

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 1, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 03-2532
STATE OF WISCONSIN**

Cir. Ct. No. 01CV000555

**IN COURT OF APPEALS
DISTRICT III**

**ALLSTATE INSURANCE COMPANY, RONALD DIETRICH AND
DARLENE DIETRICH,**

PLAINTIFFS-APPELLANTS,

v.

VOLKSWAGEN OF AMERICA,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Marathon County:
VINCENT K. HOWARD, Judge. *Affirmed in part, reversed in part and cause
remanded.*

Before Deininger, P.J., Dykman and Higginbotham, JJ.

¶1 PER CURIAM. Allstate Insurance Company, and its insureds, Ronald and Darlene Dietrich (collectively Allstate) appeal from an order dismissing their strict product liability claim against Volkswagen of America.

Litigation continues on Allstate's claim for negligent manufacture of the Dietrich's Volkswagen automobile, and this interlocutory appeal also concerns the trial court's ruling that *res ipsa loquitur* does not apply to the negligence claim. We affirm the *res ipsa loquitur* ruling, but reverse the order dismissing Allstate's products liability claim.

¶2 In 1998, the Dietrichs' 1989 Volkswagen Jetta caught fire while parked in their garage, damaging both the car and garage. They filed a claim under their homeowner's insurance with Allstate, which Allstate paid, less a \$250 deductible. Because Allstate's investigation attributed the fire to a defectively manufactured alternator, it commenced this action under a contract assignment and on principles of subrogation. It sought recovery of the amount paid on the Dietrichs' claim, and stated causes of action for negligent manufacture, strict product liability, and breach of warranty. The Dietrichs joined as plaintiffs to recover \$250.

¶3 Volkswagen answered and moved for summary judgment on all claims. The facts supporting its motion included: the car was shipped from Volkswagen's manufacturing plant in 1989; after purchasing it the Dietrichs altered the electrical system by installing an ammeter; and Volkswagen's expert believed this alteration was done poorly and was the most likely cause of the fire.

¶4 The trial court granted summary judgment on the warranty claim. Allstate does not appeal that decision. The court also granted summary judgment on the product liability claim because installation of the ammeter had substantially and materially changed the condition of the car's electrical system after it left Volkswagen's control. Finally, the trial court dismissed the negligence claim because *res ipsa loquitur* did not apply, and Allstate had relied solely on that

doctrine to support its claim. On reconsideration, the court reinstated the negligence claim to give Allstate an opportunity to develop evidence to support it, without the benefit of *res ipsa loquitur*.

PRODUCT LIABILITY CLAIM

¶5 To prove a strict product liability claim, the plaintiff must prove, among other things, that the product has not undergone a substantial, material change since it left the manufacturer's or seller's control. *Glassey v. Cont'l Ins. Co.*, 176 Wis. 2d 587, 599, 500 N.W.2d 295 (1993). If the plaintiff fails to make this showing, then the court must dismiss the claim. *Id.* A substantial, material change is a "change in the design, function or character of the product linked to the accident." *Id.* at 600.

¶6 Here, the Dietrichs undisputedly altered the Jetta's electrical system. However, the question remains whether the change was substantial and material because the expert witnesses dispute whether the electrical system as a whole, or just the alternator, caused the fire. If the latter, then the evidence produced thus far shows that the change to the electrical system was not substantial and material because it did not affect the design, function or character of the alternator. This is a question to be determined by the trier of fact.

¶7 We disagree with Volkswagen's assertion that we are adopting a rule that a subsequent change in a product will not relieve the manufacturer from strict liability unless the subsequent alteration itself was the sole cause of injury. That goes well beyond our holding. Volkswagen does not have a burden to prove that installing the ammeter was the sole cause of the injury. Instead, the issue is whether installation changed the product linked to the accident. Here, under Allstate's theory, the product linked to the accident is the alternator, which it

claims remained unaffected by the ammeter installation. Allstate should have the opportunity to prove that theory at trial.

RES IPSA LOQUITUR

¶8 *Res ipsa loquitur* is a rule of circumstantial evidence that permits a factfinder to infer a defendant's negligence from the mere occurrence of the event. See *Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶3, 241 Wis. 2d 804, 623 N.W.2d 751. Before *res ipsa loquitur* applies, there must be proof that the event in question would not occur in the absence of negligence, and that the instrumentality causing the harm was within the exclusive control of the defendant. *Id.*, ¶34. “[I]t is only where the circumstances leave no room for a different presumption that the maxim applies. When it is shown that the accident might have happened as a result of one of two causes, the reason for [*res ipsa loquitur*] fails and it cannot be invoked.” *Id.*, ¶40, (quoting *Klein v. Beeten*, 169 Wis. 2d 385, 389, 172 N.W.2d 736 (1919)). When the parties raise the issue on summary judgment, we may decide it as a question of law. *Id.*, ¶27.

¶9 Here, as a matter of law, the doctrine cannot apply. The evidence on summary judgment sets forth competing theories of causation, only one of which involves an instrumentality arguably within Volkswagen's exclusive control.

¶10 No costs to either party.

By the Court.—Order affirmed in part, reversed in part and cause remanded.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (2001-02).

