

IN THE SUPREME COURT OF THE STATE OF FLORIDA

TALLAHASSEE, FLORIDA

COLLEEN NODURFT,

Case No. SC04-2179

Plaintiff/Appellant, Respondent, 4th DCA Case No. 4D03-2516

vs.

SERVICO CENTRE ASSOCIATES, LTD.,

A limited partnership, d/b/a

OMNI WEST PALM BEACH HOTEL, and

ROYCE MANAGEMENT CORP.,

Defendants/Appellees, Petitioners.

RESPONDENT'S BRIEF ON JURISDICTION

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SUMMARY OF ARGUMENT

The opinion of the Fourth District Court of Appeal does not expressly and directly conflict with the decisions in Goodyear, Monforti or Wal-Mart. Under the unique facts presented in this case, the district court properly reversed the trial court by holding that the plaintiff was entitled to an instruction on *res ipsa loquitur*. The district court's opinion did not alter the legal standard for application of the *res ipsa loquitur* doctrine. Rather, it applied the doctrine in a manner consistent with, and in harmony with, the cases cited by OMNI.

QUESTION PRESENTED

DOES THE OPINION OF THE 4TH DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICT WITH Goodyear Tire & Rubber Co. v. Hughes Supply, Inc., 358 So.2d 1339 (1978), Monforti v. K-Mart, Inc., 690 So.2d 631 (5th DCA 1997), OR Wal-Mart Stores, Inc. v. Rogers, 714 So.2d 577 (1st DCA 1998), PROVIDING THIS COURT WITH A BASIS TO ACCEPT DISCRETIONARY JURISDICTION?

ARGUMENT

This is a classic case for application of *res ipsa loquitur* - a garbage can, that appears to be securely affixed to a wall, suddenly and without provocation falls to the ground, the cause of which cannot be determined or explained. The opinion of the

lower court is correct, the reasoning is sound, and it is entirely consistent with Goodyear, Monforti and Wal-Mart.

OMNI asks this Court to accept discretionary jurisdiction based upon Rule 9.030(a)(2)(A)(iv) Fla.R.App.P., which gives this Court discretion to accept jurisdiction if the opinion of the district court "*expressly and directly* conflict[s] with a decision of another district court of appeal or of the supreme court on the same question of law" (emphasis added). In the present case, the district court's opinion does not "*expressly and directly*" conflict with Goodyear, Monforti or Wal-Mart. An express and direct conflict must come from within the four corners of the district court's opinion, not from inferences one party believes are supported by evidence in the case. Since OMNI is unable to point to any "express and direct" conflict contained within the opinion, it spends considerable effort to create conflict where none exists. The elements necessary to establish applicability of the *res ipsa loquitur* doctrine were consistently set forth in Goodyear, Monforti and Wal-Mart, and they were consistently applied in the present case to a very different factual situation. Application of the same legal principles to different sets of facts, arriving at different results, does not amount to "express and direct" conflict.

Goodyear Tire & Rubber Co. v. Hughes Supply, Inc.

Goodyear involved an appeal of two consolidated tire blowout cases. In one case, the plaintiff had been in possession and control of the defective tire for one month and had driven it 9,500 miles. In the second case, the plaintiff had been in possession and control of the defective tire for six months and had driven it 4,000 miles. Additionally, "both parties introduced substantial expert and other evidence tending to prove or disprove negligence". Goodyear, supra, at 1340. Furthermore, the court stated that a tire blowout is not the type of event that ordinarily happens only as the result of negligence. In Goodyear, the defendant had no control over the tires at the time of the injuries. It had relinquished all control to the plaintiffs long before the events occurred. At the time of the incidents, the defendant no longer had any responsibilities for proper inspection, maintenance and upkeep of the tires, a situation far different from the present case.

Monforti v. K-Mart, Inc.

In this case, items on display in a retail store fell on the plaintiff when the display collapsed. This, too, is a very different scenario than the present case. Items on display and for sale in the store were intended and expected to be moved,

grabbed, stacked, rearranged, manipulated, turned, inspected, tested, altered, carried and replaced by customers many times every day. The items were not locked, fastened or secured to the wall or shelf. In the present case, although hotel customers may have been in the same room with the item that fell, there was no evidence that they were removing it, picking it up, inspecting it, carrying it, and replacing it hundreds or thousands of times each week, as was the situation in Monforti (in that case, 12,000 customers visited the store each week).

Additionally, direct evidence of negligence was available to the plaintiff in Monforti, who introduced expert testimony to establish why the display collapsed. In the present case, NODURFT introduced some general evidence that garbage cans in the hotel were loose, but she was never able to present "direct evidence" to explain why this particular garbage can fell. The only direct evidence regarding this particular garbage can was that it was secured tightly to the wall, such that it had to be forced out in order to remove it. There was no "direct evidence" regarding why this garbage can mysteriously fell.

Wal-Mart Stores, Inc. v. Rogers

Like Monforti, the Wal-Mart case also involved an item falling from a display in a retail store (a radio fell from a

hook). Just like in Monforti, the defendant intended and expected for the display items to be frequently handled, removed and manipulated by its customers. Additionally, direct evidence of negligence was available to the plaintiff in that case. The plaintiff introduced evidence regarding the manner in which the radios were displayed and the number of radios placed on the particular hook to show that they were negligently placed or hung on the hook.

Although a full discussion of the merits of this appeal is inappropriate at this stage, a brief discussion must be included in this Brief in order to demonstrate the lack of any conflict between the district court's opinion and the decisions cited by OMNI. In Monforti and Wal-Mart, the defendants relinquished most control over the items to their customers. Because the customers had such unfettered access to the items on display, there was a substantial probability that the negligence of someone other than the defendant caused the items to fall. Fixtures in a public restroom are quite a different matter. The public has access to bathroom walls, dividers, ceiling lights and tiles, countertops, urinals, wall-mounted mirrors, fold-down baby changing tables, sinks and more. However, the fact that such fixtures are accessible to customers and available for their use does not mean

that the property owner no longer has exclusive control over those fixtures. If one of these fixtures fell onto a customer's foot without explanation, certainly *res ipsa loquitur* would apply, regardless of the fact that other customers use them and a janitorial service might clean them. Why should a wall-mounted garbage can be any different?

In the present case, OMNI's primary argument is that it did not have exclusive control over the garbage can and that the 4th District improperly found that it did. Contrary to its assertion, OMNI did have exclusive control over the garbage can that fell. OMNI was responsible for inspecting and maintaining it. It was secured and affixed to the wall. Although customers had access to the restroom, they did not have "access" to the garbage can. The evidence at trial demonstrated that the garbage can had a locking mechanism (although the evidence conflicted as whether or not the lock worked) to hold it in place and that it fit snugly into the wall so that it had to be forced out in order to remove it. Customers did not have keys to unlock the garbage can in order to remove it from the wall. Unlike the situations in Monforti and Wal-Mart, OMNI neither expected nor intended for its customers to be removing and replacing the garbage can, inspecting it, handling it, manipulating it and playing with it. As OMNI correctly pointed out in its brief, "mere proximity to

the instrumentality causing the injury does not negate the exclusivity of the defendant's control in the absence of any evidence that the plaintiff's conduct--or that of any other person--precipitated the accident." Cardina v. Kash 'N Karry Food Stores, Inc., 663 642, 643 (2nd DCA 1995).

OMNI also contends that it did not have exclusive control of the garbage can because an independent janitorial service was responsible for emptying it and changing the garbage bags. However, OMNI fails to recognize that it hired the janitorial company, and that the company was an agent or servant of OMNI.

[W]here the thing is shown to be under the management of the defendant *or his servants*, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care. (emphasis added)

W. Prosser, W. Keeton, *Torts* § 39 at 244 (5th ed. 1984) (quoting *Scott v. London & St. Katherine Docks Co.*, (1865) 3 H. & C. 596, 159 Eng.Rep. 665). Absent evidence that the servant, subcontractor or some other third party was negligent, the *res ipsa loquitur* doctrine is available to the plaintiff. "The possibility. . .that [a] subcontractor may have removed the sign during the process of repainting and then replaced it, is not sufficient to relieve the contractor from its responsibility." W.J. Kiely & Co. v. Dickey, 124 So.2d 731, 733 (3rd DCA 1960).

The 4th District's opinion in the present case correctly points out on page 3 that "the trial court denied appellant's request for the *res ipsa* instruction because of the *possibility* that someone in the general public could have tampered with the trash receptacle." (emphasis added). The court went on to say "[t]his interpretation of the applicability of the *res ipsa loquitur* doctrine is too narrow under these circumstances." This ruling by the district court is entirely consistent with Florida cases addressing the applicability of the doctrine. The mere possibility that the negligence of someone other than the defendant was responsible does not make the doctrine inapplicable. In Monforti and Wal-Mart, the *res ipsa loquitur* doctrine was found to be inapplicable based on evidence and common understanding that many customers every day were tampering with, handling and manipulating the items that fell. In both of those cases, there was a probability that the items fell due to the negligence of someone other than the defendants. In the present case, the nature of the instrumentality was such that it was highly unlikely that the negligence of anyone other than OMNI caused the garbage can to fall from the wall.

Res ipsa loquitur is applicable if "the indicated negligence is within the scope of the defendant's duty to the plaintiff." Restatement (2nd) of Torts (1965) §328D(1)(c). Maintaining a

reasonably safe restroom and ensuring that the garbage can does not fall from the wall is certainly within the scope of OMNI's duty to the plaintiff.

OMNI further contends that the lower court's opinion changed the standard announced by this Court in Goodyear from "exclusive control" to "sufficient exclusivity". The appellate court did not change any legal standard. It simply applied existing law to the facts of this unique case. In the last sentence of its opinion, the court indicated that its ruling is narrow: "Based on the facts in this case, the *res ipsa loquitur* charge was warranted."

Additionally, OMNI attempts to make a distinction without substance. Although Florida courts have used the term "exclusive control", the analysis always focuses on the degree to which the defendant exercises control over the instrumentality in question. §328D(1)(b) Restatement (2nd) of Torts (1965) lends additional support. *Res ipsa loquitur* is available to the plaintiff when "other responsible causes, including the conduct of the plaintiff and third persons, are *sufficiently* eliminated by the evidence." (emphasis added).

Although a comprehensive discussion of them is not appropriate in this jurisdictional brief, numerous cases have found the *res ipsa loquitur* doctrine applicable even when the

defendant did not have "exclusive control", by looking at the degree to which the defendant exercised control under the circumstances. The courts have found the doctrine applicable to elevator malfunctions (Burns v. Otis Elevator Company, 550 So.2d 21 (3rd DCA 1989); Commercial Union Insurance Co. v. Street, 327 So.2d 113 (2nd DCA 1976)), exploding bottles (Steele v. Royal Crown Cola Bottling Co., 335 So.2d 586 (3rd DCA 1976)), and motor vehicles (Yarbrough v. Ball U-drive System, Inc., 48 So.2d 82 (Fla., Special Div. B 1950)), to name a few.

Even if this Court finds that it does have discretionary jurisdiction, there is no compelling reason to exercise such discretion and accept jurisdiction, as the lower court's opinion is narrowly limited to the facts of this unique case. The district court, upon being asked to consider this issue, refused to certify conflict with Goodyear, Monforti or Wal-Mart.

CONCLUSION

The district court's opinion does not expressly and directly conflict with Goodyear, Monforti or Wal-Mart. Respondent respectfully requests that this Court deny certiorari jurisdiction, and allow the opinion of the 4th District Court of Appeal to stand.

Certificate of Service

I hereby certify that a true and correct copy of the foregoing has been sent via U.S. Mail this 3rd day of January 2005 to:

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Certificate of Compliance

I hereby certify that this Brief complies with the font and formatting requirements of Rule 9.210(a)(2) Fla.R.App.P. This document is submitted in Courier New 12-point font.

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