STATE OF MICHIGAN

COURT OF APPEALS

MARY C. CRIPPEN,

Plaintiff-Appellee,

v

REGENTS OF THE UNIVERSITY OF MICHIGAN,

Defendant-Appellant.

UNPUBLISHED
May 9, 1997

No. 162400
Court of Claims
LC No. 91-013303-CM

Before: Reilly, P.J., and Sawyer and W. E. Collette*, JJ.

PER CURIAM.

Defendant appeals from a judgment of the circuit court in favor of plaintiff entered following a bench trial. We affirm.

Plaintiff underwent an emergency appendectomy at defendant's hospital. Thereafter, she began suffering from a neurological condition that affected her lower extremities, including bowel and bladder control. Plaintiff commenced this medical malpractice action, contending that she suffers from a condition known as cauda equina syndrome (CES). She further contended that that condition was most likely caused by an unidentified contaminant in the spinal anesthetic, Tetracaine, that was used during the appendectomy. In support of her claim, she advanced a theory of res ipsa loquitur.

The matter was tried to the bench and the trial court issued findings of fact and conclusions of law and found in favor of plaintiff on the res ipsa loquitur theory.[1] Defendant's only argument on appeal is that the trial court erred in imposing liability under a res ipsa loquitur theory.

The following four factors are required to establish a res ipsa loquitur claim:

> (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence;

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* Circuit judge, sitting on the Court of Appeals by assignment.

(2) it must be caused by an agency or instrumentality within the exclusive control of the defendant;

(3) it must not have been due to any voluntary action or contribution on the part of the plaintiff. . . .

(4) "[e]vidence of the true explanation must be more readily accessible to the defendant than to the plaintiff." [*Locke v Pachtman*, 446 Mich 216, 230; 521 NW2d 786 (1994), quoting *Jones v Porretta*, 428 Mich 132, 150-151; 405 NW2d 863 (1987).]

The last two elements are not in dispute. However, defendant does challenge the first two elements. Defendant does point to a great deal of evidence to support its position. It also makes a strong argument why plaintiff's evidence on these should not have been accepted by the trial court. Indeed, had we sat as the trier of fact, we may well have found in favor of defendant on this theory.

However, we are not the trier of fact. The trial judge was. Plaintiff certainly presented evidence, which if believed by the trier of fact, would justify a decision for plaintiff. While we may not have reached the same conclusion as the trial judge, it is not our place to substitute our judgment for the trial judge's. In short, we cannot say that the trial court clearly erred in its conclusion. MCR 2.613(C).

Affirmed. Plaintiff being the prevailing party, she may tax costs pursuant to MCR 7.219.

/s/ Maureen Pulte Reilly
/s/ David H. Sawyer
/s/ William E. Collette

[1] The trial court did reject an alternate theory by plaintiff based upon informed consent.