IN THE COURT OF APPEALS OF IOWA

No. 1-509 / 11-0088
Filed October 19, 2011

WILEY WHITACRE,
Plaintiff-Appellant,

vs.

BILL BROWN, CHAD CLAREY, DAN HOFFMAN, and JASON PETON,
Defendants-Appellees.

Appeal from the Iowa District Court for Palo Alto County, Patrick M. Carr, Judge.

Wiley Whitacre appeals from the district court order granting summary judgment in favor of the defendants on his gross negligence claim. **AFFIRMED.**

Stephen F. Avery and Jill M. Davis of Cornwall, Avery, Bjornstad & Scott, Spencer, for appellant.

Mark W. Thomas and Anita L. Dhar of Grefe & Sidney, P.L.C., Des Moines, for appellees.

Heard by Eisenhauer, P.J., and Doyle and Mullins, JJ.

PER CURIAM

Wiley Whitacre sustained injuries in the course of his job duties and sued several supervisory and management co-employees for gross negligence. The district court granted summary judgment in favor of the defendants. On appeal, Whitacre contends genuine issues of material fact precluded summary judgment. We affirm.

***I. Background Facts and Proceedings*.**

The summary judgment record reveals the following essentially undisputed facts. In October 2008, Whitacre began working at Energy Panels Structures, Inc. (EPS), a manufacturer of pre-engineered building systems. Whitacre received general training for approximately two weeks. Thereafter, he began working in EPS's lamination department and was trained to use a roll coater machine ("the machine") by his foreman, defendant Jason Peton.[1] The machine was generally used four to six days a week, eight to sixteen hours a day, depending on the work schedule. The machine was cleaned each day after every use.

Peton began working for EPS in 1997. At that time, Peton was trained by his then foreman, Kevin Kulow, how to operate and clean the machine. Kulow was trained to operate and clean the machine in approximately 1990 by his then foreman. Regarding the cleaning of the machine, Kulow was instructed to move the rollers on the machine so that there was a three to three and half inch-

[1] There were two roll coater machines in the lamination department. Whitacre was trained on one machine and injured on the other. The record is not clear as to whether or not Whitacre had previously operated or cleaned the machine that injured him, but both machines were "pretty much" the same and "not substantially different."

distance between the rollers. After he applied a solvent to the rollers, he was to use a rag or industrial paper towel, while the machine and its rollers were running, to wipe the rollers clean.

Kulow cleaned the machine for many years following these procedures without any incident. Kulow then taught the same cleaning procedures to Peton, who used these procedures off and on for twelve years without any incident. Peton was promoted to foreman of the department in or about 2005. In 2008, Peton taught Whitacre the same cleaning procedures when Whitacre started operating the roll coater machine.[2]

When Whitacre, Peton, and Kulow were trained on the machine, they were told the manufacturer's manual for the machine was located near the machine in a desk or podium. The manual contained information regarding "maintenance, repair, [and] safety instructions," including cleaning instructions. The manual contained the following images:

[2] Although there is a factual dispute as to whether Peton instructed Whitacre to separate the rolls to a three to three and a half inch-distance before cleaning the machine, we find this fact is not material to resolve the question before us.

The cleaning instructions stated to "keep hands away from revolving rolls" and "do not wipe rolls while turning!" The instructions recommended a brush with a long handle be used for clean-up. Additionally, the cleaning instructions noted that "[m]inor procedure variations may be necessary with some materials and/or auxiliary equipment but NEVER touch revolving rolls. *Always Safety First.*" Peton stated he had personally referenced the manual for repairing the machine, but he had not reviewed its cleaning instructions.

On April 13, 2009, Whitacre was cleaning the machine using a dry paper towel to remove dust from the rollers while the machine and the rollers were running. He was severely injured when the paper towel got stuck in the rollers and his hands and arms were pulled into the machine.

Whitacre sued Peton as well as Bill Brown, EPS's general manager and president; Chad Clarey, EPS's vice president of production; and Dan Hoffman, an EPS foreman in another department who had operated the machine in the 1990s (collectively hereinafter "defendants"); asserting defendants' gross negligence was a proximate cause of his injury.[3] Whitacre alleged he was taught to clean the machine in a manner contrary to the manufacturer's instructions. He asserted defendants were aware of the peril of cleaning the machine in a manner contrary to the manufacturer's instructions and that "injury from cleaning in the manner taught was probable, yet the manner of cleaning was not changed so as to avoid the peril."

[3] Whitacre also sued EPS and the machine's manufacturer, but Whitacre's claims against those parties are not at issue in this appeal.

Defendants filed a motion for summary judgment. Following an unreported hearing on the motion, the district court entered its order sustaining defendants' motion and dismissing Whitacre's petition. The court found that, viewing the evidence in a light most favorable to Whitacre, Whitacre could not establish any of the elements of gross negligence.

Whitacre appeals.

***II. Scope and Standards of Review*.**

We review the district court's summary judgment ruling for the correction of errors at law. Iowa R. App. P. 6.907; *Frontier Leasing Corp. v. Links Eng'g, LLC*, 781 N.W.2d 772, 775 (Iowa 2010). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Walderbach v. Archdiocese of Dubuque, Inc.*, 730 N.W.2d 198, 199 (Iowa 2007). "No fact question exists if the only dispute concerns the legal consequences flowing from undisputed facts." *McNertney v. Kahler*, 710 N.W.2d 209, 210 (Iowa 2006) (citation omitted). Like the district court, we view the record in the light most favorable to the party opposing summary judgment. *Frontier Leasing Corp.*, 781 N.W.2d at 775. 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. Discussion*.**

***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 amounting to such lack of care as to amount to wanton neglect for the safety of another." Iowa Code § 85.20(2) (2009). Simple or ordinary negligence will not justify recovery. *Taylor v. Peck*, 382 N.W.2d 123, 126 (Iowa 1986). A plaintiff bears a substantial burden under section 85.20(2) 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). Our supreme court has noted that "our cases have demonstrated that the scope of coemployee gross negligence claims authorized by the legislature under section 85.20 is 'severely restricted, particularly by adding the requirement of wantonness in defining gross negligence.'" *Henrich v. Lorenz*, 448 N.W.2d 327, 332 (Iowa 1989) (quoting *Woodruff Constr. Co. v. Mains*, 406 N.W.2d 787, 789 (Iowa 1987)). This concept of wantonness "involves the combination of attitudes: a realization of imminent danger, coupled with a reckless disregard or lack of concern for the *probable* consequences of the act." *Henrich*, 448 N.W.2d at 333 (quoting *Thompson v. Bohlken*, 312 N.W.2d 501, 505 (Iowa 1981)).

To establish a co-employee's "gross negligence" under Iowa Code section 85.20(2), three elements must be proved: (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. *Walker v. Mlakar*, 489 N.W.2d 401, 403 (Iowa 1992) (citing *Thompson*, 312 N.W.2d at 504). This three-factor test "is necessarily a stringent one because undesirable consequences could result from improvidently holding a co-employee liable to a

fellow employee." *See id*. at 405 (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. If the fellow employee who was held liable to a co-employee was indemnified by his or her employer, such an employer could be burdened with common law damages beyond the employer's statutory workers' compensation liability or with the expense of carrying insurance to cover the personal liability of all supervisory personnel") (internal quotation omitted).

Viewing the evidence in a light most favorable to Whitacre, Whitacre must establish genuine issues of material fact exist as to all three elements to prevail. *Id*. The district court determined that no genuine issue of material fact existed as any of the elements. Upon our review, we find it unnecessary to address the first or third elements because the material facts relating to the second element are undisputed and entitle defendants to judgment as a matter of law.

***B. Element Two*.**

The question we are called to answer is whether Whitacre is unable to prove as a matter of law that defendants knew his 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." *Thomas v. Food Lion, L.L.C.*, 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*, 448 N.W.2d at 334 n.3. 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 v. Midwest Gas Co*., 523 N.W.2d 300, 305 (Iowa Ct. App. 1994).

There are two means by which Whitacre may demonstrate that defendants possessed knowledge that the existing danger would probably result in injury. First, a plaintiff may show that the defendants knew about prior injuries 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 cleaning procedure Whitacre was instructed to use had been utilized by EPS for some twenty years and produced no history of injuries. Whitacre himself cleaned the machine on a daily basis for almost six months with no report of injuries. Given this accident-free history, defendants had no reason to suspect injuries would probably occur under the prevailing work practices. *See Henrich*, 448 N.W.2d at 329-31, 333-35 (finding insufficient evidence of gross negligence where plaintiff was instructed to use a butt skinning machine contrary to the

machine manufacturer's instruction manual); *see also Hernandez*, 523 N.W.2d at 306. Furthermore, both Hoffman and Peton had previously used and cleaned the machine using the same method as Whitacre. Had these defendants known this method would probably result in injury, we doubt they would have used it themselves. *See Henrich*, 448 N.W.2d at 333, *Hernandez*, 523 N.W.2d at 306.

Upon our review, we agree with the district court's conclusion that Whitacre 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 any history of injuries. Because we conclude Whitacre cannot establish the second element of gross negligence as to defendants, we accordingly affirm the judgment of the district court.

AFFIRMED.

Eisenhauer, P.J., and Mullins, J., concur; Doyle, J., dissents.

DOYLE, J. (dissenting)

I respectfully dissent because I think a jury question was presented on the issue of gross negligence.

In order to dodge the summary judgment bullet, Whitacre must show there are disputed material facts as to all three of the *Thompson* elements necessary to establish coemployee gross negligence under Iowa Code section 85.20(2). *Thompson v. Bohlken*, 312 N.W.2d 501, 505 (Iowa 1981) ((1) knowledge of the peril to be apprehended; (2) knowledge that the injury is a probable, as opposed to a possible, result of the danger; and (3) a conscious failure to avoid the peril).

With regard to element one, the district court noted the parties disagreed as to what the peril was in this situation. Whitacre asserted the peril was cleaning the rollers while the machine was on, and the defendants asserted the peril was cleaning the machine with the rollers too close together. The district court concluded Whitacre's injuries occurred because the rollers were too close together and because there was no showing that any of the defendants had actual knowledge the rollers would be set at a narrow enough width to create a danger to Whitacre. Although placing the rollers too close together may have increased the severity of Whitacre's injuries, the risk of some injury to Whitacre existed regardless of how far apart the rollers were, so long as they were rotating at the time Whitacre touched them.

Whitacre's experts, Hall-Wade Engineering Services, observed that

> the workers were instructed to clean the machine while running and were allowed to place their hands with towels or rags on the roller while the rollers were turning. However, the manufacturer's instructions directed the operator to never touch moving rollers, even during cleaning, and provided a safe method for the operator

> to clean the rollers. Thus, the manufacturer['s] cleaning procedure was not followed. This is a very dangerous operational procedure as the machine rollers, when rotating, provide a wrap point hazard. The rotating rollers can easily catch a person's hand or clothing and pull it with the rollers in the direction of rotation. At many rollers there is an adjacent obstruction or roller in close proximity which provides an additional pinch or nip hazard. If one is ingested due to touching the rotating roller, injury can occur by the wrapping or rotating roller process. An additional hazard such as an obstruction point in [close] proximity to the rotating roller can cause additional injury.

Whitacre's experts' conclusion that "the wrap point pulled Mr. Whitacre's hand into the machine to cause injury" was unrebutted by any expert testimony. Once Whitacre was pulled into the machine, the *additional* pinch or nip hazard created by the close proximity of the two rollers may have caused additional injuries.

Further, Whitacre's experts concluded that instructing an operator to touch moving rollers, as Whitacre was, "is contrary to all the safety information published and known concerning the hazards of contacting rotating members." Recognizing the wrap point hazard, the manufacturer of the roll coating machine emphatically, specifically, and graphically warned operators to "Never Touch Moving Rolls." The warning was not limited to rollers being "too close together"; the warning instructed operators to *never* touch moving rollers. The manufacturer's cleaning procedure instructed the machine's operator to clean the rollers when they were stopped. The wrap point hazard is eliminated by this safe method of cleaning the rollers.

Did Peton actually know of the wrap point peril so graphically demonstrated in the operator's manual? Peton waffled during his deposition, first saying he had never reviewed the safety portions of the operator's manual prior to Whitacre's injury, and later saying he may have glanced over the page on

safety. In any event, he was well aware of the existence of the manual. One cannot defeat the knowledge of the peril element through the deliberate avoidance of readily available knowledge. For all the above reasons, I believe a fact question was generated as to element one of the *Thompson* test.

In discussing element two, knowledge that injury was a probable result of the danger, the district court mentions Whitacre's "injury is the first time an employee has been injured using the roll coater machine at EPS" and concludes "there is no evidence the defendants had actual knowledge this machine was likely to cause injury to Whitacre." The fact that there were no reported injuries over a twenty-year period is misleading. To be sure, the machine was cleaned daily without incident, but this was not the procedure Whitacre was performing at the time of his injury. He was injured while cleaning new dry rollers after their replacement, a relatively infrequent event. Rollers were replaced only once or twice a year. He was faced with different conditions than he faced during the routine daily cleaning. Here, the newly replaced rollers were dry, not wet with solvent, and they were stickier because they were new. Although the record is not crystal clear, it appears this was the first time Whitacre had cleaned dry, newly-replaced rollers. As Whitacre found out after he was injured, paper towels stuck to new rollers "like glue." Kulow testified that in his experience, he did not need to clean the rollers after they were replaced, so he never had the occasion to clean the machine when the rollers were dry. Hoffman explained how he cleaned the machine on a daily basis during his two-year tenure as a roll coater operator, but he did not say whether he had ever wiped down dry rollers. Only Peton testified he used dry towels to dust off the rollers, but he did not elaborate.

I believe the lack of history of injuries presented to us does not establish as a matter of law that the operation performed by Whitacre would only possibly, not probably, result in injury. I believe a fact question was generated as to whether a high probability of harm was manifest even in the absence of a history of accidents or injury.

In discussing element three, conscious failure to avoid the peril, the district court reiterated its finding that the peril that caused Whitacre's injury was the distance between the rollers on the machine. Further, it stated:

> Had the distance between the rollers been greater, the court finds that [Whitacre's] injury would not have occurred. There is no testimony that any of the defendants instructed [Whitacre] to keep the rollers at a distance of 1½ to 2 inches. If the defendants had given this instruction, that would have helped create a fact question on if the defendants consciously failed to avoid the peril. Without that showing, the court finds that [Whitacre] has failed to show any of the defendants consciously failed to avoid the peril.

As discussed above, I believe the court's finding that Whitacre's injury would not have occurred had the distance between the rollers been greater is in error. Some injury would have been caused regardless of the distance between the rollers. The rotating rollers themselves were the peril. Whitacre was directed to clean the machine and was merely doing what he had been instructed to do by his supervisor; that is, wipe the moving rollers. I believe a fact question was generated as to whether Whitacre was consciously placed in a place of peril.

It may well be that the stringent gross negligence standard is a virtually insurmountable bar for Whitacre to hurdle. Nevertheless, I feel it is more appropriate for a jury to make that call after the evidence has been fully

developed and presented. I therefore would reverse the district court's grant of summary judgment.