COURT OF APPEALS
DECISION
DATED AND RELEASED

September 26, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-2962

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

SECURA INSURANCE,
A MUTUAL INSURANCE COMPANY,

Plaintiff-Appellant,

THOMAS WALSH and
JUNE WALSH,

Involuntary-Plaintiff-Appellants,

v.

STEVE BOSHARDY, JR. and
FRED J. BRACH, d/b/a B&B
CARPENTRY, and AMERICAN FAMILY
MUTUAL INSURANCE CO.,

Defendant-Respondents.

APPEAL from a judgment of the circuit court for Columbia County: LEWIS W. CHARLES, Judge. *Affirmed*.

Before Dykman, P.J., Vergeront, J., and Robert D. Sundby, Reserve Judge.

PER CURIAM. Secura Insurance appeals from a judgment in favor of Steve Boshardy, Jr.; Fred Brach, d/b/a B&B Carpentry, and American Family Mutual Insurance Company dismissing Secura's motion for judgment notwithstanding the verdict and, in the alternative, a new trial. The issues are: (1) whether the trial court erred when it refused to give a *res ipsa loquitur* jury instruction; (2) whether the trial court erred when it refused to instruct the jury regarding an alleged breach of contract; and (3) whether the jury's verdict is supported by the evidence. We affirm.

The home of Thomas and June Walsh was destroyed by fire. The home had been built by B&B Carpentry and its subcontractors. The fire occurred about one hour after Thomas Walsh lit a wood-burning stove on the first floor. There were two fireplaces in the home, a wood-burning fireplace on the first floor and a gas-burning fireplace on the second floor. B&B Carpentry or its subcontractors did all of the work on the home except the final connection of the gas-burning fireplace to the pipes supplying propane to it on the second floor, which they agreed Walsh could do because of his extensive experience doing that type of work.

Secura Insurance first argues that the trial court erred in refusing to give an instruction on *res ipsa loquitur*. The doctrine of *res ipsa loquitur*, or "the thing speaks for itself," allows a fact-finder to draw an inference that a defendant was negligent in certain circumstances. A jury should be instructed on *res ipsa loquitur* when:

> (a) either a laymen is able to determine as a matter of common knowledge or an expert testifies that the result which occurred does not ordinarily occur in the absence of negligence, (b) the agent or instrumentality causing the harm was within the exclusive control of the defendant, and (c) the evidence offered is sufficient to remove the causation question from the realm of conjecture, but not so substantial that it provides a full and complete explanation of the event.

Peplinski v. Fobe's Roofing, Inc., 193 Wis.2d 6, 17, 531 N.W.2d 597, 601 (1995).

The trial court refused to give the *res ipsa loquitur* jury instruction because it concluded that B&B Carpentry did not have exclusive control of the instrumentality that caused the fire. Secura Insurance argued that the fire was caused by an electrical problem originating in the chimney chase, which was constructed by B&B Carpentry and, thus, within its exclusive control. However, B&B Carpentry argued that the fire was caused by a propane gas leak, that Thomas Walsh performed work within the chimney chase when he installed and connected a gas line to the second-story fireplace and that the area in which the fire started was therefore not exclusively in its control. The trial court concluded that the chimney chase was not exclusively within B&B Carpentry's control because Walsh also worked in the area. Because the *res ipsa loquitur* instruction should not have been given unless the agent or instrumentality which caused the fire was shown to be in the exclusive control of the defendant, the trial court properly refused to give the instruction.[1]

Secura Insurance next argues that the trial court erred in refusing to instruct the jury on its breach of contract claim. We conclude that Secura Insurance has waived its right to raise this argument. Although Secura Insurance originally submitted a proposed verdict form which included a question asking whether the defendants had breached their contract, Secura Insurance did not mention this question or make any argument for it during the verdict conference. Secura Insurance was asked whether it had any objections to the instructions once they were formulated, and it said, "none," except for the objections regarding the *res ipsa loquitur* instruction. Secura Insurance has therefore waived its right to raise this issue. *See* ***State v. Schumacher***, 144 Wis.2d 388, 409, 424 N.W.2d 672, 680 (1988), and § 805.13(3), STATS. ("Failure to object at the [jury instruction] conference constitutes a waiver of any error in the proposed instructions or verdict.").

Secura Insurance finally argues that the jury's verdict was not supported by credible evidence. We will not overturn a jury verdict unless

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[1] Because we conclude that the trial court properly concluded that no exclusivity had been shown, we need not address whether any other grounds for refusing to give the instruction existed.

there is no credible evidence in the record to sustain the jury's finding. ***Topp v. Continental Ins. Co.***, 83 Wis.2d 780, 787, 266 N.W.2d 397, 401 (1978). There was evidence to show that B&B Carpentry was negligent in the installation of the metal chimney. It was not inconsistent for the jury to find that the home was negligently built (apparently that the construction of the chimney elbows was negligent), but to conclude that the negligence was not a causal factor in the fire. The jury could have concluded that the gas which caused the explosion was present for reasons other than the negligence of B&B Carpentry or of Walsh. As stated in the respondent's brief, "[f]ires frequently occur without negligence" and "[i]t is frequent that the origin of fires cannot be determined." ***Arledge v. Scherer Freight Lines, Inc.***, 269 Wis. 142, 150, 68 N.W.2d 821, 826 (1955). There was credible evidence to support the jury verdict.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.