72227-1

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NO. 72227-1-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

CAMILLE PALMER, an individual,

Appellant,

v.

RAINBOW FACTORY SHOWROOM, LLC, a Washington Corporation,

Respondent.

RESPONDENT RAINBOW FACTORY SHOWROOM, LLC'S BRIEF

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CASES

A. RESPONSE TO ASSIGNMENT OF ERROR

The trial court correctly granted Rainbow Factory Showroom's motion for summary judgment.

The issue is whether a plaintiff who claims to have injured herself on a slide, who claims that the slide was negligently assembled, and who inspected and photographed the slide after her alleged injury, may rely exclusively on the doctrine of *res ipsa loquitur* to survive summary judgment when she has no direct or circumstantial evidence of negligent assembly.

B. COUNTER STATEMENT OF THE CASE

The Parties

Respondent Rainbow Factory Showroom assembles and sells play structures that are designed, developed, and manufactured by defendant below, Rainbow Play Systems. CP 27-28. Appellant Camille Palmer ("Palmer") alleged that she was injured on one of these slides because the slide was negligently assembled or negligently designed. CP 1.

The Accident

On March 20, 2010, Palmer was at Rainbow Factory Showroom shopping for a play structure for her two-and-a-half-year-old daughter and her son, with whom she was five to six months pregnant with at the time. CP 181, 186-87. Palmer and her daughter climbed onto a play structure

and then Palmer's daughter sat in Palmer's lap at the top of the slide attached to that play structure. CP 182. Palmer admitted she is not sure how the accident occurred. CP 189-190. She testified that she believed her left hand became "caught" on the left side of the slide or impacted the support post as she slid down the slide, but she was not sure. CP 183, 190. Palmer claimed she suffered injuries to her left hand as a result. CP 1, 196. The General Manager on duty for Rainbow Factory Showroom at the time viewed all of the display models on the day of the accident and concluded that they were all properly assembled. CP 28.

Within days after the accident, Palmer and her mother, Mary Lou Gjemso, returned to Rainbow Factory Showroom. CP 201. During this visit, Gjemso took pictures of certain slides. *Id.*

The Litigation

Palmer sued only Rainbow Play Systems. CP 1. Palmer alleged that the slide was either negligently designed or was negligently assembled. *Id.*

At her deposition, Palmer claimed that two photographs taken by Gjemso demonstrated that the sides of the subject slide were different. CP 183-185, 189-191, 198. This appeared to be the basis for her negligent assembly claim. However, Palmer abandoned this theory at summary judgment because these two photographs actually depicted two different

slides. CP 22. In summary judgment briefing at the trial court, Palmer made three discernible arguments for why she claimed Rainbow Factory Showroom was negligent. One argument was *res ipsa loquitur* based solely on her allegation that she was injured. CP 139-140. Palmer also argued that the evidence supported a design defect claim against Rainbow Factory Showroom under the Washington Product Liability Act, and that the deposition transcript of Jeff Motl created a genuine issue of material fact on the negligent assembly claim. CP 141-142. Palmer has abandoned these latter two arguments on appeal.

On June 27, 2014, the Honorable Barbara Linde of the King County Superior Court granted summary judgment to Rainbow Factory Showroom. CP 171.

C. ARGUMENT

The Doctrine of *Res Ipsa Loquitur* Does Not Apply Because the Slide Remained Accessible to Palmer and Palmer Has No Direct or Circumstantial Evidence of Negligent Assembly.

The doctrine of *res ipsa loquitur* is "ordinarily sparingly applied, 'in peculiar and exceptional cases, and only where the facts and the demands of justice make its application essential.'" *Tinder v. Nordstrom, Inc.*, 84 Wn. App. 787, 792, 929 P.2d 1209, 1212 (1997) (quoting *Morner v. Union Pac. R.R.*, 31 Wn.2d 282, 293, 196 P.2d 744, 750 (1948)). "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." *Pacheco v. Ames*, 149 Wn.2d 431, 436, 69 P.3d 324, 326 (2003). "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 injury." *Robison v. Cascade Hardwoods, Inc.* 117 Wn. App. 552, 563, 72 P.3d 244, 250 (Div. 2 2003). The trial judge properly ruled that *res ipsa loquitur* was inapplicable.

a. The slide remained accessible to Palmer.

Palmer relies on *Curtis v. Lein*, 169 Wn. 2d 884, 239 P.3d 1078 (2010) to support her argument that the evidence before the trial court supported a claim for negligent assembly under the doctrine of *res ipsa loquitur*. Appellant's Brief at 4-5. *Curtis* is distinguishable because here, the slide remained accessible to Palmer.

In *Curtis*, plaintiff was injured when a dock on which she was walking gave way beneath her. *Curtis*, 169 Wn. 2d at 888, 239 P.3d at 1080. There was no evidence as to the dock's condition at the time of the accident because the defendants destroyed the dock shortly after the

accident. *Id.*, 169 at 888-89, 239 P.3d at 1080. Here, unlike *Curtis*, the slide remained intact and accessible to Palmer. In fact, days after the accident, Palmer and her mother returned to Rainbow Factory Showroom and they viewed and photographed slides. The slide remained available for testing and expert review.

b. Palmer has no evidence of negligent assembly.

Palmer relies on *Robison v. Cascade Hardwoods, Inc.*, and argues that, like the plaintiff in that case, she has evidence of a "plausible theory of injury" such that the doctrine of *res ipsa loquitur* should apply. Appellant's Brief at 5-7. *Robison* is distinguishable because here, Palmer has no circumstantial evidence of negligent assembly.

In *Robison*, plaintiff Todd Robison was electrocuted while operating a loader at defendant Cascade's lumber mill. *Robison*, 117 Wn. App. at 555, 72 P.3d at 247. Robison claimed that he pressed the loader's controller button, heard a loud bang, and was then rendered unconscious for a minute and a half. *Id.*, 117 Wn. App. at 557, 72 P.3d at 247. Before Robison's accident, other workers reported "tingles" and "buzzes" while operating the loader. *Id.*, 117 Wn. App. at 559, 72 P.3d at 248. Robison retained an expert who eliminated other potential causes of the electrical shock, but could not opine with certainty as to the origin of

Robison's electrical shock. *Id.*, 117 Wn. App. at 559, 72 P.3d at 248. The *Robison* court reversed the order granting summary judgment because the reports from prior workers and expert testimony made a "defective electrical system a reasonably probable cause for Robison's injuries." *Id.*, 117 Wn. App. at at 570, 72 P.3d at 254.

Here, unlike Robison, Palmer has no circumstantial evidence from which an inference of negligence can be drawn under the *res ipsa loquitur* doctrine. She has no expert opinion supporting her allegations of negligent assembly or defective design. Just as she argued to the Court below, Palmer argues to this Court a loose-bolt negligent assembly theory. Appellant's Brief at 7. However, Palmer has no evidence of loose bolts. The photographs taken by her mother do not show loose bolts. She has no evidence that any person has ever been injured at a Rainbow Factory Showroom or reported that bolts were loose on any play structure. Because Palmer has no circumstantial evidence of negligent assembly, the doctrine of *res ipsa loquitur* does not apply.

c. The trial Court correctly dismissed Palmer's claims.

Unlike *Curtis* and *Robison*, this case is an ordinary negligence case where an injured person can immediately look over the product which she claims caused her injury, ascertain whether there was any protrusion, gap,

or loose bolt to explain her injury, take photos to document it, and retain an expert to inspect and opine. Palmer inspected the slide and took photos, but she admits she is not sure how she hurt her hand. She produced no expert opinion in opposition to the motion for summary judgment. She guesses that her injury must somehow be Rainbow Factory Showroom's fault, but guessing is not enough to withstand the summary judgment requirement that Palmer proffer *evidence* of her claims. If Palmer's argument were accepted, then anyone injured on a Washington playground claiming negligent assembly would be entitled to a jury trial regardless of the underlying facts. Taken to its logical conclusion, this argument would eliminate the summary judgment standard for all defendants sued for personal injury.

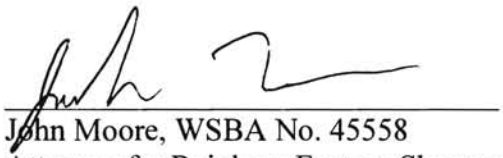
Palmer wants the Court to apply this doctrine because she has no evidence of negligence, but the doctrine is not a substitute for a plaintiff's burden of proof. If it were, every plaintiff unable to prove negligence could simply rely on *res ipsa loquitur* to avoid summary judgment.

D. CONCLUSION

The Order granting summary judgment should be affirmed.

RESPECTFULLY SUBMITTED this 5th day of December, 2014.

DAVIS ROTHWELL
EARLE & XÓCHIHUA, PC



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DECLARATION OF SERVICE

I, Kristine Dirsiye, hereby declare under penalty of perjury under the laws of the State of Washington that on this date I sent a copy of RESPONDENT'S BRIEF via U.S. mail, first class, postage prepaid, to all counsel of record as follows:

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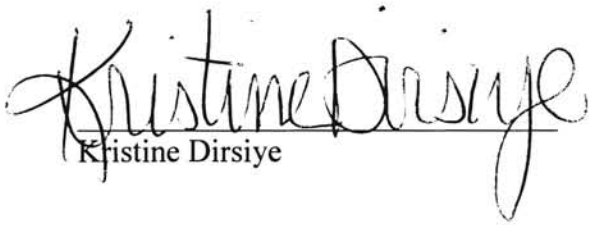
DATED at Seattle, Washington, on this 5th day of December, 2014.



Kristine Dirsiye