IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

Jacqueline Austin, by and through: her Guardian *Ad Litem*, John Austin,:		
	:	C.A. No: 05C-01-003 (RBY)
Plaintiff,	:	
	:	
v.	:	
	:	
Happy Harry's Inc.,	:	
	:	
Defendant.	:	

Submitted: November 17, 2006
Decided: November 27, 2006

William D. Fletcher, Jr., Esq., Schmittinger & Rodriguez, P.A., Dover, Delaware for Plaintiff.

David L. Baumberger, Esq., Chrissinger & Baumberger, Wilmington, Delaware for Defendant.

Upon Consideration of Defendant's
Motion for Summary Judgment
GRANTED

Young, J.

Austin v. Happy Harry's Inc.
November 27, 2006

The Defendant, Happy Harry's Inc., moves for summary judgment due to the Plaintiff's, Jacqueline Austin's, inability to offer any evidence or proof on the essential elements of her claims. For the following reasons the motion should be **GRANTED.**

PROCEDURAL HISTORY

On January 3, 2005, the Plaintiff filed her Complaint against the Defendant alleging negligence arising from her visit to the Defendant's store, Happy Harry's, on January 9, 2003. The Defendant answered the Complaint on March 22, 2005, and an arbitration letter was sent on August 15. However, on July 29, 2005, the Defendant was informed that Mrs. Austin was suffering from dementia, and would be unable to testify in her own behalf at the arbitration hearing. On January 11, 2006, a Rule 41(e) notice was sent to the Plaintiff. Following briefing by the parties, this Court granted the Plaintiff's Motion to Vacate the Rule 41(e) order allowing the Plaintiff to by-pass arbitration, given her dementia. On August 29, 2006, Mrs. Austin's son was appointed guardian ad litem. The Defendant filed a summary judgment motion on October 20. The motion was heard on Friday, November 17, 2006.

FACTS

On January 9, 2003, the Plaintiff was shopping at the Happy Harry's in Millsboro, Delaware. Plaintiff alleges that as she was exiting the store her cane became lodged in the automatic door, causing her to fall to the ground inside the store, and to suffer a comminuted fracture of her right wrist as well as pain and discomfort. As a result of her injuries, she incurred medical expenses. She seeks

compensatory damages for those expenses and for pain and suffering. The incident was witnessed by Patricia Brown, a Happy Harry's employee, who, on the day of the accident, wrote a statement for the store's records, reporting that Mrs. Austin "was taking real small steps going out of the sliding door - door closed before she got thru the door, her cane got caught and she fell." The door was evidently examined by one Henry Lilly, who apparently submitted a memo indicating that it was possible for the doors to close with a cane lodged in them; that the doors closed after seven seconds; and that they have no sensor to detect if something the size of Plaintiff's cane is between them.

STANDARD OF REVIEW

A motion for summary judgment should be granted if the record shows that there is no genuine issue as to any material fact, and, the moving party is entitled to judgment as a matter of law.[1] The facts must be viewed in the light most favorable to the non-moving party.[2] Summary judgment may not be granted if, from the evidence produced, there is a reasonable indication that a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the circumstances.[3] However, when the facts permit a reasonable person to draw but one inference, the question becomes one for decision

---

[1] Super. Ct. Civ. R. 56(c).

[2] *Guy v. Judicial Nominating Comm'n*, 659 A.2d 777, 780 (Del. Super. Ct. 1995).

[3] *Ebersole v. Lowengrub*, 180 A.2d 467, 468-69 (Del. 1962).

as a matter of law.[4] The burden of proof is initially borne by the moving party.[5] However, if the movant can meet its burden, then the burden shifts to a non-moving party to demonstrate the existence of material issues.[6] If, as in this case, the non-moving party is the party who will bear the burden of persuasion at trial, then, to survive summary judgment, that party is obliged to point to facts in the record that will support its *prima facie* case at trial.[7] In resisting the motion, the non-movant's evidence of material facts, or the significance of them, in dispute must be sufficient to withstand a motion for judgment as a matter of law and must support the verdict of a rational jury.[8]

DISCUSSION

To prevail in an ordinary negligence action, a plaintiff must show, by a preponderance of the evidence, that the defendant's allegedly negligent act or

---

[4] *Wootten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

[5] Super. Ct. Civ. R. 56(e); *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979) (citing *Ebersole v. Lowengrub*, 180 A.2d 476 (Del. 1962)).

[6] *Moore*, 405 A.2d at 681 (citing *Hurtt v. Goleburn*, 330 A.2d 134 (Del. 1974)).

[7] *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986); *see also Hynansky v. Vietri*, 2003 WL 21976031, at *2 (Del. Ch. 2003) ("In the face of a properly supported motion for summary judgment, the non-moving party must produce evidence that creates a triable issue of fact or suffer the entry of judgment against it.").

[8] *Lum v. Anderson*, 2004 WL 772074, at *2 (Del. Super. 2004) (citing James W. Moore et. al., *Moore's Federal Practice* § 56.03[3], at 56-35 (3d ed. 2003) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-252 (1986) and *Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1148-1149 (Del. 2002) (en banc) (adopting *Liberty Lobby's* "main holding" that the substantive proof required at trial should be the substantive standard of proof at the summary judgment stage)).

omission breached a duty of care owed to the plaintiff in a way that proximately caused the injury.[9] While a storekeeper is not an insurer of the safety of his patrons,[10] he does owe a duty to these business invitees to provide "that those portions of [his] premises ordinarily used by [his] customers are kept in a reasonably safe condition for their use."[11] In discharging this duty, the storekeeper is responsible only for the defects or conditions of which the storekeeper had "actual notice or which could have been discovered by such reasonable inspection as other reasonably prudent storekeepers would regard as necessary."[12]

Thus, in a premises liability action, as the one before the Court, the elements of a business invitee's *prima facie* case are: "(1) that the invitee's injuries were caused by an unreasonably dangerous condition on the premises; (2) which the owner knew or should have discovered by the exercise of reasonable case; (3) which the owner was more likely than the invitee to know about or discover in the exercise of reasonable care; and (4) that the owner failed to use reasonable care to protect the invitee against the danger."[13] On summary judgment, a moving defendant has the

---

[9] *Orsini v. K-Mart Corp.*, 1997 WL 528034, at * 2 (Del. Super. 1997) (citing *Duphily v. Delaware Elec. Co-op., Inc.*, 662 A.2d 821, 828 (Del. 1995).

[10] *Robelen Piano Co. v. Di Fonzo*, 169 A.2d 240, 243 (Del. 1961).

[11] *Howard v. Food Fair Stores, New Castle, Inc.*, 201 A.2d 638, 640 (Del. 1964).

[12] *Id.* (citing *Robelen Piano Co.*, 169 A.2d at 243-244).

[13] *Callaway v. Scrivner*, 1991 WL 113437, at *3 (Del. Super. 1991). *See also Collier v. Acme Markets Inc.*, 670 A.2d 1337 (Table) (Del. 1995) ("Negligence is never presumed from the mere fact that the plaintiff has suffered an injury.").

burden of negating such a showing; if the showing is made.[14]

Typically, the question of whether or not a dangerous condition existed "must depend upon the facts and circumstances of each case and is a question of fact for the jury to determine except in very clear cases."[15]

In the present case, the Defendant rests its motion for summary judgment on: (1) the Plaintiff's inability to "offer any evidence or proof on the essential elements of her claim" because of her dementia and (2) Delaware case law that "the non-moving party must meet the essential elements of its claim with a *prima facie* showing with specific facts demonstrating a plausible ground for its claim." Of course, the mere fact that the Plaintiff suffers from dementia, precluding her testimony, does not bar her from trial.[16] The availability of evidence from other sources must be looked to. On summary judgment, it is not the Court's role to "weigh qualitatively or quantitatively the evidence adduced on the summary judgment record."[17] The Plaintiff claims, through eyewitness testimony, that the automatic door shut on her cane, and that she then fell to the ground. For these purposes, that is

---

[14] *Howard*, 201 A.2d at 640.

[15] *Callaway*, 1991 WL 113437, at *1.

[16] Defendant has asserted that Plaintiff's inability, due to her dementia, to present testimony of any kind precludes, also, any ability of Defendant to cross-examine Plaintiff. While that creates problems for the presentation of a defense, particularly in a slip and fall case, it is a problem confronted by every defendant in a wrongful death action. It is not a situation, in and of itself, that justifies terminating a claim.

[17] *Cerberus International, LTD. v. Apollo Management, L.P.*, 794 A.2d 1141,1150 (Del. 2002) ("The test is not whether the judge considering summary judgment is skeptical that plaintiff will ultimately prevail.").

treated as a given. In addition, the Plaintiff has evidence, from an inspection of the door following the incident, that it is possible for a cane to become lodged in the door. Again, for these purposes, that is assumed at this point.

At trial, the Plaintiff would be required to demonstrate the existence of a dangerous condition. As previously noted, because the existence of such a condition depends on the facts and circumstances of each case, it is generally a question of fact for the jury to determine.

Nevertheless, if the non-moving party is to meet its burden to survive summary judgment, that party is obliged to point to facts in the record that will support its *prima facie* case at trial. The Courts have long held that, in supporting its *prima facie* case, the non-moving party "must show specific facts demonstrating a plausible ground for his claim, and cannot rely merely upon allegations in the pleadings or conclusory assertions in affidavits."[18]

The non-moving party, in this case the Plaintiff, must meet her burden by pointing to facts that will support a *prima facie* case; a case that could go to a jury.

The actual question, then, is whether or not a showing that the Plaintiff's cane got caught in the automatically closing doors of a commercial enterprise, without more, can permit a claim to go to a jury. Notably, for example, no evidence exists that the timing of closing was unreasonable; that automatic doors, to be safe, must take at least 8 seconds to close; that the floor surface prevents swifter departure; that a business should anticipate someone's particular use of a cane, or for how long; that

---

[18] *In re Tri-Star Pictures, Inc. Litg.*, 1992 WL 37304, at *4 (Del. Ch. 1992), *aff'd in part, rev'd in part*, 364 A.2d 319 (Del. 1993).

a "stop closing sensor" should exist, which would be capable of detecting something the circumference of a cane – and, if it should, that such detection should stop the closing mechanism; that a closing mechanism should not be capable of creating any resistance to anything smaller than 4" in circumference; to say nothing of any notice that, with whatever volume of usage the doors had, the doors as they operated presented any difficulty to anyone. That is: what evidence exists to establish negligence on the part of the store? Is there something here beyond the Plaintiff's having fallen? Has Plaintiff demonstrated any evidence of a dangerous condition? From the state of the case at this date – only 4 weeks from trial, and past any discovery cut-off – no expert, or for that matter any, testimony on proper automatic door propensities has been suggested by Plaintiff. Actually, ANCI regulations may suggest the very absence of defects.

To counter this shortcoming, at the hearing on this motion, the Plaintiff raised the doctrine of *res ipsa loquitur* to support her claim that the Defendant's evidence of negligence did, by legal theory, exist. *Res ipsa loquitur* is "a rule of circumstantial evidence, not affecting the burden of proof, which permits, but does not require, the trier of facts to draw an inference of negligence from the happening of an accident."[19] It allows a plaintiff to prove indirectly what she cannot prove directly[20] It is a doctrine which applies only when direct evidence of negligence is absent and unavailable.[21]

---

[19] D.R.E. 304(a).

[20] *Orsini v. K-Mart Corp.*, 1997 WL 528034, at * 4 (Del. Super. 1997)

[21] *Id*. (citing *Vattilana v. George & Lynch, Inc.*, 154 A.2d 565, 567 (Del. Super. 1959)).

Despite the rule, the burden of proof remains with the plaintiff.[22] It should be noted that the Delaware Supreme Court has said that:

> "In order to prove the defendant's negligence by circumstantial evidence . . . it is necessary that the conclusion of negligence be the only inference possible from the admitted circumstances. "[23]

The Court stated that this language also applies to the doctrine of *res ipsa loquitur*.[24]

Before the doctrine will apply, Delaware Rule of Evidence 304 and the case law interpreting it require that five elements must be present. First, "[t]he accident must be such as, in the ordinary course of events, does not happen if those who have management and control use proper care."[25] Second, "[t]he facts are such as to warrant an inference of negligence of such force as to call for an explanation or rebuttal from the defendant."[26] Third, "[t]he thing or instrumentality which caused the injury must have been present under the management or control of the defendant or his servants at the time the negligence likely occurred."[27] Fourth, "where the injured person participated in the events leading up to the accident, the evidence must exclude his own conduct as a responsible cause."[28] Fifth, "[t]here must be a causal

---

[22] *Id.*

[23] *Ciociola v. Delaware Coca Cola Bottling Co.*, 172 A.2d 252, 257 (Del. 1961).

[24] *Id.*

[25] D.R.E. 304(b)(1).

[26] D.R.E. 304(b)(2).

[27] D.R.E. 304(b)(3).

[28] D.R.E. 304(b)(4).

connection between defendant's act or omission and the accident."[29] The elements pertinent to this consideration are the first and second.

While Delaware Rule of Evidence 304(c)(1) states that the applicability of the doctrine should be determined at the close of the plaintiff's evidence,[30] Delaware Courts have held that the language of the rule "does not force the Court into any particular course of action."[31] Instead, "the stage at which a court may consider the applicability of *res ipsa loquitur* is to be determined on a case-by-case basis considering the nature of the contentions, the sufficiency of the parties' factual showing, and the doctrine's applicable standards."[32] Delaware Courts have held that it is appropriate to assess the applicability of the doctrine on summary judgment.[33] Thus, the question is does *res ipsa loquitur* to the present case? As previously described, the Plaintiff has failed to demonstrate that this accident is one that does not normally happen unless someone was negligent. "It is true an accident occurred, but an accident need not always be someone's fault."[34] Even viewing the facts of this case in the Plaintiff's best light, the evidence fails to suggest that this accident would

---

[29] *Skipper v. Royal Crown Brewing*, 192 A.2d 910, 912 (1963).

[30] *National Fire Ins. Co. of Hartford v. Pennsylvania R. Co.*, 220 A.2d 217, 219 (Del. Super. 1966) (citing *Delaware Coach Co. v. Reynolds*, 71 A.2d 69, 75 (Del. 1950)).

[31] *Orsini*, 1997 WL 528034, at * 4.

[32] *Id*. (citing *Lacy v. G.D. Searle & Co.*, 484 A.2d 527, 530 (Del. Super. 1984)).

[33] *See Dillon v. GMC*, 315 A.2d 732 (Del. Super. 1974), *aff'd*, 367 A.2d 1020 (Del. 1976); *Hornbeck v. Homeopathic Hosp. Ass'n of Del.*, 197 A.2d 461 (Del. Super. 1964).

[34] *Orsini*, 1997 WL 528034, at * 5.

occur only in the presence of negligence. People fall; automatic doors close. Those bare facts do not warrant an inference of negligence. The theory of *res ipsa loquitur* may not permit the Plaintiff's case to be submitted to the jury.

Finally, the Plaintiff argues that the Defendant had a duty to warn her about the automatic doors; and that Defendant's failure to do so creates a *prima facie* case of negligence. Delaware Courts have long held that "the owner of land who invites a person to go upon his premises owes to such person a duty to exercise care, and to have his premises in a reasonably safe condition, and to give warning of any latent or concealed dangers."[35] While a storekeeper has a duty, in some circumstances, to provide some warnings, the storekeeper is liable in damages to an injured invitee if, and only if, he failed to warn the invitee of a dangerous condition. Because the Plaintiff has presented no direct evidence of the existence of such a condition, the Plaintiff cannot establish that the automatic doors are a dangerous condition. Without such a showing, the Defendant's duty to warn does not arise.

Both the U.S. and Delaware Supreme Courts have noted, "trial courts should act . . . with caution in granting summary judgment [and] the trial court may . . . deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial."[36] That of course, is entirely appropriate. Here, however, the mere fact that Plaintiff's cane became lodged in an automatic door causing Plaintiff's fall (and that is the totality of Plaintiff's claims for negligence) is

---

[35] *Niblett v. Pennsylvania R. Co.*, 158 A.2d 580, 582 (Del. Super. 1960).

[36] *Cerberus International, LTD.*, 794 A.2d at 1150 (citing *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986)).

not sufficient to create a jury issue. In addition, the Plaintiff, having failed to demonstrate that *res ipsa loquitur* carries Plaintiff's burden here, is not entitled to have the inference of negligence presented to the jury. The Defendant is not the insurer of safety to Plaintiff. Defendant has the duty only to provide a reasonably safe condition, and must be shown to have breached that duty. No evidence in this case, in which discovery has been completed, exists suggesting any breach of duty on the part of Defendant.

Accordingly, Defendant's Motion for Summary Judgment is **GRANTED**.

SO ORDERED.

/s/ Robert B. Young
J.