

STATE OF MICHIGAN
COURT OF APPEALS

VAUGHN RANDEL WAITE and DENISE
WAITE,

UNPUBLISHED
February 28, 2006

Plaintiffs-Appellees,

v

AMERITECH CORP, INC, d/b/a SBC
AMERITECH CORP,

No. 257378
Kalamazoo Circuit Court
LC No. 02-000562 – NI

Defendant-Appellant.

Before: Zahra, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Plaintiffs brought this negligence action to recover for injuries related to an automobile accident caused when their son was unable to maneuver the vehicle he was driving around three or four orange cones standing upright in a diamond or triangle formation that were located in his eastbound traffic lane on Interstate 94 (I-94). Defendant appeals by leave granted an order denying its motion for summary disposition. We reverse and remand.

I

On February 21, 2002, plaintiff Randel Waite, a passenger in a car driven by his son, Chad Waite, was severely injured in an automobile accident when Chad swerved to avoid hitting a group of orange safety cones in the traffic lane in which Chad was driving on eastbound I-94 near Kalamazoo. Chad lost control of the car, struck a cement wall in the median, and then struck the right guardrail. It was undisputed that the safety cones were stamped with Ameritech's name and belonged to defendant. Plaintiffs filed this negligence action against defendant on the theory that defendant failed to properly secure the cones on its trucks, the cones became displaced, and they fell onto the highway.

Defendant moved for summary disposition, arguing that plaintiff's allegations were based on mere speculation or conjecture and that plaintiffs' theory of negligence was unsupported by any evidence of causation. The trial court denied defendant's motion, ruling that the doctrine of *res ipsa loquitur* applied to establish an inference of negligence.

II

Defendant argues that the trial court erred in permitting plaintiffs to rely on the doctrine of res ipsa loquitur because plaintiffs failed to establish that the cones were under the exclusive control of defendant. We agree.

This Court reviews a trial court's denial of a motion for summary disposition de novo. *Woodard v Custer*, 473 Mich 1, 5; 702 NW2d 522 (2005). When a plaintiff is unable to prove the actual occurrence of a negligent act, the doctrine of res ipsa loquitur entitles a plaintiff to an inference of negligence if the following four elements are met:

“(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;

(3) it must not have been due to any voluntary action or contribution on the part of the plaintiff”; and

(4) “[e]vidence of the true explanation of the event must be more readily accessible to the defendant than to the plaintiff.” [*Woodard, supra* at 6-7, quoting *Jones v Porretta*, 428 Mich 132, 150-151; 405 NW2d 863 (1987) and *Wilson v Stilwell*, 411 Mich 587, 607; 309 NW2d 898 (1981).]

Whether the doctrine of res ipsa loquitur applies to a particular case is a question of law. *Jones, supra* at 154 n 8.

The only direct evidence to establish that the cones were under the exclusive control of defendant at one time is that the cones were stamped with an Ameritech stamp. There is, however, no direct evidence that the cones were under the exclusive control of defendant when the cones ended up on the highway.

Plaintiffs support their argument that the cones were under defendant's exclusive control with circumstantial evidence that all defendant's vehicles are required to carry cones and the standard number of cones to be carried is four; cones are not always secure on the vehicle and defendant's employees have in the past pushed cones in between the ladder rack and the vehicle's roof; and defendant's vehicles travel I-94 dozens of times each day. This evidence is insufficient to establish that defendant was in exclusive control of the cones when the cones ended up on I-94.

Defendant's employees testified that defendant's cones are often left at work sites after defendant is done at the work site to keep the site secured for other contractors who work at the site and that these cones are not always returned to defendant. An employee also testified that other companies had been seen using defendant's cones. This testimony establishes that defendant was not always in exclusive control of its cones. Because plaintiffs failed to establish that defendant was in exclusive control of the cones when the cones ended up on I-94, the trial court erred in holding that plaintiffs may rely on res ipsa loquitur to prove their negligence claim.

Nonetheless, plaintiff argues, given the circumstantial evidence presented, there remains a question whether defendant is entitled to summary disposition absent the application of doctrine of *res ipsa loquitur*. A *prima facie* case of negligence may be based on legitimate inferences “as long as sufficient evidence is introduced to take the inferences ‘out of the realm of conjecture.’” *Berryman v K Mart Corp*, 193 Mich App 88, 92; 483 NW2d 642 (1992), quoting *Ritter v Meijer*, 128 Mich App 783, 786; 341 NW2d 220 (1983).

Defendant contends that evidence that the cones were standing upright in the road defeats plaintiffs’ claim because it cannot be reasonably inferred that the cones fell from a truck traveling at seventy miles an hour given that they were upright on the highway in a particular pattern. Defendant asserts that some third person could have been responsible for the presence of the cones on the highway, a possibility that plaintiffs did not exclude. The question then is whether defendant’s alleged breach of duty caused plaintiffs’ injury.

“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). Evidence of causation is sufficient if the jury may conclude that, more likely than not, but for the defendant’s conduct the plaintiff’s injuries would not have occurred, even if other plausible theories have evidentiary support. *Wilson v Alpena Co Rd Comm*, 263 Mich App 141, 150; 687 NW2d 380 (2004). An explanation that is consistent with known facts but not deducible from them is impermissible conjecture. *Skinner, supra* at 164; *Karbel v Comerica Bank*, 247 Mich App 90, 98; 635 NW2d 69 (2001). On remand, the trial court shall determine on the basis of the evidence, and further hearing if necessary, whether a triable issue of fact exists regarding causation.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ William B. Murphy
/s/ Janet T. Neff