72227-1 72227-1

No. 72227-1-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

CAMILLE PALMER, an individual,

Appellant,

v.

RAINBOW FACTORY SHOWROOM, LLC, a Washington Corporation,

Respondent.

APPELLANT'S BRIEF

David A. Williams, WSBA #12010
Law Office of David A. Williams
9 Lake Bellevue Dr, Ste104
Bellevue, WA 98005
Email: DAW@Bellevue-Law.com
Phone: 425-646-7767
Facsimile: 425-646-1011

Attorney for Appellant Camille Palmer

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INTRODUCTION

Though it's seemingly obvious that people using a playground slide in the typical manner don't break their hand on the way down unless there's been negligence in the assembly or maintenance of the slide itself, the Court dismissed Plaintiff's lawsuit, holding that the doctrine of *res ipsa loquitor* did not apply.

On March 20th, 2010, the Appellant Camille Palmer ("Palmer") and her husband visited the Respondent Rainbow Factory Showrooms, L.L.C. ("Rainbow"), along with their daughter Jocelyn. They were shopping for a "slide" for Jocelyn to play on. Camille was pregnant.

With Jocelyn in her lap, Palmer slid down one of the "display slides". Her arms were on the respective "runners" at the side of the slide. No evidence in the record suggests that she did anything careless.

When she reached the bottom of the slide, she had a severely broken left hand.

ASSIGNMENT OF ERROR

The Court erred in dismissing Palmer's complaint on Summary Judgment.

The issue is whether Palmer may use *res ipsa loquitor* to establish negligence.

STATEMENT OF THE CASE

The accident occurred March 20th, 2010. CP 1, 2. Palmer gave this testimony:

> A. Okay. I was going down the slide. Moments before I reached the bottom, I could feel my hand---my left hand stuck, caught, still there. And then when I---by the time my feet had touched the bottom, my hand was behind me. And when I stood up to try to get out, it came out. I put my daughter . . . with my right hand, I put my daughter down, looked at my left hand, and my finger was laying over the rest of my hand.

CP 91.

Palmer unambiguously testified that her hands were in what should have been a safe position as she went down the slide, saying:

> Q. So we're going down the slide at this point. Where was your right hand?
>
> A. On the side---the right side of the slide over the edge. I mean, I dont' know if "over the edge" is the right word. Just on the top edge of the slide.
>
> Q. Right. So as you're going down the slide---let me ask it this way: Is your right hand creating friction with the side of the slide or is it kind of over the side in the air.
>
> A. No, I would say it was on the slide.
>
> Q. Okay.
>
> A. Both---yeah.

Q. As you're going down the slide, where was your left hand?

A. The exact same place my right one was, on the top edge of the slide.

Q. Creating friction with the slide as opposed to being in the air?

A. Correct.

CP 36, 37.

The slide was supported on the sides by "posts". Each was "bolted" to the plastic slide. The display slide was assembled sometime in February or March, 2010, weeks before the incident. CP 150. The "slide was supported by posts, which were connected by bolts; the assembly instruction indicate that the bolts should be regularly tightened. CP 149. The purpose of doing so is to prevent a "gap" between the post and the slide. CP 150.

Palmer had felt her hand "caught" on something at the bottom of the slide:

A. Okay. I was going down the slide moments before I reached the bottom, I could feel my hand... my left hand stuck, caught, still there and when I ... by the time my feet had touched the bottom, my had was behind me and when I stood up to try to get out, it came out.

CP 135.

Palmer sued Rainbow CP 1, 2.

Rainbow moved for Summary Judgment. CP 20-59; 64-79. The Motion was granted. CP 172, 173. This appeal timely followed. CP 174, 177.

ARGUMENT

The Evidence Supports a Claim for Negligent Assembly Under the Doctrine of Res Ipsa Loquitur

In Curtis v. Lein, 169 Wn.2d 884, 239 P.3d 1078 (Wash. 2010), our Supreme Court revisited the time-honored doctrine of res ipsa loquitur. There, the plaintiff had been injured when a dock gave way. No specific "negligent" act on the part of the dock's owner was proven. Nonetheless the Court allowed the case to proceed on "res ipsa locquitur", making several salient points:

> "The doctrine of res ipsa loquitur spares the plaintiff the requirement of proving specific acts of negligence in cases where a plaintiff asserts that he or she suffered injury, the cause of which cannot be fully explained, and the injury is of a type that would not ordinarily result if the defendant were not negligent. In such cases the jury is permitted to infer negligence. The doctrine permits the inference of negligence on the basis that the evidence of the cause of the injury is practically accessible to the defendant but inaccessible to the injured person."

The Curtis court added at 169 Wn.2d 894:

> A plaintiff claiming res ipsa loquitur is " not required to eliminate with certainty all other possible causes or inferences' in order for res ipsa loquitur to apply." *Pacheco,* 149 Wash.2d at 440-41, 69

P.3d 324 (quoting *Douglas v. Bussabarger*, 73 Wash.2d 476, 486, 438 P.2d 829 (1968) (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 222 (3d ed.1964))). Instead, " res ipsa loquitur is inapplicable where there is evidence that is *completely* explanatory of how an accident occurred and no other inference is possible that the injury occurred another way." *Id.* at 439-40, 69 P.3d 324. The rationale behind this rule lies in the fact that res ipsa loquitur provides an inference of negligence."

(emphasis added)

In Robison v. Cascade Hardwoods, Inc., 117 Wn.App. 552, 563, 72 P.3d 244 (Wash.App. Div. 2 2003), the Court of Appeals said:

> "The doctrine of res ipsa loquitur spares the plaintiff the requirement of proving specific acts of negligence in cases where a plaintiff asserts that he or she suffered injury, the cause of which cannot be fully explained, and the injury is of a type that would not ordinarily result if the defendant were not negligent. In such cases the jury is permitted to infer negligence. The doctrine permits the inference of negligence on the basis that the evidence of the cause of the injury is practically accessible to the defendant but inaccessible to the injured person."

The Court went on to say:

> "Stated another way, res ipsa loquitur is a rule of evidence that allows an inference of negligence from circumstantial evidence to prove a defendant's breach of duty where (1) the plaintiff is not in a position to explain the mechanism of injury, and (2) the defendant has control over the instrumentality and is in a superior position to control and to explain the cause of the injury. Morner v. Union P. R.R., 31 Wash.2d 282, 291-92, 196 P.2d 744 (1948)."

In Robison, the Plaintiff was a logging truck driver who suffered severe electrical shock while using the defendant's apparatus to unload his truck. A somewhat lengthy quote of the Court's application of the facts and the law in his case may be in order:

> Robison's uncontroverted evidence indicates that he received "a severe electrical shock and electrical burns" while operating Cascade's electrically powered trailer loader, on Cascade's premises, on a very rainy day, when the ground beneath the trailer loader was saturated with water. Supp. CP at 553. Three medical experts concluded that electrical shock caused his severe injuries and medical symptoms, all of which he did not begin experiencing until after regaining consciousness at Cascade.
>
> At this point, Cascade does not deny that Robison suffered an electrical shock; it strictly contends that it is speculative and inconclusive to say that the source or cause of the electric shock came from stray electricity from Cascade's equipment. Without producing any affirmative evidence, Cascade argues that Robison cannot prove that his shock did not come from lightning or his own truck.
>
> Taken in the light most favorable to Robison, the record belies Cascade's claims: There is no evidence of any lightning on this rainy day in late winter/early spring, and the electrical evidence suggests that a 12-volt battery could not have caused Robison's severe burns. The record shows that Robison's severe internal burns and injuries, without visible

Thus was summary judgment dismissing the case reversed. The Court will note that there was no evidence pertaining to any exact issue with the "trailer loader", only that the Plaintiff suffered severe shock while using it.

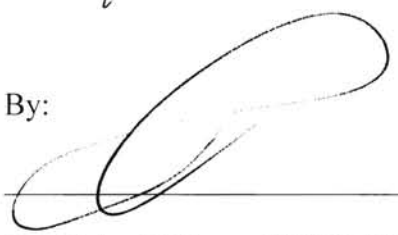
Here, the Plaintiff's testimony---which must be taken as true in the light most favorable to her—is that she was using the slide in a perfectly safe manner, but severely injured her hand. There is no evidence to the contrary, and no other conceivable explanation offered for her injury.

Furthermore, Plaintiff has evidence to concretely support a plausible theory of injury---one that Defendants admit must be guarded against! If the bolts holding the support posts to the slide were improperly assembled, or had loosened, a "gap" would exist, in which Camille's hand would have been "caught".

CONCLUSION

Palmer deserves a jury trial.

Respectfully submitted on this 31 of October, 2014.

By: 

David A. Williams, WSBA #12010
9 Lake Bellevue Dr, Ste104
Bellevue, WA 98005

Attorney for Appellant
Camille Palmer

PROOF OF SERVICE

I hereby certify that a copy of the **Appellant's Brief** was forwarded for service upon the counsel of record:

Via U.S. Mail to:

Davis Rothwell Earle & Xochihua, P.C.
John E. Moore
5500 Columbia Center
701 Fifth Avenue
Seattle, WA 98104

Schwabe Williamson & Wyatt, P.C.
Averil Rothrock
Bert W. Markovich
Claire L. Rootjes
1420 5th Avenue, #3400
Seattle, WA 98101

Attorney for Respondent

Dated this 31st Day of October, 2014.

Lora Perry
Paralegal