IN THE COURT OF APPEALS OF IOWA

No. 8-277 / 07-1278
Filed June 11, 2008

JASON BANKS,
Plaintiff-Appellant,

vs.

SUSAN BECKWITH, M.D. and
THE IOWA CLINIC, P.C.,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Karen Romano, Judge.

Jason Banks appeals the jury verdict returned in favor of the defendants.

AFFIRMED.

Thomas P. Slater of Slater and Norris, P.L.C., West Des Moines, for appellant.

Michael H. Figenshaw and Thomas M. Boes of Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, for appellees.

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

HUITINK, J.

I. Background Facts and Prior Proceedings

On April 7, 2004, Dr. Susan Beckwith inserted a catheter in Jason Banks's subclavin vein in the area between the clavicle and the first rib. The catheter was inserted for long-term venous access for the delivery of chemotherapy to Banks's body. By November 2004, the catheter had fractured and a small piece had migrated to Banks's heart. On November 18, 2004, Banks underwent open-heart surgery to remove the fractured piece. The catheter was returned to the manufacturer for testing to determine the cause of the fracture. The manufacturer determined the catheter was not defective. It stated that this type of fracture was "most commonly" the result of compressive forces associated with improper placement in the subclavin vein.

Banks filed the present lawsuit against Dr. Beckwith and the Iowa Clinic, P.C., alleging Dr. Beckwith had improperly implanted the catheter in his vein. The petition stated Banks intended to rely upon the doctrine of res ipsa loquitur to prove his claim.

During trial, Banks's expert witness described the proper method of placing the catheter in the vein. Banks presented no direct evidence to show how Dr. Beckwith had actually placed the catheter. Nevertheless, his expert witness concluded that, because the catheter had fractured, Beckwith must have placed the catheter in the vein improperly. However, the same expert witness conceded that a catheter could fracture even if it was placed in the vein properly, but that an improperly placed catheter would be "more susceptible" to damage by shoulder motion and the resulting "scissors-like effect between the first rib and

the clavicle." Likewise, an expert witness for the defense testified that a catheter could fracture even when it was placed in the vein properly.

At the conclusion of the evidence, Banks requested that the court instruct the jury on the doctrine of res ipsa loquitur. The court determined the res ipsa instruction was not warranted. In doing so, the court stated: "I think all the evidence in the record is that the fracture of the catheter is a rare occurrence . . . just because it's rare doesn't mean that we get to the point of the general negligence res ipsa instruction." The jury ultimately found the defendants were not at fault, so the court entered a judgment in favor of the defendants.

On appeal, Banks claims the district court erred when it refused to give the jury the res ipsa instruction.

II. Standard of Review

The standard of review concerning alleged error with respect to jury instructions is for correction of errors at law. *Wells v. Enterprise Rent-A-Car Midwest*, 690 N.W.2d 33, 36 (Iowa 2004). Error in refusing to give a requested instruction does not warrant reversal unless it is prejudicial to the party. *Id.*

III. Merits

Parties are entitled to have their legal theories submitted to a jury if they are supported by the pleadings and substantial evidence in the record. *State v. Musser*, 721 N.W.2d 758, 762 (Iowa 2006). Evidence is substantial enough to support a requested instruction when a reasonable mind would accept it as adequate to reach a conclusion. *Bride v. Heckart*, 556 N.W.2d 449, 452 (Iowa 1996). The question presented in this case is whether it was reversible error for the trial court to refuse to provide the jury with the res ipsa loquitur instruction.

Res ipsa loquitur is a type of circumstantial evidence which permits a jury to circumstantially 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." *Conner v. Menard*, 705 N.W.2d 318, 320 (Iowa 2005) (citations omitted). It is also a rule of evidence which permits, but does not compel, an inference that the defendants were negligent. *Sammons v. Smith*, 353 N.W.2d 380, 385 (Iowa 1984). Where res ipsa loquitur is submitted in a medical malpractice case, the patient is relieved of the burden of showing that specific acts of the physician were below accepted medical standards and, though the patient must still prove negligence, he or she may do so by convincing the jury that the injury would not have occurred absent some unspecified but impliedly negligent act. *Id.*

A plaintiff must prove two foundational facts in order to invoke the doctrine: "(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." *Weyerhaeuser Co. v. Thermogas Co.*, 620 N.W.2d 819, 831 (Iowa 2000) (quoting *Brewster v. United States*, 542 N.W.2d 524, 529 (Iowa 1996)). Because the doctrine allows an inference of negligence without specific proof, our supreme court has been "cautious with the doctrine's requirements before applying it." *Wick v. Henderson*, 485 N.W.2d 645, 649 (Iowa 1992). This is particularly true in medical malpractice cases, where the "health care provider cannot control the physical condition and reactions of a patient." *Id.*

The fighting issue in this case is whether Banks satisfied the second prong of the res ipsa loquitur test. In *Tappe v. Iowa Methodist Medical Center*, 477 N.W.2d 396, 400 (Iowa 1991), our supreme court summarized the second foundational element in the following manner:

> [I]f reasonable minds might differ about whether the injury could result from surgery in the absence of negligence, the court should instruct on res ipsa and allow the jury to accept or reject the inference that the doctrine affords. If, however, the evidence is undisputed that such injury may occur even in the absence of negligence, then the doctrine of res ipsa loquitur should not be submitted and the case should proceed to verdict on the question of specific negligence, if any be shown. In this way neither the doctor nor the plaintiff is unfairly advantaged. The playing field remains level, and res ipsa is limited, as it should be, to those circumstances where "the thing speaks for itself" and says "negligence."

(Internal citations omitted.)

At best, Banks's medical expert testified that a catheter may, in extremely rare circumstances, fracture even when it was properly placed in the patient's subclavin vein. The manufacturer's instruction booklet for this particular catheter also indicates that a possible complication is that the catheter could break or be damaged due to compression between the clavicle and the first rib. The instructional booklet does not state that such damage or breakage is limited to situations where the catheter was improperly placed in the vein.

In total, the evidence reveals that the catheter may have fractured even if it was properly inserted. These are not the circumstances where "the thing speaks for itself" and says "negligence." *See Tappe*, 477 N.W.2d at 400. Because the evidence proves that the injury may have occurred even if Dr. Beckwith had used reasonable care while inserting the catheter, we find that

Banks failed to provide substantial evidence to support the second foundational element for the res ipsa loquitur doctrine. See *Perin v. Hayne*, 210 N.W.2d 609, 615 (Iowa 1973) ("Rarity of the occurrence is not a sufficient predicate for application of res ipsa loquitur.").

Accordingly, we affirm the district court's decision not to instruct the jury on the doctrine of res ipsa loquitur.

AFFIRMED.