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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

LORRAINE VOHS,
Appellant,
v.
THE UPJOHN COMPANY,
Appellee.

Filed December 28, 1977

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2-59577

Appeal from Webster District Court - James Smith, Judge.

Plaintiff appeals from summary judgment for defendant drug manufacturer in products liability case. Reversed and remanded.

Mitchell, Murray, Blackburn & Coleman, of Fort Dodge, for appellant.

Duncan, Jones, Riley & Finley, of Des Moines, for appellee.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

This is a products liability action in which plaintiff seeks to recover damages for alleged adverse reactions suffered from taking the drug "Cleocin" manufactured by the defendant pharmaceutical company. Plaintiff alleges that she took the drug according to a prescription and directions given to her by her dentist. The theory of her claim against defendant is that it was negligent in failing to warn her dentist adequately "by literature or otherwise" of potential side effects or adverse reactions to be encountered in the use of the product.

The action in the trial court was determined adversely to plaintiff by a ruling sustaining defendant's motion for summary judgment. On appeal, plaintiff urges that the trial court erred in this ruling because the case presents genuine issues of material facts which must be tried on the merits. We agree and reverse the judgment below.

I. In order to rule upon a motion for summary judgment the trial court must examine the entire record before it, including the pleadings, admissions, depositions, answers to interrogatories, affidavits, and other matters on file. Meyer v. Nottger, 241 N.W.2d 911, 917 (Iowa 1976). In requesting summary judgment, the burden is upon the movant to show absence of any genuine issues of material fact. Steinbach v. Continental Western Ins. Co., 237 N.W.2d 780, 783 (Iowa 1976). Failure to adequately resist a summary judgment motion is fatal only if the movant has met the burden of negating any genuine issue of material fact. American Telephone & Telegraph Co. v. Dubuque Communications Corp., 231 N.W.2d 12, 14 (Iowa 1975). In application of the foregoing principles we conclude that the petition states a claim upon which relief can be granted and that the pleadings, depositions, answers to interrogatories, affidavits, and other material matters on file do not dispel, as a matter of law, the validity of said claim.

II. The defendant's motion for summary judgment was supported by two affidavits. The first affidavit was by an assistant secretary of the company who recited that, at all times material, certain printed warnings concerning the type of side effects involved (severe and prolonged diarrhea) were contained in all sample and stock packages in which the product was dispensed. This affidavit further stated that (a) printed materials setting forth warnings of this potential side effect were left by defendant's representatives in the office of the dentist who prescribed its use for

plaintiff; (b) that on certain specified dates, prior to his prescribing this drug for plaintiff, this dentist had been given a "formal presentation" by defendant's representatives of the properties, effects, indications and contra-indications of the drug; and (c) that these potential side effects were brought to the attention of dentists generally at dental conferences and in advertisements which ran in dental publications.

The second affidavit was by a sales representative of defendant stating that she had contacted plaintiff's dentist on two specified dates prior to his prescribing the drug for plaintiff and left certain printed materials with him relating to the potential side effects of the drug including diarrhea. This affiant also states that she "discussed" the drug with the dentist on these occasions but the nature of the discussion is not indicated in the affidavit.

Based upon the matter specified in these two affidavits, the defendant urged in its motion for summary judgment that its duty to warn was satisfied as a matter of law. In considering defendant's duty to warn of potential side effects or adverse reactions we note that plaintiff's claim in the present case asserts only a breach of defendant's duty to warn her dentist. She does not assert any duty on defendant's part to warn her directly and we do not determine whether such duty exists.

As to the sufficiency of the warnings given by defendant to plaintiff's dentist the trial court concluded:

> The Court concludes that a fact question may marginally exist as to the issue of the adequacy of the warning involved, and that were the matter in trial and proximate cause prima facie established, that Plaintiff's case would withstand a motion for directed verdict and reach the jury.

The court went on to conclude:

> However, at this stage, as Defendant argues, this Court has no idea whether Dr. Knouf did or did not have actual knowledge of the possible diarrhea side effect at prescription time. Plaintiff has failed to factually support the proximate cause issue at this summary judgment stage, which the Court believes her required to do; and which she could have easily so done via Dr. Knouf's affidavit. The issue of proximate cause is here challenged factually by the motion, and its absence factually supported by Defendant's affidavits. Plaintiff needed only to have Dr. Knouf state, under oath, that he had no actual knowledge, either from the warnings as then given by Defendant or elsewhere, of the side effect.

We hold that the latter conclusion of the trial court was erroneous. On the state of the record made by defendant on the motion, plaintiff was not required to factually support the proximate cause issue. The thrust of the verified factual support provided by defendant on the motion for summary judgment went to its claim that its duty to warn was satisfied as a matter of law. But the trial court concluded, and we believe properly so, that a factual issue remained as to this question. The issue of proximate cause was at most only facially alluded to in defendant's motion and clearly was not factually supported by "evidence which a jury would not be at liberty to disbelieve." See Daboll v. Hoden, 222 N.W.2d 727, 735 (Iowa 1974). As observed in American Telephone & Telegraph Co. v. Dubuque Communications Corp., 231 N.W.2d 12, 14 (Iowa 1975):

> While failure to adequately resist a motion for summary judgment is a dangerous course. . . to take, it becomes fatal only if the summary judgment movant has met the burden of proof imposed upon it.

The trial court concluded, and we believe properly so, that the state of Dr. Knouf's knowledge, as gained from the defendant or elsewhere, was an essential element in determining whether an inadequate warning, if found to exist, was a "legal cause" of plaintiff's injury.[1] See Schnebly v. Baker, 217 N.W.2d 708, 729 (Iowa 1974). But the burden was on defendant in the summary judgment proceeding to establish as a matter of law that assuming the warning to be inadequate it could not have been a legal cause. In view of the record, including Dr. Knouf's affidavit filed in resistance to the motion, defendant clearly failed to carry the burden on this issue at the motion stage.

We have considered the issues presented and hold that the case must be reversed and remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

[1] We believe this issue must be approached with caution, however, because it is exceedingly complex. What would constitute an adequate warning by defendant of potential side effects of the drug is an issue for the trier of fact to be determined on all the facts and circumstances shown. But assuming arguendo that the warning was inadequate the causation issue then becomes what would Dr. Knouf have done with respect to prescribing Cleocin for plaintiff had he received an adequate warning. In solving this puzzle the trier of fact is dealing with severable variables only one of which is Dr. Knouf's knowledge. The ultimate fact to be established is not his knowledge but rather what action he would have taken in the face of such knowledge. It is therefore hazardous to assume that any particular state of knowledge on his part, independent of an adequate warning from the defendant, would preclude plaintiff, as a matter of law, from establishing legal causation.