

Roman v Board of Educatino of City of New York

2003 NY Slip Op 30090(U)

March 3, 2003

Supreme Court, New York County

Docket Number: 0113177/1995

Judge: Martin Shulman

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: Hon. HON MARTIN SHULMAN, J.S.C.
Justice

PART 1

Daniel Ray Roman

City of New York
-v-

INDEX NO. 113177/95
MOTION DATE _____
MOTION SEQ. NO. 003
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...	_____
Answering Affidavits – Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided ;–
accordance with the decision attached.

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE _____
DATED: _____ J.S.C.

Dated: April 28, 2003

MARTIN SHULMAN
J.S.C. J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Hon. MARTIN SHULMAN ,Justice

PART 40

DANIEL RAY ROMAN, an infant by his Mother
and Natural Guardian, VALERIE VALENTIN,

INDEX NO.: 113177/95

Plaintiff,

-against-

DECISION/ORDER

BOARD OF EDUCATION OF THE CITY OF NEW
YORK, CONSOLIDATED BUS TRANSIT, INC.,
And UNITED CEREBRAL PALSY, INC.,

Defendants.

The following papers were read on this motion

	<u>Papers Numbered</u>
NOTICE OF MOTION-AFFIDAVITS-EXHIBITS	1
CROSS-MOTIONS-ANSWERINGAFFIDAVITS- EXHIBITS	2,3,4
REPLY AFFIRMATION	5

CROSS- MOTIONS: YES

In this personal injury action, the plaintiff Daniel Ray Roman (“plaintiff or “Daniel”), by his attorney, moves by order to show cause for leave to proffer his theory of liability to a jury grounded on *res ipsa loquitur* (“*res ipsa*” or “*res ipsa loquitur*”? . The plaintiffs attorney concedes that this is the only theory of liability Daniel can rely on to prevail at trial.’ The defendants, Board of Education of the City of New York (the “Bd.of

‘At a settlement conference before this Court, the plaintiffs counsel admitted his sole theory of liability is *res ipsa* and the parties consented to Daniel’s counsel moving by order to show cause for leave to present this doctrine to a jury if supported by the surrounding circumstantial evidence.

Educ.”), Consolidated Bus Company, Inc. (“Consol.”) and United Cerebral Palsy, Inc., (“UCP”) (collectively “defendants”), cross-move for summary judgment dismissing the complaint. The motion and cross-motions are consolidated for disposition.

It is undisputed that Daniel suffers from severe cerebral palsy which prevents him from speaking, ambulating, eating, drinking or performing daily functions and Daniel’s only form of communication is via facial expressions and eye movements. The plaintiff is confined to a wheelchair.

In September 1994, Daniel was a full-time resident at a UCP facility. Generally, Consol. picked up the plaintiff from the residence each morning by a bus it owns and operates, and transported him to P.S. 138, a specialized school the Bd. of Educ. operated. At the end of the daily school session, Consol. would pick Daniel up for his return trip to the UCP facility. On the day of the injury, Consol. picked up Daniel from the UCP residence at approximately 8:00 a.m. and dropped him off at P.S. 138 at approximately 8:30 a.m.² At approximately 8:55 a.m., one of the P.S.138 staff

²The deposition testimony of Julia Clarke (“Clarke Tr.” as Exh. C to the Pearsall Affirmation), the UCP employee charged with plaintiffs care that morning, reveals that she fed Daniel breakfast between 6:45 a.m. and 7:00 a.m. on the morning of the accident and at that time, he was in a good mood— laughing and smiling constantly. Clarke Tr. at 7-8. She also testified that at the time she fed him breakfast, he was already in his wheelchair. Clarke Tr. at 9. **Ms.** Clarke further testified that she was present during the entire time Daniel was being loaded on to the bus and remained outside the facility until the bus pulled away from the curb. She noticed no discernable change in plaintiffs mood and testified that he was still smiling and happy. Clarke Tr. at 21-22.

The deposition of Carmen Rodriguez (“Rodriguez Tr.” as Exh. B to OSC), the driver of the Consol. bus on September 2 , 1994, disclosed that she personally operated the mechanical lift to load Danny in his wheelchair into the bus and he appeared happy and laughing (Rodriguez Tr. at 16), and Ms. Rodriguez did not notice anything unusual. Rodriguez Tr. at 19. She further testified that when she unhooked his wheelchair and placed Daniel on the wheelchair lift, the plaintiff appeared happy and was not crying (Rodriguez Tr. at 21-22). When she transferred Daniel to the care of a Bd. of Educ. paraprofessional at the school, she continued to observe that Daniel appeared happy. Rodriguez Tr. at 24.

members, while changing the plaintiffs diaper, discovered redness and swelling on Daniel's right leg. Thereafter, an x-ray revealed that the plaintiff fractured his right femur.³ Each defendant had the plaintiff in its respective custody and control for some period of time prior to his injuries being discovered. It is also undisputed that Daniel is unable to communicate how, when or where he was injured.

In St. Paul Fire & Marine Insurance Co. v City of New York, 907 F.2d 299 (2d Cir., 1990), the Second Circuit Court of Appeals remarked that *res ipsa loquitur* "...is an often confused and often misused doctrine that enables a jury presented only with circumstantial evidence to infer negligence simply from the fact that an event happened [and that] since the time it was crafted by Baron Pollock in Byrne v. Boadle, 2 H. & C. 722 ... (1863), in which a now-legendary barrel of flour rolled out of a window, its use has expanded to cover a myriad of accidents and incidents." (*Id.*, at 302.)

For the doctrine of *res ipsa* to apply, the following prerequisites must be met: (1)

³ On the date of the accident, Rory Mulholland, a Bd. of Educ. paraprofessional, stated in a written statement:

I took Danny Roman off the bus at 8:30 a.m. and proceeded to take him up to his classroom at about 8:35 a.m. I noticed that he was not positioned correctly in that he was slouched down in his chair. Other than that I did not notice anything out of the ordinary and he did not seem to be in any discomfort. (Exh. F to McCrate Affirmation)

The transcript testimony of Libonesa Reynoso ("Reynoso Tr."as Exh. G to McCrate Affirmation) discloses that on the date of the accident, she went to assist him when his facial expression appeared "uncomfortable and very sad." Reynoso Tr. at 34. It was early that morning, ". . . 8:30, 8:35 - - no later than that." She brought him to the bathroom with the assistance of other para-professionals to see if his diaper needed to be changed. Reynoso Tr. at 36. They took him out of the wheelchair, placed him on a mat and removed his pants; he was crying. Reynoso Tr. at 36-37. When Reynoso removed his pants, she saw a red mark on his leg, observed the leg was swollen and summoned the school nurse. Reynoso Tr. at 37.

the event 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. Kambat v. St. Francis Hospital, 89 N.Y.2d 489 (1997); Corcoran v. Banner Super Market, Inc., 19 N.Y.2d 425 (1967).

Daniel's counsel maintains that the circumstances of the plaintiffs accident squarely meet these conditions because: a) Daniel's injury could not have occurred in the absence of defendants' negligence; b) the plaintiff was in the exclusive control and custody of the defendants when he was injured; and c) Daniel could not have contributed to his injury. Dinkes Reply Aff. At ¶ 25. Thus, counsel asserts that a jury could infer negligence against one or more of the defendants under the theory of *res ipsa*.

The defendants posit that the plaintiffs counsel failed to identify the agency or instrumentality that caused plaintiffs injuries and establish which of the three defendants had custody of Daniel at the time he was injured. The absence of these requisite factors, the defendants argue, bar the plaintiff from utilizing the doctrine of *res ipsa*.

“ The doctrine of *res ipsa loquitur* is not an arbitrary rule, but, rather, ‘a formulation of a species of circumstantial evidence.’ A condition precedent to its application requires requisite proof that the event, *inter alia*, was caused by an instrumentality within the exclusive control of defendant. While more than one defendant may be held liable under the doctrine in certain circumstances, it is nevertheless plaintiffs burden to establish the negligence of each of the defendants

against whom the doctrine is sought to be invoked (internal citations omitted).” Cooke v. Bernstein, 45 A.D.2d 497, 499 (1st Dept., 1974). These essential elements must be established after the plaintiff has first demonstrated the nature of the instrumentality which caused the injury and its connection to the defendant to make out a *prima facie* case of negligence. Dermatossian v. New York City Transit Authority, 67 N.Y.2d 219, 227 (1986). If the evidence is capable of an interpretation equally consistent with the presence or absence of a wrongful act, that meaning must be given which accords with its absence. Manley v. New York Telephone Co., 303 N.Y.18, 26 (1951).

“In a *res ipsa* case, as in any other, the plaintiff must establish first and foremost the nature of the instrumentality which is alleged to have caused the injury. . . While the actual sequence of events may be established by inference, the circumstances must be such as to indicate negligence, and there must be more than mere speculation, guess or surmise . . . The mere fact that an accident has happened and that injury followed does not give rise to a presumption of negligence on the part of the one charged.” Manley, supra, at 25.

The Court of Appeals unambiguously held that “...it is never enough for the plaintiff to prove merely that he has been injured by someone by the negligence of someone unidentified. Even though there is beyond all possible doubt negligence in the air, it is still necessary to bring it home to the defendant. On this too the plaintiff has the burden of proof by a preponderance of the evidence; and in a case where it is clear that it is at least equally probable that the negligence was that of another, the Court must direct the jury that the plaintiff has not proved his case.” Corcoran, supra, 19 N.Y.2d at 431. Where it is at least as likely that the negligence was that of another, *res ipsa* is

inapplicable. Camillio v. Geer, 185 A.D.2d 192,196 (1st Dept., 1992).

The case of Rabena v. City of New York, 147 Misc.2d 538 (Civ. Ct., Kings Co., 1990), is strikingly on point and instructive. There, the infant plaintiff was severely disabled. He could not speak and was only able to move by “scoot[ing] around on his backside.” On the day he was injured, he was transported to and from his home by bus to a special school. When the infant plaintiff was put to bed, he began whining and crying. His mother removed his pants and observed that his leg had been injured. The exact location and manner in which the accident happened was unknown, except that it took place between the time the infant plaintiff left for school and the time he returned home.

Following trial, the Rabena Court granted the City of New York’s motion for a directed verdict finding that “...[r]es ipsa loquitur by its term means that the ‘thing speaks for itself’ and that means that the thing or instrumentality that caused the injury speaks for itself. It clearly does not mean that the injury speaks for itself. It means that when the initial fact, namely, what thing or instrumentality caused the injury has been shown then and not before, an inference arises that the injury occurred by reason of the negligence of the party or parties who had it under exclusive control.” Rabena, *supra*, 147 Misc.2d at 542.⁴

⁴ See also, J.C. Penny Company v. Eubanks, 294 F.2d 519 (10th Cir., 1961) [“... there is no dispute as to the meaning of the words *res ipsa loquitur*. They simply mean ‘the thing speaks for itself.’ And that means the thing or instrumentality involved speaks for itself. It clearly does not mean the accident speaks for itself ...”]; Tarbox v. Eason, 179 So. 2d 916 (La.App. 2nd Cir., 1965)[“To clarify and facilitate an understanding of the doctrine, this question appears appropriate: What is the ‘thing’ which speaks? In this regard, it may be pointed out that the thing which speaks is the unusual factor within the causal chain which connects the injury to the plaintiff with the act or omission of the defendant. . . . **As** a preliminary

Daniel’s counsel distinguishes the case at bar from Rabena arguing that in the latter, the infant was not in the exclusive custody and control of the defendant. While this distinction is true, counsel still ignores of the rudiments for applying *res ipsa*– the “thing” that speaks for itself is the instrumentality that caused the injury, not the injury, and the instrumentality must be in the control of a defendant. While Daniel’s attorney correctly points out that the Rabena decision is not binding on this Court, he errs in concluding that the Rabena ruling is “just plain wrong.”

Moreover, “...it has been established by law that [where] the instrumentality causing the injury could have been under the control of any one of a number of persons, each of whom is independent of the other, and none of them subject to the control or direction of the other, the doctrine may not be invoked unless there is some proof given to enable the jury to identify the wrongdoer.” Rabena at 542 *citing* Wolf v American Tract Society, 164 N.Y. 30, 34 (1900); Continental Craftsmen Inc. v Sommer, 41 A.D. 2d 716 (1st Dept., 1973).

The plaintiffs attorney relies on Schroeder v. City and County Savings Bank, 293 N.Y. 370 (1944) to support the proposition that *res ipsa* can be attributed to multiple defendants and, therefore, can be applied to the case at bar. However, the operative facts in Schroeder are markedly different; the instrumentality that caused the accident, *viz.*, a street barricade, was clearly identified and the “interdependent” defendants had a common interest in, and exclusive control over, the barricade.

proposition , plaintiff must establish the ‘thing’ that caused the injury. The doctrine of *res ipsa loquitur* permits an inference that the known act which produced the injury was a negligent act, but there is no inference as to what act produced the injury, and no foundation is laid for the application of the doctrine where the physical act or the thing which caused the injury *is* unknown or is not disclosed or identified.”]

Similarly, in Corcoran, *supra*, the parties had a “. . . shared or dual duty. . .” with respect to the identified instrumentality that caused the injury. Corcoran, 19 N.Y.2d at 432. In this case, no evidence has been presented which either identifies the instrumentality that caused the injury or verifies the identity of the party caring for Daniel when he was injured.

Although UCP, Consol. and the **Bd.** of Educ. were charged with the care and custody of Daniel, nonetheless, on the day Daniel was allegedly injured, the defendants maintained consecutive custody of him. Simply put, each defendant had sole custody of Daniel for a prescribed period of time, and there is no evidence that any of the three named defendants ever had shared custody of Daniel or had control over each other. Daniel’s counsel also acknowledges there is no proof of active negligence against any of the defendants. Dinkes Reply Aff. at ¶¶ 3, 14. To reiterate, “. . . where it is clear that it is at least equally probable that the negligence was that of another, the Court must direct the jury that the plaintiff has not proved his case.” Corcoran *supra*, 19 N.Y.2d at 431. Where it is at least as likely that the negligence was that of another, *re ipsa* is inapplicable. Camillio v. Geer, 185 A.D.2d at 196 (1st Dept., 1992). Because the plaintiff is physically unable to identify when the injury occurred and who was caring for Daniel at that time he was injured, there can simply be no proof as to which specific defendant was negligent.

Daniel’s attorney then argues that the plaintiffs’ mother and natural guardian entrusted the care of her son to the defendants and their failure, jointly and severally, to return him in the same state of health and well-being creates an inference of negligence which then shifts the burden of proof to the defendants, who are in a better

position to explain Daniel's injuries.⁵

As stated earlier, one of the three prerequisites to get to a jury on the theory of *res ipsa loquitur* is that the event is caused by an agency or instrumentality within the exclusive control of the defendant. Kambat v. St. Francis Hospital, 89 N.Y.2d 489, 494, 655 N.Y.S.2d 844, 846 (1997); Ebanks v. N.Y.C. Transit Authority, 70 N.Y.2d 621, 623, (1987); Dermatossian, *supra*, 67 N.Y.2d at 226. Here, this requisite condition cannot be met. See, New York Pattern Jury Instructions, Vol 1A (3rd Edition, 2003), PJI 2:65. Res Ipsa Loquitur, Comment at 333, which notes:

. . . where it appears that the instrumentality causing the injury could have been under the control of any one of a number of persons, each of whom is independent of the other, and none of them subject to the control or direction of the other, the doctrine may not be invoked unless there is some evidence to enable the jury to identify the perpetrator of the wrong, Dermatossian v New York City Transit Authority, 67 NY2d 219,501 NYS2d 784,492 NE2d 1200; Corcoran v Banner Super Market, Inc., *supra*; Wolf v American Tract Soc., 164 NY 30, 58 NE 31; Raimondi v New York Racing Association, 213 AD2d 708,624 NYS2d 273; Camillo v Geer, 185 AD2d 192,587 NYS2d 306; Espinosa v A & S Welding & Boiler Repair, Inc., 120 AD2d 435, 502 NYS2d 451; Goree v Dixon, 62 AD2d 1078,403 NYS2d 605; Lindenauer v State, 45 AD2d 73,356 NYS2d 366; Continental Craftsmen, Inc. v Sommer, 41 AD2d 716, 341 NYS2d 351; see Troisi v Merit Oil Co., 208 AD2d 615,617 NYS2d 347; Fleischer v Melmarkets, Inc., 174 AD2d 647, 571 NYS2d 509; Godfrey v Nassau, 24 AD2d 569,262 NYS2d 60.

⁵In a case where all the parties purportedly responsible for the injuries are named defendants and a plaintiff has demonstrated that all of the named defendants have acted tortiously (applying an alternative theory of liability a prima facie case has been made out implicating *res ipsa*), then the burden shifts to the defendants to explain their respective conduct and sort out the facts as to which defendant(s) are connected to the causal process. There is no reason to shift the burden to the defendants in this case because there is absolutely no evidence, direct or circumstantial, that any of the defendants acted tortiously.

No such evidence exists in the case at bar. Accordingly, plaintiffs motion for leave to try his case under the theory of *res ipsa* is denied. Because Daniel's attorney concedes this is the plaintiff's sole theory of liability against defendants, this Court is constrained to grant defendants' cross-motions for summary judgment and the complaint is dismissed, in its entirety.⁶

The foregoing constitutes the Decision and Order of this Court. The Clerk of the Court is directed to enter a judgment accordingly. Courtesy copies of this Decision/Order have been sent to counsel for the parties.

Dated: March 3, 2003
New York, New York



Hon. Martin Shulman, J.S.C.

Duplicate ORIGINAL
April 28, 2003

Non-Final Disposition

A n a l Disposition **MARTIN SHULMAN**
J.S.C.

⁶ Based on the foregoing ruling, it is unnecessary to address UCP's alternative argument that the plaintiffs pleading of specific negligence in the complaint otherwise bars the application of *res ipsa*.