STATE OF MICHIGAN

COURT OF APPEALS

JESSE MALDONADO,

Plaintiff-Appellee,

v

OTIS ELEVATOR COMPANY,

Defendant/Cross-Defendant-Appellant,

and

INGHAM COUNTY BUILDING AUTHORITY,

Defendant/Cross-Plaintiff.

UNPUBLISHED
November 30, 1999

No. 212495
Ingham Circuit Court
LC No. 96-083124 NO

Before: Sawyer, P.J., and Hood and Whitbeck, JJ.

PER CURIAM.

Defendant Otis Elevator Company (hereinafter "defendant") appeals by leave granted from the circuit court's order denying defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse and remand for entry of judgment in favor of defendant.

In November 1994, plaintiff worked as a janitor in a building owned by defendant Ingham County Building Authority.[1] Plaintiff was vacuuming the tracks of the freight elevator when the doors to the elevator allegedly closed upon his head and caused him to suffer injuries, including but not limited to, loss of hearing. Although the freight elevator was equipped with a "stop" button which would prevent the doors[2] from closing, plaintiff did not activate the button. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10). The trial court denied defendant's motion for summary disposition, holding that the doctrine of res ipsa loquitor and circumstantial evidence presented issues for the trier of fact, and therefore, plaintiff could maintain his cause of action for negligence. The trial court also held that there were no factual issues surrounding a claim for design defect because it had not been pleaded. We granted defendant's application for leave to appeal.[3]

Defendant argues that the trial court erred in denying its motion for summary disposition where plaintiff could not satisfy the elements of res ipsa loquitor. We agree. This Court reviews a trial court's decision regarding a motion for summary disposition de novo. *Countrywalk Condominiums, Inc v Orchard Lake Village*, 221 Mich App 19, 21; 561 NW2d 405 (1997). We examine the record to determine whether the defendant was entitled to judgment as a matter of law. *Id.* In order to avail oneself of the doctrine of res ipsa loquitor, the plaintiff must show that (1) the injury causing event would ordinarily not occur in the absence of negligence, (2) the event was 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 plaintiff. *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 194; 540 NW2d 297 (1995).

In the present case, plaintiff has failed to satisfy the elements of res ipsa loquitor. Plaintiff alleges that he suffered injury when the elevator doors closed upon his head. However, plausible explanations for this event are that plaintiff's body did not extend over the electronic eye to trigger the system or the door which closed upon plaintiff was the hoistway door which was not equipped with sensors. In light of these plausible explanations, the operation of the elevator was not within the exclusive control of defendant and, therefore, the doctrine of res ipsa loquitor does not apply. *Hasselbach v TG Canton, Inc*, 209 Mich App 475, 480; 531 NW2d 715 (1994). Furthermore, plaintiff must establish that the event was not due to any voluntary action or contribution on his part. *Cloverleaf, supra*. Plaintiff acknowledged in his deposition that he could have activated the "stop" button to prevent the elevator doors from closing, but did not do so. Accordingly, the trial court erred in denying defendant's motion for summary disposition where plaintiff cannot satisfy the requirements of res ipsa loquitor.[4]

Plaintiff also argues that the denial of defendant's motion for summary disposition was appropriate because plaintiff has proven a design defect. We disagree.[5] Review of plaintiff's complaint reveals that, while plaintiff used the word "defect" to refer to malfunctions of the electronic eye system, plaintiff failed to allege a claim for design defect. Accordingly, summary disposition was proper pursuant to MCR 2.116(C)(8). Any amendment would not have been justified. MCR 2.116(I)(5). A plaintiff who alleges that a product is defectively designed has the burden of producing evidence of the magnitude of the risk posed by the design, alternatives to the design, or other factors concerning the unreasonableness of the risk of the design. *Lawrenchuk v Riverside Arena, Inc*, 214 Mich App 431, 435; 542 NW2d 612 (1995). Expert testimony is required to establish the design defect. *Id.* Here, plaintiff's expert failed to offer an opinion addressing plaintiff's burden of proof. Accordingly, plaintiff's contention that the circuit court should be affirmed on a claim of design defect is without merit.

Reversed and remanded for entry of judgment in favor of defendant. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Harold Hood
/s/ William C. Whitbeck

[1] The circuit court granted defendant Ingham County Building Authority's motion for summary disposition, and plaintiff has not appealed the circuit court's order. Accordingly, Ingham County Building Authority is not a party to this appeal.

[2] Defendant notes that two types of doors must be entered in order to access the elevator. "Car" doors are the inner doors to the elevator which are equipped with an "electronic eye" or reopening device upon sensing the presence of an obstruction in the doorway. "Hoistway" or outside doors are not equipped with sensor devices, but are adjusted with minimal force such that any impact with an obstruction is mild. Hoistway doors are designed to remain closed to preclude a passenger from entering an empty elevator shaft when the elevator car is at another floor. Plaintiff, in his deposition, could not identify the type of door which allegedly closed upon his head.

[3] *Maldonado v Otis Elevator Co*, unpublished order of the Court of Appeals, entered November 20, 1998 (Docket No. 212495).

[4] We also note that the circuit court stated that there was "circumstantial evidence" for the trier of fact to evaluate, although the circuit court did not specify the evidence upon which it was relying. Our review of the record reveals that plaintiff submitted deposition testimony wherein two employees "heard" about another incident involving the closing of the elevator doors. Documentary evidence filed in opposition to a motion for summary disposition must be admissible evidence. *SSC Associates Ltd Partnership v General Retirement System of Detroit*, 192 Mich App 360, 363-364; 480 NW2d 275 (1991). Opinions, unsworn averments and inadmissible hearsay do not create a disputed fact. *Id.* Accordingly, this hearsay information failed to create a factual issue for the trier of fact.

[5] We note that it was unnecessary for plaintiff to file a cross appeal regarding this issue, which was rejected by the lower court, because it is urged as an alternative ground for affirmance. *Candelaria v B C General Contractors, Inc*, 236 Mich App 67, 83 n 6; 600 NW2d 348 (1999).