COURT OF APPEALS
DECISION
DATED AND RELEASED

September 6, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

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

No. 95-0353

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

LEE KREMSREITER,

Plaintiff-Appellant,

v.

MARATHON COUNTY,

Defendant-Third Party Plaintiff-Respondent,

WISCONSIN COUNTY MUTUAL INSURANCE COMPANY,

Defendant-third Party Plaintiff,

v.

STAINLESS SPECIALISTS, INC.,

Third Party Defendant.

APPEAL from a judgment of the circuit court for Marathon County: VINCENT K. HOWARD, Judge. *Reversed and cause remanded*.

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Lee Kremsreiter appeals a summary judgment that dismissed his negligence lawsuit against Marathon County. Kremsreiter suffered injuries while serving a sentence at the Marathon County jail. While he slept, the upper bunk of his metal bunk bed separated from the masonry wall and collapsed. The trial court correctly granted the County summary judgment if there was no dispute of material fact and the County deserved judgment as a matter of law. ***Powalka v. State Mut. Life Assur. Co.***, 53 Wis.2d 513, 518, 192 N.W.2d 852, 854 (1972). According to the trial court, Kremsreiter's summary judgment affidavit essentially admitted that the bunk bed apparatus was safe, claiming only that the apparatus could have been safer. Kremsreiter argues that the trial court misjudged the facts and the aptness of the doctrine of res ipsa loquitur. We agree with Kremsreiter that disputes of material fact existed. We therefore reverse the summary judgment and remand the matter for further proceedings.

Kremsreiter's summary judgment affidavit created a dispute of material fact on the bunk bed's safety and the County's negligence. Negligence is the failure to exercise ordinary care under the circumstances. ***Marciniak v. Lundborg***, 153 Wis.2d 59, 64, 450 N.W.2d 243, 245 (1990). Himself a mason for sixteen years, Kremsreiter served as his own expert witness. He stated that he had personal experience with the masonry rivets and other fasteners. In his opinion, the method used to attach the bunk bed was unsafe in terms of several factors: (1) the number of rivets; (2) the availability of better fasteners; (3) the method used to brace and support the bed; (4) the rivets' uneven effectiveness on hollow block walls; and (5) the lack of expony or other substance to provide extra gripping strength where the rivets met the wall. These facts directly contradicted the County's expert mason's deposition, which stated that masonry rivets were a recognized method of attaching things to block walls, thereby implying that they were safe. Viewed in its entirety, Kremsreiter's affidavit stated that masonry rivets were sometimes safe for attaching things to masonry walls, but not in this instance; it thereby created an inference that the County was negligent. The trial court read Kremsreiter's affidavit too narrowly.

Moreover, the facts brought out on summary judgment created a bona fide issue concerning res ipsa loquitur tort liability. This doctrine imposes liability whenever an instrumentality causes an injury that would not have occurred without negligence by the person having exclusive control over the injury causing agency. ***McGuire v. Stein's Gift & Garden Ctr., Inc.***, 178 Wis.2d 379, 390, 504 N.W.2d 385, 389 (Ct. App. 1993). Here, neither we nor the trial

court can rule out res ipsa loquitur liability as a matter of law from the facts thus far developed. In rejecting res ipsa loquitur, the trial court questioned whether the County had exclusive control over the bunk bed. The trial court hypothesized that another inmate could have damaged the bed, which the trial court concluded destroyed the County's exclusive control. This analysis overstated the significance of the presence of other inmates. Although the trial court's hypothesis is certainly possible, or even probable, this hypothesis was not the only reasonable inference that the facts permitted and it did not conclusively show that the County lacked sufficient control over the jail to sustain res ipsa loquitur liability. Other reasonable inferences arose from the evidence that were consistent with both inmate tampering, County control, and County malfeasance.

Ironically, the County's attempt to prove the masonry rivets' inherent safety laid the foundation for a res ipsa loquitur theory of liability. To defeat Kremsreiter's res ipsa loquitur claim, the County needed to show that he had virtually no chance of proving this theory from the facts as they then stood. *See, e.g.,* ***Van Dyke v. Merchants Indem. Corp.***, 215 F. Supp. 428, 429-30 (E.D. Wis. 1963); *see also* ***Brewster v. United States***, 860 F. Supp. 1377, 1387 (S.D. Iowa 1994). By suggesting that rivets furnished an intrinsically safe method for securing the bed, the County's expert tried to rule out rivets as the cause of the collapse. This also implied, however, that the bed failed for other reasons. Such testimony did nothing to eliminate other potential areas of fault by the County, such as a failure to conduct periodic inspections or to perform ordinary maintenance; inferentially, the County retained exclusive control over such matters. In other words, if a fact finder assumed that the rivets were sufficient when installed and that an inmate damaged the bed, the fact finder could nonetheless infer that the County should have foreseen inmate vandalism, conducted regular inspections, and performed needed repairs. The County's evidence left these inferences of County malfeasance undisturbed. Inasmuch as the County did not conclusively refute res ipsa loquitur inferences, they survived the County's motion and barred summary judgment.

By the Court.—Judgment reversed and cause remanded for further proceedings consistent with this opinion.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.