IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GEORGE SCHLASTA, AN INDIVIDUAL, Appellant, vs. WILLIAM MERTZ, AN INDIVIDUAL, Respondent.	No. 71344
GEORGE SCHLASTA, AN INDIVIDUAL, Appellant, vs. WILLIAM MERTZ, AN INDIVIDUAL, Respondent.	No. 73575

ORDER REVERSING AND REMANDING

George Schlasta appeals from a judgment, pursuant to a jury verdict, in a tort action and from an order awarding attorney fees and costs. Eighth Judicial District Court, Clark County; Eric Johnson, Judge. We consolidated these appeals for disposition.

Schlasta and his daughter were traveling south on Interstate-15 when their vehicle was struck by the detached left-front wheel of William Mertz's motor home.[1] Schlasta sued Mertz alleging negligence, specifically failure to maintain vehicle (res ipsa loquitur) and failure to control vehicle. Mertz served Schlasta an offer of judgment for $20,000. Schlasta declined the offer and Mertz moved for summary judgment. The district court granted the motion in part regarding res ipsa loquitur but denied in part regarding general negligence.

[1]We do not recount the facts except as necessary for the disposition.

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During jury selection, Schlasta challenged five venirepersons for cause, claiming that they were biased against awarding large sums and/or pain and suffering damages. The district court struck two of the five venirepersons. Near the conclusion of the five-day trial, Schlasta submitted a res ipsa loquitur jury instruction, which the district court declined to give. The jury found Mertz was not negligent. Post-trial, Mertz moved for, and the district court awarded, attorney fees, costs, and prejudgment interest under NRCP 68(f).

In these consolidated appeals, Schlasta argues that the district court erred in (1) granting summary judgment on his claim of res ipsa loquitur, (2) failing to instruct the jury on res ipsa loquitur, (3) denying his challenges for cause, and (4) granting attorney fees, costs, and interest.

Schlasta argues that the district court erred in granting summary judgment on his res ipsa loquitur negligence claim because he demonstrated that such an accident does not ordinarily occur absent negligence, Mertz was in exclusive control of the motor home prior to the accident, Mertz was in the best position to explain the accident, and Mertz failed to provide any non-negligent explanations for the accident. Further, Schlasta contends that notwithstanding the district court's grant of summary judgment regarding his res ipsa loquitur negligence claim, it should have instructed the jury as to res ipsa loquitur because "evidence was brought forth at the trial" that justified the instruction.

Mertz counters that he did not have superior knowledge to explain the accident and that there are non-negligent explanations for a wheel detaching, including the fault of the manufacturer or mechanic who installed the bolts, general wear, or objects in the road. Additionally, Mertz contends that the accident could have been explained by the evidence presented at trial, rendering a res ipsa loquitur instruction inapplicable.

Below, the district court granted Mertz's motion for summary judgment in part with respect to Schlasta's claim of res ipsa loquitur neglgience. We review a district court's order granting summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id.* When deciding a summary judgment motion, all evidence "must be viewed in a light most favorable to the nonmoving party." *Id.*

Negligence requires that the plaintiff establish the defendant owed the plaintiff a duty of care, "the defendant breached that duty," the breach caused the plaintiff injury, and that the injury resulted in damages. *Sadler v. PacifiCare of Nev., Inc.*, 130 Nev. 990, 995, 340 P.3d 1264, 1267 (2014). To infer negligence under res ipsa loquitur, the plaintiff must show:

> (1) the event [is] of a kind which ordinarily does not occur in the absence of someone's negligence; (2) the event [is] caused by an agency or instrumentality within the exclusive control of the defendant; and (3) the event [could] not have been due to any voluntary action or contribution on the part of the plaintiff.

Woosley v. State Farm Ins. Co., 117 Nev. 182, 188-89, 18 P.3d 317, 321 (2001) (quoting *Bialer v. St. Mary's Hosp.*, 83 Nev. 241, 243, 427 P.2d 957, 958 (1967) (overruled by *Woosley*)). Further, "Nevada also requires the defendant to have superior knowledge of or be in a better position to explain the accident for res ipsa loquitur to apply." *Id.* at 189, 18 P.3d at 321. After the plaintiff establishes the res ipsa loquitur elements, "the burden shifts to the defendant to show that something other than its negligence caused the accident." *Id.* Moreover, generally,

> where the plaintiff in his complaint gives the explanation of the cause of the accident, that is to

> say, where the plaintiff, instead of relying upon a general allegation of negligence, sets out specifically the negligent acts or omissions complained of, the doctrine of res ipsa loquitur does not apply.

Austin v. Dilday, 55 Nev. 357, 362, 36 P.2d 359, 359 (1934) (internal quotation marks omitted).

Further, "[a] party is entitled to have the jury instructed on all of his theories of the case that are supported by the evidence." *Beattie v. Thomas*, 99 Nev. 579, 583, 668 P.2d 268, 271 (1983). An instruction on res ipsa loquitur is unnecessary when "the accident was explained by the evidence," as it "is appropriate only when the specific acts that cause the injury are unknown to the plaintiff." *Sheeketski v. Bortoli*, 86 Nev. 704, 707, 475 P.2d 675, 677 (1970).

Here, regarding the first element of res ipsa loquitur, common sense weighs in favor of finding that the detachment of the wheel from the motor home was of a kind that ordinarily does not occur in the absence of negligence. *See Maroules v. Jumbo, Inc.*, 452 F.3d 639, 645 (7th Cir. 2006) (stating plaintiff failed to show "common sense or expert testimony that the injury was one that would not ordinarily occur in the absence of proper care on the part of those controlling the instrumentality"); *see, e.g., McLaughlin v. Lasater*, 277 P.2d 41, 42 (Cal. Dist. Ct. App. 1954) ("A wheel does not ordinarily become detached from an automobile in the absence of negligence in either its operation or maintenance."); *Wilson v. Spencer*, 127 A.2d 840, 841 (D.C. 1956) (concluding plaintiff was entitled to go to the jury under a res ipsa loquitur theory when she was struck by a hubcap that flew off a passing vehicle: "Thousands of automobiles are using our streets, but no one expects the air to be filled with flying hubcaps."); *Holten v. Parker*, 224 N.W.2d 139, 144 (Minn. 1974) ("We adopt the rule in conformance with the majority of courts that in accidents where a wheel becomes disengaged from

a moving vehicle the doctrine of res ipsa loquitur is applicable except where defendant offers evidence establishing that he is not solely responsible for any negligence connected with the loss of the wheel."); *Spica v. Connor*, 288 N.Y.S.2d 719, 723 (Dist. Ct. 1968) ("It is common knowledge that a wheel will not ordinarily leave a car unless there has been a lack of reasonable care in its installation and maintenance.").

As to the second element, the motor home was in Mertz's exclusive control. Mertz purchased it three to four years prior to the accident, he only drove it twice a year, he was the driver at the time of the accident, and about three months prior, he had the tires "checked" but did not have them replaced or rotated. And there is no evidence that a third person repaired or replaced the wheel, or otherwise had control of the motor home. Further, regarding the third element, as Mertz conceded, the accident was not due to any action or contribution by Schlasta.

Last, we conclude that Mertz was in a better position to explain the accident because he knew the age of the motor home and its condition for the last three to four years. And three months before the accident, a repair shop informed him that he "[n]eeds tires" yet he did not have them replaced or rotated prior to his multi-state travels. Although we recognize that the recommendation to replace tires may not have had anything to do with the stability or condition of the wheel, it shows that Mertz was in a better position to explain the accident.

Therefore, because Schlasta met his burden to receive an inference of res ipsa loquitur, the district court erred by granting in part Mert'z motion for summary judgment regarding res ipsa loquitur. *Woosley*, 117 Nev. at 189, 18 P.3d at 321 ("Whether sufficient evidence supports an inference of negligence under res ipsa loquitur is a question for the jury; however, the district court must first determine whether sufficient evidence

has been adduced at trial to support the consideration of a res ipsa loquitur instruction and therefore whether the instruction should be given."). Therefore, we reverse the judgment and remand for a new trial.[2]

For the aforementioned reason, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

Silver, C.J.

Tao, J.

Gibbons, J.

cc: Hon. Eric Johnson, District Judge
Lansford W. Levitt, Settlement Judge
Jay Young, Settlement Judge
Maier Gutierrez & Associates
Ayon Law, PLLC
Messner Reeves LLP
Eighth District Court Clerk

[2]Because we reverse the district court's order granting in part Mertz's motion for summary judgment on res ipsa loquitur, we need not address Schlasta's other issues on appeal, namely, the district court's denial of his challenges for cause and order granting attorney fees, costs, and interest.