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

ROBERT LONCOSKY	:	**CIVIL ACTION**
	:	
v.	:	
	:	
WAL-MART STORES, INC.	:	**No. 96-4668**

MEMORANDUM ORDER

This is a slip and fall case. At the close of plaintiff's evidence, defendant moved for a directed verdict or more precisely for judgment as a matter of law. See Fed. R. Civ. P. 50(a). Such a motion should be granted only if after viewing and construing the evidence most favorably to the nonmovant, there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on his claim. McDaniels v. Flick, 59 F.3d 446, 453 (3d Cir. 1995). Such motions are granted sparingly. Indeed, in eight years the court has granted only one such motion. This will be the second.

The only evidence regarding liability presented by plaintiff was his own testimony which the court assumes to be true. The sum and substance of that testimony as pertinent to liability is as follows.

Plaintiff visited defendant's store near his home in Fairless Hills the afternoon of July 3, 1994. He spent fifteen minutes in the store and left without buying anything. He exited the store through one of several main doors in an outer vestibule fronting on a parking lot. The doors are metal with glass panels and are not automatic. They may be pushed open by pressing on a

metal bar handle, the door frame or a glass panel. Plaintiff put his hand on the bar handle. It came loose and fell. Plaintiff lost his balance and fell to the ground injuring his knees. The handle looked normal and felt normal when plaintiff touched it. It did not jiggle or move around. Plaintiff had visited the store at least twice before. On each occasion he exited and observed others exit from the same door without any problem.

A jury could not reasonably find from this evidence that the harmful condition was created by defendant itself or its agent. See Hyatt v. County of Allegheny, 547 A.2d 1304, 1308 (Pa. Cmwlth. 1988) (discussing this exception to usual requirement of actual or constructive notice of property owner). Plaintiff did not contend otherwise.

A jury could not reasonably find from this evidence that defendant knew or by the exercise of reasonable care should have known that one of its door handles was in a condition which involved an unreasonable risk of harm to its invitees. See Restatement (Second) of Torts § 343; Carrender v. Fitterer, 469 A.2d 120, 123 (Pa. 1983). There was no evidence to show that defendant knew of the weakness in the bar handle or could have learned of this by a reasonable inspection, visual or physical. Indeed, plaintiff's evidence shows that a moment before the accident the handle appeared and felt normal. See Lonsdale v. Joseph Horne Co., 587 A.2d 810, 814-15 (Pa. Super. 1991) (holding no more than visual inspection required of faucet handle which dangerously recoiled with extreme force injuring plaintiff and

upholding compulsory nonsuit where plaintiff testified she detected no problem with handle before turning it and encountered no problem with faucets on earlier visits to defendant's store). See also Winkler v. Seven Springs Farm, Inc., 359 A.2d 440, 443 (Pa. Super. 1976) (judgment n.o.v. should have been entered against plaintiff who lost balance and fell opening door that jammed absent evidence defendant knew or by reasonable inspection could have discovered condition of door).

Apparently recognizing the shortcomings in his proof, plaintiff principally argued that his case should be submitted on a theory of "exclusive control" or "res ipsa loquitur." These previous theories were rejected and replaced in Pennsylvania by Restatement (Second) of Torts § 328D in 1974. See Gilbert v. Korvette, Inc., 327 A.2d 94, 99-100 (Pa. 1974) ("the time has come to reject our earlier duty-oriented doctrines" and to "replace them with a single doctrine based on appropriate evidentiary concerns").[1] See also Jones v. Harrisburg Polyclinic Hospital, 437 A.2d 1134, 1137 & n.8 (Pa. 1981) ("exclusive control" and other related doctrines "rejected" with adoption of § 328D); Williams v. Eastern Elevator Co., 386 A.2d 7, 10-11 (Pa. Super. 1978) ("former doctrines of res ipsa loquitur and

[1] Pursuant to § 328D, a defendant's causal negligence may be inferred when it appears that the occurrence in question is of a kind which ordinarily does not happen in the absence of negligence, other responsible causes are sufficiently eliminated and the negligence indicated is within the scope of the defendant's duty to the plaintiff. A plaintiff must establish these requirements by a preponderance of the evidence. Lonsdale, 587 A.2d at 815.

exclusive control have been replaced by Section 328D").

The Restatement provision is not a rule of procedure or substantive law but only an evidentiary formula for circumstantial proof of negligence. Jones, 437 A.2d at 1137. A plaintiff must still show that it is more probable than not that his injuries were caused by the defendant's negligence. Micciche v. Eastern Elevator Co., 645 A.2d 278, 281 (Pa. Super. 1994). While proof of defendant's exclusive control of the instrumentality causing injury is a fact which might practically eliminate other responsible causes in a given case for purposes of § 328D(1)(b), "the critical inquiry is not control but whether a particular defendant is the responsible cause of the injury." Gilbert, 327 A.2d at 101.[2] See also Jones, 437 A.2d at 1139 ("the critical inquiry as to whether 'other responsible causes are sufficiently eliminated by the evidence' is whether a particular defendant is the responsible cause of the injury"); Prusinowski v. Sears, Roebuck and Co., 1997 WL 597965, *3 (E.D. Pa. Sept. 16, 1997) (defendant's control of cart with exploding tire does not per se eliminate other responsible causes including manufacturing defect).

Even assuming defendant can fairly be said to have

[2] The Court in Gilbert quoted with approval Dean Prosser's view that "[i]t would be far better, and much confusion would be avoided, if the idea of 'control' were discarded altogether and we were to say merely that the apparent cause of the accident must be such that the defendant would be responsible for any negligence connected with it." Gilbert, 327 A.2d at 102 (quoting W. Prosser, Handbook on the Law of Torts § 39, at 220-21 (4th ed.)).

exclusive control of its outer doors and accepting that plaintiff eliminated his conduct as a responsible cause, one cannot reasonably find by a preponderance of the evidence that plaintiff has eliminated other causes of the accident such as the manufacturer or other store patrons. Lonsdale, 587 A.2d at 815-16.[3]

After the motion for judgment as a matter of law was argued and after the court indicated it would grant the motion and began to explain why, plaintiff's counsel asked if he could reopen his case and recall the plaintiff to give additional testimony in an effort to salvage his claim. Defense counsel rejoined with some force that this would be unfair and prejudicial. A defendant ordinarily should be able to make a decision about presenting a dispositive motion and to expend billable time fashioning and presenting an argument without concern that the plaintiff will then alter the record on which such a decision was made and such an effort was undertaken. A lawyer defending a client at a trial should not be in the position of a law student who must reevaluate and adapt his responses as the professor keeps changing his hypothetical.

Nevertheless, the court asked counsel for a proffer of plaintiff's proposed additional testimony. Counsel indicated that plaintiff would now say that he showed an unidentified woman

[3] One cannot reasonably view defendant as having any more control over its outer doors than Joseph Horne Company had over its restroom faucets.

who had been behind a sales counter the broken door handle which was hanging down at an angle at which time she said she was not surprised as there had been problems with that door handle before. Because defendant's objection to the admissibility of such testimony would be sustained, there was no need for the court to ponder the discretionary question of whether plaintiff should be permitted to reopen his case.

Plaintiff's counsel suggested that the statement of the unknown woman, whom the court assumes was an employee, could be admissible under the present sense impression exception to the hearsay rule. A present sense impression is a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." Fed. R. Evid. 803(1). To qualify under Rule 803(1), the statement must be made by the speaker at the same time she observed the event or condition described. See e.g., Phoenix Mut. Life Ins. Co. v. Adams, 30 F.3d 554, 566-57 (4th Cir. 1994) (note made contemporaneously with event admissible); First State Bank of Denton v. Maryland Cas. Co., 918 F.2d 38, 41-42 (5th Cir. 1990) (statement was made immediately after declarant's observation admissible); Hilyer v. Howat Concrete Co., 578 F.2d 422, 426 n.7 (D.C. Cir. 1978) (statement regarding accident made 15 to 45 minutes after event does not qualify as present sense impression); United States v. Nanny, 745 F. Supp. 475, 480-81 (M.D. Tenn. 1989) (out-of-court statement regarding

party's sobriety does not qualify as present sense impression absent evidence statement was made contemporaneously with or immediately after declarant's observation).

Plaintiff did not seek to introduce the employee's statement to show the condition of the door at the time the statement was made. It is uncontroverted that the handle was broken after plaintiff fell. Plaintiff sought to introduce the statement to describe the condition of the exit door at some indefinite time or times before his fall. This is not something that the employee observed at the time she made the statement. Indeed, it is not clear from the proffer that it is something the employee ever personally observed. It is entirely possible from the proffer that it is something someone else related to her at some time in the past. In any event, the proffered statement is clearly not a present sense impression.

Plaintiff's counsel alternatively suggested that the employee's statement was an admission by Wal-Mart pursuant to Fed. R. Evid. 801(d)(2)(D). The rule provides that "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship" is not hearsay when offered against the party. An employer is not vicariously responsible for each statement made by its employees. For such a statement to be admissible, it is necessary that the content of the declarant's statement

concern the scope of her agency. Hill v. Spiegel, Inc., 708 F.2d 233, 237 (6th Cir. 1983). The relevant inquiry is whether the speaker was authorized to act for his employer concerning the matter spoken about. Wilkinson v. Carnival Cruise Lines, Inc., 920 F.2d 1560, 1566 (11th Cir. 1991).[4]

Plaintiff proffered no evidence that the employee to whom he first spoke was in any way responsible for the maintenance, inspection or safety of the exterior doors or for processing complaints about accidents or the physical condition of the store.[5]

ACCORDINGLY, this day of November, 1997, **IT IS HEREBY ORDERED** that defendant's motion for judgment as a matter of law is **GRANTED** and judgment will be entered in this case for the defendant.

BY THE COURT:

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[4] Plaintiff's counsel stated that he could also present deposition testimony of a managerial employee that many employees enter and exit the store through the doors in question from which it could be inferred that the unidentifiable declarant was one of them. Even accepting this logic, the question is not whether an employee spoke about a condition on a portion of the premises she may have had occasion to traverse but whether she was authorized to act for the employer with regard to the matter she spoke about.

[5] It is almost inconceivable that plaintiff's counsel would not have sought and received during discovery any prior complaints or service reports regarding similar problems with these doors or door handles. None were offered in evidence.

JAY C. WALDMAN, J.

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O R D E R

AND NOW, this day of November, 1997, consistent with the companion memorandum order of this date, **IT IS HEREBY ORDERED** that **JUDGMENT is ENTERED** in the above action for the defendant and against the plaintiff.

BY THE COURT:

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JAY C. WALDMAN, J.