

No. 65477-2

IN THE COURT OF APPEALS
DIVISION 1 OF THE STATE OF WASHINGTON

Monte Price,

Appellant,

vs.

Beacon Pub Inc.,

Respondent.

APPELLANT'S BRIEF

Appeal Originating from the Superior Court, King County,
The Honorable Paris K. Kallas, Presiding

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DIVISION 1
SEATTLE, WA
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ORIGINAL

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I.

ASSIGNMENTS OF ERROR

A. Summary Judgment is inappropriate where a party has raised an inference of negligence under the doctrine of *res ipsa loquitur*.

B. Appellant met his burden of providing circumstantial evidence of Respondent's negligence under the doctrine of *res ipsa loquitur*.

II.

STATEMENT OF THE CASE

The facts in this case are essentially undisputed. This case involves an incident that occurred at the Beacon Pub on July 26, 2006. At that time, Price was at the pub to perform for an open mic-type night. This was not a paid engagement, and Price was there as a business invitee. Shortly after taking the stage for a performance, a ceiling fan at Beacon Pub became dislodged from the ceiling, and struck Price on the head.

Price filed his original Complaint on May 20, 2009, alleging negligence, as well as other counts. **CP 1-6.** Thereafter, on June 4, 2009, Price filed his First Amended Complaint for Damages removing causes of action for Outrage and Violation of Statutes. **CP 7-10.** Beacon Pub filed its Answer to the First Amended Complaint on June

10, 2009, denying any fault, and alleging negligence on the part of the property owner, as well as asserting negligence of other persons and Price. **CP 11-16.**

Based on the assertion by Beacon Pub that the owner of the property was at fault, Price then filed a Second Amended Complaint for Damages on October 14, 2009, adding Ron Stevenson and Marina Buser. **CP 17-21.**

Beacon Pub filed their Answer to the Second Amended Complaint on January 25, 2010, again asserting the negligence of Michael Blackburn, as well as Ron Stevenson and Marina Buser. **CP 22-27.**

On April 2, 2010, Beacon Pub moved the Court for summary judgment (**CP 28-34**) asserting that Price could not “prove that Beacon Pub knew, or should have known, that the ceiling fan on its premises presented a dangerous condition...” **CP 28.** The Motion contained a Declaration of Laurie Lusko asserting that Beacon Pub had “been in business for over 20 years”. **CP 59.** Further, that during that time, Beacon Pub had never been cited for “violations of any city, county or Uniform Building Codes related to the installation, operation or

maintenance of the ceiling fan.” **CP 60**. Additionally, Beacon Pub argued that it had “used the fan countless times over the past 10 years and never noticed a problem with the fan. **CP 32**. As such, Beacon Pub argued it was entitled to judgment as a matter of law, based on Price’s inability to prove that Beacon Pub had actual or constructive notice of the alleged dangerous condition.

Thereafter, on April 19, 2010, Price filed his Opposition to the Motion for Summary Judgment (**CP 61-68**) asserting that Summary Judgment was inappropriate due to an inference of negligence under a theory of *res ipsa loquitur*, as Beacon Pub clearly had exclusive control over the instrumentality of injury (i.e., the ceiling fan). **CP 65**. Price posited that since Beacon Pub had occupied the premises for “in excess of 20 years” they clearly had the exclusive right and ability to inspect and maintain the interior of the premises. **CP 64**.

Price further asserted that discovery was ongoing with regards to the issue of actual knowledge of the defective condition. **CP 63-64**. Despite Price’s assertions, the Court dismissed Price’s Complaint finding that “no material facts exist...to support [Price’s] claims against Beacon Pub, Inc.” **CP 88-89**.

Price filed his Notice of Appeal on May 27, 2010. CP 90-94.

III.

ARGUMENT

A. Summary Judgment is Inappropriate Where a Party Has Raised an Inference of Negligence Under the Doctrine of *Res Ipsa Loquitur*

Civil Rule 56 provides a party with the ability to bring a motion for Summary Judgment “as to all or any part thereof”, and shall be granted *only* where the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to *any* material facts...” (emphasis added). CR 56(b) and (c). For purposes of summary judgment, a “material fact” is one upon which the outcome of the litigation depends in whole or in part. CR 56. Further, the evidence and reasonable inferences from the facts are to be viewed in the light most favorable to the non-moving party. *Vasquez v. State Dept. of Social and Health Services*, 97 Wash.App. 691, 988 P.2d 972 (1999).

Res ipsa loquitur “allows an inference of negligence from circumstantial evidence to prove a defendant’s breach of duty where (1)

the plaintiff is not in a position to explain the mechanism of injury, and (2) the defendant has control over the instrumentality and is in a superior position to control and to explain the cause of the injury”. *Robison v. Cascade Hardwoods, Inc.*, 117 Wash.App. 552, 563, 72 P.3d 244 (2003), citation omitted. Additionally, a plaintiff is not required to eliminate all other causes for injury for an application of *res ipsa loquitur* to apply. *Pacheco v. Ames*, 149 Wash.2d 431, 441, 60 P.3d 324 (2003). Whether or not *res ipsa loquitur* is applicable to a particular case is a question of law and requires that the court examine whether or not a ‘reasonable inference of negligence’ exists. *Tinder v. Nordstrom, Inc.*, 84 Wash.App.787, 791-792, 929 P.2d 1209 (1997).

Price’s claim for damages in this case arises out of an incident that occurred at a business establishment operated by Beacon Pub, Inc. According to Beacon Pub, they have occupied this building and operated the business for more than 20 years. On the evening of July 26, 2006, while an invitee at the premises, Price was struck on the head when a ceiling fan came crashing down from the ceiling. Based on the facts of this case, a reasonable inference would be that negligence exists. Whether or not there are other possible causes is not the issue to be determined by the Court. Unfortunately, the Court erred in ruling that Price was required

to establish actual or constructive knowledge of the dangerous condition.

RP 28.

Generally, a defendant is negligent, if he owed a duty of care to the plaintiff and breached that duty, and the breach was the proximate cause of injury. *Keller v. City of Spokane*, 146 Wash.2d 237, 242, 44 P.3d 845 (2002). In this case, Beacon Pub owed a duty to Price and other patrons to ensure their premises were free of dangerous conditions. Price contends that Beacon Pub breached that duty when the ceiling fan fell. The only thing that Price can say with certainty is that the ceiling fan fell and struck him in the head. Price cannot establish with certainty the reason *why* the ceiling fan fell. Therefore, Price relies upon an inference of negligence under the doctrine of *res ipsa loquitur*. Again, if the reasonable inference can be made that the ceiling fan would not fall absent someone's negligence, *res ipsa loquitur* should apply.

As stated in *Zukowsky v. Brown*, 79 Wash.2d 586, 593, 488 P.2d 269 (1971), “proof of negligence is not essential to take a case to the jury or to overcome challenges to the sufficiency of the evidence” (emphasis added) where there is a valid *res ipsa loquitur* issue. The Court erred when it ruled that *res ipsa loquitur* should be applied only in exceptional cases. **RP 28.** Rather, according to case law, it should be applied on an

individual basis. As discussed below, Price has met his burden of establishing an inference of negligence under the doctrine of *res ipsa loquitur*. Once the plaintiff has raised evidence to satisfy a *res ipsa loquitur* inference, a jury question has been raised, and summary judgment is inappropriate. *Robison* at 564.

B. Appellant Met His Burden of Providing Circumstantial Evidence of Respondent's Negligence Under the Doctrine of *Res Ipsa Loquitur*.

Price asserted Beacon Pub was negligent, and Beacon Pub argued that Price had no evidence it was negligent. While Price has no direct evidence of negligence, Price does have circumstantial evidence of negligence under the doctrine of *res ipsa loquitur* sufficient to allow the matter to go forward to the jury. If, after application of the elements of *res ipsa loquitur* to the facts, a reasonable inference can be made, the Court should allow the plaintiff to present his case to the jury.

The Court has long opined as to when circumstances are sufficient to raise an inference of negligence against a particular defendant. Each time, the Court has indicated that the question can only be answered in the context of the individual case. *Zukowsky* at 594, citations omitted. Nonetheless, the consensus has been that there are three (3) requirements

to allowing the use of *res ipsa loquitur*. They are that: (1) the incident producing the injury is one that does not ordinarily happen absent someone's negligence; (2) the injury-producing incident was caused by an agency or instrumentality under the exclusive control of the defendant; and, (3) the plaintiff did nothing to cause or contribute to the injury-producing event. *Tinder* at 792.

1. Ceiling fans do not generally fall from ceilings absent someone's negligence.

An assertion of *res ipsa loquitur* does not require that Price establish that Beacon Pub had actual or constructive knowledge of an unsafe condition. Rather, the doctrine "spares the plaintiff the requirement of proving specific acts of negligence" where the cause of the injury cannot be fully explained. *Pacheco* at 436. *Res ipsa loquitur* applies when the evidence is more practically accessible to the defendant than the plaintiff. *Id.*

Unlike the escalator that suddenly stopped in the *Tinder* case, this case does not involve the mechanical operation of the ceiling fan. No one has said the ceiling fan was not working properly. In fact, Respondent has argued that there was nothing wrong with the ceiling fan. CP 32. The

question is whether or not a ceiling fan *should* fall from a ceiling. Clearly, ceiling fans should not.

The *Tinder* case stated that the first element of *res ipsa loquitur* is met if there is a **reasonable probability** that the incident would not occur in the absence of negligence. *Tinder* at 792. Price meets this burden in that it is not reasonable that a ceiling fan would fall without someone's negligence. If there is some other explanation, Beacon Pub is in the superior position to provide evidence of such a cause. However, no one, not even Beacon Pub, can say this is an event that would normally occur absent negligence, as it simply does not occur! Similar to *Zukowsky*, "in the general experience of mankind" a ceiling fan falling down is an "event that would not be expected without negligence on someone's part". *Zukowsky* at 597. The *only* plausible explanation for why it fell was that someone was negligent.

Much like the collapsing chair in the *Zukowsky* case, Price cannot establish with certainty the cause of the ceiling fan falling. Despite varying opinions by experts in the *Zukowsky* case concerning the reasons *why* the chair collapsed, the court found there was testimony upon which a jury could find negligence of the defendants in either failing to properly inspect or maintain the chair. *Zukowsky* at 589.

In the instant case, Beacon Pub has produced no evidence to refute an inference that the fan fell as a result of someone's negligence.

Common sense says that ceiling fans do not generally fall. The logical inference is that someone failed to install, inspect or maintain the ceiling fan, which was the reason that it fell. According to the *Robison* Court, unless the defendant produces evidence of an alternate cause rebutting the inference of negligence, a jury question has been raised. *Robison* at 564.

2. The ceiling fan was under the exclusive control of Beacon Pub.

The second requirement for the application of *res ipsa loquitur* is a showing that the mechanism of injury was within the exclusive control, or right of control, of the Defendant. *Id.* at 594-595. Exclusive control includes, but is not limited to, the responsibility for ensuring the proper and efficient functioning of the mechanism of injury. *Tinder* at 795. As the lessee of the premises, Beacon Pub had the exclusive right to control the interior of the premises, including the right to inspect and maintain all appurtenances to the interior such as the ceiling fan. In fact, the Superior Court assumed Beacon Pub had exclusive control, and despite that assumption refused to apply the doctrine of *res ipsa loquitur*. **RP 28.**

Price is not required to show actual negligence, only that the ceiling fan was within the exclusive control of Beacon Pub. Unlike the *Las v. Yellow Front Store*, 66 Wash.App. 196, 831 P.2d 744 (1992) case where the stacked pans could have been altered by other patrons, the ceiling fan in this case was not under the control of anyone but Beacon Pub or its agents. There is absolutely no evidence to suggest that anyone other than Beacon Pub had the right to inspect and maintain the ceiling fans in the building. **CP 66.** Nor is there any evidence that anyone else had access to the ceiling fan in a manner that would have caused it to fall. If there was even a scintilla of evidence to suggest otherwise, Beacon Pub would have produced such evidence, but they did not.

3. Price did nothing to cause or contribute to the ceiling fan falling.

The final requirement for *res ipsa loquitur* is that the Plaintiff did not voluntarily cause or contribute to the incident. There is absolutely no evidence that Price did anything to cause the ceiling fan to fall on his head. In fact, Beacon Pub admits that Price “probably did not cause this”, as it is clear Price did nothing to ceiling fan. **RP 7.**

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IV.

CONCLUSION

Price has satisfied the requirements to establish an inference of negligence under a theory of *res ipsa loquitur*. The sufficiency of the evidence, and weight to be afforded to it, are issues for the jury to decide. Consequently, this matter should not have been dismissed upon summary judgment. Price therefore requests this Court to reverse and remand the matter to the Superior Court for trial.

Respectfully submitted this 17th day of September, 2010.

LAW OFFICES OF
STEVEN D. WEIER, INC., PS

A handwritten signature in black ink, reading "Theresa M. Buchner". The signature is written in a cursive style with a large, decorative initial "T".

Theresa M. Buchner, WSBA #29573
Attorney for Appellant

