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**COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I**

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MONTE PRICE,

Plaintiff/Appellant,

v.

BEACON PUB, INC.,

Defendant/Respondent.

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**RESPONDENT'S BRIEF**

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Maggie Diefenbach, WSBA No. 31176

BETTS, PATTERSON & MINES, P.S.

701 Pike Street, Suite 1400

Seattle, Washington 98101

Telephone: (206) 292.9988

Attorneys for Respondent Beacon Pub, Inc.

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## I. INTRODUCTION

Plaintiff/Appellant Monte Price ("Price") claims he was injured when a ceiling fan inside Beacon Pub suddenly and without warning fell, hitting him on the head. Price filed a premises liability action against Beacon Pub to recover damages for his alleged injuries.

Price had a full and fair opportunity to come forward with evidence in support of his claim against Beacon Pub, but was unable to do so. Price has not produced any evidence that (1) Beacon Pub knew or should have known that the ceiling fan constituted a dangerous condition; or (2) Beacon Pub failed to exercise reasonable care to protect its patrons from the ceiling fan.

Instead, Price relies entirely on the doctrine of *res ipsa loquitur* in support of his claim. However, *res ipsa loquitur*, a doctrine used sparingly and only in exceptional cases, does not apply here. Therefore, the trial court properly dismissed Beacon Pub on summary judgment in April 2010.

For the reasons discussed herein, Beacon Pub respectfully requests that this Court affirm the trial court's summary judgment order.

## II. STATEMENT OF THE CASE

### A. The Subject Accident

On July 26, 2006, Price went to Beacon Pub to play music with his friends. CP 29. Price claims that he was bending over to adjust a microphone stand when he was suddenly struck on the head by the ceiling fan. *Id.*

Price had been to the Beacon Pub once or twice before that night and had never seen nor heard of any problems with the ceiling fan. *Id.* Price did not notice anything unusual about the condition of the fan on the night of the accident. *Id.* Nor does he know what caused the fan to fall. *Id.* He does not even know whether the fan was on or off at the time it hit him. *Id.*

### B. The Trial Court Dismisses Price's Claims Against Beacon Pub

Price alleges that Beacon Pub failed to exercise the degree of care expected of a reasonably prudent business owner to warn its patrons of possible hazards on the premises.

Beacon Pub moved for summary judgment dismissal of Price's claims because there is no evidence that Beacon Pub had actual or constructive notice that the subject ceiling fan posed a danger to its patrons or that it failed to exercise reasonable care to protect its patrons from the fan. In response, Price was unable to

produce any lay or expert witness testimony that Beacon Pub had actual or constructive notice of an unreasonably dangerous condition on its premises or that it failed to exercise reasonable care to protect its patrons from the condition. Without this evidence, Price's premises liability claim against Beacon Pub fails as a matter of law.

On April 30, 2010, the trial court held a hearing on Beacon Pub's summary judgment motion. After oral argument from the parties, the trial court ruled as a matter of law that Price had failed to produce evidence sufficient to support his claims against Beacon Pub and granted Beacon Pub's motion for summary judgment. CP 88-89. Price did not file a motion for reconsideration of the trial court's April 30, 2010 summary judgment ruling.

**C. Price Files the Current Appeal as Matter of Right**

On or about May 28, 2010, Price filed a notice of appeal to commence this direct appeal of the trial court's April 30, 2010 order granting Beacon Pub's summary judgment motion. CP 90-94.

### III. ARGUMENT

#### A. Standard of Review

This Court reviews *de novo* the order granting summary judgment. See *Green v. Normandy Park Riviera Section Cmty. Club, Inc.*, 137 Wn. App. 665, 681, 151 P.3d 1038 (2007); *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

Summary judgment is appropriate if the pleadings, affidavits, and depositions before the trial court demonstrate that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. CR 56(c). A defendant in a civil action is entitled to summary judgment when that party shows that there is an absence of evidence supporting an element essential to the plaintiff's claim. *Las v. Yellow Front Stores*, 66 Wn. App. 196, 198, 831 P.2d 744 (1992) citing *Young v. Key Pharmaceutical*, 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989). A defendant may support the motion by merely challenging the sufficiency of the plaintiff's evidence as to any such material issue. *Id.* In response, the non-moving party may not rely on the allegations in the pleadings but must set forth

specific facts by affidavit or otherwise that show a genuine issue exists for trial. *Id.*

**B. The Trial Court Properly Dismissed Beacon Pub on Summary Judgment**

1. Premises Liability: Applicable Legal Standards

A negligence claim requires a plaintiff to show (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty (3) resulting in an injury; and (4) a proximate cause between the breach and the injury. *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 127-28, 875 P.2d 621 (1994).

In general, one who possesses land owes an affirmative duty to invitees to use ordinary care to keep the premises in a reasonably safe condition. *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 49, 914 P.2d 728 (1996). Liability for physical harm caused by a dangerous condition on the land attaches only when the possessor (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, *and* (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, *and* (c) fails to exercise reasonable care to protect them against the danger. *Tincani*, 124 Wn.2d at 138; Restatement (Second) of Torts § 343 (1965).

Thus, liability will not attach to a possessor of land if the injury-causing defect is not discoverable in the exercise of reasonable care. *Degel*, 129 Wn.2d at 43, 49. In other words, while a possessor must exercise reasonable care to discover dangerous conditions, there is no liability for an undiscoverable latent defect. See *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 652, 869 P.2d 1014 (1994) (“actual or constructive notice of an unsafe condition” is a prerequisite for possessor liability). Strict liability does not apply. Possessors of land are not guarantors or insurers of the safety of their business invitees.

In this case, Price’s premises liability claim against Beacon Pub fails because there is no evidence that the Beacon Pub had actual or constructive notice of the condition of the fan or that it failed to exercise reasonable care to protect Price from the fan.

2. The Trial Court Properly Found No Evidence that Beacon Pub had Actual or Constructive Notice that the Ceiling Fan Posed a Danger to Price on the Night of the Accident

Price alleges that Beacon Pub breached its duty to maintain reasonably safe premises. However, Price has not presented any direct evidence from which a jury could conclude that Beacon Pub breached its duty.

There is simply no evidence that Beacon Pub knew or should have known that the ceiling fan posed a danger to Price on the night of the subject accident. Rather, the uncontroverted evidence is that Beacon Pub had used the fan countless times over the course of ten years and had never noticed a problem with the fan. CP 33, 59-60. Beacon Pub had never received a complaint about the condition of the fan. *Id.* Plaintiff admits that he did not notice anything unusual about the fan, even though he was standing directly below it at the time of the accident.

3. The Trial Court Properly Found No Evidence that Beacon Pub had Failed to Exercise Reasonable Care to Protect its Patrons

In order to establish his premises liability claim, Price must prove that Beacon Pub failed to exercise reasonable care to protect its patrons against dangerous conditions on its premises. In this case, Price has not produced any evidence that Beacon Pub's inspection and maintenance procedures violated any applicable duty of care. In fact, Price has not produced any evidence at all regarding Beacon Pub's inspection and maintenance practices and procedures. Likewise, he has not produced any expert testimony as to the proper methods and procedures for inspecting and maintaining ceiling fans.

Likewise, Price fails to establish that the specific unsafe condition had existed for sufficient time for Beacon Pub or its employees to remedy the unsafe condition. *Las*, 66 Wn. App. at 198. In this case, Price has failed to produce any evidence that the allegedly dangerous condition had existed for any period of time, much less an extended period of time.

In short, Price has not produced any evidence in support of his claim, other than his testimony that the fan fell from the ceiling.<sup>1</sup> There is no evidence that Beacon Pub knew, should have known, or had any reason to suspect there was a defect in the ceiling fan or that it failed to exercise reasonable care to keep its premises safe. Accordingly, the trial court correctly determined that Price's claims against Beacon Pub fail as a matter of law. CP 88-89.

4. The Trial Court Properly Found that Res Ipsa Loquitur Does Not Raise an Inference of Negligence in this Case

Price did not set forth any specific facts in support of his premises liability claim against Beacon Pub. Instead, in a last-ditch effort to avoid summary judgment, Price argued that the

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<sup>1</sup> Price had ample opportunity to come forward with evidence in support of his claim. The accident occurred in July 2006. Price filed suit in this matter in May 2009. In the next 11 months, Price did not conduct any depositions or introduce any expert witness testimony.

seldom-used doctrine of *res ipsa loquitur* raises an inference of negligence in this case. The trial court correctly disagreed.

The doctrine of *res ipsa loquitur*, or “the thing speaks for itself,” permits a circumstantial inference of negligence if the plaintiff establishes the following three criteria: (1) the accident or occurrence is of a kind that ordinarily does not happen in the absence of negligence; (2) the injuries were caused by an agency or instrumentality under the exclusive control of the defendant; and (3) the plaintiff did not contribute to the injury-causing accident or occurrence. *Tinder v. Nordstrom, Inc.*, 84 Wn. App. 787, 792, 929 P.2d 1209 (1997). In this case, *res ipsa loquitur* does not apply because Price fails to establish the first two criteria. Beacon Pub does not dispute the last element.

The determination of whether the doctrine of *res ipsa loquitur* applies is a question of law to be determined on the facts and circumstances of each case. *Tinder*, 84 Wn. App. at 792. In deciding whether the doctrine applies, the court is to examine whether a “reasonable inference of negligence exists.” *Id.* at 791-92. Because *res ipsa loquitur* spares a plaintiff the necessity of establishing a complete *prima facie* case of negligence against the defendant, the doctrine is to be used sparingly and only in

peculiar and exceptional cases. *Id.* at 792. *A.C. v. Bellingham School Dist.*, 125 Wn. App. 511, 517, 105 P.3d 400 (2005). This case is not one of them.

a. Price Fails to Establish That the Accident Would Not Have Occurred Without Beacon Pub's Negligence

The first *res ipsa loquitur* element is met if there is a reasonable probability that the accident would not have occurred in the absence of someone's negligence. *Tinder*, 84 Wn. App. at 792. The mere occurrence of an accident and an injury does not necessarily infer negligence. *Id.* Washington courts have described three types of circumstances that do not normally occur absent negligence: (1) obvious negligence such as leaving a foreign object in a surgical patient; (2) when general knowledge or experience teaches that the result would not occur absent negligence; and (3) when proof by experts in an exotic field creates an inference that negligence caused the injuries. *Id.* at 793. None of these situations is analogous to the incident that caused Price's alleged injuries. Therefore, the trial court properly concluded that *res ipsa loquitur* does not apply and dismissed Price's Complaint.

Price relies entirely on the second type of situation, contending that general experience tells us that ceiling fans do not fall, absent someone's negligence. Price repeatedly asserts that the ceiling fan could not have fallen absent negligence on someone's part, but he fails to demonstrate that the fan could not have fallen absent the negligence of Beacon Pub. Price speculates that the failure to install, inspect or maintain the fan is "the reason that [the fan] fell." P. 13 of Appellant's Brief. However, there are no facts supporting this belief.

The fact that the ceiling fan fell is not enough, in the absence of anything more, to permit the conclusion there was negligence in the installation, inspection, or maintenance of the fan.<sup>2</sup> It is quite easy to contemplate an accident such as this without the "negligence" of any party. The fact there was an accident and an injury does not necessarily mean there was negligence. Common experience tells us that mechanical devices (and their associated materials and parts), can break, become wobbly or loose, or otherwise wear out - without any particular negligence on anyone's part. This is particularly true for mechanical devices, such as ceiling fans, that are subject to a

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<sup>2</sup> Notably, there is no evidence that Beacon Pub installed the ceiling fan.

high volume of usage, and are operated on a daily basis by yanking down on an attached cord.

In *Tinder v. Nordstrom*, this Court held that the sudden stop of an escalator was not the type of unusual situation that generally occurs only if someone has been negligent, noting that “[m]echanical devices like escalators and elevators, can wear out or break without negligence.” *Tinder*, 84 Wn. App. at 793. This Court dismissed the plaintiff’s claims in that case because “...common experience does not suggest that escalators only make sudden stops when there has been negligence, and there was no expert testimony offered to establish the inference that negligence caused the plaintiff’s injuries.” *Id.* at 793-94. (*Emphasis Added*).

Price contends that the facts in *Tinder* are distinguishable from those in this case because there are no allegations that the ceiling fan was not working at the time of the accident. However, there were no claims that the elevator in *Tinder* was not working either. Rather, in that case, a later examination of the elevator revealed no evidence of a malfunction and the stop remained an unexplained event. Likewise, in this case, the reason for the fan’s fall remains unexplained.

Further, Price's attempts to narrowly limit the holding in *Tinder* to mechanical malfunctions is unpersuasive. Common sense teaches us that the associated materials and parts of a mechanical device, such as screws, bolts, and other parts, wear out and can become loose over time – absent a mechanical malfunction.

Price relies almost entirely upon *Zukowsky v. Brown*, 79 Wn.2d 586, 488 P.2d 269 (1971), a case decided almost 40 years ago. Price's reliance on *Zukowsky* is misplaced. In that case, the plaintiff fell, after a seat on a boat broke. Following the fall, it was observed that the head of one screw of the supporting flange was broken off, with the body of the screw remaining in the wooden decking. The other flange screw had pulled out of the wood. *Id.* at 589. Evidence confirmed that the defendant had removed the flange and support post on several occasions, each time replacing it with larger steel screws. *Id.* There is no such evidence in this case. There is no evidence that anyone at Beacon Pub ever removed, repaired, or otherwise tampered with the ceiling fan or any of its associated materials and parts.

Further, unlike in this case, the plaintiff in *Zukowsky* produced expert witness testimony from which a jury could find

negligence of the defendants in either failing to properly set the supporting post in a telescoped position or failing to properly inspect and maintain the supporting flange at its connection with the deck. Price has not produced any expert witness (or lay witness testimony) from which a jury could find negligence on the part of Beacon Pub. None. Where the parties have no explanation as to why the injury occurred, *res ipsa loquitur* is not applicable and a failure of proof of negligence is fatal to the cause of action. *E.C. Edwards v. A.F.J. Distributors, Inc.*, 58 Wn.2d 789, 792, 364 P.2d 952 (1961) (no evidence as to what caused the pile of lime bags to fall over, therefore, *res ipsa loquitur* not applicable).

*Res ipsa loquitur* does not apply here, because the ceiling fan could have failed in the absence of negligence on the part of Beacon Pub. The fan's fall could be attributable to a latent defect, such as a loose or worn screw, or the result of a patron yanking on the cord too hard. The fact that there was an accident and an injury does not necessarily mean there was negligence. Because Price has made no showing that his injury was of a kind that generally occurs only as a result of negligence, the trial court

correctly concluded that the *res ipsa loquitur* doctrine does not apply.

b. Price Fails to Establish that Beacon Pub Exercised Exclusive Control Over the Fan

When a plaintiff fails to show that a defendant has exclusive control of the instrumentality causing the injury, *res ipsa loquitur* does not apply. *Murphy v. Montgomery Elevator Co.*, 65 Wn. App. 112, 114, 828 P.2d 584 (1992). A defendant does not have exclusive control of the instrumentality if other persons also have the right to exercise control over it. *Id.* at 115-116.

Price argues that Beacon Pub exercised exclusive control over the ceiling fan.<sup>3</sup> However, Price ignores that Beacon Pub patrons exercised control over the fan as well.

In *Las v. Yellow Front Stores*, 66 Wn.App. 196, 831 P.2d 744 (1992) this Court concluded that the instrumentality causing the plaintiff's injury (a stack of frying pans) was not within the store owner's *exclusive* control, because other customers had access to the stack of pans.

Like the facts in *Las*, the instrumentality causing the plaintiff's injury in this case (a ceiling fan) was not within the bar

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<sup>3</sup> At summary judgment hearing, the trial court conceded this element to Price.

owner's exclusive control because other Beacon Pub patrons had access to the fan. The fan was within reach of Beacon Pub patrons and could be turned off and on at their discretion. The condition of the fan was just as likely caused by the public, as by any negligence of Beacon Pub.

c. Price Repeatedly Attempts to Avoid his Evidentiary Obligations.

Price repeatedly attempts to avoid satisfying his burden of proof in this case. Price cannot produce any evidence to show that Beacon Pub had actual or constructive notice of the ceiling fan's condition or that Beacon Pub failed to exercise reasonable care to protect its patrons from any risks associated with the fan. As such, he attempts to avoid his burden of proof, by arguing that *res ipsa loquitur* applies. Price now attempts to avoid his burden of proof under *res ipsa loquitur*, by arguing that Beacon Pub has failed to produce evidence in this case.

First, Price ignores the fact that a defendant may support a motion for summary judgment by merely challenging the sufficiency of the plaintiff's evidence as to any element of the plaintiff's claim. *Las*, at 198. The burden then shifts to the non-moving party to set forth specific facts by affidavit or otherwise

that show a genuine issue exists. *Id.* Second, if the elements of res ipsa loquitur are not satisfied, no presumption of negligence can be maintained. *Tinder*, 84 Wn. App. 792. Despite Price's assertions, Beacon Pub does not have a duty to refute an inference of negligence until Price satisfies the elements of res ipsa loquitur – which, over four years after the subject accident, he has yet to do.

5. Public Policy Supports the Dismissal of Price's Claims Against Beacon Pub

Washington courts only sparingly apply the doctrine of res ipsa loquitur “in peculiar and exceptional cases ... where the facts and the demands of justice make its application essential.” *Tinder*, 84 Wn. App. at 792. Here, the trial court properly concluded that neither the facts nor the demands of justice require application of the doctrine in this case.

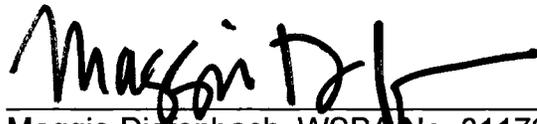
#### **IV. CONCLUSION**

The facts in this case do not rise to the level of those where plaintiff should be spared the requirement of proving specific acts of negligence. This is especially true, where Price had the opportunity, yet chose to forgo any investigation or discovery regarding the potential cause(s) of the ceiling fan's failure or Beacon Pub's inspection and maintenance procedures.

The trial court properly dismissed Price's claims against Beacon Pub because Price failed to submit any evidence that would permit a reasonable jury to find that Beacon Pub breached some duty of care owed to Price. Nor does the evidence support the application of res ipsa loquitur. Thus, for the reasons discussed herein, Beacon Pub respectfully requests that this Court affirm the trial court's Order Granting Beacon Pub's Motion for Summary Judgment.

RESPECTFULLY SUBMITTED this 20th day of October, 2010.

BETTS PATTERSON & MINES, P.S.

A handwritten signature in black ink, appearing to read "Maggie Diefenbach", written over a horizontal line.

Maggie Diefenbach, WSBA No. 31176

BETTS PATTERSON & MINES, P.S.  
700 Pike Street, Suite 1400  
Seattle, Washington 98101  
Telephone: (206) 292.9988  
Attorneys for Respondent Beacon Pub,  
Inc.