

IN THE COURT OF APPEALS OF IOWA

No. 8-1044 / 08-0728
Filed January 22, 2009

KELLY SMITH,
Plaintiff-Appellant,

vs.

TODD ELICK and NATASHA ELICK,
Defendants-Appellees.

Appeal from the Iowa District Court for Scott County, Mark J. Smith,
Judge.

Kelly Smith appeals from the district court's ruling granting summary
judgment to defendants. **AFFIRMED.**

Michael J. McCarthy of McCarthy, Lammers & Hines, Davenport, for
appellant.

William J. Bush of Bush, Motto, Creen, Koury & Halligan, P.L.C.,
Davenport, for appellees.

Considered by Vogel, P.J., and Vaitheswaran and Potterfield, JJ.

POTTERFIELD, J.**I. Background Facts and Proceedings**

Kelly Smith worked at Kunkel's Sport Center, Inc. (Kunkels) with Todd and Natasha Elick, who were employees and the sole shareholders of Kunkels. For years the Elicks brought their dogs to work with them, finding that having the dogs at work was good for business as it created a comfortable, family-oriented environment at the store. The Elicks also used their dogs in television and print advertisements.

On December 12, 2005, the Elicks brought their Akita dog to work and secured him in the backroom with a leash. Smith entered the backroom to get cookies, which Kunkels provided for customers. While Smith was moving cookies, the dog attacked her, causing substantial injuries including pain, disability, loss of income, and emotional distress. Smith filed a workers' compensation claim. The workers' compensation insurance carrier for Kunkels paid Smith temporary total disability and medical payment benefits.

On August 3, 2006, Smith filed a petition for damages against the Elicks under Iowa Code section 351.28 (2005), which imposes strict liability upon the owner of a dog when that dog bites a person. On March 5, 2008, the Elicks moved for summary judgment on the grounds that Smith's exclusive remedy against the Elicks was provided by the Workers' Compensation Act in chapter 85 of the Iowa Code. On April 1, 2008, the district court granted the Elicks' motion for summary judgment, ruling that Iowa Code section 85.20 is the exclusive remedy for employees who are injured within the scope of their employment.

Smith appeals, arguing that her strict liability claim under Iowa Code section 351.28 falls outside the exclusivity of the Workers' Compensation Act.

II. Standard of Review

We review the district court's decision for errors at law. Iowa R. App. P. 6.4. Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Smith v. CRST Int'l, Inc.*, 553 N.W.2d 890, 893 (Iowa 1996).

III. Preemption of Workers' Compensation Act

Smith contends that her strict liability claim under Iowa Code section 351.28 falls outside the scope of the Workers' Compensation Act. We disagree. Section 85.20 provides that

the rights and remedies provided in this chapter . . . for an employee . . . shall be the exclusive and only rights and remedies of the employee . . . at common law or otherwise, on account of such injury . . . against . . . the employee's employer [or] any other employee of such employer, provided that such injury . . . arises out of and in the course of such employment¹

We agree with the district court that section 85.20 is the exclusive remedy against an employer or coemployee for employees who are injured by dog bite within the scope of their employment.

The Iowa Supreme Court considered a similar argument, that a statutory claim was excepted from workers' compensation exclusivity, in a vicarious liability negligence case, *Steffens v. Proehl*, 171 N.W.2d 297 (Iowa 1969). In *Steffens*, an employee was injured by a coemployee's negligent operation of a

¹ Smith argues on appeal that her injury did not arise out of and in the course of employment. However, Smith did not raise this argument before the district court judge; therefore, we decline to consider the argument on appeal. *Zeman v. Canton State Bank*, 211 N.W.2d 346, 350 (Iowa 1973).

truck owned by their employer. *Steffens*, 171 N.W.2d at 298. The supreme court held that the employee was precluded from recovering under Iowa Code section 321.493 (1966), the motor vehicle owner's liability statute. *Id.* at 300. The employee's exclusive remedy against the employer was under the Workers' Compensation Act. *Id.*

Though Smith argues that her strict liability claim falls outside the scope of the Workers' Compensation Act, she provides no authority for this argument. Even when considering the strict liability nature of Iowa Code section 351.28 (2005), we agree with the district court that section 85.20 is clearly and unambiguously Smith's only remedy. *See Welp v. Iowa Dep't of Revenue*, 333 N.W.2d 481, 483 (Iowa 1983) (finding that when a statute uses clear and plain language, there is no room for statutory construction). Therefore, we find that summary judgment was proper.

AFFIRMED.