IN THE COURT OF APPEALS OF IOWA

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DOROTHY SCHERMER,

Plaintiff-Appellant,

vs.

LINDA MULLER, As Administrator of the Estate of DANNY MULLER, and M.W. THORNBURGH, as Administrator of the Estate of KARL LAYNE ANDERSON,

Defendants-Appellees.

Filed June 25, 1985

KARA MARIE SCHERMER AND MARY CHRISTINE SCHERMER, Minors, by ROY SCHERMER, their Father and Next Friend

Plaintiffs-Appellants,

vs.

LINDA MULLER, As Administrator of the Estate of DANNY MULLER, and M.W. THORNBURGH, as Administrator of the Estate of KARL LAYNE ANDERSON,

Defendants-Appellees.

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ETHEL NEIBAUER,

Plaintiff-Appellant,

vs.

LINDA MULLER, As Administrator of the Estate of DANNY MULLER, and M.W. THORNBURGH, as Administrator of the Estate of KARL LAYNE ANDERSON,

Defendants-Appellees.

Appeal from the Iowa District Court for Butler County - John F. Stone, Judge.

Plaintiffs appeal from a summary judgment for defendants in a negligence action. AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Raymond P. Drew of Hobson, Cady & Drew, Hampton, Iowa, for appellants.

E. R. McCann and Jim D. DeKoster of Swisher & Cohrt, Waterloo, Iowa, for appellee Thornburgh.

George Lindeman of Lindeman & Yagla, Waterloo, Iowa, for appellee Muller.

Heard by Snell, P.J., and Schlegel and Sackett, JJ.

SCHLEGEL, J.

Plaintiffs appeal the court's ruling sustaining defendants' motions for summary judgment in this negligence action arising from the collision of plaintiff Dorothy Schermer's automobile with the pickup truck driven by defendant Karl Layne Anderson.

Schermer was driving her automobile east on Highway 3 at 35 to 45 miles per hour. About four miles west of the accident scene, the Anderson pickup truck pulled onto the road in front of Schermer. Schermer followed Anderson at a distance of 15 to 20 car lengths. Weller (not a party) was driving a semi-truck west at 40 to 50 miles per hour. A second pickup truck, driven by the defendant, Danny Muller, followed Weller's semi-truck from a point about three miles east of the accident scene. The Muller pickup started following Weller with a quarter-mile gap, but the gap narrowed to one-eighth mile. The Muller pickup was traveling at a speed greater than Weller's unit.

Weller met the Anderson and Schermer vehicles about 150 feet apart. After meeting the Anderson pickup, Weller next saw a ball of fire in his rearview mirror. The Anderson and Muller vehicles had collided (nearly headon), resulting in the death of both drivers. Within seconds after the collision between Anderson and Muller, Schermer drove her car into the Anderson vehicle.

The evidence shows that Muller had closed the gap between his pickup and the Weller unit by one-eighth mile in a distance of no more than three miles. Weller testified that he was concerned that Muller would attempt to pass him and that it would create a dangerous situation. A combination of a light snow falling, snow on the highway, and the semi-truck's effect upon the snow at the time of the collisions, caused a situation of extremely limited visibility in meeting or passing the semi. When Anderson met the semi, he disappeared from the view of Schermer. She next saw the Anderson vehicle stopped, crosswise in the eastbound lane of the road, just before she collided with it.

There were no eyewitnesses to the collision between Anderson and Muller. The only eyewitness to the collision between Schermer and the Anderson pickup was the plaintiff, Dorothy Schermer. The other plaintiffs in this action were passengers in Schermer's car, but they are unable to testify. Schermer's mother is now deceased and the others were Dorothy's young children.

A state trooper following the Muller pickup saw the ball of fire from the pickups. The highway was snowpacked in the area of the collisions. The trooper found no marks on the highway from the collision and could not determine a point of impact.

Plaintiffs sued both defendants separately, alleging in one division of each action, specific acts of negligence, and in another division, general negligence under the doctrine of res ipsa loquitur.

I. Summary Judgment. Summary judgment may be granted only where the moving party demonstrates the absence of any genuine issue of material fact. The court must view all the materials before it in the light most favorable to the plaintiffs. See Meyer v. Nottger, 241 N.W.2d 911, 917 (Iowa 1976). The burden to show the absence of any genuine issue of material fact is upon the moving party. Swets Motor Sales v. Pruisner, 236 N.W.2d 299, 304 (Iowa 1975).

II. Specific Negligence. Schermer contends there is evidence to support a finding of negligence. We agree. Negligence, like other facts, may be proven by circumstantial evidence. Eaves v. City of Ottumwa, 240 Iowa 956, 969, 38 N.W.2d 761, 769 (1949). We hold that when the record is considered in the light most favorable to plaintiff, there is circumstantial evidence that would permit the jury to find that either Muller or Anderson, or both, were negligent in one or more of the particulars alleged by plaintiff.

It must be concluded, without contradiction, that either Muller or Anderson or both of them, crossed the centerline of the highway while meeting traffic from the opposite direction. Had both Anderson and Muller survived the collision and

each testified that the other had crossed the centerline, without physical evidence to confirm the story of either, there is no question that a jury question would be generated as to which of them, or whether both, were negligent. Simply because they are not available to create the same conflict that now exists, should not lessen the need to resolve the factual dispute, or make it less a question for the jury. As would be the situation if those drivers had survived, the issue should be submitted to the jury for determination on the basis of the circumstantial evidence available.

The trial court, in ruling upon the motions for summary judgment, stated at one point:

> In order for the collision to have occurred between the two pickups, it is obvious that one or both of the pickups was over the centerline at the time of impact. Under the conditions that existed a jury could find the driver of that vehicle over the centerline to have been negligent; it also could have found that said driver was not negligent.
>
> The court concludes that there is not evidence available to justify the submission of any one of the claimed specifications of negligence made by the plaintiffs.

That statement demonstrates that the able trial judge recognized that the collision in this case is one that would not likely have occurred absent negligence on the part of one or both of the defendants. Still, he held that there was not sufficient evidence to submit any specific negligence to the jury.

A. Circumstantial Evidence. Circumstantial evidence relates to instances where proof is given of facts and circumstances from which the finder of fact may infer other connected facts which reasonably follow, according to the common experience of mankind. Robesen v. Dilts, 170 N.W.2d 408, 414 (Iowa 1969). The weight to be given circumstantial evidence has evolved through the years in Iowa until at the present time the rules applicable to it are stated as follows:

> Circumstantial and direct evidence are equally probative, State v. O'Connell, 275 N.W.2d 197, 205 (Iowa 1979), but the substantial evidence rule requires that the circumstances have "sufficient probative force to constitute the basis for

> a legal inference, and not for mere speculation . . . ." 32A C.J.S. Evidence § 1039, pp. 753-54 (1964); see also 30 Am. Jur.2d Evidence § 1091, at 251 (1967) ("Circumstantial evidence must do more than raise a suspicion; it must amount to proof. It is necessary that there be some reasonable connection between the facts proved and the fact at issue.") Circumstances are not sufficient when the conclusion in question is based on surmise, speculation, or conjecture. Green v. Ralston Purina Co., 376 S.W.2d 119, 123-24 (Mo. 1964); Adams v. Smith, 479 S.W.2d 390, 397-98 (Tex. Civ. App. 1972).

Harsha v. State Savings Bank, 346 N.W.2d 791, 800 (Iowa 1984).

Formerly, the rules for reliance upon circumstantial evidence, both in criminal cases and civil cases, imposed serious restrictions upon its use. For example, the old uniform jury instructions for criminal cases, citing cases as far back as State v. Hayden, 45 Iowa 11 (1876), contained the following instruction:

> The facts essential to establish guilt of the defendant, or any such facts, may be shown by evidence either direct or circumstantial.
>
> * * *
>
> Circumstantial evidence is that which tends to establish a fact or facts, from which it may be reasonably and logically deduced that the main or ultimate fact exists which is thus sought to be proved .... [T]o warrant a conviction on circumstantial evidence alone, the facts proved must not only be consistent with the guilt of the accused, but they must also be inconsistent with any rational theory of his innocence .... It is not sufficient that they render probable the guilt of the accused, but they must exclude every reasonable hypothesis of his innocence.

Uniform (Criminal) Jury Instruction 501.13 (1970) (amended in Uniform (Criminal) Jury Instruction 110 (1978)).

The rule, with respect to reliance upon circumstantial evidence in civil cases, was similarly restricted. In the early cases it was stated:

> A theory cannot be said to be established by circumstantial evidence, even in a civil action, unless the facts relied upon are of such a nature, and are so related to each other, that it is the only conclusion that can fairly or reasonably be drawn from them. It is not sufficient that they be consistent, merely, with that theory ....

Asbach v. Chicago, Burlington & Quincy Ry., 74 Iowa 248, 249, 37 N.W. 182, 183 (1888) (emphasis added).

As the rule evolved, the language became more temperate. In 1965, the Iowa Supreme Court stated:

> But the quoted statement in instruction 12—"provided they are of such nature and are so related to each other that (such) conclusion . . . is the only (one) that can fairly or reasonably be drawn from the facts and circumstances"—here has not been the approved rule of this court in a civil case of this kind since 1941 and should not be included in instructions on the measure of proof of a claimed fact by circumstantial evidence. An issue in a civil case may be proven by circumstantial evidence provided the evidence is such as to make the claimed theory reasonably probable, not merely possible, and more probable than any other theory based on such evidence. It is not necessary the testimony be so clear as to exclude every other theory.

Christianson v. Kramer, 257 Iowa 974, 983-84, 135 N.W.2d 644, 650 (1965).

The rule stated in Christianson had been adopted as Iowa Rule of Civil Procedure 344(f)(16) by court order dated September 17, 1962. Rule 344(f)(16) stated:

> An issue may be proven by circumstantial evidence; but this evidence must be such as to make the theory of causation reasonably probable, not merely possible, and more probable than any other theory based on such evidence. Generally, however, it will be for the jury or other trier of the facts to say whether circumstantial evidence meets this test.

That statement of the rule was amended by Report of the Supreme Court of July 24, 1980, with the new language simply stating:

> (16) Direct and circumstantial evidence are equally probative.

Iowa R. App. P. 14(f)(16).

B. Undisputed Facts, A Jury Question. Even when facts are not in dispute or contradicted, if reasonable minds might draw different inferences from them, a jury question is engendered. Iowa R. App. P. 14(f)(17).

Generally, questions of negligence, contributory negligence, and proximate cause are for the jury; it is only in exceptional cases that they may be decided as a matter of law. Iowa R. App. P. 14(f)(10). If reasonable minds could differ on an issue, it should be submitted to the jury. Kooyman v. Farm Bureau Mutual Insurance Co., 315 N.W.2d 30, 34 (Iowa 1982).

C. Substantial Evidence. Direct and circumstantial evidence are equally probative, "but the substantial evidence rule requires that the circumstances have 'sufficient probative force to constitute the basis for a legal inference, and not for mere speculation . . . .' " Harsha v. State Savings Bank, 346 N.W.2d 791, 800 (Iowa 1984) (citation omitted).

D. Consideration of the Evidence. We agree with the plaintiffs that there is substantial evidence, when considering the direct and circumstantial evidence under the proper rules, from which a rational trier of fact could find that the defendants were guilty of negligence which was a proximate cause of the collision and injuries and damages suffered by plaintiffs.

Considering the evidence in the light most favorable to plaintiffs, we believe that a rational fact finder could find that one or the other of the defendants was over the centerline, and that in that conduct, negligently failed to keep a proper lookout, as alleged by plaintiffs.

> Proper lookout means more than merely to look and see an object. It implies being watchful of the movements of the driver's vehicle in relation to other things seen and which could be discerned or seen in the exercise of ordinary care. It involves care, watchfulness and attention of the ordinarily prudent person under the circumstances.

Larkin v. Bierman, 213 N.W.2d 487, 489 (Iowa 1973).

We believe that there was evidence available in this record to justify the jury in finding that one or both of the defendants were negligent in failing to yield one-half of the roadway, in failing to have their vehicles under control, and in failing to operate them at a reasonable speed under the circumstances.

The motions for summary judgment should have been overruled as to the plaintiffs' allegations of specific acts of negligence.

III. Res Ipsa Loquitur. As indicated in Division II hereof, this case must be remanded to the district court for further proceedings. As a part of its ruling on the motions for summary judgment, the trial court rejected the plaintiffs' allegations of general negligence, which were based upon the doctrine of res ipsa loquitur. We affirm that portion of the trial court's ruling.

Res ipsa loquitur is a rule of evidence under which an inference of negligence is permissible when an injury is caused by an instrumentality under the exclusive control of defendant and the occurrence is such as, in the ordinary course of things, would not happen if reasonable care had been used in the operation of such instrumentality. It is of limited scope, ordinarily to be applied sparingly and with caution and only where the facts and demands of justice make its application essential. Mickelson v. Forney, 259 Iowa 91, 94, 143 N.W.2d 390, 392 (1966).

In the Mickelson case, the supreme court indicated that under Iowa law, the doctrine of res ipsa loquitur does not apply if there is a fact question whether conduct of the plaintiff may have been a contributing factor to the accident. Id. at 95, 143 N.W.2d at 393.

Dorothy Schermer stated that just before the accident she lost sight of the Anderson vehicle. When the semi passed her, a whirl of snow caused her to lose sight of the Anderson vehicle. She stated that she let up on the accelerator, but there is no evidence that she braked or otherwise attempted to slow down. As she emerged from the blowing snow, she encountered the prior accident and was unable to stop. This evidence establishes a fact question whether the plaintiff contributed to the accident. Therefore, res ipsa loquitur is inaplicable.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Snell, P.J., concurs; Sackett, J., dissents and specially concurs.

SACKETT, J. (dissenting and specially concurring)

I concur in part and dissent in part. The trial court properly rejected plaintiff's claim based on the doctrine of res ipsa loquitur.

Under the doctrine of res ipsa loquitur where an injury occurs by instrumentalities under the exclusive control and management of the defendants and the occurrence is such as in the ordinary course of things would not happen if reasonable care had been used, the happening of the injury permits but does not compel an inference that defendant was negligent. Eaves v. City of Ottumwa, 240 Iowa 956, 969, 38 N.W.2d 761, 769 (1949). The doctrine of res ipsa loquitur is only a rule of evidence, not substantive tort law. Wiles v. Myerly, 210 N.W.2d 619, 624 (Iowa 1973).

It is not required for application of the doctrine to prove defendant had control of the instrumentality when the injury occurred, it is enough to show control at the time of the alleged negligent act, provided plaintiff proves there was no change in the condition of the instrumentality and no intervening act which could reasonably cause the event resulting in the injury. Northwestern Nat'l. Ins. v. Raid Quarries Corp., 249 N.W.2d 640, 644 (Iowa 1977).

> If it appears that two or more instrumentalities, only one of which was under defendant's control, contributed to or may have contributed to the injury the doctrine [of res ipsa loquitur] cannot be invoked.
>
> In none of the limited number of Iowa automobile cases in which the doctrine has been applied has there been any evidence which would indicate conduct of the plaintiff may have been a contributing factor. (Citations omitted.)

Mickelson v. Forney, 143 N.W.2d 390, 393 (Iowa 1966).

Res ipsa loquitur does not apply. Schermer's car under her exclusive control was an instrumentality involved in the accident and her conduct in driving her car into the Anderson pickup a contributing factor.

The majority finds there is evidence one or the other of the defendants was over the center line and in said conduct they failed to maintain a proper lookout. It is impossible to determine from the majority opinion what that evidence is

supposed to be. While negligence, like other facts, may be proven by circumstantial evidence, see Eaves, 240 Iowa, at 969, 38 N.W.2d at 769, plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not the conduct of the defendant was a substantial factor in bringing about the result. A mere possibility of such causation is not enough. Northwestern Nat'l Ins., 249 N.W.2d at 643. See also Schmitt v. Jenkins Truck Lines, Inc., 170 N.W.2d 632, 649 (Iowa 1969)(speed may be proven by circumstantial evidence). In a case depending on circumstantial evidence alone to establish negligence, the plaintiff is not bound to negative every other conceivable theory or hypothesis which ingenuity may invent to account for his injury. Gordon v. Chicago Rock Island & Pacific Ry. Co, 146 Iowa 588, 594, 123 N.W. 762, 764 (1909).

Where a case rests largely on circumstantial evidence, evidence must be such as to make plaintiff's theory of causation reasonably probable, not merely possible, and more probable than any other theory based on such evidence. It is not necessary that the testimony be so clear as to exclude every other possible theory. Shinofield v. Curtis, 245 Iowa 1352, 1357, 66 N.W.2d 465, 468 (1954). See also Welch v. Greenberg, 235 Iowa 159, 165, 14 N.W.2d 266, 268 (1944).

Plaintiffs speculated and asked us to determine the jury could find Muller passed the Weller truck and collided with Anderson. I have searched the record and find no evidence other than speculation and conjecture to support such a theory. To establish negligence, circumstantial evidence must rise above mere speculation. Connecticut Fire Ins. Co. v. Gusman, 259 Iowa 271, 276, 144 N.W.2d 333, 336 (1966).

Plaintiffs directed us to no statutory laws of the road which they claim were violated. Their argument is simply that they [plaintiffs] are entitled to have their case submitted to a jury who must only find that the defendants in some way were negligent in causing the accident. There is insufficient evidence here to remove the issue of negligence from the realm of speculation. The trial court should be affirmed.