IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2007 Term

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No. 33183

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FILED
May 15, 2007
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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

DAVID R. KYLE,
Plaintiff Below, Appellant

v.

DANA TRANSPORT, INC.,
A NEW JERSEY CORPORATION AUTHORIZED
TO DO BUSINESS IN THE STATE OF WEST VIRGINIA,
AND RONNIE DODRILL,
Defendants Below, Appellees

Appeal from the Circuit Court of Putnam County
The Honorable N. Edward Eagloski, Judge
Civil No. 01-C-147

AFFIRMED

Submitted: April 3, 2007
Filed: May 15, 2007

Rudolph L. DiTrapano
Lonnie C. Simmons
Heather M. Langeland
DiTrapano, Barrett & DiPiero, PLLC
Charleston, West Virginia
Attorneys for the Appellant

Harvey D. Peyton
Thomas H. Peyton
Peyton Law Firm
Nitro, West Virginia
Attorney for the Appellees

JUSTICE ALBRIGHT delivered the Opinion of the Court.

CHIEF JUSTICE DAVIS and JUSTICE STARCHER concur and reserve the right to file concurring opinions.

SYLLABUS BY THE COURT

1. "A circuit court's entry of summary judgment is reviewed *de novo*." Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

2. "Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. Pt. 4, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

3. "Pursuant to the evidentiary rule of *res ipsa loquitur*, it may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when (a) the event is of a kind which ordinarily does not occur in the absence of negligence; (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff." Syl. Pt. 4, *Foster v. City of Keyser*, 202 W.Va. 1, 501 S.E.2d 165 (1997).

4. A plaintiff seeking to apply the doctrine of *res ipsa loquitur* is required to demonstrate that the evidence he or she intends to present is circumstantial evidence that will

lead to reasonable inferences by the jury, and is not simply evidence which would force the jury to speculate in order to reach its conclusion.

5. "'The doctrine of *res ipsa loquitur* cannot be invoked where the existence of negligence is wholly a matter of conjecture and the circumstances are not proved, but must themselves be presumed, or when it may be inferred that there was no negligence on the part of the defendant. The doctrine applies only in cases where defendant's negligence is the only inference that can reasonably and legitimately be drawn from the circumstances.' Syl. Pt. 5, *Davidson's, Inc. v. Scott*, 149 W.Va. 470, 140 S.E.2d 807 (1965)." Syl. Pt. 2, *Farley v. Meadows*, 185 W.Va. 48, 404 S.E.2d 537 (1991).

6. In order to avoid summary judgment or judgment as a matter of law, a plaintiff who seeks to proceed on a theory of *res ipsa loquitur* must demonstrate each of the three prongs of the test this Court adopted in syllabus point four of *Foster v. City of Keyser*, 202 W.Va. 1, 501 S.E.2d 165 (1997), as a predicate to application of the evidentiary rule of *res ipsa loquitur*.

Albright, Justice:

David R. Kyle appeals from the January 6, 2006, adverse summary judgment ruling entered by the Circuit Court of Putnam County as a result of Appellant's request that he be permitted to proceed under the doctrine of *res ipsa loquitur* in connection with his personal injury case. Upon our review of all pertinent submitted materials and applicable law, we conclude that the circuit court did not commit error in ruling that Appellant had failed to make the requisite demonstrations necessary to permit application of *res ipsa loquitur*. Accordingly, the decision of the circuit court is affirmed.

I. Factual and Procedural Background

As set forth in the January 6, 2006, order of the circuit court, the parties stipulated to the following facts taken in a light most favorable to the Plaintiff/Appellant:

> 1. On February 3, 2000, Plaintiff, David R. Kyle, a master electrician, had been dispatched by his employer, Al Marino, Inc., to examine and repair a problem in the maintenance building owned by Defendant, Dana Transport, Inc., in Nitro, West Virginia.
>
> 2. This maintenance building was on property owned by Defendant, Dana Transport, Inc., and the electrical panel examined by Plaintiff was inside the maintenance building.
>
> 3. Plaintiff was told that Defendant, Dana Transport, Inc., was having a circuit breaker problem. Prior to the 3rd day of February, 2000, Plaintiff had not performed any prior work on this electrical panel in the maintenance building.

> 4. When the Plaintiff examined the panel, he saw that the cover on the electrical panel had been removed.
>
> 5. Plaintiff noticed the screw was loose on one of the mounting fingers of the breaker and tightened it up.
>
> 6. The Plaintiff does not know what happened, but stated the electrical panel blew up.
>
> 7. As a result of this explosion, the Plaintiff suffered various injuries.
>
> 8. The Plaintiff was been unable to determine a cause for this accident.

Prior to the trial of this matter, Appellant requested that his case be allowed to proceed under a *res ipsa loquitur* theory. In February 2003, both parties submitted briefs on this issue which included a stipulation of the above-delineated facts. The matter was not ruled upon by the trial court until the entry of the January 6, 2006, order. In that order, the circuit court decided that Appellant had failed to prove that the event causing Appellant's injuries was of a kind that would ordinarily not occur in the absence of negligence. Additionally, the trial court ruled that Appellant had failed to show that other responsible causes, including his own conduct and that of third parties, were sufficiently eliminated as potential causes of the incident. Through its January 6, 2006, order, the trial court granted summary judgment to Appellees Dana Transport, Inc., and Ronnie Dodrill. Appellant seeks relief from this adverse ruling.

II. Standard of Review

The principles under which we review a summary judgment ruling are well-established. "A circuit court's entry of summary judgment is reviewed *de novo*." Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). Of additional import to our review is this Court's recognition in syllabus point four of *Painter* that "[s]ummary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." *Id.* at 190, 451 S.E.3d at 756, syl. pt. 4.

III. Discussion

Appellant argues that the trial court incorrectly concluded that he was not entitled to present his case to a jury under a theory of *res ipsa loquitur*. This evidentiary doctrine operates as an exception to the general rule that negligence cannot be presumed. *See Foster v. City of Keyser*, 202 W.Va. 1, 14, 501 S.E.2d 165, 178 (1997) (quoting 16 Am. & Eng. Enc. Law, p.448). The question of its application arises in those circumstances where mere occurrences of certain events in and of themselves suggest negligence, barring another plausible explanation. *Id.* at 15, 501 S.E.2d at 179.

After reviewing the development of the doctrine of *res ipsa loquitur* in *Foster*, we proceeded to adopt the principles recognized in the Restatement of Torts (Second) as a predicate to its application:

> Pursuant to the evidentiary rule of *res ipsa loquitur*, it may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when (a) the event is of a kind which ordinarily does not occur in the absence of negligence; (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff.

Foster, 202 W.Va. at 4, 501 S.E.2d at 168, syl. pt. 4.

In ruling on this matter, the trial court concluded that Appellant had failed to satisfy the first two prongs of the test set forth in *Foster*. Specifically, the trial court ruled that Appellant had not shown "that the accident was of a kind that ordinarily would not have occurred in the absence of the Defendants' negligence." Additionally, the circuit court ruled that Appellant "has not presented evidence that other responsible causes, including the conduct of Plaintiff [Appellant], was sufficiently eliminated by the evidence."

Appellant contends that his inability to identify an act of negligence committed by Appellees which might have caused the underlying explosion is inconsequential. He maintains that the doctrine of *res ipsa loquitur* was adopted as an evidentiary aid for plaintiffs in situations similar to his. Stressing that the objective of this evidentiary doctrine

is to allow a litigant to recover without direct proof of negligence, Appellant argues that he has no duty to prove what specific negligent act or omission resulted in his injuries.

In response to these contentions, Appellees observe that while Appellant is not required to prove the specific instance of negligence which caused the accident that resulted in harm to him, he does have a duty to present circumstantial evidence of Appellees' negligence. As this Court explained in *Beatty v. Ford Motor Co.*, 212 W.Va. 471, 574 S.E.2d 803 (2002), "[i]t is . . . 'clearly an incorrect statement of the law' to say that *res ipsa loquitur* 'dispense[s] with the requirement that negligence must be proved by him who alleges it.'" *Id*. at 476, 574 S.E.2d at 808 (quoting *Peneschi v. Nat'l Steel Corp.*, 170 W.Va. 511, 520, 295 S.E.2d 1, 10 (1982)).

We specifically addressed the level of proof that a plaintiff who is relying on *res ipsa loquitur* principles must establish in *Beatty*. We explained that a plaintiff seeking to apply this doctrine is required to demonstrate that the evidence he intends to present is circumstantial evidence "that will lead to reasonable inferences by the jury, and is not simply evidence which would force the jury to speculate in order to reach its conclusion." 212 W.Va. at 476, 574 S.E.2d at 808. As we held in syllabus point two of *Farley v. Meadows*, 185 W.Va. 48, 404 S.E.2d 537 (1991),

> "The doctrine of *res ipsa loquitur* cannot be invoked where the existence of negligence is wholly a matter of

> conjecture and the circumstances are not proved, but must themselves be presumed, or when it may be inferred that there was no negligence on the part of the defendant. *The doctrine applies only in cases where defendant's negligence is the only inference that can reasonably and legitimately be drawn from the circumstances*." Syl. Pt. 5, *Davidson's, Inc. v. Scott*, 149 W.Va. 470, 140 S.E.2d 807 (1965).

Id. at 49, 404 S.E.2d at 538 (emphasis supplied).

In this case, Appellees emphasize that Appellant has not identified any possible cause for the accident which led to his injuries. And, as Appellees note, the only evidence of a potential cause of negligence for causing the electrical fire at issue in this case is Appellant's contact with the breaker box. Critically, without the theory of an expert or even a plausible explanation by the plaintiff as an experienced electrician of what may have happened, the jury would have had to resort to conjecture to identify the cause of this accident. *See Farley*, 185 W.Va. at 50, 404 S.E.2d at 539 (recognizing that where facts suggest more than one inference of wrongdoing, expert testimony may be required to establish inference of negligence under *res ipsa loquitur* principles).

The trial court was required to determine whether Appellant had introduced sufficient evidence to permit the jury to infer that the harm suffered by Appellant was caused by the negligence of Appellees. The role of the trial court, as we discussed in *Foster*, is "to determine whether the inference may reasonably be drawn by the jury, or whether it must

necessarily be drawn." 202 W.Va. at 21, 501 S.E.2d at 185. Provided the case is appropriate for the jury, it is then "the function of the jury to determine whether the inference is to be drawn in any case where different conclusions may reasonably be reached." *Id.* at 21, 501 S.E.2d at 185.

Applying the three-part test we adopted in *Foster*, the trial court determined that Appellant had failed to meet the first two prongs of the test. In deciding against Appellant on the first prong of the test that requires him to demonstrate that the accident is of a kind that ordinarily does not occur absent negligence, the trial court reasoned:

> The Plaintiff is a certified master electrician who was called to the premises owned by the Defendant in order to repair an electrical problem in the Defendant Dana Transport Inc.'s breaker box. The Plaintiff was notified that the breaker box was energized and began working on the breaker box with a pair of needle nose pliers. He was tightening a screw with a screwdriver when he was burned by an electrical fire. The Plaintiff notes that the electrical panel had been removed prior to the Plaintiff examining it and that a screw on one of the breaker's mounting fingers was loose. However, the Plaintiff has offered no evidence that this constitutes negligent conduct of the Defendants or that these conditions contributed in any manner to the electrocution of the Plaintiff. There is a substantial possibility that the Plaintiff's carelessness in performing work on the electrical panel may have been, at the very least, a contributing factor to the accident. Accordingly, the Plaintiff has not shown that the accident was of a kind that ordinarily would not have occurred in the absence of the Defendants' negligence.

As to the second prong of the *Foster* test, the trial court found

> that the Plaintiff has not presented evidence that other responsible causes, including the conduct of the Plaintiff, was sufficiently eliminated by the evidence to allow the application of *Res Ipsa Loquitur*. The records show that it is not clear how the electrical panel was maintained nor whom had previously performed work on the panel, suggesting that the conduct of unknown third persons or the Plaintiff himself, could have caused the accident. The Plaintiff therefore has failed to satisfy the second element of the test set forth in Foster.

As we recognized in *Foster*, the benefit of the doctrine of *res ipsa loquitur* to a plaintiff is the permissible inference of negligence. *See Foster*, 202 W.Va. at 15, 501 S.E.2d at 179. Through our adoption in *Foster* of the Restatement of Torts (Second) principles governing the use of *res ipsa loquitur*, we established a three-part test as a predicate to application of this doctrine. Before *res ipsa loquitur* can be used as an evidentiary tool to supply the requisite element of negligence, a plaintiff who seeks to utilize this doctrine must first adduce sufficient circumstantial evidence which demonstrates that the injury-causing event is the kind of occurrence that does not routinely take place absent negligent conduct; that other responsible causes are sufficiently eliminated; and that the negligent conduct at issue is within the scope of the defendant's duty to the plaintiff. Only when a plaintiff has adduced evidence that meets all three prongs of the *Foster* test is the fact finder entitled to make the permissible inference of negligence without proof of specific acts of negligence.

Upon our review of the record submitted in this case, we are compelled to reach the same conclusion as the trial court: that Appellant failed to meet the first two elements of the test we adopted in *Foster*. Appellant failed to submit any circumstantial evidence of negligent conduct on the part of Appellees. By failing to introduce evidence, lay or expert, as to the cause of the accident, he did not meet the first requirement to show that the accident was of a kind that ordinarily would not have occurred in the absence of Appellees' negligence. He similarly failed to satisfy the second requirement of ruling out other responsible causes for the accident, including his own conduct. *See* Syl. Pt. 4, *Foster*, 202 W.Va. at 4, 501 S.E.2d at 168.

In order to avoid summary judgment or judgment as a matter of law, a plaintiff who seeks to proceed on a theory of *res ipsa loquitur* must demonstrate each of the three prongs of the test this Court adopted in syllabus point four of *Foster* as a predicate to application of the evidentiary rule of *res ipsa loquitur*. *See Foster*, 202 W.Va. at 4, 501 S.E.2d at 168, syl. pt. 4. Because Appellant did not meet the foundational requirements necessary to invoke application of *res ipsa loquitur*, the circuit court correctly held that Appellant failed to show a genuine issue of material fact regarding whether Appellees were negligent through the application of *res ipsa loquitur* principles.

Based on the foregoing, we conclude that the circuit court correctly held that Appellant failed to show a genuine issue of material fact regarding whether Appellees were negligent through the application of *res ipsa loquitur* principles. Accordingly, the January 6, 2006, order of the Circuit Court of Putnam County is hereby affirmed.

Affirmed.