# STATE OF MICHIGAN

# COURT OF APPEALS

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ROBERT L. WALBRIDGE,

Plaintiff-Appellant,

v

CITY OF DETROIT,

Defendant-Appellee,

and

COUNTY OF WAYNE and DETROIT-WAYNE JOINT BUILDING AUTHORITY,

Defendants-Third-Party Plaintiffs-Appellees,

and

UNITEC ELEVATOR SERVICE,

Defendant-Third-Party Defendant-Appellee.

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UNPUBLISHED
March 3, 2000

No. 214007
Wayne Circuit Court
LC No. 97-715441-NO

BEFORE: O'Connell, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendants' motions for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff was injured when he fell down an escalator in the Frank Murphy Hall of Justice. Alleging that the escalator was negligently maintained and unreasonably dangerous, plaintiff sued both the owners of the building, defendants Wayne County and the Detroit-Wayne Building Authority,[1] and the contractor hired to maintain and inspect the escalator, defendant Unitec. According to plaintiff, he fell because the steps and the handrail of the escalator were traveling at different speeds and because the escalator was traveling with a hesitation or jerking motion.

On appeal, plaintiff argues that summary disposition was improper because he was able to show that the escalator was negligently maintained by lay and expert testimony and documented evidence in the form of Unitec's maintenance records. Plaintiff further argues that application of the doctrine of res ipsa loquitur was proper because defendants were in exclusive control of the escalator and the problems were not the sort that generally occur without someone's negligence. This Court reviews the trial court's grant of summary disposition de novo. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). The trial court record is reviewed to determine if the movant was entitled to judgment as a matter of law. *Phillips v Deihm*, 213 Mich App 389, 398; 541 NW2d 566 (1995). All reasonable inferences are to be drawn in favor of the nonmoving party. *Id.*

We conclude that the trial court did not err in granting defendants' motion for summary disposition because plaintiff did not rebut defendants' evidence that they did not have notice of the allegedly dangerous condition. Furthermore, we are satisfied that the trial court did not err in failing to apply the doctrine of res ipsa loquitur to infer defendants' negligence.

A premises owner has a duty to exercise reasonable care to protect invitees from unreasonable risks of harm caused by a dangerous condition of the land that the owner knows or should know the invitees will not discover, realize, or protect themselves against. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995); *Butler v Ramco-Gershenson, Inc*, 214 Mich App 521, 532; 542 NW2d 912 (1995). A premises owner cannot turn a blind eye to problems with the property, but must inspect the premises to discover possible defects. *Kroll v Katz*, 374 Mich 364, 373; 132 NW2d 27 (1965). When a defect is hidden, a premises owner must warn the invitee of the problem. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 91; 485 NW2d 676 (1992). This obligation extends to defects of which the premises owner knows or should know. *Id.* A premises owner does not owe a duty to protect an invitee when the condition cannot be anticipated. *Butler, supra* at 535. Additionally, a tortfeasor/landowner takes its victim as it finds him. *Richman v City of Berkley*, 84 Mich App 258, 261; 269 NW2d 555 (1978); *McNabb v Green Real Estate Co*, 62 Mich App 500, 518; 233 NW2d 811 (1975). The mere proof of an accident does not establish negligence. *Kasten v United States Truck Co*, 28 Mich App 466, 467; 184 NW2d 508 (1970).

In *Butler, supra* at 524, the plaintiff was injured when struck by a piece of falling masonry. Before the masonry fell, contractors had noticed rusted tie bars, bulges in the brick work, and moisture infiltration into the brick wall that had been occurring for years, all of which caused masonry to be unstable and more likely to fall. *Id.* at 536. This evidence was sufficient to show that the defendants were aware of the condition before the accident and created a question of fact whether the defendants should have known of the risk of falling masonry. *Id.* at 537.

Conversely, in this case, plaintiff presented no evidence that defendants had notice of the dangerous condition in the escalator. The county denied receiving any complaints about the escalator, the service records of Unitec do not indicate the existence of any problem, plaintiff and his witnesses testified that they did not realize that there was a problem until on the escalator, and the building engineer and a Unitec employee testified that they rode on the escalators every day and noticed no problems with jerking or a step/railing speed differential. Plaintiff's expert concedes that nothing was repaired or replaced on the escalator after the incident, but stated that these problems were the sort that would worsen over time. While plaintiff's expert opined that Unitec kept shoddy records that should have put the county on notice that Unitec's work was shoddy, the records do reflect inspections approximately every week. Unlike the facts in *Butler*, in this case plaintiff presented no evidence that defendants were aware of any danger or defect in the escalator.

Further, the doctrine of res ipsa loquitur[2] cannot be used by plaintiff to infer negligence. While the escalator may have been in the complete control of defendants, plaintiff has failed to show even the low quantum of evidence necessary to invoke the doctrine. *Gadde v Michigan Consolidated Gas Co*, 377 Mich 117; 139 NW2d 722 (1966), is the seminal case discussing the use of circumstantial evidence of negligence. There, our Supreme Court stated that Michigan permits the inference of negligence from circumstantial evidence and concluded that the plaintiff's circumstantial evidence demonstrated that a repairman from the defendant gas company was negligent in either causing a gas leak or failing to discover an existing leak. *Id.* at 126. The *Gadde* Court noted that only the defendant's employee worked on the stove, that the plaintiff did nothing unusual, and that the explosion was consistent with a theory that gas accumulated after the repairman's visit. *Id.* According to the Court, under these circumstances the repairman's negligence could be inferred. *Id.* at 126-127.

The early case of *Fuller v Wurzburg Dry Goods Co*, 192 Mich 447; 158 NW 1026 (1916), is very similar to the facts in this case, and supports the refusal to apply the res ipsa loquitur doctrine under these circumstances. There, the plaintiff fell while riding up an escalator in the defendant's store. *Id.* at 447-448. According to the plaintiff, she had nearly reached the top of the escalator when she was thrown by a "peculiar motion" of the stairway. *Id.* Two witnesses testified that the escalator jerked on two other occasions, however there was no evidence that the defendant was aware of the jerking sensation or had been made aware of the incidents. *Id.* at 448. The Supreme Court ruled that the plaintiff could not recover because there was no evidence the defendant knew or could have known that any irregularity in motion could or might occur on the escalator. *Id.* The Court ruled that the plaintiff's res ipsa loquitur theory was not valid because there was no testimony of any negligence on the part of the defendant. *Id.* at 448-449. According to the Court, before any inference of negligence can be drawn, the plaintiff must show some evidence of wrongdoing beyond the mere happening of the event. *Id.* at 448.

Here, plaintiff could present no evidence of defendants' negligence with regard to the escalator. There was no record defendants knew of the problems with the escalator. While a prosecutor testified that the building's escalators jerked, he did not testify that he ever complained about the problem or that this escalator in particular jerked. The county and Unitec denied receiving any complaints about the escalator at any time. Further, apparently nothing was later repaired that related to the alleged

problems. On this record, we hold that the trial court did not err in granting summary disposition in favor of defendants.

Affirmed.

/s/ Peter D. O'Connell
/s/ William B. Murphy
/s/ Kathleen Jansen

[1] The county and building authority were represented by one attorney and presented a single defense. For ease of reference, the use of the singular "county" will reference both Wayne County and the building authority.

[2] The question whether Michigan recognizes res ipsa loquitur has been debated for decades. However, Michigan's use of circumstantial evidence to infer negligence creates the same result. For ease of reference, we will use the Latin term to designate this usage.