

IN THE COURT OF APPEALS OF THE **FILED MAR 17 1998**

SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY **CARNEY SVENDAHL**
CLERK OF COURT

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Patricia Kostelnik,)	
)	
Appellant,)	
)	
vs.)	Case No. 019-97
)	
Little Six, Inc., d/b/a)	
Mystic Lake Casino,)	
)	
Appellee.)	

MEMORANDUM DECISION AND ORDER

Before Judge John E. Jacobson and Judge Henry M. Buffalo, Jr.. Judge Robert A. Grey Eagle took no part in this decision.

Patricia Kostelnik ("Kostelnik") filed this tort action claiming Little Six, Inc. d/b/a Mystic Lake Casino ("Mystic Lake") was liable for injuries she suffered due to the negligence of its employees. Following a four-day bench trial, the trial court entered judgment in favor of Mystic Lake. Kostelnik appealed from that judgment.

For the reasons set forth below, we affirm the trial court.

I. FACTS

The record discloses the following: On April 27, 1993, Kostelnik was seated at the far

right end of a row of slot machines on the main floor of the Mystic Lake Casino. Her chair was affixed to the slot machine and she testified that she was positioned squarely on the chair with her feet on its metal base pointing toward the machine. She was looking straight ahead.

A money cart escorted by two Mystic Lake employees came in contact with her chair as it rounded the corner where she sat. She did not see the cart before contact, and could not testify as to the manner in which the cart was being operated or the conduct of the Mystic Lake employees. One of the Mystic Lake employees¹ testified that they were pushing the cart at a normal walking speed of less than one mile an hour, moving from Kostelnik's left to her right.

Kostelnik testified that after hitting her chair, the cart rolled over the metal base of her chair and came to rest on her right foot where it remained until the two cart operators removed it. In contrast, the cart operator testified that the middle of the cart brushed the back of Kostelnik's chair, but never rolled over the base of the chair or came in contact with her foot. An accident reconstructionist expert presented by Mystic Lake testified that it would have been physically impossible for the cart to roll over the metal base onto her right foot in the manner claimed by Kostelnik.

After the contact, a Mystic Lake employee called an emergency medical technician (EMT), who twice surveyed Kostelnik for possible injuries. The EMT testified that although he asked Kostelnik what happened, she never mentioned the cart hitting her foot. As part of his second survey, the EMT removed Kostelnik's shoes and socks, inspected her feet, and found no lacerations or cuts. He did, however, note that her right foot was slightly swollen.

¹The appellate brief for Mystic Lake notes that at the time of trial only one of the original cart operators, Chris Fairbanks, was still employed by the casino and he testified at trial. Mystic Lake explains the other operator did not testify because he could not be located.

Kostelnik was transported by ambulance to St. Francis Hospital where her foot and neck were x-rayed. The EMT testified that he did not think an ambulance was necessary, but Kostelnik requested one. Kostelnik testified that it was the EMT who requested the ambulance. Neither the ambulance nor the emergency room records indicate the existence of a cut, laceration, scratch, or bleeding injury to Kostelnik's foot or ankle, but the x-ray report from the hospital did note some swelling on her right foot.

Kostelnik testified that the next day she removed her ace bandage and saw a scratch on her foot which she cleaned with peroxide before rewrapping. She testified that any redness associated with this scratch went away within a few days. The next week, however, Kostelnik said she began experiencing headaches, achiness, fever, and fatigue. In June 1993, after consulting several medical professionals, an epidural abscess and a condition known as vertebral osteomyelitis were discovered in an isolated area of Kostelnik's spine. Both conditions are caused by bacterial infections. Vertebral osteomyelitis is a deterioration or displacement of spinal vertebrae. Kostelnik required surgery to remove the abscess and two spinal vertebrae.

Kostelnik presented evidence that the abscess and her spinal damage was caused by the accident at Mystic Lake. One of the doctors who treated her in June of 1993, Dr. Christopher Sullivan, testified that her spinal problems had been caused by a staph aureus bacteria which could have entered her body through a cut on her foot, such as the one she claimed to have received from the accident at Mystic Lake. Dr. Sullivan never treated the cut on Kostelnik's foot, nor did he ever review the other medical records relating to the casino incident. He relied on Kostelnik's description of the cut to arrive at the medical opinion that the cut was the most likely entry point for the staph bacteria. In order to link her spinal injuries to the incident at

Mystic Lake, Kostelnik also presented testimony from her daughter and a friend who stated she was in fine health before the incident, but that both her foot and general health deteriorated afterward.

Mystic Lake presented evidence to show that Kostelnik's injuries were not caused by the accident. The testimony of the EMT, his report, and the emergency room report all fail to note any cut caused by the incident at the casino. Dr. Gary Kravitz, a specialist in infectious diseases, testified that staph bacteria only enter the body through soft tissue wounds if the cut is so infected that it drains pus. Kostelnik had previously testified that she did not observe any pus draining from her foot. Mystic Lake also presented evidence that Kostelnik had a history of neck and back pain dating back to 1982, including a diagnosis of a degenerative spinal condition in the same location where her vertebral osteomyelitis was diagnosed in June of 1993. Both Drs. Kravitz and Sullivan testified that her age and degenerative spinal condition would make Kostelnik predisposed to developing osteomyelitis even before the incident. Lastly, Mystic Lake presented evidence that as part of an unrelated clinical study, Kostelnik had reported to doctors that she was in bed with neck and back pain for four days from April 14 to 18, 1993, only a week a half before the incident at Mystic Lake. Dr. Kravitz testified that the nature and timing of the reported pain in mid-April would be consistent with a diagnosis of vertebral osteomyelitis in June.

Based on these facts, the trial court concluded Kostelnik had failed to demonstrate the Mystic Lake employees were negligent in the operation of the cart or that her injuries were caused by the accident. On appeal, Kostelnik argues that Mystic Lake was negligent and that the trial court erred by admitting certain hospital records into evidence. Mystic Lake counters

that it was not negligent, that even if it was it did not cause Kostelnik's injuries, and that the disputed records were properly admitted.

II. ANALYSIS

A. **Negligence.** The first question we must address is whether the trial court erred in concluding that Kostelnik had failed to demonstrate that Mystic Lake was negligent?

The standards of review following a bench trial are (i) whether the trial court's findings of fact were clearly erroneous, and (ii) whether the court erred in its conclusions of law. Schweich v. Ziegler, Inc., 463 N.W.2d 722, 729 (Minn. 1990). Specifically, a question of negligence is for the trier of fact to determine, and the trial court's verdict should not be disturbed unless there is no evidence which reasonably supports the verdict or it is manifestly contrary to the evidence. Id.

To succeed on a claim of negligence, a plaintiff must demonstrate that the defendant (1) owed her a duty, (2) breached that duty, (3) that the defendant's breach was the proximate cause of her injury, and (4) that she suffered actual injury. Schweich, supra, at 729.

From the record before us, there appears to be no direct evidence that the defendant breached its duty to use reasonable care in the operation of the money cart. Kostelnik testified that she did not see the defendants operating the money cart and she offered no other witnesses to testify regarding the operation of the cart. One of the cart operators testified that he and the other operator were moving the cart at a normal speed of less than one mile an hour when they came in contact with her chair as they rounded a corner. Besides the very fact of contact, there is nothing in the record to suggest they exercised less than reasonable care in the operation of

the cart.

Acknowledging that she is unable to provide direct evidence that Mystic Lake breached a duty it owed her, Kostelnik maintains that the defendants are liable under a theory of *res ipsa loquitur*. The doctrine of *res ipsa loquitur* can create a rebuttable presumption that the defendant was negligent if the injury causing event (1) would not normally occur in the absence of negligence, (2) the instrumentality or agency which caused the accident was in the exclusive control of the defendant, and (3) the accident was not due to any voluntary action or contribution by the plaintiff. Warrick v. Giron, 290 N.W.2d 166,169 (Minn. 1980); Spannus v. Otolaryngology Clinic, 242 N.W.2d 594, 596 (Minn. 1976).

The parties disagree primarily on the first of these elements. Kostelnik argues that the contact between the cart and her chair, and the extent of her injuries, makes this an accident that could not happen in the absence of negligence. Mystic Lake argues that the existence of an accident does not compel a finding of negligence and that its employees used reasonable care in guiding a heavy change cart through the casino floor.

The trial court did not specifically address Kostelnik's *res ipsa loquitur* theory, but it did conclude that the mere fact of an accident is not sufficient to establish negligence and that Kostelnik had not demonstrated that the employees of Mystic Lake failed to exercise reasonable care.

We believe the trial court was correct. When considering whether an accident is one that would normally not occur in the absence of negligence, we consider common knowledge, the testimony of expert witnesses, and the circumstances relating to a particular accident. See generally, Newing v. Cheatham, 540 P.2d 33, 39 (Cal. 1975). Here, a cart operator testified

that the cart was operated in a normal manner, was moving at walking speed, and that the cart came in brief contact with the back of Kostelnik's chair as the cart rounded a corner in the casino. It seems plausible that, even exercising reasonable care, this type of accident could occur. Therefore, we hold that Kostelnik has failed to demonstrate the first element of *res ipsa loquitur*.

What is confusing about Kostelnik's argument, however, is that she appears to attempt to use *res ipsa loquitur* to bypass the causation element of a tort claim. Under her analysis, the mere fact that an accident occurred suffices to create liability on the part of Mystic Lake for all the subsequent injuries she claims were caused by that accident. In support of this analysis, Kostelnik cites Hoven v. Rice Memorial Hospital, 396 N.W.2d 569, 572 (Minn. 1986), where the Minnesota Supreme Court stated that *res ipsa loquitur* required that a plaintiff show the injury (rather than accident) was one that would not normally occur without negligence, that the cause of the injury was in the exclusive control of the defendant, and that the injury was not due to plaintiff's actions.

The problem with that test, as Hoven states it, is that, read formalistically, a defendant could argue that almost any injury, such as a broken leg, does not require negligence in order to occur and that *res ipsa loquitur* should not apply.

Mystic Lake responds by arguing that the more appropriate formulation of the *res ipsa loquitur* test is stated by Spannus v. Otolaryngology Clinic, supra, which clearly incorporates the causation requirement in its test for *res ipsa loquitur*. The formulation of the *res ipsa loquitur* test in Spannus requires that the "injury causing event" (1) would not normally occur in the absence of negligence, (2) the instrumentality or agency which caused the accident was

in the exclusive control of the defendant, and (3) the accident was not due to any voluntary action or contribution by the plaintiff. See also, Warrick v. Giron, 290 N.W.2d 166,169 (Minn. 1980).

In our view, the formulation of the test in Spannus is the sounder approach, because it requires a plaintiff to demonstrate causation while focussing on the nature of the accident within the defendant's control, not the nature of the injury.

And using the Spannus approach, even if Kostelnik showed the casino accident is one that would not normally occur in the absence of negligence, her res ipsa loquitur claim fails because she has not demonstrated that the incident at the casino was the injury causing event. While Dr. Sullivan testified that he believed the staph bacteria which caused her spinal complications had entered through the cut she claimed to have had on her foot, he acknowledged that his only source of information regarding the cut was Kostelnik. The EMT report and the emergency report never mentioned a cut--despite the fact that Kostelnik's foot was inspected in each of those examinations. Dr. Kravitz testified that while it was possible for a staph bacteria to enter the body through a soft tissue wound, urinary tract and respiratory infections were more common methods of entry, and that in the vast majority of cases, the entry point simply cannot be determined. Taken together, this evidence suggests to us that the trial court reasonably could have concluded that the incident at Mystic Lake was not the proximate cause of the bacterial infections which led to Kostelnik's spinal problems.

On appeal from a trial court verdict, the Appellant has the burden to demonstrate that the trial court committed clear error. If the Appellant cannot carry that burden, the trial court's decision must be affirmed. Here, from the record of the proceedings, Kostelnik has failed to

do that: She has failed to demonstrate that Mystic Lake breached a duty it owed her or caused her injuries, has failed to demonstrate the first element of her res ipsa loquitur theory, and has failed to show that the accident at Mystic Lake was the injury-causing event.

B. The Admission of Exhibit 25. Kostelnik contends, however, that the trial court committed reversible error in admitting certain evidence, which tended to suggest that Kostelnik's condition existed before April 27, 1993.

On appeal, a ruling on the admissibility of evidence should be overturned only if the trial court has abused its discretion. Betzold v. Sherwin, 404 N.W.2d 286, 288 (Minn. Ct. App.) (citing, In re Conservatorship of Torres, 357 N.W.2d 332, 341 (Minn. 1984)). And if an error was committed, relief should only be granted if it might have reasonably changed the result of the trial. Jenson v. Touche Ross & Co, 335 N.W.2d 720, 725 (Minn. 1983).

In the spring of 1993, Kostelnik was involved in a clinical trial for a new anti-depressant drug which was unrelated to her spinal problems. Exhibit 25, the admission of which Kostelnik contends was error, contains a progress report from that study dated April 19, 1993 and a side effect report written on or about July 21, 1993. Both sheets were filled out by Dr. Chastek who was on staff at Ramsey Mental Health Center and had treated Kostelnik in the past. In these reports, Dr. Chastek notes that she complained of neck and back pain starting on April 14, 1993 (or approximately two weeks before the incident at the casino) and that as a result she was in bed for four days. The reports were sent by telefax to Ramsey County Mental Health Center, and were maintained as part of Kostelnik's permanent file there. It appears from the record that at least one hand written sentence on the bottom of the side effect report was cut off by the telefax sheet.

Kostelnik argues that Exhibit 25 is hearsay, not relevant, unauthenticated, lacks foundation, and includes inadmissible conclusions of an expert. We disagree on all points; and we are of the view that, even if Exhibit 25 had not been admitted, ample evidence would have supported the trial court's decision.

Exhibit 25 is not hearsay because a hospital record is admissible as a business record if it relates to the medical history, diagnosis, or treatment of a patient. Lindstrom v. Yellow Taxi Co. of Minneapolis, 214 N.W.2d 672, 678 (Minn. 1974). The relevant portions of Exhibit 25 address the medical history and treatment of Kostelnik.

But Kostelnik argues that even if Exhibit 25 qualifies as a business record it should not have been admitted because the method or circumstance of its preparation was not trustworthy, inasmuch as a sentence apparently is missing at the bottom of one page of the document. See Minn. R. Evid. 803(6). However, the record custodian for Ramsey Mental Health Center testified that Exhibit 25 was an exact copy of the facsimile from the file and that they routinely receive and maintain such facsimile copies in their files. While the facsimile machine did cut off a portion of the record, the missing portion does not call into question the authenticity of the record or necessarily suggest that the method or circumstance of its preparation was not trustworthy.

Kostelnik also argues that the relevance of Exhibit 25 is conditioned on it being authenticated properly and that since it was not properly authenticated it should not have been admitted--and, indeed, authentication requires sufficient evidence to support a finding that the record is what its proponent claims. But here, the testimony of the record custodian of Ramsey Mental Health Center, combined with the lack of a credible challenge to the document's

authenticity, seem to us to provide sufficient evidence for the trial court to find the document is what Mystic Lake claims it is.

Next, Kostelnik argues that Exhibit 25 lacked foundation and contained inadmissible conclusions of an expert. But, while a doctor did fill out the form, Exhibit 25 does not, in fact, contain unsubstantiated expert opinions: it merely notes aspects of Kostelnik's reported medical history. Hence, Kostelnik's arguments based on rules relating to expert testimony seems to us to be misplaced.

Finally, Kostelnik argues the missing portion of the record violates the requirement which that if a duplicate is offered into evidence, it must have been produced by a means that accurately reproduces the original. But facsimile transmissions are a method that generally provide accurate reproductions. In our view, the controlling rules are those which permit the admission of a duplicate unless a genuine question is raised as to the authenticity of the original, or unless it would be unfair to admit the duplicate in lieu of the original. Since neither of those conditions applies here, the trial court did not abuse its discretion by admitting Exhibit 25.


Finally, Kostelnik has not demonstrated that she suffered actual prejudice from the admission of Exhibit 25: Exhibit 25 is relevant only to the issue of causation. If there is sufficient evidence to support the trial court's conclusion that Mystic Lake did not breach a duty it owed Kostelnik--as we have held there is--then any error regarding evidence of causation would not affect the outcome below. Even absent Exhibit 25, there was ample evidence to support the trial court's conclusion that Kostelnik failed to demonstrate causation. The EMT and emergency room reports failed to note Kostelnik's cut, Kostelnik's neck was the subject of examination immediately after the casino incident (suggesting that at that moment she was

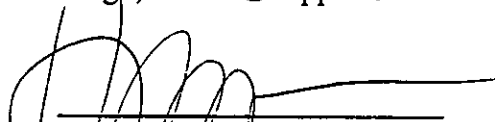
experiencing pain), an expert accident reconstructionist testified that it was physically impossible for Kostelnik to be injured in the manner she claims, and Dr. Kravitz testified that the Mystic Lake incident did not cause her bacterial infection because there was no indication that her foot was severely infected.

For all of the foregoing reasons, the judgment of the trial court in this matter is .

AFFIRMED.

March 17, 1998


John E. Jacobson
Judge, Court of Appeals


Henry M. Buffalo, Jr.
Judge, Court of Appeals