

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 18-11442  
Non-Argument Calendar

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D.C. Docket No. 1:16-cv-02178-AT

KIMBERLY THOMAS,

Plaintiff - Appellant,

versus

AMTRAK,  
NATIONAL RAILROAD PASSENGER CORPORATION,  
d.b.a. Amtrak,  
JOHN DOE,  
(to be named later),

Defendants - Appellees.

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Appeal from the United States District Court  
for the Northern District of Georgia

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(August 15, 2018)

Before WILSON, BRANCH, and HULL, Circuit Judges.

PER CURIAM:

Kimberly Thomas appeals the district court's grant of summary judgment in favor of the National Railroad Passenger Corporation (Amtrak). The case stems from Thomas's alleged injuries after a cushion in an Amtrak sleeper car fell on her in North Carolina. On appeal, Thomas argues that the district court erred in its application of the summary judgment standard. Specifically, she contends that the district court analyzed *res ipsa loquitur* under North Carolina law incorrectly and gave improper weight to an Amtrak superintendent's affidavit. After careful review of the parties' briefs and the record, we affirm.<sup>1</sup>

I.

We review the district court's grant of summary judgment *de novo*. *Rine v. Imagitas, Inc.*, 590 F.3d 1215, 1222 (11th Cir. 2009). In our review, we construe the evidence and all reasonable inferences in the light most favorable to the non-movant. *Id.* We will affirm summary judgment only if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The movant carries the initial burden of demonstrating that there are no genuine issues of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). If this burden is satisfied, the burden shifts to the non-movant to show that a genuine issue remains for trial.

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<sup>1</sup> Thomas did not submit a reply to the government's brief on appeal.

*United States v. Four Parcels of Real Prop.*, 941 F.2d 1428, 1438 (11th Cir. 1991) (en banc).

Under North Carolina law, *res ipsa loquitur* applies when (1) direct proof of the cause of injury is not available; (2) the instrumentality involved in the incident was under the defendant's control at that time; (3) the injury is of a type that does not ordinarily occur without some negligent act or omission. *Grigg v. Lester*, 401 S.E.2d 657, 657–58 (N.C. Ct. App. 1991). *Res ipsa loquitur* does not apply when the entity alleged to have caused the injury was not under the exclusive control or management of the defendant at the time of the incident. *O'Quinn v. Southard*, 152 S.E.2d 538, 542–43 (N.C. 1967). Where the facts of an incident do not point to the defendant as the only probable tortfeasor, the plaintiff must present additional evidence eliminating negligence on the part of all others in control of the injurious instrument in order to survive summary judgment. *Kekelis v. Whitin Mach. Works*, 160 S.E.2d 320, 323 (N.C. 1968).<sup>2</sup>

### III.

The district court did not err in granting summary judgment in favor of Amtrak. Thomas brought a single negligence claim in this case and argued that *res ipsa loquitur* should apply, or namely, that the thing speaks for itself and therefore

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<sup>2</sup> Thomas chose to bring this case in Georgia. Under Georgia choice of law rules, we assess tort cases according to the substantive law of the state where the tort was committed. *Rayle Tech Inc., v. DEKALB Swine Breeders, Inc.*, 133 F.3d 1405, 1409 (11th Cir. 1998).

the jury could infer negligence “from the mere occurrence of the event and the defendant’s relation to it.” *Kekelis*, 160 S.E.2d at 323. But Thomas did not satisfy her burden under North Carolina law to eliminate other potential tortfeasors or wrongdoers. *See id.* In essence, Thomas did not present any evidence that removed her or her daughter, the only two people in the sleeper car at the time, from fault in the alleged incident.<sup>3</sup> Thomas alleges that she used the bed in the sleeper car in the traditional manner, but offers no evidence to corroborate her allegations. At the summary judgment stage, bare assertions simply cannot suffice. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–24, 106 S. Ct. 2552, 2553 (1986). Therefore, Thomas’s *res ipsa loquitur* argument on appeal has no merit.

Thomas’s contention concerning the Amtrak superintendent’s affidavit is also unavailing. Thomas argues that the affidavit of Amtrak Superintendent of Mechanical Operations, Frank Ross (the Ross Affidavit), was improperly relied upon by the district court as evidence at this stage of the case. But inherent in the summary judgment inquiry is the district court’s ability to consider affidavits taken from personal knowledge of the event at issue. *See Fed. R. Civ. P. 56; Macuba v. Deboer*, 193 F.3d 1316, 1322–23 (11th Cir. 1999). Ross specifies in the affidavit

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<sup>3</sup> Thomas testified in her deposition that she was in the sleeper car with her daughter for approximately twelve hours before the incident. *Cf. Schueler v. Good Friend N.C. Corp.*, 57 S.E.2d 324, 324–25 (N.C. 1950) (concluding that the plaintiff’s negligence claim based on *res ipsa loquitur* was properly submitted to the jury because the evidence showed that she was immediately thrown to the ground upon sitting down in a connected row of chairs that were in the complete control of the defendant).

that his testimony consists of his own personal knowledge. Amtrak also buttressed the affidavit with the documents that support Ross's contentions. The district court could have assessed the affidavit alone as evidence, but having the documents to also consider strengthened the affidavit's reliability in support for summary judgment. Thomas's contention as to the Ross Affidavit is thus simply wrong.

The district court applied the summary judgment standard correctly. Amtrak met its initial burden to show that Thomas did not have evidence in the record to support her negligence claim based on *res ipsa loquitur* or Amtrak's specific acts or omissions. The district court also correctly considered the Ross Affidavit in support of Amtrak's contention. When the burden shifted to Thomas to show a genuine issue of material fact, she could not meet it. Without more, she cannot proceed to trial on her negligence claim.

**AFFIRMED.**