STATE OF MICHIGAN

COURT OF APPEALS

JEANNINE COOPER-JAMES,

Plaintiff-Appellant,

v

TEXAS ROADHOUSE OF ROSEVILLE,

Defendant-Appellee.

UNPUBLISHED
November 30, 2010

No. 293797
Macomb Circuit Court
LC No. 2008-003592-NO

Before: STEPHENS, P.J., and MARKEY and WILDER, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

In 2006, plaintiff was a customer in defendant's restaurant. She was sitting in the waiting area, waiting for a table, when a neon and metal sign hanging in the window behind her fell, hitting her shoulder and injuring her. The sign had been hanging since 2004 by a chain hooked on a screw attached to the wall above the window. Plaintiff sued, alleging that the sign "was not secure or was overloaded or was in a precarious or unstable position and placed there in an unreasonable manner." Defendant moved for summary disposition, arguing that plaintiff had no proof of negligence. Defendant maintained that there was no proof a defect existed and no proof that defendant had notice of a defect. Plaintiff responded that the doctrine of res ispa loquitur applied because what happened—the sign falling without anyone bumping or pulling on it—normally does not happen in the absence of negligence. Plaintiff noted that the screw holding the sign was well above the reach of any customers, so it was in defendant's exclusive control. Plaintiff also noted that defendant took the sign out of the public area after the incident and so the evidence of the reason it fell was not available to plaintiff.

The trial court agreed with defendant, finding that ordinary negligence was not established because there was no evidence that defendant had notice of a defect. The court noted, "[P]laintiff's theory that the screw came loose due to repeated pulling on the string to turn it off and off [sic] or from vibrations from the operation of the doors is mere supposition. Indeed, there is no evidence to suggest the screw came loose." The court also rejected plaintiff's res ipsa loquitur theory, finding that although the sign would not be expected to fall in the absence of negligence, the sign's location in the public area meant that numerous people

outside of defendant's control had access to it and that plaintiff, who stayed and dined after the incident, could have examined the sign, chain, and screw but did not.

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although substantively admissible evidence submitted at the time of the motion must be viewed in the light most favorable to the party opposing the motion, the non-moving party must come forward with at least some evidentiary proof, some statement of specific fact upon which to base his case. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

The trial court did not err in dismissing this case. First, there is no evidence that defendant acted negligently in any way. To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages. *Henry v Dow Chem Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005). Breach of the duty requires determination of a general standard of care and a specific standard of care; causation requires both cause in fact and proximate cause. *Case v Consumers Power Co*, 463 Mich 1, 6 n 6; 615 NW2d 17 (2000). Cause in fact requires that the harmful result would not have come about but for the negligent conduct. *Martin v Ledingham*, 282 Mich App 158, 161; 774 NW2d 328 (2009). Cause in fact may be established by circumstantial evidence, but such proof must be subject to reasonable inferences and not mere speculation. *Skinner*, 445 Mich at 163-164. An explanation that is consistent with known facts but not deducible from them is impermissible conjecture. *Id*. at 164.

In this case, while defendant owes plaintiff a duty to maintain its premises in a reasonably safe condition, there is no evidence that it failed to do so, other than the mere fact that the sign fell. Deciding whether this was due to a defective screw, a defective wood frame, a negligent hanging job, someone bumping or pulling on the sign, or just something that happened due to the passing of time requires speculation. Plaintiff prefers the explanation that vibrational forces caused it to fall, but she provides no evidence that the sign actually was subject to such forces, that they would be sufficient to cause it to fall, or that defendant had any notice of them. Although the trial court agreed with plaintiff that the sign would not have fallen in the absence of negligence, there is no evidence that this is so. That is, it is pure speculation to say that a person acting without negligence would have secured the sign in a different manner, e.g., with a bigger or stronger screw or with more than one attachment point. Nor is there any evidence that periodic inspection would have revealed the condition or that the condition should have been inspected sooner than the two years it hung there unobserved.

Nor does res ipsa loquitur save plaintiff's case. Proof of negligent conduct can be established by a permissible inference of negligence from circumstantial evidence. To invoke the doctrine of res ipsa loquitur, a plaintiff must show: (1) that the event was of a kind that ordinarily does not occur in the absence of negligence; (2) that it was caused by an agency or instrumentality within the exclusive control of the defendant; (3) that it was not due to any voluntary action of the plaintiff; and (4) that evidence of the true explanation of the event was more readily accessible to the defendant than to the plaintiff. *Woodard v Custer*, 473 Mich 1, 6-7; 702 NW2d 522 (2005).

Although the trial court accepted plaintiff's assertion that this event was of a kind that ordinarily does not occur in the absence of negligence, plaintiff must produce some evidence of wrongdoing beyond the mere happening of the event, *Fuller v Wurzburg Dry Goods Co*, 192 Mich 447, 448; 158 NW 1026 (1916), and plaintiff failed to do so. Moreover, the hanging screw may have been outside normal reach of defendant's customers, but the photographs clearly show that anyone could have tugged on or bumped the sign at any time. Even though no one did so while plaintiff waited, there is no reason why earlier contact, combined with plaintiff's "vibrational forces" could not be the cause. Finally, plaintiff's argument, that evidence of the true explanation of the event was more readily accessible to defendant than to plaintiff, fails because plaintiff apparently made no attempt to inspect the evidence until the notice to produce, filed October 16, 2008, over two years after the incident. There is no evidence that defendant attempted to prevent plaintiff from inspecting the evidence, and plaintiff's failure to ask does not amount to the evidence being unavailable.

Finally, plaintiff's argument for an inference that the missing screw establishes proof of defendant's negligence is unfounded. The rule plaintiff cites, as explained in *Trupiano*, is "'the intentional spoliation or destruction of evidence raises the presumption against the spoliator where the evidence was relevant to the case or where it was his duty to preserve it, since his conduct may properly be attributed to his supposed knowledge that the truth would operate against him.'" 349 Mich at 570, quoting 20 Am Jur, Evidence, § 185, p 191. However, the Court noted that there was more to the rule than this:

> The full section continues, however:
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> > "Such a presumption can be applied only where there was intentional conduct indicating fraud and a desire to destroy and thereby suppress the truth. Moreover, while the spoliation of evidence raises a presumption against the person guilty of such act, yet such presumption does not relieve the other party from introducing evidence tending affirmatively to prove his case, insofar as he has the burden of proof. The spoliation or suppression of evidence is a circumstance open to explanation." [*Id*.]

There is no evidence in this case that defendant acted with intent. Indeed, the manager indicated that the screw in the photographs taken after the event may or may not be the same one. Moreover, even if a presumption arises that the screw would have been detrimental to defendant's case, there is no proof if this was because it had broken, had come out of the wall, was defectively manufactured, was too small, was not angled correctly, or whether defendant had been negligent at all in using the screw.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Jane E. Markey
/s/ Kurtis T. Wilder