

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.

_/

AMENDED
BRIEF OF PETITIONERS ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

COLLEEN NODURFT (hereinafter referred to as ANODURFT@) sued SERVICIO CENTRE ASSOCIATES, LTD., d/b/a OMNI WEST PALM BEACH HOTEL (hereinafter referred to as AOMNI@) in the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County, alleging injuries as a result of a wall-mounted trash receptacle in the ladies restroom of the OMNI HOTEL falling out of the wall and striking her foot. The case was tried to a jury. NODURFT requested a jury instruction on *res ipsa loquitur*, which the trial judge denied. The primary reason for denial of the instruction was lack of exclusive control of the OMNI over the trash receptacle. The jury returned a verdict in favor of the OMNI. NODURFT's Motion for New Trial was denied and she then filed her appeal with the Fourth District Court of Appeal. The only issue raised on appeal was the failure of the trial judge to give the jury instruction on *res ipsa loquitur*. The Fourth District held that the instruction should have been given and reversed and remanded for a new trial.

The following facts are summarized from the Fourth District's Opinion. NODURFT was attending a seminar at the OMNI when she went into the restroom during a break. As she was washing her hands, she heard an unusual noise. The trash receptacle, which was mounted in the wall, fell and landed on her foot.

A former OMNI employee, Lisa Sisserman, observed the trash receptacle on the floor and a bruise on the Plaintiff-s foot after the incident. Sisserman suggested that the trash receptacle probably fell because it was loose. It was common knowledge that all of the wall-mounted receptacles were loose, although she had never heard of any of them falling and did not think they posed a safety concern.

The OMNI was under contract with a janitorial service that performed housekeeping, cleaning and stocking responsibilities in the hotel-s restrooms. The owner of that service, Tim Finnerty, recalled that the wall-mounted trash receptacles did not have working key lock mechanisms. However, he felt the receptacles fitted snugly enough into the side walls to keep them in place. Craig LeBlanc, chief engineer for the OMNI, also testified that the receptacles were difficult to take off the wall and there had never been an incident where one simply fell.

SUMMARY OF ARGUMENT

The Opinion of the Fourth District Court of Appeal is in conflict with *Goodyear Tire & Rubber Co. v. Hughes Supply, Inc.*, 358 So.2d 1339 (Fla. 1978), *Monforti v. K-Mart, Inc.*, 690 So.2d 631 (Fla. 5th DCA 1997), and *Wal-Mart*

Stores, Inc. v. Rogers, 714 So.2d 577 (Fla. 1st DCA 1998). The Fourth District should have affirmed the trial judge refusing to give an instruction on *res ipsa loquitur* where the trash receptacle which fell on the Plaintiff's foot was not in the exclusive control of the Defendants, and where there was direct evidence of negligence available to the Plaintiff. The Fourth District, in essence, changed the criteria for *res ipsa loquitur* from Aexclusive control@ to Asufficient control.@ This Court set forth the requirement of Aexclusive control@ in the *Goodyear* case. In *Montforti* and *Rogers*, the District Courts of Appeal found *res ipsa loquitur* instructions should not be given in factually indistinguishable circumstances from the present case.

QUESTION PRESENTED

Whether this Court has jurisdiction to review the Opinion of the Fourth District Court of Appeal as being in conflict with *Goodyear Tire & Rubber Co. v. Hughes Supply, Inc.*, 358 So.2d 1339 (Fla. 1978), *Monforti v. K-Mart, Inc.*, 690 So.2d 631 (Fla. 5th DCA 1997), and *Wal-Mart Stores, Inc. v. Rogers*, 714 So.2d 577 (Fla. 1st DCA 1998), on the issue of entitlement to a jury instruction on *res ipsa loquitur*.

ARGUMENT

This Court, in *Goodyear Tire & Rubber Co. v. Hughes Supply, Inc.*, 358 So.2d 1339 (Fla. 1978), expressed concern that the doctrine of *res ipsa loquitur* has developed a judicial gloss which was never intended. *Id.* at 1341. Accordingly, the Court recognized that:

Res ipsa loquitur is a doctrine of extremely limited applicability. It provides an injured plaintiff with a common-sense inference of negligence where direct proof of negligence is wanting, provided certain elements consistent with negligent behavior are present. Essentially, the injured plaintiff must establish that the instrumentality causing his or her injury was under the exclusive control of the defendant, and that the accident is one that would not, in the ordinary course of events, have occurred without negligence on the part of the one in control. *Id.* at 1341-42.

This Court went on to recognize exclusive control as an essential element, subject only to very specific exceptions. The Court cited in particular the exploding bottle cases and found that in order to be entitled to a *res ipsa loquitur* instruction, even in those cases the plaintiff had to make an affirmative showing that the bottle after leaving the bottler's possession was not subject to unusual changes and was not handled improperly.

The facts of the present case meet none of the requirements set forth in *Goodyear* for entitlement to an instruction on *res ipsa loquitur*. First, the trash receptacle was not under the exclusive control of the OMNI. In addition to the

OMNI's responsibilities in the restroom, an independent janitorial company had access and control. Further, the restroom was used by guests and members of the general public who visited the OMNI.

Second, this is not a situation where direct evidence of negligence was unavailable to the Plaintiff. There was testimony that the receptacle may have fallen because it was loose and it lacked a working locking mechanism, which conflicted with other testimony that the receptacle fit very snugly and tightly into the wall, making it unlikely that it would dislodge.

Furthermore, this situation cannot be found to fall within the reasoning of the exception to exclusive control, i.e., the "exploding bottle" rationale. The Plaintiff in the present case did not make an affirmative showing that the trash receptacle had not been subject to any unusual or improper handling by other individuals.

Additionally, The *Monforti* and *Rogers* cases are factually very similar to the present case and conflict with the decision of the Fourth District. In *Monforti v. K-Mart, Inc.*, 690 So.2d 631 (Fla. 5th DCA 1997), the Fifth District upheld the trial court's denial of the an instruction on *res ipsa loquitur*.

Mrs. Monforti testified that shortly before her injury she observed a K-Mart employee stocking hanging file folders on a shelf above merchandise in which she was interested. After the clerk moved down the aisle, she went to the shelf. As she squatted down to look at what she needed, boxes of file folders fell and injured her. The K-Mart employee testified that she was not stocking file folders, but was replacing labels on merchandise opposite the file folder display. After hearing something fall, she observed the file folders on the floor and that the shelf had collapsed at an angle, tipped with one end still attached to the display, with bent brackets.

The Fifth District found *res ipsa loquitur* inapplicable for the same two reasons that it is inapplicable in the present case. First, as to the question of exclusive control, the court noted:

In the instant case it is not clear that the instrumentality that caused the injury was under the exclusive control of the defendant. There was evidence presented that the highest box on the shelf was well within the reach of K-Mart's customers and that visits by customers for this particular store averaged 12,000 per week. *Id.* at 633.

Additionally, direct proof of negligence was not wanting or unavailable in the *Monfortis*-case. The Monfortis introduced expert opinions in an attempt to prove to the jury that the shelf that collapsed was not adequate to support the weight of the merchandise on display.

The *res ipsa loquitur* instruction, thus, was properly denied for the additional reason that substantial direct proof of negligence was presented for the jury to consider. *Id.* at 633.

Accordingly, in *Monforti*, the Fifth District found lack of exclusive control even though the plaintiff testified that only minutes before the boxes fell, a K-Mart employee was involved in stocking the shelf which collapsed. There is no material distinction from the present case where the area was accessible to numerous members of the public. In the present case, not only was there access by members of the public who visited the hotel, but by an independent janitorial service with cleaning and service responsibilities. Additionally, there was testimony of specific acts of negligence alleged on the part of OMNI in failing to properly maintain the receptacles, i.e., that the receptacles were loose and that the locking mechanisms did not work. *Res ipsa loquitur* is not applicable if direct proof of negligence is available.

In *Wal-Mart Stores, Inc. v. Rogers*, 714 So.2d 577 (Fla. 1st DCA 1998), the trial court was found to have erred in giving an instruction on *res ipsa loquitur*. Plaintiff was injured when a toy radio fell from a hook which was located over her head and beyond her reach. She testified that there were too many

radios hanging from the hook. The court noted that her testimony was sufficient to permit the jury to find creation of a dangerous condition by Wal-Mart. The court also found that the radios were not under the exclusive control of Wal-Mart because they were displayed in the store, accessible to customers. The court, therefore, concluded that the *res ipsa loquitur* instruction should not have been given.

The Fourth District in the present case relied on *Cardina v. Kash N-Karry Food Stores, Inc.*, 663 So.2d 642 (Fla. 2nd DCA 1995). That case is materially distinguishable because the box in question which fell on the plaintiff was not located in a public area, and the only access to it prior to her injury was by the defendant's employees. As part of plaintiff's employment for a food distributor, she inspected her inventory at the defendant's store in a private area of the store, the produce prep room. After retrieving a box and placing it on the floor near a pallet containing bananas and tomatoes, she sensed something was happening. She then saw a 25-pound case of tomatoes falling from the pallet, which struck her.

The produce manager testified that the pallet had been delivered to the store early that morning. A produce clerk had removed one of the cases from the

corner, leaving unsupported one corner of the tomato case that fell on the plaintiff.

The only argument made by the defendant in *Cardina* to try to negate its exclusive control was the contention that the plaintiff squatting near the pallet meant she had control over it. The court found that her mere proximity to the pallet did not negate exclusive control. This is a very different situation from the present case where there was no question in *Cardina* that only the defendant's employees had access to the pallet and it was one of their employees who had likely created the problem. It is apparent that the conclusion regarding exclusive control would have been very different if the pallet had been located in a public area of the store.

Additionally, in the present case, the Fourth District relied upon a New York decision, *Bonventure v. Max*, 645 N.Y.S.2d 867 (N.Y. App. Div. 1986). The plaintiff was injured when a mirrored wall panel with shelves fell on her as she was leaving a store. In contrast to the Florida requirement of exclusive control, the New York court applied a standard of sufficient exclusivity to fairly rule out the chance that any purported defect was caused by some other agency. The

Bonventure case is in direct conflict with *Monforti*, which held that there was not exclusive control of the shelving in question.

In the present case, the receptacle in question was not a large item which certainly could have been manipulated by members of the public or employees of the independent janitorial service so as to cause it to fall. In essence, the Fourth District in the present case has changed Florida law on *res ipsa loquitur* from Aexclusive control@ to Asufficient control.@ The Court has also failed to recognize the direct evidence of negligence available to NODURFT.

CONCLUSION

The Opinion in the present case is in express and direct conflict with decisions of other District Courts of Appeal and of the Supreme Court. Petitioners would respectfully move this Court to accept *certiorari* jurisdiction to review the Opinion of the Fourth District Court of Appeal.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 4th day of January, 2005, to John Romano, Esq., PO Box 21349, West Palm Beach, FL 33416-1349.

CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that this document complies with the requirements of Fla.R.App.P.9.100(l). This document is being submitted in New Times Roman 14 point font.

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