[Cite as *Currie v. The Big Fat Greek Restaurant, Inc.*, 2012-Ohio-6168.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Michael W. Currie,	:	
Plaintiff-Appellant,	:	
		No. 12AP-440
v.	:	(C.P.C. No. 11CVH-04-4609)
The Big Fat Greek Restaurant, Inc.,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on December 27, 2012

Welin, O'Shaughnessy & Scheaf LLC, and *O. Judson Scheaf, III*, for appellant.

Amy M. Fulmer, for appellee.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶ 1} Plaintiff-appellant, Michael W. Currie, appeals from a judgment entered by the Franklin County Court of Common Pleas in favor of defendant-appellee, The Big Fat Greek Restaurant, Inc., pursuant to appellee's motion for summary judgment. Because the doctrine of res ipsa loquitur does not apply in this case, and appellee has established that it is entitled to summary judgment, we affirm.

I. Factual Background and Procedural History

{¶ 2} The facts in this case are not in dispute. Appellee operates a restaurant in Columbus, Ohio. Among other items on its menu, appellee offered to its customers a "gyro platter." A gyro platter consists of processed meat, lettuce, tomatoes, onions, and house dressing wrapped in pita bread and served with french fries. The gyro meat is a processed product. It consists of ground lamb and beef, blended with spices and rolled oats. The combined ingredients are then pressed around a dowel/cylinder. The meat is

sliced off the dowel as the gyro is prepared in the restaurant. At the time in question, appellee purchased its gyro meat from Sofo Foods.

{¶ 3} On May 13, 2010, appellant was a customer in appellee's restaurant. Appellant ordered and received a gyro platter for lunch. Following his second bite of the gyro, appellant bit down on what he described as a hard object and shattered/broke one of his teeth. Appellant did not recover the object; nor does he know what the object was. After notifying a server what had happened, appellant left appellee's restaurant and went immediately to see his dentist for treatment.

{¶ 4} The server preserved appellant's gyro platter for inspection. Shortly after appellant left the restaurant, the restaurant manager inspected the remaining portion of the gyro with his fingers. The manager did not find any hard or foreign objects in the food. Another restaurant employee took a video of the inspection on her phone. That video was later "texted" to the appellee's insurer adjuster.

{¶ 5} Neither appellant nor appellee know what it was that caused appellant's injury.

{¶ 6} Appellant sued appellee for negligence. Both parties filed motions for summary judgment. The trial court granted appellee's motion for summary judgment and denied appellant's motion.

{¶ 7} Appellant appeals, assigning the following error:

> THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANT-APPELLEE THE BIG FAT GREEK RESTAURANT, INC., AND IN DENYING SUMMARY JUDGMENT AS TO LIABLE (SIC) TO PLAINTIFF-APPELLANT MICHAEL W. CURRIE.

II. Summary Judgment Standard

{¶ 8} Summary judgment is appropriate when the moving party demonstrates that: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion when viewing the evidence most strongly in favor of the nonmoving party, and that conclusion is adverse to the nonmoving party. *Hudson v. Petrosurance, Inc.*, 127 Ohio St.3d 54, 2010-Ohio-4505, ¶ 29; *Sinnott v. Aqua-Chem, Inc.*, 116 Ohio St.3d 158, 2007-Ohio-5584, ¶ 29. Appellate review of a trial court's ruling on a motion for summary judgment is de novo. *Hudson* at ¶ 29. This means that an appellate court conducts an

independent review, without deference to the trial court's determination. *Zurz v. 770 W. Broad AGA, L.L.C.*, 192 Ohio App.3d 521, 2011-Ohio-832, ¶ 5 (10th Dist.); *White v. Westfall*, 183 Ohio App.3d 807, 2009-Ohio-4490, ¶ 6 (10th Dist.).

{¶ 9} When seeking summary judgment on the ground that the nonmoving party cannot prove its case, the moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on an essential element of the nonmoving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). The moving party does not discharge this initial burden under Civ.R. 56 by simply making a conclusory allegation that the nonmoving party has no evidence to prove its case. *Id.* Rather, the moving party must affirmatively demonstrate by affidavit or other evidence allowed by Civ.R. 56(C) that the nonmoving party has no evidence to support its claims. *Id.* If the moving party meets its burden, then the nonmoving party has a reciprocal burden to set forth specific facts showing that there is a genuine issue for trial. Civ.R. 56(E); *Dresher* at 293. If the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party. *Id.*

III. Res Ipsa Loquitur

{¶ 10} In his assignment of error, appellant contends the trial court erred in granting appellee's motion for summary judgment because the doctrine of res ipsa loquitur applies and creates a rebuttal presumption of negligence precluding summary judgment in appellee's favor. We disagree.

{¶ 11} The doctrine of res ipsa loquitur is an evidentiary rule which permits, but does not require, a finder of fact to draw an inference of negligence when the logical premises for the inference are demonstrated. *Jennings Buick, Inc. v. Cincinnati*, 63 Ohio St.2d 167, 169 (1980). The doctrine originated by necessity when the true cause of an occurrence was known by or could be determined by the defendant but not by the plaintiff. *Fink v. New York Cent. R. Co.*, 144 Ohio St. 1, 5 (1944). The doctrine of res ipsa loquitur does not alter the nature of the plaintiff's claim in a negligence action; it is merely a method of proving the defendant's negligence through the use of circumstantial evidence. *Jennings Buick* at 170.

{¶ 12} " 'To warrant application of the rule a plaintiff must adduce evidence in support of two conclusions: (1) That the instrumentality causing the injury was, at the

time of the injury, or at the time of the creation of the condition causing the injury, under the exclusive management and control of the defendant; and (2) that the injury occurred under such circumstances that in the ordinary course of events it would not have occurred if ordinary care had been observed.' " *Id.*, quoting *Hake v. Wiedemann Brewing Co.*, 23 Ohio St.2d 65, 66-67 (1970).

{¶ 13} The first prerequisite, that there must be evidence tending to prove that the instrumentality causing the injury was under the exclusive management and control of the defendant, permits the inference that it was the defendant who was negligent. The second prerequisite, that there must be evidence tending to prove that the injury ordinarily would not have occurred if ordinary care had been exercised, serves to establish the logical basis for the inference that the plaintiff's injury was the proximate result of the defendant's negligence. *Jennings Buick* at 170-71. A court must determine on a case-by-case basis whether the doctrine of res ipsa loquitur applies. *Id.* at 171; *Estate of Hall v. Akron Gen. Med. Ctr.*, 125 Ohio St.3d 300, 2010-Ohio-1041, ¶ 26 .

{¶ 14} Viewing the evidence in favor of appellant as the nonmoving party, we agree with the trial court that the doctrine of res ipsa loquitur does not apply in this case. Appellant has not shown that the instrumentality causing the injury (the gyro and/or the hard object contained therein) was, at the time of the injury, or at the time of the creation of the condition causing the injury (introduction of the object into the food), under the exclusive management and control of appellee.

{¶ 15} At the time of the injury, appellant had exclusive control of the instrumentality that caused his injury, not appellee. Nor can appellant establish that appellee was in exclusive control of the food at the time the object was introduced to the food because there is no evidence regarding when that might have occurred. It is undisputed that the gyro in question contained processed meat supplied by Sofo Foods. Therefore, the hard object may have been introduced to the gyro meat prior to appellee's receipt of the product. Neither appellant nor appellee know what it was that caused appellant's injury. Where all the facts connected with an accident fail to point to the negligence of the defendant as the proximate cause of the injury, but show a state of affairs from which an inference could as reasonably be drawn that the accident was due to a cause or causes other than the negligent act of defendant, the doctrine of res ipsa loquitur does not apply. *Jennings Buick* at 172, citing *Loomis v. Toledo Rys. & Light Co.*,

107 Ohio St. 161, 169-70 (1923); *Williams v. A & M Operating Co., Inc.*, 973 So.2d 138 (La.App.2007) (res ipsa loquitur not applicable against restaurant defendant when foreign object in chicken meat caused injury because meat was pre-cut, pre-washed, packaged and delivered by a third-party supplier).

{¶ 16} We also note that appellant has not established the second prerequisite for application of res ipsa loquitur—that the injury occurred under such circumstances that in the ordinary course of events, it would not have occurred if ordinary care had been observed. Without evidence of what broke appellant's tooth, appellant has not shown that the injury occurred under circumstances that in the ordinary course of events it would not have occurred if ordinary care had been observed.

{¶ 17} Because appellant has not established the prerequisites for its application, the doctrine of res ipsa loquitur does not apply. Without the inference of negligence created by the application of the doctrine of res ipsa loquitur, we agree with the trial court that appellee is entitled to summary judgment. Appellant admits he does not know what he bit into that broke his tooth. Appellee's manager examined appellant's food following appellant's injury and failed to find any foreign or hard object. Appellant has presented no evidence that appellee breached its duty of care or that its action or inaction was the proximate cause of appellant's injury. Appellant asks us to infer that because he bit into something and broke his tooth, there must have been a foreign object in his food and appellee must have breached its duty of care by causing or allowing the presence of the object. This second inference is necessarily drawn from the first inference.

{¶ 18} It is impermissible to draw an inference from a deduction that is itself purely speculative and unsupported by an established fact. There is no evidence that appellant bit down on a foreign object. Appellant cannot create a genuine issue of fact by stacking inference on inference. *Haughey v. Twins Group, Inc.*, 2d Dist. No. 2004-CA-7, 2005-Ohio-1371, ¶ 17-18 (summary judgment for defendant affirmed when plaintiff was unable to identify what she bit into that broke her tooth while eating pizza).

{¶ 19} Because the doctrine of res ipsa loquitur does not apply and appellee has shown that it is entitled to summary judgment, we overrule appellant's assignment of error.[1]

[1] For the same reason, the trial court did not err when it denied appellant's motion for summary judgment.

{¶ 20} Appellant also argues that the trial court erred when it permitted appellee to rebut the res ipsa loquitur presumption of negligence despite appellee's alleged spoliation of evidence. Appellant's counsel represented during oral argument that this issue is moot if the doctrine of res ipsa loquitur does not apply. We agree. Because there are no material issues of fact and appellee is entitled to judgment as a matter of law, the discovery issue is moot.

{¶ 21} Having overruled appellant's sole assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT and FRENCH, JJ., concur.