STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1756

Matthew Olson,
Appellant,

vs.

Jamie Gausen, et al.,
Respondents,

Shane Friesner,
Respondent,

John Streiff,
Respondent.

Filed July 21, 2009
Affirmed
Hudson, Judge

Roseau County District Court
File No. 68-CV-07-648

Gary M. Hazelton, Hazelton Law Firm, PLLC, P.O. Box 1248, Bemidji, Minnesota 56619-1248 (for appellant)

Paul R. Aamodt, 2829 South University Drive, P.O. Box 966, Fargo, North Dakota 58107 (for respondents Gausen, et al.)

Bradley J. Beehler, Morley Law Firm, Ltd., 1697 South 42nd Street, Suite 200, P.O. Box 14519, Grand Forks, North Dakota 58208-4519 (for respondent Friesner)

Leif A. Nelson, Lano, Nelson, O'Toole & Bengtson, Ltd., 515 Northeast Second Avenue, Grand Rapids, Minnesota 55744 (for respondent Streiff)

Considered and decided by Hudson, Presiding Judge; Worke, Judge; and Muehlberg, Judge.*

U N P U B L I S H E D O P I N I O N

HUDSON, Judge

In this coemployee-tort action, appellant argues that the district court erred by applying a gross-negligence standard to respondents' conduct. Appellant also contends that even if respondents' conduct is subject to a gross-negligence standard, respondents were grossly negligent as a matter of law. Because the district court applied the appropriate negligence standard and because the record supports the jury's determination that respondents were not grossly negligent, we affirm.

FACTS

Appellant Matthew Olson and the four respondents—Jamie Gausen, Shane Friesner, Andy Brandt, and John Streiff—worked for the same employer, Arrow Brake. On August 5, 2003, Friesner and Streiff were on their lunch break on their employer's premises when, as a prank, they decided to throw a firecracker at Gausen and Brandt. Gausen and Brandt were startled by the firecracker's explosion, but no one was hurt and respondents all laughed at the prank afterwards. Respondents then decided to scare appellant with the same prank.

When appellant returned to work from his lunch break, Friesner lit a firecracker and Gausen threw the firecracker in appellant's direction. The firecracker rolled too

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art VI, § 10.

close to appellant and respondents yelled at appellant to run away from the firecracker. The record reflects that either appellant stomped on the firecracker in an apparent attempt to put out its fuse, or appellant began to run. In any event, the firecracker exploded under appellant's foot. As a result of the explosion, appellant suffered significant injuries to his foot, which required surgery and hospitalization.

Appellant sued respondents, claiming that respondents' conduct in lighting and throwing the firecracker was grossly negligent, reckless, and willful. Appellant further alleged that respondents acted in concert and are, therefore, jointly and severally liable for the harm caused to appellant. Prior to trial, appellant moved the district court for a summary-judgment determination that respondents' conduct was subject to a negligence standard rather than a gross-negligence standard. The district court denied appellant's motion, determining that gross negligence is the applicable standard in coemployee-tort claims.

The jury returned a special verdict finding that respondents acted in a joint enterprise toward appellant, but that respondents' conduct was not grossly negligent. The jury awarded appellant $9,520 for lost earnings and $30,255 for incurred medical expenses. The jury also awarded appellant $6,000 for future medical expenses. But the jury declined to award appellant any damages for past or future pain, or for loss of earning capacity.

Appellant moved the district court for a new trial, arguing that the wrong negligence standard was applied to respondents' conduct. Appellant also moved the district court for judgment as a matter of law declaring—under either plain negligence or

gross negligence—that respondents were liable for appellant's injury. Finally, appellant requested additur or a new trial on damages because the jury failed to award general damages. The district court denied appellant's motions and issued an order consistent with the jury's special verdict. Because the jury found that respondents were not grossly negligent, the district court held that appellant was not entitled to any compensation for damages. This appeal follows.

D E C I S I O N

I

Appellant contends that the district court erred in applying a gross-negligence standard to respondents' conduct. We review de novo whether the district court erred in its application of the law. *Art Goebel, Inc. v. N. Suburban Agencies, Inc.*, 567 N.W.2d 511, 515 (Minn. 1997).

"The workers' compensation laws of Minnesota were designed to provide remedies for employees injured as a result of job-related activities." *Wicken v. Morris*, 527 N.W.2d 95, 98 (Minn. 1995). Under the Minnesota Workers' Compensation Act, an employee is generally precluded from bringing an action for damages against a coemployee. Minn. Stat. § 176.061, subd. 5(e) (2008). But if the injured employee can "show that the coemployee (1) owed the injured employee a personal duty and (2) was grossly negligent in performing that personal duty," the injured employee can bring a tort action against the coemployee. *Stringer v. Minn. Vikings Football Club, LLC*, 705 N.W.2d 746, 747 (Minn. 2005); *see also* Minn. Stat. § 176.061, subd. 5(e) ("A coemployee working for the same employer is not liable for a personal injury incurred by

another employee unless the injury resulted from the gross negligence of the coemployee or was intentionally inflicted by the coemployee."). "To owe a personal duty to the injured employee, the coemployee defendant must have (1) taken direct action toward or have directed another to have taken direct action toward the injured employee, and (2) acted outside the course and scope of employment." *Stringer*, 705 N.W.2d at 747 (internal citations omitted).

Appellant argues that because respondents were acting outside the course and scope of employment, they do not qualify for coemployee immunity under Minn. Stat. § 176.061, subd. 5(e). Thus, according to appellant, respondents' conduct is not subject to a gross-negligence standard. We disagree.

In *Stringer*, the supreme court defined "course and scope of employment" in the context of coemployee immunity as follows: "When determining coemployee immunity, we conclude that course and scope of employment should have the same meaning as the course and scope of employment test used to determine whether an employee qualifies for workers' compensation benefits." *Id.* at 760. Appellant interprets this language to mean that when determining whether a coemployee qualifies for coemployee immunity—and, thus, whether the gross-negligence standard applies—courts must ask whether the coemployee would qualify for workers' compensation benefits had the coemployee been injured from his or her own conduct.

According to appellant's interpretation of *Stringer*, if the coemployee would qualify for workers' compensation benefits had he or she been injured, then the coemployee would be entitled to coemployee immunity. But if the coemployee would

not qualify for worker's compensation benefits, then the coemployee would not be entitled to coemployee immunity and the gross-negligence standard would not apply.

Appellant posits that here, if respondents were injured as a result of their conduct, they would not qualify for workers' compensation benefits because their conduct was beyond the course and scope of employment. *See* Minn. Stat. § 176.021, subd. 1 (2008) (providing that employers are liable for injuries "arising out of and in the course of employment"); *see also Foley v. Honeywell, Inc.*, 488 N.W.2d 268, 271 (Minn. 1992) (stating that injuries are not compensable under the Workers' Compensation Act unless they arise out of and in the course of employment). Appellant argues that respondents are, thus, not entitled to coemployee immunity and that the district court improperly applied the gross-negligence standard to respondents' conduct.

We find no support for appellant's interpretation of *Stringer*. In *Stringer*, the supreme court did not endeavor to determine whether the coemployees would have qualified for workers' compensation benefits had they been injured as a result of their own conduct. 705 N.W.2d at 760–63. Rather, the supreme court merely inquired as to whether the coemployees' actions in *Stringer* conformed to their duties as employees. *Id.* at 762. Because the coemployees' conduct in *Stringer* conformed to their duties as employees, their conduct was within the course and scope of their employment; therefore, the appellant in *Stringer* could not bring a tort action against the coemployees. *Id.* at 762–63.

Furthermore, whether respondents' actions were outside the course and scope of employment has no bearing on the applicable negligence standard. As noted above,

Stringer establishes that to bring a tort action against a coemployee, an injured employee must show that the coemployee (1) owed the injured employee a personal duty and (2) was grossly negligent in performing that personal duty. *Id.* at 747. The question of whether a coemployee is acting within the course and scope of employment is relevant only to the first part of the *Stringer* analysis—whether the coemployee owed the injured employee a personal duty. *Id*. ("To owe a personal duty to an injured employee, the coemployee defendant must have (1) taken direct action toward or have directed another to have taken direct action toward the injured employee, and (2) acted outside the course and scope of employment.").

But in regard to the second part of the *Stringer* analysis—the applicable negligence standard—that a coemployee is acting outside the course and scope of employment is irrelevant. Statute and caselaw both require a gross-negligence standard in the context of coemployee-tort claims. *See* Minn. Stat. § 176.061, subd. 5(e) ("A coemployee working for the same employer is not liable for a personal injury incurred by another employee unless the injury resulted from the gross negligence of the coemployee or was intentionally inflicted by the coemployee."); *Stringer*, 705 N.W.2d at 747 (requiring an injured employee to show that a coemployee was grossly negligent); *Wicken*, 527 N.W.2d at 98 ("[T]he injury must arise from gross negligence on the part of the co-employee."); *Ackerman v. Am. Family Mut. Ins. Co.*, 435 N.W.2d 835, 838 (Minn. App. 1989) (holding that the appellant could maintain an action against a coemployee only if the coemployee was grossly negligent). Therefore, respondents' conduct is

subject to a gross-negligence standard even if their conduct was outside the course and scope of employment.

Appellant also asserts that a gross-negligence standard does not apply when the employee's injury bears no relationship to the work environment and it is merely coincidence that the employee and the tortfeasor are coemployees. In support of this proposition, appellant relies on a footnote from *Ackerman* that states that coemployee immunity "would not apply to [the] negligent injury of a co-employee where the tortfeasor and injured party are merely by happenstance co-employees and where the injury has no relationship to the work environment." 435 N.W.2d at 838 n.2.

While we agree with appellant's proposition, it is inapplicable here. Appellant received workers' compensation benefits because of his foot injury, and he cannot now claim, for the purposes of his suit against respondents, that his injury bore no relationship to the work environment. *See* Minn. Stat. § 176.021, subd. 1 (providing that employers are liable to pay compensation, under the Workers' Compensation Act, for injuries "arising out of and in the course of employment"); *Foley*, 488 N.W.2d at 271 (stating that injuries are not compensable under the Workers' Compensation Act unless they arise from and in the course of employment). Moreover, we cannot say that it was by mere happenstance that the parties were coemployees. The injury occurred on Arrow Brake's premises when the parties were returning from their lunch break, and the record indicates that prior to appellant's injury, playing with fireworks at their workplace was something that all of the parties—including appellant—did together as coemployees.

What appellant apparently assumes here is that because respondents' conduct was outside the course and scope of employment, the entire incident was unrelated to the work environment. But we rejected a similar argument in *Ackerman*:

> Appellant urges that the accident here only "arose out of the employment" and did not occur during the "course of the employment." Therefore, continues appellant, the statute does not apply. We cannot agree. The statutes of Minnesota do not exempt incidents which merely arise out of the employment relationship from the scope of section [176.061, subdivision 5(e)]. There is no language in the statutes which would permit this court to place injuries occurring within the course of employment under the scope of section [176.061, subdivision 5(e)] while removing from that section's application those injuries which merely arose out of that employment relationship.

Id. at 838 (footnote omitted). Accordingly, appellant's argument here is without merit.

Finally, at oral argument, appellant averred that a gross-negligence standard should not apply when the respondents' conduct involved potentially deadly harm. But appellant cites no authority in support of this position, and in the context of this appeal, appellant's claim is just another way of saying that respondents were acting outside the course and scope of employment, which has no bearing on the applicable negligence standard. As a result, the gross-negligence standard—required by both statue and case law—is applicable to respondents' conduct, and the district court did not err in its application of the law.

II

Next, appellant contends that even if respondents' conduct is subject to a gross-negligence standard, the district court should have granted his posttrial motion for

judgment as a matter of law on the issue of respondents' gross negligence. We review de novo the denial of a motion for judgment as a matter of law. *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998). We must affirm the denial of such a motion if "there is any competent evidence reasonably tending to sustain the verdict." *Id*. Unless a reviewing court is "able to determine that the evidence is practically conclusive against the verdict, or that reasonable minds could reach but one conclusion against the verdict," the district court's order denying a motion for judgment as a matter of law should stand. *Seidl v. Trollhaugen, Inc.*, 305 Minn. 506, 507, 232 N.W.2d 236, 239 (1975).

Gross negligence is defined as negligence in the highest degree. *High v. Supreme Lodge of the World*, 214 Minn. 164, 170, 7 N.W.2d 675, 679 (1943); *4 Minnesota Practice*, CIVJIG 25.35 (2006). More specifically, gross negligence has been explained as

> substantially and appreciably higher in magnitude than ordinary negligence. It is materially more want of care than constitutes simple inadvertence. It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. It is very great negligence, or the absence of slight diligence, or the want of even scant care. It amounts to indifference to present legal duty, and to utter forgetfulness of legal obligations so far as other persons may be affected. It is a heedless and palpable violation of legal duty respecting the rights of others.

State v. Bolsinger, 221 Minn. 154, 159, 21 N.W.2d 480, 485 (1946) (quotation omitted); *see also Ackerman*, 435 N.W.2d at 840 (further examining definition of gross negligence).

Appellant provides little argument as to why respondents' conduct was grossly negligent as a matter of law, other than to say that he does not think reasonable minds can disagree that respondents were grossly negligent. Despite the brevity of appellant's assertion, we acknowledge that appellant's position has some merit. But "it is only in the clearest of cases that the question of negligence becomes one of law," *Teas v. Minneapolis St. Ry. Co.*, 244 Minn. 427, 434, 70 N.W.2d 358, 363 (1955), and there is competent evidence in the record to support the jury's special-verdict determination that respondents were not grossly negligent.

Respondents testified that they did not intend to injure appellant and that the tossing of the firecracker was just a prank; appellant acknowledged that respondents had no intent to injure him. Additionally, Gausen testified that he did not intend for the firecracker to get close enough to appellant to cause injury. Rather, Gausen only meant to place the firecracker somewhere between himself and appellant so that appellant would be startled by the explosion. And when the firecracker rolled closer to appellant than had been anticipated, respondents yelled at appellant to run away.

Accordingly, there was sufficient evidence in the record for the jury to conclude that respondents were not indifferent as to their duty to appellant and that they exhibited more than scant care regarding appellant's safety and wellbeing. Because the record supports the jury's special verdict, the district court did not err by denying appellant's motion for judgment as a matter of law.[1]

[1] Because we affirm, we decline to consider appellant's claim that he is entitled to a remand for additur or a new trial on damages.

Affirmed.