

210 A.D.2d 628, 619 N.Y.S.2d 852
 (Cite as: 210 A.D.2d 628, 619 N.Y.S.2d 852)

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Supreme Court, Appellate Division, Third Department,
 New York.
 Mildred DI SANTO et al., Appellants,
 v.
 COUNTY OF WESTCHESTER et al., Respondents,
 et al., Defendants.

Dec. 8, 1994.

Airline passenger who slipped and fell on wet tarmac as she was walking from plane to terminal brought negligence action against county which owned airport, county's agent which operated airport, and company which provided ground services for the various airlines utilizing airport. The Supreme Court, Westchester County, Ruskin, J., dismissed complaint against county at conclusion of the evidence and entered judgment on jury verdict for agent and company, and appeal was taken. The Supreme Court, Appellate Division, White, J., held that: (1) passenger was not entitled to res ipsa loquitur charge, and (2) complaint against county should not have been dismissed at close of the evidence since it would have been vicariously liable if jury had found its agent negligent, but error was harmless given jury's verdict.

Affirmed.

West Headnotes

[1] Trial 388 ↪ 27

388 Trial

388III Course and Conduct of Trial in General
388k27 k. Experiments and Tests. Most Cited Cases

In negligence brought by airline passenger who slipped and fell on wet tarmac as she was walking from plane to terminal, trial court did not abuse its discretion in refusing to allow passenger's proposed witness to demonstrate that petroleum products and water do not mix and that fuel will float on water, thereby creating slippery condition, since there was

no proof that demonstration would replicate conditions existing at accident scene.

[2] Negligence 272 ↪ 1723

272 Negligence

272XVIII Actions

272XVIII(E) Instructions

272k1721 Presumptions and Burden of Proof

272k1723 k. Res Ipsa Loquitur. Most Cited Cases

(Formerly 272k138(2))

Res ipsa loquitur charge is warranted only where plaintiff establishes that event does not ordinarily occur in the absence of someone's negligence, that it was caused by agency or instrumentality within exclusive control of defendant, and that event was not due to any voluntary action or contribution on plaintiff's part.

[3] Aviation 48B ↪ 234.1

48B Aviation

48BV Airports and Services

48Bk234 Actions for Injuries

48Bk234.1 k. In General. Most Cited Cases

Absence of clear proof as to cause of airline passenger's slip and fall on wet tarmac as she was walking from plane to terminal foreclosed passenger from establishing that it was the kind of event that ordinarily did not occur absent someone's negligence and that her actions did not contribute to it and thus, passenger was not entitled to res ipsa loquitur charge in her negligence action against county which owned airport, operator of airport, and company providing ground services for airlines utilizing airport.

[4] Appeal and Error 30 ↪ 1061.2

30 Appeal and Error

30XVI Review

30XVI(J) Harmless Error

30XVI(J)14 Dismissal

30k1061.2 k. In General. Most Cited

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Cases

Aviation 48B ↪ 232.1

48B Aviation

48BV Airports and Services

48Bk232 Injuries from Operation and Maintenance of Airports in General

48Bk232.1 k. In General. Most Cited Cases

Since county, which owned airport, would have been vicariously liable if jury had found operator of airport, county's agent, negligent, airline passenger's slip and fall claim against county should not have been dismissed at close of the evidence, but error was harmless since jury rendered verdict in favor of operator.

[5] New Trial 275 ↪ 72(1)

275 New Trial

275II Grounds

275II(F) Verdict or Findings Contrary to Law or Evidence

275k67 Verdict Contrary to Evidence

275k72 Weight of Evidence

275k72(1) k. In General. Most Cited

Cases

To set verdict aside on ground that it is against weight of the evidence, it is necessary to conclude that there is simply no valid line of reasoning and permissible inferences which could possibly lead rational persons to the conclusion reached by jury on basis of the evidence presented at trial.

[6] Aviation 48B ↪ 236

48B Aviation

48BV Airports and Services

48Bk234 Actions for Injuries

48Bk236 k. Questions for Jury. Most Cited

Cases

Jury's verdict that company which provided ground services for airlines utilizing airport was negligent in not having gatekeeper meet passenger's plane to direct her and her fellow passengers but that its negligence was not proximate cause of passenger's slip and fall on wet tarmac as she was walking from

plane to terminal was not irrational since evidence supported finding that wet and slippery condition of tarmac at point where passenger fell was caused by natural phenomena over which company and airline had no control.

****853 Monroe Yale Mann** (Carolyn H. Mann, of counsel), Port Chester, for appellants.

Downing & Mehrtens P.C. (Thomas E. Mehrtens, of counsel), New York City, for respondents.

Before MIKOLL, J.P., and MERCURE, CREW, WHITE and YESAWICH, JJ.

***628 WHITE**, Justice.

Appeal (transferred to this court by order of the Appellate Division, Second Department) from a judgment of the Supreme Court (Ruskin, J.), entered July 1, 1992 in Westchester County, *inter alia*, upon a verdict rendered in favor of certain defendants.

On June 7, 1989 at about 5:25 P.M., plaintiff Mildred Di Santo (hereinafter plaintiff) arrived at Westchester County Airport on a flight from Philadelphia. As she was walking in the rain from the plane to the terminal, she slipped and fell on the wet tarmac, sustaining serious personal injuries. Thereafter, plaintiffs ^{FN1} commenced this negligence action against, among others, defendants County of Westchester (the owner of the airport), Pan Am World Services Inc. (the operator of the airport pursuant to a contract with the County) and Ground Handling Inc., which, under a contract with Pan Am provided ground services for the various airlines utilizing the airport. ^{FN2} At the conclusion of the evidence, Supreme Court dismissed the complaint against the County, and the jury rendered a verdict in favor of the remaining two defendants. Following Supreme Court's denial of plaintiff's motion to set aside the verdict, this appeal ensued.

^{FN1}. A derivative claim was brought by plaintiff James Di Santo.

^{FN2}. Plaintiffs also sued three fuel companies and U.S. Air Inc. The actions were dismissed against the fuel companies by stipulation and against U.S. Air at the close of plaintiffs' case.

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*629 [1] Plaintiffs' theory of liability was that plaintiff's fall was caused by a dangerous condition created by defendants' failure to clean up a fuel oil spill. To support this theory, plaintiffs proposed to have a witness **854 demonstrate the fact that petroleum products and water do not mix and that the fuel will float on the water, thereby creating a slippery condition. Supreme Court's refusal to allow this demonstrative evidence was not an abuse of discretion as there was no proof that the demonstration would replicate the conditions existing at the accident scene (see, Uss v. Town of Oyster Bay, 37 N.Y.2d 639, 641, 376 N.Y.S.2d 449, 339 N.E.2d 147).

[2] The next issue raised by plaintiffs is that Supreme Court erred in refusing their request for a res ipsa loquitur charge. Such a charge is warranted only where a plaintiff establishes that (1) the event does not ordinarily occur in the absence of someone's negligence, (2) it was caused by an agency or instrumentality within the exclusive control of the defendant, and (3) the event was not due to any voluntary action or contribution on the plaintiff's part (see, Ebanks v. New York City Tr. Auth., 70 N.Y.2d 621, 623, 518 N.Y.S.2d 776, 512 N.E.2d 297).

[3] Plaintiff's testimony was that, as she left the plane and was walking toward a terminal building, somebody told her to go to the right, which she did. A few steps later she fell on the tarmac which was wet from an all-day rain. On the critical issue of what caused the fall, plaintiff's proof is far from conclusive as she admitted that she was not looking down to see where she was walking and did not know what caused her to fall. Further, all her witnesses, except one, placed the fuel spill some distance from the point where plaintiff fell. Lacking clear proof as to the cause of her fall foreclosed plaintiff from establishing that it was the kind of event that ordinarily does not occur absent someone's negligence and that her actions did not contribute to it. Thus, we conclude that Supreme Court properly denied plaintiffs' request for a res ipsa loquitur charge (see, Hryciuk v. 120 Wall Co., 201 A.D.2d 254, 607 N.Y.S.2d 28; McDonald v. City of New York, 172 A.D.2d 296, 568 N.Y.S.2d 108, lv denied 78 N.Y.2d 861, 576 N.Y.S.2d 219, 582 N.E.2d 602).

[4] We do agree with plaintiffs, however, that the complaint against the County should not have been

dismissed at the close of the evidence since it would have been vicariously liable if the jury had found its agent, Pan Am, negligent (see, Brown v. Poritzky, 30 N.Y.2d 289, 292, 332 N.Y.S.2d 872, 283 N.E.2d 751; Donohue v. Losito, 141 A.D.2d 691, 529 N.Y.S.2d 813, lv denied 72 N.Y.2d 810, 534 N.Y.S.2d 938, 531 N.E.2d 658). This error was harmless, however, given the jury's verdict.

[5][6] Lastly, plaintiffs contend that the jury's verdict, particularly *630 its finding that Ground Handling was negligent in not having a gatekeeper meet plaintiff's plane to direct passengers but that its negligence was not a proximate cause of the accident, is against the weight of the evidence. To set a verdict aside on this ground it is necessary to first conclude that there is simply no valid line of reasoning and permissible inferences which could possibly lead rational persons to the conclusion reached by the jury on the basis of the evidence presented at trial (see, Campbell v. City of Elmira, 198 A.D.2d 736, 604 N.Y.S.2d 609). Here, the jury's verdict is not utterly irrational since the evidence supports a finding that the wet and slippery condition of the tarmac at the point where plaintiff fell was caused by natural phenomena over which Ground Handling and Pan Am had no control.

For these reasons, we affirm.

ORDERED that the judgment is affirmed, with costs.

MIKOLL, J.P., and MERCURE, CREW and YESAWICH, JJ., concur.

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