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

RUTH E. WILLIS	:	
	:	CIVIL ACTION
	:	
v.	:	
	:	
	:	NO. 04-CV-0913
BESAM AUTOMATED ENTRANCE SYSTEMS, INC., ET AL.	:	

SURRICK, J. **NOVEMBER 3, 2005**

MEMORANDUM & ORDER

Presently before the Court are the following Motions: (1) Motion For Summary Judgment Of Defendant Marriott International, Inc. ("Marriott") (Doc. No. 15); (2) Motion For Summary Judgment Of Defendant Besam Automated Entrance Systems, Inc. ("Besam") (Doc. No. 16); (3) Marriott's Motion In Limine Or, In The Alternative, Request For A *Daubert* Hearing To Preclude The Testimony Of Ronald Panunto (Doc. No. 28); (4) Marriott's Supplemental Motion For Summary Judgment (Doc. No. 29); and (5) Besam's Motion In Limine Or, In The Alternative, Request For A *Daubert* Hearing To Preclude The Testimony Of Ronald Panunto, P.E. (Doc. No. 35). For the following reasons, Defendants' Motions will be granted.

I. BACKGROUND

A. Factual Background

On Friday, May 16, 2003, Plaintiff Ruth E. Willis ("Willis"), a resident of Philadelphia, traveled to Washington, D.C. with her daughter and son-in-law to attend a relative's graduation

ceremony. (Doc. No. 17 at Ex. D. ("L. Lowry Dep."), p. 17.)[1] She stayed at the Marriott Wardman Park Hotel ("Hotel") with various other members of her family. (*Id.* at 20-21.) The Hotel has several doors at its main entrance. These include an automatic revolving door that continuously revolves and two sets of automatic swinging doors that are accessible to handicapped persons, one on each side of the revolving door. (Bush Dep. at 25, 32.) During the course of the weekend, Plaintiff, walking with a cane, used the revolving door on three separate occasions without incident. She did not use the handicapped accessible automatic swinging doors. (Willis Dep. at 46, 48, 50.) When Willis left the Hotel on May 18, 2003, she walked into the revolving door compartment with her daughter in order to exit the building.[2] (L. Lowry Dep. at 39; Willis Dep. at 51.) Plaintiff contends that as she attempted to exit the revolving door, the edge of one of the panels struck her on the shoulder, at which point she fell. (L. Lowry Dep. at 26-27; Doc. No. 18 at Ex. 19 ("M. Lowry Dep."), p.19;[3] Willis Dep. at 54.) Plaintiff also contends that after she fell, the door continued to rotate, pushing her several feet on the floor. (L. Lowry Dep. at 30; M. Lowry Dep. at 21.)

---

[1]Leslie Lowry is a daughter of the Plaintiff.

[2]Plaintiff was again using a cane to assist her as she exited the Hotel. (Willis Dep. at 50.)

[3]Michael Lowry is the husband of Leslie Lowry.

The automatic revolving door was installed in 1999 and has three safety devices: (1) a mid-door presence sensor;[4] (2) force-sensitive door leaves;[5] and (3) compressible safety switches.[6] (Weber Dep. at 13, 123-24.) Besam also manufactured a handicap speed actuation device, which is a button that allowed a person to reduce the speed of the door. (*Id.* at 48-49.) The automatic revolving door did not have such a device. (Bush Dep. at 68; Weber Dep. at 49.) The handicap accessible automatic swinging doors on each side of the revolving door did have a speed actuation device. (Weber Dep. at 49.) There were caution decals on the revolving door which stated "Automatic Door - Caution."[7] (*Id.* at 119-20; Doc. No. 18 at Ex. 21.)

Marriott contracted with Besam to perform maintenance on the revolving door. (Doc. No. 18 at Ex. 4.) Under the terms of the Planned Maintenance Agreement, Marriott was "to notify Besam if an unsafe condition exists, to disable any door that is operating in an unsafe manner, and to provide Besam twenty four hour written notice of any accident, alteration, or change affecting the equipment." (*Id.*) Besam serviced the revolving door on a number of

---

[4]The mid-door presence sensor is an electric eye that is located on a horizontal bar across each separate wing of the revolving door. (Bush Dep. at 44-45.) The presence sensor is designed to prevent the door from hitting a person who walks through it. (*Id.* at 50.) When a person or object comes within several inches of this sensor, the door should stop rotating. (*Id.* at 46.)

[5]The force-sensitive door leaf is a rubber strip across the bottom of each separate revolving door compartment. When a door leaf touches a person or object, the door should stop rotating. (Doc. No. 18 at Ex. 3, p. 6.)

[6]The compressible safety switch is a strip on the outer edge of the interior of the revolving door. When a person or object becomes lodged between one of the wings and the outer edge of the interior of the revolving door, the door should stop rotating. (Doc. No. 18 at Ex. 3, p. 6.)

[7]When Besam furnishes a revolving door to a customer, it places yellow automatic door caution decals on it. (Bush Dep. at 119.) There is no industry standard that requires an owner to keep these caution decals on the door. (*Id.* at 19.)

occasions after its installation in 1999. In the summer of 2001, Besam fixed or replaced the door's safety devices. (*Id.* at Ex. 13.) In October 2001, Besam replaced the gearbox in the revolving door. (*Id.* at Ex. 14.) As part of Besam's contract with Marriott, a service technician performed a planned maintenance review of the door in March 2003. (*Id.* at Exs. 4, 15.) The technician concluded that there were no problems with the door. During the March 2003 inspection, the technician checked and cleaned all of the door's safety devices. (*Id.* at Ex. 15.) In May 2003, prior to Plaintiff's accident, Besam replaced the motor on the revolving door. (*Id.* at Ex. 16.) After Plaintiff's accident, Besam received no notification from Marriott that there was any problem with the safety sensors on the revolving door. (Bush Dep. at 116-18; Novella Dep. at 52.) In August 2003, a Besam service technician performed another planned maintenance review of the revolving door. (Weber Dep. at 114-15.) The door, including all of its safety sensors, was working properly at the time of the August 2003 planned maintenance. (*Id.* at 115.) In January 2005, a service technician performed a planned maintenance review of the revolving door and determined that the presence sensors and door leaves were inoperable. (Bush Dep. at 37; Doc. No. 18 at Ex. 17.) He concluded that a third party had disabled the safety devices. (Bush Dep. at 38.)

B. Procedural History

Plaintiff filed the instant Complaint in February 2004. (Doc. No. 1.) The Complaint alleges four counts: (1) negligence against both Defendants (Compl. ¶¶ 15-18); (2) strict liability against Defendant Besam (*id.* ¶¶ 19-20); (3) breach of warranty against Defendant Besam (*id.* ¶¶ 21-25); and (4) *res ipsa loquitur* against both Defendants (*id.* ¶¶ 26-27). On July 22, 2004, we issued a Scheduling Order which required Plaintiff to provide expert reports to Defendants on or

before September 22, 2004. It also established a discovery deadline of November 22, 2004. (Doc. No. 9.)

On November 24, 2004, at Plaintiff's request, we issued a second Scheduling Order which required Plaintiff to provide expert reports to Defendants on or before January 3, 2005, and set a discovery deadline of February 22, 2005. Plaintiff's Motion to Extend the Discovery Deadline stated that additional time is needed, in part, so that Plaintiff's expert can "review all of the documents requested and [] *inspect the revolving doors in Washington* before providing an expert report." (Doc. No. 12 ¶ 8 (emphasis added).) Despite granting Plaintiff additional time in which to conduct discovery, Plaintiff did not provide Defendants with the report of her expert until March 15, 2005, more than two months after the deadline for the exchange of Plaintiff's expert reports, after the close of discovery, and after Defendants had filed their Motions for Summary Judgment.[8] After conference with counsel, we permitted the late filing of the expert's report and permitted Defendants to depose Plaintiff's expert. (Doc. No. 27.)

After deposing Plaintiff's expert, Defendants filed supplemental summary judgment briefs and *Daubert* motions to preclude Plaintiff's expert from testifying. On August 16, 2005, we held a *Daubert* hearing to further develop the evidentiary record on the issues related to Plaintiff's expert testimony. (Doc. No. 51.) At Defendants' request, we permitted all parties to file supplemental briefs regarding the issues raised in the *Daubert* hearing.

[8]On March 1, 2005, Defendants sought summary judgment on all counts of Plaintiff's Complaint. (Doc. Nos. 15, 16.) The expert report is dated March 14, 2005. (Doc. No. 18 at Ex. 1.)

II. LEGAL STANDARD

Summary judgment is appropriate "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." Fed. R. Civ. P. 56(c). A genuine issue of material fact exists only when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The party moving for summary judgment bears the initial burden of demonstrating that there are no facts supporting the nonmoving party's legal position. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986). Once the moving party carries this initial burden, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (explaining that the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts"). "The nonmoving party . . . 'cannot rely merely upon bare assertions, conclusory allegations or suspicions' to support its claim." *Townes v. City of Phila.*, Civ. A. No. 00-CV-138, 2001 U.S. Dist. LEXIS 6056, at *4 (E.D. Pa. May 11, 2001) (quoting *Fireman's Ins. Co. v. DeFresne*, 676 F.2d 965, 969 (3d Cir. 1982)). Rather, the party opposing summary judgment must go beyond the pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324. When deciding a motion for summary judgment, the court must view facts and inferences in the light most favorable to the nonmoving party. *Anderson*, 477 U.S. at 255; *Siegel Transfer, Inc. v.*

Carrier Express, Inc., 54 F.3d 1125, 1127 (3d Cir. 1995). We will not resolve factual disputes or make credibility determinations. *Siegel Transfer, Inc.*, 54 F.3d at 1127.

III. LEGAL ANALYSIS

A. Plaintiff's Proffered Expert

In order to decide Defendants' motions for summary judgment we must first address Defendants' *Daubert* motions. Plaintiff offers the expert testimony of Ronald J. Panunto ("Panunto"), P.E., C.F.E.I., of Dawson Engineering, Inc., in support of her claims against Defendants Besam and Marriott. Defendants contend that under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), Panunto should be precluded from offering any expert testimony.

Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702. "Rule 702 embodies a trilogy of restrictions on expert testimony: qualification, reliability and fit." *Schneider v. Fried*, 320 F.3d 396, 404 (3d Cir. 2003). A plaintiff must establish by a preponderance of the evidence that an expert is qualified and that the expert's testimony is admissible. *Daubert*, 509 U.S. at 593 n.10.

In making a determination as to whether an expert is qualified to give testimony, Rule 702 requires that the witness have specialized knowledge regarding the proffered area of

testimony. *Elcock v. Kmart Corp.*, 233 F.3d 734, 741 (3d Cir. 2000). An expert witness must, at a minimum, "'possess skill or knowledge greater than the average layman.'" *Id.* (quoting *Waldorf v. Shuta*, 142 F.3d 601, 625 (3d Cir. 1998)). However, the Third Circuit interprets this qualifications requirement liberally, providing "that 'a broad range of knowledge, skills, and training qualify an expert.'" *Schneider*, 320 F.3d at 404 (quoting *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 741 (3d Cir. 1994)); *see also In re TMI Litig.*, 193 F.3d 613, 664 (3d Cir. 1999) (citing *Paoli*, 35 F.3d at 749-50); *Holbrook v. Lykes Bros. S.S. Co.*, 80 F.3d 777, 782 (3d Cir. 1996) (holding that "it is an abuse of discretion to exclude testimony simply because the trial court does not deem the proposed expert to be the best qualified or because the proposed expert does not have the specialization that the court considers most appropriate").

When the qualification threshold is satisfied, the Federal Rules of Evidence "assign to the trial judge the task of ensuring that an expert's testimony . . . rests on a reliable foundation." *Daubert*, 509 U.S. at 597; *see also United States v. Mitchell*, 365 F.3d 215, 234 (3d Cir. 2004); *Oddi v. Ford Motor Co.*, 234 F.3d 136, 145 (3d Cir. 2000).[9] In assessing the "reliability" of the testimony, a court should consider:

> (1) whether a method consists of a testable hypothesis; (2) whether the method has been subjected to peer review; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; (5) whether the method is generally accepted; (6) the relationship of the technique to methods which have been established to be reliable; (7) the qualifications of the expert witness testifying based on the

[9]*Daubert*'s general principles apply to both scientific expertise and technical knowledge. *Mitchell*, 365 F.3d at 234 (citing *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 149 (1999)); *see also Kumho Tire Co.*, 526 U.S. at 141 ("*Daubert*'s general holding—setting forth the trial judge's general 'gatekeeping' obligation—applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge.").

> methodology;[10] and (8) the non-judicial uses to which the method has been put.

Oddi, 234 F.3d at 145 (citing *Paoli*, 35 F.3d at 742 n.8). A court has the discretion to consider other additional factors and to determine whether all of these designated factors must be considered in every case. *Elcock*, 233 F.3d at 746.

Finally, to be admissible under Rule 702, the expert's testimony must also be relevant and must assist the trier of fact. *Daubert*, 509 U.S. at 587-88, 595*; Schneider*, 320 F.3d at 404; *Paoli*, 35 F.3d at 743. "Admissibility thus depends in part upon 'the proffered connection between the scientific research or test result to be presented and particular disputed factual issues in the case.' This standard is not intended to be a high one . . . ." *Oddi*, 234 F.3d at 145. Federal Rule of Evidence 402 provides that all relevant evidence generally is admissible. Fed. R. Evid. 402. The Federal Rules of Evidence define relevance as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401.

1. Admissibility of Panunto Testimony Regarding Plaintiff's Negligence Claims

Plaintiff offers Panunto's testimony to support her negligence claims against both Besam and Marriott. Defendants argue that Panunto should not be allowed to testify as an expert regarding Plaintiff's negligence claims because he is not qualified and his testimony is unreliable. We will exclude Panunto's expert testimony regarding Plaintiff's negligence claims because the

[10]Under Rule 702, the issue of whether an expert is qualified is analytically distinct "from the more finely textured question whether a given expert's qualifications enhance the reliability of his testimony." *Mitchell*, 365 F.3d at 242.

testimony is not based on sufficiently reliable research methods and because it would not assist the jury.

Panunto based his expert opinion on his review of various discovery materials regarding both the automatic revolving door at the Hotel and Plaintiff's accident. (Doc. No. 29 at Ex. B; Panunto Dep. at 46; Tr. 8/16/05 at 19, 58.) After reviewing these materials, he concluded that each Defendant acted negligently in failing to ensure that the revolving door was properly inspected.[11] In this particular case, forming an expert opinion by mere reliance on the discovery materials does not constitute a sound methodology.[12] *Bethea v. Bristol Lodge Corp.*, Civ. A. No. 01-612, 2002 U.S. Dist. LEXIS 24411, at *16-17 (E.D. Pa. Dec. 18, 2002) (excluding proffered expert testimony where expert's "analysis appear[ed] to be no more than his instinctive reaction to the materials provided"). Instead of conducting his own independent investigation, Panunto merely relies on documents provided to him by Plaintiff's counsel. Panunto never inspected the subject door or its safety devices and has no knowledge concerning the condition of the revolving door on the day that Willis sustained her injuries. (Tr. 8/16/05 at 40.) Panunto does not even attempt to exclude other causes of Plaintiff's accident and, in fact, concedes that Willis herself may have caused the accident. Panunto testified that, "walking with a cane, it just might have been more prudent for [Plaintiff] to use one of the side doors" and that Plaintiff could have been "distracted at the time of her accident." (Panunto Dep. at 92.; Tr. 8/16/05 at 104.)

---

[11]Panunto's expert report details all of the opinions that he would express if he were called as an expert witness in this matter and contains all of the grounds for his conclusions. (Panunto Dep. at 43.)

[12]Methodology is defined as a "body of methods, rules, and postulates employed by a discipline: a particular procedure [or] set of procedures." *Oddi*, 234 F.3d at 157 n.20 (internal quotation omitted).

Panunto also concedes that the safety sensors could have been working properly just prior to Plaintiff using the door on May 18th. (*Id.* at 100.) In addition, Panunto never measured the speed of the door or the force that it exerts when it comes in contact with a person or an object. (*Id.* at 60-61.) As a result, he cannot say with any degree of certainty that the force of the moving door would have been sufficient to knock Plaintiff to the floor. Finally, Panunto never inspected or tested any similar automatic revolving door or safety devices. (Tr. 8/16/05 at 63-64, 86-87.)

Panunto's conclusions that Plaintiff's injuries were caused by Defendants' conduct does not derive from any testable hypothesis. The conclusions that Panunto draws from his review of the discovery materials are pure speculation and conjecture. "An 'expert's opinion must be based on the methods and procedures of science rather than on subjective belief or unsupported speculation.'" *Oddi*, 234 F.3d at 158 (quoting *Paoli*, 35 F.3d at 742); *see also Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 319 (7th Cir. 1996) ("[T]he courtroom is not the place for scientific guesswork, even of the inspired sort. Law lags science; it does not lead it. There may be evidence to back up [the expert's] claim, but none was presented to the district court."). Since an expert's "conclusions and methodology are not entirely distinct from one another," *Montgomery County v. Microvote Corp.*, 320 F.3d 440, 448 (3d Cir. 2003), a "court may conclude that there is simply too great a gap between the data and the opinion proffered." *Gen. Elec. v. Joiner*, 522 U.S. 136, 146 (1997).

In *Oddi v. Ford Motor Co.*, the Third Circuit affirmed a district court's exclusion of expert testimony as to the cause of an automobile accident based upon *Daubert*. In affirming the district court, the Third Circuit placed great emphasis on the fact that the plaintiff's expert never tested his theory and did not perform tests or experimentation to support his conclusions. As the

court explained,

> Essentially [the expert's] opinion . . . is based on nothing more than his training and years of experience as an engineer. Although there may be some circumstances where one's training and experience will provide an adequate foundation to admit an opinion and furnish the necessary reliability to allow a jury to consider it, this is not such a case . . . . [The expert's] *ipse dixit* does not withstand *Daubert* scrutiny.

Oddi, 234 F.3d at 158; *see also Pappas v. Sony Elecs., Inc.*, 136 F. Supp. 2d 413, 426 (W.D. Pa. 2000) ("If *Daubert* and its progeny require anything, it is that plaintiffs come forward with proof of a valid methodology based on more than just the *ipse dixit* of the expert.").

In this case, Panunto does not support his conclusions through any generally accepted methodology. Panunto conducted no tests, did not examine the subject door, never examined any similar door, and had no experience with the safety devices on the subject door. He used little, if any, methodology beyond his own intuition. *Oddi*, 234 F.3d at 158. Panunto's *ipse dixit* does not withstand *Daubert* scrutiny.

Interestingly, Panunto concludes that Marriott disabled the safety devices on the revolving door after Besam performed work on the door on May 15, 2003, and then reconnected them before Besam returned to conduct a planned maintenance inspection on August 29, 2003. Instead of advancing a theory which would explain how the negligence of either party caused Plaintiff's injuries, Panunto devises a competing theory to explain Willis's accident. According to Panunto, Plaintiff fell because Marriott intentionally disabled the safety devices on the revolving door. At his deposition, Panunto testified that "when Ruth Willis was hit by the door, it was an indication that the sensors were not working." (Panunto Dep. at 51.) Similarly, the fact that Plaintiff was pushed across the floor suggests that the force-sensitive door leaves were

inoperable. (*Id.* at 70.) Because Besam's maintenance records reflect that there were no problems with either the door's mid-door presence sensors or door leaves, Panunto concluded that they must have been intentionally disabled by Marriott. (*Id.* at 51, 54, 72; Tr. 8/16/05 at 40, 66.) In reaching this conclusion, Panunto relied on three instances of asserted unauthorized work on the door, two in 2001 and one in 2005.[13] (Tr. 8/16/05 at 40.) He testified that "it's highly unlikely" that all of the safety systems would fail simultaneously. (*Id.*) Panunto's expert report explains that "[t]he disconnecting of the safety devices by Marriott would explain the occurrence of Ms. Willis' accident. The failure of both the mid-door presence sensors and the force-sensitive door leaves is more likely a result of an intentional act than coincidence." (Doc. No. 28 at Ex. B.) Panunto testified that the intentional conduct constituted criminal activity. (Tr. 8/16/05 at 84.) Plaintiff's Complaint pursues a negligence claim and does not assert that Marriott committed an intentional tort. *See Anderson v. United States*, Civ. A. No. 01-0016-LFO, 1992 U.S. Dist. LEXIS 7443, at *4-5 (D.D.C. May 18, 1992) (dismissing complaint because plaintiff alleged negligent, and not intentional, conduct).

While Panunto testified that he believes that Marriott disconnected the safety devices because they were a nuisance, he offers no evidence to support this belief. (Tr. 8/16/05 at 69-70; Panunto Dep. at 53-54.) Moreover, there is no evidence in this record that the safety devices were disconnected after Besam serviced the door on May 15, 2003, but before Plaintiff's May 18, 2003 accident. (*Id.* at 98.) In addition, there is no evidence that the door did not work properly

[13]Besam's service records indicate that in June 2001, a "third party" performed unauthorized work on the door. In October 2001, someone performed unauthorized work on the gearbox. In January 2005, the mid-door sensor and the force sensitive door levers were disconnected by someone without authority.

between May 18th and August 2003 when the planned maintenance found absolutely nothing wrong with the door or the sensors. Panunto's theory is not based on a methodology which can be readily tested or subjected to peer review. Instead, Panunto provides the Court with "nothing more than subjective belief" that the accident happened, there had been unauthorized work done on the door, and therefore Defendants must have been negligent or guilty of criminal conduct. *Wartsila NSD N. Am., Inc. v. Hill Int'l, Inc.*, 299 F. Supp. 2d 400, 407 (D.N.J. 2003) (excluding proffered expert testimony as being unreliable).

In addition, Panunto's qualifications do not enhance the reliability of his proffered testimony. Panunto has a degree in electrical engineering, is a licensed electrical engineer, and has practical experience in electrical engineering.[14] However, he has never designed, installed, or serviced an automatic revolving door, nor has he ever designed, installed, or repaired any sensor components for an automatic revolving door. (Tr. 8/16/05 at 63, 85.) Since he was not familiar with automatic revolving doors prior to this case, Panunto has no specialized knowledge or experience relating to the operation or maintenance of the automatic revolving door. *Silva v. Am. Airlines, Inc.*, 960 F. Supp. 528, 531 (D.P.R. 1997) (precluding proffered expert testimony from individual who had never previously served as an expert regarding aircraft design because "an expert must have specific knowledge, not mere capacity to acquire knowledge"). Consequently, Panunto's background in electrical engineering adds little to the reliability of his conclusions in this matter. *Mitchell*, 365 F.3d at 242. Furthermore, Panunto's proffered testimony would not

[14]Panunto received a bachelor of science degree in electrical engineering from Drexel University and has been a registered electrical engineer since 1971. (Doc. No. 29 at Ex. B; Panunto Dep. at 10, 32-33.) He is currently the President of Dawson Engineering, Inc. (Doc. No. 29 at Ex. B.)

assist the jury in understanding or determining a fact in issue because his theories are not based on science or engineering. Plaintiff argues that "[o]ne need not be an automatic door maven to reach this opinion [that the mid-door presence sensor malfunctioned], which is based on the facts in the record, simple logic, and clear reasoning." (Doc. No. 55 at 3.) This is precisely the point. One does not need an engineering degree to reach the conclusion reached by Panunto. Permitting Panunto to testify as an expert in support of Plaintiff's negligence claims would allow too great of an analytical gap between his review of the data and the conclusion that he reached.

2. Admissibility of Panunto Testimony Regarding Defective Design Claim

Plaintiff also seeks to rely on Panunto's testimony to support her defective design claim against Besam. Specifically, Plaintiff contends that the revolving door was defectively designed because it lacked a handicap speed actuation device. (Doc. No. 20 at 10.)

Panunto's testimony concerning defective design must be excluded because it does not rest on a reliable foundation. Panunto states in his expert report that Besam

> should have equipped the revolving doors with a slow speed actuation device, operated by push button, which could slow down the doors for one revolution. This device was manufactured by Besam. This device is easy to use, causes no inconvenience to others, and would have slowed down the doors sufficiently to prevent this accident. The doors were defective and unreasonably dangerous without this safety device.

(Doc. No. 28 at Ex. B., p. 5.) Panunto did not conduct any tests or provide any analysis of alternative revolving door designs. *See Milanowicz v. Raymond Corp.*, 148 F. Supp. 2d 525, 535 (D.N.J. 2001) (explaining that "the absence of testing is a consistent factor in court decisions excluding expert testimony" in defective design cases). Panunto also did not visit the Hotel to inspect the revolving door or to inspect the available handicapped entrances on each side of the

revolving door. In addition, he does not address the extent to which other manufacturers in the industry equipped automatic revolving doors with slow speed actuation devices when Besam installed the door in 1999.[15] Instead, Panunto relies on a standard issued by the American National Standards Institute[16] ("ANSI") which required all doors to have a handicap speed actuation device. However, this ANSI standard was not in effect when Besam installed the door in August 1999 nor at the time of Plaintiff's accident. (Tr. 8/16/05 at 77.) Rather, the standard was issued in 2003 after Plaintiff's accident. (*Id.* at 43-44.) Furthermore, Panunto fails to address the question of whether the magnitude of the danger of the revolving door's movement outweighed the costs of avoiding the danger through the use of a handicap speed actuation device. *Westinghouse Elec. Corp. v. Nutt*, 407 A.2d 606, 611 (D.C. 1979) ("[E]vidence of a design alternative, by itself, is not sufficient to impose liability on the manufacturer.") This failure is especially significant when one considers the fact that there were alternative doors available to guests of the Hotel on each side of the revolving door which were equipped with handicap speed automatic door openers.

In addition, Panunto's intuition about the importance of a slow speed actuation device is not expert opinion that will assist the trier of fact. When asked about the engineering principles that he relied on in arriving at his opinion regarding this safety device, Panunto stated: "I don't know that you need an engineering principle, it's fairly—it's common sense that—that elderly

---

[15]Industry practice is an important indicia of reliability. *Milanowicz*, 148 F. Supp. 2d at 533. The failure of an expert to address the issue of industry practice undermines testimony concerning alternative design. *Id.*

[16]ANSI provides "detailed design standards which reflect systematic testing and safety certification." *Milanowicz*, 148 F. Supp. 2d at 533.

people walk slower than younger people. And . . . it's not fair to expect that one door speed meets the walking speed . . . of every type of individual." (Tr. 8/16/05 at 43.) "Generalized common sense does not rise to the level of expert opinion simply because it is offered by someone with an academic pedigree." *Fedor v. Freightliner, Inc.*, 193 F. Supp. 2d 820, 832 (E.D. Pa. 2002); *see also Salem v. U.S. Lines Co.*, 370 U.S. 31, 35 (1962); *Bethea*, 2002 U.S. Dist. LEXIS 24411, at *23. Panunto's testimony concerning design defect lacks reliability and would not assist the jury.

3. Admissibility of Panunto Testimony Regarding Failure to Warn Claim

Plaintiff also seeks to rely on Panunto's testimony to support her failure to warn claim against Besam. Besam seeks to exclude Panunto's testimony on the failure to warn issue because he is not qualified and his proffered testimony is not reliable. We agree that Panunto's proffered expert testimony regarding Defendant Besam's purported failure to warn must be excluded.

In his expert report, Panunto notes that "Besam should have manufactured, sold, and installed these revolving doors with the warning signs diverting those with ambulatory difficulties to the swinging doors; without these signs, the doors were defective and unreasonably dangerous." (Doc. No. 28 at Ex. B, p. 5.) Evidently, Panunto feels that the yellow "Automatic Door – Caution" decals are not sufficient. Panunto testified at the *Daubert* hearing that "[w]hat I've seen currently on a lot of revolving doors . . . is a sign to the effect that the doors move quickly, indicating that . . . if you can't move as quickly as that door, you'd better use . . . another method of ingress and egress." (Tr. 8/16/05 at 48.) Panunto's opinion regarding the warning signs that should have been on the revolving door seems to be derived primarily from warning

signs that he has seen on other automatic revolving doors in 2005. Such expert testimony would provide little assistance to the jury.

Panunto suggests that one of the following types of warnings should be on the revolving door: (1) "[a]n indication that the revolving doors move quickly and that a person that—hotel guests that move more slowly because of some sort of an incapacity or age, would be—would be recommended that they use one of the side doors designed for handicap personnel" (Panunto Dep. at 116); (2) "slower moving customers or . . . infirm customers should use the doors, the handicapped doors to either side of the revolving door" (Tr. 8/16/05 at 48); or (3) "automatic door, revolves quickly, . . . slower customers use doors on the side"[17] (*Id.* at 77). However, Panunto did not create or design a specific warning sign that he believes would be appropriate or effective. *Milanowicz*, 148 F. Supp. 2d at 541 (citing *Jaurequi v. Carter Mfg., Inc.*, 173 F.3d 1076, 1084 (8th Cir. 1999)). Moreover, Panunto lacks the requisite qualifications to testify regarding appropriate warnings for an automatic revolving door. His testimony and his curriculum vitae reveal no expertise on this subject. (Tr. 8/16/05 at 64.) Panunto's lack of qualifications in this area seriously undermines the reliability of any testimony that he might offer. His testimony regarding warnings does not pass muster under the Federal Rules of Evidence and *Daubert*.

[17]None of these suggested warnings were included in Panunto's expert report and he has offered no specific warnings.

B. Negligence Claims – Summary Judgment

1. Defendant Besam

To show negligence on the part of a defendant, a plaintiff bears the burden of proving what standard of care applies to a defendant's conduct, a deviation from that standard of care, and a causal connection between that deviation and the plaintiff's injury. *District of Columbia v. Chinn*, 839 A.2d 701, 706 (D.C. 2003).[18] Plaintiff alleges that Defendant Besam is liable for her injuries based upon a theory of negligent maintenance because it failed to provide Marriott with a daily inspection checklist for the automatic revolving door and failed to ensure that Marriott conducted appropriate daily inspections.[19] (Doc. No. 20 at 7.) To establish negligent maintenance, a plaintiff must show: (1) the cause of the revolving door malfunction; (2) the defendant's prior knowledge of the condition; and (3) the defendant's failure to act with reasonable care to correct it. *See Westinghouse Elec. Corp.*, 407 A.2d at 612 n.7. Plaintiff fails to satisfy any of these elements. Plaintiff offers no evidence as to what was actually wrong with

[18]In a diversity case such as this, the district court must determine which state's substantive law will govern. To make this determination, we apply the conflict of law rules of the forum state. *Kirschbaum v. WRGSB Assocs.*, 243 F.3d 145, 150 (3d Cir. 2001). Pennsylvania's choice of law analysis incorporates elements of both the "government interest" and "significant relationship" tests. *Id.* at 151. We agree with the parties that the substantive law of the District of Columbia governs this case.

[19]Under the terms of the Planned Maintenance Agreement, the Hotel must use a safety checklist to conduct a daily inspection of the revolving door. (Doc. No. 18 at Ex. 4.) Completing the safety checklist on a daily basis helps the owner of the revolving door to promptly report any maintenance problems or operational problems to Besam. (Bush Dep. at 81; Weber Dep. at 107.) According to Marriott, Besam did not provide it with a safety checklist and never advised the Hotel to perform daily inspections of the revolving door. (Novella Dep. at 13, 17.) Nicholas R. Novella, assistant director of engineering at the Hotel, never asked Besam for a daily inspection checklist. (*Id.* at 9, 13.) The Hotel did not conduct any routine safety inspections of the revolving door because Besam told Marriott "not to touch the door." (*Id.* at 16-17, 64.)

the revolving door when she used it to exit the Hotel on May 18, 2003. Plaintiff also fails to show that Besam had prior knowledge of a revolving door malfunction involving the door's safety sensors and that Besam failed to act with reasonable care to correct any such problem. As the court observed in *Bell v. May Department Stores Co.*, 866 F.2d 452 (D.C. Cir. 1989), a case involving elevator doors that closed on plaintiff, "the defect, if any, could have occurred mere seconds before the injury, leaving defendants no time in which to discover and correct the problem." *Id.* at 457.

As part of Besam's contract with Marriott, a service technician performed a planned maintenance review of the door in March 2003. This was just two months before this accident. (Doc. No. 18 at Exs. 4, 15). The technician concluded that there were no problems with the door. During that inspection, the technician checked and cleaned all of the door's safety devices. (*Id.* at Ex. 15.) Under the Planned Maintenance Agreement, Marriott was "to notify Besam if an unsafe condition exists, to disable any door that is operating in an unsafe manner, and to provide Besam twenty four hour written notice of any accident, alteration or change affecting the equipment." (*Id.* at Ex. 4.) There is no evidence that Marriott ever contacted Besam regarding problems with any of the door's safety devices between the March 2003 planned maintenance and Plaintiff's May 2003 accident. (Bush Dep. at 116-17.) In fact, in May 2003, just prior to Plaintiff's accident, Besam replaced the motor on the revolving door. (Doc. No. 18 at Ex. 16.) There is no indication that there was any problem with the door's safety sensors at that time. (Bush Dep. at 125.) Absent a service call from Marriott, Besam could not have known about any problems with the revolving door when Plaintiff had her accident on May 18, 2003. Moreover, in August 2003, just three months after Plaintiff's accident, when Besam again

performed planned maintenance on the door, the door and all of the sensors were working properly. (Weber Dep. at 115.) We are satisfied that the evidence is not sufficient to support Plaintiff's negligent maintenance claim against Besam. Accordingly, we will grant summary judgment as to this claim.

2. Defendant Marriott

In order to recover against an owner or occupier of land under a negligence theory, a plaintiff must show that the owner or occupier of land "had actual or constructive notice of a dangerous condition that he failed to correct." *Croce v. Hall*, 657 A.2d 307, 310 (D.C. 1995). As mentioned above, Plaintiff offers speculation not evidence as to what was actually wrong with the revolving door when she used it to exit the Hotel on May 18, 2003. *See S. Kann's Sons Corp. v. Hayes*, 320 A.2d 593, 595 (D.C. 1974) ("Notice would only become relevant after a defective condition was shown so that notice of the defective condition would be probative of negligence."). Evidence of an injury-causing accident by itself is not evidence of negligence. *Id.*

Even if the condition of the revolving door somehow constituted a dangerous condition, Plaintiff offers no evidence that Marriott had actual notice of the dangerous condition before Plaintiff was injured. Plaintiff argues that Marriott had actual knowledge of inoperable safety sensors because it tampered with them prior to Besam service maintenance in 2001 and 2005. Plaintiff relies on this evidence to create the inference that Marriott's dismantling of the safety sensors caused the revolving door to hit Plaintiff on May 18, 2003. We will not permit a jury to engage in such rank speculation. As part of Besam's March 2003 planned maintenance on the door, Besam checked and cleaned all of the door's safety devices. They were working properly. (Doc. No. 18 at Ex. 15.) In May 2003, before Plaintiff's accident, Besam did work on the

revolving door. The sensors were working properly. In August 2003, only three months after Plaintiff's accident, Besam performed another planned maintenance of the door and concluded that the safety sensors were working properly. There is no evidence that between the May 2003 work and the August 2003 planned maintenance, the sensors did not operate properly. (Weber Dep. at 115.) Under these circumstances, the instances of unauthorized work in 2001 and 2005, are not sufficient to support Plaintiff's claim that Marriott had notice of a dangerous condition on May 18, 2003.

To establish constructive notice of a dangerous condition, a plaintiff must show that (1) the cause of the injury was foreseeable and (2) "the cause must have been present in the area where the injury occurred for a sufficient length of time that the property owner should have known about it." *Marinopoliski v. Irish*, 445 A.2d 339, 341 (D.C. 1982). Plaintiff offers no evidence that she fell because of a dangerous condition that Marriott should have known about and failed to correct. She offers only surmise. Under the circumstances, we are compelled to conclude that "there is no logical way that one can determine from the evidence in this case the proximate cause of the accident. The lack of evidence as to negligence and proximate cause leaves one to speculate as to what happened; this, the trier of fact is not permitted to do." *Hayes*, 320 A.2d at 595.

Under District of Columbia law, "the applicable standard for determining whether an owner or occupier of land has exercised the proper level of care to a person lawfully upon his premises is reasonable care under all of the circumstances." *Sandoe v. Lefta Assocs.*, 559 A.2d 732, 738 (D.C. 1989). Given the evidence that Marriott did not conduct routine inspections of the revolving door, a jury could conclude that Marriott breached a duty to inspect the door.

However, this evidence alone is not enough to allow Plaintiff's negligence claim to survive summary judgment because there is no evidence that Defendant's failure to inspect the revolving door caused Plaintiff's injury. As the court observed in *Bell*, the defect, if any, could have occurred just seconds before the incident.

Plaintiff argues that she should be permitted to invoke the doctrine of *res ipsa loquitur* as to her negligence claim against Marriott.[20] (Doc. No. 19 at 16.) *Res ipsa loquitur* is "[t]he doctrine providing that, in some circumstances, the mere fact of an accident's occurrence raises an inference of negligence so as to establish a prima facie case." Black's Law Dictionary 1311 (7th ed. 1999). Courts recognize that *res ipsa loquitur* "is a powerful doctrine which 'should be applied with caution in a negligence action so that the mere happening of an accident will not permit the inference of a defendant's liability.'" *Hailey v. Otis Elevator Co.*, 636 A.2d 426, 428 (D.C. 1994). The doctrine only applies:

> 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.

Restatement (Second) of Torts § 328D (1965); *see also Hailey*, 636 A.2d at 428. Plaintiff has the burden of showing "that the injury ordinarily does not occur when due care is exercised." *Quin v. George Wash. Univ.*, 407 A.2d 580, 583 (D.C. 1979) (noting that there must be a basis in the record or in common experience to warrant an inference of negligence); *see also Crenshaw v. Wash. Metro. Area Transit Auth.*, 731 A.2d 381, 383 (D.C. 1999).

---

[20]Even though Plaintiff's Complaint asserts that the doctrine of *res ipsa loquitur* applies to Besam as well, Plaintiff offers nothing to support the invocation of *res ipsa* as to that Defendant.

For Plaintiff to rely on *res ipsa loquitor*, she must offer evidence from which a layman can infer negligence as a matter of common knowledge or must present expert evidence that a particular accident does not occur absent negligence. *Quin*, 407 A.2d at 583-84; *see also Bell*, 866 F.2d at 456-58 (holding that *res ipsa loquitur* did not apply to accident involving automatic elevator). As the *Bell* court explained, "[R]eliance on *res ipsa loquitur* is recognized as an evidentiary tool to establish defendant's negligence in special circumstances; however, it requires more than mere speculation. 866 F.2d at 456. "[O]ne cannot rely on *res ipsa loquitur* if causes other than the defendant's negligence might just as well have produced the accident." *Id.* In *Crenshaw v. Washington Metropolitan Area Transit Authority*, the plaintiff argued that she was injured when she fell on an escalator and that the doctrine of *res ipsa loquitur* applied to her accident. 731 A.2d at 382. The District of Columbia Court of Appeals affirmed the trial court's conclusion that *res ipsa loquitur* did not apply because plaintiff had not provided any evidence, expert or otherwise, to show that negligence of the defendants could be inferred. *Id.* at 383. The *Crenshaw* court noted that, "[i]n fact, the undisputed evidence in this case was that the escalator was operating smoothly both before and after the alleged incident and that the escalator had been maintained in accordance with its maintenance schedule." *Id.* at 384. Here, too, the evidence shows that the revolving door's safety sensors were operable before and after the accident and that Besam performed appropriate maintenance on the door. (Doc. No. 18 at Ex. 15; Weber Dep. at 114-15.)

Plaintiff offers no admissible evidence that her accident is of a kind which ordinarily does not occur in the absence of negligence. At most, Plaintiff's expert opined that it was unlikely that all of the door sensors would malfunction at the same time. Plaintiff argues that "[a] person

would not ordinarily be knocked down by a revolving door in the absence of someone's negligence, where the door was equipped with a safety device to prevent this type of accident and the device was supposed to be regularly inspected." (Doc. No. 19 at 16.) Although this argument is appealing at first blush, it does not relieve Plaintiff of the burden of showing "that the injury ordinarily does not occur when due care is exercised."[21] *Quin*, 407 A.2d at 583 (citing *Harris v. Cafritz Mem'l Hosp.*, 364 A.2d 135, 137 (D.C. 1976)); *see also Crenshaw*, 731 A.2d at 383. In this case, the doctrine of *res ipsa loquitur* would improperly encourage the jury to speculate about "possibilities rather than weighing probabilities based on the evidence." *Hailey*, 636 A.2d at 429.

Additionally, Plaintiff does not eliminate other alternative causes for her fall. *See Hafferman*, 653 F. Supp. at 433 (quoting *Ford v. District of Columbia*, 190 A.2d 905, 906-07 (D.C. 1963)); Restatement (Second) of Torts § 328D cmt. i ("Where the evidence fails to show a greater probability that the event was due to the defendant's negligence than that it was caused by the plaintiff's own conduct, the inference of the defendant's responsibility cannot be drawn."). Plaintiff, with the assistance of her cane, chose to walk into the same revolving door compartment as her daughter.[22] (L. Lowry Dep. at 39; Willis Dep. at 51.) At some point before

[21]Even if Plaintiff is correct that Marriott failed to inspect the revolving door sometime prior to Plaintiff's accident and that the safety sensors were inoperable at the time of her injury, it does not follow that an inspection would have revealed inoperable sensors. The malfunction of the safety sensors could very well have occurred between the time of the inspection and Plaintiff's accident. *See Hafferman v. Westinghouse Elec. Corp.*, 653 F. Supp. 423, 433 (D.D.C. 1986) (holding that *res ipsa* doctrine was inapplicable to accident involving an elevator, in part, because "[a] defect could have arisen so closely to the occurrence of the accident that defendants would have had no opportunity to discover it").

[22]Plaintiff also decided to use the revolving door even though handicapped exits with speed actuation devices were available.

she was able to fully exit the door, the edge of the door struck her shoulder and she fell. This situation presents a multitude of possible responsible causes for the accident other than Marriott's asserted negligence. Evidence will be presented at trial that a revolving door may strike a person even if the safety sensors are operable. In his report, Besam's expert William S. Meyer, a professional engineer, stated that "it is possible under normal use and operation for the outer edge of a door wing to graze a pedestrian or for a wing panel to contact a pedestrian upon stopping after sensing their presence." (Doc. No. 17 at Ex. G, p. 3.) Moreover, the voluntary action or contribution by Plaintiff cannot be eliminated. *Hailey*, 626 A.2d at 428. It is also possible that there was a temporary malfunction of the sensors. Plaintiff has not attempted to rule out possible secondary causes. Therefore, "it would be sheer speculation to conclude that the cause of the [accident] was due to the negligence of the defendant," *Bell*, 866 F.2d at 457. Plaintiff may not rely on the doctrine of *res ipsa loquitur* to prove her case.

C. Strict Liability Claim – Summary Judgment

A cause of action for strict liability in tort is available in the District of Columbia based on the Restatement (Second) of Torts § 402A.[23] *Hull v. Eaton Corp.*, 825 F.2d 448, 454 (D.C. Cir. 1987). To prevail under this theory, a plaintiff must prove by a preponderance of the evidence that: (1) the seller was engaged in the business of selling the product that caused the harm; (2) the product was sold in a defective condition that was unreasonably dangerous to the user; (3) the seller expected the product to reach the user without any substantial change from the

[23]Plaintiff's Complaint also seeks to pursue a strict liability claim under the Restatement (Second) of Torts § 402B, which establishes liability for a seller's material misrepresentation about a product. (Compl. ¶ 20.) Plaintiff points to no misrepresentation of a material fact that was made by Besam. Accordingly, we will not permit her to proceed with a strict liability claim under this provision of the Restatement.

condition in which it was sold; and (4) the defect caused plaintiff's injuries. *Word v. Potomac Elec. Power*, 742 A.2d 452, 459 (D.C. 1999) (citing *Warner Freuhauf Trailer Co. v. Boston*, 654 A.2d 1272, 1274 (D.C. 1995)). A plaintiff may establish that a product is defective because of its design, manufacture, or the failure of the seller to warn adequately of a risk related to the product's design.[24] *MacPherson v. Searle & Co.*, 775 F. Supp. 417, 422 (D.D.C. 1991).

1. Design Defect

In order to prevail on a theory of strict liability, the plaintiff must rely on expert testimony "when the subject presented is 'so distinctly related to some science, profession, business or occupation as to be beyond the ken of the average layman.'" *Hull*, 825 F.2d at 455 (quoting *District of Columbia v. White*, 442 A.2d 159, 164 (D.C. 1982)). The mechanics of an automatic revolving door involve design and engineering concepts that are beyond the ken of the average layman. *See Westinghouse Elec. Corp.*, 407 A.2d at 612 (trial court erred in submitting issue of

[24]Plaintiff's Complaint alleges liability under several strict liability theories. (Compl. ¶ 20.) However, in her Response to Defendant Besam's Motion for Summary Judgment regarding the strict liability claims and in her Trial Memorandum, Plaintiff seems to have abandoned her claim that Besam defectively manufactured the revolving door. (Doc. No. 20 at 10-11; Pl.'s Trial Mem. at 3.) Rather, Plaintiff argues that Defendant defectively designed the revolving door and that it failed to adequately warn users. (*Id.*) In any event, any strict liability claim based on defective manufacture of the revolving door must fail because Plaintiff has offered no evidence in support of this theory.

Plaintiff's Complaint also seeks to raise a claim for breach of warranty. However, in response to Besam's Motion for Summary Judgment regarding the warranty claim, she appears to have abandoned this claim as well. In any event, such a claim must be dismissed. *Dyson v. Winfield*, 113 F. Supp. 2d 35, 42 (D.D.C. 2000) ("[A] breach of warranty claim is not actionable in coordination with a products liability claim."); *see also Wainwright v. Wash. Metro. Area Transit Auth.*, 903 F. Supp. 133, 139 (D.D.C. 1995) ("Where there are no issues unique to warranty, a claim of strict liability in tort is effectively made out in a complaint for breach of warranty.").

negligent elevator design to jury because plaintiff offered no expert evidence regarding the feasibility of an alternative design).

Under District of Columbia law, a court should apply a risk-utility balancing test to determine whether a product has a design defect. *Boston*, 654 A.2d at 1276. A plaintiff "must 'show the risks, costs and benefits of the product in question and alternative designs,' and 'that the magnitude of the danger from the product outweighed the costs of avoiding the danger.'"[25] *Id.* (quoting *Hull*, 825 F.2d at 453). Plaintiff must offer expert testimony regarding the actual risk of the design used, the relative utilities of an alternative design, and the costs associated with adopting one design over another. *Hull*, 825 F.2d at 455. Plaintiff's expert offered no testimony on these subjects. He simply opined that Besam should have provided a speed actuation device on the door. And his opinion was based on an ANSI standard that was not adopted until after Plaintiff's accident. Absent proper evidence, the jury would be encouraged to engage in improper speculation about whether Besam should have provided a handicap speed actuation device on the door. *See id.* at 455. Since Plaintiff has failed to offer sufficient evidence to support her defective design claim, we will grant summary judgment to Besam.

2. Failure to Warn

Plaintiff also argues that Besam failed to warn users who were elderly or who had physical impairments that they should not use the revolving door. (Doc. No. 20 at 11.) To prevail under a failure to warn theory, a plaintiff must show that: (1) the defendant had a duty to warn because it knew or should have known about the risk of a reasonably foreseeable harm; (2)

[25]After the plaintiff satisfies his prima facie burden of production, the defendant must show that the benefits of the design outweigh its risks. *Boston*, 654 A.2d at 1277 n.11.

the defendant breached that duty; and (3) the breach was the proximate cause of the plaintiff's injury because the failure to provide an adequate warning was a substantial factor in causing the harm. *Fuller v. Chem. Specialties Mfg. Corp.*, 702 A.2d 1239, 1241 (D.C. 1997).

In this context, the manufacturer's duty is one of ordinary care. *MacPherson*, 775 F. Supp. at 422 (citing W. Page Keeton et al., Prosser and Keeton on Torts 697 (5th ed. 1984); *East Penn Mfg. Co. v. Pineda*, 578 A.2d 1113, 1118 (D.C. 1990)). In reviewing a plaintiff's claim of failure to warn, a court must answer "the threshold question as to whether a duty to warn exists." *Hull*, 825 F.2d at 454. Plaintiff has not established that Besam had a duty to provide warnings beyond placing the yellow "Automatic Door - Caution" decals on the door. Plaintiff has also failed to establish what additional warnings would be appropriate.

The record shows that despite Plaintiff's use of a cane to walk, she chose to use the Hotel's revolving door on several occasions before her accident, each without incident. This choice was made by Plaintiff notwithstanding the fact that on each side of the revolving door there were handicap accessible swinging doors that were marked as such. These doors were equipped with a speed actuation device.

Plaintiff has failed to offer proper evidence that a foreseeable risk existed that was sufficiently serious to give rise to a duty to provide warnings beyond those which it had already provided. Accordingly, Plaintiff's failure to warn claim must fail.

An appropriate Order follows.

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

RUTH E. WILLIS	:	
	:	CIVIL ACTION
	:	
v.	:	
	:	
	:	NO. 04-CV-0913
BESAM AUTOMATED ENTRANCE SYSTEMS, INC., ET AL.	:	

ORDER

AND NOW, this 3rd day of November, 2005, upon consideration of the Motion For Summary Judgment Of Defendant Marriott International, Inc. ("Marriott") (Doc. No. 15), (2) Motion For Summary Judgment Of Defendant Besam Automated Entrance Systems, Inc. ("Besam") (Doc. No. 16), (3) Marriott's Motion In Limine Or, In The Alternative, Request For A *Daubert* Hearing To Preclude The Testimony Of Ronald Panunto (Doc. No. 28), (4) Marriott's Supplemental Motion For Summary Judgment (Doc. No. 29), and (5) Besam's Motion In Limine Or, In The Alternative, Request For A *Daubert* Hearing To Preclude The Testimony Of Ronald Panunto, P.E. (Doc. No. 35), and all papers submitted in support thereof and in opposition thereto, it is ORDERED as follows:

1. Besam's Motion In Limine To Preclude The Testimony Of Ronald Panunto, P.E. is GRANTED; and

2. Marriott's Motion In Limine To Preclude The Testimony Of Ronald Panunto is GRANTED;

3. Defendant Besam's Motion For Summary Judgment is GRANTED;

4. Defendant Marriott's Motion For Summary Judgment and Supplemental Motion

For Summary Judgment are GRANTED;

5. Judgment is entered in favor of Defendants Besam Automated Entrance Systems, Inc. and Marriott International, Inc. and against Plaintiff Ruth E. Willis.

IT IS SO ORDERED.

BY THE COURT:

S:/R. Barclay Surrick, Judge