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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2250**

Wendy Page Rieken, et al.,
Appellants,

vs.

Achim IV, Inc., d/b/a Alley Gators Lounge,
a/k/a Alleygators Nightclub & Restaurant, et al.,
Respondents.

**Filed December 9, 2008
Affirmed in part, reversed in part, and remanded
Halbrooks, Judge**

Hennepin County District Court
File No. 27-CV-07-9756

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Considered and decided by Schellhas, Presiding Judge; Halbrooks, Judge; and
Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals
by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellants challenge the district court's grant of summary judgment to respondents, dismissing their negligence, res ipsa loquitur, and loss-of-consortium claims arising out of injuries suffered when a mirror tile on a restaurant wall fell and struck appellant Wendy Page Rieken. We affirm the district court's grant of summary judgment to respondent Kadur, Inc. because its involvement was too attenuated for a legal duty to be imputed to it. But because issues of material fact exist as to whether respondent Achim IV, Inc. breached its duty to appellants, we reverse summary judgment as to respondent Achim IV, Inc. and remand for trial.

FACTS

Respondent Achim IV, Inc. d/b/a Alley Gators Lounge owns a restaurant and nightclub. Respondent Kadur, Inc. d/b/a Spectrum Lanes, owns a bowling alley within the same building. The businesses share a vice-president, Ron Rosenzweig, but are separately incorporated, maintain different entrances and hours, and have separate employees. Achim IV purchased Alley Gators from a previous owner in 1995. At the time that Achim IV purchased the restaurant, the interior walls had mirrors extending from the tops of some of the booths to the ceiling. Achim IV has never changed the wall treatment. Appellant Wendy Page Rieken was seated in a booth at the restaurant on March 31, 2005, when a mirror tile fell from the wall and struck her on her head.

Rieken testified in her deposition that she did not notice anything unusual about the mirror when she sat down at the booth. She also testified that neither she nor the

other people seated with her bumped or jostled the mirror. After the mirror fell, Rieken stated that she saw spots of glue on the wall but no other fasteners that would have attached the mirror to the wall.

Rosenzweig testified in his deposition that he also saw glue spots on the wall and that after this incident, clips or clamps were installed to reinforce other mirrors in the restaurant. Prior to this incident, no mirror had ever fallen from a wall in the 10 years that Achim IV had owned the restaurant.

In its answers to appellants' interrogatories, Achim IV stated that the mirror at issue "was cleaned as needed and it was never noted by any staff that it was loose or otherwise unstable." Rosenzweig testified that there were no policies regarding inspection or reporting of hazardous conditions. Instead, he stated that "if somebody [saw] something that [was] hazardous . . . that they would bring it to somebody's attention." The same outside service had been cleaning the restaurant's glass and mirrors on a weekly basis since Achim IV purchased it in 1995. Achim IV had never received any reports of mirror-related problems from the cleaning service, although Rosenzweig acknowledged that the outside company's job duties did not include inspection or maintenance of the mirrors. Rosenzweig also testified that the restaurant wait staff spot-cleans the bottom portions of the wall mirrors for "head spots" and fingerprints on a weekly basis. The restaurant staff had never reported any problems with the mirrors.

Rieken sued respondents for personal injury based on theories of negligence¹ and *res ipsa loquitur*. Rieken's husband brought a claim for loss of consortium. The district court concluded that because appellants had presented no evidence that Achim IV or Kadur knew or should have known about the dangerous condition of the mirror, respondents owed no duty to appellants. The district court therefore granted summary judgment to both respondents. This appeal follows.

DECISION

On appeal from summary judgment, we review *de novo* whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *STAR Centers, Inc. v. Faegre & Benson, LLP*, 644 N.W.2d 72, 76-77 (Minn. 2002).

Appellants' arguments in their primary and reply briefs do not distinguish between the alleged liability of respondents Achim IV and Kadur. But at oral argument, appellants conceded that summary judgment was properly granted to Kadur. We agree. We therefore affirm the dismissal of Kadur because, as the district court stated, "the evidence indicates that [Kadur]'s involvement with the mirror and incident in question is simply too attenuated . . . to impute a legal duty [to] it."

We next address the district court's grant of summary judgment to Achim IV. The district court granted summary judgment to Achim IV on appellants' negligence claim because "[a]s a result, [appellants] have failed to produce evidence on which this court

¹ In the complaint, appellants allege premises liability and negligence. Because appellants' negligence claim is based on a theory of premises liability, we will refer to this claim as one for negligence. See *Louis v. Louis*, 636 N.W.2d 314, 320 (Minn. 2001) (stating that premises-liability theory involves negligence based on a condition located on landowner's property).

could conclude that [Achim IV] owed a duty to [appellants] with regard to the mirror at issue.”

A negligence action has four elements: (1) the existence of a duty of care; (2) a breach of that duty; (3) an injury; and (4) the breach of that duty being the proximate cause of the injury. *Louis*, 636 N.W.2d at 318. “Any legal analysis of an action brought against a landowner alleging negligence must begin with an inquiry into whether the landowner owed the entrant a duty.” *Id.* The existence of a duty is generally an issue of law for the court to determine. *Id.* Summary judgment may be granted on negligence issues “where the material facts are undisputed and, as a matter of law, compel only one conclusion.” *Kaczor v. Murrow*, 354 N.W.2d 524, 525 (Minn. App. 1984).

It is well established “that a landowner has a duty to use reasonable care for the safety of all entrants upon the premises.” *Olmanson v. LeSueur County*, 693 N.W.2d 876, 880 (Minn. 2005). This “duty of reasonable care includes an ongoing duty to inspect and maintain property to ensure entrants on the landowner’s land are not exposed to unreasonable risks of harm.” *Id.* at 881; *see also Peterson v. Balach*, 294 Minn. 161, 173-74, 199 N.W.2d 639, 647 (1972) (stating that a property owner’s duty of reasonable care includes inspection). We disagree with the district court’s determination that, on these facts, Achim IV had no duty to appellants. We conclude that, as a matter of law, Achim IV owed appellants the duty of reasonable care. The case instead turns on whether or not that duty was breached.

In order to survive summary judgment, appellants must establish that there are genuine issues of material fact regarding whether or not Achim IV breached its duty of

reasonable care. Appellants argue that Achim IV failed to perform a reasonable inspection of the mirrors and that had such an inspection been performed, Achim IV would have discovered that the mirror was not secure on the wall.

A duty of reasonable care is not breached by the mere occurrence of an accident. *Johnson v. Evanski*, 221 Minn. 323, 326, 22 N.W.2d 213, 215 (1946); *see also MacBeth v. Mondry*, 392 N.W.2d 24, 27 (Minn. App. 1986) (stating that strict liability does not apply to a landowner in a premises-liability case). “If a reasonable inspection does not reveal a dangerous condition, such that the landowner has neither actual nor constructive knowledge of it, under the theory of negligence the landowner is not liable for any physical injury caused to invited entrants by the dangerous condition.” *Olmanson*, 693 N.W.2d at 881; *see also Messner v. Red Owl Stores*, 238 Minn. 411, 413, 57 N.W.2d 659, 661 (1953) (stating that landowner would be negligent if its employees “failed to rectify the dangerous condition after they knew, or in the exercise of reasonable care should have known, that the condition existed”).

Relying on *Messner*, 238 Minn. at 414–15, 57 N.W.2d at 662, and *Otto v. City of St. Paul*, 460 N.W.2d 359, 362 (Minn. App. 1990), the district court stated that “in cases involving dangerous conditions, such as the mirror in this case, a plaintiff must prove that a landowner had actual or constructive knowledge of the dangerous condition prior to the incident in order to establish a landowner’s duty, i.e., the landowner knew or should have known of the condition.” But *Messner* was not decided on summary judgment. 238 Minn. at 412-13, 57 N.W.2d at 660–61. The evidence in *Messner* had been fully developed at trial. *Id.* Following a jury verdict for Messner, who slipped on a banana

peel in a grocery store, the district court granted the grocery store's motion for judgment notwithstanding the verdict. *Id.* The supreme court affirmed on the ground that the evidence was insufficient to permit a finding that a dangerous condition resulted from acts of the grocery store owner's employees or that the condition had existed for such a length of time as to render the employees negligent in not discovering and removing the dangerous condition. *Id.* at 413–15, 57 N.W.2d at 661–62. In addition, the supreme court stated, “[U]nless the dangerous condition in the instant case resulted from acts of defendant's employees, defendant would be negligent only if its employees failed to rectify the dangerous condition after they knew, or in the exercise of reasonable care should have known, that the condition existed.” *Id.* at 413, 57 N.W.2d at 661.

Otto did arise out of a district court's grant of summary judgment to homeowners who were allegedly negligent in maintaining their private sewer line in a location seven feet from the city's main line (and 11 feet beneath the paved road). 460 N.W.2d at 360–62. The homeowners had been third-partied in by the city after the city had been sued by a man injured when the street where he was operating a front-end loader gave way. *Id.* at 360–61. The city remained in the lawsuit. *Id.* This court affirmed the grant of summary judgment to the homeowners, holding that they had no actual knowledge that their sewer line underneath the ground was defective based on the mere presence of a depression in the street that was indistinguishable from “untold numbers of similar depression in St. Paul streets.” *Id.* at 362.

Because breach of a duty is a factual determination, “[s]ummary judgment is seldom granted on negligence issues. However, it may be entered where the material

facts are undisputed and, as a matter of law, compel only one conclusion.” *Kaczor*, 354 N.W.2d at 525. Because this record does not compel that conclusion, we reverse the district court’s grant of summary judgment to Achim IV on appellants’ negligence claim and remand for trial.

Because we reverse summary judgment on appellants’ negligence claim, we also reverse the dismissal of appellants’ *res ipsa loquitur* and loss-of-consortium claims.

“*Res ipsa loquitur*” translates as the thing or situation speaks for itself and . . . is merely another way of characterizing the minimal kind of circumstantial evidence which is legally sufficient to warrant an inference of negligence. The purpose of the doctrine is to assist plaintiff in discharging his obligation to make out a *prima facie* case of negligence and to aid the jury in performing its fact finding function.

Res ipsa rests upon inference and not on presumption. It permits an inference of negligence that the fact-finder is not required to adopt.

There are three elements of *res ipsa loquitur*: . . . (1) The event must be of a kind which ordinarily does not occur in the absence of someone’s 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 plaintiff.

Stelter v. Chiquita Processed Foods, L.L.C., 658 N.W.2d 242, 246–47 (Minn. App. 2003) (citations and quotations omitted). The district court must assess the evidence to determine whether there is sufficient evidence of the three elements. *Fleming v. Hallum*, 350 N.W.2d 417, 420 (Minn. App. 1984). If the evidence is sufficient to establish a *prima facie* case for *res ipsa loquitur*, a jury instruction must be given. See *Olson v. St. Joseph’s Hosp.*, 281 N.W.2d 704, 709 (Minn. 1979); *Stelter*, 658 N.W.2d at 247;

Stearns v. Plucinski, 482 N.W.2d 496, 498 (Minn. App. 1992), *review denied* (Minn. Apr. 29, 1992). The jury then determines whether or not facts exist that would support the application of a res ipsa loquitur theory. *Olson*, 281 N.W.2d at 709. Should the district court determine, at the close of evidence, that appellants have established a prima facie case for res ipsa loquitur, the jury should be so instructed.

Finally, because the loss-of-consortium claim is a derivative of the negligence claim, it also survives summary judgment. *See Carlson v. Mut. Serv. Ins.*, 494 N.W.2d 885, 887 (Minn. 1993).

Affirmed in part, reversed in part, and remanded.