IN THE

Indiana Supreme Court

Supreme Court Case No. 21S-CT-119

Walter Griffin, Jr. and Candus Griffin,
Appellants/Plaintiffs,

–v–

Menard, Inc. and Briggs Plumbing Products, LLC,
Appellees/Defendants.

Argued: May 13, 2021 | Decided: October 19, 2021

Appeal from the Elkhart Superior Court
No. 20D02-1603-CT-56
The Honorable Stephen R. Bowers, Judge

On Petition to Transfer from the Indiana Court of Appeals
No. 20A-CT-310

Opinion by Justice David

Chief Justice Rush and Justices Massa and Slaughter concur.
Justice Goff dissents with separate opinion.

David, Justice.

In this summary judgment case we are asked to determine: 1) if there is an issue of material fact regarding whether a store had actual or constructive knowledge that a box in its store that opened at the bottom and injured a customer was defective; and 2) whether the doctrine of *res ipsa loquitur* can apply to these facts and circumstances. For the reasons discussed herein we answer both questions in the negative.

Facts and Procedural History

Walter and Candus Griffin were shopping for a sink in Menard. They found one they liked and Walter grabbed the box from the shelf. When he did so, the bottom of the box opened and the sink fell on him, causing him injuries. Walter did not notice that the staples were coming loose when he picked up the box from the shelf. The Griffins sued Menard for damages alleging premises liability and loss of consortium. Menard brought in the manufacturer of the sink as a third party.

Menard filed a motion for summary judgment alleging that it had no actual or constructive knowledge of any issues with the box. The Griffins argued there remains an issue of material fact regarding Menard's knowledge and made a *res ipsa loquitur* claim.[1] The trial court granted summary judgment for Menard. The Court of Appeals affirmed in part, reversed in part and remanded. It found that there were issues of material fact precluding summary judgment on the knowledge issue as well as the *res ipsa* issue.

Under the facts and circumstances here, there is no issue of material fact as there is no evidence that Menard had either actual or constructive knowledge that the box was defective. Further, Plaintiffs do not have a viable *res ipsa* claim. As such, we affirm the trial court.

[1] They also made a spoliation of evidence claim not at issue on transfer.

Standard of Review

We review summary judgment de novo and using the same standard the as the trial court. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). That is, we draw all reasonable inferences in favor of the non-moving party and summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id*. A fact is material if its resolution would affect the outcome of the case. *Id.*

Discussion and Decision

I. Indiana's summary judgment standard

Summary judgment "is a desirable tool to allow the trial court to dispose of cases where only legal issues exist." *Id*. at 1003 (citations omitted). As this Court explained in *Hughley*, "Indiana consciously errs on the side of letting marginal cases proceed to trial on the merits, rather than risk short-circuiting meritorious claims." *Id*. at 1004. That is, we do not want to prematurely clos[e] the courthouse doors to the non-moving party. *Id*. at 1005. This standard has long been in place even prior to *Hughley*. But our standard is not without bounds.

As explained in more detail below, even with our standard which is generous to the non-moving party, Plaintiffs here cannot overcome Menard's summary judgment motion on this record.

II. Plaintiffs did not meet their burden on their premises liability claim.

In *Burrell v. Meads*, 569 N.E.2d 637, 639 (Ind. 1991), this Court adopted the following language defining the duty owed an invitee by the premises owner:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.

Id. at 639–40 (quoting RESTATEMENT (SECOND) OF TORTS § 343 (1965)).

Here, Walter was a business invitee of Menard. To prevail on their premises liability claim, Plaintiffs needed to prove that Menard had actual or constructive knowledge of the dangerous condition—here the defective box. *Burrell*, 569 N.E.2d at 639. And pursuant to our summary judgment standard, the initial burden was on Menard to prove an absence of a genuine issue as to a material fact. *Hughley*, 15 N.E.3d at 1003.

With regard to the designated evidence, the record here is sparse. To affirmatively negate Plaintiffs' claim of constructive knowledge, Menard presented the Griffins' deposition testimony and the affidavit of general manager Brett Bahr. Bahr's affidavit stated that Menard had no prior notice of any problem or defect with the box and, had an employee noticed any issues, they would not have placed the box on the shelf in the first place. Menard's designated evidence also reveals that since 2000, the store manager was not aware of any defective sink boxes by the company that manufactured the sink at issue. Further, Menard does not make any changes to the boxes received by the manufacturer. Walter testified that he did not notice that the staples were coming loose on the bottom of the box.

In response, Plaintiffs designated evidence focused on Menard's failure to document its compliance with its own policies on inspecting products. While Menard had a process for inspecting each section of the store and front facing the products, it is not clear when the last time the box at issue was examined. Menard kept no records and had no surveillance footage. Further, it did not know when the sink was first stocked or how long it had been on the shelf.

The Court of Appeals held that there was an issue of material fact here and we disagree. Menard set forth evidence, through the affidavit of its store manager and Walter's deposition testimony, that there was an absence of genuine material fact as to its actual or constructive knowledge that the box was defective. The burden then shifted to Plaintiffs to come forward with evidence that creates an issue of material fact. *Hughley*, 15 N.E.3d at 1003.

Although Plaintiffs designated evidence that Menard had no records of when it last inspected the boxes or how long the box was on the shelf, and Plaintiffs are critical of the same, this doesn't create an issue of *material* fact with regard to Menard's actual or constructive knowledge. (This goes more towards the reasonableness element, if anything.) Indeed, Plaintiffs do not argue that Menard had any duty to have certain policies, conduct certain inspections, or keep records of the same. We decline to impose such duties. We also reject any implication that a premises owner may avoid an inference of constructive notice by failing to enact or follow safety policies.

Here, the designated deposition testimony of Walter reveals that a *visual inspection* of the box did not indicate its dangerous condition as he testified that he did not notice staples on the box coming loose. Thus, there is no indication or evidence that Menard's should have noticed the defective condition of the box after it was initially placed on the shelf even if they would have inspected and front-faced the products. The defect here was not readily apparent or visible and staples on the bottom of the box did not fail until after the box was fully removed from the shelf.

While our summary judgment standard allows for even marginal cases to proceed to trial, the non-moving party must designate some evidence to

defeat the moving parties' motion. Plaintiffs' designated evidence falls short of what is needed to create an issue of material fact as to Menard's knowledge of the box's defect. While they are critical of Menard's policies and procedures, they have designated no evidence to refute the fact that Menard had no actual or constructive knowledge that the box at issue was defective. Notably, the designated evidence does **not** include copies of the policies and practices at issue or an employee handbook. We would be in a different situation if there was, for example, deposition testimony indicating that this type of box had opened before, that a store employee saw the staples had come loose and Menard placed the box on the shelf anyway, that the defect was something that could be identified when front facing the products, or that the staples were known to fail after a certain period of time. But those are not the facts before us. Instead, Plaintiffs offer speculation that an inspection or some other action on the part of Menard maybe could have revealed something about the box defect. However, there's no evidence supporting that speculation and speculation is not enough to overcome summary judgment. As Plaintiffs did not meet their burden, we must affirm the trial court's grant of summary judgment for Menard. (Plaintiffs may still proceed against the box manufacturer.)

III. Plaintiffs' *res ipsa loquitur* claim fails.

Res ipsa loquitur is translated from Latin as "the thing speaks for itself." *Gary Cmty. Sch. Corp. v. Lardydell*, 8 N.E.3d 241, 247 (Ind. Ct. App. 2014), trans. denied. The doctrine of *res ipsa loquitur* recognizes that in some situations, an occurrence is so unusual, that absent reasonable justification, the person in control of the situation should be held responsible. *Cergnul v. Heritage Inn of Indiana, Inc.*, 785 N.E.2d 328, 331 (Ind. App. 2003). The central question in *res ipsa loquitur* cases is whether the incident probably resulted from the defendant's negligence rather than from some other cause. *Deuitch v. Fleming*, 746 N.E.2d 993, 999 (Ind. App. 2001). To establish this inference of negligence, a plaintiff must demonstrate: (1) that the injuring instrumentality was within the exclusive management and control of the defendant, and (2) the accident is of the type that ordinarily does not happen if those who have management or

control exercise proper care. *Balfour v. Kimberly Home Health Care, Inc*., 830 N.E.2d 145, 148 (Ind. Ct. App. 2005). Whether the doctrine of *res ipsa loquitur* applies in any given negligence case is a mixed question of law and fact. *Syfu v. Quinn*, 826 N.E.2d 699, 703 (Ind. Ct. App. 2005).

Here, at issue is first whether this doctrine even applies to a premises liability action, and then if it does, whether it could apply under the facts of this case. As the trial court noted in its Order on Summary Judgment, in *Rector v. Oliver*, 809 N.E.2d 887 (Ind. Ct. App. 2004), the Indiana Court of Appeals called into question the application of the doctrine of *res ipsa loquitur* in a premises liability action. Specifically, after discussing the doctrine of *res ipsa loquitur*, the Court of Appeals stated:

> Furthermore, the position adopted from the Restatement (Second) of Torts in Burrell, supra, states that a possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, the conditions listed therein are met. To say that a premises owner may be liable under the doctrine of res ipsa loquitur when they could not be liable under the premises liability standard would seem to fly in the face of the standard adopted in Burrell.

Id. at 895. The panel below in this case assumed otherwise–that *res ipsa* could apply here without any analysis of that issue. While we do not believe that *Rector* completely forecloses the application of *res ipsa* to a premises liability action, it also makes clear that if there's no liability under a premises liability standard, *res ispa* cannot apply. As such, determining the *res ispa* issue is necessarily dependent on whether a defendant can be liable under premises liability in the first place. Thus, Plaintiff's *res ipsa* claim alone does not preclude summary judgment for Menard.

Additionally, even assuming *res ispa* applies here, the doctrine requires that the injuring instrumentality was within the exclusive management and control of the defendant. That just isn't the case here because customers had access to the sink box. This case is rather analogous to *Cergnul v. Heritage Inn of Indiana, Inc.,* 785 N.E.2d 328 (Ind. Ct. App. 2003),

reh'g denied, *trans. denied*. In Cergnul, a hotel patron who fell when a handrail came out of the wall sued the hotel, alleging that it negligently installed and maintained the handrail. 785 N.E.2d at 330. The patron sought a *res ipsa* jury instruction, but the trial court granted the hotel's motion for judgment on the evidence. *Id*. Our Court of Appeals affirmed, finding that even though the hotel could be said to be in exclusive control of the handrail after it was installed, there are other reasons, besides the negligence of the hotel that the handrail could have become loose, e.g., another hotel patron could have vandalized it. *Id*. at 331. Here too, it seems like speculation that the only way the sink could have fallen out of the box was because Menard was negligent when the box could have been handled/tampered with by another customer.

Indeed, the showing of exclusive control is difficult when the injuring instrumentality is accessible to customers. It's also a high bar to show that an occurrence is "so unusual" that it would not ordinarily happen in the absence of someone's negligence. *See Johnson v. Blue Chip Casino, LLC*, 110 N.E.3d 375, 378 (Ind. Ct. App. 2018) (holding that hotel guest failed to prove the presence of bed bugs in hotel room more probably resulted from hotel's negligence as opposed to another cause), *trans. denied*.

Nevertheless, while we disagree with our Court of Appeals panel below that assumes *res ipsa* applies here, we decline to hold that *res ispa* can never apply to a premises liability case. If an injury results from a fixture or other component that customers did not or could not disturb—such as a chandelier suspended from the ceiling, or a set of shelves bolted to the wall—and the incident would not normally occur absent negligence, *res ipsa* could be appropriate. *See Rust v. Watson*, 141 Ind. Ct. App. 59, 64-65, 215 N.E.2d 42, 44–45 (1966).

We need not address that question today.

Conclusion

We affirm the trial court's grant of summary judgment for Menard.

Rush, C.J., and Massa and Slaughter, JJ., concur.
Goff, J., dissents with separate opinion.

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Goff, J., concurring in part and dissenting in part.

I take no issue with the Court's conclusion that *res ipsa loquitur* does not apply here. However, I part ways with the Court in its decision that the Griffins failed to meet their burden on their premises-liability claim. While acknowledging that "our summary judgment standard allows for even marginal cases to proceed to trial," the Court insists that "the non-moving party must designate some evidence to defeat the moving parties' motion." *Ante*, at 5–6. And the evidence designated by the Griffins, characterized by the Court as mere "speculation," ostensibly "falls short of what is needed to create an issue of material fact as to Menard's knowledge of the box's defect." *Id.* at 6. Contrary to this conclusion, the record here, in my view, sufficiently presents a genuine issue of material fact of whether Menard had constructive knowledge of the faulty box for liability to attach. And even if the Griffins appear unlikely to prevail at trial, that's a question for the jury—not for this Court—to decide.

Because the trial court, in my view, improperly granted summary judgment and deprived the Griffins of their constitutional right to a jury trial, I would reverse and remand for reconsideration of their premises-liability claim.

Discussion

Part I of this opinion explains why, in my view, the Court departs from a faithful application of Indiana's summary-judgment standard. Part II, in turn, explains why, under our summary-judgment standard, a jury—rather than this Court—should decide whether Menard had constructive knowledge of the defective box.

I. The Court's opinion departs, in my view, from Indiana's summary-judgment standard.

In Indiana, summary judgment is appropriate "if the designated evidentiary matter shows that there is no genuine issue as to any material

fact and that the moving party is entitled to judgment as a matter of law." Ind. Trial Rule 56(C). The party seeking summary judgment (the movant) carries the initial burden of showing "the absence of any genuine issue of fact as to a determinative issue." *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014) (cleaned up). The burden then shifts to the party opposing summary judgment (the non-movant) to "come forward with contrary evidence showing an issue for the trier of fact." *Id.* (quotation marks omitted). To make this showing, the non-movant "may not rest upon the mere allegations or denials of his pleading." T.R. 56(E). Rather, "his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." *Id.* If the non-movant carries this burden, then the case may proceed to trial. *Id.* But if the non-movant "does not so respond, summary judgment, if appropriate, shall be entered against him." *Id.* When resolving motions for summary judgment, courts draw "all reasonable inferences in favor of the non-moving party." *Kesling v. Hubler Nissan, Inc.*, 997 N.E.2d 327, 331 (Ind. 2013).

While the text of Indiana Trial Rule 56 mirrors its federal counterpart nearly verbatim, we've long distinguished the two by imposing a more stringent procedural burden: whereas federal practice permits the movant to simply point to the absence of evidence supporting his opponent's claim, *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986), Indiana's standard requires the movant to "affirmatively negate" the non-movant's claim, *Hughley*, 15 N.E.3d at 1003 (quotation marks omitted). This heightened standard reflects a policy—fundamentally rooted in our constitution—of "consciously err[ing] on the side of letting marginal cases proceed to trial on the merits, rather than risk short-circuiting meritorious claims." *Id.* at 1004. *See* Ind. Const. art. 1, §§ 12 (open courts), 20 (right to jury trial in civil cases).

The Court today, in my view, strays from Indiana's well-established summary-judgment procedure, applying instead a standard akin to federal practice. Indeed, while reciting the *Hughley* standard, the Court focuses its analysis on the Griffins' burden—and their ostensible failure—to "designate some evidence to defeat" Menard's summary-judgment motion. *See ante*, at 5–6. And, while acknowledging "that Menard had no

records of when it last inspected the boxes or how long the [defective] box was on the shelf," the Court concludes that the evidence set forth by the store sufficiently established the "absence of [a] genuine material fact as to its actual or constructive knowledge that the box was defective." *Id.* at 5.

Because it's the movant's "burden to affirmatively negate the plaintiff's claim" and "not the plaintiff's burden to make a prima facie case," *Gaff v. Indiana-Purdue Univ. of Fort Wayne*, 51 N.E.3d 1163, 1167 (Ind. 2016), the Court, in my view, failed to properly apply Indiana's summary-judgment standard.

I now turn to the merits of this case to explain why, under our summary-judgment standard, a jury—rather than this Court—should decide whether Menard had constructive knowledge of the defective box.

II. A jury should decide whether Menard had constructive knowledge of the defective box.

For liability to attach, Menard's knowledge of the defective box must have been either actual or constructive. *See Schulz v. Kroger Co.*, 963 N.E.2d 1141, 1144 (Ind. Ct. App. 2012). A landowner is charged with constructive knowledge when the risk of harm or dangerous condition "has existed for such a length of time and under such circumstances that it would have been discovered in time to have prevented injury if the storekeeper, his agents or employees had used ordinary care." *Wal-Mart Stores, Inc. v. Blaylock*, 591 N.E.2d 624, 628 (Ind. Ct. App. 1992) (cleaned up).

In response to Menard's summary-judgment motion, the Griffins designated an affidavit and portions of a deposition in which Menard's general manager (or GM) testified to the store's general policies and practices. According to the GM, these policies and practices involve identifying and removing "defective merchandise or unsafe merchandise," nightly "fronting and facing," and daily "sectioning." App. Vol. 2, pp. 128–29. This process, the GM attested, requires employees to survey each aisle and to inspect every product in a four-foot section, to "dust it, clean it, bring it forward," and to "make sure that section is perfect." *Id.* at 130. The employees, the GM added, do "a section a day in

every department and rotate." *Id.* The GM conceded, however, that there is no way to verify if a department had completed a section or to determine who inspected that section on a particular day. *Id.* As for the section in which the defective box was located, Menard admitted in interrogatory responses to not knowing when it was first stocked or how long it had sat on the shelf and acknowledged that the store maintains "no records" documenting "the inspection and refacing of the areas/sections." *Id.* at 182–83.

In my view, the issues of fact presented by this evidence—whether the employees inspected the section where the sink fell and for how long the defective box sat on the shelf—leads to a reasonable inference that Menard had constructive knowledge of the dangerous condition.

Still, while acknowledging "that Menard had no records of when it last inspected the boxes or how long the box was on the shelf," the Court insists that this evidence—or lack of evidence, to be more precise—creates no material-fact issue of whether Menard had actual or constructive knowledge of the defective box. *Ante*, at 5. This conclusion apparently rests on the Griffins' failure to "argue that Menard had any duty to have certain policies, conduct certain inspections, or keep records of the same." *Id.* And because Walter testified to not having noticed any defect in the box himself, the Court reasons that "there is no indication or evidence that Menard's should have noticed" it either, once it was on the shelf. *Id.*

The Court's reasoning, in my opinion, falls short of supporting its conclusions.

A. The lack of evidence showing that Menard followed its policies and practices presents a material-fact issue of its constructive knowledge.

To begin with, whether the Griffins argued that Menard had a "duty" to implement certain policies, conduct certain practices, or keep certain records in the first place is beside the point. By testifying to those policies and practices, Menard's GM acknowledged as much. The question, rather, is whether, in light of these policies and practices, Menard "reasonably

should have known" of the defective box. *See Dutchmen Mfg., Inc. v. Reynolds*, 891 N.E.2d 1074, 1083–84 (Ind. Ct. App. 2008) (internal citations omitted) (emphasis added).

Here, the GM explicitly testified in his deposition to Menard's policies and "common practices of **identifying** defective merchandise or **unsafe merchandise**." App. Vol. II, p. 128 (emphasis added). Menard's employees inspect this merchandise for defects, the GM elaborated, "whether it's received off of incoming trucks before it goes to the floor or once it's on the floor," and then remove that merchandise before "bill[ing] it back to the vendor." *Id.* The GM further testified to his role in training employees, under a specific policy, to "look for **defective or unsafe** material on a shelf," to "pull those products off the shelf," and to "defect those products out." *Id.* at 129 (emphasis added).

In my view, the **lack** of evidence showing that Menard actually followed these policies and practices leaves unresolved the question of whether the store reasonably should have known of the defective box, creating a material-fact issue of whether the store had constructive knowledge of the hazard.

I find precedential support for this conclusion in *Golba v. Kohl's Department Store, Inc.*, 585 N.E.2d 14 (Ind. Ct. App. 1992), *trans. denied*. In that case, a department-store customer was injured when she slipped and fell after stepping on a small object left on the store's high-gloss floor. The accident occurred at 10:50 am, and testimony indicated that employees of the store had swept the floor "earlier in the morning." *Id.* at 17. But there was "no evidence that the floor was swept immediately before [the customer] slipped." *Id.* In other words, the evidence failed to disclose either the length of time the dangerous condition existed or the circumstances in which it may have been found. And based on this evidence (or lack thereof), the court "infer[red] that the object was on the floor for a sufficient amount of time that morning such that" it presented a material-fact issue as to whether the department store had actual or constructive knowledge of the hazard. *Id.* Here, as in *Golba*, the evidence fails to disclose the length of time the dangerous condition existed or the circumstances in which it was found.

Had the evidence shown that Menard actually followed its policies and sufficiently documented its practices (potentially revealing the length of time the defective box sat on the shelf and whether the employees had inspected the section in which it fell), then it **might** be a different story. *See Johnson v. Blue Chip Casino, LLC*, 110 N.E.3d 375, 380 (Ind. Ct. App. 2018) (holding that, in a premises-liability claim, a hotel owner had no constructive knowledge that bed bugs were present in the guest's hotel room where the record reflected that the hotel had appropriate "bed-bug policies and procedures in place" and that it "**followed them as well**") (emphasis added), *trans. denied*; *Schulz*, 963 N.E.2d at 1145 (holding that a grocery store lacked constructive knowledge of a clear liquid on which a patron slipped and fell where an employee, following the store's general policy to inspect, observed no spillage in the area just 10 minutes prior to the accident). But that's not the case here. And by absolving Menard of its failure to follow its own policies and practices, the Court today gives landowners little reason to inspect their premises for dangerous conditions. After all, no inspection means no notice, whether actual or constructive.

In sum, the lack of evidence showing that Menard followed its policies and practices, in my view, leaves unresolved the question of whether the store should have known of the defective box. And that's a question for the jury—not for this Court—to decide after "weighing the credibility of witnesses and the application of the test of reasonableness to the facts." *See Golba*, 585 N.E.2d at 17.

B. Walter's failure to notice a defect in the box didn't relieve Menard of its duty to exercise reasonable care.

The Court also concludes that, because Walter testified to not having noticed any defect in the box, "there is no indication or evidence that Menard's should have noticed" that defect after placing the box on the shelf. *Ante*, at 5.

I respectfully disagree. Premises-liability law doesn't charge the invitee with a duty to exercise reasonable care. Rather, that duty lies with the landowner. *Burrell v. Meads*, 569 N.E.2d 637, 639 (Ind. 1991). In fact,

Menard "**should expect**" that a patron like Walter "will not discover or realize the danger" before him. *See id.* at 639–40 (quoting Restatement (Second) of Torts § 343 (1965)). *See also Douglass v. Irvin*, 549 N.E.2d 368, 370 (Ind. 1990) (noting that a landowner's duty is "not extinguished by the knowledge of its customers concerning potential risks on the premises"). For that reason, the law charged Menard "with the knowledge that its method of operation may result in customers dropping objects onto the ground as they browse through the merchandise." *See Golba*, 585 N.E.2d at 17. And Walter's failure to notice a defect in the box didn't relieve Menard of this duty.

Conclusion

For the reasons above, I concur in part and dissent in part from the Court's decision.