IN THE COURT OF APPEALS OF IOWA

No. 7-963 / 07-0726
Filed January 30, 2008

MARIA ESPINOSA,
Plaintiff-Appellant,

vs.

KIRK J. COOK, RANDY ZORN, SILVANNA B. HEILMANN, SHAWN BAGLEY, KEVIN DVETON, RODNEY HOSELTON and DAVID ROACH,
Defendants-Appellees.

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

Appeal from the district court's grant of summary judgment in favor of defendants. **AFFIRMED.**

Philip F. Miller, West Des Moines, and Roland Peddicord, Des Moines, for appellant.

Brian C. Campbell and Christian S. Walker of Faegre & Benson, L.L.P., Des Moines, for appellees.

Considered by Sackett, C.J., Vaitheswaran and Baker, JJ.

SACKETT, C.J.

Plaintiff-appellant, Maria Espinosa, was injured while working for Excel at their packing plant in Ottumwa, Iowa. She brought suit against co-workers defendants-appellees Kirk J. Cook, Randy Zorn, Silvanna B. Heilmann, Shawn Bagley, Kevin Kveton, Rodney Hoselton, and David Roach, contending their gross negligence was a direct and proximate cause of her injury. The district court, finding no evidence to establish a prima facie case of co-employee gross negligence, sustained a motion for summary judgment filed by defendants and dismissed the case. Plaintiff on appeal contends the district court erred in granting the summary judgment for she showed there was a genuine issue of material fact as to whether defendants had (1) knowledge of the peril to be apprehended, (2) injury was probable, and (3) whether defendants consciously failed to avoid the risk or proceed despite the risk of probable injury. We affirm.

I. Background Facts

Plaintiff's injury occurred while working on a sirloin skinner machine. Her hand was pulled into the machine and it cut her fingers. The machine plaintiff was using at the time of the accident was a recent model that replaced another skinner machine plaintiff had operated without incident for several months. Defendants were supervisors or managers at the plant. The new machine had the same basic design and operated in the same basic fashion as the old machine.

II. Scope and Standards of Review

> The standard of review for summary judgment cases is well settled. We review summary judgment motions for correction of errors at law. Summary judgment is appropriate only when the entire record demonstrates that no genuine issue of material fact

> exists and the moving party is entitled to judgment as a matter of law. We review the evidence in the light most favorable to the nonmoving party.
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> A party resisting a motion for summary judgment cannot rely on the mere assertions in his pleadings but must come forward with evidence to demonstrate that a genuine issue of fact is presented. The record on summary judgment includes the pleadings, depositions, affidavits, and exhibits presented.

Stevens v. Iowa Newspapers, Inc., 728 N.W.2d 823, 827 (Iowa 2007). "A fact is material if the dispute over it might affect the outcome of the suit given applicable governing law." *Grace Hodgson Trust v. McClannahan*, 569 N.W.2d 397, 399-400 (Iowa Ct. App. 1997).

III. Analysis

Iowa's workers' compensation system provides a worker's "exclusive and only rights and remedies" for injury against another employee 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 (2003). Plaintiff sued the appellees alleging gross negligence. The elements necessary to establish a coworker's "gross negligence" within the meaning of section 85.20 are (1) a knowledge of the peril to be apprehended, (2) a knowledge that an injury is probable as opposed to possible, and (3) a conscious failure to avoid the peril. *Nelson v. Winnebago Indus., Inc.*, 619 N.W.2d 385, 390 (Iowa 2000). Plaintiff argues she "has created a genuine issue of material fact" as to each of the three elements.

A. Knowledge of the peril to be apprehended. Plaintiff points to other accidents on other machines at the plant, the skinner-machine safety committee, and a district court ruling in a different lawsuit as evidence the defendants had

knowledge of the danger such machines present—especially if the operator is not trained.

None of the previous accidents on other machines provide knowledge about the machine involved in this case. There had been no previous accidents on this machine. The fact that the plant had a safety group for skinner machines because they can be dangerous to operate does not satisfy this element. The lawsuit cited is inapposite and does not satisfy this element. We conclude plaintiff did not establish this element.

B. Knowledge injury is probable. In order to satisfy this element, plaintiff had to prove the defendants "knew or should have known that [their] conduct placed the plaintiff in a zone of imminent danger." *Alden v. Genie Indus*., 475 N.W.2d 1, 2 (Iowa 1991). Knowledge that skinner machines are inherently dangerous and that eventually someone will be injured when using them is not sufficient to satisfy this element. *Heinrich v. Lorenz*, 448 N.W.2d 327, 334 n.3 (Iowa 1989). Even knowledge "of the actuarial foreseeability—even certainty—that 'accidents will happen' does not satisfy" this element. *Id*.; *see Thompson v. Bohlken*, 312 N.W.2d 501, 504-05 (Iowa 1981).

The evidence shows plaintiff had been trained on and operated the previous machine without incident. The new machine operated and functioned the same as the old machine. Plaintiff received some training on the new machine. Although plaintiff claims the new machine was faster, there is nothing in the record to establish this claim and no authority for concluding this claim, even if true, would establish this element. We conclude plaintiff did not establish this element.

C. Conscious failure to avoid the peril. The district court concluded, and we agree, that since defendants had no knowledge of the peril or that injury was probable, they could not "consciously" fail to avoid the peril. *See Thompson*, 312 N.W.2d at 504-05.

IV. Conclusion

"[W]e believe that the legislature intended the section 85.20 coemployee gross negligence exception to common law tort immunity to be a narrow one." *Walker v. Mlakar*, 489 N.W.2d 401, 406 (Iowa 1992). A plaintiff must prove all three elements set forth in *Thompson* to prevail. *Id*. at 403. Plaintiff failed to establish any of the three elements, so the defendants were entitled to judgment as a matter of law. The district court did not err in granting summary judgment in favor of the defendants.

AFFIRMED.