ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOHN B. ROBBINS, JUDGE

DIVISION I

CA 06-201

NOVEMBER 29, 2006

JAMES NEIGHBORS, III
APPELLANT

V.

DEATON, INC.
APPELLEE

APPEAL FROM THE FRANKLIN COUNTY CIRCUIT COURT, NORTHERN DISTRICT
[NO. CV-03-22]

HONORABLE JOHN S. PATTERSON, JUDGE

AFFIRMED

Appellant James Neighbors, III, appeals the entry of summary judgment against him by the Franklin County Circuit Court regarding a negligence action he filed against appellee Deaton, Inc., a trucking company. In the complaint filed on March 10, 2003, appellant alleged that he suffered personal injuries and property damage after he wrecked his vehicle on Interstate 40 near Ozark, Arkansas, on the morning of September 26, 2000. Appellant alleged that a tarp came off one of appellee's eighteen-wheel trucks, that appellant was unable to avoid the tarp in the left lane of the freeway, and that the tarp caused him to lose control of his vehicle and crash. Appellant asserted that the trucking company was negligent in failing to use ordinary care for the safety of others and that the tarp on the truck was

improperly secured.[1] Appellee filed an answer in which it denied that one of its trucks was being operated at or around the same time appellant was driving on Interstate 40, and it generally denied each and every material allegation of the complaint.

In August 2005, appellee moved for summary judgment, asserting that after discovery had taken place and appellant had been deposed, no party had knowledge of how a tarp came to be on or about Interstate 40 on the day of appellant's car accident. There was no quarrel that appellant's car had hit an object on the freeway, which appellant first believed to be an orange traffic barrel, but which he later believed was a tarp. There was no affidavit or deposition of the deputy who investigated the accident. However, the deputy prepared an accident report, which stated that his investigation "revealed the object to be a semi trailer tar[p] belonging to Deaton Inc." Appellee pointed to relevant responses to Requests for Admissions and relevant sworn testimony of appellant. Those evidentiary items showed that appellant did not recall ever seeing a Deaton truck that day, nor did appellant know how the tarp came to be on or near the freeway lane in which he was traveling. The tarp was not recovered or examined by any party to the lawsuit. Appellant stated that there was "no other explanation for the tarp being on the interstate than it fell from one of Defendant's trucks," which was the basis of his lawsuit.

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[1]Appellant also alleged that appellee failed to keep a proper lookout and failed to keep the truck under control on the road. Appellant, admittedly, could not present any evidence whatsoever to support those allegations because he did not see a Deaton truck on the road that day. Therefore, these two allegations in the complaint are not at issue on appeal.

Appellee asserted in its motion for summary judgment that to prove a negligence claim, appellant had the burden to prove that appellee owed a duty to appellant, that appellee breached that duty, and that appellant sustained damages that were proximately caused by the breach. Appellee asserted that appellant failed on all those requirements. Appellee stated that the mere fact that an accident occurred did not constitute evidence of negligence or fault on the part of anyone.

Appellant responded that the accident report provided evidence to show that he hit a tarp belonging to Deaton, Inc., and furthermore, appellant was attempting to acquire an affidavit from this deputy. Appellant added in his responsive brief that there was no other explanation for the tarp being on the Interstate other than it fell from one of Deaton's trucks.

There was no hearing on the motion for summary judgment. The trial court entered an order granting summary judgment to appellee. The one-paragraph order did not explain the basis for the ruling. A timely appeal followed.

Summary judgment should only be granted when it is clear that there are no genuine issues of material fact to be litigated, and the moving party is entitled to judgment as a matter of law. *Calcagno v. Shelter Mut. Ins. Co.*, 330 Ark. 802, 957 S.W.2d 700 (1997). The burden of sustaining a motion for summary judgment is the responsibility of the moving party. *Pugh v. Griggs*, 327 Ark. 577, 940 S.W.2d 445 (1997). Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.* We view the

evidence in the light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id*. Our review is not limited to the pleadings, as this court also focuses on the affidavits and other documents filed by the parties. *Wallace v. Broyles*, 331 Ark. 58, 961 S.W.2d 712 (1998); *Angle v. Alexander*, 328 Ark. 714, 945 S.W.2d 933 (1997). On appellate review, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of its motion leave a material fact unanswered. *Young v. Gastro-Intestinal Ctr.*, 361 Ark. 209, _ S.W.3d _ (2005). This court views the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Adams v. Arthur*, 333 Ark. 53, 969 S.W.2d 598 (1998).

No party disputes that appellant hit an object and wrecked his vehicle resulting in damages. Rather, the issue before the trial court was whether there was any evidence of appellee's negligence, meaning a duty and a breach of that duty. *See Sanford v. Ziegler*, 312 Ark. 524, 851 S.W.2d 418 (1993). Negligence is the failure to do something that a reasonably careful person would do; a negligent act arises from a situation where an ordinarily prudent person in the same situation would foresee such an appreciable risk of harm to others that he would not act or at least would act in a more careful manner. *Sanford v. Ziegler*, *supra*; *White River Rural Water Dist. v. Moon*, 310 Ark. 624, 839 S.W.2d 211 (1992). Foreseeability is a necessary ingredient of actionable negligence in this state. *Benson v. Shuler Drilling Co., Inc.*, 316 Ark. 101, 871 S.W.2d 552 (1994); *First Electric*

Coop. Corp. v. Pinson, 277 Ark. 424, 642 S.W.2d 301 (1982); *Dollins v. Hartford Acc. & Indem. Co.*, 252 Ark. 13, 477 S.W.2d 179 (1972). Arkansas law has long since recognized that there is no duty to guard against merely possible, as opposed to likely or probable, harm. *Ethyl Corp. v. Johnson*, 345 Ark. 476, 49 S.W.3d 644 (2001).

The issue of whether a duty exists is always a question of law, not to be decided by a trier of fact. *Hall v. Rental Mgmt., Inc.*, 323 Ark. 143, 913 S.W.2d 293 (1996). Defining the existence of a legal duty is emphatically a matter for the courts or the legislature to decide. *Young v. Gastro-Intestinal Ctr., Inc.*, __ Ark. __, __ S.W.3d __ (Mar. 24, 2005); *DeHart v. Wal-Mart Stores*, 328 Ark. 579, 946 S.W.2d 647 (1997); *Lawhon Farm Supply, Inc. v. Hayes*, 316 Ark. 69, 870 S.W.2d 729 (1994); *Catlett v. Stewart*, 304 Ark. 637, 804 S.W.2d 699 (1991); *Keck v. American Employment Agency, Inc.*, 279 Ark. 294, 652 S.W.2d 2 (1983). If the court finds that no duty of care is owed, the negligence count is decided as a matter of law. *Dunn v. Westbrook*, 334 Ark. 83, 971 S.W.2d 252 (1998); *Smith v. Hansen*, 323 Ark. 188, 914 S.W.2d 285 (1996). Duty is a concept that arises out of the recognition that relations between individuals may impose upon one a legal obligation for another. *Shannon v. Wilson*, 329 Ark. 143, 947 S.W.2d 349 (1997), *citing W. Prosser, Handbook on the Law of Torts*, § 42 at 244 (1971). If no duty of care is owed, summary judgment is appropriate. *Smith v. Hansen*, 323 Ark. 188, 914 S.W.2d 285 (1996).

Viewing the evidence and all reasonable inferences deducible therefrom in the light most favorable to the non-movant, we accept as true appellant's allegation that he hit a tarp

belonging to Deaton, Inc. on the day in question, and that he wrecked his car as a result of hitting the tarp. Appellant asserts in his brief that no party has any knowledge about the origins of the tarp, but that it "probably" came from appellee's truck. He concludes that a "jury could easily conclude Defendant was negligent and the tarp fell from one of Defendant's trucks. ... A tarp does not normally appear on the roadway all by itself."

The fact that an accident occurred is not, of itself, evidence of negligence on the part of anyone. *See Mahan v. Hall*, 320 Ark. 473, 897 S.W.2d 571 (1995); Arkansas Model Jury Instruction – Civil 603. The relevant question on appeal is whether appellant presented any evidence to support that appellee owed a duty to appellant and that appellee breached that duty. While a party may establish negligence by direct or circumstantial evidence, he cannot rely upon inferences based on conjecture or speculation. *Morehart v. Dillard Dep't Stores*, 322 Ark. 290, 908 S.W.2d 331 (1995). Conjecture and speculation, however plausible, cannot be permitted to supply the place of proof. *Glidewell v. Arkhola Sand & Gravel Co.*, 212 Ark. 838, 208 S.W.2d 4 (1948).

In Judge Cardozo's immortal words: "Negligence in the air, so to speak, will not do." *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 341, 162 N.E. 99, 99 (1928); *see also Hill v. Wilson*, 216 Ark. 179, 183, 224 S.W.2d 797, 800 (1949) ("There is no such thing as 'negligence in the air'. Conduct without relation to others cannot be negligent; it becomes negligent only as it gives rise to an appreciable risk of harm to others."). *Compare Mahan v. Hall*, 320 Ark. 473, 897 S.W.2d 571 (1995) (holding that summary judgment for defendant

producer of rodeo show was proper; boy standing near a gate was injured on his face by a bucking horse that broke through a gate; allegation that Hall owed the boy a duty to use ordinary care to prevent injuries to him did not survive summary judgment in the absence of any evidence to show that show's producer was negligent in some fashion).

In the present appeal, there is simply no evidence to support that appellee negligently allowed the tarp to be on or near the roadway; there is no evidence of how the tarp came to be on or near the roadway in Ozark, Arkansas that day; there is no evidence that a truck belonging to appellee was in or near the area that day. Appellant failed to meet proof on the elements of his cause of action – that appellee owed appellant a duty and, assuming it did, that appellee breached that duty.

Affirmed.

NEAL and CRABTREE, JJ., agree.