IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

DONNARAE LEMCKE and JAMES R. LEMCKE, wife and husband, and the marital community composed thereof, Appellants, v. LOWE'S HIW, INC., dba LOWE'S HIW, INC. #285, a Washington corporation, Respondent.	No. 65849-2-I DIVISION ONE UNPUBLISHED OPINION FILED: July 25, 2011

Leach, J. — Donnarae Lemcke appeals a trial court's summary dismissal of her negligence claim against Lowe's Home Improvement. Lemcke claims the trial court erred by failing to apply the doctrine of res ipsa loquitur. We hold that Lemcke was entitled to an inference of negligence under the facts of this case and reverse and remand for further proceedings.

Background

On September 11, 2006, Donnarae Lemcke was shopping at a Lowe's hardware store in Lynnwood, Washington. On her way to check out at the cash register, Lemcke stopped to look at an end-cap display of a kitchen counter.[1] When Lemcke pulled out a drawer from the display, a cardboard box fell from

[1] An end cap is a display of products placed at the end of an aisle in a store.

above and hit her between the eyes. Lemcke did not see the box fall, nor did she feel anything out of the ordinary when she opened the drawer. Lemcke looked up to the shelf above the display and saw boxes similar to the one that struck her. Lemcke told a Lowe's employee about the accident but declined his offer to speak with a manager. After Lemcke left, the employee did not immediately notify the on-duty manager as required by store policy. No Lowe's employee completed an incident report that day as also required by store policy.

Later that day, the store's operational manager, Benjamin Bear, was notified of the incident. Working only with the knowledge that a box fell and struck a customer, Bear inspected the general area of the incident. Bear observed the end cap as a "rolling, moving wire under-storage cabinet display." Bear noted that nothing could have been stored on top of the display, but there was an overhead shelf above the display on which extra product was stored. Bear did not take photographs of the area, nor did he check to see if the store's loss prevention department had video of the incident available from the store security system.

Lemcke awoke the next day with an excruciating headache and a mark on her nose. Two days after the incident, Lemcke called Lowe's and spoke with Bear, who interviewed Lemcke over the phone and filled out an incident report. Lemcke and her husband then returned to the store to inspect the display, where they discovered it had been removed.[2]

[2] Bear could not recall when or why the end-cap display was removed.

Three years later, Lemcke sued Lowe's for negligence. Lowe's moved for summary judgment, arguing that Lemcke could not produce sufficient evidence to prove Lowe's alleged negligence. In response, Lemcke produced no evidence of Lowe's negligence but asserted that she was entitled to an inference of negligence based on the theory of res ipsa loquitur. The trial court granted summary judgment and dismissed the action.

Lemcke appeals.

Analysis

Lemcke's sole argument on appeal is that summary judgment was inappropriate because she raised an inference of negligence under the doctrine of res ipsa loquitur. A motion for summary judgment presents a question of law, which we review de novo.[3] Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[4]

A landowner generally owes business invitees a duty to exercise "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.'"[5] A property owner is liable to invitees for injury-causing conditions if the landowner:

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[3] Osborn v. Mason County, 157 Wn.2d 18, 22, 134 P.3d 197 (2006).

[4] CR 56(c).

[5] 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) 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
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> "(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
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> "(c) fails to exercise reasonable care to protect them against the danger."[6]

Lemcke did not produce any evidence of Lowe's negligence. Instead, she relied exclusively on the doctrine of res ipsa loquitur at summary judgment. This doctrine permits 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 of the injured party.[7]

The doctrine recognizes that the nature of an accident may allow the occurrence itself to circumstantially establish prima facie negligence on the part of the defendant, without further direct proof.[8] Where res ipsa loquitur applies, it spares the plaintiff from proving specific acts of negligence and shifts the burden to the defendant to provide an explanation.[9] Courts ordinarily apply the doctrine "'sparingly in peculiar and exceptional cases, and only where the facts and the

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[6] Tincani, 124 Wn. 2d at 138 (quoting Restatement (Second) of Torts § 342).

[7] Curtis v. Lein, 169 Wn.2d 884, 891, 239 P.3d 1078 (2010).

[8] Jackson v. Criminal Justice Training Comm'n, 43 Wn. App. 827, 829, 720 P.2d 457 (1986).

[9] Curtis, 169 Wn.2d at 894.

demands of justice make its application essential.'"[10] Whether res ipsa loquitur applies to a particular case is a question of law, which we review de novo.[11]

Dealing with the third element first, because neither party contends that Lemcke contributed to the occurrence, we resolve it in Lemcke's favor.

The first factor—whether the occurrence producing the injury is of the kind that ordinarily does not occur in the absence of negligence—is satisfied if one of the following three conditions is met:

> "'(1) When the act causing the injury is so palpably negligent that it may be inferred as a matter of law, i.e., leaving foreign objects, sponges, scissors, etc., in the body, or amputation of a wrong member; (2) when the general experience and observation of mankind teaches that the result would not be expected without negligence; and (3) when proof by experts in an esoteric field creates an inference that negligence caused the injuries.'"[12]

Lemcke relies on the second condition: that a box stacked on a high overhead shelf not generally accessible by the public does not fall in the absence of someone's negligent act. We agree. General experience demonstrates that properly stored boxes do not fall from these store shelves without some negligence or an act of god.[13]

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[10] Curtis, 169 Wn.2d at 889 (internal quotation marks omitted) (quoting Tinder v. Nordstrom, 84 Wn. App. 787, 792, 929 P.2d 1209 (1997)).

[11] Pacheco v. Ames, 149 Wn.2d 431, 436, 69 P.3d 324 (2003).

[12] Pacheco, 149 Wn.2d at 438-39 (quoting Zukowsky v. Brown, 79 Wn.2d 586, 595, 488 P.2d 269 (1971) (quoting Horner v. N. Pac. Beneficial Ass'n Hosps., Inc., 62 Wn.2d 351, 360, 382 P.2d 518 (1963))).

[13] We note that Restatement (Second) 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

We find that Lemcke has also established the second factor—that the instrumentality causing the plaintiff's accident was in the exclusive control of the defendant. The boxes were stacked on a high, separate, overhead shelf designed to store extra product. That shelf was above the ordinary person's reach and could be accessed only by ladder. Lowe's restricted use of the ladders providing access. It intended them to be solely for employee use and so labeled many of them.

Lowe's argues that a customer could have been responsible for dislodging the box. Margaret Thomas, a Lowe's divisional safety manager, testified in her deposition that in some incidents customers also used those ladders. This argument misapplies the second element. This element does not require that the plaintiff show that the occurrence never happens without negligence. The proper inquiry is whether "the injury-producing event is of a type that would not ordinarily occur absent negligence."[14] A plaintiff claiming res ipsa loquitur is "'not required to eliminate with certainty all other possible causes or inferences in order for res ipsa loquitur to apply.'"[15] Rather, res ipsa loquitur is inapplicable when the defendant presents "'evidence that is completely

> 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) of Torts § 328D cmt. c.

[14] Curtis, 169 Wn.2d at 893 (emphasis added).

[15] Curtis, 169 Wn.2d at 894 (internal quotation marks omitted) (quoting Pacheco, 149 Wn.2d at 440-41).

explanatory of how an accident occurred and no other inference is possible that the injury occurred another way.'"[16] Here, the evidence shows that the box in issue was stacked on a shelf not generally accessible to the public. Lowe's attempted to maintain exclusive control over this shelf. It intended the ladders used to reach the shelf to be used only by its employees, going so far as to so label some of these ladders. Lowe's provided no evidence that these efforts were unsuccessful at this store or that the boxes here were not in its exclusive control before Lemcke's accident.[17]

Lowe's disagrees, relying on Las v. Yellow Front Stores, Inc.[18] In Las, the plaintiff sued a store after several skillets on a low shelf fell to the floor and injured her foot.[19] This court affirmed summary judgment in the defendant's favor, noting that the pans were not in the store's exclusive control because "[o]ther customers could take out a pan and then replace it."[20] In that case, however, the pans were intended to be and were directly accessible by customers. In contrast, Lowe's customers could not readily access the shelf containing the boxes, which was out of the customers' general reach. In addition, Lowe's affirmatively sought to exclude customer access to this shelf. Las is therefore factually distinguishable.

We hold that this is a "'peculiar and exceptional'" case where the res ipsa

[16] Curtis, 169 Wn.2d at 894 (quoting Pacheco, 149 Wn.2d at 439-40).
[17] See Curtis, 169 Wn.2d at 893.
[18] 66 Wn. App. 196, 831 P.2d 744 (1992).
[19] Las, 66 Wn. App. at 197.
[20] Las, 66 Wn. App. at 202.

loquitur doctrine applies.[21] Lowe's removal of the end cap immediately after the accident supports this result. For example, in Curtis v. Lein,[22] the plaintiff was unable to determine the cause of her fall through a dock because the property owner destroyed the dock following her accident. The court held application of the doctrine appropriate because the plaintiff could not discover evidence of negligence through her own investigation.[23] 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.[24] The new Restatement (Third) of Torts similarly emphasizes the importance of applying the doctrine where the true cause of the accident is not discoverable: "[t]he doctrine implies that the court does not know, and cannot find out, what actually happened in the individual case."[25]

Lemcke's situation is analogous. Lemcke notified Lowe's immediately after the box struck her. Lowe's failed to investigate the claim despite this notification. Instead, it removed the display, depriving Lemcke of the opportunity to gather the evidence necessary to establish her claim. We find the facts of this case make res ipsa loquitur applicable.

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[21] Curtis, 169 Wn.2d at 889.

[22] 169 Wn.2d 884, 890-91, 239 P.3d 1078 (2010).

[23] See, e.g., Pacheco, 149 Wn.2d at 441 ("[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.").

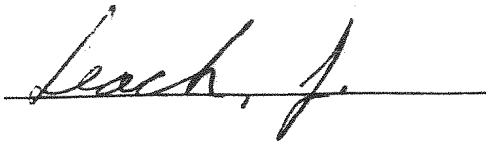
[24] Curtis, 169 Wn.2d at 896 (Madsen, C.J., concurring).

[25] Restatement (Third) of Torts: Physical & Emotional Harm § 17 cmt. a (2010).

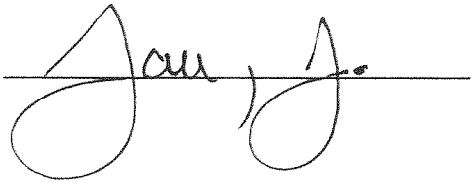
Finally, Lowe's argues that Lemcke cannot argue res ipsa loquitur on appeal because she did not plead it in her complaint, citing CR 8. However, Lowe's makes no argument nor cites any authority for this position. "'Where no authorities are cited, the court may assume that counsel, after diligent search, has found none.'"[26] "[W]e will not review an issue that was addressed by an inadequate argument or that is given only passing treatment."[27] Therefore, we do not consider this issue.

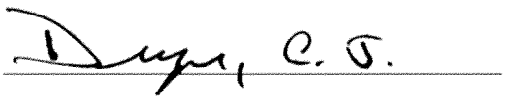
Conclusion

We reverse and remand for further proceedings.



WE CONCUR:





[26] Mercer Place Condo. Ass'n v. State Farm Fire & Cas. Co., 104 Wn. App. 597, 606, 17 P .3d 626 (2000) (quoting Grant County v. Bohne, 89 Wn.2d 953, 958, 577 P.2d 138 (1978).

[27] Timson v. Pierce County Fire Dist. No. 15, 136 Wn. App. 376, 385, 149 P.3d 427 (2006) (citing State v. Thomas, 150 Wn.2d 821,868-69, 83 P.3d 970 (2004)).