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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

RALPH COOK,	)	
Appellant,	)	Filed May 31, 1978
vs.	)	
CITY OF SIOUX CITY, IOWA, A Municipal Corporation,	)	496
	)	2-59975
Appellee.	)	

Appeal from Woodbury District Court - James P. Kelley, Judge.

Plaintiff appeals from adverse judgment entered after trial court granted defendant's motion for directed verdict. REVERSED AND REMANDED.

Ronald E. Runge, of Sioux City, counsel for appellant.

James L. Abshire and Michael S. Walsh, of Sioux City, counsel for appellee.

Submitted to Allbee, C. J., Donielson, Snell, Oxberger and Carter, JJ.

DONIELSON, J.

Plaintiff-Ralph Cook appeals from a judgment entered for defendant-City of Sioux City after the trial court granted defendant's motion for a directed verdict at the conclusion of plaintiff's evidence. In his petition in which he sought judgment in the amount of $75,000, plaintiff alleged that he suffered serious injury to his right arm, shoulder and chest as a result of a blood test performed on him by Daniel Weakley, a bacteriologist who was an employee and agent of defendant.

In Count I of his petition, plaintiff alleged that defendant, through its agent, was negligent (1) in injecting the needle of the instrument used to withdraw the blood specimen in such a manner as to cause both a slowing of the circulation and an alteration of the blood or vessel walls, creating in turn a thrombus; (2) in improperly injecting said instrument into plaintiff's body and vein; and (3) in using a non-sterile instrument and inserting it into plaintiff's body and blood vessel. In Count II, plaintiff alleged as an alternate theory that the happening of the injury in question permits an inference of negligence by defendant under the doctrine of res ipsa loquitur because defendant, through its agent and employee, had sole control of the instrument used to withdraw the blood and such withdrawal does not ordinarily create thrombosis of a vein in the absence of reasonable care. A jury trial was held and at the conclusion of plaintiff's evidence, the court granted defendant's motion for a directed verdict on the grounds that plaintiff had failed to prove any of the specific allegations of negligence contained in Counts I and II.

When presented with a motion for directed verdict, both the trial court and this court must view the evidence in the light most favorable to the party against whom the motion is made, whether the evidence is contradicted or not. Rule 14(f)(2), Rules of Appellate Procedure. If reasonable minds might differ on the evidential questions, then a fact or jury question is presented and the motion to direct the verdict should be overruled. Rule 14(f)(17), R. App. P. A movant for a directed verdict must be considered as admitting the truth of all evidence offered by the adverse party and every favorable inference which may be fairly and reasonably deducted therefrom must be carried to the aid of the evidence. Prestype Inc. v. Carr, 248 N.W.2d 111, 118-119 (Iowa 1976); Meeker v. City of Clinton, 259 N.W.2d 822, 828 (Iowa 1977); Oak Leaf Country

Club, Inc. v. Wilson, 257 N.W.2d 739, 744 (Iowa 1977). Our function in this case is to review the evidence only to determine whether it is sufficient to warrant the submission of the question of defendant's negligence to the jury as trier of fact. See Meeker v. City of Clinton, supra, at 828; Miller v. Young, 168 N.W.2d 45, 51 (Iowa 1969). Further, the weight and credibility of testimony are matters for the jury, Becker v. D & E Distributing Co., 247 N.W.2d 727, 730 (Iowa 1976); Trapalis v. Gershun, 259 Iowa 775, 783, 145 N.W.2d 591 (1966), and generally, questions of negligence, contributory negligence and proximate cause are matters for the jury and it is only in exceptional cases that they may be decided as matters of law. Rule 14 (f)(10), R. App. P.

The evidence adduced at trial established that Weakley, a bacteriologist employed by defendant, administered a vena puncture to plaintiff at the Sioux City Police Station on April 8, 1975, a short time after plaintiff had been arrested for operating a motor vehicle while under the influence of alcohol (OMVUI). Weakley testified that he received no specific training in the administration of this vena puncture procedure other than on-the-job training and experience. He also stated that although normally there is no hazard of creating a closed or compressed vein, under some circumstances the administration of a blood test of this nature can result in a temporary compression of the vein when the blood is taken too quickly by the syringe. Weakley indicated that the blood sample tube used in the test was retained, but the syringe, cotton and other equipment were destroyed the following day.

Plaintiff testified that although he had been hospitalized in 1974 for injuries to his lower neck and back, he had never had any difficulty in his right arm area prior to the date of the blood test in question. Cook stated that the test was administered inside of the elbow of the right arm while he sat in a chair and held his arm upright. After a couple of seconds, the needle was withdrawn and shortly thereafter his arm began to ache severely. Cook indicated that he had been given blood tests in his right arm on several previous occasions and had experienced no difficulty. He stated that it was the quickness and the pushing of the needle in and pulling it back too fast that distinguished this test from the others he had received. A few minutes after the instant test, he felt pain in the elbow region of his right arm which worked itself up to the shoulder. By the next morning, his entire arm was swollen and later turned black and blue.

Two physicians, one specializing in internal medicine and the other in general and thoracic surgery, had examined plaintiff and testified at trial. The internist testified that during his examination of Cook on April 12, Cook complained of swelling in the right arm which started some time after having had blood drawn from his arm. His diagnosis of a blockage in the venous network on the right arm was confirmed by subsequent tests. The internist expressed his opinion that the blood test in question was a possible cause of the thrombosis condition and indicated that other tests conducted to determine the cause of the swelling proved fruitless. He also stated that pain or injury in the area of the vena puncture would be more consistent with the thrombosis condition found in Cook and his medical history revealed no injury to the shoulder area during the time span involved. As far as the internist knew, the only event that did occur during this period of time was the vena puncture.

The surgeon testified that his examination of plaintiff revealed much evidence of congestion and distention of the veins, which he diagnosed as venous occlusion or blockage in the right shoulder area. He determined that since some obstruction in the area might be aggravating the situation, surgery would be necessary. Further, he and a third doctor, both of whom examined Cook and discussed his injury, were unable to find any cause from plaintiff's previous injury which caused the compression of the vein here. The surgeon also testified that he considered it possible that the thrombosis was caused by the taking of the blood and that he found no other possibility.

Defendant argues that the trial court properly directed a verdict because Count I, paragraph 6, subparagraphs A, B & C of plaintiff's petition only refer to the injection of the needle in such a manner as to cause or create a thrombus, and there is no evidence in the record which would indicate that the manner in which the needle was injected by Weakley was negligent or improper. Further, defendant contends that there was neither an allegation of negligence based upon the manner of withdrawal of blood nor any evidence adduced at trial which would indicate that the withdrawal was negligent or improper. Finally, defendant contends not only that there was no evidence that the instrument injected was non-sterile as alleged in Count I, paragraph 6, subparagraph D, but that plaintiff's attorney admitted that he could not prove that the instrument was non-sterile because the syringe and needle had been destroyed.

Viewing the evidence in the light most favorable to plaintiff and allowing every favorable inference which may fairly and reasonably be deducted therefrom, we conclude that a jury question as to the issue of defendant's negligence was generated with regard to the items specified in Count I, paragraph 6, subparagraphs A, B and C. With regard to subparagraph D, we agree with the trial court that a directed verdict was appropriate. With the exception of subparagraph D, we do not believe that this is one of those exceptional cases in which negligence may be decided as a matter of law.

Plaintiff also contends that the court erred in directing a verdict with regard to Count II. He contends that, as an alternative to the specific allegations of negligence in Count I, he is entitled to rely upon the inference of negligence permitted under the doctrine of res ipsa loquitur because the happening was caused by an instrumentality under the exclusive control of the defendant and the occurrence was such as in the ordinary course of things would not have happened if reasonable care had been used. See Fosselman v. Waterloo Community School Dist., Etc., 229 N.W.2d 280, 283 (Iowa 1975); Cronin v. Hagan, 221 N.W.2d 748, 751-753 (Iowa 1974); Clippinger v. Becker, 220 N.W.2d 879, 881 (Iowa 1974). If the necessary causal evidence is circumstantial, as it is here, it must make plaintiff's theory not merely possible, but more probable than any other theory based on the evidence. Northwestern Nat. Ins. v. Raid Quarries Corp., 249 N.W.2d 640, 644 (Iowa 1977); rule 14(f)(16), R. App. P. In the instant case, although both physicians testified that the blood test was a possible cause of plaintiff's injury, they also indicated that they had found no other possibility. After reviewing the record, we conclude that the court erred in directing a verdict as to Count II as well, and that plaintiff was entitled to have the res ipsa loquitur doctrine submitted to the jury. The judgment of the district court is reversed and remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED.