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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000451-MR

LAFAYETTE OWEN AND
PATRICIA OWEN APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 07-CI-010372

RAYMOND C. BISSMEYER AND
SUSAN BISSMEYER APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE, NICKELL, AND WINE, JUDGES.

MOORE, JUDGE: Lafayette and Patricia Owen appeal the Jefferson Circuit Court's order granting the motion for summary judgment filed by Raymond C. Bissmeyer and Susan Bissmeyer in this action for damages caused by a fire which

originated at the Bissmeyers' residence. After a careful review of the record, we affirm because the doctrine of *res ipsa loquitur* does not apply in this case.

I. FACTUAL AND PROCEDURAL BACKGROUND

On October 31, 2006, a fire started on the porch of the Bissmeyers' house and caused damage to the house next door, which was owned by the Owens. According to the Louisville Fire Department's report, it was "determined that Halloween decorations on the front porch area [of the Bissmeyers' house had] ignited/shorted out causing a fire." Additionally, Susan Bissmeyer's statement was taken following the incident, in which she said that

> she believed the fire was caused by Halloween ornaments she had plugged in on the porch. She stated that there was nothing else on the porch that could have started a fire. She stated she had several electrical pumpkins sitting around a table near the front door that were all plugged into a large extension cord. That cord was plugged into an outlet located on the front of the dwelling.

The incident report written by Sergeant John Griffith, of the Louisville Fire Department's Arson Bureau, stated:

> Excavation of the porch area showed the remains of several electrical items that appeared to have been once plugged into an outlet located in the south exterior wall near the front door. Several strands of wiring were found running under a metal table sitting in front of the door. Another run of wiring was found going to the east side of the porch and may have supplied a spotlight found in that part of the porch remains. A "V" pattern was found on the exterior wall that was heaviest near the central section of the porch around the general area of the electrical components. The fire spread from the porch area, up the exterior wall into the first and second floor causing heavy

> fire damage. The fire also communicated to the exterior siding of the two dwellings on either side. A limited fire scene examination had to be done due to the structural stability of the building.

The deposition of Lafayette Owen was taken, and Mr. Owen testified that it was his belief that the Bissmeyers had improperly used Halloween lights and an extension cord outside on a windy, rainy night, when the lights and cord were graded only for indoor use, so they shorted out. Mr. Owen opined that he believed the improper use of the lights and cord was the cause of the fire. However, when questioned, Mr. Owen admitted that he did not know if the lights and extension cord were made for indoor or outdoor use, and he had not spoken to an expert witness regarding the case, nor had he retained anyone to conduct an investigation. Rather, his knowledge of the fire was based entirely on Sergeant Griffith's incident report and on the transcribed version of Mrs. Bissmeyer's statement. Therefore, Mr. Owen had no proof that the lights and cord were being used improperly, or that the Bissmeyers' porch was wet from the rain, so his allegations were based purely on speculation.[1]

The Bissmeyers moved for summary judgment, but the circuit court denied their motion on the following basis:

> As the case is less than eleven months old, it appears that [the Bissmeyers'] motion is premature and [the Owens] should be permitted to conduct further discovery. At this

[1] We pause to note that Mr. Owen did not live in the house that was damaged by the fire. Rather, he lived about half a block down the street from that house, and at the time of the fire, he had been using the house that was damaged as rental property. Mr. Owen admitted that he did not know the Bissmeyers, and he did not go to the Bissmeyers house on the night of the fire. So, he could not state with certainty that the Bissmeyers' porch was wet from the rain.

> point, it appears that only the deposition of [Lafayette Owen] has been taken. It does not appear that the depositions of either of the [Bissmeyers] have been taken, nor does it appear that the deposition of the arson investigator [has] been taken. If, after further discovery, [the Owens are] unable to show that [the Bissmeyers] were aware that the Halloween ornaments and/or extension cord were not exterior grade, then the matter will be ripe for summary judgment.

The deposition of the arson investigator, Sergeant Griffith, was then taken. Sergeant Griffith testified that he had found that the fire was caused by an electrical malfunction, but he was unable to determine whether it was a power cord or the Halloween decorations that malfunctioned and caused the fire. He attested that he was not able to determine whether the Bissmeyers had been using the Halloween lights and the extension cord in an improper manner or about whether the lights and cord were interior grade or exterior grade. Sergeant Griffith testified that if he had thought the weather had been a factor affecting the lights or the cord, he probably would have put that in his report. He further attested that malfunctions can occur without any negligence on the part of the user. Sergeant Griffith testified that he believed he had examined the outlet that the cord was plugged into, and he did not find anything wrong with the outlet.

The Bissmeyers renewed their motion for summary judgment, contending, *inter alia*, that in the three months since the court had entered its order denying summary judgment, the Owens took no steps to schedule depositions of either of the Bissmeyers. Thus, the Bissmeyers attached their affidavits to their renewed motion, in which they each attested that "the lights and extension cord

were identified and sold as appropriate for outdoor use." In their renewed motion for summary judgment, the Bissmeyers also asserted that in his deposition, Sergeant Griffith testified: (1) he had no opinion regarding whether the lights and the extension cord were graded for indoor or outdoor use; (2) he had no opinion regarding the weather conditions, and he did not believe that rain was a factor; and (3) he had no opinion regarding whether the outlet was overloaded or improperly used.

The Owens opposed the renewed motion for summary judgment, contending that the Bissmeyers' affidavits were suspect because in their affidavits, they attested that the lights and extension cord were graded for outdoor use, but in their initial motion for summary judgment, the Bissmeyers' attorney stated that "'the Bissmeyers admit to not knowing whether the lights were indoor or outdoor lights and have no way of finding out.'" The only evidence the Owens presented to defeat summary judgment was the report by Sergeant Griffith. The Owens also asserted that the doctrine of *res ipsa loquitur* applied to the case.

The circuit court granted the Bissmeyers' renewed motion for summary judgment, reasoning that *res ipsa loquitur* was inapplicable because "the circumstances of the fire do not create a clear inference that [the] fire would not have occurred but for [the Bissmeyers'] negligence." The court also stated that although the Bissmeyers' affidavits attached to their renewed motion for summary judgment contradicted the statement by their attorney in their original motion for summary judgment, their "attorney's statement in their original motion for

summary judgment was not an admission on the part of [the Bissmeyers], nor was it sworn testimony." Thus, the court found that because the Owens "failed to present any affirmative evidence to rebut [the Bissmeyers'] affidavits[,] . . . it would be impossible for [the Owens] to prove that [the Bissmeyers] committed any negligence." The circuit court then granted the Bissmeyers' renewed motion for summary judgment.

The Owens now appeal, contending that the circuit court erred in finding that the doctrine of *res ipsa loquitur* did not apply.

II. STANDARD OF REVIEW

"The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Summary judgment should be "cautiously applied . . . in actions involving allegations of negligence." *Poe v. Rice*, 706 S.W.2d 5, 6 (Ky. App. 1986) (citations omitted). "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). "Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact." *Id*. Further, "the movant must convince the court, by the evidence of record, of the nonexistence of an issue of material fact." *Id*. at 482.

III. ANALYSIS

We first note that the Owens continue to allege that the Bissmeyers' affidavits in support of their renewed motion for summary judgment are suspect. They based this argument on the fact that in the Bissmeyers' affidavits, they attested that the lights and extension cord were graded for outdoor use, but in their initial motion for summary judgment, the Bissmeyers' attorney stated that "the Bissmeyers admit to not knowing whether the lights were indoor or outdoor lights and have no way of finding out." The circuit court held that the statement from the Bissmeyers' attorney did not constitute evidence because it was not an admission on the Bissmeyers' part, nor was it sworn testimony. The affidavits, however, constituted evidence. We find that the circuit court did not err in this holding.

Next, the Owens contend that the circuit court erred in granting the Bissmeyers' motion for summary judgment because the doctrine of *res ipsa loquitur* applies to this case. The requirements for applying the doctrine of *res ipsa loquitur* are as follows:

> (1) The defendant must have had full management and control of the instrumentality which caused the injury.
>
> (2) The circumstances must be such that, according to common knowledge and the experience of mankind, the accident could not have happened if those having control and management had not been negligent.
>
> (3) The plaintiff's injury must have resulted from the accident.

Cox v. Wilson, 267 S.W.2d 83, 84 (Ky. 1954).

> The fact that some mystery accompanies an accident does not justify the application of the doctrine of res ipsa loquitur. The fact that we cannot pinpoint an act of omission or commission wherein one fails to respect the rights of others does not summon its use. A lack of knowledge as to the cause of the accident does not call for the application of the doctrine. The separate circumstances of each case must be considered and from them it must be first decided whether according to common knowledge and experience of mankind, this accident could not have happened if there had not been negligence.
>
> * * *
>
> In other words, the doctrine of res ipsa loquitur does not involve the establishment of the ultimate fact by circumstantial evidence or of presumed negligence merely because of injury.

Id.

In the present case although the Bissmeyers may have had control of the instrumentality that caused the damages, the Owens have not presented evidence to defeat summary judgment, i.e., evidence that the Bissmeyers were negligent. Under case law, it was incumbent on the Owens to come forward with at least some evidence of negligence on the part of the Bissmeyers, not just their speculation. *See Helton v. Forest Park Baptist Church*, 589 S.W.2d 217, 219 (Ky. App. 1979) ("The doctrine does not apply where the existence of the negligent acts is not more reasonably probable and where the proof of occurrence, without more, leaves the matter resting only to conjecture.") In fact, Sergeant Griffith testified that electrical malfunctions, such as occurred in this case, can occur without any negligence on the part of the user. For example, a manufacturing defect could

cause this type of electrical malfunction. Therefore, the doctrine of *res ipsa loquitur* does not apply to the present case because the Owens failed to meet their burden under the summary judgment standard. Thus, the circuit court properly granted the Bissmeyers' motion for summary judgment.

Accordingly, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Bert M. Edwards
Louisville, Kentucky

BRIEF FOR APPELLEE:

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John E. Hamlet
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