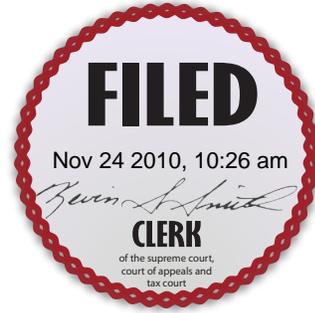


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEYS FOR APPELLANT:

BRENT R. WEIL
CHARLES S. HEWINS
Kightlinger & Gray, LLP
Evansville, Indiana

MARK D. GERTH
Kightlinger & Gray, LLP
Indianapolis, Indiana

ATTORNEY FOR APPELLEE:

NATHAN MAUDLIN
Klemer Maudlin, P.C.
New Harmony, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

MacLELLAN INTEGRATED SERVICES, INC.,)

Appellant/Defendant,)

vs.)

DOMINECK P. MARANO, II,)

Appellee/Plaintiff.)

No. 26A01-1006-CT-296

APPEAL FROM THE GIBSON CIRCUIT COURT
The Honorable Jeffrey Meade, Judge
Cause No. 26C01-0610-CT-7

November 24, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

In this interlocutory appeal, MacLellan Integrated Services, Inc. (“MacLellan”) appeals the trial court’s denial of its summary judgment motion in Domineck Marano’s negligence action against MacLellan. Concluding there is a genuine issue of material fact concerning whether the injuring instrumentality was within MacLellan’s exclusive control at the time of Marano’s injury, we affirm.

FACTS AND PROCEDURAL HISTORY

In October 2004, Marano worked at the Toyota Motor Manufacturing Plant (“Toyota”) in Gibson County. He worked on the automobile hood assembly line preparing hoods for installation on Toyota Sienna mini-vans. Specifically, Marano had to move the outer shell of a hood from a pallet to a machine that attached the underside of the hood to the outer shell and installed hinges. Marano then had to transfer each hood back to another pallet before the hood was installed on the body of the vehicle. Marano used a wire rope and a hoist to move the hoods from place to place. On October 21, 2004, while Marano was moving a hood from one pallet to another, the cable on the hoist snapped and the hood dropped and injured Marano’s shoulder. A few days after the accident, Toyota discarded the hoist. It is undisputed that the wire rope and hoist were never available for either party to inspect.

At the time Marano was injured, MacLellan had a contract with Toyota to perform maintenance services. These services included monthly inspections and preventative

maintenance of the wire rope hoists used at Toyota. Specifically, MacLellan inspected cables, pneumatic lines, switches that controlled the pneumatic lines, the end effector that lifted the parts, all clamps and blocks, and the entire wire rope. Between MacLellan's monthly inspections, Toyota performed twice-daily basic visual inspections of the hoists.

In October 2006, Marano filed a negligence action against MacLellan wherein Marano alleged MacLellan negligently failed to maintain the hoist Marano was using at the time of his injury. In January 2010, MacLellan filed a summary judgment motion wherein it argued that Marano could not establish a causal connection between MacLellan's conduct and Marano's injury because the hoist was not preserved for evaluation by experts. Marano responded that the summary judgment motion should be denied because pursuant to "the doctrine of *res ipsa loquitur*, the circumstantial evidence surrounding the incident create[d] an inference of negligence that MacLellan faile[d] to rebut." Appellant's App. 403. The trial court denied the summary judgment motion, and MacLellan appeals.

DISCUSSION AND DECISION

MacLellan argues that the trial court erred in denying its summary judgment motion. When reviewing the denial of a summary judgment motion, our well settled standard of review is the same as it is for the trial court. *Kroger Co. v. Plonski*, 930 N.E.2d 1, 4-5 (Ind. 2010). Summary judgment should be granted only if the evidence sanctioned by Indiana Trial Rule 56(C) shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* All factual inferences must be construed in favor of the nonmoving party, and all doubts as to the existence of a material issue must be

resolved against the moving party. *Id.* Summary judgment is rarely appropriate in negligence actions because issues of causation and reasonable care are more appropriately left for determination by the trier of fact. *Cincinnati Ins. Co. v. Davis*, 860 N.E.2d 915, 922 (Ind. Ct. App. 2007).

The tort of negligence consists of three elements: 1) a duty owed to the plaintiff by the defendant; 2) a breach of that duty by the defendant; and 3) injury to the plaintiff proximately caused by that breach. *Id.* at 923. Generally, the mere fact that an injury occurred will not give rise to a presumption of negligence. *Id.* However, the doctrine of *res ipsa loquitur* is a qualified exception to this general rule. *Id.* This doctrine literally means, “the thing speaks for itself.” *Id.* It is premised upon an assumption that in certain instances an occurrence is so unusual that, absent a reasonable justification or explanation, those persons in control of the situation should be held responsible. *Id.*

The doctrine operates on the premise that negligence, like any other fact or condition, may be proved by circumstantial evidence. *Id.* To create an inference of negligence, the plaintiff must establish that: 1) the accident is of the type that does not ordinarily happen if those who have the management exercise care and control, and 2) the injuring instrumentality was within the exclusive management and control of the defendant or its servants. *Id.* Exclusive control is an expansive concept that focuses upon who has the right or power of control and the opportunity to exercise it. *Id.* Whether the doctrine applies in any given negligence case is a mixed question of law and fact. *Id.* The question of law is whether the plaintiff’s evidence included all the underlying elements of *res ipsa loquitur*. *Id.*

Here, as a matter of law, we conclude that the parties designated evidence relating to underlying elements of *res ipsa loquitur*. Moreover, the designated evidence that MacLellan had a contract with Toyota to perform monthly inspections and preventative maintenance of the wire rope hoists used at Toyota and that Toyota performed twice-daily basic visual inspections of the hoists and ropes between MacLellan's inspections demonstrates that there is a genuine issue of material fact as to whether either party had the exclusive control over the hoists and wire rope. We therefore conclude that a genuine issue of material fact remains as to the applicability of *res ipsa loquitur* in this case. *See id.* Under these circumstances, the trial court did not err in denying MacLellan's summary judgment motion.

The judgment of the trial court is affirmed.

KIRSCH, J., and CRONE, J., concur.