IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MONTE PRICE, Appellant, v. BEACON PUB' INC., a Washington corporation, Respondent, RON STEVENSON and JANE DOE STEVENSON, and the marital community composed thereof, if any; and MARINA BUSER and JOHN DOE BUSER, and the marital community composed thereof, if any, Defendants.	)	No. 65477-2-I DIVISION ONE UNPUBLISHED OPINION FILED: June 13, 2011

Appelwick, J. — Price sued Beacon Pub for negligence. A negligence claim requires proof of breach and causation. Price furnished neither, and summary judgment for Beacon Pub was appropriate. We affirm.

FACTS

On July 26, 2006, Monte Price was preparing to perform at an open-microphone-type event at Beacon Pub' Inc. when the ceiling fan fell on his head. Beacon Pub rented the property from its owners, Ron Stevenson and Marina Buser. Almost three years after the accident, Price sued Beacon Pub and the property owners for negligence. Beacon Pub filed a motion for summary judgment, arguing that Price had failed to prove negligence. Price responded that an inference of negligence could be made from the evidence on the theory of res ipsa loquitur. The trial court granted summary judgment for Beacon Pub and dismissed Beacon Pub from the action.

Price appeals.

DISCUSSION

Price argues on appeal only that summary judgment was inappropriate because he raised an inference of negligence under the doctrine of res ipsa loquitur. A motion for summary judgment presents a question of law reviewed de novo. Osborn v. Mason County, 157 Wn.2d 18, 22, 134 P.3d 197 (2006). A trial court grants summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c).

A landowner generally owes business invitees[1] a duty to exercise

[1] The legal duty owed by a landowner to a person entering the premises depends on whether the entrant falls under the common law category of a trespasser, licensee, or invitee. Iwai v. State, 129 Wn.2d 84, 90-91, 915 P.2d 1089 (1996). A business invitee is defined as "'a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.'" Younce v. Ferguson, 106 Wn.2d 658, 667, 724 P.2d 991 (1986) (quoting Restatement (Second) of Torts § 332 (1965)). Price was a business invitee here.

"reasonable care" and "inspect for dangerous conditions, 'followed by such repair, safeguards, or warning as may be reasonably necessary for [the invitee's] protection under the circumstances.'" Tincani v. Inland Empire Zoological Soc'y, 124 Wn.2d 121, 139, 875 P.2d 621 (1994) (alteration in original) (quoting Restatement (Second) of Torts § 343 cmt. b (1965)). A property owner is liable to invitees for injury-causing conditions if the landowner:

> "(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."

Id. at 138 (quoting Restatement (Second) § 343).

Price has not attempted to put forth evidence of negligence on the part of Beacon Pub. Instead, Price sought at summary judgment to rely on the doctrine of res ipsa loquitur. The doctrine of res ipsa loquitur allows an inference of negligence if the plaintiff establishes three elements:

> (1) The occurrence producing the injury was of a kind that ordinarily does not occur in the absence of negligence;
>
> (2) The injury was caused by an agency or instrumentality within the exclusive control of the defendant; and
>
> (3) The injury-causing occurrence was not due to any contribution by the injured party.

Curtis v. Lein, 169 Wn.2d 884, 891, 239 P.3d 1078 (2010). The doctrine recognizes that an accident may happen under circumstances that will allow the

occurrence itself to circumstantially establish prima facie negligence on the part of the defendant, without further direct proof. Jackson v. Criminal Justice Training Comm'n, 43 Wn. App. 827, 829, 720 P.2d 457 (1986). Where res ipsa loquitur applies, it spares the plaintiff the requirement of proving specific acts of negligence and shifts the burden to the defendant to provide an explanation. Curtis, 169 Wn.2d at 894. The doctrine is ordinarily sparingly applied in peculiar and exceptional cases, and only where the facts and the demands of justice make its application essential. Id. at 889. Whether res ipsa loquitur applies to a particular case is a question of law reviewed de novo. Pacheco v. Ames, 149 Wn.2d 431, 436, 69 P.3d 324 (2003).

Taking the third element first, neither party argues on appeal that Price contributed to the occurrence. Because that element is uncontested, we draw an inference in favor of Price.

Regarding the first element, Price simply asserts that general experience and observation teaches that in the absence of negligence, a ceiling fan would not fall from the ceiling.[2] We disagree. Common experience does not supply the necessary link between Beacon Pub's duty to invitees and the occurrence here, i.e., that ceiling fans fall only where proper care is lacking. The mere occurrence of an accident and an injury does not necessarily infer negligence. Tinder v Nordstrom, Inc., 84 Wn. App. 787, 792-93, 929 P.2d 1209 (1997); see also

[2] A plaintiff may also satisfy the first element by showing the injury is so palpably negligent that it may be inferred as a matter of law, or when proof by experts in an esoteric field creates an inference that negligence caused the injuries. Curtis, 169 Wn.2d at 891 (citing Pacheco, 149 Wn.2d at 438-39). Price does not argue that either of these conditions is applicable here.

Restatement (Third) Of Torts: Liability for Physical and Emotional Harm § 17 cmt. e (2010)) ("Evidence that harmful results are rare in the course of a particular activity does not itself show that res ipsa loquitur is warranted.").[3] We note that the second Restatement of Torts suggested that an object falling from the defendant's premises is the type of event where an inference under the res ipsa loquitur doctrine would be appropriate:

> On the other hand there are many events, such as those of objects falling from the defendant's premises, the fall of an elevator, the escape of gas or water from mains or of electricity from wires or appliances, the derailment of trains or the explosion of boilers, where the conclusion is at least permissible that such things do not usually happen unless someone has been negligent.

Restatement (Second) § 328D cmt. c (emphasis added). But, our Supreme Court has not expressly adopted this section or applied this comment and we decline to as well. Price fails to show that in the general experience a ceiling fan would not fall from the ceiling without negligence.

Even if Price had established the first element of the doctrine, it is unclear whether the second element, exclusive control, was also established by Price. The trial court assumed for the purposes of summary judgment that Beacon Pub maintained exclusive control of the fan without deciding that issue. The unrebutted evidence is that the fan was installed prior to Beacon Pub's tenancy of the building and that Beacon Pub did not maintain the ceiling fan. In its response to an interrogatory, Beacon Pub stated that it "did not own the building

[3] Our Supreme Court has adopted the third Restatement of Torts, although not the section related to res ipsa loquitur. See, e.g., Michaels v. CH2M Hill, Inc., No. 84168-3, 2011 WL 2077653 at *9 (Wash. May 26, 2011).

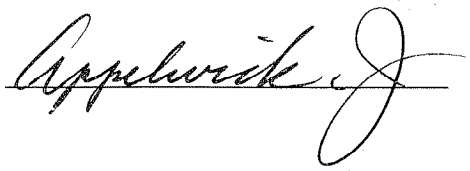
where the incident occurred and thus there were no employees working at the time of the incident who were responsible" for maintenance of the fan. Price offered no evidence as to whether maintenance was in the exclusive control of the tenant, rather than the owner. We therefore note that the lack of evidence of exclusive control provides an alternative basis upon which to support the trial court's grant of summary judgment.

We also note that this is not the "'peculiar and exceptional'" case where application of the doctrine is necessary for justice. Curtis, 169 Wn.2d at 891 (quoting Tinder, 84 Wn. App. at 792). For example, Price relies on Curtis. In that case the plaintiff was unable to determine the cause of her fall through a dock because the property owner destroyed the dock following her accident. Id. at 890-91. Application of the doctrine is appropriate in that case, where the plaintiff could not discover evidence of negligence through her own investigation. See, e.g., Pacheco, 149 Wn.2d at 440-41 ("[T]he res ipsa loquitur doctrine allows the plaintiff to establish a prima facie case of negligence when he cannot prove a specific act of negligence because he is not in a situation where he would have knowledge of that specific act."). In fact, the two concurring justices emphasized that the removal of the dock after the accident, preventing the plaintiff from discovering the defect in the dock, was the only reason for the application of the doctrine. Curtis, 169 Wn.2d at 896 (Madsen, C.J., concurring). The new Restatement (Third) of Torts similarly emphasizes the importance of applying the doctrine only where the true cause of the accident is not discoverable: "The doctrine implies that the court does not know,

and cannot find out, what actually happened in the individual case." Restatement (Third) § 17 cmt. a. It is clear from the record that Price conducted no investigation into the cause of the accident. Price argued at summary judgment that the fan had been destroyed and that he had no means of conducting an investigation. But, he does not make that assertion on appeal and the record does not permit us to review whether the fan was in fact destroyed, and if so under facts analogous to those in the Curtis case. Without showing that "'he cannot prove a specific act of negligence,'" Curtis, 169 Wn.2d at 894 (quoting Pacheco, 149 Wn.2d at 440-41), Price has failed to show that his is the unusual case to which the res ipsa loquitur doctrine should be applied.

Price fails to show that res ipsa loquitur has any application to these circumstances. He also fails to show that justice requires that he benefit from the inference of negligence. Price has failed to establish any other issue of material fact as to Beacon Pub's liability. The court properly granted summary judgment and dismissed Beacon Pub from the lawsuit.

We affirm.



WE CONCUR:

Schindler, J. Spearman, J.