NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 1070

LAUREN SELF, INDIVIDUALLY AND ON BEHALF OF HER MINOR SON, TRENT LEDET

VERSUS

CHICK-FIL-A, INC. AND SHANNON LEWIS

DATE OF JUDGMENT: DEC 2 2 2010

ON APPEAL FROM THE THIRTY-SECOND JUDICIAL DISTRICT COURT
NUMBER 149,383, PARISH OF TERREBONNE
STATE OF LOUISIANA

HONORABLE TIMOTHY C. ELLENDER, JUDGE

* * * * * *

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Defendants/Appellees
Chick-Fil-A Inc., Shannon Lewis,
and American Home Assurance
Company

* * * * * *

BEFORE: KUHN, PETTIGREW, AND KLINE, JJ.,[1]

Disposition: AFFIRMED.

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[1] The Honorable William F. Kline, Jr. is serving *pro tempore* by special appointment of the Louisiana Supreme Court.

Kuhn, J.

This case involves an injury to a child that occurred on the premises of an indoor restaurant playroom. On appeal, we address the sole issue of whether the trial court committed legal error by failing to instruct the jury regarding the doctrine of *res ipsa loquitur*. We conclude that because reasonable minds could not conclude, based on the facts of this case, that all of the criteria for using the doctrine were satisfied, the trial court acted properly in not instructing the jury regarding this doctrine. Accordingly, we affirm the trial court's judgment that dismissed plaintiff's suit with prejudice.

I. PROCEDURAL AND FACTUAL BACKGROUND

On the morning of March 1, 2006, plaintiff-appellant, Lauren Self, and her four and one-half year old son, Trent Ledet, arrived at the Chick-Fil-A, Inc. ("Chick-Fil-A") restaurant located on Martin Luther King Boulevard in Houma, Louisiana. The restaurant, which included a glass-enclosed playroom, was newly constructed and had opened for business less than two weeks earlier. Self proceeded to the counter to place her breakfast order, and Trent went to the playroom. Self motioned for Trent to return to the dining area, and he did. They sat at a table that was located next to the playroom. Trent took a few bites of his food and ran back into the playroom. Self remained at the table by the glass wall, while Trent was in the playroom. According to Self, she was able to see inside the "whole playroom" from her seat outside the playroom. She again motioned for Trent to return to the table. Within seconds, as he came back towards the table, the accident happened. She could see Trent "diagonally" through the glass, and she related that as he went towards the playroom door, he fell "in front of the

door." Self heard him scream, and she ran inside the playroom to attend to Trent. She discovered that his nose was cut open. Medical records reveal that Trent sustained a three-inch laceration across the bridge and left side of his nose.

A Chick-Fil-A employee called for "911" emergency services, and an ambulance arrived to transport Trent to a local hospital. Ambulance records reveal that Trent stated that he "hit his nose on the door of the [playroom]." Trent was seen by a physician at the hospital, and his injury was sutured. When his nose became swollen and oozing the next day, Self brought him to Dr. O'Neil Engeron, a plastic surgeon, who removed a blood clot and re-stitched the cut. Although the injury healed well, a scar remained.

Self filed suit against defendants, Chick-Fil-A, Shannon Lewis d/b/a Chick-Fil-A Houma FSU ("Lewis"), who operates the restaurant in question where Trent was injured; and the alleged liability insurer of Chick-Fil-A and Lewis, American Home Assurance Company ("American").[2] Self sued on her own behalf and on Trent's behalf, seeking to recover damages, medical expenses, and her own lost wages.

At trial, plaintiff offered the testimony of Mitchell Wood, a commercial and residential builder, who was accepted by the court as an expert in the fields of architecture, construction safety, and commercial inspection. Eighteen months after Trent's accident, Wood performed a site inspection of the Chick-Fil-A restaurant playroom that focused on the door, and he concluded there was no item on the site that had apparently caused the severe laceration. He testified that due

[2] Plaintiff also named other defendants, who were dismissed from the suit prior to trial and are not relevant to the issues addressed on appeal.

to the passage of time, the cause of the accident was "conjecture." Wood testified the glass door to the playroom was encased by metal, and he explained that Chick-Fil-A had used rounded handles on the door. Although Wood could not find any damaged or sharp edges at the accident site, he speculated that a "sharp edge" had caused Trent's injury, and he further stated that one of the door hinges or a small screw drilled into the door's threshold edge might have caused the injury. Wood also described scratches in the door frame area as "small defects in the [storefront] material." He further speculated that "a small piece of glass" or "a screw" caused the accident and was later vacuumed up. On cross examination, however, Wood testified there were some "ninety (90) degree edges" in the door frame of the playroom. He further admitted that he found no code violations on the premises, and "overall, it appeared to be a safe environment."

Plaintiff also offered the testimony of Dr. Engeron, who testified that he performed surgery on Trent, which consisted of cleaning the wound, removing a blood clot, trimming the edges of the skin, and re-suturing the cut with about thirty stitches. On his examination of Trent's injury, he testified that he did not see any indication of blunt force or bruising. He explained that photographs of Trent's injury revealed that it was more of a "slicing" than a "smashing" injury. In his opinion, the wound was caused by something "sharp" or "a right angle." He related that the injury had to have been caused by "something with some sort of [an] edge to it [--] either a corner of a door, or a corner of something[,] or a piece of metal...." Dr. Engeron testified that although he did not visit the accident site, his testimony was based on his review of pictures of the accident site. He

described the edge of the door as a right angle that was "kind of sharp." He opined that the edge of the door could have caught Trent "as he went down."

Self also testified that she returned to the restaurant on the afternoon of the accident to request that Chick-Fil-A fill out an injury report, to inspect the general area where Trent was hurt, and to take pictures of this area. She discovered no blood in this area, but she testified that the metal on the edges of the door to the playroom was "very sharp." Self also testified that she could not say what Trent hit, what actually caused the incident, or what caused Trent to trip. She related that Trent was not carrying anything when he fell.

Lewis, the operator of the Chick-Fil-A restaurant, testified that prior to the grand opening, he had walked through the restaurant, including the playroom area, many times. Although he did not personally ask anyone else to specifically inspect the area where the accident happened, he explained that based on his inspection, he would have recognized anything unsafe on the premises. He related that he never saw anything defective regarding the playroom door, and none of his employees had reported anything wrong with this area. He explained that one of his managers walked through the store daily to make sure it was clean and that it was a "proper setting" for opening the store.

After Trent's injury, Lewis reported the incident to his insurer, but he did not further conduct an investigation of the area in question or attempt to determine the cause of the injury. He recounted that there had been no other incidents involving an injury on the playground either before or after Trent's injury, and he stated he had no knowledge prior to Trent's injury of any defective condition on the premises. He also testified that no work had been performed in the playroom

door area since the store opened; he explained that as of the time of trial, the door area looked precisely as it did on the day of the incident.

Geneva Diggs, a Chick-Fil-A patron, testified that she was having breakfast at the restaurant on the morning of March 1, 2006, when the incident occurred. Diggs recounted that when she looked up towards the playroom, Trent was "pulling up, and he had fallen," but she did not see the actual event that caused the injury. She witnessed blood coming from Trent's nose, and she saw him running to his mother, who she recalled was on the phone when the accident happened. Diggs never examined the door, she did not see anything unreasonably dangerous or "out of the ordinary," and she did not see anything that would have caused Trent to trip.

Raymond Parrish, a Chick-Fil-A employee who had overseen the construction of the restaurant in question, testified that he had inspected and regularly reviewed the site, which included the playroom door area, as the restaurant was built. He also explained that another employee, Davie Wide, also inspected the premises as they were built, so that together they had performed "double-check inspections." Parrish stated that the inspections of the playground area revealed that it was built according to the plans and specifications, and they found no defects. Parrish testified that hinge protectors had been used over the door hinges to protect against children's fingers getting stuck in the door, and a strip had been installed along the bottom of the door to protect against children's toes getting caught. He further explained that the door and window surrounds in the restaurant were made out of extruded aluminum, with the screws held behind the glass in gaskets. He described the design as having "no sharp edges."

Although he detected some scratches on the storefront (or door frame) area, he related that none were significant enough to cut anyone. He explained that if there had been a gouge in the storefront material as of the day of Trent's injury, it would have remained visible as of the time of trial.

Erica Taylor, a Chick-Fil-A employee, was working behind the counter when the incident occurred. She testified that the manager called "911," at the mother's request. Although Taylor did not witness how Trent was injured, she and the ambulance driver inspected the door and rubbed it in search of sharp objects, but none were found. She testified that neither she nor the ambulance driver found any blood in this vicinity either. Taylor further testified that the Chick-Fil-A employees had a procedure, whereby they checked the restaurant every morning to make sure "everything [was] okay" prior to opening. Taylor, who remained working at the restaurant as of the time of trial, also testified that no work had been performed on the playroom door area since the restaurant had opened. Jason Williams, another Chick-Fil-A employee who had worked at the restaurant since it opened, confirmed that no work had been done to alter the playroom storefront area since the incident had occurred.

Before the case was submitted to the jury, plaintiff requested a jury instruction on the doctrine of *res ipsa loquitur*, which the trial court rejected. Plaintiff's counsel objected to the court's exclusion of the requested charge. After a three-day trial, the jury returned a verdict in favor of defendants, finding that neither Lewis nor Chick-Fil-A was at fault with respect to the subject incident.

In accordance with the jury verdict, the trial court signed a September 8, 2009 judgment in favor of Chick-Fil-A, Lewis, and American that dismissed Self's

claims with prejudice. Self has appealed, urging that "[t]he doctrine of *res ipsa loquitur* was tailor-made for the evidentiary circumstances surrounding [Trent's] injury[,] and the trial court was clearly wrong in holding otherwise." Self further contends that the trial court's refusal to instruct the jury regarding this doctrine constituted legal error that impeded its fact-finding process.

II. ANALYSIS

Louisiana Civil Code articles 2317.1 and 2322 address an owner or custodian's liability for defective things and buildings. Article 2317.1 provides:

> The owner or custodian of a thing is answerable for damage occasioned by its ruin, vice, or defect, only upon a showing that he knew or, in the exercise of reasonable care, should have known of the ruin, vice, or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care. Nothing in this Article shall preclude the court from the application of the doctrine of res ipsa loquitur in an appropriate case.

Article 2322 addresses the circumstances in which an owner of a building is answerable for damages, as follows:

> The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice or defect in its original construction. However, he is answerable for damages only upon a showing that he knew or, in the exercise of reasonable care, should have known of the vice or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care. Nothing in this Article shall preclude the court from the application of the doctrine of res ipsa loquitur in an appropriate case.

Louisiana Revised Statutes 9:2800.6 addresses a plaintiff's burden of proof in a negligence claim brought against a merchant, as set forth below in pertinent part:

> A. A merchant owes a duty to persons who use his premises to exercise reasonable care to keep his aisles, passageways, and floors in a reasonably safe condition. This duty includes a reasonable effort to

keep the premises free of any hazardous conditions which reasonably might give rise to damage.

B. In a negligence claim brought against a merchant by a person lawfully on the merchant's premises for damages as a result of an injury, death, or loss sustained because of a fall due to a condition existing in or on a merchant's premises, the claimant shall have the burden of proving, in addition to all other elements of his cause of action, all of the following:

(1) The condition presented an unreasonable risk of harm to the claimant and that risk of harm was reasonably foreseeable.

(2) The merchant either created or had actual or constructive notice of the condition which caused the damage, prior to the occurrence.

(3) The merchant failed to exercise reasonable care. In determining reasonable care, the absence of a written or verbal uniform cleanup or safety procedure is insufficient, alone, to prove failure to exercise reasonable care.

...

D. Nothing herein shall affect any liability which a merchant may have under Civil Code Arts. 660, 667, 669, 2317, 2322, or 2695.

At trial, Self sought a jury instruction on the doctrine of *res ipsa loquitur*, which permits the inference of negligence from the surrounding circumstances. ***Broussard v. Voorhies***, 06-2306, p. 6 (La. App. 1st Cir. 9/19/07), 970 So.2d 1038, 1043, ***writ denied***, 07-2052 (La. 12/14/07), 970 So.2d 535. *Res ipsa loquitur* is not a substantive legal tenet, but rather an evidentiary doctrine under which a tort claim may be established by circumstantial evidence. ***Id.***

In ***Linnear v. CenterPoint Entergy Entex/Reliant Energy***, 06-3030 (La. 9/5/07), 966 So.2d 36, the supreme court addressed the doctrine of *res ipsa loquitur*. Therein, a plaintiff homeowner sustained an injury that resulted when she allegedly stepped into a sinkhole next to her driveway as she was placing

items in the backseat of her car. ***Linnear***, 06-3030 at pp. 1-2, 966 So.2d at 38-39. Eleven days before the accident, the defendant company had been dispatched to investigate a gas leak at the plaintiffs' residence. After locating the leak and turning off the gas, the defendant installed a temporary line to maintain service and returned a few days later to install a new gas line. To perform that work, the defendant had dug a trench parallel to the driveway and about two to three feet away from it. The accident occurred in the general area where the trench was dug, when Mrs. Linnear stepped backward from the open rear door of her car.

According to Mrs. Linnear's testimony, her foot sank into a sinkhole. Both Mr. and Mrs. Linnear alleged that defendant had negligently filled the trench and failed to re-sod the area, resulting in a sinkhole that caused her to fall. Mrs. Linnear testified that the area where the accident occurred was wet, but it was not muddy, and it appeared stable. Photographs of the accident scene taken by Mr. Linnear showed a "muddy area with an indentation of a footprint in the mud." ***Id.***, 06-3030 at p. 2, 966 So.2d at 39. Mr. Linnear testified that it had rained on the morning of the accident and again between the time of the accident and when he took the photograph. Workers for the defendant testified regarding the work that had been performed at the Linnear residence, which testimony described the back-filling of the trench and the process used to tamp down and harden the dirt. The defendant denied the presence of a sink hole and argued that based on the photographs presented by plaintiffs, "Mrs. Linnear simply stepped into an open and obvious muddy area and slipped." ***Id.***, 06-3030 at pp. 3-4, 966 So.2d at 39-40.

In ***Linnear***, the court reasoned that the doctrine of *res ipsa loquitur* did not apply to the facts presented because direct evidence was used by both parties to

explain the accident or injury. ***Id.***, 06-3030 at pp. 8-9, 966 So.2d at 42-43. The court explained that *res ipsa loquitur* only applies where direct evidence of a defendant's negligence is not available to assist the plaintiff to present a prima facie case of negligence. ***Id.***, 06-3030 at p. 8, 966 So.2d at 42. The ***Linnear*** court further instructed that in cases where plaintiff uses circumstantial evidence only to meet its burden of proof, *res ipsa loquitur* may be applicable, if the trial judge sequentially determines that the three criteria for its use are satisfied. The ***Linnear*** court set forth the following three criteria: 1) the injury is of the kind which does not ordinarily occur in the absence of negligence on someone's part; 2) the evidence sufficiently eliminates other more probable causes of the injury, such as the conduct of the plaintiff or of a third person; and 3) the alleged negligence of the defendant must be within the scope of the defendant's duty to the plaintiff. ***Id.***, 06-3030 at p. 10, 966 So.2d at 44. The ***Linnear*** court further directed that the trial court must determine whether reasonable minds could differ on the presence of **all three criteria**. If reasonable minds could not conclude that all three criteria are satisfied, then the legal requirements for the use of *res ipsa loquitur* are not met, and consequently, the jury should not be instructed on the doctrine. ***Id.*** If reasonable minds could differ as to all three criteria, then the law permits the use of *res ipsa loquitur* to allow the jury to infer negligence if it chooses to do so from the circumstances presented, including the incident itself. ***Id.***

Applying the applicable criteria, the ***Linnear*** court determined that the trial court had properly rejected plaintiff's request for a *res ipsa loquitur* instruction:

> [T]his case does not pass the first requirement, as this injury was of the kind which can ordinarily occur in the absence of negligence on someone's part. In *Cangelosi* [*v. Our Lady of the Lake Regional Medical Center*, 564 So.2d 654 (La. 1989)], we explained that 'the

> event must be such that in light of ordinary experience it gives rise to an inference that someone *must* have been negligent.' People fall in their yards and injure themselves all the time without any third party involvement at all. We have long held that '[*r]es ipsa loquitur,* as "a qualification of the general rule that negligence is not to be presumed," must be sparingly applied.' The doctrine only applies 'when the circumstances surrounding an accident are so unusual' as to give rise to an inference of negligence. It does not apply to cases involving ordinary accidents or injuries that often occur in the absence of negligence, such as this one.... It is clear that reasonable minds could not differ on this point. That being the case, there is no need to consider the other two requirements.

Linnear, 06-3030, pp. 10-11, 966 So.2d at 44 (citations omitted).

In the instant case, Self offered only circumstantial evidence from which defendants' negligence might have been inferred. However, if reasonable minds could not have concluded that all three criteria for the use of the *res ipsa loquitur* doctrine were satisfied, then the legal requirements for its use were not met. As did the court in ***Linnear***, we conclude this case does not meet the first requirement of the criteria because Trent's injury is the kind that can ordinarily occur in the absence of negligence on someone's part. Children fall and injure themselves frequently without any third party involvement. Although the exact cause of Trent's injury is unknown, no one disputes that Trent fell in the area of the playroom door. Dr. Engeron's testimony further supports that the injury may have been caused by Trent falling against the right angle of the playroom's door or its frame. The doctrine of *res ipsa loquitur* only applies when the circumstances surrounding an accident are so unusual as to give rise to an inference of negligence. ***Id.***, 06-3030 at p. 11, 966 So.2d at 44.

It is clear that reasonable minds could not differ on the finding that injuries of this type routinely occur in the absence of negligence. Thus, it is unnecessary

to consider the other two requirements for applying the doctrine, and we conclude the trial court properly decided that it was improper to instruct the jury regarding this doctrine. Accordingly, we find no legal error that impeded the jury's fact-finding process, as alleged by plaintiff.

III. CONCLUSION

For these reasons, we affirm the trial court's judgment that dismissed Self's claims against Chick-Fil-A, Lewis, and American with prejudice. Appeal costs are assessed against plaintiff-appellant, Lauren Self.[3]

AFFIRMED.

[3] Although Self filed this appeal *in forma pauperis*, since we find no merit in her appeal, appeals costs may be assessed against her. See ***Johnson v. State Dept. of Social Services***, 05-1597, p. 11 n.10 (La. App. 1st Cir. 06/09/06), 943 So.2d 374, 381 n.10, ***writ denied***, 06-2866, (La. 02/02/07), 948 So.2d 1085; see also La. C.C.P. arts. 5186 and 5188.