SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1081-21

MAGNO ROCHA and
OLGA ROCHA, his wife,

Plaintiffs-Appellants,

v.

NEW JERSEY TURNPIKE AUTHORITY, NEW JERSEY DEPARTMENT OF TRANSPORTATION, AND STATE OF NEW JERSEY,

Defendants,

and

CCA CIVIL-DAIDONE ELECTRIC, INC., a joint venture,[1]

Defendant-Respondent.

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Submitted January 18, 2023 – Decided February 1, 2023

Before Judges Messano and Gilson.

[1] Improperly pled as CCA Civil Inc.; Daidone Electric, Inc.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-2010-19.

Robert M. Mayerovic, attorney for appellant.

Golden, Rothschild, Spagnola, Lundell, Boylan, Garubo & Bell, PC, attorneys for respondent (Philip A. Garubo, Jr. and Minal J. Acharya, on the brief).

PER CURIAM

As plaintiff Magna Rocha drove on the New Jersey Turnpike, his car passed under the Pulaski Skyway (Skyway). Without any notice, a long thin metal rod smashed through the front windshield and imbedded itself in the dashboard of plaintiff's car. Although plaintiff sustained no physical injury, his car was damaged, and he claimed to have suffered emotional distress as a result of the incident. Plaintiff and his wife Olga filed a complaint against the New Jersey Department of Transportation (DOT), the State of New Jersey, and defendant CCA Civil-Daidone, Inc. (Daidone).[2] At the time, Daidone was the contractor performing rehabilitation and repair work on the Skyway.

[2] Plaintiff Olga Rocha's claims are derivative of her husband's. Therefore, we use the singular "plaintiff" throughout the opinion. In addition, the complaint named the New Jersey Turnpike Authority as a defendant. Plaintiff entered a stipulation of dismissal without prejudice of his claims against the Authority. It has not participated in this appeal.

Defendants answered and discovery ensued before DOT and the State moved for summary judgment, and Daidone cross-moved for the same relief.

After considering argument, the Law Division judge issued an oral decision granting both motions, in large part, because she concluded plaintiff failed to demonstrate the metal rod came from the Skyway's overhead roadway. She subsequently filed two orders dismissing plaintiff's complaint.

Plaintiff moved for reconsideration, contending the judge failed to consider the accident report prepared by New Jersey State Trooper Richard Musso, who responded to the scene of the incident and spoke with David Hawes, DOT's safety engineer for the project. Musso's report said Hawes "confirmed the metal debris was rebar that became dislodged from the . . . Skyway." Defendants filed opposition.

The judge granted the reconsideration motion but denied plaintiff any relief. She reasoned that even if plaintiff raised a material factual dispute as to whether the metal rod fell from the Skyway, he failed to demonstrate defendants were negligent. The judge declined to vacate her prior orders granting summary judgment, and this appeal followed.

Plaintiff argues the judge erred in granting summary judgment because a reasonable factfinder could conclude that the metal rod came from the Skyway,

which Daidone was repairing.[3] For the first time, plaintiff contends the doctrine of res ipsa loquitor would permit a reasonable factfinder to infer Daidone was negligent. We find no merit to plaintiff's contentions and affirm.

We review de novo the Law Division's grant of summary judgment, Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021) (citing Barila v. Bd of Educ. of Cliffside Park, 241 N.J. 595, 611 (2020)), limiting our review to the motion record, Ji v. Palmer, 333 N.J. Super. 451, 463–64 (App. Div. 2000) (citing Bilotti v. Accurate Forming Corp., 39 N.J. 184, 188 (1963)).

> Applying the same standard that governs the trial court's review, we determine whether "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."
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> [Branch, 244 N.J. at 582 (quoting R. 4:46-2(c)).]

A dispute of material fact is "genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would

[3] Plaintiff makes no argument in his brief as to DOT and the State. We determine then that plaintiff has abandoned any appeal from the order granting them summary judgment. Pullen v. Galloway, 461 N.J. Super. 587, 595 (App. Div. 2019).

require submission of the issue to the trier of fact." Grande v. Saint Clare's Health Sys., 230 N.J. 1, 24 (2017) (quoting Bhagat v. Bhagat, 217 N.J. 22, 38 (2014)). "When no issue of fact exists, and only a question of law remains, [we] afford[] no special deference to the legal determinations of the trial court." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016) (citing Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

Plaintiff did not know where the metal rod came from. He testified that he saw the rod falling from the sky for a split second before it impacted his windshield. Plaintiff did not produce any expert to identify possible sources of the metal rod.

At his deposition, Hawes denied ever telling Musso that the metal rod was debris from the Skyway. Hawes testified that he knew the metal rod was not rebar from the Skyway after inspecting it at State Police Headquarters later in the evening of the incident. A week later, Hawes walked the "shielding system" Daidone constructed under the Skyway roadway while doing the repairs, and he testified that a hexagonal metal rod like the one that fell through plaintiff's windshield was not being used by Daidone. Hawes later reviewed Daidone's

"shop drawings" and determined the metal rod was not part of the shielding system.

Musso, however, testified that his report was accurate, and Hawes told him the metal rod was debris that became dislodged from the Skyway. However, Musso did not know whether Hawes had seen the rod when he made that statement. Trooper Kevin Hogan also investigated the incident with Musso, but he did not hear Hawes' statement to Musso, and neither Musso nor Hogan could recall if they were together when Musso spoke with Hawes.

Patrick Bakelaar, Daidone's safety manager for the Skyway project, and Justin Fernandez, the project superintendent, were both deposed. Each testified the metal rod that struck plaintiff's windshield was unfamiliar to them and was not used during the Skyway project. In short, the only record evidence identifying the Skyway as the source of the metal rod was Hawes' hearsay statement to Musso as recorded in the trooper's report.

"Although we must view the 'evidential materials . . . in the light most favorable to the non-moving party' in reviewing summary judgment motions, we emphasize that it is evidence that must be relied upon to establish a genuine issue of fact." Cortez v. Gindhart, 435 N.J. Super. 589, 605 (App. Div. 2014) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)). "As

a practical matter, a trial court confronted with an evidence determination precedent to ruling on a summary judgment motion squarely must address the evidence decision first." Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 384–85 (2010).

Plaintiff simply assumes Hawes' statement to Musso is admissible evidence against Daidone without explaining what exception to the hearsay rule applies. Hawes' hearsay statement might be admissible against DOT and the State pursuant to N.J.R.E. 803(b)(4). See, e.g., Hassan v. Williams, 467 N.J. Super. 190, 207 (App. Div. 2021) (explaining admissibility of a party opponent's statement made by an "'agent or servant' . . . 'concerning a matter within the scope of the agency or employment, made during the existence of the relationship.'" (quoting N.J.R.E. 803(b)(4))). We are unsure how it would be admissible against Daidone.

Assuming arguendo Hawes' hearsay statement to Musso would be admissible, competent evidence, and that it was sufficient to raise a disputed material fact by which a reasonable jury might conclude the metal rod came from the Skyway, plaintiff failed to demonstrate Daidone was negligent. "To sustain a cause of action for negligence, a plaintiff must establish four elements: '(1) a duty of care, (2) a breach of that duty, (3) proximate cause, and (4) actual

damages.'" Townsend v. Pierre, 221 N.J. 36, 51 (2015) (quoting Polzo v. Cnty. of Essex, 196 N.J. 569, 584 (2008)). A plaintiff bears the burden of proving negligence, which is never presumed. Khan v. Singh, 200 N.J. 82, 91 (2009) (citing Hansen v. Eagle-Picher Lead Co., 8 N.J. 133, 139 (1951)); see also Long v. Landy, 35 N.J. 44, 54 (1961) ("The mere showing of an incident causing the injury sued upon is not alone sufficient to authorize the finding of an incident of negligence.").

Plaintiff belatedly cites the doctrine of res ipsa loquitor as supplying the missing piece of a prima facie case of negligence against Daidone. Plaintiff contends Eaton v. Eaton, 119 N.J. 628 (1990), supports his claim that res ipsa applies to permit a factfinder to infer Daidone was negligent because "[f]alling debris onto vehicular Turnpike traffic . . . bespeaks of some negligence," and the "[S]kyway was under the exclusive control of Daidone." We disagree.

"Res ipsa loquitur is not a theory of liability; rather, it is an evidentiary rule that governs the adequacy of evidence in some negligence cases." Myrlak v. Port Auth. of N.Y. & N.J., 157 N.J. 84, 95 (1999) (citing Brown v. Racquet Club of Bricktown, 95 N.J. 280, 288 (1984)). "Res ipsa loquitur is an equitable doctrine that allows, in appropriate circumstances, a permissive inference of negligence to be drawn against a party who exercises exclusive control of an

instrumentality that malfunctions and causes injury to another." McDaid v. Aztec W. Condo. Ass'n, 234 N.J. 130, 135 (2018) (emphasis added).

> The res ipsa doctrine allows a factfinder to draw an inference of negligence when: "(a) the occurrence itself ordinarily bespeaks negligence; (b) the instrumentality was within the defendant's exclusive control; and (c) there is no indication in the circumstances that the injury was the result of the plaintiff's own voluntary act or neglect."
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> [Id. at 142–43 (quoting Jerista v. Murray, 185 N.J. 175, 192 (2005)).]

Viewing the evidence most favorably for plaintiff, he failed to demonstrate that the incident – a metal rod falling from an overhead road – bespeaks negligence, or, more importantly, that Daidone was in exclusive control of the metal rod or, more generally, the Skyway. "Whether an occurrence ordinarily bespeaks negligence is based on the probabilities in favor of negligence." Myrlak, 157 N.J. at 95. Here, many non-negligent scenarios could explain the metal rod's flight. For example, the rod could have fallen off another vehicle passing on the Skyway overhead, or it may have been lying on the Skyway's surface and was jettisoned into the air when struck by another vehicle.

"[T]he element of 'exclusive control' in [a] defendant 'relate[s] to the time of the indicated negligence . . . [and o]ur cases applying the principle of res ipsa

loquitur generally speak in terms of control at the moment of accident.'" Brown, 95 N.J. at 290 (third and fourth alterations in original) (quoting Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275–76 (1958)). The term "exclusive control" "does not require that a plaintiff exclude all other possible causes of an accident," but rather it may also be demonstrated by showing that "it is more probable than not that [a] defendant's negligence was a proximate cause of the mishap." Luciano v. Port Auth. Trans-Hudson Corp., 306 N.J. Super. 310, 313 (App. Div. 1997) (citing Brown, 95 N.J. at 291–92). To establish "exclusive control," a plaintiff must produce "competent evidence that 'reduces the likelihood of other causes so that the greater probability of fault lies at defendant's door.'" Szalontai v. Yazbo's Sports Café, 183 N.J. 386, 400 (2005) (quoting Jimenez v. GNOC, Corp., 286 N.J. Super. 533, 545 (App. Div. 1996)). Plaintiff here offered no evidence that reduced the likelihood that the metal rod fell from other causes than because of Daidone's negligence.

Plaintiff's reliance on Eaton is misplaced. There, the decedent and the defendant, mother and daughter respectively, were involved in a one-car accident. 119 N.J. at 632. "As the car approached the end of the curve, it left the road, struck a guardrail, flew about fifty feet in the air, collided with some trees, and landed on its roof." Id. at 633. The defendant insisted her mother had

been driving and swerved to avoid a phantom vehicle approaching them head-on; the decedent, however, told police her daughter was driving, and substantial circumstantial evidence supported that conclusion. Id. at 633–34. Police issued the defendant a summons for careless driving, N.J.S.A. 39:4-97. Id. at 634. At the end of the testimony,

> the court generally charged the law of negligence, stated that the mere occurrence of an accident did not give rise to an inference of negligence, and explained variously that a jury finding of a violation of N.J.S.A. 39:4-97 was both evidence of negligence and negligence itself. Plaintiff's counsel did not request a res ipsa loquitur charge. Hence, the court did not charge that if the jury found that [the defendant] had been driving and had not been forced off the road by the phantom car, it might draw an inference of negligence from the circumstances. The jury found that [the defendant] had been driving, but that she had not been negligent.
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> [Id. at 637.]

In concluding it was plain error not to have given a res ipsa loquitor charge, the Court held "that the unexplained departure of a car from the roadway 'ordinarily bespeaks negligence[,]'" and the jury was free to disbelieve the defendant's claim that a phantom vehicle caused the accident because there was substantial evidence to the contrary. Id. at 639. The Court also said that "once

the jury found that [the defendant] had been the driver, it could logically have found that she had been in exclusive control of the car." Id. at 640.

In this case, plaintiff's evidence — a metal rod falling from an overhead roadway on which Daidone was working — is insufficient to support application of res ipsa loquitor. The incident neither bespeaks negligence nor was Daidone in exclusive control of the bar and the roadway above.

Affirmed.