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IN THE SUPREME COURT OF THE STATE OF UTAH

SELANIE SANONE, by and through her Guardian Ad Litem, JOHN G. SANONE,

Plaintiff-Respondent,

vs.

J. C. PENNEY COMPANY, a corporation,

Defendant-Appellant.

No. 10047

BRIEF OF RESPONDENT

Appeal from a Judgment of the Third District Court
For Salt Lake County
Honorable A. H. Ellett, Judge

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BRIEF OF RESPONDENT

STATEMENT OF FACTS

The parties will be referred to as in the court below.

Plaintiff prevailed before the jury and is therefore entitled to have the facts reviewed in a light most favorable to her. We deem it necessary to restate the facts in order that the aforesaid salutary principle of law may be satisfied.

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Plaintiff was 2½ years old at time of the accident involved in this case. She seeks to recover damages for personal injuries she sustained while riding on an escalator in the defendant's store in company with her mother.

The escalator involved in this case is operated between the first and second ffoor of the store. The escalator had the customary moving steps and stationary metal side panels, and there is a clearance between the side panels and the steps.

Plaintiff's mother testified that on the day of the accident, they started from the second to the main floor on the escalator. Plaintiff was on the same step and to the right side of her mother and was holding her mother's hand. The mother testified they had descended half way between the floors when the child cried out her foot was caught. The mother noticed the escalator seemed to open up and it appeared the child's foot was caught between the moving step and the side panel. She pulled the child free and ran down the escalator to the main floor. (R. 212, 213).

The doctor testified the skin, tissue and muscle of the leg had been torn from the ankle up the front of the leg and the flap of skin, tissue and muscle had been crushed. (R. 228). (See Exhibit P-3).

The inspector from the Industrial Commission of Utah inspected the escalator approximately seven days after the accident and found the clearance between the

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steps and the metal side panel violated the standards of the American Safety Code for elevators, escalators and dumb waiters. (R. 260). The defendant had the clearance adjusted.

The witness testified it is the custom and practice in this community for the metal side panels of escalators to be properly lubricated with an oily substance so as to give them a slipping motion rather than a grabbing motion. (R. 261, 262).

The manager of the store testified the escalators were inspected, serviced and maintained by an independent service company. He admitted it was the policy of this service company to always lubricate the metal side panels on the escalators. (R. 278).

An employee from the service company testified the escalators were serviced every Monday morning and the metal side panels were lubricated with a substance called "Slip It." (R. 282). The witness testified he inspected the escalator on the day of the accident, but did not find any excessive clearance between the side panel and the moving steps. (R. 281). He admitted he failed to inspect the metal side panels to determine if they were properly lubricated. (R. 283, 284).

The trial court submitted the case to the jury on two theories. The first was based on negligence and the jury was to determine whether or not on the date of the accident the defendant operated its escalator with excessive amount of clearance between the moving steps

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and the side panel. The second was under the doctrine of Res Ipsa Loquitur (R. 304). The jury returned a special verdict and found no preponderance of the evidence as to the issue of whether there was an excessive amount of clearance on the date of the accident. (R. 313). The jury did find, however, that this accident was of such a kind and nature that it could not have happened if defendant had exercised the highest degree of care. (R. 315). The jury awarded damages to plaintiff in the sum of $12,500.00. (R. 317).

Defendant filed a motion for new trial and a motion for judgment notwithstanding the verdict. (R. 169). Defendant withdrew its motion for new trial and the court thereafter denied the motion for a judgment notwithstanding the verdict. (R. 183).

POINT I

THE DOCTRINE OF RES IPSA LOQUITUR IS APPLICABLE TO CASES INVOLVING ESCALATORS.

Applicability of the doctrine of Res Ipsa Loquitur to accidents occurring on escalators has been the subject of many legal decisions. The cases clearly support application of the doctrine under the facts of the case at bar.

In 66 ALR 2d 507, the following is made:

> "The rule that wherever anything which has produced an injury is shown to have been under

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the control and management of the defendant, and the occurrence is one which, in the ordinary course of events, would not have happened if due care had been exercised, the fact of the injury itself is sufficient evidence to support a recovery, in the absence of any explanation by the defendant tending to show that the injury was not due to his want of care, has been applied in a number of cases involving injuries resulting from the operation of escalators."

In *J. C. Penney Company vs. Eubanks,* 294 Federal 2d 519, the plaintiff, a small boy, had his foot caught and pulled into the space between the step he was standing on and the side panel of the escalator. The Trial Court awarded damages to the plaintiff. In affirming the judgment the court stated:

"Gerald relied on the doctrine of res ipsa loquitur. That doctrine has long been recognized in Oklahoma. (Citing cases).

"The trial court found that at the time of the accident the escalator, or instrumentality involved, was under the complete control of the Penney Company and that under the facts and circumstances of the case the doctrine of res ipsa loquitur was applicable.

"The Penney Company contends that if there was a defect in the construction and design of the escalator, it was a latent defect and that the Penney Company is not charged with the knowledge thereof, but the difficulty of the Penney Company position is that it failed to meet the burden cast on it to explain the cause of the accident. The only explanation it offered was an unjustified deduction from the physical facts.

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There was no proof of a latent defect and if the accident was caused by excessive clearance between the step and the side panel, it was an obvious defect.

"We are of the opinion that the evidence fully established that the thing which caused the injury to Gerald at the time of the accident was under the complete control and management of the Penney Company, its agents and servants; that in the ordinary course of things the accident would not have happened if the Penney Company, its agents and servants, had exercised due or proper care; that the Penney Company offered no evidence or explanation of the accident sufficient to refute the presumption that it was caused by the lack of due care on its part, and that the trial court properly applied the doctrine of res ips aloquitur."

In *J. C. Penney Company vs. Livingston,* 271 SW 2d 906, a 22 month old child was riding on an escalator when his hand was caught in the step behind him. Neither party to the action introduced any testimony to explain how the accident happened. The defendant introduced testimony that the escalator was built, installed and operated according to proper specifications and a subsequent inspection revealed no structural defects.

In affirming the ruling by the trial court that the doctrine of Res Ipsa Loquitur was applicable, the court stated:

"Even if the petition did allege specific acts of negligence in addition to the plea of res ipsa loquitur, plaintiff would not for that reason be

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deprived of the benefit of the doctrine. He would still be entitled to the benefit of the doctrine to the extent it might tend to establish the particular acts of negligence alleged. Wallace vs. Norris, 310 Ky. 424, 220 S.W. 2d 967; Kroger Grocery & Baking Co. vs. Stevenson, Ky., 244 S.W. 2d 732.

"The main question is whether this is a res ipsa loquitur case. Defendant insists it is not.

"In line with the weight of authority, this court has held that the principle of res ipsa loquitur may be invoked only when there are present three essential elements: (1) the instrumentality must be under the control of the defendant; (2) the circumstances, according to common knowledge and experience, must create a clear inference that the accident would not have happened if the defendant had not been negligent; (3) the plaintiff's injury must have resulted from the accident. Lewis vs. Wolk, 312 Ky. 536, 228 S.W. 2d 432, 16 A.L.R. 2d 974.

"We conclude that all three elements are present here. Admittedly, the escalator was under control of the defendant, and admittedly plaintiff's injury resulted from the accident.

"That brings us to the crucial question: Do the circumstances, according to common knowledge and experience, create a clear inference that the accident would not have happened if the defendant had not been negligent? We think they do. Defendant's escalator was maintained for the benefit of its customers and they were impliedly invited to use it. It is common knowledge that children, and especially young children, are attracted to an escalator, and that they often-

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times ride unaccompanied by their parents or custodian. It is also common knowledge that the ordinary escalator is completely safe even for small children, and that thousands of children ride them daily without injury or danger of injury. Yet, in this case it is established that plaintiff's hand was caught in the machinery of the escalator while he was riding where he was expected to ride. It seems to us this creates a logical inference that there was a defect in the escalator which made it unsafe for small children; and if the escalator was unsafe for children to use, then the defendant was negligent in making it available to children."

In the case of *Young v. Anchor Co., Inc.,* 79 S.E. 2d 785, the trial court applied the doctrine. The case was reversed for error in instructions, but the court stated as follows:

> "The mechanical device known as an escalator, which the defendant furnished to its customers and invitees as a means of ascent to the second floor of the department store, was installed by the defendant and was under its exclusive management and control, imposing up it the continuous duty of inspection and maintenance, and due care in its operation, and the sudden jerk, stoppage and unusual movement on the occasion alleged was such as to raise the inference that the accident complained of would not have occurred unless there had been negligent failure to inspect and maintain."

We respectfully submit the foregoing authorities conclusively establish applicability of the doctrine of Res Ipsa Loquitur to the case at bar. The trial court

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was correct in submitting this issue to the jury. The verdict for plaintiff rests on sound factual and legal foundation.

POINT II

THE TRIAL COURT PROPERLY PRESENTED TO THE JURY THE DOCTRINE OF RES IPSA LOQUITUR.

Instruction No. 14 defined the doctrine of Res Ipsa Loquitur and set forth the elements necessary for its application. The jury decided the doctrine was applicable and that defendant was negligent. Based on this finding, the court very properly entered judgment in favor of plaintiff and against defendant. The defendant contends on this appeal that the evidence did not warrant submission of Instruction No. 14 to the jury. In support of this contention defendant points out that the jury did not find the spacing between the siding and the steps to be excessive, and contends that excessive spacing between the steps and the side panel was the only possible defect on the escalator that could have caused the injury to plaintiff. Said contention is erroneous in that it ignores the evidence as to the manner in which the accident occurred.

It will be recalled that plaintiff's mother was the only witness to the accident. She testified the child was standing on the step when the accident happened. There was no testimony that the child was doing any-

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thing other than riding the escalator in a proper and safe manner. Coupled to this fact is the testimony of the inspector from the Industrial Commission of Utah, the manager of the defendant's store, and the employee from the service company all to the effect that it was the custom, practice, and duty of defendant to see that the metal side panels of its escalators were properly lubricated to give the sides a *slipping motion rather than a grabbing motion.* From the fact that the child's skin and flesh had to be grabbed or caught in the crevice between the side and the moving step in order for the accident to happen, a number of permissible inferences arise. These inferences are not speculation or conjecture as contended by defendant. They are the natural result of the logical thought process. Reasoning needn't be divorced from law. The child's leg was caught along the side of the escalator because it did not slide along a lubricated surface. Her flesh was pulled into a crevice that may very well have been too wide. This being a res ipso loquitur case, plaintiff did not have the burden of specific item by item proof of negligence. Plaintiff was entitled to the inference of negligence that is historically indulged in res ipsa loquitur cases.

In *Moore v. James,* 5 Utah 2d 91, 297 P.2d 22, this court held that the trial court had committed prejudicial error when it excluded res ipsa loquitur. The court stated:

> " * * * Undoubtedly the jury believed defendants' testimony in finding a verdict of 'no cause of action', but in addition to the maid's

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> testimony which was disputed, the plaintiff was entitled to have the jury draw the natural and normal inferences from the 'happening of the event' as permitted under the rule, even though they disbelieved the maid's testimony. * * * The court's refusal to instruct the jury on the rule of res ipsa loquitur, therefore, unduly restricted the right of the jury to decide questions of fact."

In the recent case of *Lund v. Mountain Fuel Supply Co.*, 15 Utah 2d 10, 386 P.2d 408, this court reversed the trial court for failure to submit res ipsa to the jury. The court stated:

> "Since the sole responsibility for the installation of the gas pipe is respondent's, and appellant having proved its breakage and consequent damage to his property through no act of his own, he has carried his burden of proof, and the duty to rebut the inference of lack of due care should be upon respondent."

In summary, the equipment and mechanisms of the escalator were under the exclusive control, management and maintenance procedures of the defendant company. A little girl's foot and leg, so a jury could find, simply wouldn't be caught between the moving steps and the side of the escalator in the absence of negligence on the part of defendant company. Consequently, a permissible inference arises that defendant was negligent and unless defendant comes forth with evidence that persuades the trier of the fact that it was free of negligence, said inference has the force and effect of a finding of fact that negligence existed. In rationalizing the type of negligence that could have

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existed and caused plaintiff's unfortunate injury, two factors are present. First, from the nature of the injury the jury could have found that the skin of the little girl's leg caught and stuck along the side as the steps moved downward. If defendant failed and neglected to properly lubricate the sides adjacent to the steps this would be negligence for the very reason that children with bare legs and women with bare legs could reasonably be expected to be riding up and down the escalator. Second, the revolving of the little girl's foot and flesh into the crevice between the side of the escalator and the moving steps could give rise to an inference that excessive clearance between the moving steps and the side of the escalator existed at the time of the accident. In this connection the jury, in answer to a specific interrogatory, found that there was no preponderance of evidence *either way* regarding the presence or absence of excessive clearance. However, under the doctrine of res ipsa loquitur, which allows the drawing of the inference of neglect in absence of specific evidence, this jury could very well have inferred from the happening of the accident that defendant was negligent for failure to lubricate the sides of the escalator and that excessive clearance had been allowed to develop between the moving steps and sides of the escalator, and as pointed out in the *Moore* case, supra, the jury could have simply found that the accident couldn't have occurred in the absence of negligence and generally inferred that negligence existed. Here is a company that installs a mechanism and invited the general public

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to use the mechanism and a little girl's leg and foot becomes caught and balled up in the mechanism as she is standing quietly with her hand in her mother's hand. The law does not place the burden of loss under this type of situation on the shoulders of the innocent customer and leave the company, which had exclusive control, operation and maintenance of the mechanism, financially free from responsibility. This case was properly presented to the jury under the doctrine of res ipsa loquitur and the verdict was properly and justly rendered.

Defendant further contends in its brief, it exercised the highest degree of care because it employed a service company to inspect the escalator and it contends there was nothing else it could do for the protection of its customers. The service company was the agent of defendant. A company cannot assign away its continuing duty of making and keeping its premises and equipment reasonably safe for business invitees. Just as the negligence of its janitors, clerks, and elevator operators becomes the negligence of the company so does the negligence of inspectors and maintainers of its escalators.

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CONCLUSION

This is a res ipsa loquitur case. The jury having resolved the issues in favor of plaintiff, we respectfully submit that the judgment in plaintiff's favor should be affirmed.

Respectfully submitted,

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