

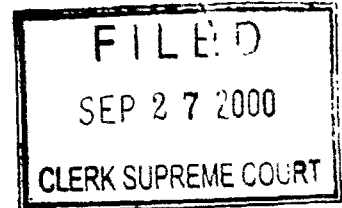
IN THE COURT OF APPEALS OF IOWA

No. 0-300 / 99-78
Filed September 27, 2000

**MICHAEL CRAIG MAYS and
ROBIN MAYS,**
Plaintiffs-Appellants,

vs.

**ALPINE CENTRE L.C. and
MONTGOMERY KONE, INC. ,**
Defendants-Appellees.



Appeal from the Iowa District Court for Scott County, David E.
Schoenthaler, Judge.

The plaintiffs appeal from the district court's ruling granting the defendant summary judgment on their tort action from an elevator accident occurring on the defendant's property. **REVERSED AND REMANDED.**

Russell A. Dircks of Dircks, Ridenour and Macek, Davenport, for
appellants.

Roger A. Lathrop and Peter J. Thill of Betty, Neuman & McMahon, L.L.P.,
Davenport, for appellee Alpine Centre, L.C.

Stuart Lefstein of Katz, Huntoon & Fieweger, P.C., Rock Island, Illinois, for
appellee Montgomery Kone.

Considered by Sackett, C.J., and Streit and Vaitheswaran, JJ.

STREIT, J.

Plaintiffs appeal the district court's grant of summary judgment to defendants in their premises liability tort suit, which arose due to an elevator accident. Plaintiffs claim summary judgment was not appropriate in this case. We reverse and remand.

Alpine Centre, L.C., owns a commercial building in Bettendorf, Iowa, and leases space to tenants. The common area of the building, which is under the control of Alpine, has an elevator. In 1994 Michael Mays, a business invitee, was using the elevator when it precipitously dropped from the second floor to the ground. Mays was injured in the fall.

Mays and his wife filed suit against Alpine under a theory of premises liability.¹ Plaintiffs stated an intention to rely on the doctrine of *res ipsa loquitur*.

Alpine filed a motion for summary judgment, claiming the alleged dangerous condition of the premises was a hidden or latent defect of the premises of which it had no notice and, therefore, no corresponding duty to warn its invitees of the condition. The district court granted the motion for summary judgment, finding that under the undisputed facts Alpine had no notice of a latent defect that allegedly caused the elevator to malfunction and injure Mays. Plaintiffs appealed.

We review a summary judgment ruling for corrections of errors of law. *Howell v. Merritt Co.*, 585 N.W.2d 278, 280 (Iowa 1998). Under Iowa Rule of

¹ At the time of the accident, Alpine had a contract with Montgomery Kone, Inc., to maintain and service the elevator. Montgomery was later added as a defendant. The issues concerning Montgomery are addressed in a companion case, *Mays v. Montgomery Kone, Inc.*, No. 99-0837 (Iowa App. Sept. 27, 2000).

Civil Procedure 237, summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Id.* The facts are reviewed in the light most favorable to the nonmoving party. *Shriver v. City of Okoboji*, 567 N.W.2d 397, 400 (Iowa 1997).

Plaintiffs contend summary judgment was not proper in this case. They are relying on the doctrine of *res ipsa loquitur*. Plaintiffs claim elevators, during normal operation, do not fall in the manner which caused plaintiffs' injury and, therefore, the fact the elevator fell speaks of Alpine's negligence.

Negligence is an issue of fact, and like any other fact, may be proved by circumstantial evidence. *Brewster v. U.S.*, 542 N.W.2d 524, 528 (Iowa 1996). *Res ipsa loquitur* is one type of circumstantial evidence. *Id.* *Res ipsa loquitur* applies when: (1) the injury is caused by an agent or instrumentality under the exclusive control of defendant and (2) the occurrence is such as in the ordinary course of things would not happen if reasonable care had been used. *Oak Leaf County Club, Inc. v. Wilson*, 257 N.W.2d 739, 743 (Iowa 1977).

Summary judgment is not appropriate if there is sufficient competent evidence to generate an inference of negligence under *res ipsa loquitur*. *Welte v. Bello*, 482 N.W.2d 437, 440 (Iowa 1992). There must be sufficient evidence to generate a jury question on both prongs of the *res ipsa loquitur* doctrine. *Brewster*, 542 N.W.2d at 531.

We find there is sufficient evidence to generate a jury question concerning whether Mays' injury was caused by an agent or instrumentality under Alpine's control. Alpine owned the building and the elevator. The duty of a possessor of

land to keep the premises in a reasonably safe condition for business invitees is a non-delegable duty. *Kragel v. Wal-Mart Stores, Inc.*, 537 N.W.2d 699, 703 (Iowa 1995). The liability of a possessor of land is the same whether the possessor maintained the premises itself or hired an independent contractor to do so. *Id.* (citing Restatement (Second) of Torts § 425 (1965)). Here, Alpine hired a company to service the elevator, but would still maintain a duty to keep the premises in a reasonably safe condition.

We turn then to the question of whether the occurrence is such as in the ordinary course of things would not happen if reasonable care had been used. Res ipsa loquitur may be applied to unusual events, such as a falling elevator. *W. Page Keeton et al., Prosser & Keeton on the Law of Torts* § 39, at 244-45 (5th ed. 1984). See Restatement of Torts (Second) § 328D (1963) cmt. c (res ipsa loquitur may apply to event such as the fall of an elevator). See also *Tait v. Armor Elevator Co.*, 958 F.2d 563, 570 (3rd Cir. 1992) (jury instruction on res ipsa loquitur should be given in case where elevator abruptly stopped); *Wolpert v. Washington Square Office Ctr.* 555 So.2d 382, 383 (Fla. Ct. App. 1989) (res ipsa loquitur applied in case where elevator suddenly dropped three floors).

In *Brewster*, our supreme court addressed a claim of res ipsa loquitur based on injuries sustained by the sudden closing of automatic doors. *Brewster*, 542 N.W.2d at 527. The court rejected defendant's claim it should not be found negligent without evidence it either knew or should have known of the defect which caused the doors to malfunction. *Id.* at 532. The court concluded there was a material fact question as to the second prong of the res ipsa loquitur

doctrine because generally automatic doors would not malfunction in the absence of negligence. *Id.* at 533.

We determine summary judgment was not proper in this case. Although it may appear other causes, such as a defect in the design or manufacture of the elevator, could preclude application of *res ipsa loquitur*, plaintiff did not allege or prove any other causes for the accident, and thus the *res ipsa loquitur* analysis of *Brewster* applies. The fact the elevator dropped two floors and caused plaintiffs' injuries raises a genuine issue of material fact on plaintiffs' general negligence claim based on *res ipsa loquitur*. A fact-finder may, but is not compelled to, infer defendant was negligent. See *Clippinger v. Becker*, 220 N.W.2d 879, 881 (Iowa 1974).

We reverse the decision of the district court and remand for further proceedings. Costs of this appeal are assessed to defendant Alpine Centre.

REVERSED AND REMANDED.