IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANNA HARRIS,	§	
	§	No. 282, 2010
Plaintiff Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware, in and for
v.	§	New Castle County
	§	
COCHRAN OIL COMPANY,	§	C.A. No. 06C-02-245
	§	
Defendant Below,	§	
Appellee.	§	

Submitted: June 22, 2011
Decided: July 26, 2011

Before **STEELE**, Chief Justice, **JACOBS** and **RIDGELY**, Justices.

O R D E R

This 26th day of July 2011, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. Plaintiff-below appellant, Anna Harris ("Harris"), appeals from a Superior Court jury verdict in favor of the defendant-below appellee, Cochran Oil Co. ("Cochran Oil"). The jury found that Cochran Oil was not negligent when delivering oil to Harris' residence. On appeal, Harris claims that the trial court erred, because the jury instructions on the law of negligence and *res ipsa loquitur* were "sufficiently confusing and misleading that they undermined the jury's ability to intelligently perform its duty to return a proper verdict." We find no merit to Harris' appeal and affirm.

2. In September 2003, Harris ordered one hundred gallons of home heating oil from Cochran Oil. Aaron Robinson ("Robinson"), an employee of Cochran Oil, was responsible for delivering the oil to Harris' residence. During that delivery, some oil spilled out from an oil delivery pipe onto the ground outside of Harris' home. The oil leaked into Harris' basement, leaving a puddle under the oil tank.

3. Harris filed a Superior Court action claiming that Cochran Oil (through its employee, Robinson) was negligent in delivering oil to her home. Harris alleged that Cochran Oil was negligent under two different theories: common-law negligence[1] and *res ipsa loquitur*. Her complaint sought relief in the form of damages for costs associated with removing the oil spill from her home, plus compensation for physical injuries suffered as a result of that spill.

4. At trial, the jury heard testimony from several witnesses, including Harris and Robinson. During the jury instruction conference, Harris' counsel asked the trial judge for a *res ipsa* jury instruction. Counsel suggested that the requested instruction be modeled on the Delaware pattern jury instructions. If Harris' request were granted, the jury would be instructed on both common-law negligence and *res ipsa loquitur*.

[1] By "common-law negligence" we refer to the traditional theory that requires proof of every element of that tort by a preponderance of the evidence.

5. The trial court initially questioned whether a *res ipsa* instruction was appropriate, given that only direct, but no circumstantial, evidence had been presented.[2] The trial court was also concerned that the *res ipsa* instruction proposed by Harris might confuse the jury as to Harris' burden of proof. Ultimately, the trial court decided to give a *res ipsa* instruction, because (i) Harris specifically sought to proceed on two alternative theories of negligence, and (ii) "the [Cochran Oil] operator had no explanation for what happened."[3] To avoid jury confusion, trial court decided to draft a "transitional statement" to be read before giving the *res ipsa* instruction. The following exchange occurred:

> **THE COURT:** I did leave in . . . the *res ipsa loquitur*. What I put is, "If you determine that Anna Harris has not proven her claim of negligence by a preponderance of the evidence, you may consider an

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[2] In expressing its concerns about a *res ipsa* instruction, the trial court stated:

> In this case, we don't have the circumstantial evidence. . . . As I said, it's not a situation where we don't have the person who delivered the oil and, so, Cochran—if the check was missing and Cochran had been there and no one could say who delivered or what happened when the oil was delivered, then *res ipsa* would be applicable, because the circumstantial evidence would be such that, absent another explanation by the defense, the inference should be that it was their negligence that caused the problem, and that's not the situation here, which is why I don't think *res ipsa* does apply.

[3] Specifically, the trial judge stated:

> I disagree with [Harris' counsel's] strategy as a litigator, and I am not certain that [*res ipsa loquitur*] is an appropriate instruction in this case. I'm not certain of that, but I'm uncertain enough, I'm going to give it. . . . My personal view is that it's only because of the uncertainties in this case that I'm giving it at all, and that it is bad practice for the Court to give *res ipsa* instructions as an alternative when there's direct evidence. But the operator had no explanation for what happened, that I think really decides the issue. And that's why I'm doing it, ultimately.

> alternative claim based on circumstantial evidence." Is that satisfactory?
>
> [**Harris' counsel]:** That would be an appropriate transitional statement, Your Honor.

6. Relying on counsel's agreement, the trial judge then instructed the jury on the law of negligence. Immediately thereafter, the trial judge addressed the jury with the following transitional statement:

> If you determine that Anna Harris has not proved her claim of negligence by a preponderance of the evidence, you may consider an alternative claim based on circumstantial evidence. Miss Harris has alleged that Cochran Oil Company was negligent and that this oil—negligence caused the oil spill on plaintiff's property and her subsequent injuries.

7. Following that statement, the trial judge immediately continued with a *res ipsa* instruction, which was modeled after the Delaware pattern jury instructions as Harris' counsel requested.[4] The trial judge instructed the jury that:

> On the issue of negligence, one of the questions for you to decide is whether the oil spill occurred under the following conditions: One, the accident is the sort that does not ordinarily happen if those who have management and control use proper care; two, the evidence excludes Anna Harris's own conduct as a cause of the accident; three, the thing that caused the injury was under the control of, although not necessarily the exclusive control, of Cochran Oil Company or its servants when the negligence occurred; and four, the facts are strong enough to suggest negligence and call for an explanation or rebuttal from Cochran Oil Company. If, and only if, you find these

[4] During the discussion of a *res ipsa* jury instruction, Harris' counsel stated, "But if [*res ipsa loquitur*] is a rule of evidence, then, the jury, if they follow that instruction as in our proposed jury instructions, *the pattern instructions*, they then find negligence based upon that evidence as presented." (emphasis added).

> circumstances exist, you may conclude that a cause of the occurrence was some negligent conduct by the defendant.

8. The jury also received a paper copy of the jury instructions. At the top of the page that contained the *res ipsa* instruction, the words "(If Applicable)" appeared. The special jury verdict form also asked the jury to answer the following question: "Do you find that defendant, Cochran Oil Company, was negligent?" After deliberating, the jury answered that question in the negative, finding that Cochran Oil had not negligently delivered oil to Harris' home. This appeal followed.

9. On appeal, Harris claims that the Superior Court erred by giving jury instructions that were "confusing and misleading," in two respects. First, Harris argues, the trial court's transitional statement "hopelessly and improperly entangled" the law of common-law negligence and *res ipsa loquitur* by instructing the jury that it should not consider any circumstantial evidence until after it had determined that she failed to prove negligence by a preponderance of the evidence. What the trial court should have done, Harris urges, was "couch[] the transitional statement in terms of *direct* evidence"[5]—that is, by first explaining the distinction between direct and circumstantial evidence, and then by instructing the jury to consider a *res ipsa loquitur* theory only if it determined that Harris had failed to prove her common-law negligence claim (specifically, that Cochran Oil failed to

[5] Emphasis in original.

meet the standard of care required by a person in similar circumstances) through direct evidence.

10. Second, Harris contends that it was error for the trial court to model the *res ipsa* jury instruction on the Delaware pattern jury instructions,[6] because the pattern instructions did not properly account for her two alternative theories of negligence. Harris insists that the pattern jury instruction is appropriate only where a plaintiff asserts *res ipsa loquitur* as the sole theory of negligence. Here, Harris claimed, because Cochran Oil was negligent under alternative theories of common-law negligence or *res ipsa loquitur*, the pattern *res ipsa* jury instruction was legally insufficient.

11. When reviewing a challenge to a trial court's formulation of a jury instruction, our analysis focuses "not on whether any special words were used, but whether the instruction correctly stated the law and enabled the jury to perform its duty."[7] Generally, a jury instruction must give a correct statement of the substance of the law and must be "reasonably informative and not misleading."[8] A jury instruction "need not be perfect, however, and a party does not have a right to a

[6] Del. P.J.I. CIV. § 10.3 (2000) (pattern Jury Instruction for *res ipsa loquitur*.

[7] *Corbitt v. Tatagari*, 804 A.2d 1057, 1062 (Del. 2002) (quoting *Cabrera v. State*, 747 A.2d 543, 545 (Del. 2000)).

[8] *Id.* (quoting *Cabrera*, 747 A.2d at 544).

particular instruction in a particular form."[9] When evaluating the propriety of a jury instruction, we do not read a single jury instruction in isolation, but rather, within the context of the jury instructions considered as a whole.[10]

12. We normally review a trial court's denial of a party's requested jury instruction *de novo*.[11] But where a party has requested or accepted a particular jury instruction at trial, we review only for plain error.[12] In the jury instruction context, a plain error is one that "undermine[s] the jury's ability to intelligently perform its duty in returning a verdict."[13] In those limited circumstances, "an improper jury instruction may amount to plain error despite a [party]'s acceptance of it."[14]

13. We conclude that Harris' claims lack both factual and legal merit. Harris' claims ignore the fact that: (i) the trial court included the transitional statement at Harris' specific request even though the court was hesitant to do

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[9] *Id.* (citations omitted).

[10] *Id.* (citations omitted).

[11] *Keyser v. State*, 893 A.2d 956, 960 (Del. 2006).

[12] *Volkswagen of Am., Inc. v. Costello*, 880 A.2d 230, 234 (Del. 2005).

[13] *Id.* at 235 (internal quotation marks and citations omitted).

[14] *Id.* (quoting *Bullock v. State*, 775 A.2d 1043, 1054 (Del. 2001)); *see also Baker v. Reid*, 57 A.2d 103, 109 (Del. 1947).

so,[15] because Harris insisted that she wanted to proceed on the dual theories of common-law negligence and *res ipsa loquitur*; and (ii) Harris expressly confirmed that the specific wording of the transitional statement was "appropriate." It is astonishing for Harris now to claim that the trial court erred in modeling its *res ipsa* instruction on the Delaware pattern jury instructions she herself had initially proposed,[16] and continued to request, despite the trial court's concern that the "if and only if" language in Harris' proposed *res ipsa* instruction would potentially "make it . . . look like your burden is heavier." It was Harris who proposed the "if and only if" language she now complains about, failed to object to the inclusion of that language after the trial court expressed its concern, and continued requesting that the trial court give her proposed *res ipsa* instruction.

14. In addition to, and apart from, the fact that the "errors" of which Harris now complains were self-created, the jury instructions themselves demonstrate that the trial court correctly instructed the jury on the applicable law. Those instructions were neither confusing nor misleading. The transitional statement read: "If you determine that Anna Harris has not proven her claim of negligence by a preponderance of the evidence, you may consider an alternative claim based on

[15] The trial transcript shows that during the jury instruction conference where the trial judge expressed concerns about instructing the jury on both theories of negligence, Harris' counsel stated "I suggest Your Honor was probably correct in suggesting, as I said, a transitional sentence."

[16] *See supra*, note 4.

circumstantial evidence." Harris now claims that the transitional statement should have used the specific phrase "by a preponderance of the *direct* evidence," rather than simply "preponderance of the evidence." But the trial judge's wording did not incorrectly state the law. A plaintiff may prove negligence by either direct or circumstantial evidence,[17] and Harris' counsel expressly agreed that the transitional statement alleviated any concern that the jury might be confused as a result of being instructed on her two alternative theories of negligence.

15. The judge also instructed the jury on the difference between direct and circumstantial evidence. The judge also correctly instructed the jury to consider only circumstantial evidence when evaluating the evidence based on the alternative theory of *res ipsa loquitur*.[18] Harris now complains that the court's explanation of direct versus circumstantial evidence should have been given to the jury before the transitional statement was read. The short answer is that the trial judge has "wide

[17] *See, e.g.*, *Ciociola v. Del. Coca-Cola Bottling Co.*, 172 A.2d 252, 257 (Del. 1961) ("Proof of negligence may be made in a variety of ways. It may be established by direct testimony or by proof of other circumstances from which an inference of negligence follows logically.").

[18] *See Skipper v. Royal Crown Bottling Co. of Wilm.*, 192 A.2d 910, 912 (Del. 1963) ("The doctrine of *res ipsa loquitur* is a rule of circumstantial evidence."); *see also* DEL. UNIF. R. EVID. 304(a)(1) ("The doctrine of *res ipsa loquitur* is a rule of circumstantial evidence, not affecting the burden of proof, which permits, but does not require, the trier of the facts to draw an inference of negligence from the happening of an accident under [certain] circumstances. . . .").

latitude in framing jury instructions,"[19] and "a party does not have a right to a particular [jury] instruction in a particular form."[20]

16. Finally, Harris' claim based on the "if and only if" language in the *res ipsa* jury instruction fails, because that language must be considered within the context of the jury instructions read as a whole. The transitional statement expressly instructed the jury to consider the *res ipsa loquitur* claim only if it found that Harris had failed to prove common-law negligence by a preponderance of the evidence. Moreover, the paper copy of the *res ipsa* jury instruction furnished to the jury included the words "(If Applicable)." For the jury even to reach the alternative *res ipsa* issue, it must first have found that Harris had failed to prove that Cochran Oil acted without reasonable care when delivering the oil to her home. The phrase "if and only if" did not incorrectly state the law of *res ipsa loquitur*, because at that point *res ipsa* was the only basis to find that Cochran Oil was negligent. Harris has not shown plain error, because the trial court's jury instructions correctly stated the law and were not confusing or misleading.

[19] *Cabrera v. State*, 747 A.2d 543, 543 (Del. 2000).

[20] *Corbitt v. Tatagari*, 804 A.2d 1057, 1062 (Del. 2002).

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Jack B. Jacobs
Justice