

STATE OF MICHIGAN
COURT OF APPEALS

JESUS REYES, Individually and as Next Friend of
LOURDES REYES, a Developmentally Disabled
Person, and JESUS ANTONIO REYES, a Minor,

UNPUBLISHED
April 28, 2005

Plaintiff-Appellant,

v

KAY-JAN, INC., d/b/a OAKLAND
INDIVIDUALIZED SERVICES, d/b/a
CHRISTIAN HILLS GROUP HOME and
ROBERT ZILLI,

No. 251901
Oakland Circuit Court
LC No. 1998-009100-NO

Defendants-Appellees.

Before: Donofrio, P.J., and Murphy and Borrello, JJ.

PER CURIAM.

This case arises from a claim that defendants were negligent in their supervision of Lourdes Reyes, a developmentally disabled person, who was sexually assaulted while allegedly under their care. This is the second time that Plaintiff appeals as of right from an order granting summary disposition in favor of defendants, and the second time that we reverse the decision of the trial court.

The basic facts in the case were recited in this Court's opinion in *Reyes v Kay-Jan Inc, et al*, unpublished per curiam opinion of the Court of Appeals, issued April 5, 2002 (Docket Nos. 226079, 230854):

Lourdes Reyes is a developmentally disabled person with an age equivalency of a person under two years old. Due to her developmental disability, Lourdes has difficulty communicating and is unable to consent to sexual interaction. . . . On September 23, 1993, Lourdes was placed in Christian Hills Group Home (Christian Hills) and was put under the care and supervision of the employees of Christian Hills. Defendant Robert Zilli is the owner and administrator of Defendant Kay-Jan, Inc. which operates Christian Hills.

In the fall of 1995, Lourdes attended classes at Pontiac Central High School. Defendants allege that sometime after November 4, 1995, Lourdes became pregnant. Defendants became aware of the pregnancy in January or

February 1996. On March 8, 1996, the Oakland County Probate Court concluded that Lourdes' pregnancy was the result of rape[.] . . . Lourdes gave birth to a healthy baby boy on July 21, 1996. . . . The father of the child has never been ascertained despite a police investigation.

Plaintiff filed a complaint alleging in relevant part negligence on the part of defendants. In the previous appeal, we reversed "the trial court's order granting defendants' motion for summary disposition on the negligence claim."

After remand, the trial court granted a motion for summary disposition brought by defendants under MCR 2.116(C)(8) and(10) in which they argued that because plaintiff could not establish the time, place, or person who assaulted Lourdes, he therefore could not establish that defendants' negligence, if proven, was the proximate cause of plaintiff's injuries. Defendants also argued that this Court's previous decision did not apply to the issue of proximate cause under the law of the case doctrine.

Determination of whether law of the case applies is a question of law which this Court reviews de novo. *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001).

The law of the case doctrine provides that "if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same." *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454; 302 NW2d 164 (1981). Likewise, a trial court may not take any action on remand that is inconsistent with the judgment of the appellate court. *Sokel v Nickoli*, 356 Mich 460, 464; 97 NW2d 1 (1959); *VanderWall v Midkiff*, 186 Mich App 191, 196; 463 NW2d 219 (1990). Thus, as a general rule, a ruling on a legal question in the first appeal is binding on all lower tribunals and in subsequent appeals. See *Driver v Hanley (After Remand)*, 226 Mich App 558, 565; 575 NW2d 31 (1997); *Poirier v Grand Blanc Twp (After Remand)*, 192 Mich App 539, 546; 481 NW2d 762 (1992). The law of the case doctrine applies only to questions actually decided in the prior decision and to those questions necessary to the court's prior determination. *Poirier, supra* at 546, 481 NW2d 762. The rule applies without regard to the correctness of the prior determination. *Driver, supra* at 565, 575 NW2d 31; *Bennett v Bennett*, 197 Mich App 497, 504; 496 NW2d 353 (1992). The primary purpose of the rule is to maintain consistency and avoid reconsideration of matters once decided during the course of a single lawsuit. *Bennett, supra* at 499-500; 496 NW2d 353. [*Kalamazoo v Dep't of Corrections*, 229 Mich App 132, 135-136 580 NW2d 475 (1998).]

"To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages." *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

In the first appeal, the parties did not dispute that defendant owed a duty of care to Lourdes Reyes nor was there any dispute regarding damages potentially owed to Lourdes. However, defendants argue that this Court only addressed whether there was a genuine issue of fact as to whether defendants had breached their duty and whether plaintiff could use *res ipsa loquitur* as a theory of causation. In response, plaintiff argues that we addressed the negligence claim as a whole, including proximate cause, and remanded for a trial finding that there were issues of material fact on both the breach element and the causation element.

It is not disputed that in its prior ruling we explicitly held that there was a genuine issue of material fact on the issue of breach of defendants' duty of care:

Assuming, without deciding, that defendants did not owe a duty to Lourdes during her transport to school and attendance at school, nonetheless, a genuine issue of material fact is presented regarding a breach of duty of care by defendants. [*Reyes, supra*, slip op at 6.]

This Court was also very clear that “the doctrine of *res ipsa loquitur* is unavailable to plaintiffs [sic].” *Id.* at 7. But this Court also noted that defendants' motion for summary disposition challenged “plaintiff's ability to demonstrate duty, breach, and *causation*” and that the trial court found for defendants on plaintiff's *res ipsa loquitur* theory “but failed to address plaintiffs' [sic] factual dispute argument.” *Id.* at 4 (emphasis added). Finally, this Court clearly held:

[W]e reverse the trial court's order granting defendants' motion for summary disposition of the negligence claims. [*Id.* at 2.]

And after a review of plaintiff's evidence, including evidence regarding causation, this Court confirmed:

Accordingly the trial court erred in granting summary disposition of plaintiffs' [sic] negligence claims. [*Id.* at 7.]

As we have noted, evidence of causation is part of a *prima facie* case of negligence. *Case, supra* at 6. Thus, when this Court reversed on the “negligence claims,” it implicitly found that plaintiff had established a genuine issue of material fact on all elements of the claim, including causation.

We conclude that it would require an exceptionally and inappropriately restricted reading of this Court's previous ruling to find that the opinion *only* applied to the element of breach and to plaintiff's claim based on *res ipsa loquitur*, simply because this Court chose to address these issues more extensively. This view is bolstered by consideration of the policies underlying the law of the case doctrine:

The reason for the rule is the need for finality of judgment and the want of jurisdiction in an appellate court to modify its own judgments except on

rehearing. [*Reeves v Cincinnati, Inc (After Remand)*, 208 Mich App 556, 560; 528 NW2d 787 (1995).]

Reeves presented a similar circumstance in which a lower court misconstrued this Court's prior opinion. In *Reeves*, a products liability case was remanded with instructions that the lower court "need not" submit the issue of duty to warn to the jury. In the second appeal, this Court held that the law of the case applied, finding:

Rather than reading the stylistic phrase "need not" in a context that showed it to be tantamount to "shall not," the trial court isolated that phrase in the opinion, took it out of context, and concluded that this Court granted the trial court discretion regarding whether to submit to the jury the issue of duty to warn. However, the trial court's interpretation is not warranted by a reading of this Court's prior opinion taken in context. Our indication that the question "need not" be submitted in the event of retrial was based on the determination that Cincinnati had no duty to warn in the first place The trial court's reading was not in keeping with this state's established judicial policy that the doctrine of law of the case is a bright-line rule to be applied virtually without exception. [*Id.* at 560.]

It should also be noted that defendants were well aware that the overall issue of causation – not just plaintiff's *res ipsa loquitur* theory – was before this Court in the prior appeal. Indeed, defendants presented almost the same arguments regarding plaintiff's failure to establish proximate cause in their brief in the prior appeal as they do in their second issue in the instant appeal, i.e., that plaintiffs' other theories of causation "merely speculate that Defendants were negligent." Because the parties had raised causation generally in their previous appeal and because this Court implicitly decided the issue, the lower court erred when it granted summary disposition in favor of defendants based on its view of the causation issue rather than recognizing this Court's prior opinion to be controlling on the point under the law of the case doctrine.

Even if we found that law of the case did not apply, we would nevertheless reverse the trial court's grant of summary disposition on the ground that plaintiff established a genuine issue of fact as to causation.

The grant or denial of a motion for summary disposition is reviewed *de novo*. *Ditmore v Michalik*, 244 Mich App 569, 574; 625 NW2d 462 (2001). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint.' In evaluating such a motion, a court considers the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004), quoting *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

“To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages.” *Case, supra* at 6. The only issue here is if plaintiff presented sufficient evidence to establish a genuine issue of material fact as to whether defendants’ breach of its duty of care proximately caused Lourdes Reyes’ injury. We conclude that he did.

Plaintiff argues that he presented sufficient evidence, without relying on *res ipsa loquitur*, to establish an issue of fact that Lourdes was sexually assaulted while under defendants’ care. Plaintiff presented the following evidence: (1) testimony that the driver who took Lourdes to school was a female, and that Lourdes had a female attendant on the school bus; (2) testimony that it would not have been possible for Lourdes to have been assaulted at school because she was always supervised by a staff person; (3) an affidavit stating that Lourdes had been seen partially undressed with a former employee, near the time when she became pregnant; (4) testimony that there were several instances when Lourdes was taken from defendants’ group home where she spent the night or weekend with a staff member who had a boyfriend or husband in the home; (5) evidence that there were other undocumented instances when Lourdes was removed from the group home to spend the night at another of defendants’ group homes; and, (6) affidavits from defendant Zilli and defendants’ expert that (a) Lourdes never spent the night in another group home, and (b) that the only contact that Lourdes ever had with any males was at her high school.

“To be adequate, a plaintiff’s circumstantial proof must facilitate reasonable inferences of causation, not mere speculation.” *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994). In *Skinner*, our Supreme Court explained the distinction between a reasonable inference, which may establish causation, and an impermissible inference:

“As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any 1 of them, they remain conjectures only. On the other hand, if there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence.” [*Kaminski v Grand Trunk W R Co*, 347 Mich 417, 422; 79 NW2d 899 (1956).]

We want to make clear what it means to provide circumstantial evidence that permits a reasonable inference of causation. As *Kaminski* explains, at a minimum, a causation theory must have some basis in established fact. However, a basis in only slight evidence is not enough. Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory. Rather, the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant’s conduct, the plaintiff’s injuries would not have occurred.

We have consistently applied this threshold evidentiary standard to a plaintiff’s proof of factual causation in negligence cases:

“The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.”

“The mere possibility that a defendant’s negligence may have been the cause, either theoretical or conjectural, of an accident is not sufficient to establish a causal link between the two.”

“There must be substantial evidence which forms a reasonable basis for the inference of negligence. There must be more than a mere possibility that unreasonable conduct of the defendant caused the injury. We cannot permit the jury to guess”

“Something more should be offered the jury than a situation which, by ingenious interpretation, suggests the mere possibility of defendant’s negligence being the cause of the injury.”

In light of the above pronouncements, we concur with the observation made in 57A Am Jur 2d, Negligence, § 461, p 442:

“All that is necessary is that the proof amount to a reasonable likelihood of probability rather than a possibility. The evidence need not negate all other possible causes, but such evidence must exclude other reasonable hypotheses with a fair amount of certainty. Absolute certainty cannot be achieved in proving negligence circumstantially; but such proof may satisfy where the chain of circumstances leads to a conclusion which is more probable than any other hypothesis reflected by the evidence. However, if such evidence lends equal support to inconsistent conclusions or is equally consistent with contradictory hypotheses, negligence is not established.” [*Skinner, supra*, 445 Mich 264-267 (internal citations omitted).]

From the evidence presented by plaintiff, a reasonable jury could conclude that Lourdes was assaulted while under defendants’ care. Looking at the evidence in the light most favorable to plaintiff, there was sufficient evidence that Lourdes was not assaulted at school or on the bus. Moreover, plaintiff presented evidence that Lourdes may have been assaulted in defendants’ group home by an employee, at the home of a staff member when Lourdes was taken for an unauthorized visit, or during an undocumented visit to another of defendants’ group homes. Furthermore, plaintiff presented evidence that defendants may have lied about the fact that Lourdes never spent weekends outside the home and that she could not have had any contact with men except at school or on the bus.

Although evidence that Lourdes was assaulted at school was not conclusively contradicted – defendants presented evidence that Lourdes had to undress for swimming class and that another developmentally disabled woman had become pregnant at the high school – plaintiff nevertheless has demonstrated a logical sequence of cause and effect which could

support an inference that Lourdes was assaulted while she was in defendants' care. "Proximate cause is usually a factual issue for the jury to determine." *Schutte v Celotex Corp*, 196 Mich App 135, 138; 492 NW2d 773 (1992).

Reversed and remanded for proceedings in accordance with this opinion. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ William B. Murphy
/s/ Stephen L. Borrello