IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

ORANGE COUNTY, FLORIDA,

Appellant,

v. Case No. 5D19-1894

ESTHER WHITEHEAD,

Appellee.

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Opinion filed December 31, 2020

Appeal from the Circuit Court
for Orange County,
Larry Helms, Judge.

Derek J. Angell, of Bell & Roper, P.A., Orlando, and Ronald L. Harrop and Dennis R. O'Connor, of O'Connor & O'Connor, LLC, Orlando, for Appellant.

Christopher J. Bilecki and David A. Paul, of Paul/Knopf/Bigger, Orlando, and Landis V. Curry, III, of Paul/Knopf/Bigger, Tampa, for Appellee.

PER CURIAM.

Orange County (the County) appeals the final judgment entered in favor of Esther Whitehead after a jury found the County negligent for the injuries that Whitehead sustained while she was visiting the Orange County Jail. The County contends that it

was error for the trial court to read the res ipsa loquitur instruction to the jury. We agree. Therefore, we reverse and remand for a new trial.

In February 2014, Whitehead, an attorney meeting a client at the Orange County Jail, was injured when an interior gate at the jail closed on her unexpectedly. As a result, Whitehead filed a complaint against the County for premises liability.

At trial, the County argued that neither it nor the officer who controlled the gate acted negligently and, instead, Whitehead either tripped a sensor or there was a malfunction, which caused the gate to close on her. Whitehead presented testimony from jail staff explaining how the jail gates operate and how an officer manually opens a gate when a visitor wishes to enter or exit the jail. There was also testimony related to sensors on the gates, which act as a safety feature and are meant to stop the gate from closing on someone. In addition, the corrections officer who operated the gate that injured Whitehead stated that he did not press any button while Whitehead was walking through the gate and, if he had done so, the sensors should have stopped the gate from closing. However, Whitehead did not present any evidence explaining whether a malfunction could cause the gate to close unexpectedly. At Whitehead's request, the trial court read the following res ipsa loquitur instruction to the jury:

> If you find that ordinarily the incident would not have happened without negligence and that the subject perimeter gate alleged to have caused injury to Mrs. Whitehead was in the exclusive control of Orange County at the time it caused the injury, you may infer that Orange County was negligent, unless taking into consideration all of the evidence in the case, you find that the operation of the gate was not due to any negligence on the part of Orange County.

The jury subsequently returned a verdict in Whitehead's favor, finding that the County's negligence was the legal cause of her injuries and damages.

Res ipsa loquitur "is a doctrine of extremely limited applicability" that "provides an injured plaintiff with a common-sense inference of negligence where direct proof of negligence is wanting, provided certain elements consistent with negligent behavior are present." Goodyear Tire & Rubber Co. v. Hughes Supply, Inc., 358 So. 2d 1339, 1341 (Fla. 1978). In order to be entitled to an instruction on res ipsa loquitur, the plaintiff "must establish that the instrumentality causing his or her injury was under the exclusive control of the defendant, and that the accident is one that would not, in the ordinary course of events, have occurred without negligence on the part of the one in control." Id. at 1341–42. Thus, the plaintiff bears the initial burden "to establish that the circumstances attendant to the injury are such that, in the light of past experience, negligence is the probable cause and the defendant is the probable actor." Id. at 1342; see City of New Smyrna Beach Utils. Comm'n v. McWhorter, 418 So. 2d 261, 263 (Fla. 1982) (explaining that in order to benefit from a res ipsa loquitur instruction, the plaintiff was required to show that the sewer line ordinarily would not have become obstructed and that sewage ordinarily would not have flooded the plaintiff's home absent negligence by the city).

While numerous cases have considered whether a plaintiff was entitled to a res ipsa loquitur instruction, Roffman v. Sears, Roebuck & Co., 522 So. 2d 31 (Fla. 4th DCA 1987), and Otis Elevator Co. v. Chambliss, 511 So. 2d 412 (Fla. 1st DCA 1987), are particularly instructive here because they each involved the application of res ipsa loquitur when complex mechanical devices failed. In Roffman, the Fourth District held that the trial court properly refused to read a res ipsa loquitur instruction because the plaintiffs

failed "to show that the escalator would not have unexpectedly stopped but for negligence" by the defendants. 522 So. 2d at 33. Similarly, in Chambliss, the First District held that the plaintiffs were not entitled to "the inference of negligence afforded by res ipsa loquitur" because they failed to show that negligence was the probable cause for the escalator stopping. 511 So. 2d at 414.

In the instant case, Whitehead was required to establish that negligence by Orange County was the probable cause of her injuries. See Goodyear Tire, 358 So. 2d at 1342. Although she offered some evidence on how the gate is intended to operate, Whitehead presented no expert testimony regarding how the gate actually worked at the time of the accident, whether a malfunction could cause it to close unexpectedly in the absence of negligence, or whether the County negligently maintained the gate. Like the escalators in Roffman and Chambliss, it is possible that a mechanical gate could malfunction for reasons other than the negligence of the party that controls the gate. And, while Whitehead offered some evidence that the officer who operated the gate acted negligently, she did not present any evidence that the accident was not the result of a mechanical failure unrelated to the County's negligence. Therefore, because Whitehead did not establish that the accident would not occur in the ordinary course of events without negligence, she failed to carry the initial burden of establishing that res ipsa loquitur applies here. See McWhorter, 418 So. 2d at 263; Roffman, 522 So. 2d at 33; Chambliss, 511 So. 2d at 414. Accordingly, we reverse and remand for a new trial.

REVERSED and REMANDED for New Trial.

WALLIS, EDWARDS and HARRIS, JJ., concur.