REL: April 10, 2020

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

1181015

Cedrick D. Nettles

v.

Ryan Pettway d/b/a Pettway's Paint, Body and Wrecker Service

Appeal from Wilcox Circuit Court
(CV-18-900039)

SELLERS, Justice.

Cedrick D. Nettles was struck by a wheel that detached from an automobile owned and operated by Antwon Aaron. Nettles sued Ryan Pettway, doing business as Pettway's Paint, Body and Wrecker Service ("Pettway"), in the Wilcox Circuit

Court, alleging that Pettway had negligently and/or wantonly installed the wheel on the automobile and that Pettway's negligence and/or wantonness resulted in Nettles's injury.[1] The trial court entered a summary judgment in favor of Pettway. We affirm.

I. Undisputed Facts

Aaron engaged Pettway to install "after market" wheel rims and tires on his automobile. The wheel rims and tires required the use of wheel adapters containing studs. Aaron purchased used adapters containing the studs from a discount tire store. He thereafter provided the wheel adapters, rims, and tires to Pettway for installation. Pettway inspected the used adapters and determined that the studs on the adapters looked "good." Likewise, Aaron averred in an affidavit that the wheel-assembly parts did not appear to him to be deformed or worn. Nettles does not direct this Court to any testimony from any witness averring that there was a visible defect in

[1]Nettles also sued Aaron, but subsequently dismissed him from the action with prejudice; accordingly, Aaron is not a party to this appeal. Nettles has also asserted no argument on appeal with regard to his wantonness claim; that claim is, thus, deemed waived. Pardue v. Potter, 632 So. 2d 470, 473 (Ala. 1994)("Issues not argued in the appellant's brief are waived.").

the parts used to complete the wheel assembly and mount the tires.

After Aaron picked up his automobile from Pettway, he test drove it and determined that there were no problems with its overall operation. On the same day, Aaron drove the automobile extensively during the "May Day" festivities in his community. Aaron explained that, approximately 10 to 12 hours after picking up the automobile from Pettway and driving it, the left rear tire of the automobile suddenly, unexpectedly, and without warning came off, injuring Nettles, who had been standing in a yard adjacent to the street on which Aaron was driving. The next day, Aaron returned the automobile to Pettway, who determined that three of the five studs on the left rear adapter were completely sheared off and that the other two were broken. Pettway replaced the adapter containing the broken studs with a new adapter that, he said, Aaron supplied. Pettway discarded the used adapter in the normal course of business. Accordingly, there was no physical evidence to indicate why the studs on the adapter had broken, and there was no allegation of spoliation of evidence.

Nettles's suit alleged that Pettway had negligently installed the wheel assembly and tire that detached from Aaron's automobile and that Pettway's negligence was the proximate cause of Nettles's injuries. Pettway moved for a summary judgment pursuant to Rule 56(c), Ala. R. Civ. P. During the summary-judgment proceedings, Nettles presented no specific act of negligence on Pettway's part. Rather, he sought to demonstrate Pettway's negligence by inference under the doctrine of res ipsa loquitur. Following a hearing, the trial court entered a summary judgment in favor of Pettway, finding the doctrine of res ipsa loquitur inapplicable. Nettles filed a motion to alter, amend, or vacate that judgment, which the trial court denied. This appeal followed.

II. Standard of Review

> "We review the trial court's grant or denial of a summary-judgment motion de novo, and we use the same standard used by the trial court to determine whether the evidence presented to the trial court presents a genuine issue of material fact. Bockman v. WCH, L.L.C., 943 So. 2d 789 (Ala. 2006). Once the summary-judgment movant shows there is no genuine issue of material fact, the nonmovant must then present substantial evidence creating a genuine issue of material fact. Id. 'We view the evidence in the light most favorable to the nonmovant.' 943 So. 2d at 795. We review questions of law de novo."

Smith v. State Farm Mut. Auto. Ins. Co., 952 So. 2d 342, 346 (Ala. 2006).

III. Discussion

This appeal asks us to determine (1) whether the trial court erred in finding as a matter of law that the doctrine of res ipsa loquitur was inapplicable and (2) if the trial court did not err in finding the doctrine inapplicable, whether Nettles met his burden of demonstrating negligence by ordinary means. "Proof of negligence requires the establishment of a duty and a breach thereof that proximately caused damage to the plaintiff." South Coast Props., Inc. v. Shuster, 583 So. 2d 215, 217 (Ala. 1991). "Mere proof that an accident and an injury occurred is generally insufficient to establish negligence." Id. However, negligence may be inferred under certain circumstances if the doctrine of res ipsa loquitur is applicable.

> "The res ipsa loquitur doctrine allows 'an inference of negligence where there is no direct evidence of negligence.' Ex parte Crabtree Industrial Waste, Inc., 728 So. 2d 155, 156 (Ala. 1998). For the doctrine to apply, a plaintiff must show that:
>
> > "'(1) the defendant ... had full management and control of the instrumentality which caused the injury; (2) the circumstances [are] such that according to common

> knowledge and the experience of mankind the accident could not have happened if those having control of the [instrumentality] had not been negligent; [and] (3) the plaintiff's injury ... resulted from the accident.'
>
> "Crabtree Industrial Waste, 728 So. 2d at 156 (quoting Alabama Power Co. v. Berry, 254 Ala. 228, 236, 48 So. 2d 231, 238 (1950), and citing Ward v. Forrester Day Care, Inc., 547 So. 2d 410, 411 (Ala. 1989), and Khirieh v. State Farm Mut. Auto. Ins. Co., 594 So. 2d 1220, 1223 (Ala. 1992)). However, '[i]f one can reasonably conclude that the accident could have happened without any negligence on the part of the defendant[], then the res ipsa loquitur presumption does not apply.' Crabtree Industrial Waste, Inc., 728 So. 2d at 158."

Kmart Corp. v. Bassett, 769 So. 2d 282, 286 (Ala. 2000). "Whether a fact is a matter of common knowledge is an issue to be determined by the court." Id.

The trial court determined that Nettles failed to satisfy the second element of the res ipsa loquitur doctrine because he failed to offer substantial evidence to foreclose other possibilities for the detachment of the wheel from the automobile. The only person who provided testimony concerning the installation of the wheel was Pettway, whom Nettles himself has referred to as an auto-collision expert. Pettway stated in his deposition that it was common for customers to provide their own parts, new or used, for repairs or

installation, and that he never installed used parts on an automobile if the parts did not look right and/or were cracked. Pettway further stated that he could tell that the studs on the adapters provided by Aaron were in used condition but that he did not change them out because they looked "good." Pettway also provided, without contradiction, a step-by-step analysis of how he installed the wheel adapters and tires. Pettway noted that, after he installed the wheel adapters and tires, he double-checked all the lug nuts. When asked by Nettles's attorney what could cause a stud to break, Pettway explained:

> "A. Well, actually, you know, certain ruts in the road, when you [have] that thin wheel on there like that, [the studs] get in a jam. Also when the [automobile] shift[s] to one side, it will break the studs on it. Like if you [were] turning hard and [the automobile shifts], it will break the studs on it.
>
> "....
>
> "Q. How many studs broke on [the left rear adapter]?
>
> "....
>
> "A. Okay. You [have] five studs on it. It cut three of them off real flat, but it cut two of them off where you could at least get another turn just to sit the rim back on the [automobile].

> "Q. Okay. So three of them were cut in half, basically.
>
> "A. Well, [they] were cut flush.
>
> "Q. Right. So cut in two--not in half but cut in two.
>
> "A. Yes. Well, all of them--you know, like the lug came off of one, and you could tell it like shifted. Like I say, if a car shift[s] like this (demonstrating), if you drive it a certain way and it hit[s] in a certain way and it hit[s] in a certain rut in the road, it will shift the wheel. Those kind of cars, called a G-body, that the rear end is just like this, so [it will] shift."

Pettway presented prima face evidence that he properly inspected and installed the adapter containing the studs and that the detachment of the wheel could have been attributable to the manner in which Aaron had operated the automobile during the 10 to 12 hours before the accident. Pettway also pointed out that common sense dictates that there could have been internal structural defects in the studs that caused them to break and that those defects would not have been detected upon inspection.

In his motion in opposition, Nettles asserted that Pettway installed the used adapters on Aaron's automobile without asking how old they were, where they came from, or how used they were. He asserted that Pettway knew the studs were

used, yet he decided not to replace them with new ones. Nettles also points out that the accident occurred less than 12 hours after Aaron picked up the automobile from Pettway's shop. Nettles claims that this evidence supports an inference that Pettway negligently failed to properly inspect and verify the integrity of the studs. Nettles, however, provided no evidence to foreclose the possibility that the detachment of the wheel could have occurred as a result of the manner in which Aaron had operated the automobile during the 10 to 12 hours before the accident or as a result of internal latent defects in the wheel-assembly parts. Because Nettles offered no evidence to foreclose such possibilities, he did not satisfy the second element of the res ipsa loquitur doctrine. Simply put, one could reasonably conclude that the tire detached from the automobile without any negligence on Pettway's part. See, e.g., Ex parte Crabtree Indus. Waste, Inc., 728 So. 2d 155, 158 (Ala. 1998) (holding that, despite plaintiff's res ipsa loquitur argument, the defendants were entitled to a summary judgment because one could reasonably conclude that the wheel detached from the moving vehicle as a result of a failure of the materials or third-party

negligence, rather than the defendant's negligent inspection of the wheel).

Nettles argues that he was not required to exclude all other explanations for the detachment of the wheel to prove Pettway's negligence under the doctrine of res ipsa loquitur. See George v. Alabama Power Co., 13 So. 3d 360, 365 (Ala. 2008)("'"The plaintiff need not ... conclusively exclude all other possible explanations.... It is enough that the facts proved reasonably permit the conclusion that negligence is the more probable explanation. ..."'" (quoting Kmart Corp. v. Bassett, 769 So. 2d at 289, 365 (Hooper, C.J., dissenting and quoting Restatement (Second) of Torts § 328D cmt. e (1965) (emphasis added))). However, Nettles fails to appreciate that, once Pettway offered evidence of other plausible explanations for the accident, he was required to offer substantial evidence demonstrating that his theory of negligence attributable to Pettway was the more probable explanation for the detachment of the wheel. In this case, such a proffer would be difficult, given the number of potential intervening causes that could explain the shearing of the studs. To show substantial evidence in this case,

Nettles was required to preclude all other rational explanations such that the only plausible explanation was Pettway's negligent installation of the wheel. The circumstances surrounding this accident, however, show that, after the automobile was released to Aaron, Pettway no longer had exclusive control over the automobile, the wheel assembly, or the tires. And, given the time lapse between the time Aaron took possession of his automobile and the accident, any number of other significant factors could have proximately caused the accident. Pettway's work on the automobile was too remote to infer his exclusive negligence.

Because the res ipsa loquitur doctrine did not supply an inference of negligence in this case, Nettles was required to show negligence through the ordinary means, i.e., by adducing substantial evidence of a duty, breach of duty, and proximate cause. Nettles argues that Pettway's negligence can be established completely through circumstantial evidence. Although circumstantial evidence may establish negligence, reliance on inferences based on conjecture and speculation are not sufficient to overcome a properly supported summary-judgment motion. In this case, there were other plausible

theories for the detachment of the wheel from the automobile. Nettles bases his theory of negligence, i.e., that Pettway was negligent in his installation of the wheel, solely on conjecture, without any corroborating substantial evidence. See Hurst v. Alabama Power Co., 675 So. 2d 397, 400 (Ala. 1996)(noting that "mere conclusory allegations or speculation that fact issues exist will not defeat a properly supported summary judgment motion, and bare argument or conjecture does not satisfy the nonmoving party's burden to offer facts to defeat the motion"). See also Southern Ry. v. Dickson, 211 Ala. 481, 486, 100 So. 665, 669 (1924) (noting that "[t]here may be two or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any one of them, they remain conjectures only").

IV. Conclusion

Nettles failed to produce substantial evidence by inference or ordinary means to establish that Pettway negligently installed the wheel that caused Nettles's injuries. Accordingly, the summary judgment in favor of Pettway is affirmed.

AFFIRMED.

Bolin, Shaw, Wise, Bryan, Mendheim, Stewart, and Mitchell, JJ., concur.

Parker, C.J., dissents.

PARKER, Chief Justice (dissenting).

I disagree with both major conclusions of the main opinion. First, Cedrick D. Nettles met the ordinary-occurrence element of the doctrine of res ipsa loquitur, as that element is currently understood by this Court. Second, drawing all reasonable inferences in Nettles's favor, I believe he produced substantial evidence that Ryan Pettway was negligent.

I. Res Ipsa Loquitur

Under the facts of this case, Nettles met the second element of the doctrine of res ipsa loquitur. To create an inference of negligence sufficient to overcome a summary-judgment motion, this element requires the plaintiff to produce evidence that "'the circumstances [of the accident were] such that[,] according to common knowledge and the experience of mankind[,] the accident could not have happened if those having control of the [instrumentality] had not been negligent.'" Ex parte Crabtree Indus. Waste, Inc., 728 So. 2d 155, 156 (Ala. 1998) (quoting Alabama Power Co. v. Berry, 254 Ala. 228, 236, 48 So. 2d 231, 238 (1950) (final bracketed language added in Crabtree)). As currently understood by this

Court, this ordinary-occurrence element requires merely that the plaintiff produce evidence from which it can reasonably be inferred that the defendant's negligence was the most probable cause of the accident. See George v. Alabama Power Co., 13 So. 3d 360, 365 (Ala. 2008). The plaintiff is no longer required, as the main opinion incorrectly asserts, to show that the defendant's negligence was the only possible cause.[2]

In Crabtree, this Court held that a plaintiff failed to meet the ordinary-occurrence element because "the plaintiff failed to present substantial evidence to foreclose [the] possibilities" that the subject accident may have been caused by events or factors other than negligence by the defendant.

[2]See ___ So. 3d at ___, ___, ___, ___ ("'"[I]f one can reasonably conclude that the accident could have happened without any negligence on the part of the defendant[], then the res ipsa loquitur presumption does not apply."'" (quoting Kmart Corp. v. Bassett, 769 So. 2d 282, 286 (Ala. 2000), quoting in turn Crabtree, 728 So. 2d at 158); "[Nettles] failed to offer substantial evidence to foreclose other possibilities ...."; "Nettles ... provided no evidence to foreclose the possibility that" the accident could have been caused by problems other than Pettway's negligence; "Nettles offered no evidence to foreclose such possibilities ...."; "[O]ne could reasonably conclude that the tire detached from the automobile without any negligence on Pettway's part."; "Nettles was required to preclude all other rational explanations such that the only plausible explanation was Pettway's negligent installation of the wheel."; "[A]ny number of other significant factors could have proximately caused the accident.").

728 So. 2d at 157-58. We understood this element to mean that res ipsa loquitur does not apply "[i]f one can reasonably conclude that the accident could have happened without any negligence on the part of the defendants." Id. at 158.

Crabtree's interpretation of the ordinary-occurrence element was most recently relied on by this Court in Kmart Corp. v. Bassett, 769 So. 2d 282 (Ala. 2000). There, a malfunctioning automatic door injured a store patron. Relying on Crabtree, we discussed possible causes of the malfunction other than the store owner's negligence, and we concluded that the plaintiff failed to satisfy the ordinary-occurrence element. We reasoned that the plaintiff

> "did not 'foreclose the possibility that [the company that installed the door or another company that sometimes serviced the door] was negligent, that the safety mat itself was inherently defective, or ... that the alleged malfunction could have occurred even in the absence of any negligence.' ...
>
> "... '[I]f one can reasonably conclude that the accident could have happened without any negligence on the part of the defendant[], then the res ipsa loquitur presumption does not apply.' Crabtree[], 728 So. 2d at 158.
>
> "....
>
> "... [Here,] 'one can reasonably conclude that the accident could have happened without any

> negligence on the part of the defendant[].' Crabtree[], 728 So. 2d at 158."

Id. at 286-87.

Chief Justice Hooper dissented, arguing that Crabtree's interpretation of the ordinary-occurrence element was wrong. Relying on the Restatement (Second) of Torts, he posited that "'[t]he plaintiff need not ... conclusively exclude all other possible explanations.... It is enough that the facts proved reasonably permit the conclusion that negligence is the more probable explanation....'" Id. at 289 (Hooper, C.J., dissenting) (quoting Restatement (Second) of Torts § 328D, cmt. e (Am. Law. Inst. 1965)). As to the facts in Kmart, Chief Justice Hooper contended that "[the plaintiff] should not have to prove that automatic doors cannot malfunction in the absence of negligence; she should have only to present facts that would permit the jury to conclude that negligence was the more probable explanation." Id. In other words, "[the plaintiff] should not be required to disprove all other possible reasons for the malfunction, as the majority suggests." Id. Chief Justice Hooper agreed with the Supreme Court of Nebraska:

> "'"The plaintiff is not required to eliminate with certainty all other possible causes or inferences, which would mean that the plaintiff must prove a civil case beyond a reasonable doubt. All that is needed is evidence from which reasonable persons 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. It is enough that the court cannot say that the jury could not reasonably come to that conclusion."'"

Id. (quoting Brown v. Scrivner, Inc., 241 Neb. 286, 289, 488 N.W.2d 17, 19 (1992), quoting in turn Anderson v. Service Merchandise Co., 240 Neb. 873, 880, 485 N.W.2d 170, 176 (1992)).

Chief Justice Hooper's interpretation was adopted unanimously by this Court in George v. Alabama Power Co., 13 So. 3d 360 (Ala. 2008). After reciting the ordinary-occurrence element, we specifically stated: "'"The plaintiff need not ... conclusively exclude all other possible explanations.... It is enough that the facts proved reasonably permit the conclusion that negligence is the more probable explanation...."' Kmart Corp. v. Bassett, 769 So. 2d 282, 289 (Ala. 2000) (Hooper, C.J., dissenting ...) (emphasis added)." 13 So. 3d at 365.

The difference between the Crabtree standard and the George standard is more than semantics. Under Crabtree, the

plaintiff must affirmatively exclude all other potential causes of the accident, whereas under George, the plaintiff must merely produce evidence from which a jury could reasonably conclude that the defendant's negligence was the most probable cause of the accident. Under the George standard, as explained by the Restatement:

> "The plaintiff need not ... conclusively exclude all other possible explanations, and so prove his case beyond a reasonable doubt. Such proof is not required in civil actions, in contrast to criminal cases. It is enough that the facts proved reasonably permit the conclusion that negligence is the more probable explanation. This conclusion is not for the court to draw, or to refuse to draw, in any case where either conclusion is reasonable; and even though the court would not itself find negligence, it must still leave the question to the jury if reasonable men might do so."

Restatement (Second) of Torts § 328D cmt. e. See also Restatement (Third) of Torts: Physical & Emotional Harm § 17 cmt. j (Am. Law. Inst. 2010) ("[T]he court determines whether the plaintiff's evidence is sufficient for a reasonable jury to find that res ipsa loquitur is appropriate; that is, whether reasonable minds can infer that the accident is of the type that usually happens because of the negligence of the class of actors to which the defendant belongs."). Indeed, the Crabtree standard would place a virtually insurmountable

burden on plaintiffs who have been injured by a probable but unobserved negligence to conclusively disprove all other possible causes of their injuries. Thus, it is with good reason that in George we rejected that draconian standard in favor of the Restatement approach embraced by Chief Justice Hooper's Kmart dissent.

Consequently, since George, the Crabtree standard is no longer good law. Yet, as detailed in footnote 2 above, the main opinion relies almost exclusively on the Crabtree standard in concluding that Nettles failed to meet the ordinary-occurrence element of res ipsa loquitur. And although the main opinion refers to this Court's current George standard, ___ So. 3d at ___, the main opinion fails to follow it. Instead, after a two-sentence discussion noting that the George standard would be "difficult" to meet in this case, the main opinion immediately reverts to the superseded Crabtree standard. ___ So. 3d at ___.

Moreover, contrary to the main opinion's conclusion, Nettles did meet the George standard. The accident occurred 10 to 12 hours after Pettway installed the wheel equipment; three of the five studs were "sheared off"; and Pettway

admitted that he did not closely inspect the wheel adapters. From this evidence, a reasonable jury could conclude that the most probable cause of the wheel's detachment was negligence on Pettway's part. That is all that is required by George. While other causes were possible, such as negligent driving by Antwon Aaron, a rut in the road, or a hidden defect in the equipment, there was no concrete evidence to support any of those causes. And under George, their mere possibility does not preclude the application of res ipsa loquitur.

In summary, Nettles presented substantial evidence from which a jury could reasonably conclude that Pettway's negligence was the most probable cause of the accident. Accordingly, Nettles met the ordinary-occurrence element of the doctrine of res ipsa loquitur.

II. Substantial Evidence of Negligence

Even if res ipsa loquitur did not apply, Nettles still presented substantial evidence of negligence by Pettway. As previously noted, the wheel flew off less than 12 hours after Pettway installed it without having inquired about the age or history of the used adapters. This evidence supported an inference that Pettway negligently installed the wheel

equipment or negligently failed to inspect it before installing it. That is, this was "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment [could] reasonably infer" that Pettway negligently caused Nettles's injury. West v. Founders Life Assur. Co. of Fla., 547 So. 2d 870, 871 (Ala. 1989).

The main opinion dismisses this inference as "conjecture and speculation." ___ So. 3d at ___. But this Court did not think so, in a still valid part of Crabtree. There, under very similar facts, we specifically said: "The evidence presented would support an inference that the wheel came off as a result of negligence on the part of the third party ... who repaired the tire three days before this [accident] ...." 728 So. 2d at 157. If three days supported an inference of repairman negligence in Crabtree, I cannot see how 12 hours support only "conjecture and speculation" here.

Further, the main opinion finds Nettles's evidence insufficient because "there were other plausible theories for the detachment of the wheel." ___ So. 3d at ___. But on a motion for summary judgment, the existence of other plausible theories is irrelevant. Rather, the question is whether,

viewing the evidence in the light most favorable to Nettles (not least favorable to him) and drawing all inferences in his favor (not against him), the evidence supported a conclusion of negligence by Pettway. See Dow v. Alabama Democratic Party, 897 So. 2d 1035, 1038-39 (Ala. 2004).

Therefore, Nettles presented substantial evidence of negligence sufficient to rebut Pettway's motion for summary judgment.

III. Conclusion

Under George, the "most probable" standard has superseded Crabtree's exclusivity standard for applying the ordinary-occurrence element of the doctrine of res ipsa loquitur. Although the main opinion fails to recognize this development in our jurisprudence, in this case application of the George standard means that Nettles satisfied this element. And even if res ipsa loquitur were not applicable, Nettles's evidence would still be sufficient to create a genuine issue of material fact as to whether negligence on Pettway's part caused the wheel detachment that injured Nettles. Accordingly, I would reverse the summary judgment.