

IN THE SUPREME COURT OF IOWA

No. 18-1545

BRIAN AND LISA TERRY

Plaintiffs/Appellants,

vs.

MEGAN DOROTHY

Defendant/Appellee,

APPEAL FROM THE IOWA DISTRICT COURT

FOR STORY COUNTY

THE HONORABLE BETHANY CURRIE, PRESIDING

APPELLEE'S BRIEF

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

**WHETHER THE DISTRICT COURT CORRECTLY GRANTED
SUMMARY JUDGMENT AS TO ALL OF PLAINTIFFS' CLAIMS**

Johnson v. Farmer, 537 N.W.2d 770 (Iowa 1995)

Nelson v. Winnebago Indus. 619 N.W.2d 385 (Iowa 2000)

United Fire & Cas. Co. v. St. Paul Fire and Marine Ins. Co., 677 N.W.2d 755
(Iowa 2004)

Walker v. Mlakar, 489 N.W.2d 401 (Iowa 1992)

Iowa Code §§85.20 and 85.35(9)

ROUTING STATEMENT

This case is appropriate for referral to the Iowa Court of Appeals because it presents the application of existing legal principles.

STATEMENT OF THE CASE

Nature of the Case/Course of Proceedings Below:

Plaintiffs Brian and Lisa Terry filed a lawsuit against defendant Dorothy alleging liability for co-employee gross negligence pursuant to Iowa Code §85.20. Prior to such filing, plaintiff Brian Terry entered into a compromise settlement of his underlying workers compensation claim pursuant to Iowa Code §85.35(3). The settlement documents as approved by the commissioner explicitly released all claims against co-employees.

On August 27, 2018, the district court granted defendant's motion for summary judgment, ruling that by entering a compromise settlement – and by virtue of the Commissioner's subsequent approval thereof – Mr. Terry lost any further rights to pursue damages under Iowa Code §85.20 for gross negligence against a co-employee both because the approved settlement documents specifically include a release for all co-employees and because Iowa Code §85.35(9) provides that a compromise settlement approved by the commissioner is a final bar to any further rights under Chapter 85 regarding the subject matter of the compromise. The district court also specifically granted summary judgment as

to Mrs. Terry's loss of consortium claim. Plaintiffs now appeal the district court's summary judgment ruling.

STATEMENT OF FACTS

On October 12, 2017, plaintiffs Brian and Lisa Terry filed a petition at law seeking to recover damages for alleged personal injuries allegedly caused by a work related incident occurring on October 14, 2015. (App. p. 4). Plaintiffs' petition alleges that co-employee gross negligence on the part of defendant Megan Dorothy caused plaintiffs' injuries and damages. (App. p. 6).

At all material times, plaintiff Brian Terry and defendant Megan Dorothy were co-employees of Lutheran Services in Iowa, Inc. (LSI) (App. p. 4-5).

On July 27, 2017, the Iowa Workers Compensation Commissioner approved a compromise settlement pursuant to Iowa Code §85.35(3) of the workers compensation claim filed by plaintiff Brian Terry against LSI and its workers compensation carrier. (App. pp. 18-20). Exhibit A to the compromise settlement documents, entitled "Additional Terms of Settlement," includes the following:

Claimant agrees that the payment of [\$XXX] is acceptable to Claimant as a full and final compromised settlement, satisfaction, and final discharge of all claims and demands that may exist against Lutheran Services of Iowa, Inc., West Bend Mutual Insurance Company, *and any* of their officers, directors, *employees*, agents, subsidiaries, affiliates, and parent companies ("Released Parties"), by reason of his employment and by reason of all injuries or damages sustained by Claimant on or about October 14, 2015, through his association with the

Released Parties. The parties stipulate that the date of injury released in this document represents any and all claims of injuries that claimant may have against the Released Parties relating to any of the body parts or systems as set forth in the following paragraph.

In consideration of this payment, Claimant releases and discharges the Released Parties *from all liability*, including liability under the Iowa Workers' Compensation Law, for the above injury or injuries, including without limitation hip, back or neck injury, head injury, brain injury, headaches, dizziness, tinnitus, vertigo, fatigue, visual disturbances, neurological injury, any sequelae of the same, and any and all psychological or mental injuries related to the alleged October [14], 2015 work injury through the date of settlement.

(Emphasis added.) (App. p. 21-22).

Plaintiff Terry's workers compensation claim and compromise settlement arises out of and involves the same same subject matter as plaintiffs' petition at law herein, *i.e.*, personal injuries allegedly caused by the alleged October 14, 2015 workplace incident. (App. p. 4-8, 18-20, 21-22).

STANDARD OF REVIEW

The appellate court reviews a district court's ruling on a motion for summary judgment for correction of errors at law. *Sweeney v. City of Bettendorf*, 762 N.W.2d 873, 877 (Iowa 2009). Summary judgment is appropriate when the moving party proves no genuine issue of material fact exists on the record. *Berte v. Bode*, 692 N.W.2d 368, 370 (Iowa 2005). "Summary judgment is appropriate if the only conflict concerns the legal consequences of undisputed

facts.” *Peppmeier v. Murphy*, 708 N.W.2d 57, 58 (Iowa 2005). If reasonable minds can differ on how a material fact issue should be resolved, summary judgment should not be granted. *Hills Bank & Trust Co. v. Converse*, 772 N.W.2d 764, 771 (Iowa 2009). The reviewing court makes every legitimate inference that can be reasonably deduced from the evidence in favor of the nonmoving party. *Id.*

ARGUMENT

I. THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF DEFENDANT

The district court correctly ruled that defendant is entitled to summary judgment. The material facts are undisputed: plaintiff Brian Terry entered into a compromise settlement of his workers compensation claim with his employer, Lutheran Services of Iowa, Inc. and its insurer pursuant to Iowa Code §85.35(3). The compromise settlement documents were signed by Plaintiff Brian Terry and his attorney on July 21, 2017. (App. p. 18-20, 21-22). The compromise settlement was approved by the workers’ compensation commissioner on July 27, 2017. (App. p. 18).

The settlement documents as approved by the commissioner contain the following provision:

Claimant agrees that the payment of [\$XXX] is acceptable to Claimant as a full and final compromised settlement, satisfaction, and final discharge of all claims and demands that may exist against Lutheran Services of Iowa, Inc., West Bend Mutual Insurance Company, and

any of their officers, directors, *employees*, agents, subsidiaries, affiliates, and parent companies (“Released Parties”), by reason of his employment and by reason of all injuries or damages sustained by Claimant on or about October 14, 2015, through his association with the Released Parties. The parties stipulate that the date of injury released in this document represents any and all claims of injuries that claimant may have against the Released Parties relating to any of the body parts or systems as set forth in the following paragraph.

In consideration of this payment, Claimant releases and discharges the Released Parties *from all liability*, including liability under the Iowa Workers’ Compensation Law, for the above injury or injuries, including without limitation hip, back or neck injury, head injury, brain injury, headaches, dizziness, tinnitus, vertigo, fatigue, visual disturbances, neurological injury, any sequelae of the same, and any and all psychological or mental injuries related to the alleged October [14], 2015 work injury through the date of settlement.

(Emphasis added.) (App. p. 21-22).

Pursuant to the Iowa Code §85.35(9), the compromise settlement pursuant to Iowa Code §85.35(3) serves as as a final bar to plaintiffs’ co-employee gross negligence claim herein. Iowa Code §85.35(9) states:

Approval of a settlement by the workers’ compensation commissioner is binding on the parties and shall not be construed as an original proceeding. *Notwithstanding any provisions* of this chapter and chapters 85A, 85B, 86 and 87, an approved compromise settlement shall constitute a final bar to *any further* rights arising under this chapter and chapters 85A, 85B, 86, and 87 regarding the subject matter of the compromise and a payment made pursuant to a compromise settlement agreement

shall not be construed as the payment of weekly compensation. (Emphasis added.)

As stated by the Iowa Supreme Court in *In Bankers Standard Ins. Co. v. Stanley*, 661 N.W.2d 178 (Iowa 2003), an approved compromise settlement is a final bar to any further rights under all of the workers' compensations statutes "without qualification or limitation." 661 N.W.2d at pp. 181-182. The language of §85.35 contains no limitation on the "final bar to any further rights" other than the bar applies only to those rights arising under chapters 85, 85A, 85B, 86, and 87." *Id.* at p. 182.

In *Bankers Trust*, the Iowa Supreme Court applied the "final bar" of §85.35(9) to to preclude an employer/insurance carrier from pursuing a lien/indemnification claim against a third party pursuant to Iowa Code §85.21 and Iowa Code §85.22. The court concluded that the compromise settlement the insurer reached with the employee barred the employer's §85.22 indemnification rights. 661 N.W.2d at p. 183.

In *United Fire & Cas. Co. v. St. Paul Fire and Marine Ins. Co.*, 677 N.W.2d 755 (Iowa 2004), the Iowa Supreme Court held that the "final bar" of 85.39(9) precluded an employer/insurance carrier from pursuing claims for contribution and indemnity against another employer/insurance carrier pursuant to Iowa Code §85.21. 677 N.W.2d at pp. 760-761.

Iowa Code §85.20 states in pertinent part:

The rights and remedies provided in this chapter, chapter 85A or chapter 85B for an employee . . . on account of injury, occupational disease or occupational hearing loss for which benefits under this chapter, chapter 85A or chapter 85B are recoverable, shall be the exclusive and only rights and remedies of the employee . . . personal or legal representatives, dependents, or next of kin, at common law or otherwise, on account of such injury, occupational disease, or occupational hearing loss against any of the following:

1. Against the employee's employer.
2. Against any other employee of such employer, provided that such injury, occupational disease, or occupation hearing loss arises out of and in the course of such employment and 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.

An employee's rights and remedies, at common law or otherwise, arising from a job-related injury as governed exclusively by the workers' compensation act under the jurisdiction of the workers' compensation commissioner. *White v. Northwestern Bell Tele. Co.*, 514 N.W.2d 70, 74 (Iowa 1994).

The allowance of a co-employee gross negligence action is a narrow exception to the exclusive remedy provision of the workers' compensation statute. *Walker v. Mlakar*, 489 N.W.2d 401, 403 (Iowa 1992). Thus while an injured worker may maintain a common law tort against a co-employee, whether the claim

is actionable is determined by the worker's compensation statute. *Walker*, 489 N.W.2d at pp 403-404.

In order to succeed on his gross negligence claim under §85.20, the plaintiff must meet the standards the Iowa Supreme Court has determined need to be proven under Iowa Code §85.20. *Walker*, 489 N.W.2d at p. 403. “[T]here are three elements necessary to establish a co-employee's “gross negligence” *under Iowa Code §85.20...*” *Id.* (Emphasis added). The three elements the plaintiff must prove unique to a claim under §85.20 are (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. *Id.* See also *Henrich v. Lorenz*, 448 N.W.2d 327 (Iowa 1989) (describing co-employee gross negligent suit as a §85.20 suit). *Thompson v. Bohlken* 312 N.W.2d 501 (Iowa 1981); *Anderson v. Bushong*, 829 N.W.2d 191, 2013 WL 530961 (Iowa App. 2013).

Further, plaintiff Brian Terry's compromise settlement agreement with LSI is a contract and the principles of contract law apply. *Mid-America Real Estate Co. v. Iowa Realty Co., Inc.* 385 F.Supp.2d 828, 834 (S.D. Iowa 2005). “It is well established in Iowa case law that settlement agreements are essentially contracts and therefore principles of contract law govern the creation, interpretation and enforceability of such agreements.” *Id.*

“It is the cardinal principle of contract construction that the parties’ intent controls; and except in cases of ambiguity, this is determined by what the contract itself says.” *Hargrave v. Grain Processing Corp.*, 863 N.W.2d 302; 2015 WL 1331706 *3 (Iowa App. 2015) (unpublished opinion). Unless there is ambiguity, the intent of the parties is determined by what the contract says. *Id.* “Courts must strive to give effect to *all the language* of a contract. [Emphasis added] *Fashion Fabrics of Iowa, Inc. v. Retail Investors Corp.*, 266 N.W.2d 22, 26 (Iowa 1978). Furthermore, an agreement must be interpreted as a whole. *Id.* at 26.

With the above principles in mind, it is clear that plaintiff Terry released any claim he might have against the defendant Dorothy involving his work place injury. It is undisputed that the compromise settlement documents state that plaintiff Terry releases “any and all claims” he may have against the “Released Parties.” (App. p. 21) Released Parties is defined as the employer (LSI), its insurance carrier “and any of their officers, directors, *employees*, agents, subsidiaries, affiliates, and parent companies” (*Id.*) It is undisputed that defendant Dorothy is an employee of LSI. As a “Released Party,” Dorothy is released and discharged “from all liability, including liability under the Iowa Workers’ Compensation Law, for the above injury or injuries...” (*Id.*) There is no limitation on the extent of the release and discharge in the compromise settlement other than it pertains to matters covered by Chapter 85 of the Iowa Code. The

commissioner would not have approved the compromise settlement if it pertained to matters outside of Chapter 85. By approving settlements including releases in favor of employees such occurred in this case, the commissioner acknowledges that the release of claims against co-employees is within his purview.

There is nothing ambiguous about the language quoted above from the parties' compromise settlement agreement. The clear and plain language in the workers' compensation settlement documents establish that plaintiff Terry released his employer and any employees including Dorothy, for any injuries or damages caused by his work injury.

Plaintiff Terry did not include any language in the worker's compensation settlement attempting to preserve a gross negligence claim. Even if he had attempted to preserve a claim for gross negligence by including such language in the settlement documents, it would be of no effect. *United Fire & Cas.*, 677 N.W. 2d at 758. In the *United Fire* case, the workers' compensation insurance carrier included language in a compromise settlement with the injured worker, that it would proceed against another insurance carrier to recover benefits paid. "Despite this language in the agreement, the approval of the compromise special case settlement by the workers' compensation commissioner extinguished the insurance carrier's right to indemnification and contribution under §85.21." *Id.* at p. 761.

Looking at all of the clearly stated language in the approved compromise settlement documents, the only conclusion that can be reached is that plaintiff Terry released any and all claims he may have against not only his employer and its insurer, but also against their employees. As defendant is one of the employees covered by the language in the settlement documents, her motion for summary judgment is properly granted.

In the absence of plaintiff Terry having an actionable claim, his wife Lisa's claim must be dismissed, as the district court ruled. She does not have a separate claim for loss of consortium under Iowa's workers' compensation statute as Iowa Code §85.20 "expressly provides that workers' compensation remedies 'shall be the exclusive and only rights and remedies of such employee, the employee's personal or legal representatives, dependents, or next of kin, at common law or otherwise, on account of such injury.'" *Johnson v. Farmer*, 537 N.W.2d 770, 773 (Iowa 1995). In *Johnson*, the claimant alleged a gross negligence claim against her supervisor, which claim was dismissed on summary judgment. This was affirmed by the Iowa Supreme Court. *Id.* at 773. The district court also dismissed the consortium claims, finding the claims precluded by §85.20. This ruling was also affirmed by the Iowa Supreme Court. *Id.* at 773. See also *Good v. Tyson Foods, Inc.* 756 N.W.2d 42 (Iowa 2008) in which the injured worker and her spouse filed a claim of gross negligence against the employer. *Id.* at 44. The Iowa

Supreme Court affirmed the summary judgment dismissal of the claim. The Court further noted that, based on the *Johnson v. Farmer* case, the parties agreed that if the injured worker's claim failed, the loss of consortium claim also failed. *Good*, 756 N.W.2d at p. 47, fn 4. Therefore this claim must be dismissed in its entirety.

The clear statutory language of §85.20 and §85.35(9) mandate the outcome in this case that defendant is entitled to the summary judgment as granted by the district court. Further, plaintiffs have already been compensated for the injuries and damages alleged in their petition through the compromise settlement that was approved by the workers' compensation commissioner pursuant to Iowa Code §85.35(3). In filing this co-employee gross negligence claim after the compromise settlement of the workers' compensation claim, plaintiffs are essentially seeking double recovery of the same alleged damages for past and future loss of earnings, loss of earning capacity and past and future medical expenses. Plaintiffs' exclusive remedy for such damages is under Iowa Code chapter 85. *Nelson v. Winnebago Indus*, 619 N.W.2d 385, 389-390 (Iowa 2000). Allowing this co-employee gross negligence suit to go forward would allow two different and inconsistent remedies. *Bolinger v. Kiburz*, 270 N.W.2d 603 (Iowa 1978) and *Gourley v. Nielson*, 318 N.W.2d 160 (Iowa 1982). The compromise settlement under Iowa Code §85.35(3) and the final bar of §85.35(9) prevents such inconsistent remedies.

CONCLUSION

For the reasons set forth herein, defendant respectfully requests this court to affirm the district court's summary judgment in their favor. The district court correctly held that defendant is entitled to summary judgment as a matter of law on plaintiffs' co-employee gross negligence claim because the compromise settlement of plaintiff's workers' compensation claim involving the same subject matter as plaintiff's co-employee gross negligence claim, bars the co-employee gross negligence claim pursuant to the final bar set forth in Iowas Code §85.35(9) and/or plaintiffs have released the co-employee gross negligence claim pursuant to the clearly stated language set forth in the compromise settlement approved by the commissioner.

REQUEST FOR ORAL ARGUMENT

Appellee requests oral argument.

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PROOF OF SERVICE

The undersigned certifies that on the February 7, 2019, he served the Appellee's Proof Brief on counsel for the Appellants electronically using the EDMS. Per Rule 16.317(1)(a), this constitutes service of the document for the purposes of the Iowa Court Rules.

Charles A. Blades

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa Rule of Appellate Procedure 6.903(1)(g)(1) because it contains 10,036 words, excluding the parts of the brief exempted.
2. This brief complies with the typeface requirement of Iowa Rule of Appellate Procedure 6.903(1)(e) because it has been prepared in proportionately spaced typeface using Microsoft Word 2010 in Times New Roman 14 point type.

CERTIFICATE OF COST

The undersigned certifies the cost of this proof brief (amount actually paid for printing or duplicating paper copies of briefs) was \$0.00.