

STATE OF MICHIGAN
COURT OF APPEALS

DAVID KRESMER,

Plaintiff-Appellant,

v

LISA ANN MICHELETTO, LANSDOWNE
ENTERPRISES, LIMITED PARTNERSHIP,
LANSDOWNE NIGHT CLUB, INC., BAJA
BEACH CLUB,

Defendants,

and

KMART CORPORATION,

Defendant-Appellee.

UNPUBLISHED
December 19, 1997

No. 197250
Wayne Circuit Court
LC No. 94-428579-NI

Before: Hoekstra, P.J., and Wahls and Gribbs, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant Kmart Corporation's (hereinafter Kmart) motion for summary disposition. We affirm.

On September 25, 1992, codefendant Micheletto took her four-year old automobile, operating with over 77,500 accumulated miles, to the Kmart Auto Service Center facility as a result of the automobile's shaking and stalling characteristics. Although codefendant Micheletto testified that she informed Kmart of the stalling problem, Hartung, the manager of that facility, testified that he had not been so advised and that the sole recorded mechanical complaint (i.e., that the automobile would run badly or not start at all under wet conditions) had been repaired. Approximately three days later, at 1:00 a.m., codefendant Micheletto's automobile stalled on the right-hand lane of I-75. A short time later, plaintiff crashed his automobile into codefendant Micheletto's automobile and was injured.

Codefendant Micheletto's automobile was completely destroyed and never inspected following the accident. Hartung indicated that codefendant Micheletto's automobile could have stalled for a number of reasons and that the exact cause could not be determined without an examination and inspection of the automobile.

Plaintiff claims on appeal that summary disposition was inappropriate because the trial court erred in ruling that a reasonable jury could not conclude that Kmart had breached its duty when the evidence showed that, after Kmart purportedly repaired a stalling problem in codefendant Lisa Ann Micheletto's automobile, the same automobile stalled on the freeway approximately three days later. We disagree. This Court reviews summary disposition decisions de novo. *Omnicom of Mich v Giannetti Investment*, 221 Mich App 341, 344; 561 NW2d 138 (1997). When conducting this review, we examine the entire record in a light most favorable to the nonmoving party to determine whether a record could be developed that would leave open an issue on which reasonable minds could differ. *Donajkowski v Alpena Power Co*, 219 Mich App 441, 446; 556 NW2d 876 (1996). Plaintiff's well-pleaded allegations are accepted as true. *Stamps v City of Taylor*, 218 Mich App 626, 630; 554 NW2d 603 (1996).

To establish a prima facie case of negligence, the plaintiff must prove (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached that duty (general and specific standards of care); (3) that the defendant's breach of duty was a proximate cause of the plaintiff's damages (cause in fact and legal cause); and (4) that the plaintiff suffered damages. *Johnson v Bobbie's Party Store*, 189 Mich App 652, 659; 473 NW2d 796 (1991), citing *Nolan v Bronson*, 185 Mich App 163, 169; 460 NW2d 284 (1990). The general standard of care in a negligence action is that of a reasonably prudent person under the same or similar circumstances. *Babula v Robertson*, 212 Mich App 45, 52 n 2; 536 NW2d 834 (1995). The specific standard of care requires a determination of " 'whether [the actor's] conduct in the particular case is below the general standard of care, including . . . whether in the particular case the risk of harm created by the [actor's] conduct is or is not reasonable.' " *Lowe v Estate Motors, Ltd*, 428 Mich 439, 457; 410 NW2d 706 (1987). Normally, the court decides the question of duty, general standard of care, and legal or proximate cause, while the jury decides the questions of cause in fact, specific standard of care, and damages. *Bobbie's Party Store, supra* at 659, citing *Bronson, supra* at 169. However, the specific standard of care or "the reasonableness of the defendant's conduct" element may be withheld from the jury if all reasonable minds could not differ. *Lowe, supra* at 460, and *Taylor v Wyeth Lab, Inc*, 139 Mich App 389, 397; 362 NW2d 293 (1984).

Under the doctrine of *res ipsa loquitur*, proof of a negligent act or conduct can be established by a permissible inference of negligence from circumstantial evidence. *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 193-194; 540 NW2d 297 (1995). To avail themselves of the doctrine, plaintiffs must show that (1) the event would ordinarily not occur in the absence of negligence, (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant, and (3) it must not have been due to any voluntary action or contribution on the part of the plaintiffs. *Id.* at 194, citing *Jones v Poretta*, 428 Mich 132, 150-151; 405 NW2d 863 (1987). In *Poretta, supra*, the Michigan Supreme Court also noted that evidence of the true explanation of the event must be more

readily accessible to the defendant than to the plaintiff. *Id.* at 151. Whether *res ipsa loquitur* may be applied in a given case is a question of law. *Id.* at 154 n 8.

In the case at bar, because codefendant Micheletto's automobile was completely destroyed and not inspected following the accident, and because Kmart was added to plaintiff's case nearly three years after the accident occurred, plaintiff must rely on circumstantial evidence to prove that Kmart's conduct (involving diagnosis of and repairs to the automobile) was unreasonable under the circumstances. However, plaintiff has not shown that an automobile will not ordinarily stall in the absence of negligence. As the trial court noted, negligence is only one of many possible explanations for why Micheletto's automobile stalled. Because plaintiff has only circumstantial evidence supporting his theory of Kmart's negligence and the doctrine of *res ipsa loquitur* does not apply in this case, summary disposition was properly granted.

Given our resolution of plaintiff's first issue on appeal, we need not address his remaining issues.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Myron H. Wahls

/s/ Roman S. Gibbs