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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

ROSE NEWLON and CLYDE NEWLON,)
Plaintiffs-Appellants,)
vs.)
IOWA ELECTRIC LIGHT & POWER COMPANY,)
Defendant-Appellee.)

Filed December 29, 1982

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2-236
2-67546

Appeal from Linn District Court - Robert E. Ford, Judge.

The plaintiffs appeal from a judgment for defendant in this negligence action arising from an accident in which a utility pole being towed by the defendant's truck came into contact with and crashed through the window of plaintiffs' vehicle. AFFIRMED.

John Lundy and James Ellefson of Lundy, Butler & Lundy, Eldora, and Dennis Appelgate of Michelson, Roan & Appelgate, Toledo, for plaintiffs-appellants.

Robert Tilden and Iris Muchmore of Simmons, Perrine, Albright & Ellwood, Cedar Rapids, for defendant-appellee.

Considered en banc.

The plaintiffs, Rose Newlon and Clyde Newlon, appeal from a judgment for defendant in this negligence action arising from an accident in which a utility pole being towed by the defendant's truck came into contact with and crashed through the window of plaintiffs' vehicle. On appeal the plaintiffs contend the evidence did not support the trial court's finding that they had failed to prove either negligence or proximate causation of their injuries by acts of the defendant. They also contend the trial court erred by rejecting their argument that the doctrine of res ipsa loquitur established the defendant's negligence. We affirm.

Our scope of review in this law action tried to the court is on assigned errors and the trial court's findings of fact have the effect of a special verdict. Iowa R. App. P. 4; Kurtenbach v. TeKippe, 260 N.W.2d 53, 54 (Iowa 1977).

I.

The record reveals that on December 13, 1978, at or near the intersection of Highway 63 and Carlton Street in the city of Toledo, in Tama County, Iowa, an accident occurred between plaintiffs' pickup truck and defendant's truck. Defendant's truck was pulling a pole trailer carrying an approximate 40 foot utility pole. The accident occurred while defendant's truck was making a right hand turn west onto Carlton Street from the right southbound lane of the four-lane Highway 63. The plaintiffs' vehicle was in the left southbound lane of the highway. The plaintiffs' vehicle came into contact with the utility pole being towed by the defendant's truck. The end of the pole crashed through the right side of the front windshield and continued through the right side of the rear window of plaintiffs' pickup truck. The pole struck plaintiff Rose Newlon on the right side of her head causing her to fall to her left on to Clyde Newlon's lap. In their lawsuit, Rose Newlon sought to recover damages for personal injuries and Clyde Newlon sought damages for loss of consortium.

At the trial to the court the plaintiffs asserted that their vehicle never left the southbound lane. They claimed that the defendant's driver negligently turned the corner in spite of the presence of plaintiffs' vehicle and that the pole swung into plaintiffs' lane and hit their vehicle. The defendant's driver, on the other hand, testified that to his knowledge the pole did not swing into the southbound lane. He did not notice plaintiffs' vehicle until after the accident. The defendant denies that its driver was negligent and suggests that plaintiff negligently drove into the pole.

The trial court found that the plaintiffs had not met their burden to prove the defendant was negligent or that any act of the defendant was the proximate cause of the accident. The trial court rejected the plaintiffs' theory that the doctrine of res ipsa loquitur required a finding of defendant's negligence; the trial court stated that the accident resulted from two instrumentalities (the two vehicles), only one of which was under the defendant's control. Judgment was entered for defendant and plaintiffs then instituted this appeal.

II.

The plaintiffs' first contention is that the evidence does not support the trial court's finding that the plaintiffs failed to prove negligence or proximate causation, but establishes defendant's negligence as a matter of law. They assert that the trial court misinterpreted or disregarded evidence which allegedly established their theory of how the accident occurred.

In TeKippe, 260 N.W.2d at 54, the court noted that

> [w] hen the trial court denies recovery because of a party's failure to carry his burden on an issue, we will not interfere unless we find the party carried his burden as a matter of law. The evidence in the party's favor must be so overwhelming that no other reasonable inference could be drawn. On review we examine the evidence in the light most favorable to the judgment.

In the instant case we are presented with a situation in which each party

claims that the accident was a result of the negligence of the other. Both plaintiffs and defendant testified that their vehicles remained in the left southbound and right southbound lanes respectively. The defendant denies that the pole ever crossed into the plaintiffs' lane. The court noted in its findings that the "testimony of the drivers of both vehicles was fair and forthright, but was conflicting." Indeed, had the situation taken place as each driver had testified there would have been no collision. The only other evidence before the court bearing upon the position of the vehicles at the point of the actual impact was a series of photographs taken after the accident. Having taken all of the evidence into consideration, the court ruled as follows:

> In this case the Court is faced with a very difficult decision to be made upon the evidence received at the trial. The testimony of the witnesses was credible, but obviously their respective positions are in conflict. The accident could, might have, or very well may have happened in the manner suggested by either the Plaintiffs or the Defendant. However, the Court cannot indulge in speculation in deciding the case and, therefore, must make its decision based upon the evidence received and the application of legal propositions set forth hereinabove.
>
> The Court finds the Plaintiffs have not carried the burden of proof in this case by a preponderance of the evidence, to prove the Defendant's negligence, and proximate cause, and that, therefore, the Petitions of the Plaintiffs be, and the same are hereby dismissed.

We cannot say, under our narrow scope of review, that plaintiffs' evidence is "so overwhelming that no other reasonable inference could be drawn" but that defendant's negligence was established as a matter of law. On the contrary, viewing the evidence in the light most favorable to the judgment, we believe the judgment is adequately supported.

III.

We also find plaintiffs' final contention, that the trial court erred in refusing

to apply the doctrine of res ipsa loquitur to the case, to be without merit. The doctrine of res ipsa loquitur is appropriate when it is established that (1) the person charged with negligence is shown to have had exclusive control and management of the instrumentality which caused the injury and (2) the occurrence causing the injury was of the type which would not have happened in the ordinary course of events had reasonable care been used. Wiles v. Myerly, 210 N.W.2d 619, 624-25 (Iowa 1973). But, as plaintiffs point out, the rule does not require that defendant have exclusive control of each instrumentality involved in the occurrence. So long as plaintiff removes any inference that he was responsible for the accident, he may invoke the doctrine of res ipsa loquitur even though he fails to show defendant's exclusive control. See Loth, Res Ipsa Loquitur in Iowa, 18 Drake L. Rev. 1, 9 (1968); Slife, The Iowa Doctrine of Res Ipsa Loquitur, 35 Iowa L. Rev. 393, 395 n.7 (1950); W. Prosser, Handbook of the Law of Torts § 39, at 224 (4th ed. 1971). Indeed, in Michelson v. Forney, 259 Iowa 91, 95, 143 N.W.2d 390, 393 (1966), the court noted that "[i] n none of the limited number of Iowa automobile cases in which the doctrine has been applied has there been any evidence which would indicate conduct of the plaintiff may have been a contributing factor (citations omitted)."

In the instant case, the defendant asserts that plaintiffs drove their car into the utility pole. The evidence is at least susceptible to this inference. Because there is evidence suggesting that plaintiffs' conduct may have been a contributing factor, we believe the court correctly concluded that res ipsa loquitur was inapplicable to the facts of this case.

Having found no grounds requiring reversal, we affirm the judgment.

AFFIRMED.