

83307-9

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No. 83307-9
Court of Appeals No. 62168-8-I

SUPREME COURT OF THE STATE OF WASHINGTON

TAMBRA CURTIS,

Plaintiff/Appellant,

v.

JACK LEIN and CLAIRE LEIN, husband and wife, and the
marital community composed thereof; and WILLOW CREEK
FARM, INCORPORATED, a domestic corporation

Defendant/Respondents.

**DEFENDANTS/RESPONDENTS'
ANSWER TO TAMBRA CURTIS' PETITION FOR
REVIEW**

ATTORNEYS FOR Defendant/Respondents

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I. IDENTITY OF RESPONDENT

Jack Lein and Claire Lein, and Willow Creek Farm, Inc., defendants/respondents, ask this Court to deny plaintiff's/appellant's petition for review of the Court of Appeals decision filed on May 11, 2009. The decision is published at __ Wash. App. ___, 206 P.3d 1264 (2009). Appellant provided a copy of the same with her Petition for Review to this Court.

II. ISSUES PRESENTED

Does the Court of Appeals opinion that the doctrine of Res Ipsa Loquitor is inapplicable in this case based on lack of evidence that defendants/respondents knew or should have known there was a defect in the dock conflict with the Supreme Court's decision in Penson v. Inland Empire Paper Co., 73 Wash. 338, 132 P. 39 (1913)?

III. STATEMENT OF THE CASE

A. Facts

This lawsuit arose out of an alleged incident that occurred on Jack (a.k.a John) and Claire Leins' farm in Sammamish, Washington. At the time, plaintiff was living in a house on the farm with her boyfriend, Michael Stewart, and their five year old son, Jacob. Mr. Stewart was

employed by the Leins as their farm manager. Plaintiff moved onto the property in December 2003. There was a small pond with a dock on the farm. Plaintiff claims that on April 25, 2004, she was injured when she took a few steps onto the dock and a plank under her left leg broke. She claims that the Leins “knew or should have known of the dangerous condition of this dock and taken appropriate measures to remedy these dangerous conditions.” CP 31; CP 35 p. 6- 8; CP 36 p. 10; CP 37 p. 25.

The Leins sold the farm in 2001 and purchased new property in Fall City. They moved to the new Fall City property in November 2004. At the time they sold the property, they learned that the new owners planned to remove their house, pond, and dock and build a new school on the property. The pond and buildings were subsequently removed by the new owners, and the school was erected. CP 68 p. 21; CP 69 p. 22, 24; CP 74 p. 42, 43.

Plaintiff testified as follows regarding the alleged incident:

Q: ... when you stepped onto the board where your foot went through, do you recall—what was the impression that you got, did it feel like it was going to give? Did it feel weak? ...

A: Walked onto the dock, went down.

...

Q: How far down did your left foot or your leg go through, like how far up the leg?

A: Past my knee.

Q: ... was it more than one board that gave away?

A: I don't know.

Q: ... was it like a hole was created or ... did the board break in the middle or can you remember anything about the breaking of the board?

A: Like I said, I just walked onto the dock, couple steps, went right through.

CP 37 p. 25; CP 38 p. 26-28.

Plaintiff testified that the next morning following the incident she told Donna Lein, Jack and Claire Leins' daughter in law, that her leg went through the dock. Donna Lein lived on the Sammamish farm as well.

According to plaintiff, Donna drove her to a doctor's office. She doesn't recall whether she had any further conversation about the incident with Donna during their drive to the doctor's office. Plaintiff recalls telling Jack and Claire Lein about the incident but doesn't recall the substance of the conversation. CP 38 p. 29; CP 31 p. 30, 31.

Plaintiff testified that she never had any conversations with any of the Lein family members about the dock prior to the incident. CP 39 p. 31, 32. She recalls that after the incident Donna Lein stated that the dock was "weathered." CP 40 p. 36. Plaintiff testified that no one gave her any

indication that the dock was in poor condition or in need of repair and she never had reason to believe it was. She had seen her son use the dock prior to the incident. He never indicated to her that there was anything wrong with the dock or that it was broken or in bad condition. CP 40 p. 34-36.

Plaintiff does not have any personal knowledge as to the condition of the dock prior to or after the incident. She testified as follows:

Q: ...After the incident occurred did you look at the dock?

A: No.

Q: And you said you hadn't been out to the dock before the incident occurred, correct?

A: Correct.

Q: So did you ever have an opportunity before or after the incident to really check out the dock and look at the condition of the dock?

A: No.

CP 40 p. 37.

Plaintiff testified that the only evidence she has in support of her claim against the Leins is (1) the conversation she believes she had with Donna Lein at which time Donna allegedly stated that the dock was weathered; and (2) a conversation she had with her son, Jacob, who was five at the time of the incident. According to plaintiff, Jacob told her that the Leins' grandsons told him that the dock was unsafe, and that they had

informed their parents and grandparents of this. CP 41 p. 57; CP 42 p. 58-

61. She testified as follows:

Q:... In your answer to interrogatory number 12 you state... the defendants were aware that the dock was unsafe at the time of this incident yet made no attempt to repair it or to warn others of this unsafe condition.

A: Uh-huh.

Q: Can you tell me what your basis is for that statement?

A: Conversation I had with, I believe it was with Donna Lein.

Q: Okay. Now, the defendants in this case are Claire and her husband?

A: Correct.

Q: Do you have any personal knowledge from them or did they make any statements to you that they were aware that the dock was unsafe at the time?

A: I don't recall.

Q: Okay. So this basis for your belief that they were aware comes from someone else? Donna Lein?

A: Yeah, their daughter-in-law.

Q: And what exactly did she say to you?

A: I don't recall.

Q: But somehow you believed from your conversation that she was telling you that her in-laws were aware that the dock was unsafe?

A: Correct.

Q: But you don't remember what she said?

A: Correct.

Q: Do you remember when she made the statement?

A: After the incident.

Q: And then in answer to number 14, the very last paragraph you state, 'It is my understanding that the defendants' grandsons Kevin, Justin, and Chris Lein were aware that the dock was not safe and had reported its dangerous condition to the defendants and to their parents.' And can you tell me what the basis for that statement is?

A: From my son Jacob Stewart.

Q: And what did he tell you?

A: Just as it's stated.

Q: He told you that defendants' grandsons were aware that the dock was not safe?

A: Not in those exact words, no.

Q: Okay. Did the defendants' grandsons Kevin, Justin and Chris Lein tell you themselves that they were aware that the dock was not safe and that they had reported this to the defendants, their grandparents?

A: I don't recall.

...

Q: Did you ever have any conversations with these three children, Kevin, Justin or Chris, about the dock?

A: I can't remember.

...

Q: Other than Donna Lein and your son, do you have any information from anybody else that my clients knew that this dock was dangerous prior to the incident?

A: Can you repeat the question.

MS. THOMPSON: Can you repeat it for me.
(The reporter read back as requested.)

A: No.

CP 41 p. 57; CP 42 p. 58-61.

Claire Lein was in charge of running the farm. She bred and raised Thoroughbred horses. One or two days after the alleged incident, Mr. Stewart mentioned to Claire that plaintiff had fallen through the dock and hurt her leg. According to Claire, "He didn't say much about it." She asked Mr. Stewart to remove the dock since it had reportedly broken and it didn't make sense to repair it since they were moving and the new owners were going to remove the pond and dock anyway. CP 66 p. 7; CP 68 p. 20, 21; CP 69 p. 24, 25.

According to Claire, the dock was built in the 1980's. The pond was dry in the summer. During the times she was on the dock prior to the date of the incident she never observed anything that led her to believe that the dock was in poor condition or in need of repair. Nor did anyone ever tell her that the dock was in need of repair or in poor condition. CP 65 p. 5; CP 67 p. 16, 17; CP 70 p. 27, 28; CP 71 p. 30; CP 72 p. 37; CP 73 p. 38; CP 74 p. 42.

According to Michael Stewart, his job was to oversee the operation of the farm. He described duties as “Anywhere from building fences to gates to repairing fences and gates.” He was working on the farm on the date of the incident, but did not witness the incident. He responded to the scene of plaintiff’s accident and found her sitting on the dock “on her rear.” He saw that her foot had gone through the dock. CP 46 p. 13; CP 47 p. 14; CP 48 p. 21; CP 49 p. 22. He described his observations as follows:

A. It was—her foot was underneath the dock, actually on the ground, and the board had broken when she stepped on it and her leg went through the dock, so she was basically sitting on her – part of the dock with her leg stuck through the dock.

Q. Okay. So she was—so it obviously occurred at the very beginning of the dock?

A. Correct, I would say four, five boards in, maybe three, four, five boards in. I don’t remember exactly.

Q. And there was ground underneath?

A. I believe so.

Q. And you said it appeared that one of the boards had broken?

A. Yes.

Q. Okay. In what way? Describe it for me. Did the whole thing come off? Describe, if you can, how it broke, what you remember seeing.

A. I believe it broke right in the middle, so it was attached on each side of the dock, and when she stepped on the board it cracked in the middle and she fell through it.

Q. Okay. Do you recall seeing what kind of condition the board was in, I mean, like did it appear rotten or did you—what were your observations about the board where her foot went through?

A. No, it wasn't—I don't—

Q. You don't know?

A. – know how to answer that.

Q. Okay. How long did you look at the board?

A. I didn't.

...

CP 48 p. 21; CP 49 p. 22.

During the time he lived on the Sammamish property, Mr. Stewart was on the dock many times. He described the number of times as “More than I can remember.” He never found the dock to be in need of repair. He never observed that it was in poor condition. He testified as follows:

Q. You said that you were on that dock many times. During those times did you ever observe that the dock was in disrepair?

A. No.

Q. Did you observe that—did you make any observations that it was in poor condition, anything like that?

A. No.

Q. Okay. All right. When you first went to the dock after Tandra had fallen and was injured, did you make any such observations?

A. That particular board.

Q. Okay. Were you able to determine or did you even try to determine what caused the board to break?

A. No.

CP 48 p. 21; CP 49 p. 22, 24; CP 50 p. 26; CP 51 p. 30, 31.

Defendant Jack Lein (a.k.a John Lein) is a medical doctor who retired from the University of Washington in 1996. He never participated in running the Thoroughbred business. His wife handled the business affairs. CP 60 p. 7, 8, 9; CP 61 p. 10, 13; CP 62 p. 15. Dr. Lein doesn't recall ever being on the dock. He was never in close proximity to the dock so as to be in a position to observe it close up before or after the incident. Prior to this incident no one ever told him the dock was in poor condition or in need of repair. CP 61 p. 12, 13; CP 62 p. 15, 16, 17; CP 63 p. 18, 19.

Michael Lein, defendants' son, was living on the farm with his wife, Donna, and their children at the time of the alleged incident. He had lived on the farm since 1983. He doesn't know who built the dock. He never had any reason to believe the dock wasn't in good shape or in need of repairs prior to the incident. CP 76 p. 5; CP 77 p. 10, 11; CP 78 p. 14, 15, 16; CP 80 p. 25; CP 81 p. 28.

Donna Lein lived on the farm from 1983 to 2004. According to Donna, her kids swam in the pond and fished off the dock. She and her

kids would “hang out” around the dock. She never noticed any “problems” or “potential hazard” related to the dock. She estimated that from 1990 to 2004 she was on the dock “frequently.” She never observed anything that led her to believe the dock was in poor condition or unsafe or dangerous. CP 84 p. 8,9; CP 85 p. 10, 11, 12; CP 87 p. 21. According to Donna, she gave plaintiff a ride to a doctor’s office the day after the incident. She never had any discussions with plaintiff about the incident or her injuries. CP 85 p. 12, 13; CP 86 p. 14, 15-17; CP 18.

B. Procedure

Plaintiff filed this lawsuit on February 9, 2007. On May 9, 2008 defendants filed a motion for summary judgment requesting dismissal of this case. The motion was heard on June 6, 2008. Judge Erlick granted defendants’ motion and signed an order dismissing the case with prejudice. CP 180-182. The trial court held that Res Ipsa Loquitor does not apply to this case because plaintiff failed to present competent evidence that the Leins actually knew of the dock’s allegedly defective condition, or that the alleged defects were discoverable. Verbatim Report of Proceeding (Hearing Transcript) p. 22-27.

Plaintiff appealed the case to the Court of Appeals. On May 11, 2009, the Court of Appeals issued its opinion in which it affirmed the trial court’s dismissal of the lawsuit. See Curtis v. Lein, Court of Appeals Slip

Opinion No. 62168-8-I. The Court of Appeals held that Res Ipsa Loquitor is inapplicable in this case because plaintiff failed to offer evidence that the defects in the dock were discoverable and/or that a reasonable inspection would have revealed defects and/or that the Leins knew or should have known about the defects. The Court of Appeals explained the basis for its decision as follows:

Because ‘there is no liability for an undiscoverable latent defect’ (citing Marsland v. Bullitt Co., 3 Wn. App. 286, 293, 474 P.2d 589 (1970)), Curtis also has the burden of showing that the dock’s defect was discoverable... Deposition testimony shows that the Leins did not actually know that the dock was defective and that Stewart, their employee, regularly walked on the dock and did not notice problems. Curtis did not notice anything obviously wrong with the dock before she walked out on it and does not remember anything about the dock’s condition, other than the fact that her leg went through it... Stewart testified that Curtis’ foot broke through a board, but he does not remember anything else about the condition of the dock. From this evidence, a reasonable jury would not be able to conclude that the dock’s dangers were obvious or known... Curtis must prove at trial that a reasonable inspection would have revealed something wrong with the dock. Because she fails to offer evidence from which a reasonable jury could find without speculating that the defect was discoverable, she cannot make out a prima facie case for premises liability. Res Ipsa Loquitor provides the common sense inference that reasonably safe docks do not ordinarily give way, but it does not follow that dangerous docks ordinarily exhibit discoverable defects.

Curtis v. Lein, Court of Appeals Slip Opinion No. 62168-8-I, at 10-11.

IV. ARGUMENT

This Court should deny review because the Court of Appeals decision does not conflict with this Court's decision in Penson v. Inland Empire Paper Co., 73 Wash. 338, 132 P. 39 (1913).

A. The Court of Appeals correctly ruled that the doctrine of Res Ipsa Loquitor is not applicable where plaintiff/respondent failed to satisfy the first element of the doctrine and show that the Leins knew or should have known about the defects in the dock and/or that the defects were discoverable.

The doctrine of Res Ipsa Loquitor is applicable only when the evidence establishes the following:

(1) the accident or occurrence producing the injury is of a kind which ordinarily does not happen in the absence of someone's negligence, (2) the injuries are caused by an agency or instrumentality within the exclusive control of the defendant, and (3) the injury-causing accident or occurrence is not due to any voluntary action or contribution on the part of plaintiff.

Pacheco v. Ames, 149 Wash. 2d 431, 436, 69 P.3d 324 (2003).

Here, the issue before this Court concerns the first element and whether plaintiff/respondent has met the element sufficiently to warrant an inference of negligence on the part of defendants. The first element is satisfied when one of three conditions exist:

(1) When the act causing the injury is so palpably negligent that it may be inferred as a matter of law, i.e. leaving foreign objects, sponges, scissors, etc.. in the body, or amputation of a wrong member ; (2) when the general experience and observation of mankind teaches that the result would not be expected without negligence; and (3) when proof by experts in an esoteric field creates an inference that negligence caused the injuries.

Pacheco at 438, citing Zukowsky v. Brown, 79 Wash. 2d 586, 595, 488 P.2d 269 (1971).

Plaintiff contends that the second condition applies and primarily relies upon Penon as a basis for applying the doctrine. In order for the doctrine to apply, “[The] inference of negligence must be legitimate... The distinction between what is mere conjecture and what is reasonable inference from the facts and circumstances must be recognized...”

Zukowsky, at 594. .

In addition, “[I]f defendant’s evidence shows so clearly that he was not guilty of any acts of negligence that the minds of reasonable men cannot differ on this issue, then the cause of the injury to plaintiff has been fully explained, and plaintiff cannot rely on res ipsa loquitor to take his case to the jury.” Kemalyan v. Henderson, 45 Wash. 2d 693, 705, 277 P.2d 372 (1954).

Here the Court of Appeals found that plaintiff/respondent did not meet the first element based on lack of evidence that the Leins knew about or should have known about the defects and that the defects were discoverable. The Court of Appeals agreed with plaintiff/appellant that “[w]ooden structures do not ordinarily give way under normal use on premises that have been maintained to provide for reasonably safe conditions.” See Slip Opinion at 10. However, the Court went on to

explain that, “it does not follow that dangerous docks ordinarily exhibit discoverable defects,” and “...everyday experience does not teach that dangerous docks ordinarily exhibit discoverable defects,” See Slip Opinion at 3, 10-11.

In other words, it cannot be said that the occurrence here was of a kind which ordinarily does not happen in the absence of someone’s negligence. Clearly, it did happen in the absence of someone’s negligence. Since there is no evidence the Leins knew or should have known about the defects and there is no evidence that the defects were even discoverable, there can be no negligence on the part of the Leins for failing to remedy defects that were not discoverable. It follows then that this type of occurrence (a dock suddenly breaks without any obvious sign of defects) can happen absent negligence. Therefore, the required element cannot be met here.

What the evidence does establish is that the dock was used over a period of approximately twenty years by Claire Lein; her son, Michael; her daughter in law Donna; her grandchildren; and Michael Stewart. None of these individuals noticed any visible or observable signs or indications that the dock was in need of repair, or in poor condition, or dangerous, or unsafe. Numerous people used the dock for years without incident. Plaintiff/appellant offered no evidence that an inspection would have, on a

more probable than not basis, led to the discovery of a problem or defect with the dock.

Allowing a jury to infer negligence on the part of defendants where there are no facts which even remotely suggest that the Leins knew about the defects or would have discovered them upon inspection does not rise to the level of a legitimate inference. Such a result would amount to holding defendants strictly liable and improperly require the jury to speculate as to whether the defects were discoverable. The doctrine of Res Ipsa Loquitor should not be used a means to obtain such a result.

The Court of Appeals analysis and holding in no way conflicts with Penson. In Penson, plaintiff was employed by the defendant to paint the interior of his building along with other employees. The defendant's foreman and his assistant set up scaffold upon which the painters were to stand. The foreman and his assistant selected wooden timbers to be used to support the scaffold. They nailed them into position themselves. While plaintiff was standing on the scaffold the wooden timber broke, causing the scaffold to fall. Plaintiff was injured in the process. Plaintiff in that case relied upon the doctrine of Res Ipsa Loquitor. The Court found that the doctrine applied in that particular situation given the particular set of circumstances involved. In explaining the application of the doctrine the Court stated as follows:

The rationale of the rule, as applied to proof of negligence, is that the accident, in the light of surrounding circumstances, is of such a character as to raise a prima facie inference of negligence, thus casting the burden of exculpatory explanation that upon the party charged. A circumstance necessary to its application is that the injured party, from the nature of the case, is not in a position to explain the cause, while the party charged is in a position where he is, or if he has exercised reasonable care, should be, able to explain and show himself free from negligence, if in fact he was so...”

Penson, at 345-346.

Plaintiff/appellant argues that the Court of Appeals decision in this case is in direct conflict with the holdings of Penson. There is no such conflict. Penson makes it clear that in light of the surrounding circumstances the accident must be of such a character as to raise a prima facie inference of negligence. The circumstances surrounding the incident in the Penson case are far different from the circumstances in the present case. In Penson, the incident occurred soon after the scaffold was erected. The defendant’s foreman (agent) was building the scaffold and had the opportunity to examine the wood being used to build the scaffold close in time to its use. In addition, the case involved a workplace injury rather than a premises liability situation. Clearly, the court in Penson considered the defect at issue in that case discoverable based on the circumstances.

In this case, which involves entirely different circumstances, the Court of Appeals distinguished the facts from those in Penson and

explained why Penson is not controlling on the issue as to whether an inference of negligence should be made:

Although Penson held that the fact of a scaffold's collapse provides an inference that two-by-four supporting the scaffold was discoverably inadequate, it does not control the question of whether the condition of this dock was discoverable... Here, the board was incorporated into a dock that was built 15 to 20 years before Curtis stepped through it, so any opportunity to inspect the structural integrity of both sides of the dock's boards had long since passed... no reasonable jury could find that possessors are required to take a dock apart to closely inspect both sides of the dock's boards when a person who had walked on that dock more times than he could remember did not notice anything wrong with it. Thus, *res ipsa loquitur* does not supply an inference that the dock's dangerous condition was discoverable.

Plaintiff/appellant argues that the Court of Appeals holding improperly adds an additional burden of proof that requires plaintiff to show that the defective condition was discoverable. This is not a new additional burden. It is encompassed within the doctrine. The doctrine requires that before an inference of negligence is made all of the circumstances must be considered and the inference must be legitimate and not based on speculation. Here, the circumstances are such that an inference of negligence is not warranted where there is no evidence the defendants knew or should have known about the defects, and there is no evidence the defects were discoverable.

V. CONCLUSION

For the above mentioned reasons, this court should deny plaintiff's/appellant's petition for review.

Respectfully submitted this 8th day of July, 2009.

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