FILED
APR 29 1980
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

470

JOANNE CLAYPOOL,

Plaintiff-Appellant,

vs.

WILLIAM A. AUDEH,

Defendant-Appellee.

Filed April 29, 1980

0-30
2-61449

Appeal from Linn District Court - Robert Osmundson, Judge.

Plaintiff appeals trial court's judgment denying her recovery in medical malpractice action against defendant, alleging trial court erred in failing to 1) apply the doctrine of res ipsa loquitur, 2) find the evidence conclusively proved defendant was negligent, and 3) make proper evidentiary rulings. AFFIRMED.

Lloyd E. Humphreys of Humphreys & Associates, Cedar Rapids, Iowa, for plaintiff-appellant.

David Elderkin of Wadsworth, Elderkin, Pirnie & VonLackum, Cedar Rapids, Iowa, for defendant-appellee.

Heard by Oxberger, C.J., and Donielson, Snell and Johnson, JJ. Carter, J., takes no part.

PER CURIAM

Plaintiff, Joanne Claypool, appeals trial court's judgment denying her recovery in medical malpractice action against defendant, Dr. William Audeh. She alleges trial court erred in failing to 1) apply the doctrine of res ipsa loquitur, 2) find the evidence conclusively proved defendant was negligent, and 3) make proper evidentiary rulings. We affirm.

On March 18, 1973, plaintiff was admitted to St. Luke's Hospital by defendant for diagnosis of a stomach ailment. During her stay in the hospital, plaintiff also requested defendant examine a lump in the back of her neck. On March 23, 1973, defendant performed, under local anesthetic, a lymph node biopsy on plaintiff to excise the lump for further analysis.

Immediately after the surgery, plaintiff returned to her hospital room to prepare for dismissal. Pain and loss of function in her right arm, however, prevented her from packing. These problems persisted at home, compelling plaintiff to seek further medical advice and treatment. Plaintiff eventually was referred to Dr. Herbert Locksley, a neurosurgeon, who performed on July 20, 1973, exploratory surgery of the spinal accessory nerve in the right posterior cervical triangle of her neck to ascertain the cause of the loss of function of her right arm. During the operation, Dr. Locksley encountered the nerve in a zone of scar tissue, found there was a discontinuity in the nerve sheath which had been bridged by neuroma formation, and consequently resected the nerve. As a result of this reparative surgery, plaintiff subsequently regained strength and some usage of her right arm.

Due to these events, plaintiff filed a petition on March 18, 1975, alleging inter alia, defendant negligently severed her right spinal accessory nerve during the lymph node biopsy. Defendant answered on April 9, 1975, denying the allegations. The matter was tried to the court on November 21-23, 1977.

At trial, plaintiff presented expert medical testimony suggesting the nerve was cut during the biopsy. Defendant testified, however, plaintiff's right spinal accessory nerve was healthy when he performed the biopsy, he was aware of its location at all times during the procedure, and he did not cut it. Defendant also submitted evidence a spinal accessory nerve is a motor nerve and, when such a nerve is cut, there is an immediate cessation of function. Dr. Locksley further stated there was no way to conclusively determine the cause of the nerve discontinuity, but testified more than one cause was possible. Based on this evidence, trial court ruled on December 9, 1977,

plaintiff failed to establish by a preponderance of the evidence defendant did not exercise the degree of skill, care, knowledge and attention ordinarily possessed, exercised, or used by similar specialists of the medical profession in like circumstances.

I. Scope of Review. Since plaintiff's action is at law, our review is on assigned error only. Iowa R. App. P. 4. Trial court's findings of fact have the effect of a special verdict and are binding on this court if supported by substantial evidence. Id. We review the evidence in a light most favorable to the prevailing party. Freese v. Lemmon, 267 N.W.2d 680, 687 (Iowa 1978).

II. Res Ipsa Loquitur. Plaintiff claims trial court erred in failing to apply the doctrine of res ipsa loquitur to the facts of this case. We find, however, error on this issue has not been properly preserved for appellate review.

In its December 9, 1977 order, trial court referred to the doctrine of res ipsa loquitur but did not discuss it in connection with the facts of the case. No specific ruling or decision was made regarding applicability of the doctrine. Under such circumstances, a motion for enlargement of findings and conclusions of law is required to preserve error. Arnold v. Long, 259 N.W.2d 749, 753 (Iowa 1977). Since plaintiff did not make a rule 179(b) motion, we will not entertain her allegations of error. Id.

Even if plaintiff had properly preserved error, her contentions are without merit. Res ipsa loquitur is a rule of evidence which permits, but does not compel, an inference defendant was negligent. Fosselman v. Waterloo Community School District, 229 N.W.2d 280, 283 (Iowa 1975). For the doctrine to be applicable, control and negligence must coincide. 229 N.W.2d at 272. Where, as here, the necessary casual evidence relied on to invoke the doctrine is circumstantial, plaintiff's theory must not be merely possible, but more probable than any other theory. Polleson v. Jewell Cooperative Elevator, 219 N.W.2d 8, 13 (Iowa 1974). We conclude plaintiff did not meet these burdens. As the evidence disclosed, plaintiff's injuries may have been due to other factors.

III. Substantial Evidence of Negligence. Plaintiff also contends trial court erred in failing to find the evidence conclusively established defendant negligently severed her right spinal accessory nerve during the lymph node biopsy. On review, we must keep in mind two factors: (1) trial court listened to the evidence and ruled plaintiff had not met her burden of proof, and (2) plaintiff cannot prevail merely by showing substantial evidence in the record of defendant's negligence. Johnson v. Svoboda, 260 N.W.2d 530, 534 (Iowa 1977). To prevail, plaintiff must show the evidence

is so overwhelming it establishes defendant's negligence as a matter of law. Id. Given trial court's superior position to view the witnesses, we will not assess their credibility in an action at law. Carson v. Mulnix, 263 N.W.2d 701, 705 (Iowa 1978).

The evidence presented at trial established more than one possible cause of plaintiff's injury existed. Consequently, we cannot say, as a matter of law, the evidence overwhelmingly established defendant's negligence as the cause of the injury. We therefore must conclude plaintiff has established no reversible error on this issue.

IV. Trial Court Prejudice. As a final assignment of error, plaintiff asserts trial court was prejudiced against her in its rulings on evidentiary matters. It is well settled receipt of opinion evidence rests largely within trial court's broad discretion and we will not interfere absent manifest abuse. Aller v. Rodgers Machinery Mfg. Co., 268 N.W.2d 830, 840 (Iowa 1978); Haumerson v. Ford Motor Co., 257 N.W.2d 7, 11 (Iowa 1977). On our review of the evidence, we find plaintiff has failed to show any such abuse in this case. Further, plaintiff's failure to specify in what manner she was prejudiced and to call this matter to trial court's attention precludes appellate review. 4 C.J.S. Appeal and Error § 376 (1957).

Judgment of trial court is affirmed.

AFFIRMED.