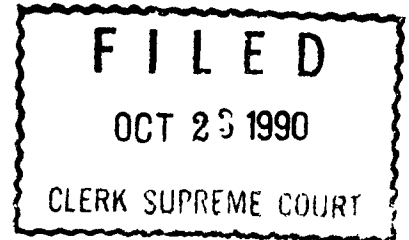


IN THE COURT OF APPEALS OF IOWA

No. 0-278 / 89-1502



LEORA M. PHELPS and VERLE W. PHELPS, Wife and Husband,

Appellees,

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vs.

K MART CORPORATION,

Appellant.

Appeal from the Iowa District Court for Black Hawk County, Forest E. Eastman and Robert F. Peterson, Judges.

K-Mart corporation appeals from an adverse judgement rendered on a jury verdict in a premises liability suit. K-Mart contends the Black Hawk County court erred in instructing the jury on the doctrine of res ipsa loquitur, and further erred by allowing the Plaintiffs to read into evidence portions of the depositions of three K-Mart employees. **AFFIRMED.**

James E. Walsh, Jr. and Bruce L. Gettman, Jr. of Clark, Butler, Walsh & McGivern, Waterloo, for appellant.

Edward J. Gallagher, Jr. and Cynthia A. Scherrman of Gallagher, Langlas & Gallagher, P.C., Waterloo, for appellees.

Heard by Oxberger, C.J., and Schlegel and Habhab, JJ.

HABHAB, J.

On November 7, 1985, Leora and Verle Phelps were shopping at K-Mart. While entering the store, Leora was injured when the door her husband held open for her swung from his hand and struck her in the shoulder. The door was not automatic. It had to be pushed or pulled for a customer to enter. However, the manner in which the door closed was controlled by a door closer. This mechanism is buried in the floor and is used to control the speed at which the door closes. It is this mechanism that the Phelps assert was not operating properly and caused Leora's shoulder injury.

Following the presentation of evidence, the district court submitted instructions to the jury. The jury was asked to determine if K-Mart was at fault because of its specific negligence in failing to maintain and inspect the door or its general negligence under *res ipsa loquitur*. The jury determined that K-Mart was 100% at fault and a proximate cause of the Phelps' damages. The court entered judgment in accordance with the jury's verdict, awarding Leora \$35,000 and Verle \$7,500.

I.

Our review is for correction of errors at law. Iowa R. App. P. 4. Findings of fact in a law action are binding upon the appellate court if supported by substantial evidence. Iowa R. App. P. 14(f)(1).

Defendant-appellants first argue the trial court erred in instructing the jury on the theory of res ipsa loquitur. K-Mart asserts the door was not in its exclusive control for Verle was holding the door open for Leora.

Res ipsa loquitur is a rule of evidence and not a statement of tort law. Wiles v. Myerly, 210 N.W.2d 619, 624 (Iowa 1973). Under this doctrine, where 1) injury is caused by an instrumentality and 2) the occurrence is such as in the ordinary course of things would not have happened if reasonable care had been used, the happening of the injury permits but does not compel an inference defendant was negligent. Town of Reasnor v. Pyland Constr. Co., 229 N.W.2d 269, 272 (Iowa 1975). Further, the res ipsa theory does not raise any inference as to what did occasion the injury-causing event. If the necessary causal evidence is circumstantial, it must make plaintiff's theory not merely possible, but more probable than any other theory based on the evidence. Id. The Plaintiff has the burden of proving these elements as well as demonstrating that he has not done anything abnormal with the instrumentality and has used it in the manner for which it was intended. Palleson v. Jewell Co-op Elevator, 219 N.W.2d 8, 14 (Iowa 1974).

K-Mart argues that because the plaintiff, Verle, opened the door to enter the store that K-Mart no longer held exclusive control over the door, and therefore the doctrine of res ipsa loquitur does not apply. In considering the applicability of res ipsa loquitur, the question whether

the particular occurrence is such as would not happen if reasonable care had been used rests on common experience and not at all on evidence in the particular case that tends to show such occurrence was in fact the result of negligence. Boyer v. Iowa High School Athletic Assn., 260 Iowa 1061, 1065, 152 N.W.2d 293, 297 (1967).

In this respect, we note that plaintiffs have the burden of proving that the door was under the exclusive control and management of K-Mart at the time of negligent acts which, either at that time or later, produced the injury. Oak Leaf Country Club, Inc. v. Wilson, 257 N.W.2d 739, 744 (Iowa 1977). Control and negligence must coincide even though the injury may come later. Town of Reasoner v. Pyland Construction Co., 229 N.W.2d 269, 272 (Iowa 1975). The two foundation facts for application of the res ipsa doctrine which permits an inference of defendant's negligence from happening of the injury are: 1) exclusive control and management by defendant of the instrumentality which causes the injury, and 2) the occurrence is such as in the ordinary course of things would not have happened if reasonable care had been used. Id.

We think the jury could properly find these foundational facts existed and infer therefrom that plaintiff's injuries were caused by defendant's negligence. The defendant argues that because the door was opened by Verle that K-Mart no longer had exclusive control over the door. We are not prepared to say that such

limited control of the door, as a matter of law, renders the doctrine of *res ipsa loquitur* inapplicable. When we review the record, we find a jury question was generated on the question of control.

It may be argued that *res ipsa* should not apply because the evidence does not show plaintiff's injury was caused without fault. The supreme court in Palleson v. Jewell Cooperative Elevator, 219 N.W.2d 8, 14 (Iowa 1974), answered this contention by stating

Ordinarily plaintiff meets this burden (which should not be confused with the problem of contributory negligence) by showing he has done nothing abnormal with the instrumentality causing the injury and has used it in the manner and for the purpose for which it was intended. Sweet v. Swangel, supra, 166 N.W.2d at 778. He has the burden of proof by a mere preponderance of the evidence: even though the question of his own contribution is left in doubt, *res ipsa loquitur* may still be applied under proper instructions to the jury. Prosser, Res Ipsa Loquitur in California, 37 Cal. L. Rev. 183, 202 (1949).

The defendant asserts that for the doctrine to apply, the occurrence must be such as in the ordinary course of things would not happen if reasonable care had been used. But as the supreme court in Palleson stated,

The inference of negligence permitted arises out of common experience, not out of knowledge of specific negligent acts which occur in a given case. [citations]

Id. at 14. We believe that common experience can bring about a finding of an inference, under the circumstances here, that the door would not have closed with such abruptness unless someone was negligent. We affirm the trial court on this issue.

II.

K-Mart also contends that the trial court erred in allowing the Phelps to read portions of the depositions of three K-Mart employees, Michael Murphy, Janice Lightfoot, and Jesse Diaz, none of whom, K-Mart contends, were an officer, partner, or managing agent of K-Mart.

Iowa Rule of Civil Procedure 144(b) allows a party to present any part of a deposition of a managing agent for any purpose, so far as is admissible under the Rules of Evidence. Iowa Rule of Evidence 801 (d)(2)(D) provides that a statement is not hearsay if it is a statement made by a party's agent or servant concerning a matter within the scope of his agency or employment, during the existence of the relationship.

Defendant K-Mart contends the three employees are not managing agents and the reading of these depositions at trial constituted inadmissible hearsay. We disagree and affirm the trial court's decision.

We do not find, nor does either counsel cite us to, an Iowa case which discuss when an employee is deemed a managing agent. However, there are federal court cases which are instructive in this area. In determining whether an employee is a managing agent there are four factors which should be considered: (1) Whether the interests of the individual are identified with those of the principal; (2) the relationship between the individual's functions, responsibilities and authority with respect to the subject

matter of the litigation; (3) whether the deponent could be relied upon to give testimony at the principal's direction, in response to a demand of the party involved in the litigation; (4) whether any other person in higher authority than the deponent is in charge of the particular matter or possessed of that information as to which examination is sought. Terry v. Modern Woodmen of America, 57 F.R.D. 141, 143 (W. D. Mo. 1972).

All three deponents were employed by K-Mart in a managerial capacity of some type and each had been employed with the K-Mart corporation anywhere from seven to twenty years. Each individual was in a position to have specific knowledge about the door mechanism in question as well as the Plaintiffs mishap. According to one federal case the purpose of rule 144(b) is to prevent admissions by a disgruntled employee. Independent Productions Corp. v. Loews, Inc., 24 F.R.D. 19, 25 (S.D.N.Y. 1959).

In reviewing the record, it is evident the defendant was not faced with damaging testimony by disgruntled employees. All three of the employees who were deposed had been employed with the K-Mart Corporation for a significant period of time and were employed with K-Mart at the time they were deposed as well as when their depositions were read at trial. After reviewing the testimony that was read in at trial it is evident that each employee's interests were closely associated with their employers and that their testimony was in no way prejudicial to the defendant. We

are unable to find the trial judge abused his discretion in admitting them into evidence.

AFFIRMED.