IN THE COURT OF APPEALS OF IOWA

No. 5-219 / 94-784

FILED
MAY 30 1995
CLERK SUPREME COURT

GERTRUDE BIGALK,

Appellant,

vs.

DONALD BIGALK,

Appellee.

Appeal from the Iowa District Court for Howard County, Margaret Lingreen, Judge.

In a slip-and-fall case, plaintiff appeals from jury verdict finding defendant not at fault. **REVERSED AND REMANDED.**

Dennis G. Larson of the Larson Law Office, Decorah, for appellant.

John T. McCoy of Lindeman, Yagla, McCoy & Riley, Waterloo, for appellee.

Considered by Hayden, P.J., and Sackett and Cady, JJ.

HAYDEN, P.J.

Gertrude Bigalk suffered injuries after falling into a stairwell located in a garage. The garage is owned by Donald Bigalk and leased to Gertrude's friend, Anna Chance, along with one-half of a duplex. Gertrude and Donald are distantly related by Gertrude's marriage to Donald's third cousin.

The accident occurred after Gertrude brought Anna home to the leased premises. While there is some dispute, it was apparently later in the evening and at least somewhat dark at the time. The garage had no lights, and Anna asked Gertrude to shine the lights from her vehicle into the garage. As Anna retrieved the keys from her ignition, Gertrude fell into an open stairwell. The stairwell was not protected by a wall or a guardrail.

Gertrude brought suit against Donald and his wife, Edith, seeking damages she suffered in the fall. Gertrude later dismissed her action against Edith. She claimed Donald was negligent in failing to provide a warning about the open stairwell or otherwise protect against the danger of falling into the stairwell. The matter proceeded to a jury trial.

The court entered judgment on the jury's verdict finding Donald was not at fault. Gertrude appeals. She claims the trial court erred in (1) failing to instruct the jury regarding the doctrine of res ipsa loquitur; (2) failing to instruct the jury regarding her specifications of negligence; (3) admitting the tape recorded evidence of a conversation

between Gertrude and Donald 's insurance agent; and (4) failing to direct a verdict on the liability issues.

I. **Res Ipsa Loquitur.**

Plaintiff first contends the trial court erred in failing to instruct the jury regarding the doctrine of res ipsa loquitur. We review for correction of errors at law. Iowa R. App. P. 4.

Res ipsa loquitur is a rule of evidence. *Mastland, Inc. v. Evans Furniture, Inc.*, 498 N.W.2d 682, 686 (Iowa 1993) (citation omitted); *Kennis v. Mercy Hosp. Med. Ctr.*, 491 N.W.2d 161, 166 (Iowa 1992). Res ipsa loquitur applies when (1) the injury is caused by an instrumentality under the exclusive control of the defendant, and (2) the occurrence is such as in the ordinary course of things would not happen if reasonable care had been used. *Holst v. Countryside Enters., Inc.*, 14 F.3d 1319, 1321 (8th Cir. 1994) (applying Iowa law) (citation omitted); *Mastland*, 498 N.W.2d at 686; *Kennis*, 491 N.W.2d at 166. If there is substantial evidence to support both elements, the happening of the injury permits -- but does not compel -- an inference the defendant was negligent. *Mastland*, 498 N.W.2d at 686; *Kennis*, 491 N.W.2d at 166.

We find the second foundational element lacking here. Bigalk's injury was the type which can occur even if reasonable care had been used. People fall down stairways even if a defendant-owner exercises reasonable care. Therefore, the doctrine of res ipsa loquitur does not apply in this case. *See, e.g., Hawkeye Bank v. State*, 515

N.W.2d 348, 352 (Iowa 1994) (child asphyxiated by scarf caught on railing of slide in school playground not an appropriate case for res ipsa instruction because accident would have occurred in the ordinary course of things had ordinary care been applied); *Mastland*, 498 N.W.2d at 686 (in suit against tenants by landlord, seeking to recover for damages to home resulting from fire caused by two-year-old child who was playing with cigarette lighter in his crib, res ipsa inapplicable because the occurrence is such as in the ordinary course of things could happen even if reasonable care had been used); *Tappe v. Iowa Methodist Med. Ctr.*, 477 N.W.2d 396, 400-01 (Iowa 1991) (in medical malpractice suit to recover for paralyzing stroke during heart bypass surgery, res ipsa instruction not appropriate because stroke occurs in fixed percentage of all bypass surgeries even in the absence of negligence; thus, plaintiff did not prove second prong of threshold res ipsa test); *Cronin v. Hagan*, 221 N.W.2d 748, 753 (Iowa 1974) (in medical malpractice suit, medical evidence with respect to necrosis of ureter failed to establish occurrence would not have happened in ordinary course of things if reasonable care had been used, and thus res ipsa doctrine inapplicable). The fact plaintiff tendered evidence her fall may have been caused by negligence "is essentially irrelevant to the res ipsa inquiry." *Tappe*, 477 N.W.2d at 400 (citing *Reilly v. Straub*, 282 N.W.2d 688, 695 (Iowa 1979)).

Plaintiff's fall is an occurrence such as in the ordinary course of things could happen even if defendant had exercised reasonable care. We affirm the trial court on this issue.

II. Jury Instructions.

Jury Instruction No. 16 provides in pertinent part: "The Defendant was negligent in failing to make the condition (open stairway) safe or in failing to warn the Plaintiff of the condition and risk involved." Plaintiff contends the jury instruction was intended to be used with a greater specification of those acts by the defendant which allegedly caused the injury. We agree.

The instruction at issue appears patterned after Iowa Uniform Civil Jury Instruction 900.1. Uniform Instruction 900.1 directs the drafter to "set forth the particulars of the claim of negligence in failing to protect the plaintiff." Our supreme court stated a specification of negligence "should identify either (a) a certain thing the allegedly negligent party did which the party should not have done, or (b) a certain thing that party omitted to do which should have been done, under the legal theory of negligence which is applicable." *Rinkleff v. Knox*, 375 N.W.2d 262, 266 (Iowa 1985) (citation omitted).

We find the instruction here fails the requirements of *Rinkleff*. *Id.* The instruction should have identified specific acts or omissions by defendant, supported by the evidence, plaintiff claimed constituted a failure "to make the condition (open

stairway) safe." At trial there was evidence the stairway was not illuminated, did not have a protective railing, was not covered, and was inadequately designed. We find the lack of specificity in the instruction on negligence prejudiced plaintiff to the extent a new trial is warranted. *See Rinkleff*, 375 N.W.2d at 266-67; *Balboa Ins. Co. v. Pixler Elec.*, 484 N.W.2d 396, 399 (Iowa App. 1992); *Fuches v. S.E.S. Co.*, 459 N.W.2d 642, 644 (Iowa App. 1990). We reverse the trial court on this issue.

III. Tape Recording.

Four days after her fall, plaintiff was interviewed by defendant's insurance investigator. Despite the fact plaintiff stated she did not wish to be interviewed or tape recorded, and did not feel well, the investigator did record the statement. The tape recording was used at trial to try to impeach plaintiff on the issue of whether she was warned about the presence of the basement stairwell immediately before her fall. Plaintiff argues the trial court erred in admitting this evidence. We review for an abuse of discretion. *Carter v. MacMillan Oil Co.*, 355 N.W.2d 52, 55 (Iowa 1984) (citation omitted); *Amco Ins. Co. v. Stammer*, 411 N.W.2d 709, 717 (Iowa App. 1987) (citation omitted).

Iowa Rule of Evidence 403 states in pertinent part, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." We agree with plaintiff under Rule 403, the evidence should not have been admitted. The evidence was elicited by the insurance investigator at a point

of time when plaintiff was in ill health, under heavy medication, was without access to counsel, and requested the investigator leave her alone and not record her statements. The investigator failed to record all of plaintiff's comments and all of their conversation. A printed transcript of the recorded portion of this interview was displayed on a screen. The jury read this projection during plaintiff's cross-examination. Plaintiff objected to its introduction into evidence as an edited, self-serving and not a complete exhibit of the statements made. Under these circumstances, we find the probative value of the evidence is substantially outweighed by its unfair prejudice. We reverse the trial court on this issue.

IV. Directed Verdict.

Plaintiff moved for a directed verdict on the issue of defendant's liability upon completion of the evidence in this case. Plaintiff appeals the trial court's refusal to grant the motion. Our scope of review on denial of motion for directed verdict is for correction of errors at law. Iowa R. App. P. 4; *McClinton v. Iowa Methodist Med. Ctr.*, 444 N.W.2d 511, 512 (Iowa App. 1989). In determining whether a jury question was engendered, we examine the evidence in the light most favorable to the nonmovant, regardless of whether such evidence is contradicted, to determine if reasonable minds could differ on the issue. *Vinson v. Linn-Marr Community Sch. Dist.*, 360 N.W.2d 108, 118 (Iowa 1984). We also initially note the familiar rule only in the exceptional case

should a trial court direct a verdict in favor of either party on a negligence claim. Iowa R. App. P. 14(f)(10); *Doe v. Johnston*, 476 N.W.2d 28, 31 (Iowa 1991).

This is not an exceptional case. There is evidence sufficient to generate a jury question on the issue of whether defendant was not negligent. Plaintiff did not introduce any evidence the garage or stairway violated any building or safety code adopted by the City of Cresco or the State of Iowa. There was evidence the stairwell was obvious and plaintiff was warned of its existence immediately before she fell. The trial court correctly refused to direct a verdict for plaintiff. We affirm the trial court on this issue. However, because of our decision on the sufficiency of the jury instructions and the admissibility of the tape recording, the judgment of the trial court is reversed. The case is remanded to the trial court for a retrial. Costs on appeal are to be divided evenly between the parties.

REVERSED AND REMANDED.

Sackett, J., concurs; Cady, J., specially concurs.

CADY, J. (concurring specially)

I agree the case must be reversed for failing to include the specific acts or omission of negligence in the instructions. but would hold that the trial court did not abuse its discretion in admitting the taped interview. The interview concerned a critical issue at trial. and the decision to admit it into evidence fell within the permissible range of the balancing process under Rule 403.