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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-736

No. COA22-150

Filed 1 November 2022

Ashe County, No. 21 CVS 13

DANNY RICHARD SULLIVAN, Plaintiff,

v.

TRIAD HOSPITALITY CORPORATION, t/d/b/a QUALITY INN & SUITES Defendant,

v.

TRIAD HOSPITALITY CORPORATION, Third-Party Plaintiff,

v.

BLUE DIAMOND POOL SERVICES, INC. d/b/a BLUE DIAMOND POOL SERVICE, Third-Party Defendant.

Appeal by plaintiff from judgment entered 2 August 2021 by Judge John O. Craig, III, in Ashe County Superior Court. Heard in the Court of Appeals 21 September 2022.

Vannoy, Colvard, Triplett & Vannoy, P.L.L.C., by Daniel S. Johnson, for plaintiff-appellant.

Brotherton, Ford, Berry & Weaver, PLLC, by Steven P. Weaver and Huntleigh F. Gilbard, for defendant-appellee Triad Hospitality Corporation.

Bowden Gardner & Hill, P.C., by Bradley J. Gardner, for third-party defendant-appellee Blue Diamond Pool Services, Inc.

ARROWOOD, Judge.

¶ 1 Danny Richard Sullivan ("plaintiff") appeals from the trial court's order granting a motion for summary judgment for Triad Hospitality Corporation, t/b/d/a Quality Inn Suites ("defendant"). Plaintiff contends that the trial court erred in granting summary judgement because the doctrine of *res ipsa loquitur* was applicable under these facts. For the following reasons, we affirm.

I. Background

¶ 2 On 20 January 2021, plaintiff filed a complaint against defendant alleging that on 2 August 2015 he was a guest of "the Quality Inn & Suites" located at "2008 South Hawthorne Road, Winston-Salem[]" ("the hotel"), which "was owned, operated, controlled, and managed by [d]efendant." He was using the hotel's swimming pool around "8:30 a.m. until 9:30 a.m." and attempted to exit the pool using the ladder "in the deep end." He saw no indication that the ladder was defective, however when plaintiff stepped on the first rung, he noticed "it was a little loose." When he proceeded to "the second rung of the ladder" it "twisted underneath . . . [p]laintiff[,]" causing his leg to be thrown "behind the ladder and the rungs against the wall" resulting in bodily injury.

¶ 3 Defendant filed a third-party complaint against Blue Diamond Pool Services, Inc., the company who maintained and serviced the pool for the hotel, on

26 February 2021. On 30 June 2021, defendant filed a Motion for Summary Judgment.

¶ 4 In support of the motion, defendant included an affidavit submitted by the hotel property manager, Ashwin Dakoriya ("Mr. Dakoriya"), a copy of the pool inspection conducted by the state, and a transcript of plaintiff's deposition. The affidavit by Mr. Dakoriya stated that the hotel had no complaints about the pool ladder prior to plaintiff's injury, and that the pool had just passed a state inspection. The North Carolina Department of Environmental and Natural Resources had conducted an inspection of the pool on 2 July 2015, including an inspection of the "[d]iving equipment, ladders, steps[,] and handrails[.]" The report indicated no issues with the pool ladder, or the pool in general.

¶ 5 During plaintiff's deposition, he acknowledged that he was unaware of any reports regarding the rung being loose before, or subsequent to, this incident. Furthermore, plaintiff could not say whether anyone used the pool ladder before him that morning or the evening prior or how many guests may have had access to the pool between the inspection and his injury.

¶ 6 The matter came on for a hearing on defendant's Motion for Summary Judgment on 12 July 2021 in Ashe County Superior Court, Judge Craig presiding. At the hearing, defendant argued that *res ipsa loquitor* was not applicable and for summary judgment in his favor because there was no evidence that defendant was

"liable for creating the problem with the ladder[.]" Plaintiff countered that the pool ladder would not normally "fail in the absence of some type of negligence[,]" and the ladder "was under the control of" defendant.

¶ 7 The trial court granted summary judgment for defendant on 2 August 2021 and dismissed the third-party complaint against Blue Diamond Pool Services, Inc., as moot. Plaintiff filed a notice of appeal on 1 September 2021.

II. Discussion

¶ 8 On appeal, plaintiff argues that the trial court erred in granting summary judgement in favor of defendant because the doctrine of *res ipsa loquitur* was applicable to plaintiff's negligence claim.

A. Standard of Review

¶ 9 "Appeals arising from summary judgment orders are decided using a *de novo* standard of review." *Midrex Techs., Inc. v. N.C. Dep't of Revenue*, 369 N.C. 250, 257, 794 S.E.2d 785, 791 (2016) (citation omitted). Upon a party's motion, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2021). When considering a motion for summary judgment, "[a]ll facts asserted by the adverse party are taken as true, and their inferences must be viewed in the light most favorable to

that party." *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 523, 723 S.E.2d 744, 747 (2012) (citation and quotation marks omitted).

B. Summary Judgment

¶ 10 Plaintiff's sole argument on appeal is that the trial court erred in granting defendant's motion for summary judgement because "there were genuine issues of material fact regarding the [plaintiff]'s negligence claim under the doctrine of res ipsa loquitur."

¶ 11 *Res ipsa loquitur* applies when (1) "direct proof of the cause of an injury is unavailable," (2) defendant controlled "the instrumentality involved in the accident[,]" and (3) "the injury is of a type that does not ordinarily occur in the absence of some negligent act or omission." *Grigg v. Lester*, 102 N.C. App. 332, 333, 401 S.E.2d 657, 657-58 (1991) (citations omitted). A plaintiff alleging *res ipsa loquitur* must show that the injury resulted from defendant's negligent act, and also "must be able to show—without the assistance of expert testimony—that the injury was of a type not typically occurring in [the] absence of some negligence by defendant." *McGuire v. Riedle*, 190 N.C. App. 785, 789, 661 S.E.2d 754, 758 (2008) (internal quotation marks, brackets, and citation omitted).

¶ 12 "The rule of *[r]es ipsa loquitur* never applies when the facts of the occurrence . . . do not point to the defendant as the *[o]nly* probable tortfeasor" nor "when the instrumentality causing the injury is not under the exclusive control or management

of the defendant." *Kekelis v. Whitin Mach. Works*, 273 N.C. 439, 444, 160 S.E.2d 320, 323 (1968) (emphasis in original); *Shadkhoo v. Shilo E. Farms, Inc.*, 328 N.C. 47, 50, 399 S.E.2d 319, 321 (1991) (internal quotation marks and citation omitted). Additionally,

> the following instances preclude the applicability of *[r]es ipsa*: (1) Where all the facts are known and testified to; (2) Where the evidence establishes that more than one inference can be drawn as to the cause of the injury; (3) Where the existence of negligence is not the more reasonable probability; (4) Where the matter is purely a question of conjecture; (5) Where the accident was due to an act of God or the tortious act of a stranger; (6) Where the accident which results in injury is defined by law; (7) Where the injury-producing instrumentality is not under the exclusive control and management of the defendant.

McPherson v. High Point Mem'l Hosp., Inc., 43 N.C. App. 164, 168, 258 S.E.2d 410, 413 (1979) (citations omitted).

¶ 13 In *Kekelis v. Whitin Machine Works*, the plaintiff was electrocuted by a yarn-processing machine which had been repaired by the defendant 9-18 hours earlier. *Kekelis*, 273 N.C. at 442, 160 S.E.2d at 322. There, our Supreme Court determined that *res ipsa loquitur* was not applicable because the plaintiff did not "offer any evidence tending to negate negligence on the part of those who manipulated or worked with the machine during the few hours which elapsed between the time defendant turned the machine over to Burlington and the time plaintiff was injured." *Id.* at 446, 160 S.E.2d at 324. "The fact that plaintiff received a shock from the

machine undoubtedly allows an inference of negligence on the part of some person, but her evidence leaves unanswered the question, whose was the fault." *Id.* at 445, 160 S.E.2d at 324.

¶ 14 In *Harris v. Tri-Arc Food Systems, Inc.*, this Court determined that the trial court was correct in finding that *res ipsa loquitur* was inapplicable to the plaintiff's case where the ceiling collapsed on the plaintiff while she was inside a restaurant, causing serious injury. *Harris v. Tri-Arc Food Systems, Inc.,* 165 N.C. App. 495, 496, 598 S.E.2d 644, 645-46 (2004). The defendant restaurant stated that the ceiling had just been inspected and approved by an inspector; subsequent investigation determined there was a defect in the construction of the ceiling. *Id.* at 497, 598 S.E.2d at 646. Therefore, this Court determined that *res ipsa loquitur* was not applicable "because there [was] evidence of what caused plaintiff's injury: a latent defect in the ceiling of the restaurant[,]" and the plaintiff "also failed to introduce any evidence eliminating all possible tortfeasors other than [the] defendant." *Id.* at 502, 598 S.E.2d at 649.

¶ 15 In *Hamilton v. Parker*, our Supreme Court determined that the plaintiff, who claimed she was hit by a business door, was not entitled to *res ipsa loquitor*. *Hamilton v. Parker*, 264 N.C. 47, 49, 140 S.E.2d 726, 727 (1965). "The owner of a store is not an insurer of the safety of those who enter his store for the purpose of making purchases, and the doctrine of *res ipsa loquitur* is not applicable. Before the plaintiff

can recover he must, by evidence, establish actionable negligence." *Id.* at 49, 140 S.E.2d at 727. Because the plaintiff showed no evidence that the doors were "unsafe [or] hazardous[,]" "improperly constructed," or "improperly maintained[,]" our Supreme Court affirmed the trial court's "allowance of defendant's motion for judgment as of nonsuit[.]" *Id.* at 50, 140 S.E.2d at 728.

¶ 16 Lastly, in *Simpson v. Cotton*, this Court again denied the use of *res ipsa loquitur* when the plaintiff, a motel guest, was injured in the motel shower. *Simpson v. Cotton,* 98 N.C. App. 209, 210-12, 390 S.E.2d 345, 346-47 (1990). In *Simpson*, the plaintiff claimed that there was "a sudden burst of scalding hot water [which] gushed out of the shower head hitting [the] plaintiff" and causing him to jump "to get away from . . . water[,]" slip and fall. *Id.* at 210, 390 S.E.2d at 346. This Court declined to apply *res ipsa loquitur* because, although the "defendant had exclusive control of the shower-tub controls and water heater for purposes of maintenance and inspection[,] . . . [the] plaintiff was then operating the control knobs and guests prior to him also had access to the controls." *Id.* at 212, 390 S.E.2d at 347. This Court further stated that the "principle reason" for declining "to apply the *res ipsa* doctrine [wa]s that the cause of the sudden burst of hot water seem[ed] to . . . be a matter of sheer conjecture" since the "physical cause of the accident [wa]s unknown and nothing indicate[ed] that improved maintenance or inspection by the defendant would have prevented the incident." *Id.* (citations omitted).

¶ 17 In our present case, *res ipsa loquitur* is likewise inapplicable. Here, as in *Kekelis* and *Harris*, plaintiff failed to eliminate all other possible tortfeasors. The ladder was accessible to any pool guest and plaintiff failed to show that the ladder had not been manipulated or damaged by someone other than defendant or even how many guests had used the ladder between the inspection and plaintiff's accident. Although plaintiff's injury may implicate negligence by some person, plaintiff presented no evidence as to who was ultimately at fault because they failed to eliminate all other possible tortfeasors.

¶ 18 Additionally, as in *Simpson*, although the ladder may have been in defendant's "exclusive control . . . for purposes of maintenance and inspection[,]" the plaintiff was utilizing the ladder at the time in question and hotel guests prior to him also had access to the pool ladder. *See id.* Furthermore, there was no indication of the "physical cause of the accident." *See id.* Lastly, as in *Hamilton*, the plaintiff was unable to show any evidence that the ladder was dangerous, negligently maintained, poorly secured, or inappropriately constructed. *See Hamilton*, 264 N.C. at 50, 140 S.E.2d at 728.

¶ 19 Plaintiff cites to *Madden v. Carolina Door Controls Inc.*, 117 N.C. App. 56, 449 S.E.2d 769 (1994), *Husketh v. Convenient Systems, Inc.*, 295 N.C. 459, 245 S.E.2d 507 (1978), *abrogated by Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998), and *Schueler v. Good Friend N.C. Corporation*, 231 N.C. 416, 57 S.E.2d 324 (1950),

arguing the similarities between these cases and the instant case support their argument that *res ipsa loquitur* is applicable. Each of these cases is distinguishable.

¶ 20 In *Madden* "[d]efendant Carolina contend[ed] that it was not proper for the trial court to instruct the jury on the doctrine of *res ipsa loquitur* and . . . that the facts of th[e] case do not invoke the doctrine of *res ipsa loquitur*." *Madden*, 117 N.C. App. at 61, 449 S.E.2d at 773. This court found no error because "[t]he trial transcript show[ed] that defendant Carolina failed to object to the instructions as given[,]" and thus the instruction on *res ipsa loquitur* was "presumed" proper. *Id.* at 62, 449 S.E.2d at 773. This is not the case here; defendant did object to the use of *res ipsa loquitur*, and thus it cannot be presumed proper in this matter.

¶ 21 Plaintiff's reliance on *Husketh* and *Schueler* is likewise misplaced. Our Supreme Court found that "in *Husketh* and *Schueler* the plaintiffs established *exclusive control and management* of the injury-producing instrumentalities in the *defendants*." *Shadkhoo v. Shilo E. Farms, Inc.*, 328 N.C. 47, 52, 399 S.E.2d 319, 322 (1991) (emphasis added). Thus, those cases are distinguishable from the present facts since, for the reasons stated above, plaintiff failed to provide any evidence that the defendant had sole control of the ladder. Accordingly, *res ipsa loquitur* was not applicable and the trial court did not err in granting defendant's motion for summary judgment.

III. Conclusion

¶ 22 For the foregoing reasons, we affirm summary judgment in favor of defendant.

AFFIRMED.

Judges HAMPSON and GORE concur.

Report per Rule 30(e).