention in this case.[2] The question we are called to answer is whether Juarez is unable to prove as a matter of law that the defendants knew her injury was "a probable, as opposed to a possible" result of their actions, and nevertheless proceeded with indifference. The respective definitions of "probable" and "possible" inform our analysis. Our supreme court has defined "probable" in this context as "that which seems reasonably to be expected: so far as fairly convincing evidence or indications go." *Nelson,* 619 N.W.2d at 391 (quotation omitted). In contrast, "possible consequences are those which happen so infrequently that they are not expected to happen again." *See Thomas v. Food Lion, LLC*, 570 S.E.2d 18, 20 (Ga. Ct. App. 2002). The second element requires more than a showing of the coworkers' knowledge of "actuarial foreseeability—even certainty—that 'accidents will happen.'" *Henrich v. Lorenz*, 448 N.W.2d 327, 334 n.3 (Iowa 1989). The probability prong is not satisfied by simply asserting that the coworkers knew that "sooner or later" someone would be injured by the dangerous machinery in question. *Id.* A plaintiff must show that the coworkers knew their actions would place the plaintiff in such "imminent danger" that he or she would be "more likely than not" be injured. *See Hernandez*, 523 N.W.2d at 305.

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[2] The district court did not address the third element of gross negligence. Accordingly, we limit our review to the second element.

The district court elucidated the two means by which plaintiffs may demonstrate that coworkers possessed knowledge that the existing danger would probably result in injury. First, a plaintiff may show that the defendants knew about prior accidents occurring under similar circumstances. *See Alden v. Genie Indus.*, 475 N.W.2d 1, 2-3 (Iowa 1991). Second, a plaintiff may prove a zone of imminent danger existed "where the high probability of harm is manifest even in the absence of a history of accidents or injury." *Id.* at 3.

The record here revealed no history of accidents in the egg-breaking room. The district court noted that Juarez, along with others, worked in close proximity to the machine in question for five months, going through as many as nine-hundred rotations, cleaning inside the egg-breaking machine on a routine basis, with no report of injuries. Neither Juarez nor any other worker reported to Horstman or Grover that they perceived a risk from working near this machine. Given this accident-free history, the defendants had no reason to suspect injuries would probably occur under the prevailing work conditions. *See Hernandez*, 523 N.W.2d at 306.

Juarez complains that it is unfair in gross negligence cases to allow Horstman and Grover a "philosophical 'free bite'"—that is to apply section 85.20(2) only to second or subsequent accidents when the peril posed by the condition is manifest. But to the contrary, our supreme court has stated, "We recognize our law does not afford coemployees one prior incident of *Thompson* gross negligence before holding them responsible for the consequences of their conduct." *Henrich,* 448 N.W.2d at 334 n.3. Here, we agree with the district

court's conclusion that Juarez is unable, as a matter of law, to prove under the instant circumstances that the high probability of harm was manifest in the absence of accidents or warnings of danger.

Juarez likens her situation to those of the injured workers in *Swanson v. McGraw*, 447 N.W.2d 541 (Iowa 1989), and *Larson v. Massey-Ferguson, Inc.,* 328 N.W.2d 343 (Iowa Ct. App. 1982). In *Swanson*, our supreme court determined that the worker's exposure to caustic chemicals while wearing defective protective gear was "truly . . . an accident waiting to happen." *Swanson*, 447 N.W.2d at 545. The court decided that the defendants knew that the burn injuries suffered by Swanson were probable, given that he was required to keep working with a leaky rain suit until new gear arrived. *Id.* When Swanson notified his supervisors twice about a tear in his suit, they told him to protect himself as best he could. *Id.*

In *Larson*, our court held the defendant knew that injury was probable when working near an unshielded auger, evidenced by the fact he had previously warned his crew to stay clear of the power take-off shaft of the post-hole digger. *Larson*, 328 N.W.2d at 346. Still, the supervisor in *Larson* instructed the crew to "put weight" on the auger to facilitate its penetration of hard ground. *Id.*

We recognize an important difference between the conduct of Horstman and Grover in the instant case and that of the defendants in *Swanson* and *Larson*. In both *Swanson* and *Larson*, the supervisors knew of the dangerous working conditions (caustic chemicals and unshielded auger, respectively), but nevertheless issued directives for their co-employees to continue performing

operations the supervisors knew would place the co-employees in harm's way. *Swanson*, 447 N.W.2d at 545; *Larson*, 328 N.W.2d at 346. In contrast, while Horstman and Grover may have been on notice from the operator's manual that the machine's moving parts posed a danger without the door in place, they did not instruct Juarez, or any other employee, to risk injury in performing their duties. The hose used by Juarez to clean the machine had a nozzle and trigger that allowed the operator to control the flow of water while standing back from the machine being cleaned. Juarez acknowledged in her deposition that neither Horstman nor Grover told her to put her hand inside the egg-breaking machine as she was hosing it down.[3] Juarez's act of reaching into the machine resulted from accidently losing her balance, not from performing duties in a manner prescribed by her supervisors.

Furthermore, the district court noted that Grover performed essentially the same tasks as Juarez in the egg-breaking room: "If Grover knew that Juarez was in a zone of imminent danger, then Grover also would be in a zone of imminent danger. It is difficult to believe Grover would put herself at risk of injury." *See Hernandez*, 523 N.W.2d at 306 (opining that had defendants known the method of cutting and capping gas lines would probably result in injury, "we doubt they would have used it themselves").

We find this case to be more aligned with *Thompson,* 312 N.W.2d 501, and *Taylor v. Peck*, 382 N.W.2d 123 (Iowa 1986). In both of those cases, the

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[3] Juarez asserts in her brief that the defendants instructed her to reach into the machine with a squeegee to clean out the water and egg material. Because she was not using a squeegee at the time of the accident, that assertion does not amount to a genuine issue of material fact.

court declined to find "gross negligence amounting to such lack of care as to amount to wanton neglect" despite supervisors allowing workers to operate machinery in a manner showing lack of ordinary care. *Taylor*, 382 N.W.2d at 128; *Thompson,* 312 N.W.2d at 505. The court found it significant in those cases that the defendants were not aware of other accidents under similar circumstances and received no word from safety inspectors that injury was probable under the working conditions. *Id*. Even if Horstman and Grover could be considered negligent in allowing Juarez to work in the "zone of danger" around the unprotected moving parts of the egg-breaking machine, Juarez's evidence does not generate a genuine issue of material fact on the element regarding their knowledge that her injury was more likely than not to result from their wanton neglect.

The record cannot be reasonably construed to support a gross negligence claim under section 85.20(2). We conclude the district court properly entered summary judgment in Juarez's suit against her coworkers.

AFFIRMED.