IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWARD J. PRUSINOWSKI, et al.	:	CIVIL ACTION
v.	:	
SEARS, ROEBUCK AND COMPANY	:	NO. 96-CV-8550

MEMORANDUM AND ORDER

J. M. KELLY, J. **September , 1997**

Defendant's Motion for Summary Judgment is presently before the Court. Defendant contends that plaintiff has failed to present sufficient evidence to allow a jury to infer negligence under the doctrine of res ipsa loquitor. Defendant also contends that it cannot be held lible under a premises liability theory because it had no reason to know of a condition dangerous to the plaintiff.

BACKGROUND

On March 20, 1995, while standing in the customer waiting area of Defendant Sears' automotive department, Plaintiff Edward Prusinowski ("Prusinowski") was injured when a tire on an unattended handcart burst. Prusinowski intends to prove that the handcart tire exploded minutes after it was overloaded with automobile batteries. At the time the tire exploded, the handcart was empty. Prusinowski also can show that the handcart tire was filled with a "white gooey substance," assumed to be a tire sealant.

SUMMARY JUDGMENT STANDARD

Under Fed. R. Civ. P. 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." This court is required, in resolving a motion for summary judgment pursuant to Rule 56, to determine whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In making this determination, the evidence of the nonmoving party is to be believed, and the district court must draw all reasonable inferences in the nonmovant's favor. See id. at 255. Furthermore, while the movant bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact, Rule 56(c) requires the entry of summary judgment "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

ANALYSIS

Prusinowski claims that defendant Sears is liable for the negligent acts of its employees and for allowing the plaintiff, as a business invitee, to wait in a dangerous area. Prusinowski has not presented any direct evidence that the negligence of Sears caused the tire to burst. Plaintiff has not investigated the tire involved in this incident and will not present an expert witness to establish the cause of the explosion. Prusinowski plans to rely on his own testimony and the testimony of other witnesses to the accident. Prusinowski contends that this evidence, along with an inference of negligence under the doctrine of res ipsa loquitor, is legally sufficient to allow a jury to find Sears liable.

Res Ipsa Loquitor

In Gilbert v. Korvette, Inc., 327 A.2d 94 (Pa. 1974), the Pennsylvania Supreme Court adopted the doctrine of res ipsa loquitor as set out in Section 328D of the Restatement (Second) of Torts. Section 328D provides:

> (1) It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when
>
> > (a) the event is of a kind which ordinarily does not occur in the absence of negligence;
> >
> > (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and

> (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff.
>
> (2) It is the function of the court to determine whether the inference may reasonably be drawn by the jury, or whether it must necessarily be drawn.
>
> (3) It is the function of the jury to determine whether the inference is to be drawn in any case where different conclusions may reasonably be reached.
> Restatement (Second) of Torts § 328D.

The occurrence of an injury does not give rise to an inference that one of the parties involved was negligent. Markovitch v. Bell Helicopter Textron, Inc., 805 F. Supp. 1231, aff'd 977 F.2d 56. A plaintiff must satisfy all three elements of §328D(1) before a negligence inference may be drawn from the happening of an event. Id. at 23. Expert testimony is not required in a res ipsa loquitor case. See Lonsdale v. Joseph Horne Co., 587 A.2d 810, 816 n.4 (Pa. Super. Ct. 1991). The elements of Section 328D(1) may be proven either by showing a "fund of common knowledge from which laymen can reasonably draw the inference or conclusion of negligence," or by presenting expert testimony. Jones v. Harrisburg Polyclinic Hospital, 437 A.2d 1134, 1138 (Pa. 1981). Nevertheless, "it is still the plaintiff's responsibility to advance some evidence to buttress [his] allegation." Lonsdale, 587 A.2d at 816.

Under Restatement Section 328D(1)(b), a plaintiff must present evidence to eliminate other responsible causes for an accident. Micciche v. Eastern Elevator Co., 645 A.2d 278, 281

(Pa. Super. 1994). While it is not necessary that a plaintiff exclude all other possible causes beyond a reasonable doubt, a plaintiff must "present a case from which a jury may reasonably conclude that the negligence was, more probably than not, that of the defendant." Lonsdale, 587 A.2d at 816, see also Restatement (Second) of Torts § 328D, comment f (1965)("It is never enough for the plaintiff to prove that he was injured by the negligence of some person unidentified. It is still necessary to make the negligence point to the defendant.").

Pennsylvania courts have refused to allow plaintiffs to get to a jury on a res ipsa loquitor theory where the plaintiff showed the happening of an accident, but did not present evidence to eliminate other responsible causes. In Lonsdale, 587 A.2d 810, plaintiff was injured when turning a handle in defendant's restroom. The plaintiff sought a res ipsa loquitor instruction. The court refused plaintiff's request because there was no evidence presented at trial that would eliminate third parties as possible causes of the accident. Similarly, in Smick v. City of Philadelphia, 638 A.2d 287 (Pa. Commw. Ct. 1994), plaintiff brought suit after being injured in a trolley accident. Plaintiff presented expert testimony, but the court refused to instruct the jury on res ipsa loquitor because plaintiff's expert admitted that he could not eliminate other responsible causes for the accident.

Prusinowski has not presented evidence to eliminate other causes of this accident. Prusinowski contends that proof

that the tire was in Sears' exclusive control is sufficient. The fact that Sears had control of the handcart at the time of the accident does not eliminate a myriad of possible causes for this accident. The tire may have exploded because it or the rim was defective, or for a number of other reasons that do not involve negligence by anyone. Prusinowski has failed to meet his burden of presenting evidence to eliminate other possible causes of this accident.

The plaintiff also has the burden of proving that the accident "is of a kind which ordinarily does not occur in the absence of negligence" by the defendant. Micciche, 645 A.2d 278 (plaintiff "must produce evidence which would permit the conclusion that it was more probable than not the injuries were caused by appellee's negligence").

Prusinowski has not presented evidence that this accident is of a kind which ordinarily does not occur in the absence of negligence by the defendant. He contends that that conclusion is within the common knowledge of the average juror. If this was a case where the tire exploded while it was overloaded, it is possible that lay jurors could reasonably conclude that the negligent overloading of the cart caused the accident. The handcart, however, was empty at the time the tire exploded. The connection between defendant's alleged negligence and this accident is tenuous. In such a case there is no "fund of common knowledge" on which a lay jury may reasonably rely. Without an expert witness, there is only speculation.

The res ipsa loquitor doctrine allows a plaintiff that does not have access to direct evidence of negligence to get to a jury on circumstantial evidence. One justification for allowing a plaintiff to rely on the res ipsa loquitor inference is the defendant's superior access to evidence. See, e.g., Ybarra v. Spangard, 154 P.2d 687, 689 (Cal. 1944); Schaffner v. Cumberland County Hosp. Sys., 336 S.E.2d 116, 122 (N.C.Ct.App. 1985). Here, evidence of the cause of this accident was equally available to the plaintiff and the defendant. Even though the tire was available for inspection, Plaintiff chose not to make any inpection of it. Prusinowski instead relies on his own testimony and that of other witnesses to the accident. This evidence is insufficient, as a matter of law, to justify an inference that defendant breached a duty owed to plaintiff and caused his injuries.

Liability to Business Invitee

It is undisputed that Prusinowski was on Defendant's premises as a business invitee. Pennsylvania courts have adopted Restatement (Second) of Torts § 343 describing the duties a possessor of land owes a business invitee. See Moultrey v. Great A & P Tea Co., 422 A.2d 593, 595 (Pa. Super. Ct. 1980). A landowner is liable for harm caused to invitees by a condition on the land if the landowner knows, or should have known, of an unreasonable risk of harm. Id. at 596. The happening of an accident on a landowner's property is not, in and of itself,

evidence of a breach of the landowner's duty of care. Myers v. Penn Traffic Co., 606 A.2d 926, 928 (Pa. 1992).

Prusinowski has not presented evidence that Sears knew or should have known that the tire posed a danger to invitees. The reason the tire exploded remains a mystery. The plaintiff has not presented evidence that tends to explain the cause of this accident.

CONCLUSION

The plaintiff in this matter has not produced sufficient evidence to justify an inference of negligence under the res ipsa loquitor doctrine. Further, the plaintiff has not presented evidence that defendant knew or should have known of a dangerous condition on its premises. Therefore, summary judgment is granted.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWARD J. PRUSINOWSKI, et al.	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
SEARS, ROEBUCK AND COMPANY	:	NO. 96-CV-8550

ORDER

AND NOW, this 16th day of September, 1997, after consideration of defendant Sears, Roebuck and Company's Motion for Summary Judgment and all responses thereto, it is hereby ORDERED that the motion is GRANTED. All other outstanding motions are dismissed as moot. JUDGMENT is ENTERED in this matter in favor of defendant Sears, Roebuck and Company and against plaintiffs Edward J. Prusinowski and Margaret Prusinowski.

BY THE COURT:

JAMES McGIRR KELLY, J.