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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

TAMBRA CURTIS,

Appellant,

vs.

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

Respondent.

Appeal from the Superior Court for King County
The Honorable John Erlick

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. RESPONSE TO RESPONDENTS' STATEMENT OF FACTS1

II. ARGUMENT2

 A. As this Is an Appeal from a Grant of Summary Judgment, all Facts must Be Considered in the Light Most Favorable to the Appellants, and the Trial Court's Decision must Be Reserved Unless this Court Determines That Respondents Were Entitled to Summary Judgment as a Matter of Law.2

 B. The Doctrine of Res Ipsa Loquitor Applies to These Claims.....3

 1. In common experience, a wooden structure such as the Leins' dock does not give way beneath the step of a person walking on it unless there has been some negligence in the construction or maintenance of the dock.3

 2. The wooden dock was the "instrumentality" which caused injury to Tamba Curtis.5

 3. The Liens had control of the dock in that they owned it, had it built, were in charge of it, and had a duty to maintain it.6

 4. Tamba Curtis is not required to eliminate with certainty all other possible causes or inferences in order to have res ipsa loquitor apply.8

 5. The Leins have the burden to show that the failure of the dock did not result from any negligence on their part.10

III. CONCLUSION.....11

TABLE OF AUTHORITIES

Washington Cases

Anderson v. McCarthy Dry Goods Co., 49 Wash. 398, 95 P. 325 (1908) ..3

Clark v. Icicle Irrigation District, 72 Wash.2d 201, 432 P.2d 541 (1967) ..4

Degel v. Majestic Mobile Manor, Inc., 129 Wash.2d 43, 914 P.2d 728
(1996).....5

Douglas v. Bussabarger, 73 Wash.2d 476, 438 P.2d 829 (1968)9

Emerick v. Mayr, 39 Wash.2d 23, 234 P.2d 1079 (1951)11

Faust v. Benton County Public Utility Dist. No. 1, 13 Wash.App. 473, 535
P.2d 854 (1975)7

Highland v. Wilsonian Inv. Co., 171 Wash. 34, 17 P.2d 631 (1932)8

Mahlum v. Seattle School Dist., 21 Wash.2d 89, 149 P.2d 918 (1944)8

McCutcheon v. United Homes Corp., 79 Wash.2d 443, 486 P.2d 1093
(1971).....5

Metropolitan Mortg. & Securities Co., Inc. v. Washington Water Power,
37 Wash.App. 241, 679 P.2d 943 (1984)4

Morner v. Union Pac. R. Co., 31 Wash.2d 282, 196 P.2d 744 (1948) ..7, 11

Pacheco v. Ames, 149 Wash.2d 431, 69 P.3d 324 (2003).....10

Penson v. Inland Empire Paper Co., 73 Wash. 338, 132 P. 39 (1913)4

Robison v. Cascade Hardwoods, Inc., 117 Wash.App. 552, 72 P.3d 244
(2003), rev. denied, 151 Wash.2d 1014, 89 P.3d 712 (2004)10

Shay v. Parkhurst, 38 Wash.2d 341, 229 P.2d 510 (1951)4

Tinder v. Nordstrom, Inc., 84 Wash.App. 787, 929 P.2d 1209 (1997) ...3, 6

Williamson v. Allied Group, Inc., 117 Wash.App. 451, 72 P.3d 230
(2003), rev. denied, 151 Wash.2d 1039, 95 P.3d 352 (2004).....5

Wilson v. Steinbock, 98 Wn.2d 434, 656 P.2d 1030 (1982)2

Wodnik v. Luna Park Amusement Co., 69 Wash. 638, 125 P. 941 (1912).8

Younger v. Webster, 9 Wash.App. 87, 510 P.2d 1182 (1973)9

Zukowsky v. Brown, 79 Wash.2d 586, 488 P.2d 269 (1971).....4, 6

Other Authorities

Merriam-Webster’s Dictionary of Law, 19965

I. RESPONSE TO RESPONDENTS' STATEMENT OF FACTS

It is apparent from the Statement of Facts submitted by Respondents in their brief herein that they are misapprehending the standard of review in this matter. This is an appeal of a summary judgment decision. This court must consider the facts in the light most favorable to the Appellants (the parties against whom the summary judgment was entered) and determine whether the trial court had facts before it which would direct as a matter of law a decision of summary judgment on behalf of the Appellants in all respects.

Respondents have submitted a confusing jumble of extraneous "facts", but have not disputed Appellant's Statement of Facts, which boils down to the following relevant known facts, taken in the light most favorable to Appellant:

Tambra Curtis was a tenant of the Leins on their horse farm in Samamish, Washington on April 25, 2004. She was walking in a common area on the property when she stepped onto a small wooden dock in a decorative lake. Her foot went through the dock, causing injury to her leg. The dock was built some 20 years before by an employee of the Leins, at their direction. No one had ever inspected the dock to see if it needed any repairs.

After the incident on April 25, 2004, the Leins had the dock torn out. They made no effort to determine why it had given way beneath Ms. Curtis. They offer no explanation.¹

II. ARGUMENT

- A. As this Is an Appeal from a Grant of Summary Judgment, all Facts must Be Considered in the Light Most Favorable to the Appellants, and the Trial Court's Decision must Be Reserved Unless this Court Determines That Respondents Were Entitled to Summary Judgment as a Matter of Law.**

The standards by which this court must consider an appeal of a motion of summary judgment are well established. As stated in Wilson v. Steinbock, 98 Wn.2d 434, 436, 656 P.2d 1030 (1982):

Since the trial court decided the liability issues in this case on an order of summary judgment, we must engage in the same inquiry as the trial court. A summary judgment motion under CR 56(c) can be granted only if the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. The court must consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party. The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. [citations omitted]

¹ Citations to the record in support of each of the preceding factual statements are contained in Appellant's opening brief, and have been omitted here.

The Respondents herein appear to be urging this court to follow some different standard, at times arguing facts in the light most favorable to Respondents and ignoring facts favorable to Appellant.

B. The Doctrine of Res Ipsa Loquitor Applies to These Claims.

Respondents argue that res ipsa loquitor does not apply in this matter because “Plaintiff could not establish that the alleged occurrence is the kind of occurrence that does not happen in the absence of someone's negligence”, Response Brief, p. 28, and “[s]he failed to cite any legal authority in which courts have found that a wooden dock on a pond constitutes an ‘instrumentality’ and/or that ownership, alone, of the dock would be considered ‘exclusive control’ of such instrumentality.” Response Brief, p.29. Respondents are simply wrong.

- 1. In common experience, a wooden structure such as the Leins’ dock does not give way beneath the step of a person walking on it unless there has been some negligence in the construction or maintenance of the dock.**

“The first element of the res ipsa loquitor formulation is met if, in the abstract, there is a ‘reasonable probability’ that the incident would not have occurred in the absence of negligence.” Tinder v. Nordstrom, Inc., 84 Wash.App. 787, 792, 929 P.2d 1209 (1997). Washington courts have found that a myriad of situations merit application of the doctrine, including collapse of a building, Anderson v. McCarthy Dry Goods Co., 49 Wash. 398, 400, 95 P. 325 (1908); failure of an irrigation ditch, Clark

v. Icicle Irrigation District, 72 Wash.2d 201, 204, 432 P.2d 541 (1967); “objects falling from the defendant's premises, the fall of an elevator, the escape of gas or water from mains or of electricity from wires or appliances, the derailment of trains or the explosion of boilers,” Metropolitan Mortg. & Securities Co., Inc. v. Washington Water Power, 37 Wash.App. 241, 246, 679 P.2d 943 (1984); taxicab doors flying open “while rounding a curve at a reasonable speed”, Shay v. Parkhurst, 38 Wash.2d 341, 346, 229 P.2d 510 (1951); and the collapse of a seat on a pleasure boat, Zukowsky v. Brown, 79 Wash.2d 586, 488 P.2d 269 (1971).

In Penson v. Inland Empire Paper Co., 73 Wash. 338, 132 P. 39 (1913), a board in a scaffold erected by an employer gave way when stepped on by his employee in the course of painting the inside of a roof. The Penson court noted: “The actual occasion of the accident was not a subject of speculation. The staging was being used as intended. The 2x4 support broke. The breaking itself demonstrated to a certainty that it was inadequate either by reason of an open or a latent defect.” Id., at 346.² Similarly here, the “actual occasion of the accident” is clear: the dock was being used as intended. It broke. The breaking itself demonstrates that for some reason it was not adequate for its intended use.

² Penson is factually very similar to the instant case and was cited as such in Appellants opening brief. Respondent did not address Penson at all, and certainly did not distinguish it in any way.

The Leins owed a duty to Tandra Curtis, their tenant, “to maintain the common areas of the premises in a reasonably safe condition for the tenants’ use.” Degel v. Majestic Mobile Manor, Inc., 129 Wash.2d 43, 49, 914 P.2d 728 (1996). The Liens had “an affirmative obligation to reasonably inspect and repair common areas, approaches and passageways.” Williamson v. Allied Group, Inc., 117 Wash.App. 451, 455, 72 P.3d 230 (2003), rev. denied, 151 Wash.2d 1039, 95 P.3d 352 (2004). “The landlord is required to do more than passively refrain from negligent acts. He has a duty of affirmative conduct, an affirmative obligation to exercise reasonable care to inspect and repair the previously mentioned portions of the premises for protection of the lessee.” McCutcheon v. United Homes Corp., 79 Wash.2d 443, 445, 486 P.2d 1093 (1971).

In common experience a wooden dock or other walkway does not collapse in the absence of negligence as to its construction or maintenance.

2. The wooden dock was the “instrumentality” which caused injury to Tandra Curtis.

“Instrumentality” is defined by the Merriam-Webster’s Dictionary of Law, 1996, in pertinent part as follows:

Something through which an end is achieved or occurs.
Example: damages incurred in a single incident through an instrumentality owned by the employer.

In this case, the dock was the instrumentality which caused Tandra Curtis's injuries.

3. The Liens had control of the dock in that they owned it, had it built, were in charge of it, and had a duty to maintain it.

For purposes of res ipsa loquitor, “[e]xclusive control does not mean actual physical control, but rather refers to the responsibility for the proper and efficient functioning of the instrumentality that caused the injury.” Exclusive control does not mean actual physical control, but rather refers to the responsibility for the proper and efficient functioning of the instrumentality that caused the injury. Tinder v. Nordstrom, supra, at 795.

To satisfy this requirement, the degree of control must be exclusive to the extent that it is a legitimate inference that defendant's control extended to the instrumentality causing injury or damage. In its proper sense, this 'condition' states nothing more than the logical requirement that 'the apparent cause of the accident must be such that the defendant would be responsible for any negligence connected with it.' Prosser, Res Ipsa Loquitor in California, 37 Cal.L.Rev. 183, 201 (1940).

Zukowsky, supra, at 595.

It is undisputed that the Liens had the dock built by their former employee, that they did nothing to inspect or maintain the dock, and,

perhaps most tellingly, they had the dock removed immediately after the incident and did nothing to determine why it had given way.

As described in Morner v. Union Pac. R. Co., 31 Wash.2d 282, 291, 196 P.2d 744 (1948):

The doctrine of *res ipsa loquitur* is based in part upon the theory that the defendant, having the sole and exclusive charge of the agency or instrumentality which caused the injury, knows the cause of the accident, or injurious occurrence, or has the best opportunity of ascertaining it, and should, therefore, be required to produce the evidence in explanation thereof, while, on the other hand, the plaintiff has no such knowledge and is, therefore, compelled to allege negligence in general terms and to rely upon proof of the happening of such occurrence to establish negligence.

The doctrine can apply even where the injured person also had access to the instrumentality. Faust v. Benton County Public Utility Dist. No. 1, 13 Wash.App. 473, 477, 535 P.2d 854 (1975). A relatively early Washington case (in which a patron at an amusement park was injured when the head flew off of a mallet he was employing to strike a machine designed to register the force of his blow) held:

We think that the fact that the head of the mallet flew off while the mallet was being used by the respondent for the very purpose for which it was furnished to him was sufficient to cast the burden of explanation upon the appellants. No explanation being offered, the jury was warranted in inferring that the head of the mallet came off because it was negligently and insecurely fastened to the handle.

'When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care.' 1 Shearman & Redfield on Negligence (5th Ed.) § 59.

Wodnik v. Luna Park Amusement Co., 69 Wash. 638, 641, 125 P. 941 (1912).

The Liens have offered no explanation as to why and how the failure of the dock occurred. They apparently did not bother to look at it after Ms. Curtis fell through it. This is exactly the situation where res ipsa loquitor should apply.

Furthermore, even proof of regular inspection of an instrumentality may not be enough, as it "still leaves the question of negligence one for the jury, and the presumption [of negligence] is not overcome as a matter of law unless the explanation shows, without dispute, that the happening was due to a cause not chargeable to the defendant's negligence." Mahlum v. Seattle School Dist., 21 Wash.2d 89, 99, 149 P.2d 918 (1944), citing Highland v. Wilsonian Inv. Co., 171 Wash. 34, 38, 17 P.2d 631 (1932).

4. Tambra Curtis is not required to eliminate with certainty all other possible causes or inferences in order to have res ipsa loquitor apply.

The plaintiff is not required to eliminate with certainty all other possible causes or inferences (in order to have res

ipsa loquitur apply), which would mean that he must prove a civil case beyond a reasonable doubt. All that is needed is evidence from which reasonable men can say that on the whole it is more likely that there was negligence associated with the cause of the event than that there was not.

Douglas v. Bussabarger, 73 Wash.2d 476, 486, 438 P.2d 829 (1968).

In order that a plaintiff be entitled to the benefit of the doctrine of res ipsa loquitur he need not exclude every other possibility that the injury was caused other than by defendant's negligence (Prosser, Res Ipsa Loquitur in California, 37 Cal.L.Rev. 183, 197--198 (1949)). The conclusion that negligence is the most likely explanation of the accident, or injury, is not for the trial court to draw, or to refuse to draw, so long as the plaintiff has produced sufficient evidence to permit the jury to draw the inference of negligence, even though the court itself would not draw that inference; the court must still leave the question to the jury for reasonable men may differ as to the balance of probabilities (Res Ipsa Loquitur in California, by Prosser, 37 Cal.L.Rev. 183 (1948--1949)). The inference of negligence is not required to be an exclusive or compelling one. It is enough that the court could say that reasonable men could draw it. Bauer v. Otis, 133 Cal.App.2d 439, 284 P.2d 133 (1955).

Younger v. Webster, 9 Wash.App. 87, 93, 510 P.2d 1182 (1973).

The Liens argue that “the fact that there were other potential causes of the dock failure other than the Defendants' negligence, (perhaps it was improper construction by a contractor, over whom Defendants had no control, when the dock was built 20 years ago, or defective wood, etc.) renders the doctrine inapplicable.” This statement is directly contrary to

Washington cases such as those quoted above, and is not supported by any citation to authority.³

In fact, “[w]here ... the elements of *res ipsa loquitur* are satisfied, a plaintiff is entitled to the doctrine even if the defendant's evidence suggests, but does not completely explain, how the event causing injury to the plaintiff may have occurred.” Robison v. Cascade Hardwoods, Inc., 117 Wash.App. 552, 574, 72 P.3d 244 (2003), rev. denied, 151 Wash.2d 1014, 89 P.3d 712 (2004), citing Pacheco v. Ames, 149 Wash.2d 431, 440-442, 69 P.3d 324 (2003).

5. The Leins have the burden to show that the failure of the dock did not result from any negligence on their part.

In the present case, the Leins have not presented any theory at all as to how the event occurred. Because the facts of this case clearly entitle Ms. Curtis to avail herself of the inference of negligence supplied by the res ipsa loquitur doctrine, the Leins now have a burden of producing evidence affirmatively showing that they were not negligent. “The injurious occurrence of itself, in the absence of explanation by the

³ See also: Pederson v. Dumouchel, 72 Wash.2d 73, 82, 431 P.2d 973 (1967):

Since the requested instruction permits the jury to infer negligence in the absence of a satisfactory explanation in the circumstances of this case, defense counsels' constant argument that the plaintiff must prove something went wrong in surgery before there is any right to recover becomes inappropriate.

defendant, affords reasonable evidence, or a permissible inference, that such occurrence arose from want of care.” Emerick v. Mayr, 39 Wash.2d 23, 25, 234 P.2d 1079 (1951), citing Morner, supra.

“[T]he res ipsa loquitur doctrine allows the plaintiff to establish a prima facie case of negligence when he cannot prove a specific act of negligence because he is not in a situation where he would have knowledge of that specific act. Once the plaintiff establishes a prima facie case, the defendant must then offer an explanation, if he can.” Pacheco, supra, at 441.

III. CONCLUSION

The facts of the present case clearly warrant application of res ipsa loquitur. The Leins had a duty toward all tenants, including Tamba Curtis, to inspect and repair the dock, especially in light of the fact that their employee had originally built it. Tamba Curtis walked onto the dock and her leg went all the way through it, causing painful injury to her. She did nothing to contribute in any way to her injury. In the ordinary experience of humankind, a dock in a pond does not give way underfoot if it is properly constructed and maintained. This is a classic situation for the application of res ipsa loquitur. Upon application of this doctrine, the burden shifts to the defendants to show that they adequately built and

maintained the dock. This is a question of fact, to be determined at trial on this matter.

The trial court's order of dismissal should be reversed, and the matter should proceed to trial.

Dated this 12th day of January 2009.


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