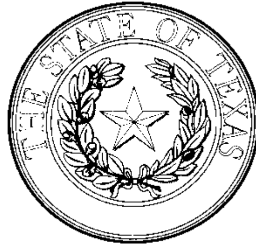
Opinion issued June 16, 2016



In The

Court of Appeals

For The

First District of Texas

NO. 01-14-00958-CV

HERMAN SANDERS, Appellant

V.

NAES CENTRAL, INC. D/B/A AMTECH ELEVATOR SERVICES, Appellee

On Appeal from the 190th District Court
Harris County, Texas
Trial Court Case No. 2012-41207

O P I N I O N

Appellant, Herman Sanders, appeals the trial court's granting of the no-evidence motion for summary judgment filed by Appellee, Naes Central, Inc. d/b/a Amtech Elevator Services [Amtech], on Sander's negligence claim. We affirm.

BACKGROUND

On August 16, 2010, Sanders was in a building with an elevator maintained by Amtech. Sanders entered the elevator on the second or third floor. Sanders alleges that the elevator fell to a few feet below the first floor. He was taken to the hospital and claims injuries as a result of the fall.

Sanders filed suit in 2012, alleging negligence. Later, Amtech filed a no-evidence motion for summary judgment, identifying three elements of Sanders's negligence claim that it asserted Sanders had no evidence to support: that Amtech owed any duty to Sanders, that Amtech breached any duty, or that Sanders suffered any injury as a result of any breach. In his response to the motion, Sanders asserted that the doctrine of *res ipsa loquitur* applied to establish the breach element. In its reply, Amtech argued that Sanders did not meet the requirements for *res ipsa loquitur*. After a hearing, the trial court granted the motion.

NO-EVIDENCE MOTION FOR SUMMARY JUDGMENT

In his two issues, Sanders argues that the trial court erred by granting summary judgment on his negligence claim against Amtech.

A. Standard of Review

After an adequate time for discovery, a party may move for no-evidence summary judgment on the ground that no evidence exists of one or more essential elements of a claim on which the adverse party bears the burden of proof at trial.

TEX. R. CIV. P. 166a(i); *Flameout Design & Fabrication, Inc. v. Pennzoil Caspian Corp.*, 994 S.W.2d 830, 834 (Tex. App.—Houston [1st Dist.] 1999, no pet.). The burden then shifts to the non-movant to produce evidence raising a genuine issue of material fact on the elements specified in the motion. TEX. R. CIV. P. 166a(i); *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006). The trial court must grant the motion unless the non-movant presents more than a scintilla of evidence raising a fact issue on the challenged elements. *Flameout Design*, 994 S.W.2d at 834; *see also Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997) (holding "[m]ore than a scintilla of evidence exists when the evidence supporting the finding, as a whole, rises to a level that would enable reasonable and fair-minded people to differ in their conclusions").

B. Law Applicable to *Res Ipsa Loquitur*

In response to Amtech's no-evidence motion for summary judgment, Sanders asserted that he could satisfy the breach element based on the legal principle of *res ipsa loquitur*. *Res ipsa loquitur*, a Latin phrase meaning "the thing speaks for itself," is a rule of evidence permitting a fact-finder to infer negligence "where it appears that the character of the accident is such that it would not ordinarily occur in the absence of negligence and the evidence shows that the instrumentality causing the injury was under the management and control of the defendant." *Goodpasture, Inc. v. Hosch*, 568 S.W.2d 662, 664 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ

dism'd) (citing *Owen v. Brown*, 447 S.W.2d 883, 886 (Tex. 1969)). It is not a separate cause of action. *Jones v. Tarrant Cnty. Util. Co.*, 638 S.W.2d 862, 865 (Tex. 1982). "The purpose of *res ipsa* is to relieve the plaintiff of the burden of proving *a specific act of negligence* by the defendant when it is impossible for the plaintiff to determine the sequence of events, or when the defendant has superior knowledge or means of information to determine the cause of the accident." *Id.* (emphasis added).

A plaintiff seeking to apply *res ipsa loquitur* must establish "(1) the character of the accident is such that it would not ordinarily occur in the absence of negligence and (2) the instrumentality causing the injury is shown to have been under the management and control of the defendant." *Jones*, 638 S.W.2d at 865. "The first factor is necessary to support the inference of negligence and the second factor is necessary to support the inference that the defendant was the negligent party." *Mobil Chem. Co. v. Bell*, 517 S.W.2d 245, 251 (Tex. 1974). Unless both factors are present, the factfinder cannot reasonably infer from the circumstances of the accident that the defendant was negligent. *See Bond v. Otis Elevator Co.*, 388 S.W.2d 681, 686 (Tex. 1965).

C. Analysis

Sanders, citing *Bond*, contends that he met the first factor because, in that case, the supreme court stated that "an elevator's going into a freefall and injuring the

petitioner [is] such an accident which does not ordinarily occur without negligence, and is such an accident, that from the mere showing that it happened, negligence of those in control may be inferred." 388 S.W.2d at 684. However, assuming, without deciding, that the first factor has been met, we nonetheless conclude that the second factor, i.e., control, is lacking in this case.

Amtech claims that the second factor—management and control—is not met because other potential defendants in the case also had control over the elevator and its components.[1] "The doctrine of res ipsa loquitur is not available to fix responsibility when any one of multiple defendants, wholly independent of each other, might have been responsible for the injury." *Esco Oil & Gas, Inc. v. Sooner Pipe & Supply Corp.*, 962 S.W.2d 193, 195 (Tex. App.—Houston [1st Dist.] 1998, pet. denied). In contrast, multiple defendants having "joint control of the instrumentality causing the injury" do not defeat the doctrine's application. *Id.*; *see*

---

[1] The dissent argues that we cannot consider this issue because we would be "affirming the trial court's ruling on a ground that no one argued at trial or on appeal[,] and that "Amtech did not object to Sander's evidence on this ground[]" and "did not present evidence on this supposed theory." However, this case involves a no-evidence summary judgment. Once Amtech filed its motion, the burden shifted to Sanders to present a scintilla of evidence so as to raise a fact question. *See Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006). Amtech had no burden to present any argument or evidence. Whether Amtech presented a scintilla of evidence, i.e., whether the res ipsa presumption applies here, is a question of law for the Court. *See Sw. Bell Telephone Co. v. Garza*, 164 S.W.3d 607, 621 (Tex. 2004) (noting that whether evidence is more than a scintilla is a question of law). Further, in its Reply to Plaintiff's Response to Defendant's No Evidence Motion for Summary Judgment and in its brief before this Court., Amtech argued that it did not have the requisite control to apply *res ipsa loquitur*.

also Bond, 388 S.W.2d at 685 (holding "exclusive control" does not mean liability must be limited to a single entity; joint control is sufficient). Two cases from the Texas Supreme Court show the difference in how multiple defendants may or may not be held responsible for management and control.

In *Bond*, the plaintiff, who was injured when an elevator went into a "free fall," sued the building owner and the company that manufactured, sold, installed, and independently contracted with the building owner to inspect and maintain the elevator. 388 S.W.2d at 682. Liability was asserted based on the independent contractor's failure to properly maintain the elevator. *Id.* at 686. The supreme court considered whether the doctrine of *res ipsa loquitur* applied, i.e., whether either defendant exercised sufficient control over the elevator. *Id*. at 684–85. The court concluded that the building owner's duty to maintain its elevators could not be delegated to the independent contractor it had hired to maintain the elevators. *Id.* at 686. The court further held that the building owner and the independent contractor had joint control over the maintenance of the elevator. *Id.* at 684–85. As such, the court's finding of joint control was based on the building owner's vicarious liability because "liability against the [building owner] can be predicated upon the negligence of its independent contractor[.]" *Id.* at 686. Because there was joint control over the elevator, based on vicarious liability, the doctrine of *res ipsa* was properly applied. *Id.*

In contrast, in *Marathon Oil Co. v. Sterner*, the plaintiff, an employee of Morrison Construction Company, sued Marathon Oil Company, a company for which Morrison was hired to provide repair and maintenance work at Marathon's plant. 632 S.W.2d 571, 572 (Tex. 1982). The plaintiff claimed he was injured by a gas that escaped at Marathon's plant while he was working there for Morrison and sought to hold Marathon responsible under the doctrine of *res ipsa loquitur* when no one could identify the source of the gas. *Id.* at 572–573. The supreme court held that res ipsa could not be applied because "it is at least as probable that the negligence, if any could be attributed to a Morrison Construction employee working in the vessel . . ." and that "[w]hen the plaintiff's evidence only shows it is equally probable that the negligence was that of another, the court must direct the jury that plaintiff has not proven his case." *Id.* at 574. The court further noted that "[t]he possibility of other causes for the accident besides the defendant's negligence does not have to be eliminated, but the likelihood of other causes must be so reduced that the jury can reasonably find that the negligence, if any, was committed by the defendant." *Id.* Because there were two possible defendants, either of which could have been separately negligent in performing its own duty, the doctrine of *res ipsa loquitur* was not applicable. *Id*.

It is important to note that in *Bond*, wherein joint control was found, both defendants were being held liable for the same negligent act, i.e., the defendants

were jointly responsible for the same duty—maintenance of the elevator. However, in *Sterner*, either possible defendant, acting alone, could have caused the plaintiff's injury. *See Clay v. BMS, Inc.*, 61 S.W.3d 489, 492 (Tex. App.—San Antonio 2001, pet. denied) (holding that plaintiff who sued one defendant alleging negligent installation and another defendant alleging negligent maintenance could not rely on *res ipsa loquitur* doctrine because "[plaintiff] alleged the injury could have been caused by either [of the defendants]."); *see also Parsons v. Ford Motor Co.*, 85 S.W.3d 323, 332 (Tex. App.—Austin 2002, pet. denied) (holding that, in light of plaintiff's agreement that three possible scenarios led to damage, and only one of those scenarios was attributable to defendant, *res ipsa loquitur* was not applicable).

Here, Sander's claims against Amtech are that Amtech negligently "inspected and repaired the elevator [in question] prior to the accident as part of its routine maintenance." However, Sanders sued at least three other defendants in this suit[2] and in its Original Petition, Amtech asserted that the elevator was negligently "manufactured, installed, inspected, and maintained," not merely the negligent maintenance and inspection that Sanders now attributes to Amtech. There is simply

[2] Sanders's petition asserted claims against the building owner, Harris County, and the elevator manufacturer, Otis Elevator, and several other, arguably misnamed defendants. The claims against these other parties were disposed of and are not a part of this appeal. The case proceeded to summary judgment with Amtech as the only remaining defendant.

no evidence that the accident was necessarily caused by negligent inspection and maintenance, the only duties arguably owed by Amtech.[3] Because the elevator's failure could have been caused by negligent manufacture and/or installation, which are duties owed by other parties who are not vicariously liable for Amtech, *res ipsa loquitur* is not applicable.

Indeed, it is the presence of other potential defendants that distinguishes this case from *Bond v. Otis Elevator.* In *Bond*, Otis Elevator *manufactured, installed, and exclusively maintained* the elevator involved. 388 S.W.2d at 682. And, the only other defendant, the building owner, was responsible "predicated upon the negligence of its independent contractor, Otis Elevator Company." *Id.* at 686. Here, there are other entities whose alleged and potential negligence in manufacturing and installing the elevator cannot be attributed to Amtech.

Indeed, this case is very similar to a case from the Kansas Supreme Court that we find persuasive. In *Bias v. Montgomery Elevator Co. of Kansas, Inc.*, 532 P.2d 1053 (Kan. 1975), the plaintiff was injured when the elevator in which he was riding fell unexpectedly. *Id.* at 1055. The plaintiff sued Montgomery Elevator Company, who was responsible for the maintenance of the elevator under an exclusive contract

---

[3] Sanders's expert, Gene Stiffler, provided an affidavit in which he opined that negligent maintenance and inspection caused the accident, but his affidavit was struck because he was not timely presented for deposition. The propriety of this ruling is not before us in this appeal.

with the building owner. *Id.* The elevator had been manufactured and installed by Otis Elevator Company. *Id.* At trial, the plaintiff attempted to rely on the doctrine of *res ipsa loquitur*, which the trial court found to be inapplicable. *Id.* The appeals court agreed, stating:

> [I]n order to establish exclusive control it is not necessary for the plaintiff to eliminate all other possible causes of the accident. All that is required is that the plaintiff produce sufficient evidence from which a reasonable man could say that on the whole it was more likely than not there was negligence on the part of the defendant. If the evidence establishes that it was at least equally probable the negligence was that of another, the court should refuse to submit to the jury the negligence of the defendant on the theory of res ipsa loquitur.

Id. at 1056 (citing PROSSER ON TORTS, 4th ed., § 39, p. 211). The court concluded that because the "defendant company had no control over any design defects, mistakes in installation, or any possible faulty construction of the elevator shaft" and that because "[t]hese are all possible causes of the accident which would not have been subject to the control of the defendant[,]" the plaintiff could not rely on the doctrine of *res ipsa loquitur*. *Id.* at 1057–58.

The same is true here. Sanders seeks to apply *res ipsa loquitur* against Amtech, but Amtech was only responsible for inspecting and maintaining the elevator. Other entities manufactured and installed the elevator, and there is no evidence that the elevator's failure was more likely than not caused by negligent maintenance. Because Sanders produced "no evidence which would indicate it is probable the accident was caused by negligent servicing rather than by negligent

manufacturing or installation," *res ipsa loqutur* cannot be applied in this case. *See Bias*, 532 P.2d at 1058.

Because *res ipsa loquitur* is not applicable, and Sanders presented no other summary judgment evidence showing that Amtech sufficiently controlled the elevator, the trial court properly granted Amtech's no-evidence motion for summary judgment.

Accordingly, we overrule Sanders's issues on appeal.

CONCLUSION

We affirm the trial court's judgment.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Higley and Massengale.

Justice Higley, dissenting.