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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

WILLIAM VOGT etc.,

Plaintiff and Appellant,

v.

C.E. ALLEN COMPANY INC. etc.,

Defendant and Respondent.

G044431

(Super. Ct. No. 30-2009-00123398)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Geoffrey T. Glass, Judge. Affirmed.

Wheatley Bingham & Baker, and William G. Wheatley, Jr.; Mahaffey & Associates, and Douglas Mahaffey, for Plaintiff and Appellant.

Horvitz & Levy, Barry R. Levy and Katherine Perkins Ross, for Defendant and Respondent.

INTRODUCTION

Appellant William Vogt, doing business as Pier Oil Company (Vogt), appeals from a judgment against him and in favor of C.E. Allen Company, Inc., doing business as Allenco (Allenco). Vogt asserted at trial that Allenco damaged an oil well he owns and operates in Huntington Beach by dropping into it about 4,000 feet of pipe, weighing approximately 13 tons, while performing some maintenance work on the well. On appeal, he invokes the doctrine of *res ipsa loquitur* to establish Allenco's negligence, because the cause of the accident was never fully explained.

The trial court rendered judgment in Allenco's favor on the ground Vogt had not proved Allenco acted below the standard of care. Vogt moved to vacate the judgment and for a new trial, apparently on *res ipsa loquitur* grounds; the court denied both motions.¹

Under well established rules of appellate review, we affirm. A record like this one compels us to assume the judge got it right when he rendered judgment for Allenco. Even if Vogt is entitled to the presumption *res ipsa loquitur* affords, he still must show that Allenco's breach of duty damaged him. The evidence regarding whether the accident damaged Vogt's well was conflicting, and, in the absence of a request for a statement of decision, we must assume implied findings that Vogt failed to make the necessary connection between accident and damages.

¹ Neither the pleadings supporting or opposing the motions nor the orders were included in the record.

FACTS

Vogt leases a 55-year-old oil well in Huntington Beach. Up to the end of 2008, the well produced about 10 barrels of oil per day.² Vogt hired Bruce King, an experienced oilman, to oversee the day-to-day operation of the well.³

In mid-October 2008, the pump in Vogt's well broke down. King secured the services of Allenco, to fix the pump and do some maintenance on the liner. As part of this service, Allenco was to "tag" the well, to determine its current depth. To tag the well, Allenco had to attach additional 30-foot sections of pipe to the tube that was already in the well, the length of which was known. The idea was to lower this extended tube in the well, see how much was left sticking out when it hit ("tagged") the bottom, and figure out the well's depth from there.

On November 3, 2008, Allenco brought its own rig, set it up over the well, and pulled out the broken pump. Allenco did not supply the extra pipes needed for the tagging, however. King sent his assistant with two men from the Allenco crew to pick up some additional pipe from a nearby oil well site. The Allenco crew brought back five lengths of pipe. On one end of each pipe is a metal ring, called a collar, by means of which one length of pipe is attached to another.

The Allenco crew then proceeded to set up for the tag. They attached two of the additional lengths of pipe to the existing tube, and a hoisting mechanism in the rig, called elevators, lifted the entire tube, now longer by sixty feet. The Allenco elevator operator lowered the tube into the well and tagged the bottom. The operator began

² As explained at trial and in the briefs, an oil well is a long hole drilled into the ground, which is then encased to keep out debris. At the bottom of the well is the liner, which is perforated to allow oil to seep into the well. A tube composed of 31-foot-long sections of pipe is suspended inside the casing, almost down to the bottom. The pump hangs from the wellhead down into this tube. The tube in this well was about 4,000 feet long and weighed 26,000 pounds.

As also explained at trial, the oil in Huntington Beach oil fields does not lie in a big pool, waiting to be pumped up. It is mixed in with water and solid material, primarily sand. In fact, the stuff pumped to the well's surface is mostly water, which has to be separated from the oil in a wash tank.

³ King owns his own company, which invoiced Vogt each month for King's services.

pulling the tube up, but King asked him to lower it again so they could mark it and get a precise reading of the well's depth. As the tube was being lowered the second time, it slipped out of the elevators, and the entire 4,000-plus feet of tube crashed into the well.

The cause of the accident was never conclusively explained. One possibility was that the collar on the topmost piece of pipe held by the elevators was not a standard collar but a slim-line collar, slightly, but significantly, smaller. The elevators Allenco was using were not designed for slim-line collars, which were, in any event, individually manufactured and not uniformly sized. The difference in size had allowed the collar to slip through the hoisting mechanism. It was not possible to verify this theory, however, because the collar on the top pipe had disappeared. Another possibility was that the door of the elevators, which held the tube in place while it was being lowered, had not been securely latched. It was not possible to verify this theory either, because the Allenco crew member in charge of latching the door had disappeared, although witnesses testified to seeing him latch the door.

Immediately after the accident, the Allenco crew pulled the entire tube, all 4,060 feet, out of the well, using the same elevators. Some pipes were straight, but over 50 of them were badly bent.

After the tube was pulled out, Allenco did a "knife and scrape" job on the well's liner. A scraper removes built-up scale caused by the water seeping into the well along with the oil. In theory, a knife opens up the liner's perforations that may have become blocked by sand or scale. Allenco finished work, and the well went back into service on November 8, 2008. The daily report for that day ended with the notation "well pumping OK."

In early December 2008, the pump broke down again. King called another oil well maintenance service, which pulled out the pump and found it full of sand. The service bailed the well each day for approximately two weeks, but could not keep the sand out. The pump was put back into the tube, but at a much higher level. Another

breakdown of the well in August 2009 showed more sand in the pump, even at the higher level.

Vogt sued Allenco in October 2009, and Allenco cross-complained for the amount owing for the service on Vogt's well in November 2008. The case was tried to the court on both negligence and breach of contract theories. Vogt claimed damages for having to abandon the well for the rest of its 45-year life. He asserted that the falling tube had breached the liner, causing large quantities of sand to flow into the well faster than it could be bailed out. He asserted that the damages caused by the dropped tube had permanently reduced the well's production from 10 barrels a day to two barrels.

The court found in favor of Allenco on both Vogt's complaint and on Allenco's cross-complaint. The court issued a tentative decision, ruling that Vogt had failed to present evidence as to the standard of care in the oil industry, and therefore evidence that Allenco had fallen below this standard was lacking. No one requested a statement of decision.

Vogt moved for a new trial and to vacate the judgment. The court denied both motions. Vogt now appeals from the ruling on his case against Allenco on *res ipsa loquitur* grounds.⁴ He does not appeal the court's decision on the cross-complaint.

DISCUSSION

“In California, the doctrine of *res ipsa loquitur* is defined by statute as a ‘presumption affecting the burden of producing evidence.’ [Citation.] The presumption arises when the evidence satisfies three conditions: ““(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.”” [Citations.] A presumption affecting the burden of producing evidence

⁴ *Res ipsa loquitur* does not appear to have figured at all in the trial. It came to the fore after closing arguments. Apparently it formed at least one of the grounds for the post-trial motions.

‘require[s] the trier of fact to assume the existence of the presumed fact’ unless the defendant introduces evidence to the contrary. [Citations.] The presumed fact, in this context, is that ‘a proximate cause of the occurrence was some negligent conduct on the part of the defendant . . .’ [Citation.] If the defendant introduces ‘evidence which would support a finding that he was not negligent or that any negligence on his part was not a proximate cause of the occurrence,’ the trier of fact determines whether defendant was negligent without regard to the presumption, simply by weighing the evidence. [Citations.]” (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 825-826.) “‘If evidence is produced that would support a finding that the defendant was not negligent or that any negligence on his part was not a proximate cause of the accident, the presumptive effect of the doctrine vanishes. . . . [Citation.]’” (*Slater v. Kehoe* (1974) 38 Cal.App.3d 819, 833, fn. 13.)⁵

Vogt maintains that Allenco was entirely responsible for the operation of the elevators, and if the tube was dropped, it had to be because Allenco was negligent. The only explanations put forth at trial for the accident were: (1) the door on the elevators was not properly closed, or (2) the collar on the topmost of the added pipes was too small. No one could suggest any other explanation for how the tube wound up at the bottom of the well.

We can assume for purposes of this appeal that *res ipsa loquitur* applies, and the responsibility for the accident rests with Allenco. This does not, however, get Vogt out of the woods. While the doctrine may dispose of Allenco’s duty and its breach of duty, it does not establish Vogt’s proximately caused damages, proof of which is

⁵ *Res ipsa loquitur* as a legal principle is not without its critics. As one exasperated judge stated, “It adds nothing to the law, has no meaning which is not more clearly expressed for us in English, and brings confusion to our legal discussions. It does not represent a doctrine, is not a legal maxim, and is not a rule. It is merely a common argumentative expression of ancient Latin brought into the language of the law by men who were accustomed to its use in Latin writings.” (*Potomac Edison Co. v. Johnson* (1930) 160 Md. 33, 40 (Bond, C.J., dissenting.)) To put it in terms Baron Pollock might find more congenial, “*Res ipsa loquitur, sed quid in infernis dicit?*” (The thing speaks for itself, but what the hell does it say?) (See *Kohler v. Aspen Airways* (1985) 171 Cal.App.3d 1193, 1199, fn. 10.)

necessary to recover under either a negligence claim or a breach of contract claim. (See, e.g., *Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 83 [negligence]; *CDF Firefighters v. Maldonado* (2008) 158 Cal.App.4th 1226, 1239 [contract].)

Whether dropping the tube into the well damaged it as Vogt claimed was vigorously disputed. Allenco's expert testified that the reason sand was entering the well was that the scraping and knifing ordered by Vogt had disturbed a delicate balance in the liner, allowing sand to come through the perforations. He opined that the lost production was owing to Vogt's operating the well improperly. The experts disagreed as to whether there was any breach in the liner at all. Vogt testified that the Allenco supervisor on the job told him shortly after the accident that the well was probably not damaged. The daily report for November 8, the day when the Allenco crew finished its maintenance on the well, stated "well pumping OK."⁶ Allenco's vice-president of operations testified that King told him over a month after the accident that the well was operating "great." Vogt told Allenco's vice-president at the Allenco holiday party on December 6 that the well was operating and producing and did not mention any problems. While there was evidence from which the court could have inferred damage to the well from dropping the tube, there was also substantial evidence that something else had caused the reduction in production or the sand intrusion.

Here is where procedure comes in. The court issued a written tentative decision on July 30, 2010, pursuant to California Rule of Court 3.1590. Under the rule and under Code of Civil Procedure section 632, a party has 10 days from the issuance of the tentative to request a statement of decision. If the statement of decision is ambiguous or incomplete, the defect must be brought to the attention of the trial court, by objecting to the statement, by moving for a new trial, or by moving to vacate the judgment. (Code

⁶ Both the head of Allenco's crew and King signed this report.

Civ. Proc., § 634.) This is the only way to avoid the application of presumptions and intendments in favor of the judgment. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-1134.)

Vogt did not request a statement of decision. He evidently did move for a new trial and to vacate the judgment, although none of the papers were included in the record before us. In any event, moving for a new trial or moving to vacate the judgment does not stave off the intendments and presumptions in the absence of a request for a statement of decision.

“The doctrine of implied findings requires the appellate court to infer the trial court made all factual findings to support the judgment. [Citation.] The doctrine is a natural and logical corollary to three fundamental principles of appellate review: (1) a judgment is presumed correct; (2) all intendments and presumptions are indulged in favor of correctness; and (3) the appellant bears the burden of providing an adequate record affirmatively proving error. [Citations.]” (*Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 58 (*Fladeboe*)). If no one requests a statement of decision after a bench trial, then the reviewing court must infer that the trial court made implied factual findings “favorable to the prevailing party on all issues necessary to support the judgment, including omitted or ambiguously resolved issues.” (*Id.* at p. 60.) These include findings even “on matters as to which the record is silent” (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) We then review the implied factual findings for substantial evidence. (*Fladeboe, supra*, 150 Cal.App.4th at p. 60.)

There was ample evidence to support an implied finding that Vogt failed to show by a preponderance of the evidence that dropping the tube damaged the well to the extent that it had to be abandoned or that dropping the tube caused production to decline permanently from 10 barrels per day to two barrels, as Vogt claimed. From this evidence, the trial court could have concluded that even if Allenco had been entirely responsible for dropping the tube, it was not responsible for the reduced production or

ruining the well. The record is silent on this issue, and well established principles of appellate review require us to resolve it in Allenco's favor.

DISPOSITION

The judgment is affirmed. Respondent is to recover its costs on appeal.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

RYLAARSDAM, J.