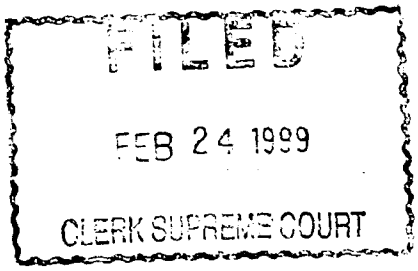
IN THE COURT OF APPEALS OF IOWA

No. 8-659 / 98-0383
Filed February 24, 1999



WILLIAM BRANDERHORST, JR.,
Plaintiff-Appellee/Cross-Appellant,

vs.

WILLIAM M. BRANDERHORST,
Defendant-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Jasper County, Peter A. Keller, Judge.

Defendant appeals from a jury verdict for plaintiff in a tort action arising out of a fire which destroyed some buildings on plaintiff's property. **REVERSED AND REMANDED.**

John B. Grier of Cartwright, Druker & Ryden, Marshalltown, for appellant.

Steven J. Holwerda of Selby, Updegraff, Smith & Holwerda, Newton, for appellee.

Heard by Huitink, P.J., and Mahan and Zimmer, JJ.

HUITINK, P.J.

I. Background Facts and Proceedings.

In this case, William Branderhorst, Jr., sued William Branderhorst, Sr., for damages resulting from a fire that destroyed a machine shed, its contents, and two grain bins on William, Jr.'s farmstead. William, Jr. claimed William, Sr.'s negligent use of a cutting torch caused the fire. William, Sr. denied he was negligent or the cause of any damages William, Jr. claimed.

At trial, a private investigator testified the fire started when the torch William, Sr. was using ignited fuel escaping from its supply hose. In his opinion, William, Sr. caused the fire by cutting through the supply hose with the torch. On cross-examination, the investigator testified:

> Q. And did you uncover any evidence during the course of your investigation that Mr. Branderhorst [Sr.] failed to exercise ordinary care in the manner that he was doing his welding?
>
> A. Not from what I was able to determine, no, based on his story, no.
>
> Q. So based on all the things that you gathered, the evidence that you gathered, you were unable to conclude that Mr Branderhorst [Sr.] failed to exercise ordinary care as he was using that torch, isn't that true?
>
> A. Based on what he told me, yes, sir.
>
> Q. And it's certainly possible, is it not, Mr. Abeltins, that a break, a cut in the hose that's feeding a torch can occur even when the operator is in the exercise of ordinary care?
>
> A. That's possible.

Q. So just because you have a break in the hose that's feeding a fire does not mean that the operator failed to exercise ordinary care, does it?

A. No sir, not if there was a crack in the hose that was developing over a long period of time.

Q. Sure, so you could have an operator who was in the exercise of ordinary care and yet a break occurs in the, in the hose that feeds the fire such as occurred at the Branderhorst garage, isn't that true?

A. It's possible, yes sir.

A written report summarizing this witness' investigative interviews and conclusions was admitted over William, Sr.'s hearsay objection. The record also includes William, Jr.'s evidence concerning the value of the property damaged or destroyed, loss of use of the machine shed, and clean-up efforts.

William, Sr., denied cutting the supply hose with the torch. On cross-examination, he testified:

Q. As I understand it, when you first started using, after you had been cutting for awhile a small flame, small fire started by your feet?

A. Yeah, just maybe a three inch fire, a little old grease maybe been on the floor a long time, didn't amount to anything.

Q. And then you doused that fire out?

A. Well, it was a plastic jug setting there on the floor and I figured it was water and I put the fire out.

Q. So whatever it was you doused --

A. Yeah.

Q. -- on the --

A. Yes.

Q. -- fire it went out. And then you resumed working on the cotter pin?

A. Yes, that's when --

Q. And that's when the second fire started?

A. Why, yes.
Q. Is that correct?
A. It literally exploded then.
Q. And that was the second fire?
A. Yes.
Q. And you were still using the cutting torch?
A. Yes.
Q. Cutting torch was still on?
A. Yes.
Q. And would you explain what you mean when you say it virtually exploded?
A. Well, it started on floor, it just within seconds it was under the bench up against the west just like something was pressuring it. And I was burning from my hips down. It went so fast I couldn't even grab the fire extinguisher, which was five foot away from me.
Q. So it was significantly different from the first fire?
A. Yes, yes.
Q. And you say it was something like pressure or pushing it under the bench?
A. It had to be something to push it under the bench against the wall as fast as it did.
Q. That all happened in a matter of seconds?
A. You bet.
Q. Did you try to put the fire out?
A. Well, I turned the torch off immediately, was trying to put my own fire out, and I hollered for Bill.

William, Sr., also testified:

Q. Are you aware of anything else or any other way that the fire could have started the it did other than cutting through the hose?
A. Not really. Unless, that jug of water that I though was water was something else, that would be the only thing, I don't know.

The district court submitted both general (res ipsa loquitur) and specific negligence theories of liability in its jury instructions. The only specification of negligence was William, Sr.'s act of cutting through the supply hose with the cutting

torch. The jury was also instructed on a measure of damages that included "reasonable market value of the property immediately before the fire, plus reasonable cost of the site clean up and reasonable loss of use."

The jury returned a general verdict in William, Jr.'s favor awarding him damages totaling $60,000. These damages included $45,000 for the machine shed, $4000 for its contents, $2500 for grain bin damages, $3500 for clean-up costs, and $5000 for loss of use of the machine shed. The verdict was subsequently reduced by $24,560, the amount William, Jr. received from his fire insurance carrier.

On appeal, William, Sr., contends the record did not support submission of a general negligence theory to the jury. He also argues admission of the investigator's report was reversible error and the jury was improperly instructed on the measure of damages.

William, Jr. cross-appeals from the district court's order crediting William, Sr. for $24,560 against the $60,000 judgment originally entered.

II. Standard of Review.

We review for errors at law. *See* Iowa R. App. P. 4.

III. General Negligence/Res Ipsa Loquitur.

Iowa courts view res ipsa loquitur as a rule of evidence rather than a rule of substantive tort law. *Brewster v. U.S.*, 542 N.W.2d 524, 529 (Iowa 1996). Under Iowa law, 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." *Id.* (quoting *Mastland, Inc. v. Evans Furniture, Inc.*, 498 N.W.2d 682, 686 (Iowa 1993)). The applicability of the doctrine is to be determined from common experience alone and not from evidence tending to prove a particular negligent act. *Wilson v. Paul*, 176 N.W.2d 807, 811 (Iowa 1970).

If there is substantial evidence to support both elements, the happening of the injury permits--but does not compel--an inference that the defendant was negligent. *Brewster*, 542 N.W.2d at 530. Evidence is substantial if a reasonable mind could accept it as adequate to reach the same findings. *Id.*

We recognize Iowa now permits a plaintiff to plead and the district court to submit to the jury both specific negligence and general negligence under the res ipsa loquitur doctrine. *Id.* While both theories may be submitted in a proper case, the res ipsa loquitur inference of negligence cannot be relied upon unless, within the common experience of lay persons, the occurrence is such that in the ordinary course of things, it would not have happened if reasonable care had been used. *See Reilly v. Straub*, 282 N.W.2d 688, 694 (Iowa 1979). "[T]his common experience may include the common experience of experts." *Brewster*, 542 N.W.2d at 530 (quoting *Reilly*, 282 N.W.2d at 694); *see also* W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* § 39 at 247 (5th ed. 1984). Submission of a general negligence theory in the absence of substantial evidence of the necessary foundational facts is error, whether

submitted alone or in conjunction with a specific negligence instruction. *Brewster*, 542 N.W.2d at 529.

Res ipsa loquitur does not raise any inference as to what occasioned the injury-causing event. If the necessary causal evidence is circumstantial, it must make plaintiffs' theory not merely possible, but more probable than any other theory based on the evidence. *Northwestern Nat. Ins. Co. v. Raid Quarries Corp.*, 249 N.W.2d 640, 644 (Iowa 1977). The mere occurrence of a fire with resultant injuries does not permit an inference of negligence. *Id.* (citing *Wilson*, 176 N.W.2d at 809)). In *Raid Quarries* the court stated:

> Fires seem to be in a class by themselves. Basically, the cases hold that the 'experience' factor forbids use of the res ipsa inference merely because defendant's instrumentality catches fire. Plaintiff must prove that a 'negligent' fire arose from something which defendant controlled, and *this requires evidence of the precise cause of the blaze.*

Id. (quoting A. Loth, Res Ipsa Loquitur in Iowa, 18 Drake L. Rev. 1, 7 (1968)). (emphasis added.)

Our review of the record discloses sufficient evidence to satisfy the foundational requirement of control. We are, however, unable to reach the same conclusion on the common experience requirement. Even if we assume the fire was caused by ignition of fuel leaking from the torch's supply hose, the record indicates this event could occur despite the exercise of ordinary care. Testimony from William, Jr.'s investigator/expert witness expressly acknowledges the possibility that escaping fuel from the hose supplying the cutting torch could have been ignited even in the

exercise of ordinary care. There is nothing else in the record providing substantial evidentiary support for the notion that in the ordinary course of things this fire would not have happened if reasonable care had been used. *See Heritage Bank v. State*, 515 N.W.2d 348, 352 (Iowa 1992)(finding district court erred in submitting res ipsa loquitur theory in absence of evidence that injurious occurrence would not have transpired in the exercise of ordinary care); *Perin v. Hayne*, 210 N.W.2d 609, 613-14 (Iowa 1973)("Where an injury may occur despite due care, a finding of negligence cannot be predicated solely on the fact it did occur."); *Wiles v. Myerly*, 210 N.W.2d 619, 625 (Iowa 1973)(finding the res ipsa loquitur inference fails if the injurious occurrence is shown to be of such a nature as can ordinarily happen despite due care); *Wagner v. Northeast Farm Service Co.*, 177 N.W.2d 1, 4 (Iowa 1970)(finding doctrine of res ipsa loquitur inapplicable absent evidence the occurrence would not have happened in the exercise of ordinary care).

Because William, Jr. failed to establish the foundational requisites for submission of a general negligence theory, we hold the district court erred in its submission. Jury instructions are designed to explain the applicable law to the jurors so the law may be applied to the facts proven at trial. *State v. Freeman*, 267 N.W.2d 69, 71 (Iowa 1978). Submission of issues which have no support in the evidence to the jury is error. *See Miller v. International Harvester Co.*, 246 N.W.2d 298, 301 (Iowa 1976); *Mosell v. Estate of Marks*, 526 N.W.2d 179, 182 (Iowa App. 1994). In civil cases, "when a trial court errs in submitting even one of several theories of

recovery and the jury returns only a general verdict for the plaintiff the verdict cannot stand and the defendant is entitled to a new trial." *Erickson v. Wright Welding Supply, Inc.*, 485 N.W.2d 82, 86 (Iowa 1992)(quoting *Gordon v. Noel*, 356 N.W.2d 559, 565 (Iowa 1984)). *See also Nichols v. Westfield Indus., Ltd.*, 380 N.W.2d 392, 397 (Iowa 1985) (where the forms of verdict do not reveal the basis upon which the jury finds a defendant to be negligent, the submission of a specification which is without support in the record requires reversal).

As we find the general negligence issue dispositive of this matter, we decline to address the plaintiff's additional assignments of error as well as defendant's cross-appeal. We accordingly reverse and remand for a new trial on all issues.

The judgment of the district court is reversed and this case is remanded for new trial.

REVERSED AND REMANDED.