[Cite as *Carter v. U-Haul Internatl.*, 2009-Ohio-5358.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Paris Carter et al.,	:	
Plaintiffs-Appellants,	:	
		No. 09AP-310
v.	:	(C.P.C. No. 06CVC09-11764)
U-Haul International et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on October 8, 2009

Blumenstiel, Evans & Falvo, LLC, and *James B. Blumenstiel*, for appellants.

Eastman & Smith Ltd., Jeffrey M. Stopar, and *Stuart J. Goldberg*, for appellee U-Haul Co. of Massachusetts and Ohio, Inc.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, P.J.

{¶1} Plaintiff-appellant, Paris Carter ("appellant"), appeals the Franklin County Court of Common Pleas' entry of summary judgment in favor of defendant-appellee, U-Haul Co. of Massachusetts and Ohio, Inc. ("UHMO"). For the following reasons, we affirm.

{¶2} On September 8, 2006, on behalf of himself and his two minor children, appellant filed this action against UHMO (misidentified as "U-Haul Company of Ohio"), U-Haul International, and two John Doe defendants. This action arises from a June 23, 2005 collision between a motorcycle, operated by appellant, and a "U-Haul truck with '$19.95' appearing on its side" (the "U-Haul truck"), operated by an unidentified driver. On that date, appellant was traveling southbound on Cleveland Avenue in Columbus, Ohio, near the intersection of Oakland Park, when the U-Haul truck, attempting to turn left into the northbound lanes of Cleveland Avenue, pulled in front of him. Appellant collided with the center of the U-Haul truck, which ran over appellant's motorcycle and left leg before leaving the scene. Despite numerous eyewitnesses to the collision, the driver of the U-Haul truck was not apprehended and has not been identified, nor has the specific U-Haul truck been identified. Appellant's left leg was amputated as a result of the collision.

{¶3} UHMO is one of 48 separate and distinct U-Haul rental companies that rent equipment to the public, each of which is a wholly owned subsidiary of a single parent company. Each rental company is in charge of all aspects of the vehicle rental business within the geographic confines of a given state or states. For example, UHMO, a corporation organized and existing under the laws of Massachusetts, is in charge of all aspects of the vehicle rental business in Massachusetts and Ohio, including the establishment of moving centers and the appointment of independent dealers who rent U-Haul equipment to the public. Many U-Haul vehicles leased to the public are owned by independent leasing corporations that have no U-Haul affiliation.

Over 13,000 independent businesses, not owned by any U-Haul company, rent U-Haul vehicles to the public throughout the United States.

{¶4} Appellant's complaint sets forth claims against UHMO and U-Haul International based on theories of agency and negligent entrustment, as well as a negligence claim against the unidentified driver and loss of consortium claims on behalf of appellant's minor children. Appellant voluntarily dismissed his claims against U-Haul International on October 31, 2007, and we, therefore, address the claims and procedural chronology only as it relates to UHMO. In his agency claim, appellant alleged that the unidentified driver was acting as UHMO's agent at the time of the collision, thus rendering UHMO vicariously liable for the driver's negligence. Appellant alternatively alleged that UHMO negligently entrusted the U-Haul truck to the driver, in violation of company policies, and that the negligent entrustment was a direct and proximate cause of the collision and his injuries.

{¶5} On December 15, 2006, UHMO filed a motion to dismiss appellant's complaint, pursuant to Civ.R. 12(B)(6), for failure to state a claim upon which relief could be granted, but the trial court deferred ruling on the motion to enable appellant to conduct discovery to identify the driver of the U-Haul truck. On February 15, 2008, the trial court issued an order converting UHMO's motion to dismiss into a motion for summary judgment, after which the parties fully briefed the motion and submitted evidentiary materials, including affidavits and responses to discovery requests.

{¶6} On October 24, 2008, UHMO filed a motion to strike certain evidence, including portions of appellant's affidavit. UHMO argued that certain statements in

appellant's affidavit were not based on personal knowledge and constituted impermissible speculation. Specifically, UHMO urged the court to strike appellant's statements (1) that the unidentified driver and passengers were Somalian, (2) that the collision occurred in an area that was home to large numbers of Somalians, (3) regarding the unidentified driver's actions immediately following the collision, and (4) that the U-Haul truck's license plate was not identified as an out-of-state plate.

{¶7} On February 6, 2009, the trial court granted UHMO's motion to strike the contested portions of appellant's affidavit and granted UHMO's motion for summary judgment. The trial court entered final judgment in favor of UHMO on February 13, 2009, and appellant filed a timely notice of appeal.

{¶8} Appellant asserts the following assignments of error for our review:

> 1. The Trial Court erred in striking portions of [appellant's] affidavit dealing with his observations, purpose of the truck use and post-accident actions of the driver.
>
> 2. The Trial Court erred in granting summary judgment on the issue of agency.
>
> 3. The Trial Court erred in granting summary judgment on the issue of negligent entrustment.
>
> 4. The Trial Court erred in failing to apply Res Ipsa Loquitur.

{¶9} By his first assignment of error, appellant argues that the trial court erred by striking portions of his affidavit. The decision to admit or exclude evidence, including affidavit testimony, is subject to review under an abuse of discretion standard, and absent a clear showing that the court abused its discretion in a manner that materially prejudices a party, we will not disturb the trial court's ruling. *Boggs v. The Scotts Co.*,

10th Dist. No. 04AP-425, 2005-Ohio-1264, ¶35, citing *Sidenstricker v. Miller Pavement Maintenance, Inc.*, 158 Ohio App.3d 356, 2004-Ohio-4653, ¶23, and *Krischbaum v. Dillon* (1991), 58 Ohio St.3d 58, 65; *Asset Acceptance, L.L.C. v. Rees*, 10th Dist. No. 05AP-388, 2006-Ohio-794, ¶10. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶10} Evid.R. 602 requires lay witnesses to have personal knowledge of the matters about which they testify. Civ.R. 56(E) likewise requires that affidavits filed in support of or in opposition to summary judgment be made on personal knowledge. "Personal knowledge" has been defined as " '[k]nowledge gained through firsthand observation or experience, as distinguished from a belief based on what someone else has said.' " *Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, 95 Ohio St.3d 314, 2002-Ohio-2220, ¶26, quoting Black's Law Dictionary (7th ed.1999). Although personal knowledge may be inferred from the contents of an affidavit, see *Fitch v. C.B. Richard Ellis, Inc.*, 10th Dist. No. 07AP-107, 2007-Ohio-4517, ¶22, a trial court has wide discretion to determine whether a witness has sufficient personal knowledge to testify competently. *Starinchak v. Sapp*, 10th Dist. No. 04AP-484, 2005-Ohio-2715, ¶27. Affidavits not based upon personal knowledge or that fail to set forth facts that would be admissible in evidence are subject to a motion to strike. *Samadder v. DMF of Ohio*, *Inc*., 154 Ohio App.3d 770, 2003-Ohio-5340, ¶17. A court may not consider inadmissible statements, such as hearsay or speculation, inserted into an affidavit in opposition to a motion for

summary judgment. *LaSalle Bank Natl. Assn. v. Street*, 5th Dist. No. 08 CA 60, 2009-Ohio-1855, ¶16.

{¶11} The trial court granted UHMO's motion to strike with respect to the following portions of appellant's affidavit:

> 6. There were two women passengers in the truck, and the driver was a male Somalian. All three of them appeared to be Somalians, both by their skin color and the wearing apparel on the women's heads. * * *
>
> 7. After running over me, the truck apparently left the scene at a high rate of speed, ran two or more red lights, was chased by one of the witnesses, but was successful in eluding arrest.
>
> 8. I believe these were Somalians, not just because of their looks and wearing apparel, but the area where the accident happened is also a very large contingent of Somalians living in the area. Just across the street and up a little bit was a large apartment complex where a lot of Somalians lived, and then further on up the street, there is a shopping center that is either run by or frequented by many Somalians, and there is a coffee shop run by a Somalian in the area, as well.
>
> 9. Nobody I talked to after the accident mentioned that it was an out-of-state license plate. It appeared to be assumed by everybody it was probably just a local move from one Somalian's apartment to perhaps another. It was not a large truck that you would expect to see if someone was moving a whole household from out of town. It was a smaller van, rented for $19.95, and from its appearance, it was probably just a local move from one house to another house or one apartment to another apartment in the Somalian community.

{¶12} The trial court concluded that appellant's statements regarding the occupants' national origin and their alleged purpose for using the U-Haul truck were pure speculation, not based upon personal knowledge, and immaterial because they did

not impact or cure appellant's failure to identify the U-Haul truck, its owner or the driver. It was not unreasonable, arbitrary or unconscionable for the trial court to conclude that appellant lacked sufficient personal knowledge to testify regarding the national origin of the U-Haul truck's occupants, the ethic composition of the neighborhood, and the occupants' purpose for using the U-Haul truck. Moreover, appellant's statements are not helpful to either a clear understanding of appellant's testimony or to the determination of a fact in issue and, therefore, are inadmissible under Evid.R. 701, regarding testimony as to an opinion or inference. Similarly, appellants' statements regarding the driver's actions immediately after the collision are not based on personal knowledge, as evidenced by appellant's statement that the U-Haul truck "*apparently* left the scene at a high rate of speed, ran two or more red lights, was chased by one of the witnesses, but was successful in eluding arrest" and his admission that he did not see the U-Haul truck run the red lights as it left the scene. (Emphasis added.) Upon review, we conclude that the trial court did not abuse its discretion in striking those statements from appellant's affidavit.

{¶13} Even had the trial court erred in striking those portions of appellant's affidavit, we would be compelled to conclude that the error was harmless because the stricken portions were irrelevant to the trial court's analysis and/or otherwise remained part of the record. The trial court based its decision granting summary judgment primarily on the absence of evidence to identify the U-Haul truck or its driver and the resultant absence of evidence creating a genuine issue of material fact as to whether the driver was an agent of UHMO or whether UHMO negligently entrusted the U-Haul

truck to another. The stricken statements do not alter the evidentiary inadequacies noted by the trial court and do not demonstrate genuine issues of material fact sufficient to overcome UHMO's motion for summary judgment. In addition, the trial court's decision to strike appellant's statements about the driver's post-collision actions was not prejudicial because the parties stipulated to the eyewitness statements contained in the police report for purposes of summary judgment. Those statements, which included the statements repeated in appellant's affidavit regarding the driver's post-collision actions, therefore remained part of the record even though the court struck them from the affidavit. For these reasons, we overrule appellant's first assignment of error.

{¶14} Appellant's remaining assignments of error stem from the trial court's entry of summary judgment in favor of UHMO. We review a summary judgment de novo. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588, citing *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. When an appellate court reviews a trial court's disposition of a summary judgment motion, it applies the same standard as the trial court and conducts an independent review, without deference to the trial court's determination. *Maust v. Bank One Columbus, N.A.* (1992), 83 Ohio App.3d 103, 107; *Brown* at 711. We must affirm the trial court's judgment if any grounds the movant raised in the trial court support it. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

{¶15} Pursuant to Civ.R. 56(C), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action,

show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Accordingly, summary judgment is appropriate only under the following circumstances: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

{¶16} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 1996-Ohio-107. Once the moving party meets its initial burden, the non-movant must set forth specific facts demonstrating a genuine issue for trial. Id. at 293. Because summary judgment is a procedural device to terminate litigation, courts should award it cautiously after resolving all doubts in favor of the non-moving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59, 1992-Ohio-95, quoting *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St.2d 1, 2.

{¶17} By his second assignment of error, appellant argues that the trial court erred by entering summary judgment in favor of UHMO on his agency claim. Based on the absence of evidence that UHMO owned the U-Haul truck or of any agency relationship between UHMO and the unidentified driver, the trial court found that no genuine issue of material fact existed as to UHMO's vicarious liability. We agree.

{¶18} In *Gulla v. Straus* (1950), 154 Ohio St. 193, the Supreme Court of Ohio stated the general rule, now well-established, regarding the imposition of vicarious liability on the owner of a vehicle for the actions of the owner's agent while operating the vehicle. The court stated, at paragraph one of the syllabus, as follows:

> The owner of an automobile cannot be held liable under the doctrine of *respondeat superior* in an action for damages for injuries to a third person caused by the negligence of an employee of such owner in the operation of the automobile, unless it is proven that the employee, at the time, was engaged in his employer's business and acting within the scope of his employment.

See also *Jackson v. Frederick* (1949), 152 Ohio St. 423, paragraph one of the syllabus. "Ohio is firmly committed to the rule that mere proof of the ownership of an instrumentality is not enough to permit an inference that the one operating it at a given time was the owner's employee or agent acting for or on behalf of his employer or principal." *McDougall v. Glenn Cartage Co.* (1959), 169 Ohio St. 522, 524.

{¶19} To recover under the agency theory set forth in *Gulla*, appellant must establish that UHMO was the owner of the U-Haul truck and that, at the time of the collision, the driver was employed by UHMO and was acting within the scope of his employment. At the heart of UHMO's argument in support of summary judgment is appellant's inability to identify either the driver or the specific U-Haul truck. UHMO maintains that, without these facts, appellant cannot establish that UHMO is vicariously liable for the unidentified driver's negligence.

{¶20} UHMO first argues that the conclusory, alternative allegation in appellant's complaint that the driver was acting as UHMO's agent is insufficient to create a genuine

issue of material fact regarding agency. To defeat summary judgment, a non-movant must produce evidence beyond the allegations in the pleadings. *Gans v. Express-Med, Inc.* (Mar. 6, 2001), 10th Dist. No. 00AP-548. However, even were appellant's allegation of agency contained in an affidavit, it would not be sufficient to defeat summary judgment. The bare assertion of agency is no more than a conclusion of law, and the bald recitation of agency in support of or in opposition to summary judgment does not comply with Civ.R. 56 as it does not reflect personal knowledge of supporting facts. *Ruggiero v. Std. Mgt.* (Dec. 19, 1995), 10th Dist. No. 95APE05-641, citing *Midland Buckeye Fed. S. & L. Assn. v. Arbonne Internatl., Inc.* (Dec. 12, 1988), 5th Dist. No. 7556. This is especially true where, as here, the alleged agent is unknown.

{¶21} In further support of its motion for summary judgment, UHMO submitted affidavits from George R. Olds, its assistant secretary, and Dave McGee, a litigation assistant employed by U-Haul International. Olds described the relationship between various U-Haul entities and other independent businesses that rent U-Haul vehicles to the public, stating that UHMO is one of 48 separate and distinct U-Haul rental companies that rent or receive vehicles bearing the "U-Haul" and "$19.95" logos, each of which maintains its own employees. Olds also stated that over 13,000 additional businesses, not owned by any U-Haul entity, also rent and receive U-Haul vehicles. According to Olds, it is impossible to identify the owner or lessor of the U-Haul truck involved in the collision without identifying information such as a license plate number or vehicle identification number. McGee similarly stated that, without a license plate number, vehicle identification number or lessee's name, there is no feasible way to

search U-Haul's records to determine whether the U-Haul truck was stolen, whether a stolen vehicle report was submitted with respect to the U-Haul truck, the identity of the lessee or driver, whether the U-Haul truck incurred damage or whether the U-Haul truck was repaired. According to McGee, the inability to identify the driver or vehicle prevents the retrieval of any applicable rental agreement, stolen vehicle report or repair or damage report, but does not imply that those documents do not exist.

{¶22} Based on its affidavits and other Civ.R. 56 evidence in the record, UHMO submits that the admitted failure to identify the U-Haul truck demonstrates the absence of evidence that UHMO owned the U-Haul truck and that the admitted failure to identify the driver demonstrates the absence of evidence that the driver was an employee or agent of UHMO. Upon review, we conclude that UHMO met its initial burden on summary judgment of informing the trial court of the basis for its motion and identifying those portions of the record suggesting the absence of a genuine issue of material fact with respect to essential elements of appellant's agency claim. We therefore consider whether appellant, in turn, satisfied his reciprocal burden, as required to avoid the entry of judgment upon a properly supported motion for summary judgment.

{¶23} Appellant argued that the evidence before the trial court on summary judgment demonstrated UHMO's ownership of the U-Haul truck and that there was no rental agreement, stolen vehicle report or repair related to the U-Haul truck. From the absence of such evidence, appellant argues that reasonable minds could infer that the driver was a UHMO agent transferring the U-Haul truck from one rental location to another at the time of the collision. We disagree.

{¶24} First, there is no evidence from which a trier of fact could infer that UHMO owned the U-Haul truck. To demonstrate UHMO's ownership, appellant relies on UHMO's statement that it removes all logos, including the "U-Haul" and "19.95" logos, from used vehicles before selling them to private owners. The presence of the "U-Haul" and "19.95" logos on the U-Haul truck at the time of the collision thus certainly permits an inference that the U-Haul truck was not a used vehicle sold by UHMO to a private owner, but it does not permit the inference, urged by appellant, that UHMO was the owner of the U-Haul truck. The undisputed evidence establishes that 48 separate U-Haul rental companies (of which UHMO is one), in addition to over 13,000 independent dealers, own and lease U-Haul vehicles to the public. Lacking, however, is any evidence connecting the U-Haul truck to UHMO. Although UHMO "is in charge of all aspects of the vehicle rental businesses within Ohio," it may not be inferred that UHMO owns all U-Haul vehicles leased in Ohio, as UHMO undisputedly appoints independent dealers in Ohio that rent U-Haul equipment to the public. Upon review, we conclude that there is no evidence in the record from which a trier of fact could determine that the U-Haul truck was owned by UHMO, as opposed to an independent dealer or one of the 47 other U-Haul rental companies that lease U-Haul vehicles to the public.

{¶25} Secondly, appellant's supposition that the absence of a rental agreement or stolen vehicle report proves that a UHMO agent was driving the U-Haul truck at the time of the collision is flawed. While UHMO was unable to produce a rental agreement, stolen vehicle report or repair record for the U-Haul truck, McGee's affidavit clarifies that the inability to produce those documents does not imply that they do not exist. Rather,

McGee stated that it was not possible to search U-Haul's records for such documents without the lessee's identification or the identification of the U-Haul truck, either by license plate number or vehicle identification number. Accordingly, a trier of fact could not infer from UHMO's inability to locate a rental agreement or stolen vehicle report that the U-Haul truck was neither leased nor stolen at the time of the collision. Moreover, even if the driver was an agent of the owner/lessor, in the absence of evidence the UHMO owned or leased the U-Haul truck, there can be no inference that the driver was UHMO's agent.

{¶26} In support of his agency claim on appeal, appellant cites *Rosenberg v. Reynolds* (1918), 11 Ohio App. 66, a case in which the plaintiff was struck by the defendant's automobile, operated by the defendant's chauffer. The only issue before the appellate court was whether the chauffer was acting within the scope of his employment. The court cited the frequent holding that, where a person is employed for the purpose of operating an automobile, he will be presumed to be acting within the scope of his authority and about his employer's business when doing so, and that, if he is not, the employer bears the burden of rebutting the presumption because that fact is peculiarly within the employer's knowledge. In *Rosenberg*, the court concluded that the defendant's admissions that he owned the vehicle and employed the chauffer raised an inference that the chauffer was acting within the scope of his employment at the time of the accident. Appellant's reliance of *Rosenberg* is misplaced. Here, unlike in *Rosenberg*, there is neither an admission nor evidence that UHMO owned the U-Haul

truck or employed the driver of that U-Haul truck in any capacity. The rule applied by the *Rosenberg* court is therefore inapplicable in this case.

{¶27} In light of the absence of evidence that UHMO either owned the U-Haul truck or employed the driver of that truck, we discern no error in the trial court's entry of summary judgment in favor of UHMO on appellant's agency claim. There could be no genuine issue as to any material fact because the complete failure of proof on these essential elements of appellant's claim necessarily renders all other facts immaterial. See *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552. Therefore, we overrule appellant's second assignment of error.

{¶28} Appellant's third assignment of error asserts that the trial court erred by granting summary judgment in favor of UHMO on appellant's negligent entrustment claim. Describing a claim of negligent entrustment, the Supreme Court of Ohio has stated that "liability may arise where an owner entrusts his motor vehicle, with permission to operate the same, to a person so lacking in competency and skill as to convert the vehicle into a dangerous instrumentality." *Williamson v. Eclipse Motor Lines, Inc.* (1945), 145 Ohio St. 467, 470. "[L]iability in such cases arises from the combined negligence of the owner and the driver; of the former in entrusting the machine to an incompetent driver, and of the driver in its operation." Id. at 471. This court has stated the elements of a negligent entrustment claim as follows:

> * * * The general test for negligent entrustment involves two parts. Liability for negligent entrustment arises "from the act of entrustment of the motor vehicle, with permission to operate the same, to one whose incompetency, inexperience or recklessness is known or should have been known by the

> owner." * * * Not only does the test require the owner to entrust the vehicle to the driver with permission to drive, but the driver must be one who is known to be incompetent, inexperienced or reckless. * * *

Dowe v. Dawkins (Dec. 23, 1993), 10th Dist. No 93AP-860, quoting *Williamson*, paragraph two of the syllabus.

{¶29} The trial court concluded that, because he failed to identify the driver of the U-Haul truck, appellant could not prove that the driver was operating the truck with UHMO's permission, that the driver was incompetent, inexperienced or reckless, and that UHMO knew or should have known of the driver's incompetence, inexperience or recklessness. As with appellant's agency claim, we must conclude that UHMO was entitled to summary judgment on appellant's negligent entrustment claim in the absence of evidence identifying either the U-Haul truck or the driver. The absence of evidence that UHMO owned the U-Haul truck, as discussed above, precludes appellant's establishment of the essential elements of his negligent entrustment claim, one of which is that the defendant is the owner of the entrusted vehicle. See *Whitaker v. Davis* (Jan. 27, 1997), 12th Dist. No. CA96-07-060, citing *Gulla*. While appellant argues that the driver's flight from the scene suggests some incompetence on the part of the driver, such as the lack of a driver's license or other "meaningful assurance" required by UHMO's rental policies, appellant's argument is mere speculation and insufficient to demonstrate a genuine issue of material fact. Moreover, evidence of the driver's alleged incompetence would not preclude summary judgment without further evidence that UHMO entrusted the U-Haul truck to the driver and knew or should have known of

the incompetence. Accordingly, we conclude that the trial court did not err by entering summary judgment in favor of UHMO on appellant's negligent entrustment claim, and we overrule appellant's third assignment of error.

{¶30} By his fourth and final assignment of error, appellant contends that the trial court erred by refusing to apply the doctrine of *res ipsa loquitur* when analyzing UHMO's motion for summary judgment. *Res ipsa loquitur* is a rule of evidence, applied as an exception to the ordinary rule that negligence is never presumed, that allows a plaintiff to prove negligence circumstantially where the facts and circumstances give rise to a probability that the defendant was negligent. *Cunningham v. Neil House Hotel Co.* (App.1940), 33 N.E.2d 859, 33 Ohio Law Abs. 157; *Williams v. Lo*, 10th Dist. No. 07AP-949, 2008-Ohio-2804, ¶13. The doctrine of *res ipsa loquitur* does not alter the nature of the plaintiff's claim, but merely offers a method of proving negligence through the use of circumstantial evidence. *Jennings Buick, Inc. v. Cincinnati* (1980), 63 Ohio St.2d 167, 170.

{¶31} "To warrant application of [*res ipsa loquitur*,] a plaintiff must adduce evidence in support of two conclusions: (1) That the instrumentality causing the injury was, at the time of the injury, or at the time of the creation of the condition causing the injury, under the exclusive management and control of the defendant; and (2) that the injury occurred under such circumstances that in the ordinary course of events it would not have occurred if ordinary care had been observed." *Hake v. George Wiedemann Brewing Co.* (1970), 23 Ohio St.2d 65, 66-67; *Cunningham*. The doctrine does not apply where the facts are such that a trier of fact could reasonably infer that the claimed

injury resulted from a cause other than the defendant's negligence as from the defendant's negligence. *Cooper v. Cannonball Transp. Co.* (Ohio App.1935), 19 Ohio Law Abs. 644.

{¶32} In rejecting appellant's *res ipsa loquitur* argument, the trial court found that appellant confused the requirement that the defendant have exclusive control of the instrumentality causing the injury with a supposed requirement that the defendant have exclusive control of the evidence, but also concluded that appellant failed to produce evidence to satisfy either of the requirements of *res ipsa loquitur*. The court stated that, without evidence that UHMO owned or leased the U-Haul truck, appellant could not establish that UHMO had exclusive control of the instrumentality that caused appellant's injuries. Rather, the court found that the evidence demonstrated that the unidentified driver, not UHMO, had exclusive control of the U-Haul truck at the time of the collision. The trial court also determined that appellant could not establish that the collision would not have occurred absent negligence by UHMO. We likewise conclude that appellant failed to satisfy the basic requirements for application of *res ipsa loquitur*.

{¶33} In his reply brief on appeal, appellant concedes that *res ipsa loquitur* does not apply to the collision itself, but maintains that the doctrine nevertheless applies to create a presumption of negligence at the time that UHMO allegedly provided the U-Haul truck to the driver. We disagree. Even assuming that UHMO had exclusive control of the U-Haul truck immediately before possession was transferred to the unidentified driver, there is no evidence that the collision would not have occurred absent negligence on the part of UHMO. It is readily foreseeable that accidents

involving rented vehicles may occur based solely on the negligence of a driver-lessee without any corresponding negligence on the part of the lessor in supplying the lessee with a vehicle. Indeed, appellant specifically alleged in his complaint that the negligence of the unidentified driver caused the accident underlying this case. Accordingly, appellant has not presented evidence that his injuries occurred under circumstances that, in the ordinary course of events, would not have occurred if UHMO had acted with ordinary care. Accordingly, we discern no error in the trial court's rejection of appellant's attempt to invoke the doctrine of *res ipsa loquitur*, and we overrule appellant's fourth assignment of error.

{¶34} Having overruled each of appellant's assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and SADLER, JJ., concur.