UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 305

September Term, 2016

ROXANNE DECIUTIIS, *et al*.

v.

SIX FLAGS AMERICA, LP

Arthur,
Beachley,
Shaw Geter,

JJ.

Opinion by Arthur, J.

Filed: April 17, 2017

Appellant Roxanne Deciutiis and her minor child were injured on a ride at a Six Flags amusement park. On the day on which their case was set for trial, Six Flags orally moved for judgment, arguing that Ms. Deciutiis needed an expert to explain the cause of her and her child's injuries, but did not have one. Ms. Deciutiis contended that an expert was unnecessary, because she would prove Six Flags' negligence under the doctrine of *res ipsa loquitur*.

The Circuit Court for Prince George's County granted judgment in favor of Six Flags on the ground that Ms. Deciutiis had not satisfied the conditions for invoking *res ipsa loquitur*. She appealed. We affirm.

FACTUAL AND PROCEDURAL HISTORY

A. The Penguin's Blizzard River Ride

On July 11, 2011, Ms. Deciutiis and her daughter visited the Six Flags amusement park in Mitchellville, Maryland. They decided to go on the Penguin's Blizzard River ride.

The ride is comprised of an elevated chute with rushing water and three loops. An inflated raft, carrying multiple persons, is "carried by the conveyer belt to the top of the chute[.]" From there, the raft is released into the chute. After it is released, the raft "twist[s], spin[s], [and] splash[es]" through the loops at a high rate of speed. Ultimately, the raft is deposited into a long, flat channel that leads to a "boathouse."

Multiple employees operate the ride. One employee "makes sure that [the occupants] are strapped in" with lap belts. At the top of the conveyor belt, another

employee releases the raft into the rushing water in the chute, spacing the rafts "about 100 yards apart" from one another. Once the raft reaches the end of the chute and flows through the long, flat channel, a third employee guides it from the channel to the boathouse.

As the Deciutiises' raft was making its descent, the raft in front of them became stuck for some unknown reason. The rafts collided. Ms. Deciutiis sustained injuries to her neck and back, and her daughter hit her head.

B. Action for Negligence

On June 11, 2014, two years and 11 months after the incident, Ms. Deciutiis, individually and as the parent of her child, filed a complaint against Six Flags America Property Corporation in the Circuit Court for Prince George's County. The complaint alleged that Ms. Deciutiis and her daughter had suffered personal injuries because of the defendant's negligence.

On August 6, 2014, the Six Flags America Property Corporation moved to dismiss the complaint, or alternatively, for summary judgment, because it did not own, operate, or manage the Six Flags amusement park. Ms. Deciutiis responded with an amended complaint, substituting Six Flags America, LP ("Six Flags") as the named defendant.[1]

Six Flags moved to dismiss Ms. Deciutiis's individual claims on the ground of

[1] Ms. Deciutiis asserts that she filed the amended complaint on September 22, 2014, but the circuit court docket entries indicate that she filed it on August 24, 2014. In either case, Ms. Deciutiis filed the amended complaint more than three years after July 11, 2011, when her claims accrued.

limitations. The circuit court denied that motion.

C. Proceedings Before the Circuit Court

Before jury selection on the morning of trial, Six Flags moved *in limine* to preclude Ms. Deciutiis from introducing hearsay statements from some unidentified, out-of-court declarants, who would supposedly testify that the first raft became stuck because it was not properly inflated. The court granted the motion *in limine* after Ms. Deciutiis's counsel agreed that the statements were hearsay and that they did not fall within any exception.

After the court granted the motion *in limine*, Six Flags made an oral motion for judgment, arguing that Ms. Deciutiis needed an expert to explain the cause of her and her daughter's injuries. Ms. Deciutiis contended that an expert was unnecessary, because she would prove Six Flags' negligence under the doctrine of *res ipsa loquitur*. *See generally District of Columbia v. Singleton*, 425 Md. 398 (2012); *Holzhauer v. Saks & Co.*, 346 Md. 328 (1997).

Six Flags countered that Ms. Deciutiis could not employ *res ipsa* for two reasons. First, *res ipsa* applies only if an injury "was caused by an instrumentality exclusively in the defendant's control" (*Holzhauer v. Saks & Co*., 346 Md. at 335-36), but Six Flags did not have exclusive control over all aspects of the ride, such as the operation of individual rafts. Second, *res ipsa* does not apply "in cases concerning the malfunction of complex machinery" (*id.* at 341), such as elevators, escalators, and (Six Flags argued) amusement park rides with rafts that ascend on conveyor belts and descend over running water,

through a downward-sloping chute with multiple turns. In such cases, "an expert is required to testify that the malfunction is of a sort that would not occur absent some negligence." *Id.*

Ms. Deciutiis challenged Six Flags' contention. She asserted that Six Flags exercised exclusive control over the ride, because "they installed the ride in the park. They operated the ride. They have maintained the ride. They have people stationed [on the ride.]" She argued that, "this is an event of an injury and a collision that would not normally happen without somebody doing something wrong and [*sic*] operating the ride." She did not rebut Six Flags' claim that the case involved the alleged malfunction of complex machinery, which required expert testimony.

The circuit court granted judgment in favor of Six Flags, concluding that Ms. Deciutiis could not proceed with her *res ipsa* theory of negligence. The court reasoned that Six Flags was not in exclusive control of the raft with which the Deciutiis raft collided. Relying on *Holzhauer v. Saks & Co.*, 346 Md. at 339-40, the court also reasoned that Ms. Deciutiis needed, but did not have, an expert to prove her case.[2]

Ms. Deciutiis filed this timely appeal.

QUESTIONS PRESENTED

Ms. Deciutiis presents three issues on appeal, which we have consolidated into

[2] Ms. Deciutiis contends that the court erred because it concluded she needed to plead *res ipsa*. Her argument is factually inaccurate. In its ruling, the court said, "I was wrong to say that you didn't [*sic*] have to plead it and I understand that but I still think other sides should have notice that you are going to proceed that way. . . . I was wrong on that part."

one: Did the circuit court err in granting judgment in favor of Six Flags on the ground that Ms. Deciutiis failed to establish a *prima facie* case of negligence under the doctrine of *res ipsa loquitur*?

Although Ms. Deciutiis quarrels with some of the circuit court's statements, we conclude that the court did not err in granting Six Flags' motion for judgment, because *res ipsa loquitur* did not apply to this case. Ms. Deciutiis did not establish that Six Flags had exercised exclusive control, and the collision involved the malfunction of complex machinery, which cannot be proved without expert testimony. We shall affirm.

DISCUSSION

Although the circuit court characterized its ruling as the grant of a motion to dismiss, we treat the ruling as a grant of summary judgment, because it did not turn on a defect in the complaint, but on the plaintiff's inability to prove negligence – an essential element of her case. *See, e.g.*, *Zilichikhis v. Montgomery County*, 223 Md. App. 158, 186 (2015); *Central Truck Ctr., Inc. v. Central GMC, Inc.*, 194 Md. App. 375, 386 (2010). The dispositive motion followed the grant of a motion *in limine*, in which the court excluded any other means of proving Ms. Deciutiis's case. The summary judgment rule "does not prevent the trial court from exercising its discretion during trial to entertain any motions *in limine* or other preclusive motions that may have the same effect as summary judgment and lead to a motion for judgment under Md. Rule 2-519." Md. Rule 2-501(a)

Committee Note.[3]

Whether the circuit court properly granted summary judgment is a question of law. *Butler v. S & S P'ship*, 435 Md. 635, 665 (2013) (citation omitted). This Court conducts a *de novo* review to determine whether the circuit court's conclusions were legally correct. *See D'Aoust v. Diamond*, 424 Md. 549, 574 (2012).

The relevant inquiry is well known:

> When reviewing a grant of summary judgment, we determine whether the parties properly generated a dispute of material fact and, if not, whether the moving party is entitled to judgment as a matter of law. This Court considers the record in the light most favorable to the nonmoving party and construe[s] any reasonable inferences that may be drawn from the facts against the moving party. A plaintiff's claim must be supported by more than a scintilla of evidence[,] as there must be evidence upon which [a] jury could reasonably find for the plaintiff.

Blackburn Ltd. P'ship v. Paul, 438 Md. 100, 107-08 (2014) (citations and quotation marks omitted).

I. *Res Ipsa Loquitur*

Res ipsa loquitur "afford[s] a plaintiff the opportunity to present a *prima facie* case when direct evidence of the cause of an accident is not available or is available solely to the defendant" (*Holzhauer v. Saks & Co.*, 346 Md. at 334), and the circumstantial evidence permits the factfinder to infer that the defendant's negligence was the cause. *District of Columbia v. Singleton*, 425 Md. at 407. Courts apply *res ipsa* only "'where the facts and circumstances and the demand of justice make its application

[3] At oral argument, both parties agreed to treat the court's ruling as a grant of summary judgment.

essential[.]'" *Dover Elevator Co. v. Swann*, 334 Md. 231, 246 (1994), quoting *Blankenship v. Wagner*, 261 Md. 37, 41 (1971); *accord District of Columbia v. Singleton*, 425 Md. at 407.

Under the doctrine of *res ipsa loquitur*, the factfinder may draw an inference of negligence if the plaintiff proves three elements: (1) the plaintiff suffered an injury that does not ordinarily occur absent negligence; (2) the injury was caused by an instrumentality exclusively in the defendant's control; and (3) the injury was not caused by any act or omission by the plaintiff. *See, e.g.*, *Holzhauer v. Saks & Co.*, 346 Md. at 335-36; *accord District of Columbia v. Singleton*, 425 Md. at 408.

To satisfy the element of exclusive control, the plaintiff must prove that it is more likely than not that no third party or intervening force contributed to the accident. *District of Columbia v. Singleton*, 425 Md. at 408. An "inference of the defendant's negligence is not permissible where an intervening force may have precipitated the accident." *Id.*

Res ipsa applies only when "'the circumstances attendant upon an accident are themselves of such a character as to justify a jury in inferring negligence as the cause of that accident.'" *Holzhauer v. Saks & Co.*, 346 Md. at 338, quoting *Benedick v. Potts*, 88 Md. 52, 55 (1898). "This is the case when 'the common knowledge of jurors [is] sufficient to support an inference or finding of negligence on the part of' a defendant." *Id.*, quoting *Meda v. Brown*, 318 Md. 418, 428 (1990). For example, courts have held that jurors may draw an inference of negligence when a barrel of flour falls out of a

warehouse window (*id*. at 339, citing *Byrne v. Boadle*, 2 Hurl. & Colt. 722, 159 Eng. Rep. 299 (1863)), or where stairs collapse below a person's feet (*id.*, citing *Blankenship v. Wagner*, 261 Md. at 417), because it is a matter of common knowledge that such events ordinarily do not occur in the absence of someone's negligence. *See id.*

On the other hand, "'because of the complexity of the subject matter'" in some cases, "'expert testimony is required to establish negligence and causation.'" *Id.*, quoting *Meda v. Brown*, 318 Md. at 428. For example, in many cases involving medical negligence, and in cases involving injuries caused by complex machinery, the common knowledge of jurors is insufficient to support an inference that the plaintiff's injury resulted from the defendant's negligence. *See id*. at 339-41. In cases in which the plaintiff must rely on expert testimony, he or she "must necessarily be precluded from relying on *res ipsa loquitur*." *Id.* at 341.

A plaintiff might also be precluded from relying on *res ipsa loquitur* if he or she decides not to adduce reasonably available evidence that could cast light on the cause of injury. *District of Columbia v. Singleton*, 425 Md. at 409. If, for example, the plaintiff fails to call witnesses who are "known and accessible" (*id.*), he or she may not do enough to eliminate causes other than the defendant's negligence and may not establish that the defendant's negligence was "the most probable causative factor." *Id.* at 412.

Finally, even if a plaintiff establishes the elements of *res ipsa loquitur*, the burden of proof does not shift to the defendant. *Potts v. Armour & Co.*, 183 Md. 483, 486 (1944); *Chesapeake & Potomac Tel. Co. of Maryland v. Hicks*, 25 Md. App. 503, 527

(1975). To the contrary, "the plaintiff retains his or her burden to prove the defendant's negligence." *District of Columbia v. Singleton*, 425 Md. at 407. "A defendant confronted properly with a res ipsa inference is oblig[ated] to go forward with his case, shouldering what has been described as the 'risk of non-persuasion.'" *Id.* at 408, quoting *Hickory Transfer Co. v. Nezbed*, 202 Md. 253, 262 (1953).

A. Exclusive Control

The circuit court rejected Ms. Deciutiis's reliance on *res ipsa loquitur* in part because she could not show that Six Flags had "exclusive control" over the raft with which her raft collided. Ms. Deciutiis responds that "[t]he force and speed of the water is determined by the amount of water pumped into the top of the chute, how steep the incline [is], and the number of directions it is required to follow," all of which, she says, were under Six Flags' complete control.

Ms. Deciutiis's argument fails to recognize that the occupants of the other raft also had some ability to stop the raft or to slow its descent. For example, Ms. Deciutiis does not rule out the prospect that the occupants of the other raft might have done something to deflate it. Nor does she rule out the prospect that the occupants of the other raft might have grabbed or touched the walls, particularly the walls in the long, flat channel through which the raft passes after it has descended through the chute. Simply put, Six Flags had control over some, but by no means every, aspect of the ride, because someone besides Six Flags had the ability to influence the movement of the other raft.

In this regard, the present case bears more than a little resemblance to *Holzhauer*

v. Saks & Co., 346 Md. at 331, which involved an injury that occurred when an escalator came to a sudden stop. In addition to the possibility that the escalator had suddenly stopped because of the negligence of its owner, the Court of Appeals recognized "an equally likely explanation for the escalator's abrupt stop." *Id.* at 336. Because the escalator was equipped with two safety buttons that would cause it to stop if they were pushed, the Court of Appeals could not "say that the escalator would not stop in the absence of the [owner's] negligence[.]" *Id*. To preclude the plaintiff's reliance on *res ipsa*, the facts did not need to show that someone actually pushed the safety button; it was sufficient for the facts merely to show that something other than the owner's negligence was just as likely to have caused the escalator to stop. *Id.* Consequently, the plaintiff could not satisfy one of the elements of *res ipsa loquitur* – the element requiring that the defendant have exclusive control over the instrumentality that caused the injury. *Id.* at 337-38.

Here, too, Ms. Deciutiis could not show that Six Flags had exclusive control over the instrumentality that allegedly caused her and her daughter's injuries – the Penguin's Blizzard River ride. Just as another person had the ability to stop the escalator in *Holzhauer v. Saks & Co.*, so too did an occupant of the other raft have the ability to slow or stop that raft in this case. The circuit court, therefore, did not err in entering judgment in Six Flags' favor.

B. Complex Mechanical Devices

Res ipsa loquitur applies only when jurors possess the background knowledge

necessary to decide whether an event ordinarily occurs in the absence of someone's negligence. *Holzhauer v. Saks & Co.*, 346 Md. at 339. Consequently, a plaintiff may not employ *res ipsa loquitur* in cases involving injury caused by complex mechanical devices, such as elevators and escalators. *Id.* at 341; *Dover Elevator Co. v. Swann*, 334 Md. at 256. As the Court of Appeals has explained:

> [W]hether an escalator is likely to stop abruptly in the absence of someone's negligence is a question that lay[persons] cannot answer based on common knowledge. The answer requires knowledge of "complicated matters" such as mechanics, electricity, circuits, engineering, and metallurgy.

Holzhauer v. Saks & Co., 346 Md. at 341.

Similarly, in a dissenting opinion that advocated a position that the Court of Appeals ultimately adopted, Judge Wilner wrote:

> Mechanical, electrical, and electronic devices fail or malfunction routinely—some more routinely than others. A speck of dust, a change in temperature, misuse, an accidental unforeseen trauma—many things can cause these devices to malfunction. To allow an inference that the malfunction is due to someone's negligence when the precise cause cannot be satisfactorily established appears to me to be unwarranted.

Swann v. Prudential Ins. Co. of America, 95 Md. App. 365, 419 (1993) (Wilner, J., concurring in part and dissenting in part), *rev'd sub nom. Dover Elevator Co. v. Swann*, 334 Md. 231 (1994).

In such cases, "'expert testimony is required to establish negligence and causation.'" *Holzhauer v. Saks & Co.*, 346 Md. at 339, quoting *Meda v. Brown*, 318 Md. at 428.

In the circuit court, Six Flags likened the Penguin's Blizzard River ride to a

complex mechanical device like an elevator or escalator. The circuit court agreed. So do we.

The successful design and operation of this particular ride depends on a number of scientific principles that are beyond the ken of anyone who lacks training in physics or engineering. To facilitate the descent of the rafts, the chute must be angled toward the ground, but the angle cannot be so steep as to allow the rafts to generate enough speed to overshoot the turns and fly out of the chute. Similarly, the radius of the turns cannot be so tight as to force the rafts to ride up, and possibly over, the walls. On the turns, the walls must be high enough to contain the rafts, but they cannot be banked at such a steep angle that they cause the rafts to flip over. Water must flow through the chute at a sufficient volume and rate as to keep the rafts moving, but not at such a volume or rate as to cause undue speed and acceleration. The rafts must be inflated with enough pressure to keep them afloat, but not enough to cause them to explode. The weight of the passengers cannot be so great as to cause a raft to run aground – and so on.

In view of the complex physical and mechanical principles that are involved in the design and successful operation of the Penguin's Blizzard River ride, Ms. Deciutiis could not rely on *res ipsa loquitur* to prove her prima facie case. *See id.* at 341. Instead, she would have to adduce expert testimony as to negligence and causation. *Id.* at 339. Because Ms. Deciutiis had no such testimony, the circuit court correctly entered

judgment in Six Flags' favor.

C. Failure to Pursue Reasonably Accessible Evidence of Direct Negligence

Ms. Deciutiis made no effort to gather direct evidence of Six Flags' negligence even though that evidence was reasonably accessible. Her failure to do so precludes her from relying on *res ipsa loquitur*. *See District of Columbia v. Singleton*, 425 Md. at 409, 412.

Although it would have been easy enough to require Six Flags to identify the employees who were operating the ride on the day of the accident, Ms. Deciutiis did not depose them to elicit their knowledge about how the accident occurred, let alone list them as potential witnesses. Similarly, although it would not have been exceedingly difficult to identify the patrons on the first raft or any other patrons on the Deciutiis's raft,[4] Ms. Deciutiis did not depose them to elicit their knowledge about how the accident occurred or indicate any intention to call them as witnesses. Consequently, Ms. Deciutiis adduced none of the readily accessible information about whether the first raft got stuck because it was underinflated as a result of something that Six Flags had done or failed to do; or whether a patron on the first raft had done something to stop the raft, slow its descent, or

[4] No one could reasonably expect Ms. Deciutiis to begin identifying and interviewing witnesses immediately after she and her daughter had been injured in an accident. Nonetheless, entities like Six Flags frequently compile incident reports that identify witnesses and sometimes disclose what they observed. When prepared in the ordinary course of business, such reports are available in discovery. *See E.I. du Pont de Nemours & Co. v. Forma-Pack, Inc.*, 351 Md. 396, 410-12 (1998); *see also Owens-Illinois, Inc. v. Armstrong*, 326 Md. 107, 113-14 (1992); *Cranford v. Montgomery County*, 300 Md. 759, 790-91 (1984).

cause it to become deflated; or whether a Six Flags employee had released the Deciutiis's raft before he should have released it; or whether an employee had released the Deciutiis's raft even though he knew or should have known that the first raft had gotten stuck.

Furthermore, Ms. Deciutiis made no effort to obtain readily available information about the maintenance records for this particular ride or about Six Flags' knowledge of similar accidents on the Penguin's Blizzard River ride, whether in Mitchellville or at another Six Flags amusement park. Consequently, Ms. Deciutiis adduced none of the readily available information about whether Six Flags had notice about maintenance defects with this ride in particular or design defects with the Penguin's Blizzard River ride in general. In fact, Ms. Deciutiis offered no explanation at all about why her raft had collided with the other one.

In similar circumstances, the Court of Appeals held that a plaintiff could not resort to *res ipsa loquitur*. In *District of Columbia v. Singleton*, 425 Md. at 404, the plaintiffs were asleep when the bus in which they were traveling left the highway, landed in a wooded area, and collided with a tree. At trial, however, only the plaintiffs and a doctor testified. *Id.* at 405. The plaintiffs did not call numerous material witnesses, including the bus driver, any of the other passengers, the emergency responders, or the motorists who witnessed the accident. *Id.* At the end of the plaintiffs' case, the circuit court granted a motion for judgment in the defendant's favor.

On appeal, the Court of Appeals concluded that the circuit court properly granted

the defendant's motion for judgment, because the plaintiffs failed to show that the defendant's negligence was a more likely cause of the accident than other potential causes. *Id.* at 409. The Court specifically cited the plaintiffs' "decision not to adduce other reasonably available evidence that could have cast light on" how the accident occurred, such as "testimony from the bus driver, other bus passengers, motorists who witnessed the accident, emergency responders, or possibly the police accident report, if admissible . . . ." *Id.* The plaintiffs' attorney had conceded that "some of these witnesses were known and accessible" (*id.*), and the Court suspected that counsel had made a "tactical decision" not to call them. *Id.* at 413. In the absence of that evidence, the Court concluded, it was just as likely that the accident had occurred because of "a sudden emergency, such as a tire blowout, avoiding another vehicle or other moving obstacle, an unforeseen medical emergency, or a mechanical failure unrelated to inadequate maintenance," as it was that the accident had occurred because of the defendant's negligence. *Id.* at 412. *Res ipsa loquitur* was unavailable. *Id.* at 415.

As in *Singleton*, Ms. Deciutiis failed to pursue reasonably available information that might have assisted her in developing direct, rather than circumstantial, evidence of Six Flags' negligence. As in *Singleton*, therefore, the circuit court correctly concluded that Ms. Deciutiis could not proceed under a theory of *res ipsa loquitur*.

II. Limitations

As a separate ground for upholding the judgment against Ms. Deciutiis (though not against her minor child), Six Flags argues that the circuit court erred in denying its

motion to dismiss on grounds of limitations.

Even though Six Flags received a wholly favorable judgment on a different ground, it may argue as a ground for affirmance any matter that was resolved against it in the circuit court. *Paolino v. McCormick & Co*., 314 Md. 575, 579 (1989), citing *Offut v. Montgomery County Bd. of Educ*., 285 Md. 557, 564 n.4 (1979). "This is merely an aspect of the principle that an appellate court may affirm a trial court's decision on any ground adequately shown by the record." *Id.*, quoting *Offut v. Montgomery County Bd. of Educ*., 285 Md. at 564 n.4.[5]

Ms. Deciutiis filed her initial complaint on June 11, 2014, but she named the wrong defendant, Six Flags America Property Corporation. She corrected the error and named the correct defendant, Six Flags (a.k.a. Six Flags America, LP), in an amended complaint that she filed on approximately August 24, 2014. *See supra* n. 1. In the meantime, however, limitations had run on July 11, 2014. *See* Maryland Code (1974, 2013 Repl. Vol.), § 5-101 of the Courts and Judicial Proceedings Article. With respect to Ms. Deciutiis's individual claims, therefore, the amended complaint is timely only if it relates back to the filing of the initial complaint.

The amended complaint would relate back only if the correct defendant, Six Flags, had notice of its intended status as a defendant before limitations had run. *See*, *e.g*., *Williams v. Hofmann Balancing Techniques, Ltd*., 139 Md. App. 339, 369 (2001). The

[5] Furthermore, to raise that argument, Six Flags was not required, and in fact was not even permitted, to note a cross-appeal, as the judgment below was entirely in Six Flags' favor. *Id.*, citing *Offut v. Montgomery County Bd. of Educ*., 285 Md. at 564 n.4.

undisputed facts in the record establish that Six Flags had no such notice.

The record reflects that Ms. Deciutiis served the wrong defendant, Six Flags America Property Corporation, on July 16, 2014. Assuming for the sake of argument that notice to Six Flags America Property Corporation amounts to notice Six Flags (a.k.a. Six Flags America, LP) of its intended status as a defendant, Six Flags still would not have had received the requisite notice until five days after limitations had run. Therefore, even if the circuit court had erred in entering judgment in Six Flags' favor, we would sustain that aspect of the judgment because Ms. Deciutiis failed to assert her individual claims against Six Flags within the three-year period of limitations.[6]

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[6] By contrast, limitations would not have barred the claims that Ms. Deciutiis asserted on her daughter's behalf: the three-year limitations period does not begin to run on the daughter's claims until she reaches the age of 18 (*see* § 5-201(a) of the Courts and Judicial Proceedings Article), which has yet to occur.