2016 WL 3747930
Supreme Court, Appellate Division,
Third Department, New York.

Montasser M. ELSAWI et al., Individually and as Parents and Guardians of Anisa Montasser Elsawi, an Infant, Respondents,
v.
SARATOGA SPRINGS CITY SCHOOL DISTRICT, Appellant.

July 14, 2016.

Synopsis

Background: Parents, on behalf of themselves and minor student, brought action against school district, seeking to recover damages for personal injuries student allegedly sustained when stage riser on which she was walking collapsed, causing her to fall. The Supreme Court, Saratoga County, Crowell, J., denied district's summary judgment motion. District appealed.

Holdings: The Supreme Court, Appellate Division, Rose, J., held that:

[1] summary judgment affidavit of parents' expert was not conclusory, unsupported, or legally insufficient;

[2] material fact issues existed regarding res ipsa loquitur theory of negligence; and

[3] court's ruling that jury charge on res ipsa loquitur theory would be given was premature.

Affirmed as modified.

West Headnotes (4)

[1] Judgment

Summary judgment affidavit of expert for parents, bringing suit against school district on behalf of themselves and minor student, seeking to recover damages for personal injuries student allegedly sustained when stage riser on which she was walking collapsed, causing her to fall, was not conclusory, unsupported, or legally insufficient to defeat district's summary judgment motion, even though expert did not examine riser until three years after incident, where there was no evidence to indicate that its condition had deteriorated between date of incident and date of expert's examination, and expert's opinion was not so lacking in factual or scientific foundation as to be utterly devoid of merit.

Cases that cite this headnote

[2] Judgment

Genuine issues of material fact existed regarding res ipsa loquitur theory of negligence, precluding summary judgment in parents' suit, on behalf of themselves and minor student, seeking to recover damages for personal injuries student allegedly sustained when stage riser on which she was walking collapsed, causing her to fall.

Cases that cite this headnote

[3] Negligence

Parents' allegations of specific acts of negligence did not preclude them from alternatively relying on res ipsa theory of negligence in their suit, on behalf of themselves and minor student, seeking to recover damages for personal injuries student allegedly sustained when stage riser on which she was walking collapsed, causing her to fall.

Cases that cite this headnote

[4] Negligence

Court's ruling that jury charge on res ipsa loquitur theory of negligence would be given was premature in parents' suit, on behalf of themselves and minor student, seeking to recover damages for personal injuries student

allegedly sustained when stage riser on which she was walking collapsed, causing her to fall, where proof related to applicability of doctrine was yet to be adduced at trial.

Cases that cite this headnote

Attorneys and Law Firms

The Mills Law Firm, Clifton Park (Christopher K. Mills of counsel), for appellant.

Powers & Santola, LLP, Albany (Michael J. Hutter of counsel), for respondents.

Before: PETERS, P.J., LAHTINEN, EGAN JR., ROSE and CLARK, JJ.

Opinion

ROSE, J.

***1** Appeal from an order of the Supreme Court (Crowell, J.), entered June 30, 2015 in Saratoga County, which, among other things, denied defendant's motion for summary judgment dismissing the complaint.

In May 2011, Anisa Montasser Elsawi was rehearsing with her classmates for a choral concert at defendant's Maple Avenue Middle School when a stage riser collapsed as she walked across it, causing her to fall and suffer injuries. Plaintiffs, who are Elsawi's parents, commenced this action against defendant alleging negligence and asserting a derivative claim. Following joinder of issue and discovery, defendant moved for summary judgment dismissing the complaint and plaintiffs cross-moved for summary judgment on the issue of liability. Supreme Court denied both motions and ruled that plaintiffs were entitled to a jury charge on the doctrine of res ipsa loquitur. Defendant now appeals.

Plaintiffs do not dispute that defendant met its initial burden of demonstrating that it "maintained the [riser] in a reasonably safe condition and neither created nor had actual or constructive notice of the allegedly dangerous condition" (*McGrath v. George Weston Bakeries, Inc.,* 117 A.D.3d 1303, 1304 [2014]; *accord Riozzi v. 30 Kingston Realty Corp.,* 112 A.D.3d 1033, 1033 [2013]). In support of defendant's motion, the head custodian at Maple Avenue Middle School and defendant's expert, a licensed engineer who examined the riser in December 2012, averred that the riser was well maintained, had no obvious defects and was properly assembled and inspected by defendant's custodial staff prior to the incident in question.

In response, plaintiffs submitted their own expert affidavit from a licensed engineer who, in August 2014, examined the riser and supplemented his observations with photographic exhibits. Upon examining the area around the point at which the upper and lower portions of the riser's support braces lock together via a spring-loaded pin, plaintiffs' expert observed tool marks and a brace bar bent outward in a manner inconsistent with normal wear. He further stated that neither of the upper brace bars laid flush against the walls of the lower portion of the brace—a steel "C channel"—which was itself bent and "flared" open. Based upon his observations, plaintiffs' expert opined to a reasonable degree of engineering certainty that, when Elsawi walked across the riser, the bent upper brace bar and "flared" condition of the lower C channel caused the brace locking mechanism to disengage and the riser to collapse, and the tool marks near that area were indicative of a failed attempt to fix the problem. He further opined that these defects in the riser braces were "easily observable," and their existence led him to believe that the risers were not properly maintained or inspected before they were used.

[1] In light of the foregoing, we cannot agree with defendant's argument that the affidavit of plaintiffs' expert is conclusory, unsupported or legally insufficient to defeat its motion for summary judgment. While plaintiffs' expert did not examine the riser until three years after the incident, there is no evidence in the record indicating that its condition had deteriorated between the date of the incident and the date of his examination, and "we do not find [his] opinion ... to be so lacking in factual or scientific foundation as to be utterly devoid of merit" (*Hyatt v. Price Chopper Operating Co., Inc.,* 90 A.D.3d 1218, 1220 [2011]). While the shortcomings that defendant perceives may well affect the weight to be accorded to the expert's opinion at trial, his affidavit is legally sufficient to raise triable issues of fact at this stage (*see Lopez–Viola v. Duell,* 100 A.D.3d 1239, 1242 [2012]; *Hyatt v. Price Chopper Operating Co., Inc.,* 90 A.D.3d at 1220, 933 N.Y.S.2d 770). Accordingly, viewing the evidence in a light most favorable to plaintiffs, we find that Supreme

Court properly denied defendant's motion for summary judgment dismissing the complaint.

***2 [2] [3] [4]** We also agree with Supreme Court's determination that plaintiffs raised questions of fact regarding a res ipsa loquitur theory of negligence (*see Morejon v. Rais Constr. Co.,* 7 N.Y.3d 203, 209 [2006]; *Brumberg v. Cipriani USA, Inc.,* 110 A.D.3d 1198, 1200 [2013]). Contrary to defendant's contention, plaintiffs' allegations of specific acts of negligence do not preclude them from alternatively relying on a res ipsa theory (*see Abbott v. Page Airways,* 23 N.Y.2d 502, 512–513 [1969]; *see Rossetti v. Board of Educ. of Schalmont Cent. School Dist.,* 277 A.D.2d 668, 671 [2000]). However, the court's ruling that a jury charge would be given was premature, as proof related to the applicability of the doctrine has yet to be adduced at trial (*see Weeks v. St. Peter's Hosp.,* 128 A.D.3d 1159, 1161–1162 [2015]).

ORDERED that the order is modified, on the law, without costs, by reversing so much thereof as ordered that plaintiffs are entitled to a jury charge on the doctrine of res ipsa loquitur, and, as so modified, affirmed.

PETERS, P.J., LAHTINEN, EGAN JR. and CLARK, JJ., concur.

All Citations

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