

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD A. BOUMA,

Plaintiff-Appellant,

v

BRAVOGRAND, INC. and BISON REALTY,
LLC,

Defendants-Appellees,

and

QUALITY DINING, INC.,

Defendant.

UNPUBLISHED

July 28, 2011

No. 297044

Kent Circuit Court

LC No. 08-002750-NO

Before: SHAPIRO, P.J., and O'CONNELL and OWENS, JJ.

SHAPIRO, P.J. (*concurring*).

I concur in the conclusion that the trial court did not err in granting a directed verdict as to plaintiff's failure-to-inspect claim. There was no evidence regarding what an additional inspection would have shown and the defects giving rise to the incident may have been wholly unapparent even upon such an inspection. Since plaintiff could not identify a discoverable defect, he failed to demonstrate a question of fact as to causation on the failure-to-inspect claim.

Res ipsa loquitur is, however, relevant to the claim of defective premises which was dismissed on a motion for summary disposition and as to which plaintiff does not appeal. A reasonable jury could certainly have found that: (a) a ladder coming loose from a building when affixed by two bolts is an incident that ordinarily does not happen absent negligence; (b) the ladder was in the exclusive control of defendants; (c) the event was not due to any voluntary action on the part of plaintiff; and (d) evidence of the true explanation of the event was more readily accessible to defendants than plaintiff. See *Woodard v Custer*, 473 Mich 1, 7; 702 NW2d 522 (2005).

Whether the factors necessary to request a res ipsa loquitur instruction are present is an issue of fact. The jury is not instructed that they are to apply a presumption of negligence based on findings of the judge. Rather, the jury is instructed that they are to apply such a presumption

if *they* conclude that the four requirements of *res ipsa loquitur* are present. Thus, the issue for the trial court to determine is not whether plaintiff is entitled to the presumption, but only whether the party seeking that instruction has provided evidence from which a reasonable jury could find the factors were present. Accordingly, had *res ipsa loquitur* been raised at that point in the case, it would have been error to grant summary disposition.

Given the way in which the case unfolded, however, I cannot fault the trial court, at the time of the directed verdict motion, for viewing the issue solely through the lens of the failure-to-inspect claim for which there was insufficient evidence of causation. Accordingly, I concur in affirming the grant of directed verdict.

/s/ Douglas B. Shapiro