**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

December 12, 1995

**NOTICE**



**No. 95-0253**

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

**THOMAS KRUEGER,**

**Plaintiff-Appellant,**

**v.**

**OTIS ELEVATOR,**
**HARTFORD FIRE INSURANCE COMPANY,**
**and FIREMEN FUND INSURANCE COMPANY,**

**Defendants-Respondents.**

APPEAL from a judgment of the circuit court for Milwaukee County: LAURENCE C. GRAM, JR., Judge. *Reversed.*

Before Wedemeyer, P.J., Sullivan and Fine, JJ.

PER CURIAM. Thomas Krueger appeals from a judgment dismissing his complaint against Otis Elevator Company and its insurer, Hartford Fire Insurance Company. The judgment arose out of a motion for summary judgment filed by Otis and Hartford. Krueger contends that the trial court erred when it concluded that he was required to name an expert witness

regarding elevator operations. Alternatively, he contends that the dismissal should not have been "on the merits." We conclude that the trial court's grant of summary judgment based upon the failure to name an expert witness was erroneous, and we reverse.[1]

Krueger alleged that he received an electrical shock when he pressed the call button for an elevator in St. Luke's Hospital. He also alleges that Otis had contracted to inspect, maintain, and repair the elevator. In response to a motion to dismiss the complaint for failure to state a claim, the trial court concluded that Krueger sufficiently pled the doctrine of *res ipsa loquitur* to state a claim for negligence.

Pursuant to the trial court's scheduling order, Krueger submitted a witness list. The list did not include an expert regarding the electrical and mechanical operation and maintenance of the elevator. Otis and Hartford filed a motion for summary judgment premised solely on the argument that expert testimony criticizing Otis's maintenance and repair procedures was necessary to prove Krueger's claim. Agreeing that such expert testimony is necessary to prove Krueger's claim, the trial court granted the motion and dismissed his complaint with prejudice.

Krueger's claim for negligence relies upon the evidentiary doctrine of *res ipsa loquitur*. This doctrine is applicable where there is evidence suggesting negligence, but the evidence does not furnish a full and complete explanation of the event causing the injury. ***Peplinski v. Fobe's Roofing, Inc.***, 193 Wis.2d 6, 18, 531 N.W.2d 597, 601 (1995). It may be relied upon (1) where there is evidence that the event or incident in question would not ordinarily occur unless there was negligence, (2) where the agent or instrumentality that caused the harm was within the defendant's exclusive control, and (3) where the evidence allows more than speculation but does not fully explain the event.[2] ***Id.***

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[1] Because we reverse the judgment on this basis, we do not address the alternative ground raised by Krueger. *See* ***Gaertner v. 880 Corp.***, 131 Wis.2d 492, 496 n.4, 389 N.W.2d 59, 61 n.4 (Ct. App. 1986).

[2] The motion for summary judgment relied solely upon Krueger's failure to name an expert witness. In the reply brief filed with the trial court, Otis and Hartford make passing references to the question of whether the elevator was within Otis's exclusive control. The trial court did not address this issue, concluding that the issue was not raised in the arguments. We agree and further

at 17, 531 N.W.2d at 601. The doctrine of *res ipsa loquitur* allows the jury to draw a reasonable inference of negligence from the circumstantial evidence surrounding the event or incident. ***Fehrman v. Smirl***, 20 Wis.2d 1, 21, 121 N.W.2d 255, 266 (1963).

The requirement that the event or incident ordinarily would not occur without negligence may be satisfied by a layperson's common knowledge or by expert testimony. ***Utica Mut. Ins. Co. v. Ripon Co-op.***, 50 Wis.2d 431, 436-37, 184 N.W.2d 65, 67-68 (1971). Generally, expert testimony is not required to invoke the *res ipsa loquitur* doctrine. ***City of Cedarburg Light & Water Comm'n v. Allis-Chalmers Mfg. Co.***, 33 Wis.2d 560, 566, 148 N.W.2d 13, 16 (1967). It is necessary, however, where the question of negligence rests on facts or principles that are extremely difficult to comprehend, as where the event or instrumentality is complex or involves sophisticated knowledge. ***Id.*** at 567, 149 N.W.2d at 16 (failure of part of massive, complicated piece of machinery); ***Utica Mut.***, 50 Wis.2d at 437, 184 N.W.2d at 68 (mechanics of internal combustion engine). This requirement is extraordinary, however, except in professional malpractice cases where expert testimony regarding the exercise of professional due care is usually necessary. *See* ***Cedarburg Light & Water***, 33 Wis.2d at 567, 148 N.W.2d at 16.

The present case was decided on a motion for summary judgment. Summary judgment is used to determine whether there are any disputed issues for trial. ***U.S. Oil Co., Inc. v. Midwest Auto Care Servs., Inc.***, 150 Wis.2d 80, 86, 440 N.W.2d 825, 827 (Ct. App. 1989). Appellate courts and trial courts follow the same methodology. ***Id.*** First, the court examines pleadings to determine whether the complaint states a claim for relief. ***Id.*** If the complaint states a claim and the answer joins the issue, the court then examines the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any. ***Id.*** If the summary judgment materials do not indicate that there is a material issue of fact and if the moving party is entitled to judgment as a matter of law, summary judgment must be entered. Section 802.08(2), STATS. The summary judgment process is not a "_short cut to avoid a trial._" ***State Bank of La Crosse v. Elsen***, 128 Wis.2d 508, 511, 383 N.W.2d 916, 917-18 (Ct. App. 1986) (citation

(..continued)
note that Otis and Hartford did not submit any summary judgment materials addressing the issue. Accordingly, we do not address whether there is a material fact regarding the exclusive control of the elevator.

omitted). If the material facts or the inferences that can be drawn from them are in dispute, summary judgment cannot be granted, and the factual issues must be resolved at trial.

The party seeking summary judgment bears the burden of making a *prima facie* showing that there are no issues of material fact for trial. ***Transportation Ins. Co., Inc. v. Hunzinger Constr. Co.***, 179 Wis.2d 281, 290, 507 N.W.2d 136, 139 (Ct. App. 1993). If the movant does so, however, the party opposing summary judgment must submit specific evidentiary materials to demonstrate that there is a genuine issue of material fact. ***Id.*** at 291, 507 N.W.2d at 139. All doubts on factual matters are resolved against the party moving for summary judgment. ***State Bank of La Crosse***, 128 Wis.2d at 512, 383 N.W.2d at 918. A movant who does not have the ultimate burden of proof on an issue may rely upon the lack of evidentiary facts regarding an element of the claim to support its position that no material issue of fact exists. ***Transportation Ins. Co.***, 179 Wis.2d at 291-92, 507 N.W.2d at 139-40. Once the movant has done so, the party who has the ultimate burden of proof on the issue must present evidentiary materials to show that it can establish the existence of the necessary element. ***Id.*** The party bearing the ultimate burden of proof on an element cannot rely on speculation or the movant's inability to prove a negative to defeat a motion for summary judgment.

Turning to the case before us, the trial court had previously determined that the complaint stated a claim for relief. Otis and Hartford do not challenge this ruling. The complaint alleges that Otis had control over the elevator, that Krueger's actions were prudent and reasonable, and that the incident would not have occurred in the absence of negligence by Otis. These allegations invoke the doctrine of *res ipsa loquitur*. The complaint states a claim, and the answer joins the issue.

The affidavit supporting the motion for summary judgment addressed only the failure to name an expert witness. The affidavit submitted in support of the motion included copies of the scheduling order and Krueger's witness list. Otis and Hartford did not submit an affidavit or other evidentiary material to show that the elevator and call button were working properly, to suggest an alternative, non-negligent explanation for the alleged injury, or to challenge the occurrence of the incident. Therefore, resolution of the summary judgment motion and this appeal depends upon whether, in this case, expert

testimony is necessary to explain the operation of the elevator. We conclude that the trial court erroneously imposed this requirement.

Although the operating system for an elevator may be complex and generally beyond the knowledge of the average lay jury, it is not beyond a matter of common knowledge that one does not ordinarily receive an electrical shock when pushing a call button. It is within the juror's common knowledge that electricity is a dangerous instrumentality, that equipment commonly used by the public is designed and operated in a manner to avoid an electrical shock, *see* ***Ryan v. Zweck-Wollenberg Co.***, 266 Wis. 630, 637, 64 N.W.2d 226, 230 (1954), and that the incident would not have occurred in the absence of negligence. Therefore, expert testimony was not required on this issue. Consequently, the trial court erroneously granted summary judgment against Krueger. At this stage of the proceeding, the doctrine of *res ipsa loquitur* provides the reasonable inference of negligence and a basis for assuming Krueger can meet his ultimate burden of proof to survive a motion to dismiss for insufficient evidence or for a directed verdict. *See* § 805.14(3) and (4), STATS. Whether he will ultimately be entitled to a jury instruction on *res ipsa loquitur* depends, of course, upon the evidence ultimately presented at trial. At that time, the trial court will determine whether he presented too little or too much evidence. *See* ***Peplinski***, 193 Wis.2d at 17, 531 N.W.2d at 601.

*By the Court.*—Judgment reversed.

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