IN THE COURT OF APPEALS OF IOWA

No. 8-467 / 07-1757
Filed August 27, 2008

AUDREY MITCHELL,
Plaintiff-Appellant,

vs.

HY-VEE, INC., and RIC ANDERSON,
Defendants-Appellees.

Appeal from the Iowa District Court for Marshall County, David R. Danilson, Judge.

Audrey Mitchell appeals the district court's grant of summary judgment in her tort action against her employer and a co-employee. **AFFIRMED.**

Barry Kaplan of Kaplan & Frese, L.L.P., Marshalltown, for appellant.

Kermit Anderson, Des Moines, for appellee.

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

MILLER, J.

Audrey Mitchell sued her employee, Hy-Vee, Inc., and its store manager, her co-employee Ric Anderson, claiming that Anderson committed an assault and battery on her, causing her fear and emotional harm. The defendants filed a motion for summary judgment. In ruling on the motion the district court concluded, with Mitchell's agreement, that no battery had occurred, and granted summary judgment as to the claim of battery. Citing *Estate of Harris v. Papa John's Pizza*, 679 N.W.2d 673 (Iowa 2004) and *Nelson v. Winnebago Indus., Inc.*, 619 N.W.2d 385 (Iowa 2000), the court concluded that although under the facts viewed most favorably to Mitchell she had been assaulted by Anderson, her exclusive remedy against Hy-Vee was pursuant to Iowa's workers' compensation laws and granted summary judgment as to the claim against Hy-Vee for assault. Finally, the court concluded that viewed in the light most favorable to Mitchell the alleged assault did not constitute the gross negligence required to remove Mitchell's claim against Anderson from the otherwise applicable exclusive remedy provisions of Iowa Code section 85.20(2) (2005), and granted summary judgment as to the claim against Anderson for assault.

Mitchell appeals. She does not challenge the grant of summary judgment as to her claim of battery, or as to her claim against Hy-Vee for assault. On appeal Mitchell's sole claim of trial court error is:

> THE DISTRICT COURT ERRED BY GRANTING DEFENDANT RICK ANDERSON'S MOTION FOR SUMMARY JUDGMENT WHEN A GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER HIS ASSAULT AMOUNTED TO GROSS NEGLIGENCE.

Our review of a district court's grant or denial of summary judgment is for correction of errors at law. Iowa R. App. P. 6.4; *LeMars Mut. Ins. Co. v. Joffer*, 574 N.W.2d 303, 306 (Iowa 1998). A motion for summary judgment should be granted when there is no genuine issue of material fact for trial and the moving party is entitled to judgment as a matter of law. Iowa R. App. P. 1.981(3). In determining whether there is a genuine issue of material fact, we review the record in the light most favorable to the non-moving party. *Anderson v. Nextel Partners, Inc.*, 745 N.W.2d 464, 466 (Iowa 2008).

The Iowa workers' compensation statute provides the exclusive remedy for an employee against a co-employee for a work-related injury, provided the injury "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). To prevail on a claim based on such co-employee gross negligence, a plaintiff must prove: (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). This test "is necessarily a stringent one because undesirable consequences could result from improvidently holding a co-employee liable to a fellow employee." *Taylor v. Peck*, 382 N.W.2d 123, 126 n.2 (Iowa 1986). The allegedly injured employee must prove all three elements in order to establish a co-employee's "gross negligence" for purposes of section 85.20(2). *Walker v. Mlakar*, 489 N.W.2d 401, 403 (Iowa 1992). The requirements of the statute impose a substantial burden on a plaintiff because

the statute requires *wanton* neglect. *Nelson*, 619 N.W.2d at 390. The statute severely restricts the scope of a claim against a co-employee, particularly by adding the requirement of wantonness in defining gross negligence. *Woodruff Constr. Co. v. Mains*, 406 N.W.2d 787, 789-90 (Iowa 1987).

As asserted by Anderson, in dismissing Mitchell's claim against Anderson the district court focused on the second element of gross negligence.

> Element two requires more than a showing of the defendant's actual or constructive knowledge of the "actuarial foreseeability" that accidents will happen. Plaintiff[ ] must show that the defendant[ ] knew [his] actions would place [his] coemployee in imminent danger, so that someone would more likely than not be injured by the conduct.
>
> The requisite showing of a "zone of imminent danger" can be made in two ways: (1) proving defendant's actual or constructive knowledge of a history of accidents under similar circumstances or, (2) showing a high probability of harm is manifest even in the absence of a history of accidents or injury.

Hernandez v. Midwest Gas Co., 523 N.W.2d 300, 305 (Iowa Ct. App. 1994) (citations omitted).

Mitchell's lawsuit is based on a claim that Anderson's act of pointing the screwdriver at her caused her emotional harm. The record contains nothing that would support a finding Anderson had actual or constructive knowledge of emotional harm having occurred under similar circumstances. We are left to consider whether the facts, viewed in the light most favorable to Mitchell, would allow a fact finder to find a zone of imminent danger in the second of the two ways noted in *Hernandez*, by finding a high probability of emotional harm even in the absence of any history of such harm from similar incidents.

The district court concluded that on viewing the evidence in the light most favorable to Mitchell a reasonable fact finder could not find that an injury such as alleged by Mitchell was a probable, rather than merely a possible, result of Anderson's act. In support of its conclusion the court noted, among other facts, the following: no physical contact occurred; although the parties disputed just how far Anderson had held the screwdriver from Mitchell, it remained at least a full foot away; no evidence indicated Anderson verbally threatened to use the screwdriver to contact or injure Mitchell; no evidence suggested Anderson took any action to restrain Mitchell or otherwise prevent her from leaving the area; and, as Mitchell had testified in a deposition, she "just turned around and went back to the pizza department."

Upon review of the summary judgment record, we agree with the district court's conclusion that it also cannot support a finding that Anderson's act generated a high probability of emotional harm to Mitchell even in the absence of a history of such harm having occurred from similar acts. We therefore affirm the grant of Anderson's motion for summary judgment.

AFFIRMED.