ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SARAH J. HEFFLEY, JUDGE

DIVISION IV

CA 07-663

April 9, 2008

JEFFREY VORSTER
APPELLANT

V.

CHARLES MAXWELL POST, PERSONAL REPRESENTATIVE OF THE ESTATE OF MARY ELIZABETH POST, DECEASED
APPELLEE

APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT
[NO. CV 05-16080]

HONORABLE JAMES MOODY, JR., JUDGE

AFFIRMED

Appellant Jeffrey Vorster appeals from an order finding that he take nothing on his complaint grounded in negligence against the estate of Mary Elizabeth Post, appellee. For reversal, appellant contends that the trial court erred by granting the estate's motion for summary judgment on the theory of res ipsa loquitur, and that the trial court erred in granting the estate's motion for a directed verdict on the claim of specific negligence. We affirm.

Mary Elizabeth Post and appellant were next door neighbors in the Capitol View area of Little Rock. At around 7:30 a.m. on March 1, 2004, Post's home exploded and was completely blown apart. Fire from the blast immediately engulfed appellant's home in flames. It, too, was a total loss. Ms. Post survived the explosion, but she suffered first, second, and third-degree burns over most of her body. She died three days later.

Appellant filed suit against Post's estate, claiming that Post's negligence caused the explosion.

Appellant also pled res ipsa loquitur in order to establish negligence. The estate moved for summary judgment. The trial court granted that motion as to res ipsa loquitur but denied it as to general negligence. However, at trial the court granted the estate's motion for a directed verdict at the conclusion of appellant's case.

Res Ipsa Loquitur

Summary judgment was granted on this issue, which calls to mind the familiar standards upon which we conduct our review. Summary judgment is to be granted by a trial court only 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. *Stolze v. Arkansas Valley Electric Cooperative Corp.,* 354 Ark. 601, 127 S.W.3d 466 (2003). The moving party is entitled to summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact. *Gafford v. Cox,* 84 Ark. App. 57, 129 S.W.3d 296 (2003). The burden of sustaining a motion for summary judgment is always the responsibility of the moving party. *Flentje v. First Nat'l Bank of Wynne,* 340 Ark. 563, 11 S.W.3d 531 (2000). All proof submitted must be viewed in the light most favorable to the party resisting the motion, and any doubts and inferences must be resolved against the moving party. *Nelms v. Martin,* ___ Ark. App. ___, ___ S.W.3d ___ (Sept. 26, 2007). On appeal, the reviewing court need only decide if the grant of summary judgment was appropriate based on whether the evidentiary items presented by the moving party left a material question of fact unanswered. *Id.*

Supporting the summary-judgment motion were the affidavits and deposition testimony of Steve Johnson and William Ford, both experts in the field of fire and explosion investigation. The trial court also considered the reports generated by the fire department inspector and Mr. Johnson. The following facts emerge from these sources of information.

Johnson and Ford were tasked with determining the cause of the explosion. However, their investigation was hampered by the sheer destructiveness of the blast, as well as the efforts of the fire department in extinguishing the fire. For instance, they could not distinguish between the pipes that were used to carry natural gas and those used to supply water. Given the force of the explosion, both experts opined that there was a substantial accumulation of natural gas caused by a leak of unknown origin. It was thought likely that most of the gas had accumulated in the crawlspace underneath the house for several reasons, including the fact that Post had not been asphyxiated.

Post had four gas appliances in her home: a floor furnace, a bathroom space heater, a stove, and a hot water heater located in the crawlspace. Each of these appliances was inspected and no obvious defects were detected. However, the inspection of the floor furnace was incomplete because the gas valve was not found in the debris. Additionally, the controls on the stove were in the "off" position, as was the valve to the space heater in the bathroom. The gas company had pressure-tested the line between the main and Post's meter and found no leak.

In his deposition, Johnson identified a number of possible sources of the leak, none of which were more likely than any other. He stated that he could not eliminate the possibilities that there was a failure at the gas range or the tubing routed to the range; that there was a failure at the space heater in the bathroom or the tubing routed to the space heater; that there was a failure at the floor furnace or the tubing that supplied the floor furnace; that there was a failure of the water heater or the tubing leading to the water heater; that there was a failure of the natural gas pipe routed inside the wall or attic; that there was a failure of the natural gas piping below the home; that there was a failure of the natural gas regulator because it had been removed by the gas company; that there was a failure of the gas pipe routed between the main and the meter; that natural gas had leaked into the ground and had leached and accumulated underneath the home; that the gas may have come from

a neighbor's home; that the gas piping may have been improperly secured or secured in such a manner that allowed for vibration, such as that caused by a washing machine; that there was damage to the piping or appliances under the home caused by repair work done one month before the explosion; that the termite company may have damaged the piping in an inspection two weeks before the explosion; or that cats or dogs may have gotten underneath the home and caused damage to the pipes.

Johnson and Ford were also of the opinion that the most probable source of ignition was a match struck by Post to light the heater in the bathroom. They arrived at this conclusion based on an anecdotal account of a neighbor who had spoken to Post when she was pulled from the fire. According to the neighbor, Post told her that she had gotten out of bed and tried to turn up the thermostat on the floor furnace but that it did not light. Reportedly, Post then went to the bathroom to light the space heater, and the explosion occurred when she lit a match.[1] Noting that the gas valve to the space heater was in the off position, it was said that it was proper technique to light a match, and then turn on the gas valve. Johnson and Ford also stated that natural gas is odorless and that a substance called Mercaptan is added to the gas to give it an odor, so that its presence can be detected by the sense of smell.

The origin and purpose of the doctrine of res ipsa loquitur were discussed by our supreme court in *Reece v. Webster,* 221 Ark. 826, 256 S.W.2d 345 (1953):

> The doctrine of res ipsa loquitur was developed to assist in the proof of negligence where the cause of an unusual happening connected with some instrumentality in the exclusive possession and control of the defendant could not be readily established by the plaintiff. The theory was that since the instrumentality was in the possession of the defendant, justice required that the defendant be compelled to offer an explanation of the event or be burdened with a presumption of

[1] As will be discussed, this was not the testimony at trial.

negligence.

Id. at 829, 256 S.W.2d at 347. This presumption is limited to situations where the defendant's negligence has been substantially proven. *Barker v. Clark,* 343 Ark. 8, 33 S.W.3d 476 (2000). The doctrine, when applicable, allows the jury to infer negligence from the plaintiff's evidence of circumstances surrounding the occurrence. *Phillips v. Elwood Freeman Co., Inc.,* 294 Ark. 534, 745 S.W.2d 127 (1988).

In order for the doctrine of res ipsa loquitur to apply, four essential elements must be established: (1) the defendant owes a duty to the plaintiff to use due care; (2) the accident is caused by the thing or instrumentality under the control of the defendant; (3) the accident that caused the injury is one that, in the ordinary course of things, would not occur if those having control and management of the instrumentality used proper care; and (4) there is an absence of evidence to the contrary. *Marx v. Huron Little Rock,* 88 Ark. App. 284, 198 S.W.3d 127 (2004). In addition, it must be shown that the instrumentality causing the injury was in the defendant's exclusive possession and control at the time of the injury. *Sherwood Forest Mobile Home Park v. Champion Home Builders Co.,* 89 Ark. App. 1, 199 S.W.3d 707 (2004).

In his argument on appeal appellant places great stock in the decision of *Megee v. Reed,* 252 Ark. 1016, 482 S.W.2d 832 (1972). In that case, Reed's car was damaged in a fire that started at two o'clock in the morning at Megee's repair shop. The cause of the fire was not known, but arson and electrical storms were ruled out as possible causes of the fire. Present in the area of the fire, however, were flammable liquids, rags, paint, and other vehicles containing gasoline along with a pilot light that had been left on. On these facts, the supreme court held that res ipsa loquitur applied because "these were instrumentalities in the exclusive control of the defendant as were the premises themselves; the accident was not due to the voluntary action on the part of the plaintiff; and the fire

was one which ordinarily does not occur in the absence of someone's negligence, absent some evidence that it was incendiary in nature." *Id.* at 1019, 482 S.W.2d at 835.

Appellant contends in his brief that the application of res ipsa loquitur is more compelling here than in *Magee* because in this case "there was uncontroverted evidence before the trial court that Ms. Post attempted to light her bathroom space heater which in turn ignited the natural gas in her home." This assertion, however, detracts from rather than supports applying the doctrine in the present matter. In *Reece v. Webster, supra,* a sixteen-year-old boy was fatally burned when he walked past a tractor that exploded and expelled burning gasoline onto his body. It was alleged that a sediment bulb in front of the tractor's motor had a defect that allowed gasoline to drip and that the dripping gasoline was ignited by the hot motor. Based on this evidence, the trial court refused an instruction on res ipsa loquitur. In affirming, the supreme court recognized that pleading an act of specific negligence may not prevent the application of the doctrine, but the court concluded that it did there because there was no suggestion of any other possible contributing factor to the explosion.

However, in the case of *Moon Distributors, Inc. v. White,* 245 Ark. 627, 434 S.W.2d 56 (1968), the defendant's wrecker was towing a dump truck that came unhitched, crossed the median, and struck the White vehicle, killing its occupants. As proof of negligence, it was alleged that the coupling mechanism on the wrecker was defective; that the driver of the wrecker was speeding; and that just before the accident the driver had swerved suddenly, causing the dump truck to fishtail before it became unhitched. On appeal, the supreme court upheld the submission of the case to the jury on res ipsa loquitur, even though specific acts of negligence were alleged, because the exact cause of the accident could not be proved with precision.

Appellant's argument brings this case more in line with the holding of *Reece v. Webster.*

Appellant faults Post for the single act of lighting a match in the presumed presence of natural gas. This is a specific act of negligence, and appellant has pointed to no other possible cause of the explosion. Thus, we conclude that this case is not suited for the application of res ipsa loquitur. Although this may not have been the basis for the trial court's grant of summary judgment, we can affirm a trial court's decision that is correct, albeit for a different reason. *Thomas v. Avant,* 370 Ark. 377, ___ S.W.3d ___ (2007) (holding that it is axiomatic that we can affirm a circuit court's decision if the right result is reached even if for a different reason).

There are other reasons for not applying res ipsa loquitur in this case. Fundamental to the application of the doctrine is the necessity that there must have been an inference of negligence on the part of the defendant as a proximate cause of injury. *Dollins v. Hartford Accident & Indemnity Co.,* 252 Ark. 13, 477 S.W.2d 179 (1972). The evidence presented for purposes of the summary-judgment motion indicated that the gas build-up was underneath the house. Thus it is purely speculative to say that Post had reason to know of any danger posed by striking a match. Conduct becomes negligent only as it gives rise to appreciable risk of injury to others, and there is no negligence in not guarding against a danger that there is no reason to anticipate. *Id.*

We also believe that the element of exclusive control was lacking. Although the gas company was said to have pressure-tested its line and found no leaks, the experts could not determine whether or not there was a failure of the gas regulator controlled by the gas company because the gas company had removed this equipment. There was also evidence that a plumbing company had recently performed repair work underneath the house. Res ipsa loquitur does not apply unless the conduct of third persons is sufficiently eliminated. *Gann v. Parker,* 315 Ark. 107, 865 S.W.2d 282 (1993). Moreover, it does not apply where an unexplained accident may be attributable to one of several causes, some of which the defendant is not responsible. *Williams v. Lauderdale,* 209 Ark. 418,

191 S.W.2d 455 (1946).

Directed Verdict

As with the issue of summary judgment, our standards of review with regard to the grant of a directed verdict are well established. A motion for a directed verdict should be granted only if there is no substantial evidence to support a jury verdict. *One Nat'l Bank v. Pope,* ___ Ark. ___, ___ S.W.3d ___ (Jan. 24, 2008). Where evidence is such that fairminded persons might reach different conclusions, then a jury question is presented, and the directed verdict should be reversed. *Id.* In determining the correctness of the trial court's ruling, we view the evidence in the light most favorable to the party against whom the verdict is sought and give it the highest probative value, taking into account all reasonable inferences deducible from it. *Little Rock v. Cameron,* 320 Ark. 444, 897 S.W.2d 562 (1995).

Appellant offered the testimony of two witnesses in an effort to establish Post's negligence. Havis Jacks was employed by the Little Rock Fire Department, and he investigated the explosion that damaged in some form or fashion an estimated twenty houses in the neighborhood. He said that the fuel for the explosion was natural gas, but he was not able to determine the source of the gas nor the reason for its ignition. He testified that "To say it was in the house, that was going to be kind of hard to say, too, because that is one of the things we couldn't determine. Gas migrates, and that's one of the problems we were having with it." Jacks explained that natural gas migrates because it is lighter than air. He also testified that "scrubbing" is a term used for when gas migrates and that scrubbing can eliminate the odor of Mercaptan, which is added to the natural gas to give it an odor. He was not able to say whether scrubbing had occurred.

Jacks found no defects in any of Post's appliances. He noted that the water heater had a thermocouple that would shut down the gas if the pilot light went out. He said that the stove had

pilot lights and that the controls for it were in the "off" position. The space heater in the bathroom did not have a pilot light but the valve was in the "off" position.

Charlotte Day testified that she and Post were close friends and neighbors. That morning, she heard the explosion, ran outside, and saw that Post's house was no longer there. Another neighbor carried Post out of the rubble, and Day held Post's hand while waiting for help to arrive. Post was able to speak to Day, and Post first commented that she "guessed" she would not be having eye surgery that was planned. Post lamented the loss of her books, but jokingly commented that she had just finished preparing her tax return. Day testified as follows as to what Post told her about the explosion, saying that Post said she had "gotten up, gone in, turned the thermostat up, went into the bathroom, she said, to light the heater. That was it."

Day further testified that Post had not complained of any problem with her sense of smell prior to the fire. She also stated that Post was conscientious about her home and its upkeep. Day recalled that Post had the floor furnace replaced in 2000 and that she had a plumber come out every spring to turn the heat off and that she would have the plumber return in the fall to inspect and relight the pilot light. In the weeks before the accident, the floor furnace had not come on and Post had called a plumber to check it. She said that the plumber found no leaks and offered no reason for it to have gone out. The plumber relit the pilot lights on the furnace, the stove, and the hot water heater.

It was on this evidence that the trial court directed a verdict against appellant, and we cannot disagree with that decision. Negligence is defined as the failure to do something that a reasonably careful person would do, or the doing of something that a reasonably careful person would not do, under the circumstances. *Ethyl Corp. v. Johnson,* 345 Ark. 476, 49 S.W.3d 644 (2001). When viewed in the appropriate light, the evidence shows that there was an accumulation of natural gas,

but the source of the gas and the ignition were undetermined. As ultimately revealed in the testimony, Post had merely gotten out of bed, turned up the thermostat, and then went into the bathroom to light the heater when the explosion occurred. There was no evidence that gas had permeated the living quarters of the home. There was also no evidence that Post actually attempted to light the space heater, such as by striking a match. The evidence in this case thus falls short of suggesting, even remotely, that Post did anything or failed to do something that caused the explosion. Because there was no substantial evidence to take the case to the jury, we affirm the decision to grant the estate's motion for a directed verdict.

Affirmed.

MARSHALL and BAKER, JJ., agree.