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No. 65477-2

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

<p>Monte Price,</p> <p style="text-align: center;">Appellant,</p> <p style="text-align: center;">vs.</p> <p>Beacon Pub Inc.,</p> <p style="text-align: center;">Respondent.</p>	<p>APPELLANT'S REPLY BRIEF</p>
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Appeal Originating from the Superior Court, King County,
The Honorable Paris K. Kallas, Presiding

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I.

ARGUMENT

A. Application of *Res Ipsa Loquitur* Provides a Prima Facie Showing of Negligence and Elements of Negligence Need Not Be Specifically Shown

Beacon Pub fails to recognize the purpose of *res ipsa loquitur*, and refuses to acknowledge that *res ipsa loquitur* is used to infer negligence. Additionally, Beacon Pub refuses to accept that *res ipsa loquitur* can be used to infer negligence in a premises liability case. Instead, Beacon Pub argues that the trial court was correct in dismissing the case because it asserts Price could not provide evidence that Beacon Pub had actual or constructive knowledge of the dangerous condition of the ceiling fan. However, all elements of negligence are presumed once *res ipsa loquitur* provides the inference of negligence.

Res ipsa loquitur allows a plaintiff an inference of negligence where there is no direct evidence from which negligence can be established. *Robinson v. Cascade Hardwoods, Inc.*, 117 Wash.App. 552, 563, 72 P.3d 244 (2003). A recent unanimous Supreme Court decision makes it clear that *res ipsa loquitur* provides a plaintiff the means of

inferring negligence in a premises liability claim where the plaintiff has no other means by which to prove the landowners' negligence. In the case of *Curtis v. Lein*, 239 P.3d 1078 (2010), the Supreme Court of Washington upheld the application of *res ipsa loquitur* to infer negligence in a premises liability claim. In the *Curtis* case, the plaintiff was injured when she walked onto a pond dock located on the property and it gave way. Plaintiff argued that docks do not ordinarily give way without negligence on the part of someone. No one was able to explain why the dock gave way, and the dock had subsequently been removed.

While the Court of Appeals in *Curtis* agreed that docks do not ordinarily give way, they held that *res ipsa loquitur* did not apply because the plaintiff could not prove that the defendant knew of the dangerous condition. The Court of Appeals stated it did not logically follow that "dangerous docks ordinarily exhibit discoverable defects". *Id.* at 1082. The Court of Appeal stated that since the plaintiff could not meet her burden of proving that the defect was discoverable, she could not prove the homeowner had breached its duty to discover the defect. *Id.* However, the Supreme Court stated that once *res ipsa loquitur* applied, it inferred a breach of the defendant's duty. *Id.*

Beacon Pub claims the “fact the ceiling fan fell is not enough, in the absence of anything more, to permit the conclusion there was negligence...” **RB at 11**. However, as the Supreme Court stated in *Curtis*, this is precisely the purpose of *res ipsa loquitur*—to provide an inference of negligence when no actual proof is available. It would appear Beacon Pub is asserting the very argument rejected by the Supreme Court. The Supreme Court said that what a defendant knows or should have known about the dangerous condition is exactly the sort of information that *res ipsa loquitur* is intended to supply by inference. *Id.* Therefore, Price should not be expected to establish that Beacon Pub knew or should have known that the fan was a danger to its patrons. Once *res ipsa loquitur* applies, the need for establishing every element is eliminated, as being inferred within the prima facie showing of negligence.

B. *Res Ipsa Loquitur* is Absolutely Appropriate Where General Knowledge and Experience Teaches that the Result Would Not Occur Absent Negligence

Beacon Pub mischaracterizes the facts of this case. It analogizes this case to the escalator failure in *Tinder v. Nordstrom, Inc.* 84 Wash.App. 787, 72 P.3d 244 (2003). However, as has been stated repeatedly, the issue with the ceiling fan is not its operation. Price is not

asserting there was any mechanical malfunction involved. In fact, no one can say with certainty that the fan was even operating at the moment it fell. Regardless of whether it was on or off, the ceiling fan never should have fallen from the ceiling. General knowledge and experience teaches us that ceiling fans, once installed, do not simply fall out of ceilings. Much like the dock failure in the *Curtis* case, the failure of a ceiling fan to remain in the ceiling is an event that does not happen absent someone's negligence.

In this case, Beacon Pub states, “[i]t is quite easy to contemplate an accident such as this without the ‘negligence’ of any party.” **RB at 11.** However, according to the Supreme Court, a plaintiff claiming *res ipsa loquitur* does not have to eliminate all other possible causes or inferences. *Curtis* at 1083. Rather, *res ipsa loquitur* allows a prima facie showing of negligence where a plaintiff is not in a position to have knowledge of specific acts constituting negligence. *Id.* Once the plaintiff has established a prima facie showing of negligence, the burden shifts to the defendant to offer some explanation other than negligence for the cause of the incident. *Id.*

The defendant property owner in *Curtis* argued that the plaintiff could not prove the cause of the dock failure was their negligence in

maintaining the dock, and that there were other plausible explanations (such as poor construction or defective materials). The Supreme Court rejected this argument stating:

“The fact that the defendant may offer reasons other than negligence for the accident or occurrence merely presents to the jury alternatives that negate the strength of the inference of negligence *res ipsa loquitur* provides.” *Id.* at 1083-1084.

In this particular case, Price has established the elements necessary for *res ipsa loquitur* to apply. As such it was inappropriate for the trial court to dismiss the matter on summary judgment, as there is now an evidentiary issue to be resolved by a jury. Beacon Pub is free to offer an explanation other than negligence as a cause for a ceiling fan to suddenly, and without any warning, fall from the ceiling. However, as the Supreme Court stated, it was error to conclude that *res ipsa loquitur* was inapplicable as a matter of law due to the possibility that reasons other than negligence could apply. *Id.* at 1084.

C. The Ceiling Fan was Under the Exclusive Control of Beacon Pub.

Beacon Pub is now asserting they did not have exclusive control over the ceiling fan, claiming that the patrons of Beacon Pub somehow had control over the ceiling fan. 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. First, it is undisputed that Beacon Pub had occupied the premises in excess of 20 years. **RP 10.** As the lessor of the property, Beacon Pub was responsible to maintain the property, particularly the interior and its appurtenances thereto. **RP 8.** Given the definition of exclusive control in the *Tinder* case, it would appear that Beacon Pub has exclusive control over the ceiling fan. To claim that patrons of the bar somehow had the right to exercise control over the ceiling fans is not only ridiculous but completely unpersuasive.

Second, and most important, the trial court found that Beacon Pub had exclusive control over the ceiling fan. **RP 28.** More likely than not, the basis for such a holding was a patron's use of the ceiling fan by turning it on and off does not constitute an interference with Beacon Pub's exclusive control over the ceiling fan. It was the sudden and unexpected

fall from the ceiling by the fan—not the operation of the fan—that is at issue. Again, this is the type of incident that does not occur absent negligence. Because the fan was in the exclusive control of Beacon Pub, they were responsible for the inspection and maintenance of the ceiling fan to ensure that it did not constitute a dangerous condition. Clearly ceiling fans don't fall if they are inspected or maintained properly.

II.

CONCLUSION

This case should be remanded to the trial court and Price allowed to proceed under a theory of *res ipsa loquitur*. The doctrine of *res ipsa loquitur* spares the plaintiff the requirement of proving specific acts where the cause of the injury cannot be fully explained and the injury is of a type that would not ordinarily occur absent someone's negligence. The purpose of *res ipsa loquitur* is to prevent injustice. This case is precisely the type of case to which *res ipsa loquitur* should apply.

There is no doubt that ceiling fans should not fall from ceilings. Falling ceiling fans pose a danger to those near them. Exactly why this ceiling fan fell cannot be ascertained, and Price should not be penalized for that fact. Beacon Pub has the right, under *res ipsa loquitur*, to provide evidence to refute the inference of negligence. A jury should decide

whether or not Beacon Pub was negligent in their installation, maintenance or inspection of the ceiling fan. As the Supreme Court pointed out in *Curtis*, “a jury is free to disregard or accept the truth of the inference. The fact that the defendant may offer reasons other than negligence for the accident or occurrence merely presents to the jury alternatives that negate the strength of the inference of negligence *res ipsa loquitur* provides.” *Curtis* at 1084.

Respectfully submitted this 18th day of November, 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, flowing style with a large initial "T".

Theresa M. Buchner, WSBA #29573
Attorney for Appellant

