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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CHARLES ABOUNASSAR, Plaintiff and Appellant, v. STAY GREEN, INC., et al., Defendants and Respondents.	B282312 (Los Angeles County Super. Ct. No. BC559409)

APPEAL from judgments of the Superior Court of Los Angeles County, Margaret L. Oldendorf, Judge. Affirmed.

Law Offices of Robert Ozeran and Robert Eugene Ozeran for Plaintiff and Appellant.

Banashek Irving, Matthew Banashek and Michael W. Irving for Defendant and Respondent Stay Green, Inc.

Hartsuyker, Stratman & Williams-Abrego, Kathleen Baxter-Walker; Veatch Carlson and Peter H. Crossin for

Defendant and Respondent Haskell Canyon Ranch Homeowners Association.

Charles Abounassar appeals from judgments of nonsuit. We affirm.

FACTS AND PROCEDURAL BACKGROUND

Charles Abounassar resides with his wife, Anne Marie Martens, in their home in Haskell Canyon Ranch in Santa Clarita. Their lot abuts a landscaped hillside owned by defendant and respondent Haskell Canyon Ranch Homeowners Association (Association), of which Abounassar is a member.

In the wee hours of March 30, 2014, Abounassar awoke and went to use his bathroom. The floor was wet, causing him to slip and fall, sustaining injuries. He and his wife, who was awakened by the commotion, eventually ascertained the water came from a broken sprinkler on the adjacent hillside, which had caused water to spray into their open bathroom window. The sprinkler break also caused water to flow into the couple's backyard. The couple called the fire department to ask it to turn off the water. The responding firefighters gave the broken sprinkler head to the couple, and placed a flower pot over the sprinkler pipe to shield the couple's property from additional spray.

Abounassar sued the Association and its landscaping maintenance contractor, defendant and respondent Stay Green, Inc. ("Stay Green"), using a form complaint, and alleging a single cause of action for "General Negligence." Among other things, the complaint alleged the defendants were "responsible for the maintenance, upkeep, irrigation, and supervision" of the hillside;

that they "had a duty to maintain, in proper working order, sprinklers and other . . . irrigation equipment, so that water would not enter the Abounassar residence;" and that they "breached that duty by failing to maintain the sprinklers and other irrigation facilities," resulting in damages.

The case was tried to a jury in January 2017. In his case in chief, Abounassar and his wife testified to the events of March 30, 2014. His doctor testified to Abounassar's injuries and medical expenses. The jury heard an audio recording of Abounassar's call to the fire department, in which he stated he had not had any previous problems with the Association's sprinkler. Plaintiff then rested, without adducing evidence of (1) what caused the sprinkler to malfunction, (2) what procedures, if any, the Association or Stay Green had in place to observe, test, or maintain the sprinklers, (3) whether the Association or Stay Green had notice of problems with this sprinkler or of similar sprinkler malfunctions, (4) whether there is any industry standard for homeowners' associations or landscaping contractors with respect to maintaining sprinkler systems, (5) what defendants actually did or did not do to monitor and maintain the sprinklers, or (6) any other evidence from which the jury could determine the duty owed by defendants or whether either defendant had breached its duty. Curiously, although defense counsel had referenced the existence of a contract between the Association and Stay Green during opening statements, Abounassar made no effort to introduce the contract into evidence, or to provide evidence of its terms.

Not surprisingly, the Association and Stay Green moved for nonsuit under Code of Civil Procedure section 581c. Abounassar, they pointed out, had introduced no evidence they knew the

sprinkler was likely to break, how it broke, the standard of care applicable to maintenance of a sprinkler system by a homeowners' association or landscaping contractor, or any evidence they breached the standard of care, whatever it might be.

The trial judge entertained argument on the motions for almost an hour. Abounassar's counsel repeatedly argued his client did not have the burden to prove why the sprinkler broke. As for duty, he argued the Association and Stay Green had a duty to maintain the property so the sprinkler did not spray onto another's property causing injury. He made what he characterized as a res ipsa argument: defendants had a duty to maintain the property so that no one was injured, and that the plaintiff was injured "speaks for itself."

The trial judge granted both nonsuit motions. She stated, "I have to grant the motions by both defendants for a nonsuit because even indulging all inferences in favor of the plaintiff, the plaintiff has not presented any evidence concerning the duty of care of either defendant or whether that duty has been breached in this case. . . . The plaintiff needed to present other evidence, most likely through the form of expert testimony, to at least proffer sufficient evidence of what the duty was of a reasonable homeowner association, and the duty of a reasonable landscape contractor for these common areas and that those duties have been breached in this case. I think that this gap is fatal to the plaintiff's case, and it compels me to grant both of these motions."

Abounassar appeals from the separate orders and judgments of nonsuit entered in favor of each defendant, arguing the court erred in granting nonsuit. We affirm.

DISCUSSION

The Court Did Not Err in Granting Nonsuit

Abounassar contends the res ipsa loquitur doctrine applies and should have defeated the nonsuit motions. We disagree.

"On review of a judgment of nonsuit, as here, we must view the facts in the light most favorable to the plaintiff. '[C]ourts traditionally have taken a very restrictive view of the circumstances under which nonsuit is proper. The rule is that a trial court may not grant a defendant's motion for nonsuit if plaintiff's evidence would support a jury verdict in plaintiff's favor. [Citations.] [¶] In determining whether plaintiff's evidence is sufficient, the court may not weigh the evidence or consider the credibility of witnesses. Instead, the evidence most favorable to plaintiff must be accepted as true and conflicting evidence must be disregarded. The court must give "to the plaintiff's evidence all the value to which it is legally entitled, . . . indulging every legitimate inference which may be drawn from the evidence in plaintiff['s] favor . . . ." ' [Citation.] The same rule applies on appeal from the grant of a nonsuit." (*Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1214–1215.)

" 'The elements of a cause of action for negligence are well established. They are "(a) a legal duty to use due care; (b) a breach of such legal duty; [and] (c) the breach as the proximate or legal cause of the resulting injury." ' " (*Ladd v. County of San Mateo* (1966) 12 Cal.4th 913, 917, italics omitted.

"Res ipsa loquitur is a rule of evidence allowing an inference of negligence from proven facts. [Citations.] It is based on a theory of 'probability' where there is no direct evidence of defendant's conduct, [citations], permitting a common sense inference of negligence from the happening of the accident.

[Citations.] The rule thus assists plaintiffs in negligence cases in regard to the production of evidence." (*Gicking v. Kimberlin* (1985) 170 Cal.App.3d 73, 75 (*Gicking*); Evid. Code § 646(c).)

Res ipsa loquitur requires "evidence satisf[ying] three conditions: ' "(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; [and] (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff." ' [Citation.]" (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 825–826; *Gicking, supra*, 170 Cal.App.3d at p. 75.) "The doctrine of res ipsa loquitur is applicable where the accident is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and that the defendant is probably the one responsible." (*Di Mare v. Cresci* (1962) 58 Cal.2d 292, 298–299.) " 'In considering the applicability of res ipsa, . . . [t]he court merely determines whether the plaintiff has produced sufficient substantial evidence to permit a jury to draw such an inference. Where reasonable [people] may differ as to the balance of probabilities, the trial judge must leave the question to the jury [citations].' " (*Albers v. Greyhound Corp.* (1970) 4 Cal.App.3d 463, 474.)

Here, the trial court granted defendants' nonsuit motions in part because Abounassar had presented no evidence defendants caused the sprinkler head to break and failed to present evidence justifying the invocation of res ipsa loquitur to prove causation by logical inference. Abounassar, as the plaintiff, bore the burden of proving each of the three res ipsa elements had been demonstrated. The third element—that Abounassar

did not contribute to the accident—is not at issue. But, as discussed below, Abounassar failed to prove facts satisfying the first two elements.

*A. **The First Element of Res Ispa Loquitur***

First, Abounassar was required to prove the injury from the broken sprinkler ordinarily wouldn't have happened unless someone was negligent. But he offered *no* evidence proving why the sprinkler head broke. Was it incorrectly installed? We don't know because Abounassar offered no evidence. Even if it was incorrectly installed, there was no evidence either defendant installed it or was aware of the installation defect. Was the malfunction caused by a design defect? Or a manufacturing defect? Again, we don't know. And in any event, there was no evidence either defendant designed or manufactured the sprinkler head, or had notice of any defect. Did it simply wear out because, as a mechanical device exposed to pressure, water, and sunlight, it could not be expected to last forever? We don't know because Abounasser offered no evidence of the manufacture or installation dates. And, in any event, there was no evidence these defendants should have known its expected lifetime or had a duty to replace sprinkler heads before failure.

"[R]es ipsa loquitur cannot be applied to infer negligence where the cause of an accident is merely speculative [citation], that is, where there are several possible causes and no cause can be excluded or included by the evidence." (*Gicking, supra,* 170 Cal.App.3d at p. 77.)

"Negligence is the failure to use reasonable care to prevent harm to oneself or to others." (CACI No. 401.) "Because application of [the] principle [of due care] is inherently situational, the amount of care deemed reasonable in a particular

case will vary, while at the same time the standard of conduct itself remains constant, i.e., due care commensurate with the risk posed by the conduct taking into consideration all relevant circumstances. [Citations.]" (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 997.) Abounassar failed to adduce evidence of the nature and amount of care required in this case, and any corresponding failure to exercise such care. In other words, he failed to provide evidence of what a reasonable homeowners' association or landscaping contractor would do under the circumstances.

As previously noted, in his complaint, and in his counsel's opening statement, Abounassar had asserted defendants had a duty to maintain the sprinkler system so that it would not spray water into Abounassar's home. But he offered no evidence concerning what the standard of care is with respect to sprinkler maintenance by homeowners' associations and landscaping contractors. Nor did he offer evidence concerning what the defendants did or did not do to maintain the sprinklers. Instead, he testified he did not know when the defendants inspected the sprinklers, and did not call as a witness anyone knowledgeable on the subject.

Moreover, Abounassar *concedes* negligence was not required for his injury to occur. In his reply brief, he states, "The judge is not wrong when she says that a sprinkler system failure can happen without someone being negligent. That is obviously plausible, and it is ridiculous to argue otherwise."

Notwithstanding this concession that his injuries could have occurred without negligence, Abounassar contends he was entitled to application of the res ipsa loquitur doctrine under a line of cases relating to burst water mains. The case he

principally relies upon, *Juchert v. California Water Service Co.* (1940) 16 Cal.2d 500, was a personal injury suit brought by a motorcyclist who was injured when he drove into a roadway depression caused by a leaking underground water pipeline. In that case, plaintiff offered plenty of evidence suggesting negligence by the water utility that installed and owned the pipeline. The utility had constructive knowledge that its water main was leaking, but when its tests failed to detect the leak in its pipeline, it wrongly assumed the water was coming either from another utility's nearby pipeline or natural seepage. There also was evidence the utility improperly constructed the pipeline by placing it on insufficiently deep fill. Our Supreme Court noted, "It may then be said of the instant case that, in the absence of other explanations, a new 5/8-inch cast iron pipe, laid for a period of approximately five or six months for the purpose of carrying water, would not have burst if those in charge of its installation and maintenance had been free from negligence." (*Ibid*. at p. 515.) In that context, the Supreme Court said, "Certainly it would not extend the [res ipsa loquitur] doctrine to say that it is a matter of common knowledge that in the ordinary course of things water mains do not break if those having the management thereof use proper care." (*Ibid*.)

Here, we are not concerned with whether a leak in a newly installed cast iron water main ordinarily is the result of negligence. We are not concerned with a water main at all. Rather, our focus is an outdoor sprinkler system. But Abounassar produced no evidence from which we can conclude the sprinkler at issue would not have broken in the absence of negligence. As the trial judge stated when denying the new trial motion, "[I]t is not common knowledge that the outdoor irrigation

system at issue in this case failed due to someone's negligence." Therefore, *res ipsa loquitur* does not apply.

Abounassar also relies on *Hercules Powder Co. v. Automatic Sprinkler Corp. of America* (1957) 151 Cal.App.2d 387 (*Hercules Powder*), a case involving the failure of a fire suppression sprinkler system to operate during a fire in an explosives factory. In that case, the court found it was error for the trial court to have refused a res ipsa loquitur instruction where there was evidence in the record to support it. (*Id*. at p. 397.) The difference again boils down to facts. In this case, Abounassar did not adduce evidence to support the res ipsa instruction, while in *Hercules Powder* the reviewing court concluded the factual predicates had been met.

B. The Second Element of Res Ispa Loquitur

Second, Abounassar needed to prove the harm was caused by something only the defendants controlled. But we don't know what caused the sprinkler to break. As noted above, it could have been the result of some third party's design, manufacturing, or installation defect. It could have been damaged in situ by a third party. Or it could simply have worn out.

Abounassar failed to present sufficient evidence of the first two elements to allow the jury to draw an inference of negligence under the doctrine of res ipsa loquitur. The trial court correctly refused to apply the doctrine.

C. Abounassar Had to Prove the Elements of his Negligence Claim

Abounassar's argument that it is enough to prove he was hurt by water escaping from neighboring land without proving defendants' duty and breach ignores or conflates the elements of

his claim. It brings to mind the seminal case of *Rylands v. Fletche*r (1868) UKHL 1, L.R. 3 H.L. 330, one of the primary antecedents of strict liability doctrine. Rylands hired contractors to build a reservoir on his property. Unbeknownst to Rylands, some abandoned mineshafts lay beneath the reservoir site, covered with soil and rubbish but not properly sealed. When Rylands partially filled the reservoir, the water entered the mineshafts, eventually flooding Fletcher's nearby mine. The House of Lords articulated a rule of prima facie strict liability, the contours of which have bedeviled law students, legal scholars, and judges for the past 150 years.

Tempting as it might be to analogize the flood from Ryland's porous reservoir to the spray from the Association's broken sprinkler head, the analogy is not apt, especially given developments in the law in the intervening years. In California, *Rylands v. Fletcher* has largely been superseded by the modern doctrine of "ultrahazardous" or "abnormally dangerous" activity. (See *Edwards v. Post Transportation Co*. (1991) 228 Cal.App.3d 980, 983 (*Edwards*); see also Rest.3d Torts, Physical and Emotional Harm, § 20.) As explained in *Edwards*, "[t]he theory of imposition of strict liability for ultrahazardous activity is that the danger *cannot* be eliminated through the use of care. Since the activity is in some sense beneficial, useful or necessary to society, the actor is not deemed negligent simply for engaging in it. . . . Where the activity is dangerous only if insufficient care is exercised, ordinary rules of fault are sufficient for allocation of the risk. There is no need for liability without proof of fault, because definitionally if there is damage it will have resulted from negligence and will be compensable." (228 Cal.App.3d at p. 987.)

Plainly, the commonplace use of sprinklers to irrigate landscaping is *not* an ultrahazardous activity, and Abounassar offered no evidence to the contrary. Thus, ordinary negligence rules govern the allocation of any risk posed by their use in this case. Moreover, as noted above, Abounassar's complaint alleged negligence only, and he never sought leave to amend to add any strict liability claim. Thus, he had to offer substantial evidence of every element of his negligence claim during his case in chief. As noted above, he did not. Nonsuit appropriately followed.

DISPOSITION

The judgments are affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED.

CURREY, J.*

We concur:

ROTHSCHILD, P. J.

CHANEY, J.

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* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.