IN THE COURT OF APPEALS OF IOWA

No. 7-607 / 06-1857
Filed December 12, 2007

PHARMACISTS MUTUAL INSURANCE COMPANY,
Plaintiff-Appellee,

CINCINNATI INSURANCE COMPANY,
Plaintiff-Appellee/Cross-Appellant,
vs.

DANIEL OLMSTEAD and BARBARA OLMSTEAD, Individually and d/b/a PARK PLACE HOTEL ANTIQUE MALL,
Defendants-Appellants/Cross-Appellees.

Appeal from the Iowa District Court for Linn County, Robert E. Sosalla, Judge.

The defendants appeal and one plaintiff cross-appeals following the entry of judgment in favor of the plaintiffs on their claim to recover payments they made under insurance policies. **AFFIRMED.**

Clinton J. McCord and Paula L. Roby of Elderkin & Pirnie, P.L.C., Cedar Rapids, for appellant.

James P. Craig, Brenda K. Wallrichs, and Kimberly K. Hardeman of Lederer Weston Craig, P.L.C., Cedar Rapids, for appellees.

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

VOGEL, J.

The defendants appeal and one plaintiff cross-appeals following the entry of judgment in favor of the plaintiffs on their claim to recover payments they made under insurance policies. We agree with the district court that the plaintiffs' claims could be properly submitted under both specific negligence and res ipsa loquitur theories of recovery. We also agree with the denial of plaintiff's motion for additur or new trial. We therefore affirm.

Background Facts and Proceedings.

On February 2, 2002, a fire started at the Park Place Antique Mall (Park Place) in Marion. Park Place is owned by Daniel and Barbara Olmstead and is comprised of two connected buildings. The buildings adjacent to Park Place house Sorg Pharmacy and the dental offices of Drs. Eganhouse, DeKock, and Purdie. The plaintiffs in this action, Pharmacists Mutual Insurance Company, representing Sorg Pharmacy, and Cincinnati Insurance Company, representing the dental practice, filed this action against the Olmsteads to recover amounts they paid to their respective insureds under claims for damages from the fire.

The plaintiffs alleged three theories of recovery: (1) specific negligence; (2) res ipsa loquitur; and (3) negligence per se. At the close of the plaintiffs' evidence, the Olmsteads moved for a directed verdict as to all three theories. The court overruled the motion as to the specific negligence and res ipsa loquitur theories, but reserved ruling on the negligence per se theory of recovery. Following the close of all evidence, the court sustained the Olmsteads' renewed motion for directed verdict on the issue of negligence per se, but allowed the other two theories to proceed to the jury. The jury later found the Olmsteads

liable for the plaintiffs' damages, awarding $363,034.83 to Pharmacists Mutual and $52,615.56 to Cincinnati Insurance. The court denied the Olmsteads' motion for new trial and Cincinnati's motion for additur or new trial. The Olmsteads appeal and plaintiff Cincinnati cross-appeals from this verdict and post-trial rulings.

Error Preservation.

We first address whether the Olmsteads have preserved for appellate review their claim that the "court erred in submitting the case to the jury under the theory of res ipsa loquitur in addition to the theory of specific negligence." As noted previously, the Olmsteads made this contention in an unsuccessful motion for directed verdict. This argument was renewed and denied at the close of all evidence. Later, after the jury verdict was handed down, the Olmsteads argued in a motion for new trial that the court erroneously submitted to the jury the res ipsa loquitur theory. The plaintiffs now assert that because the Olmsteads did not object to the inclusion of the res ipsa loquitur theory in the jury instructions, they have failed to preserve this alleged error for appellate review. *See Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 356 (Iowa 1995) ("Issues must ordinarily be presented to and passed upon by the trial court before they may be raised and adjudicated on appeal.").

We believe the failure to object to the res ipsa loquitur jury instruction is not fatal on appeal. *See James ex rel. James v. Burlington Northern, Inc*., 587 N.W.2d 462, 464 (Iowa 1998) (determining appellant was not required to object to jury instructions in order to preserve error on allegedly erroneous submission of negligence claim); *Hoekstra v. Farm Bureau Mut. Ins. Co*., 382 N.W.2d 100,

107 (Iowa 1986) ("Finally, Farm Bureau argues trial court erred in submitting the issue of substantial compliance to the jury because the evidence was insufficient to generate a jury question. This issue was preserved by motions for directed verdict in the course of trial.").

The underlying rationale for our error preservation requirement was met when the Olmsteads raised the issue both during and after trial. *See Dutcher v. Lewis*, 221 N.W.2d 755, 759 (Iowa 1974) (noting that in determining the sufficiency of an objection to preserve error, "the test is whether the exception taken alerted the trial court to the error which is urged on appeal"); *State v. Baskin*, 220 N.W.2d 882, 886 (Iowa 1974) (stating the purpose is "to afford the trial judge an opportunity to catch exactly what is in counsel's mind and thereby determine whether the objection possesses merit to an extent the instruction should be recast"). As the issue already had been fully argued and a final ruling made, a further objection to the instruction would have been a mere formality.

Res Ipsa Loquitur.

We thus proceed to the question of whether the court properly submitted the plaintiffs' claim to the jury under the theory of res ipsa loquitur. In particular, they claim it should not have been submitted when a negligence claim was also submitted and when "none of the plaintiffs' evidence showed that the fire could not have happened in the absence of negligence . . . . "

> Res ipsa loquitur is a type of circumstantial evidence. *Brewster v. United States*, 542 N.W.2d 524, 529 (Iowa 1996). In Iowa, res ipsa loquitur applies in negligence cases when (1) the injury is caused by an instrumentality under the exclusive control of the defendant, and (2) the occurrence is such that in the ordinary course of things would not have happened if reasonable care had been used.

Novak Heating & Air Conditioning v. Carrier Corp., 622 N.W.2d 495, 498 (Iowa 2001). Although Iowa generally has been "very circumspect" in the application of res ipsa loquitur, *see Conner v. Menard, Inc.*, 705 N.W.2d 318, 320 (Iowa 2005), we do permit the plaintiff to plead res ipsa loquitur in addition to specific negligence as an alternate theory of the case under certain circumstances. *Brewster*, 542 N.W.2d at 530.

Our supreme court has had occasion to define those circumstances for which both a negligence and a res ipsa loquitur theory may be submitted, and has stated "the doctrine does not apply when there is direct evidence as to the precise cause of the injury and all of the facts and circumstances attending the occurrence." *Conner*, 705 N.W.2d at 320.

In *Reilly v. Straub*, 282 N.W.2d 688, 689 (Iowa 1979), a case arising out of a medical malpractice action, the plaintiff introduced evidence of specific acts of negligence that allegedly caused the injury. The experts called by the parties disagreed on some of the details of the alleged negligent acts. *Reilly*, 282 N.W.2d at 689. The supreme court concluded that it was not fatal to a res ipsa theory that a plaintiff had also introduced evidence of specific acts of negligence, stating:

> [P]roof of the cause of an injury or loss will not necessarily avoid application of the *res ipsa* doctrine. Care should be taken to distinguish those situations in which evidence of the cause of an injury or loss is so strong and extensive as to leave nothing for inference and those which establish the cause but still raise only an inference as to defendant's negligence.

Id. at 694. It noted that, despite the fact that evidence of the dynamics of the child's injury was overwhelming, the evidence failed "to pinpoint the precise

cause of the injury and all of the facts and circumstances attending the occurrence." *Id.* at 696.

The supreme court revisited this issue in *Conner*, a case in which the evidence presented at trial as to the cause and manner of the accident and injury was undisputed. *Conner*, 705 N.W.2d at 322. It held that direct evidence of the essential elements of the claim precludes the res ipsa inference, largely because the evidence as to the cause and manner of the injury was "accessible to the plaintiff and was 'so strong and extensive as to leave nothing for inference.'" *Id.* at 321 (quoting *Reilly*, 282 N.W.2d at 694).

Moreover, in *Clinkscales v. Nelson Sec., Inc*., 697 N.W.2d 836, 847 (Iowa 2005), our supreme court affirmed the submission of both a specific negligence and a res ipsa loquitur claim in an action based on a grease fire. In so holding it noted that other courts have often applied the doctrine of res ipsa loquitur in actions against the occupant of a premises for personal injury caused by fire. *See, e.g., Aetna Cas. & Sur. Co. v. Brown*, 256 So.2d 716, 718 (La. Ct. App. 1971) (holding res ipsa loquitur applicable to grease fire); *see also* 35A Am. Jur. 2d *Fires* § 59 (2001).

In light of the preceding discussion, we conclude the district court properly submitted the res ipsa loquitur theory of recovery in this case. In our view, "the evidence of specific acts of negligence was not so clear as to preclude application of res ipsa." *Conner*, 705 N.W.2d at 320. Plaintiffs' expert Garry Lee opined that there were at least four potential causes for the fire: (1) the ignition of combustibles stored too close to the boiler at their ignition temperature; (2) the low temperature ignition of combustibles stored too close to the boiler at their

ignition temperature; (3) the ignition of combustibles stored further away from the boiler, which was negligently maintained and operating at a higher temperature than normal; and (4) the escape of hot gases together with combustibles escaping the combustible chamber through splits in the boiler sections. Plaintiffs' expert John Palmer detailed several specific things wrong with the boiler and concluded the boiler's overall maintenance was lacking such that it malfunctioned at the time of the fire by "dry firing."

For their part, the Olmsteads attempted to show the uncertainty as to the cause and origin of the fire. Chief Rick Boots of the Marion Fire Department testified that he was unable to rule out an electrical cause of the fire and was unable to determine an exact point of origin. Further, he did not believe a workbench located in the boiler room caused the fire. Another of defendants' experts, mechanical engineer Duane Wolf, directly rebutted John Palmer's theory that the boiler was dry firing on the night of the fire.

The evidence as to the cause and manner of the alleged negligent act was far from undisputed. This is not a case where "the precise cause of the injury and all the facts and circumstances attending the occurrence appear." *Reilly*, 282 N.W.2d at 694. Although the plaintiffs' experts opined as to various potential causes for the fire, causation remained uncertain, and was clearly disputed by the defendants' experts' opinions. Accordingly, we conclude the court properly submitted to the jury the res ipsa loquitur theory. *See id.* at 696 (affirming the submission of both specific negligence and res ipsa loquitur theories where the evidence of specific negligence was not "so strong and extensive as to leave nothing for inference").

2001 Fire Inspection.

The Olmsteads next maintain the court erred in excluding certain evidence, and seek a new trial on this ground. In particular, in a motion in limine argued at the close of the plaintiffs' case, they sought to admit evidence that in 2001, the Marion Fire Department inspected their property and did not issue any citations with respect to the presence of combustibles in the boiler room. In the plaintiffs' case, Robert Handley, a lieutenant with the Marion Fire Department, testified, without objection, that he found violations of the Marion Fire Code in the furnace/water heater room in May of 1998. The court determined the 2001 evidence was irrelevant due to the timing of the inspection, which occurred several months prior to the fire. The court noted that such an inspection may have been relevant had it been done immediately prior to the fire. Nonetheless, the court did allow the defendants' questioning of the fire department witnesses as to whether there was "a concern about there being combustibles in a room with a boiler."

We review evidentiary rulings for an abuse of discretion. *Hutchison v. Am. Family Mut. Ins. Co.*, 514 N.W.2d 882, 885 (Iowa 1994). The trial court has wide discretion in ruling on the admissibility of evidence, and we will not disturb its decision unless there is a clear and prejudicial abuse of discretion. *Gamerdinger v. Schaefer*, 603 N.W.2d 590, 594 (Iowa 1999).

We conclude the trial court did not abuse its discretion in refusing to admit evidence of no citations in 2001. The fact that there may not have been any combustibles close to the boiler some four months prior to the fire is simply not relevant to what, if any, items were situated near the boiler at the time of the fire.

See Iowa R. Evid. 5.401 (defining relevant evidence). The same is true as it relates to the relevance of the evidence in light of jury instruction 16[1].

Motion for Additur.

In its cross-appeal, Cincinnati Insurance Company contends the district court erred in failing to grant its motion for additur, or in the alternative a new trial on damages. Cincinnati believes the jury improperly failed to award any loss of business income or business interruption damages and therefore requests that we remand with direction for the district court to order additur of $75,928, or in the alternative that we grant a new trial on damages.

A court must not "disturb a jury verdict for damages unless it is flagrantly excessive or inadequate, so out of reason so as to shock the conscience, the result of passion or prejudice, or lacking in evidentiary support." *Kuta v. Newberg*, 600 N.W.2d 280, 284 (Iowa 1999). The district court has broad discretion to determine if the verdict effectuates substantial justice between the parties. Iowa R. App. P. 6.14(6)(*c*). We accordingly review its denial of the plaintiffs' motion for an abuse of discretion. *Vaughan v. Must, Inc.*, 542 N.W.2d 533, 542 (Iowa 1996).

We discern no abuse of discretion in the court's refusal to grant additur or a new trial on damages. The jury awarded Cincinnati $52,615.56 in damages. This was a general damages award, in that the verdict form did not require the

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[1] Instruction 16 read:

> You have received evidence of the City of Marion ordinances regarding the storage of combustible materials in boiler rooms and storage of fueled substances in buildings. Conformity with these city ordinances is evidence that defendants were not negligent and violations of these city ordinances is evidence that defendants were negligent. Such evidence is relevant and you should consider it, but it is not conclusive proof.

jury to apportion damages into specific categories. Accordingly, there is simply no way to determine how much money the jury awarded to Cincinnati specifically for the loss of business income and business interruption. The district court found:

> First, given the form of the verdict, I cannot presume that the jury's verdict excluded any damages for business income loss and interruption. Second, even assuming that to be the case, given the state of the record, a reasonable jury could have concluded that the dental practice did not lose business income because of the fire.

We agree. Evidence was presented that this dental office was merely a "satellite" office, open only a few days per week, and that the practice's main office was located only ten minutes away. In addition, there was evidence that the named insureds under Cincinnati's policy were in the process of selling the business. Finding no abuse of discretion in the district court's ruling, we affirm the denial of additur and motion for new trial on damages.

AFFIRMED.