COURT OF APPEALS
DECISION
DATED AND FILED

November 21, 2001

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-0630 **Cir. Ct. No. 97-SC-4826**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

RUDY TREML, D/B/A TREML SALES AND SERVICE,

PLAINTIFF-APPELLANT,

V.

EUGENE ZWISLER,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County: DONALD J. HASSIN, Judge. *Affirmed*.

¶1 SNYDER, J.[1] Rudy Treml, acting pro se, appeals from an order dismissing his small claims action against Eugene Zwisler based upon his failure to present trial evidence sufficient to establish a prima facie case. He contends

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (1999-2000). All statutory references are to the 1999-2000 version unless otherwise noted.

that because the doctrine of res ipsa loquitar applies, he has presented a prima facie case in his claim for damages against Zwisler. We disagree with Treml and affirm the order dismissing his claim.

Background

¶2 On October 10, 1997, Treml sued Zwisler in small claims court alleging that

> [t]he week of July 7-14, 1997, Mr. Zwisler girdled trees along our adjacent property lines. This caused them to die and fall on my property, and created a dangerous situation. When asked to dispose of this hazard, he stated it was my responsibility. When presented with the bill, he refused to pay.

Treml sought damages in the amount of $2,092.44. Zwisler answered Treml's complaint by denying the allegations and objecting to the damages as inconsistent with Treml's prior demands and as being incapable of substantiation.

¶3 On January 13, 2000, the matter was tried before a Waukesha county court commissioner. The commissioner dismissed Treml's complaint on the basis that he had failed to meet his burden of proof at trial. Treml moved for a trial de novo to the circuit court on January 20, 2000.

¶4 On February 9, 2001, Treml's trial de novo occurred in the circuit court. Treml called two witnesses, Douglas Howell and Brian Treml, and submitted six exhibits. At the conclusion of Treml's evidence, Zwisler moved for a directed verdict on the basis that Treml had presented no evidence as to the causation of trees falling on his property, no testimony as to negligence on the part of Zwisler causing damage to Treml's property, and had established no link between his alleged damages and Zwisler. The circuit court found that Treml's

trial evidence failed to establish a cause of action against Zwisler for any wrongdoing:

> At this point what I have is some clean up cost of some box elder scrub trees that occurred along a property line. Why they fell and if there's some negligence involved in that or some purposeful conduct, I don't know. All I have is speculation. I have no choice but to dismiss the case.

¶5 The circuit court filed an order on February 28, 2001, stating that the "case [was] dismissed at the close of the plaintiff's case for failure to establish a prima facie case." Treml appeals.

Discussion

¶6 Treml first contends that he had established at the trial before the court commissioner that Zwisler was responsible for the trees falling on his property and causing damage. The circuit court explained to Treml that his appeal from that decision was "the trial on the merits of this case de novo," that in "a trial de novo the case starts over, in essence, for purposes of proof," and that a transcript of the prior commissioner's proceeding "is not a part of this trial record today." Treml responded to the circuit court's explanation of his failure to present a prima facie case by stating, "I must have made a mistake. I assumed that [the commissioner's proceeding] was in [this trial record]."

¶7 Whether evidence has been presented at a trial to the circuit court to establish a prima facie case addresses the sufficiency of the evidence and may be raised on appeal. WIS. STAT. § 805.17(4). Findings by the trial court shall not be set aside on appeal unless they are clearly erroneous. Sec. 805.17(2). When the trial judge rules on a motion for a directed verdict that there is or is not sufficient

evidence upon a given question, this court should not disturb the decision unless it is clearly convinced that the trial court's conclusion was wrong. ***Helmbrecht v. St. Paul Ins. Co.***, 122 Wis. 2d 94, 110, 362 N.W.2d 118 (1985).

¶8 A trial de novo is a new trial in which the whole case is retried as if no trial whatsoever had been had in the first instance. ***Village of Menomonee Falls v. Michelson***, 104 Wis. 2d 137, 149, 311 N.W.2d 658 (Ct. App. 1981). The circuit court's limitation of the evidence to that presented by Treml in the trial de novo was a correct application of the law.

¶9 Treml admitted that he had made a mistake by assuming that the transcript of the prior trial before the commissioner was included in the trial de novo. In addition to Treml's admission, the circuit court found that the record failed to present evidence that there was negligence on the part of anyone, that all the record included was speculation, and that the circuit court had no choice but to dismiss Treml's action. Our independent review of the record supports the circuit court's findings and conclusion that a prima facie case was not established by Treml.

¶10 Treml further contends that Zwisler's causing damage to Treml's property finds support in the doctrine of res ipsa loquitur. The doctrine of res ipsa loquitur is a circumstantial evidence rule that permits the fact finder to infer the defendant's negligence from the mere occurrence of an event and ordinarily arises

at trial in determining the instructions the trial court should give to the jury.[2] ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶3, 241 Wis. 2d 804, 623 N.W.2d 751. Treml never raised the res ipsa loquitur contention in the circuit court that he presents here on appeal.

¶11 This court will generally not review an issue raised for the first time on appeal, but this rule of judicial administration does not affect the power of this court to deal with the issue. ***State v. Zanelli***, 212 Wis. 2d 358, 369, 569 N.W.2d 301 (Ct. App. 1997). Whether to admit or exclude evidence is within the trial court's sound discretion. ***State v. Clark***, 179 Wis. 2d 484, 490, 507 N.W.2d 172 (Ct. App. 1993). We will not overturn a discretionary determination on a ground not brought to the attention of the trial court. ***State v. Foley***, 153 Wis. 2d 748, 754, 451 N.W.2d 796 (Ct. App. 1989). Treml's res ipsa loquitur argument fails.

¶12 Costs are awarded to the respondent pursuant to WIS. STAT. § 809.25.

By the Court.—Order affirmed.

[2] The doctrine of res ipsa loquitur requires proof of three elements: (1) that either a lay person is able to determine as a matter of common knowledge or an expert testifies that the result which occurred does not ordinarily occur in the absence of negligence; (2) that the result must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) that the evidence offered is sufficient to remove the causation question from the realm of conjecture, but not so substantial that it provides a full and complete explanation of the event. ***Peplinski v. Fobe's Roofing, Inc.***, 193 Wis. 2d 6, 17, 531 N.W.2d 597 (1995). When facts developed in the course of a trial are sufficient to raise a res ipsa loquitur inference, a plaintiff may rely on that doctrine even though he or she did not plead it. ***Szafranski v. Radetzky***, 31 Wis. 2d 119, 133, 141 N.W.2d 902 (1966).

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.