IN THE COURT OF APPEALS OF IOWA

No. 8-151 / 07-0637
Filed July 16, 2008

BARBARA HIMES,
Plaintiff-Appellant,

vs.

JOHN A. RUNYAN, JOHN A. AND R. NADINE RUNYAN TRUST DATED MAY 19, 1993,
Defendants-Appellees.

Appeal from the Iowa District Court for Poweshiek County, Annette J. Scieszinski, Judge.

Barbara Himes appeals from the district court ruling directing verdict in favor of the defendants on her negligence and breach of contract claims. **AFFIRMED IN PART; REVERSED IN PART; AND REMANDED FOR FURTHER PROCEEDINGS.**

Edward M. Mansfield of Belin, Lamson, McCormick, Zumbach & Flynn, P.C., Des Moines, for appellant.

Brian R. Kohlwes of Capuani & Peterson, Des Moines, and Daniel Northfield, Clive, for appellees.

Heard by Miller, P.J., and Vaitheswaran and Eisenhauer, JJ.

EISENHAUER, J.

Barbara Himes appeals from the district court grant of a motion for directed verdict in favor of the defendants, John A. Runyan and the John A. and R. Nadine Runyan Trust (Runyan Trust), on her claims of negligence and breach of contract. She claims the court erred in finding there was not substantial evidence to support her claims. We affirm in part, reverse in part, and remand for further proceedings.

I. Background Facts and Proceedings. On July 21, 2000, Himes entered in a lease for 919 Main Street Grinnell with Runyan Trust through its trustee, Runyan. The term of the lease was three years with monthly payments of $700. Himes took the premises "in present condition, except for such repairs and alterations as may be expressly otherwise provided in this lease." The lease also states the landlord is responsible for replacing and repairing the structural parts of the building, defined as "the foundation, exterior walls, load bearing components of the interior floors and walls, [and] the roof . . . ." Both parties agreed to insure their respective real and personal property for full value to cover losses. "To the extent permitted by their policies, the Landlord and Tenant waive all rights of recovery against each other." The lease further states:

> Each party shall be liable to the other for all damage to the property of the other negligently, recklessly or intentionally caused by that party . . . except to the extent the loss is insured and subrogation is waived under the owner's policy.

Himes operated a bookstore in the leased premises beginning in September 2000 when she moved her collection from its previous location. She began collecting books in her teens or early twenties and opened the bookstore

in 1979. Himes kept the more valuable books in her collection at the front of the store in display cases, while less expensive paperbacks were kept in the rear.

Sometime on the night of December 19, 2000, or early morning of December 20, the building's roof collapsed. The roof fell to the floor in the front area of the store. The building was declared a total loss and was demolished.

At the time of the roof's collapse, Himes had been in the process of creating an inventory. She was able to verify approximately $50,000 in lost books and estimated the total loss to be approximately 65,000 hard cover books at an average of seven dollars per book and 20,000 paperback books at an average of $3.50 per book for a total loss of $525,000.

The roof was flat and had been erected without the use of supporting walls. Instead the roof relied on ceiling supports toed into the adjacent buildings. The roof was originally tarpaper and required semi-annual maintenance and frequent visual inspections performed by Runyan. He also checked the roof rafters often. However, in the mid-1990s, Runyan moved to Arizona. At the time, the tarpaper was replaced with rubber, which required little to no maintenance.

In the years leading up to the collapse, the roof had occasional minor leaks which were promptly repaired. In October 2000, there was a minor leak near the back door, which Runyan fixed immediately.

On November 21, 2005, Himes filed a petition alleging negligence and breach of contract claims against the defendants. She sought attorney fees and punitive damages. The defendants filed a motion for summary judgment on

October 19, 2006. The district court denied the motion in a November 30, 2006 order, finding genuine issues of material fact were in dispute.

Trial commenced on March 6, 2007. No expert witness testified for Himes. At the close of her evidence, the defendants made a motion for directed verdict, which the court granted. Himes appeals.

II. Scope and Standard of Review. We review a trial court's ruling on a motion for directed verdict for correction of errors of law. *Podraza v. City of Carter Lake*, 524 N.W.2d 198, 202 (Iowa 1994). Our standard of review concerning appeal from the grant of a motion for directed verdict involves looking for substantial evidence. *Godar v. Edwards*, 588 N.W.2d 701, 705 (Iowa 1999). The court may sustain a motion for directed verdict when there is not substantial evidence to support each element of a plaintiff's claim. *Id.* Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion. *Id.* We view the evidence as the trial court did in ruling on the motion; in the light most favorable to the party against whom the motion was directed. *Id.*

III. Negligence. The district court granted the directed verdict after finding there was not substantial evidence a defect in the roof caused its collapse or that the defendants should have known about any such defect. The district court also concluded the theory of res ipsa loquitur did not apply and found Himes had not proved her claim of lost profits.

To prove negligence, the plaintiff must establish that (1) the defendant had a duty to conform to a standard of conduct for the protection of others, (2) the defendant failed to conform to that standard of conduct, (3) the plaintiff's

damages were proximately caused by the defendant's conduct, and (4) the plaintiff suffered damages. *Hartig v. Francois*, 562 N.W.2d 427, 429 (Iowa 1997).

In order to succeed on her claim, Himes must show a defect in the roof existed which caused the collapse, and the defendants knew or should have known of the defect. Himes's claim fails because she has not proved by substantial evidence the existence of a defect. The evidence in the record that supports this inference is that the roof was built without the use of supporting walls. Additionally, Himes testified that a joist was bent and did not reach the wall so a short section of two-by-four and two-by-two pieces of lumber were nailed in place for the joists to rest on.

It is possible that the bent joist was a defect in the roof that caused its collapse. However, roof engineering principles would be outside the purview of the average juror and expert testimony was necessary to establish the presence of a defect. *Diemer v. Hansen*, 545 N.W.2d 573, 576 (Iowa Ct. App. 1996) (holding technical issues that go beyond common knowledge and experience require expert testimony). Without expert testimony, any finding of a defect would be mere speculation, which is not enough to generate a jury question. *See Chenoweth v. Flynn*, 251 Iowa 11, 16, 99 N.W.2d 310, 313 (1959) (holding a mere possibility "would hardly be said to meet the burden plaintiff must carry. Mere possibility does not ordinarily generate a jury question, it leaves the jury to speculate upon a speculation").

Himes also argues the collapse of a roof under normal conditions gives rise to a presumption of negligence. Because Himes did not plead the theory of res ipsa loquitur in her petition, the defendants argue the claim is not preserved.

Iowa is a notice-pleading state. *See Adam v. Mt. Pleasant Bank & Trust Co.*, 355 N.W.2d 868, 870 (Iowa 1984). A petition need not plead ultimate facts to raise or preserve a claim. *Id.* The petition is sufficient if it "apprises the opposing party of the incident from which the claim arose and the general nature of the action." *Id.*

Himes's petition did not specifically plead general negligence as a cause of action. Our supreme court has previously found a claim of res ipsa loquitur was made, even though it wasn't specifically pled in the petition. *Weyerhaeuser Co. v. Thermogas Co.*, 620 N.W.2d 819, 831-32 (Iowa 2000). In *Weyerhaeuser*, the plaintiff pled several specifications of negligence and found one to be so general as to encompass the doctrine of res ipsa loquitur. *Id.* at 832. The court found that the arguments made by both sides over a motion in limine showed that the defendant had notice that the plaintiff was relying on the theory of res ipsa loquitur in addition to its specific allegations of negligence. *Id.*

Here, Himes pled one count of negligence alleging the defendants "negligently failed to maintain the roof in good repair." Himes did not mention the theory in her trial brief or the proposed verdict form, but she did request a jury instruction on general negligence. She also wrote in her resistance to summary judgment that the fact of the roof's collapse is evidence of a defect as roofs do not normally collapse when it snows. The district court ruled on this claim at the close of the plaintiff's case, stating, "There's not presumption of negligence in the situation that is described in the evidence in this case." We conclude that under the reasoning in *Weyerhaeuser*, Himes sufficiently states a claim for recovery under the theory of res ipsa loquitur.

We then consider whether the district court erred in finding the general negligence theory not applicable under the facts of this case. Under Iowa law, res ipsa loquitur applies when "(1) the injury is caused by an instrumentality under the exclusive control of the defendant, and (2) the occurrence is such as in the ordinary course of things would not happen if reasonable care had been used." *Mastland, Inc. v. Evans Furniture, Inc.*, 498 N.W.2d 682, 686 (Iowa 1993).

> Procedurally, if the plaintiff produces substantial evidence as to both prongs of res ipsa loquitur the plaintiff overcomes a motion for directed verdict. At this point the plaintiff simply has the right to have the case submitted to the jury on plaintiff's general negligence theory.

Brewster v. United States, 542 N.W.2d 524, 529 (Iowa 1996).

The defendants dispute there is substantial evidence the premises were in their exclusive control at the time the roof collapsed. However, the lease clearly states the roof was the responsibility of the landlord. Although Runyan was not physically there at the time of the collapse, there was no change in its condition since it had last been under his control which could have reasonably caused injury. *Thompson v. Burke Eng'g Sales Co.*, 252 Iowa 146, 150, 106 N.W.2d 351, 353 (1960) ("However, there is a growing number of decisions which apply the rule where defendant was in exclusive control of the instrumentality at the time of the alleged negligent act, although not at the time of the injury, provided plaintiff first proves there was no change in the condition of the instrumentality after it left defendant's control which could reasonably have caused the injury.")

We conclude the evidence supports submission of the general negligence theory to the jury. We reverse the directed verdict on this claim. We affirm the directed verdict in favor of the defendants on the specific negligence claim.

IV. Breach of Contract. Himes next contends the court erred in directing a verdict in favor of the defendants on her breach of contract claim.

A breach-of-contract claim requires proof of (1) the existence of a contract, (2) the terms and conditions of the contract, (3) performance of all the terms and conditions required under the contract, (4) the defendant's breach of the contract, and (5) damages as a result of the breach. *Molo Oil Co. v. River City Ford Truck Sales, Inc.*, 578 N.W.2d 222, 224 (Iowa 1998).

The district court found there was not substantial evidence Runyan failed to perform a condition of the contract; either because he should have known of a problem that would trigger a responsibility under the contract, or because he did not maintain the building in good condition.

The lease states, "Each party shall be liable to the other for all damage to the property of the other negligently, recklessly or intentionally caused by that party . . . ."

Under the lease agreement, the defendants were responsible for all damage caused by their negligence and therefore, if Himes has a valid negligence claim, she has a valid breach of contract claim as well. Because we reverse the district court's ruling granting directed verdict to the defendants on the general negligence question, we must also reverse the directed verdict on the breach of contract claim.

V. Personal Liability. Himes next contends the court erred in finding Runyan was not personally liable for his negligence as he was acting in a fiduciary capacity as a trustee of the Runyan Trust.

Appellant concedes, Runyan is not personally liable for the breach of contract claim under Iowa Code section 633A.4601(1) (2005). However, a person acting for another person may be held liable for negligence if they take part personally in the commission of the tort against a third party. *Haupt v. Miller*, 514 N.W.2d 905, 909 (Iowa 1994). Accordingly, we reverse the court's ruling on the issue of Runyan's personal liability with respect to the negligence claim.

VI. Lost Profit and Punitive Damages. Himes also contends the court erred in directing the verdict on her claim for lost profit damages and punitive damages. Because we are remanding this matter for new trial we need not decide these issues.

VII. Summary. We affirm the district court's ruling granting directed verdict in favor of the defendants on Himes's claim of specific negligence. We reverse the ruling with regard to her general negligence and breach of contract claims, as well as her negligence claim again Runyan personally. We remand to the district court for further proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED FOR FURTHER PROCEEDINGS.