IN THE COURT OF APPEALS OF IOWA

No. 9-116 / 08-1149
Filed May 6, 2009

HERMAN VERWERS and
HANNAH VERWERS,
Plaintiffs-Appellants,

vs.

JOSEPH L. RHOADES, M.D.,
PHILIP H. KOHLER, M.D., and
CENTRAL IOWA HOSPITAL
CORPORATION, d/b/a IOWA
METHODIST MEDICAL CENTER,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Donna Paulsen, Judge.

Plaintiffs appeal the jury verdict returned in favor of the defendants. **REVERSED AND REMANDED.**

Steven Lawyer and E.J. Flynn of Steven V. Lawyer & Associates, P.L.C., Des Moines, for appellants.

Susanna M. Brown of Brown Law Firm, P.L.C., Adel, for appellees.

Considered by Sackett, C.J., and Mahan and Mansfield, JJ.

MAHAN, J.

Herman Verwers[1] appeals the jury verdict returned in favor of Dr. Philip Kohler in Verwers' medical malpractice claim.[2] Verwers argues the district court erred in refusing to give a general negligence (res ipsa loquitur) jury instruction in Verwers' medical malpractice claim. We reverse and remand.

I. Background Facts and Procedures.

On September 2, 2004, Dr. Philip Kohler and Dr. Joseph Rhoades performed surgery on Verwers. The surgery was to treat Verwers' prostate cancer, and radioactive seeds were implanted through his perineum. During the surgery, a square metal template heated to 270 degrees was used to implant the seeds into Verwers' prostate through long pins. Usually the template was cooled in water before being used on patients. However, it appears during Verwers' surgery the template was not cooled and Verwers suffered second- and third-degree burns in the shape of a square to his rectal perineal area and inner buttocks.

Dr. Kohler and Dr. Rhoades were "co-surgeons" for the operation. Although each claimed the other doctor actually positioned the template to Verwers' skin, the doctors both admitted to holding the template at some point during the surgery. Dr. Kohler testified that he did not feel any heat from the template when he touched the template during the procedure. The doctors both noted Verwers' burn after the surgery. As a result of the burn, Verwers endured

[1] Hannah Verwers also appeals with Herman; however, for purposes of clarity, we refer to Herman only.

[2] The other defendants, Dr. Joseph Rhoades and Central Iowa Hospital Corporation, doing business as Iowa Methodist Medical Center, settled with Verwers prior to trial. Therefore, Dr. Kohler is the only remaining defendant in this action.

intense pain for more than four months after the surgery without being able to walk normally, wear ordinary clothing, or clean himself.

Verwers filed the present suit, alleging his injuries were a result of specific and general negligence on the part of Dr. Kohler. Verwers intended to rely upon the doctrine of res ipsa loquitur to prove his general negligence claim. Trial began on April 21, 2008. Over Verwers' objections, the district court denied Verwers' request for a res ipsa loquitur jury instruction and submitted Jury Instruction Nos. 9, 10, and 11. On April 25, 2008, the jury returned a verdict in favor of Dr. Kohler on the only submitted claim: specific negligence. Verwers filed a motion for a new trial, which the district court denied. Verwers now appeals.

II. Standard of Review.

We review claims regarding the court's giving or failing to give a requested instruction for the correction of errors at law. Iowa R. App. P. 6.4. Parties are entitled to have their legal theories submitted to the jury when the instruction expressing those theories is not otherwise covered in other instructions. *Vasconez v. Mills*, 651 N.W.2d 48, 52 (Iowa 2002); *see Banks v. Beckwith*, 762 N.W.2d 149, 151-52 (Iowa 2009) ("The district court must give a requested jury instruction if the instruction (1) correctly states the law, (2) has application to the case, and (3) is not stated elsewhere in the instructions . . . ."). Proposed instructions must be supported by the pleadings and substantial evidence in the record. *Vasconez*, 651 N.W.2d at 52. Evidence is substantial if a reasonable person would accept it as adequate to reach a conclusion. *Id*.

III. Merits.

A. Res Ipsa Loquitur Instruction.

Under Iowa law, the doctrine of res ipsa loquitur is considered to be a rule of evidence, rather than a rule of pleading or substantive law. *Conner v. Menard, Inc*., 705 N.W.2d 318, 320 (Iowa 2005).

> Res ipsa loquitur is a type of circumstantial evidence that allows the jury to infer the cause of the injury from the naked fact of injury, and then to superadd the further inference that this inferred cause proceeded from negligence.

Banks, 762 N.W.2d at 151-52 (internal quotations omitted) (noting that "res ipsa loquitur" means "the thing speaks for itself"). A plaintiff must introduce substantial evidence of the following two elements to submit a case on the theory of res ipsa loquitur: (1) the injury was caused by an instrumentality under the exclusive control and management of the defendant and (2) that the occurrence causing the injury is of such a type that in the ordinary course of things would not have happened if reasonable care had been used. *Id.* at 152. "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." *Id*.

Shortly after the briefs were submitted in this case, our supreme court squarely addressed the issue of res ipsa loquitur jury instructions in medical malpractice cases in *Banks*, 762 N.W.2d at 151-54. In *Banks*, the court reiterated Iowa's longstanding application of the doctrine of res ipsa loquitur in medical malpractice cases. *Id*. at 152. As the supreme court stated:

> When the doctrine of res ipsa loquitur is used in a medical malpractice case, the plaintiff is relieved of the burden of showing that specific acts of defendant were below accepted medical standards. The plaintiff must still prove negligence, but he or she does so by convincing the jury the injury would not have occurred absent some unspecified but impliedly negligent act.

Id. (internal quotations omitted). The court noted that "[t]he issue for the trial court is whether there is sufficient competent evidence of the existence of the foundational facts to generate a jury question." *Id*. ("Evidence is substantial if a reasonable mind could accept it as adequate to reach the same findings.").

1. Control of the Instrumentality.

We turn to the first element of the res ipsa loquitur doctrine: whether the injury was caused by an instrumentality under the exclusive control and management of the defendant. With regard to this issue, the district court determined Dr. Kohler did not have exclusive control of the template causing injury to Verwers:

> Here, according to the testimony, it was unclear who had control of the template. Dr. Kohler testified he was not sure if he or Dr. Rhoades first handled the template. The jury could have determined that there was not simultaneous control but instead sequential control of the template. Therefore, the doctrine of res ipsa loquitur is inapplicable to this case.

We disagree. Iowa courts use a flexible application of control. *Wick v. Henderson*, 485 N.W.2d 645, 649-50 (Iowa 1992) (examining recent Iowa cases and noting that the test of control for the doctrine of res ipsa loquitur "has become one of right of control rather than actual control"); *Sammons v. Smith*, 353 N.W.2d 380, 387-88 (Iowa 1984) (determining the plaintiff did not need to prove a doctor's "exclusive control," but rather, that the doctor's "shared control"

was sufficient for purposes of allowing a res ipsa loquitur instruction). Specifically with regard to medical malpractice cases, our supreme court has stated that the control requirement may be satisfied by concurrent or joint control. *Wick*, 485 N.W.2d at 650. Thus, the "right or power to control" and "the opportunity to exercise" the right or power have been held to be sufficient to generate a jury question as to a defendant's control. *Id*.

In this case, Dr. Kohler and Dr. Rhoades testified they were "co-surgeons" for Verwers' operation, although we note Dr. Kohler's report indicated he was the "Surgeon" and Dr. Rhoades was the "Assistant." Both doctors admitted to holding the template at some point during the surgery; however, each claimed the other doctor had actually positioned the template to Verwers' perineum. Joe Conlon, the physicist assisting with the surgery, testified that typically in this procedure, Dr. Rhoades (the radiation/oncologist whose department planned the procedure) would read off coordinates for the needles to be placed while Dr. Kohler (the urologist) would actually hold the template to the patient and guide the needles through the template. Upon our review of the record, we find substantial evidence exists to create a jury question as to whether Dr. Kohler had control, or at least shared control, of the template causing injury to Verwers in this case.

2. Reasonable Care.

Upon our finding that Verwers introduced substantial evidence to produce a jury question on the first element of the res ipsa loquitur doctrine, we now turn to the second element of the doctrine: whether the occurrence causing the injury

is of such a type that in the ordinary course of things would not have happened if reasonable care had been used. With regard to this issue, the supreme court in *Banks* explained that a plaintiff in res ipsa loquitur cases is not required to eliminate with certainty all other possible causes or inferences. *Id*. at 153. Rather, the plaintiff is only required to produce evidence that could lead a reasonable person to conclude that "on the whole it is more likely than not that there was negligence associated with the cause of the event." *Id*. Expert testimony can fulfill a claimant's burden of providing substantial evidence that it was more likely than not negligence was the cause of the claimant's injury. *See id*.

In this case, Verwers argues the distict court erred in failing to give his requested instruction on res ipsa loquitur. His expert, Dr. Peter Bretan, testified as follows:

> Q. Do you agree that in medicine there are times when bad outcomes occur, however, there is no physician negligence involved in those bad outcomes? A. Absolutely. But I don't believe this is one of those cases.
>
> Q. Do you leave room for the possibility that Dr. Kohler followed the standard of care in this case, and yet, Mr. Verwers suffered from a burn? A. No. Again, a burn is a burn. It speaks for itself. It's hard to get around that you have a burn and standard of care has been followed.
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> Q. Now, you said that the way that a surgeon tells whether a template or any other instrument is safe for use on a patient is by touch and whether or not he feels any heat. If Dr. Kohler did not touch the template in this case, then he would have done nothing below the standard of care; is that correct? A. No, that's not correct. Again, my testimony and my past answers is that it is required of the surgeon that is placing anything, whether he touches it himself or not, that the safety of those instruments, especially if they're coming out of the autoclave, be inspected before they're applied. Now, there is a scenario in which you can be holding something and it's not painful to you because you're

> holding it with towels or you're holding it away from you and you're applying that to the patient. That doesn't fit the standard. We are responsible in the operating room for known injuries and to prevent those known injuries. This is one of them—is a burn in the operating room from metal, from the autoclave.

Dr. Kohler testified he felt no heat from the template when he handled it during the surgery, and therefore he did not know or could not have known the template was too hot to place against Verwers' perineum. Specifically with regard to Dr. Kohler's testimony, Dr. Bretan testified:

> I think it's still possible that Dr. Kohler could feel no discomfort or significant heat, [and] still put together the apparatus. It's not only possible, it did happen. And you can have a burn. So that is his testimony [that he did not feel any heat emanating from the template] and we know the outcome. A burn did occur. So I don't think with that testimony—that is his known testimony, I would have to say that there is still a deviation from the standard because a burn did occur. . . . For a burn to occur, it's a placement of a hot object against the perineum of the patient. That is the deviation from the standard of care.

Dr. Kohler also presented evidence of a number of other potential causes for Verwers' burn, including an allergic reaction, or a chemical reaction due to the use of antiseptics or gels. However, Dr. Bretan responded that "there is no support for those theories at all. As far as I'm concerned, this is a burn injury to the perineum." He further stated that, in his opinion, burn injuries to patients do "absolutely not" occur in the ordinary course of a surgical procedure, "if reasonable care has been used."

Upon our review, we find a reasonable mind could accept Dr. Bretan's testimony as adequate to reach the conclusion that a template does not burn if it is sufficiently inspected before its use, and therefore does not burn in the absence of negligence. *See id*. Although Dr. Kohler produced expert testimony

that the template Dr. Kohler used during the surgery did not cause Verwers' burn, Verwers was not required to refute any other possibilities for the burn. Verwers was only required to provide substantial evidence that it was more likely than not negligence was the cause of the event. *Id*. We find Verwers has met this burden.

We conclude Verwers met his burden with regard to both elements of the doctrine of res ipsa loquitur, and therefore was entitled to have res ipsa loquitur submitted to the jury. The refusal to submit the res ipsa loquitur instruction was prejudicial to Verwers. *Banks*, 762 N.W.2d at 151 ("A district court's failure to give a requested instruction does not require a reversal unless the failure results in prejudice to the party requesting the instruction."). Having insufficient evidence to prove specific negligence by Dr. Kohler, Verwers had no means of proving fault. Verwers is entitled to a new trial on his general negligence claim to allow the jury to apply res ipsa loquitur to the facts of this case. *See id*. at 154.

B. Applicability of Res Ipsa Loquitur.

Dr. Kohler argues res ipsa loquitur is inapplicable in this case because Verwers was able to submit evidence as to the actual cause of his injury. Specifically, Dr. Kohler contends the jury should not be instructed on both specific negligence and general negligence (res ipsa loquitur) because "the doctrine does not apply where 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. Dr. Kohler alleges instruction on res ipsa loquitur,

after the jury has already been instructed on specific negligence, would give Verwers "two bites at the apple."

Under Iowa law, "[t]he plaintiff may plead, and the district court may submit to the jury, both specific negligence and general negligence under *res ipsa loquitur*." *Weyerhaeuser Co. v. Thermogas Co*., 620 N.W.2d 819, 831 (Iowa 2000). The court should submit these theories alternatively, and "[i]f the jury finds for the plaintiff on specific acts of negligence, it should not consider liability under res ipsa loquitur." *Id*. There are several situations, however, under which res ipsa loquitur does not apply, including (1) where control of the instrumentality of injury is sequential or not established at the time of the negligent act and (2) when there is direct evidence as to the precise cause of the injury and all of the facts and circumstances attending the occurrence. *See, e.g*., *Conner*, 705 N.W.2d at 320. We have already determined substantial evidence exists that Dr. Kohler had proper control over the template.[3] We now evaluate whether res ipsa loquitur applies in this case if a specific negligence instruction is also given.

Verwers argues this case is one that both general and specific allegations of negligence should be submitted because the evidence of specific acts of negligence are not so clear as to preclude application of res ipsa loquitur. In *Reilly v. Straub*, 282 N.W.2d 688, 694-95 (Iowa 1979), our supreme court noted the distinction between cases in which the court should instruct the jury on both specific and general negligence, as opposed to only specific negligence:

[3] Verwers has met his burden to show substantial evidence existed to create a jury question as to whether Dr. Kohler had control, or at least shared control, of the template causing injury to Verwers in this case. *Wick*, 485 N.W.2d at 650.

> 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 only raise an inference as to defendant's negligence.
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> . . . .
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> [I]t is quite generally agreed that the introduction of some evidence which tends to show specific acts of negligence on the part of the defendant, but which does not purport to furnish a full and complete explanation of the occurrence does not destroy the inferences which are consistent with the evidence, and so does not deprive the plaintiff of the benefit of res ipsa loquitur.

Id.; *see Conner*, 705 N.W.2d at 320-22. And more recently, in *Conner*, the supreme court reiterated *Reilly*'s explanation of the res ipsa distinction and specifically noted why it had approved application of res ipsa in *Reilly*:

> In *Reilly* we approved the court's submission of *res ipsa*, although we characterized the case as "a close one." We 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."

Conner, 705 N.W.2d at 322 (internal citations omitted).

Upon our review, we find the doctrine of res ipsa loquitur is applicable in this case. The testimony at trial lacked a clear and consistent recollection by Dr. Kohler, Dr. Rhoades, and the operating room staff as to who or what was responsible for the burn to Verwers' perineum. Furthermore, Dr. Kohler suggested additional theories as to how the injury occurred, which were disputed by Verwers' expert testimony. We find such inconsistencies and other theories do not constitute "direct evidence as to the precise cause" or "all of the facts and circumstances attending the circumstance" required to preempt instruction on both general and specific negligence. *Id.* (reiterating that, in order to preclude application of res ipsa loquitur, the evidence of negligence must be "so strong

and extensive as to leave nothing for inference"); *Reilly*, 282 N.W.2d at 694 (noting that res ipsa loquitur applies where "the evidence [is] sufficient to raise an inference of defendant's negligence").

We conclude the issue of Dr. Kohler's negligence in this case should have been left to the jury under the district court's instruction on res ipsa loquitur.[4] We find no further error in the district court's jury instructions.[5]

IV. Conclusion.

We hold the district court erred in refusing to give the res ipsa loquitur instruction because Verwers introduced substantial evidence that Dr. Kohler was in control of the instrumentality causing the injury, and burn injuries to patients do not occur in the ordinary course of events without negligence. We further find res ipsa loquitur applies in this case because there is no direct evidence as to the precise cause of the injury. The court's refusal to allow the instruction was prejudicial to Verwers, and therefore, we reverse the decision of the district court and remand the case for a new trial with the application of res ipsa loquitur.

REVERSED AND REMANDED.

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[4] Verwers also contends on appeal that the district court erred in giving Instruction No. 11 to the jury. Instruction No. 11, taken from section 700.8 of the Iowa Civil Jury Instructions, states, "The mere fact an accident occurred or a party was injured does not mean a party was at fault." The comment to section 700.8 directs courts to "not use this instruction if general negligence (res ipsa loquitur) is submitted." Therefore, upon our finding that a res ipsa instruction should have submitted, we acknowledge Instruction No. 11 should not be used on remand.

[5] Thus, we find Verwers' argument with regard to Instruction No. 9 and the reasonable person standard to be without merit.