UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0199

September Term, 2015

SUSAN COHEN

v.

VEOLIA TRANSPORTATION SERVICES, INC.

Arthur,
Reed,
Eyler, James R.
(Retired, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: February 29, 2016

Susan Cohen, appellant, filed suit against Veolia Transportation Services, Inc., appellee, in the Circuit Court for Baltimore City. Appellant alleged that she sustained personal injuries while being transported in a mobility van when the motorized scooter on which she was seated tipped over. Appellant alleged that appellee's employee negligently failed to secure the scooter to the floor of the van. At trial, to establish a prima facie case of negligence, appellant relied on the doctrine of res ipsa loquitur. The trial court held that it did not apply and granted appellee's motion for judgment at the conclusion of appellant's case. We shall affirm.

Background

On September 9, 2011, appellant was recovering from hip surgery and, because she was not ambulatory, was required to use a motorized scooter. On that day, appellant and her son, Zachary Cohen, were picked up at the Padonia Village Shopping Center by an employee of appellee, the driver of a mobility van. While en route to their destination, with appellant seated on the scooter, the scooter tipped over. Appellant was injured.

Appellant testified that she saw the driver do something with straps at the front of the scooter. She also saw him move to the rear of the scooter, but because she could not turn around, she could not see what he did there. On cross examination, appellant testified that she received a manual with the scooter, that she "skimmed" it or read it "kind of halfish," and understood what she read. She acknowledged that the manual, admitted into evidence, contained a warning that sitting on the scooter while in a moving vehicle was potentially hazardous. Also on cross examination, appellant testified that "normally" when she boarded a mobility van, the driver would ask whether she wanted to sit in a seat. She

did not remember whether that occurred on the day of the accident, but she testified that she was not able to sit in a seat because of the brace she was wearing.[1]

Zachary, a 12th grader at the time, testified that he was sitting behind appellant and the scooter. He testified that he was "sitting down so I couldn't see what he did to the back, but I saw him bend over the front – to the front of the scooter and the back of the scooter with lock buckles to strap them in." He explained that "[a]fter that, he checked both front and back and he then proceeded to the driver's seat." He further explained that he could not see to the floor to determine what the driver did with his hands because of a small barricade between where he was located and the scooter. Zachary also testified that, after the scooter tipped and appellant fell, he "saw [the driver] check the – check the straps that were supposed to secure my mom into the – onto the floor to see if there was a malfunction or if they were properly tightened."

Discussion

The governing principles were recently set forth by the Court of Appeals in *D.C. v. Singleton*, 425 Md. 398 (2012).

II. STANDARD OF REVIEW

> We review, without deference, the trial court's grant of a motion for judgment in a civil case. *Thomas v. Panco Mgmt. of Md., LLC*, 423 Md. 387, 393–94, 31 A.3d 583, 587–88 (2011) (citing *C & M Builders, LLC v. Strub*, 420 Md. 268, 290, 22 A.3d 867, 880 (2011)); Md. Rule 2–519(b)[ ]. We conduct the same analysis that a trial court should make when considering the motion for judgment. *Thomas*, 423 Md. at 394,

[1] Appellant does not claim that appellee was negligent in failing to provide an accessible seat in the van or in failing to provide a van with a mechanism to secure the scooter by tying to the highest point of the scooter.

31 A.3d at 588. Where the defendant, in a jury trial for negligence, argues that plaintiffs' evidence is insufficient to create a triable issue, the court determines whether an inference of negligence is permissible; that is, whether the evidence demonstrates that it is more probable than not that the defendant was negligent. *Vito v. Sargis & Jones, Ltd.,* 108 Md. App. 408, 417, 672 A.2d 129, 134 (1996); Md. Rule 2–519(b). The court considers "the evidence and reasonable inferences drawn from the evidence in the light most favorable to the non-moving party." *Thomas,* 423 Md. at 393, 31 A.3d at 587.

III. DISCUSSION

With regard to a negligence action based on a perceptually single-vehicle accident, res ipsa loquitur ("res ipsa" or "the doctrine") will be available "if the accident or injury is one which ordinarily would not occur without negligence on the part of the operator of the vehicle" and "the facts are so clear and certain that the inference [of negligence] arises naturally from them." *Knippenberg v. Windemuth,* 249 Md. 159, 161, 238 A.2d 915, 916–17 (1968). Res ipsa loquitur (literally, "the thing speaks for itself") allows generally a plaintiff to establish a prima facie case of negligence when direct evidence of the cause of the accident is unavailable and the circumstantial evidence permits the drawing of an inference by the fact-finder that the defendant's negligence was the cause. *Dover Elevator Co. v. Swann,* 334 Md. 231, 236–37, 638 A.2d 762, 765–66 (1994); *Blankenship v. Wagner,* 261 Md. 37, 41, 273 A.2d 412, 414 (1971). "'The rule is not applied by the courts except where the facts and circumstances and the demand of justice make its application essential, depending upon the facts and circumstances in each particular case.'" *Dover,* 334 Md. at 246, 638 A.2d at 769 (quoting *Blankenship,* 261 Md. at 41, 273 A.2d at 414). Nonetheless, the plaintiff retains his or her burden to prove the defendant's negligence. *Dover,* 334 Md. at 236, 638 A.2d at 765. A defendant confronted properly with a res ipsa inference is obliged to go forward with his case, shouldering what has been described as the "risk of non-persuasion." *Hickory Transfer Co. v. Nezbed,* 202 Md. 253, 262, 96 A.2d 241, 245 (1953). In effect, res ipsa loquitur allows the plaintiff to present the question of negligence to the fact-finder, notwithstanding a lack of direct evidence bearing on causation. *Dover,* 334 Md.

at 236, 638 A.2d at 765 (citing *Munzert v. Am. Stores*, 232 Md. 97, 103, 192 A.2d 59, 62 (1963)).

To invoke successfully the doctrine, the plaintiff must establish that the accident was "(1) of a kind that does not ordinarily occur absent negligence, (2) that was caused by an instrumentality exclusively in the defendant's control, and (3) that was not caused by an act or omission of the plaintiff." *Holzhauer v. Saks & Co.*, 346 Md. 328, 335–36, 697 A.2d 89, 93 (1997) (citing *Dover*, 334 Md. at 236–37, 638 A.2d at 765). Additionally, although not an indispensable requirement of res ipsa, "one of the circumstances which calls for the application of the doctrine is when the facts surrounding the accident are more within the knowledge of the defendant than within the knowledge of the plaintiff." *Johnson v. Jackson*, 245 Md. 589, 594–95, 226 A.2d 883, 886 (1967); *see also Coastal Tank Lines v. Carroll*, 205 Md. 137, 144–45, 106 A.2d 98, 100–01 (1954); *Vito*, 108 Md. App. at 431, 672 A.2d at 141.

To satisfy the exclusive-control requirement, the evidence adduced must demonstrate that no third-party or other intervening force contributed more probably than not to the accident. *Holzhauer*, 346 Md. at 337, 697 A.2d at 93; *Johnson*, 245 Md. at 593, 226 A.2d at 885. We iterated in *Holzhauer* that a res ipsa inference of the defendant's negligence is not permissible where an intervening force may have precipitated the accident. *Holzhauer*, 346 Md. at 337, 697 A.2d at 93. The existence of that potentiality "'weakens the probability that the injury is attributable to the defendant's [negligent] act or omission.'" *Holzhauer*, 346 Md. at 337, 697 A.2d at 93 (quoting *Lee v. Hous. Auth. of Balt.*, 203 Md. 453, 461, 101 A.2d 832, 836 (1954)). In proving the absence of other, more-probable causes of the accident, the plaintiff "is not required to exclude every possible cause for [his] injuries other than that of negligence; [he] is only required to show a greater likelihood that [his] injury was caused by the defendant's negligence than by some other cause." *Norris v. Ross Stores, Inc.*, 159 Md. App. 323, 331, 859 A.2d 266, 271 (2004); *see also Leikach v. Royal Crown Bottling Co.*, 261 Md. 541, 548–50, 276 A.2d 81, 84–85 (1971).

In sum, res ipsa loquitur requires the conclusion that, "by relying on common sense and experience, the incident

> more probably resulted from the defendant's negligence rather than from some other cause." *Norris*, 159 Md. App. at 331, 859 A.2d at 271.

425 Md. at 406-09. (footnote omitted.)

Whether ipsa loquitur is applicable to a set of facts is to be distinguished from whether inferences that can be drawn from circumstantial evidence are legally sufficient to support a finding of a specific act of negligence. *See Cogen Kibler, Inc. v. Vito*, 346 Md. 200, 211 (1997); *Meda v. Brown*, 318 Md. 418, 420 (1990). Appellant does not contend that the evidence was legally sufficient independent of the res ipsa doctrine. Res ipsa loquitur, when applicable, permits a fact finder to infer from circumstantial evidence that the defendant was negligent in some unspecified way when direct evidence of the cause of an accident is unavailable. The three elements of the doctrine interrelate; thus, we shall address the elements simultaneously.

There is nothing in the record to demonstrate that, ordinarily, a motorized scooter being transported with someone sitting on it will not tip without an act of negligence. The owner's manual comments on the instability of the scooter under certain circumstances. It contains a warning that sitting on the scooter while being transported in a vehicle presents a potentially hazardous situation that can cause personal injury or damage to the scooter. It contains several references to the danger of tipping, including when driving the scooter at a high speed, when operating it on uneven terrain or on an excessive incline, or when carrying a passenger.

What are the possible causes of the tipping?: (1) inherent instability of the scooter with a person sitting on it even if secured in accordance with the apparatus in the van; (2)

a defect in the straps or related apparatus that could have been due to a manufacturing defect, lack of maintenance, or tampering by a third party; or (3) the straps were not latched properly. If the defendant was negligent and the negligent act was other than failing to strap properly, we do not know when the negligent act occurred. The evidence does not demonstrate that the straps or other apparatus were not tampered with by third parties or otherwise not functional as a result of acts by third parties prior to the time that appellant was transported. *See Smith v. Kelly*, 246 Md. 640 (1967) (res ipsa loquitur not applicable when plaintiff struck by an object that broke off of a washing machine in a laundromat because laundromat was used by the public). It is speculative to determine whether the driver did not secure the scooter properly with the straps and hooks provided or whether some other cause existed.

The situation here is different from cases involving a failure of a stationary structural component of a building. *See Blankenship v. Wagner*, 261 Md. 37 (1971) (stair step to residence); *Norris v. Ross Stores Inc.*, 159 Md. App. 323 (2004) (shelving units). The current situation here is more like that in *Holzhauer v. Saks & Co.*, 346 Md. 328 (1997) (res ipsa loquitur not applicable when escalator stopped suddenly and emergency stop buttons were accessible to the public).

Moreover, what the *Singleton* Court stated as an additional reason for the result in that case is applicable here:

> Respondents' apparent tactical decision here to forego calling known (or knowable) witnesses to supplement their meager evidence (or otherwise explain the absence of those witnesses), raises the inference that Respondents' access to facts that might have illuminated the cause of the accident was equal to that of

> the District's—a circumstance that militates against the successful invocation of res ipsa loquitur.

Id. at 403.

There was no evidence describing the security apparatus and how it was supposed to be attached. The evidence indicated only that there were straps that inferentially were to be attached at a location on or near the floor. The van was mobile and used by the public. There was no evidence that witnesses with personal knowledge of the van, the security apparatus, and its use prior to and after the accident were unavailable. There is no evidence of where the van was prior to the date of the accident, who drove it, and who occupied it. There was no evidence that, after the accident, the van was unavailable for inspection by plaintiff or her representative or that use and maintenance history of the van before the accident was unavailable. "[T]he failure of a plaintiff in a negligence action to produce reasonably available and explanatory evidence about the accident to supplement his/her deficient evidence may preclude, in and of itself, plaintiffs from invoking res ipsa loquitur." *Singleton*, 425 Md. at 415, n. 7 (Citations omitted). *See Pahanish v. Western Trails, Inc.*, 69 Md. App. 342, 361 (1986) (plaintiff injured when thrown from a horse allegedly caused, *inter alia*, by a negligently maintained saddle girth) (res ipsa loquitur not applicable because there was no proof from which a fact finder could infer the condition of the girth prior to or after the accident).

Lastly, one of the speculative causes of the tipping was instability caused by appellant sitting on the scooter. This was contrary to a warning in the owner's manual. Thus, appellant may have contributed to the tipping.

We conclude that the elements of res ipsa loquitur are not satisfied. Consequently, we affirm the judgment.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.