Circuit Court for Baltimore County
Case No. C-16-4972

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 534

September Term, 2017

BARBARA JONES

v.

SCHINDLER ELEVATOR CORP., *et al.*

Wright,
Leahy,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: June 25, 2018

Appellant Barbara Jones was injured on March 28, 2015, when the escalator she was riding in the Macy's Department Store in the White Marsh Mall stopped suddenly. She filed suit in the Circuit Court for Baltimore County against Macy's Corporate Services, Inc.[1] ("Macy's") and Schindler Elevator Corporation ("Schindler," together with Macy's as "Appellees"), the companies which owned, operated, and/or maintained the escalator. After Ms. Jones failed to designate an expert witness on the issue of liability, the circuit court granted Appellees' motion for summary judgment.

Ms. Jones appealed, asking us to resolve the following: "Did the lower court err by granting Appellee's Motion for Summary Judgment?" We hold that the doctrine of *res ipsa loquitur* was unavailable on the facts of the case. Without the aid of expert testimony, a lay jury could not infer that Appellees' negligence more probably than not caused the escalator to malfunction and injure Ms. Jones.

BACKGROUND

Around 13 months after Ms. Jones's injury, on May 9, 2016, she sued Appellees for negligence in the Circuit Court for Baltimore County. According to Ms. Jones, Schindler was negligent for failing to inspect, maintain, and repair the escalator; Macy's was negligent for allowing the escalator to remain in an unsafe condition by failing to inspect, discover, warn of, and correct the dangerous condition.

Following the discovery deadline, Ms. Jones had designated medical expert witnesses but no expert to present testimony concerning the mechanics of the escalator.

[1] Macy's represents that the proper corporate entity to sue was Macy's Retail Holdings, Inc.

Schindler moved for summary judgment, asserting that Ms. Jones' failure to designate an expert on the issue of liability left her unable to prove that Schindler's negligence proximately caused her injuries. Macy's joined Schindler's motion. In her response, Ms. Jones agreed that, "under normal circumstances, an expert would be required in cases involving an escalator or elevator," but suggested that "this [wa]s not your average escalator case[.]" Ms. Jones produced maintenance records that showed that the escalator on which she was injured had two prior maintenance issues. On October 5, 2014, nearly six months prior to her accident, the records indicated that the escalator "keeps shutting down," noting there was a "piece of gum in [the] handrail inlet." Then, on March 14, 2015, two weeks before her accident, a maintenance report reflected as follows: "Reported unit shutting down but starts back up with key. Observe unit and tried skirt switches and stop switches to see if [they're] too sensitive[.] No problems at this time. Unit should be gone over berger [sic] store opens[.]"

At a hearing on May 10, 2017, Appellees argued that summary judgment was required because Ms. Jones failed to provide expert testimony about what caused the escalator to stop. Ms. Jones proffered two reasons why expert testimony was unnecessary: (1) a video of the incident showed that no one pushed the emergency stop button at the time of the accident and (2) maintenance records showed that the escalator had a recent history of shutting down, putting Appellees on notice. The circuit court ruled from the bench, granting summary judgment to Appellees based on the Court of Appeals decision in *Holzhauer v. Saks & Co.*, 346 Md. 328 (1997), because Mr. Jones "does not have an expert witness and expert testimony is required."

Ms. Jones noted her timely appeal to this Court on May 16, 2017.

DISCUSSION

I.

Res Ipsa Loquitur

Ms. Jones argues on appeal that she met her burden to apply the doctrine of *res ipsa* because she demonstrated that (1) the accident would not have occurred absent Appellees' negligence; (2) the escalator was exclusively in Appellees' control; and (3) Ms. Jones's acts or omissions did not cause her injury. Although the Court of Appeals has held that expert testimony is required to prove negligence in similar instances, Ms. Jones suggests that Appellees' negligence is clear because they had prior knowledge of a defect in this escalator and neither party resolved the issue nor warned customers of the dangerous condition. According to Ms. Jones, "the issue at hand is not *why* the escalator stopped, but that it *did* stop and caused injury to Appellant."

Schindler makes two main points in response. First, it asserts that Ms. Jones's claim fails as a matter of law because "[t]he functioning of the escalator concerns specialized and technical knowledge that is unfamiliar to the layperson[,]" and Ms. Jones "proffered no expert testimony whatsoever regarding *how* or *why* the escalator stopped, only that it did." Second, Schindler maintains that, because "lay jurors are not permitted to draw an inference of negligence without the aid of expert testimony," Ms. Jones may not avoid presenting expert testimony by relying on *res ipsa*. Macy's joined Schindler's arguments and reiterated that the Court of Appeals' decision in *Holzhauer*, 346 Md. at 335-36, is dispositive of the first two elements of *res ipsa*. According to Macy's, (1) the facts "only

need show that something other than the Appellees' negligence was just as likely to cause the escalator to stop[;]" and (2) the presence of other patrons in the store leave Ms. Jones unable to prove that the escalator was in Appellees' exclusive control.

In *Holzhauer*, the Court of Appeals explained that a plaintiff seeking to rely on *res ipsa* must establish, by a preponderance of the evidence, that the accident was "(1) a casualty of a kind that does not ordinarily occur absent negligence, (2) that was caused by an instrumentality exclusively in the defendant's control, and (3) that was not caused by an act or omission of the plaintiff." 346 Md. at 335-36 (citation omitted). If a plaintiff can prove each of these elements, the jury may then choose "to infer a defendant's negligence without the aid of any direct evidence." *Dover Elevator Co. v. Swann*, 334 Md. 231, 236 (1994) (citations omitted). Successfully invoking *res ipsa* does not shift the burden of proof to the defendant; nor does it create a rebuttable presumption of negligence. *See Hickory Transfer Co. v. Nezbed*, 202 Md. 253, 262 (1953).

Two decisions by the Court of Appeals support Appellees' contention that Ms. Jones's claim must fail for want of expert testimony. The first of those, *Dover*, involved a negligence action that David Swann brought after he injured himself tripping into an elevator that had misleveled. 334 Md. at 234. Maintenance logs showed that the same elevator had misleveled multiple times in the three months leading up to the accident. *Id.* at 235. Swann filed suit against Dover Elevator Company ("Dover") and the building's owner and management company. *Id.* at 234. After the jury found for the defendants on the merits, this Court reversed as to Dover, holding that the trial court should have permitted Swann to rely on *res ipsa*. *Id.* at 235-36, 238-39.

The Court of Appeals reversed this Court. A large part of the Court's discussion focused on the plaintiff's expert who testified, "to a reasonable degree of engineering probability," that the elevator misleveled because of a specific technical malfunction that Dover had attempted to repair when it should have replaced the faulty parts. *Id.* at 244. Dover's technician had testified in response that the parts did not need replacing. *Id.* at 243. The Court explained that these competing technical explanations for the misleveling did not give rise to a *res ipsa* instruction, reasoning that the plaintiff's expert "did not merely provide some circumstantial evidence tending to show the defendant's negligence[,]" but "purported to offer a complete explanation of the precise cause and how the negligence of Dover's technician contributed to that cause." *Id.* at 246. In effect, "Swann's primary complaint was not that a single misleveling created an inference of negligence, but that Dover's failure to properly correct the problem after prior mislevelings constituted negligence." *Id.* at 248. The Court reasoned that "[t]his did not constitute reliance on *res ipsa loquitur*. Swann establish a *prima facie* case of direct negligence based on specific and comprehensive evidence gleaned from Dover's service records and [his expert's] on-site investigations." *Id.* The Court then expounded on the role of expert testimony in such technical cases:

> If expert testimony is used to raise an inference that the accident could not happen had there been no negligence, then it is the expert witness, not an application of the traditional *res ipsa loquitur* doctrine, that raises the inference. The expert testimony offered in these "quasi *res ipsa loquitur* cases" differs somewhat from more traditional expert testimony because, instead of testifying that a *particular act* or commission constituted a failure to exercise due care, the expert testifies to the *probability* that the injury was caused by the failure to exercise due care. The expert also testifies that the accident ordinarily would not occur unless there was a failure to exercise the

appropriate degree of care.

Id. at 254 (internal citation omitted) (emphasis in *Dover*).

In conclusion, the Court stated that Swann's case "involved the complicated inner workings of elevator number two's machinery which were outside the scope of the average layperson's common understanding and knowledge, and expert testimony *was a necessary element* of the plaintiff's case." *Id.* at 256 (emphasis added). Accordingly, the *res ipsa* instruction was unavailable to Swann and he "was required to prove it was more probable than not that this accident was the result of negligence." *Id.* at 256.

Three years later, in a set of certified questions from the United States District Court for the District of Maryland, the Court of Appeals considered, *inter alia*, whether *res ipsa* was available in a similar set of circumstances. *Holzhauer*, 346 Md. at 330. Mr. Holzhauer, much like Ms. Jones, was shopping in a mall when the escalator he was riding stopped suddenly causing him injury. *Id.* at 331. Unlike Mr. Swann in *Dover*, however, Holzhauer did not offer expert testimony to attempt to explain why the escalator malfunctioned. *Id.* at 332. The Court of Appeals concluded that there were three reasons why Holzhauer could not rely on *res ipsa*. *Id.* at 342.

First, Holzhauer could not prove that it was more probable than not that the elevator company was negligent because the escalator had not malfunctioned before or after his accident and it was equally, if not more, likely that the escalator "stopped because somebody intentionally or unintentionally pushed an emergency stop button." *Id.* at 336-37. Second, Holzhauer "[wa]s unable to satisfy the second essential component of *res ipsa*[,]" exclusive control, because "[h]undreds of Saks & Co.'s customers have unlimited

access to the emergency stop buttons each day." *Id.* at 337-38. The Court then iterated a third reason why *res ipsa* was inapplicable: "in cases concerning the malfunction of complex machinery, an expert is required to testify that the malfunction is of a sort that would not occur absent some negligence." *Id.* at 341 (citing *Dover*, 334 Md. at 254, 256). "Leaving aside the presence of any emergency stop buttons," the Court continued, "whether an escalator is likely to stop abruptly in the absence of someone's negligence is a question that laymen cannot answer based on common knowledge." *Id.* at 341. Thus, the Court ruled categorically, *res ipsa* "does not apply" in circumstances that "require[] knowledge of 'complicated matters' such as mechanics, electricity, circuits, engineering, and metallurgy." *Id.*

Returning to the case before us, Ms. Jones seeks to distinguish *Holzhauer* because she claims she presented evidence that no other customer pressed an emergency stop button. That evidence, however, deals only with the first two reasons that the Court of Appeals announced in support of its holding that a *res ipsa* instruction was unavailable in Holzhauer's case. *Id.* at 335-38. "Leaving aside the presence of any emergency stop buttons," the fact remains that escalators are complex machines that may malfunction for reasons outside of a layperson's common knowledge that do not involve negligence. *Id.* at 341. As was the case in *Dover*, Ms. Jones having maintenance logs showing prior abrupt stops does not change this point or explain the cause or the mechanical failure that caused the escalator to stop on the day Ms. Jones was on the escalator. *See* 334 Md. at 235, 248-49. Ms. Jones's complaint that Appellees were negligent in their "failure to properly correct the problem after prior [sudden stops] . . . did not constitute reliance on *res ipsa*

loquitur." *Id.* at 249. As the Court made clear in *Dover*, "expert testimony was a *necessary element*" of Ms. Jones's claim and she "was required to prove it was more probable than not that this accident was the result of negligence." *Id.* at 256 (emphasis added). Accordingly, we affirm the court's grant of summary judgment on the grounds that *res ipsa* was unavailable to Ms. Jones and, without the aid of expert testimony, she could not prove her case.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.