

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

EDWARD BROOKS,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	No. 3056 EDA 2013
CHARLES JOHNSON &	:	
PAULA JOHNSON, H/W	:	

Appeal from the Judgment Entered December 31, 2013,
in the Court of Common Pleas of Philadelphia County
Civil Division at No. 12-01-01844

BEFORE: FORD ELLIOTT, P.J.E., LAZARUS AND WECHT, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED MAY 13, 2014**

Edward Brooks appeals from the judgment entered December 31, 2013, in favor of the defendants/appellees, Charles and Paula Johnson. We affirm.

Brooks and the Johnsons were next-door neighbors. On April 30, 2010, the Johnsons' two-story garage collapsed, causing damage to Brooks' property. The cause of the collapse was undetermined. On January 16, 2012, Brooks filed a complaint alleging that the Johnsons' negligent maintenance of their property was the cause of the building's collapse. On May 21, 2012, this case was consolidated with case number 110700590, ***Nationwide Insurance Co. as subrogee of Charles and Mary Lorman v. Charles Johnson and Philadelphia Gas Works***; and case number

110700926, ***Certain Underwriters at Lloyd's London, as subrogee of Edward V. Brooks c/o Dorothy L. Brooks v. Charles Johnson, Paula Johnson, and Philadelphia Gas Works.*** Charles and Mary Lorman lived on the other side of the Johnsons and also sustained damage to their residence.

The matter proceeded to arbitration, and on November 8, 2012, the arbitrators found in favor of the defendants. Brooks and Lloyd's London appealed the arbitrators' decision, and a non-jury trial was held on July 30, 2013, before the Honorable Frederica A. Massiah-Jackson. The Lormans did not appeal the arbitration award.

On August 13, 2013, following the filing of briefs by the parties, Judge Massiah-Jackson issued findings of fact and conclusions of law, finding in favor of the defendants, the Johnsons. Judge Massiah-Jackson rejected the plaintiffs' theory of ***res ipsa loquitur*** where they failed to eliminate other possible causes of the building's collapse other than the Johnsons' negligence. Timely post-trial motions were filed on August 23, 2013, and denied on September 23, 2013. A timely notice of appeal was filed on October 23, 2013.¹ Brooks was not ordered to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b); on

¹ Lloyd's London has not appealed the trial court's decision. As stated above, judgment was entered on December 31, 2013. Pursuant to Pa.R.A.P. 905(a), the notice of appeal previously filed in this case will be treated as filed after the entry of judgment.

November 25, 2013, the trial court filed a Rule 1925(a) opinion, relying on its findings of fact and conclusions of law of August 13, 2013.

Brooks has raised the following issues for this court's review:

- I. Did the trial court abuse its discretion by failing to find the requirements of *res ipsa loquitur* were met at trial[?]
- II. Did the trial court abuse its discretion by not finding the plaintiff/appellant presented a case from which the court may reasonably conclude negligence was more probably than not that of the defendant[?]

Brooks' brief at 4.

Our appellate role in cases arising from non-jury trial verdicts is to determine whether the findings of the trial court are supported by competent evidence and whether the trial court committed error in any application of the law. The findings of the trial judge in a non-jury case must be given the same weight and effect on appeal as the verdict of a jury, and the findings will not be disturbed on appeal unless predicated upon errors of law or unsupported by competent evidence in the record. Furthermore, our standard of review demands that we consider the evidence in a light most favorable to the verdict winner.

Baney v. Eoute, 784 A.2d 132, 135 (Pa.Super. 2001) (citation omitted).

Additionally, "the trial court, as factfinder, is free to believe all, part or none of the evidence presented" **Turney Media Fuel, Inc. v. Toll Bros., Inc.**, 725 A.2d 836, 841 (Pa.Super.1999). "[T]herefore, assessments of credibility and conflicts in evidence are for the trial court to resolve; this Court is not permitted to reexamine the weight and credibility determinations or substitute our judgment for that of the factfinder." **Id.**

Sovereign Bank v. Valentino, 914 A.2d 415, 420 (Pa.Super. 2006).

Res ipsa loquitur allows juries to infer negligence from the circumstances surrounding the injury. ***Res ipsa loquitur***, meaning literally "the thing speaks for itself," is "a shorthand expression for circumstantial proof of negligence—a rule of evidence." ***Gilbert v. Corvette, Inc.***, 457 Pa. 602, 327 A.2d 94, 99 (1974). It is a rule that provides that a plaintiff may satisfy his burden of producing evidence of a defendant's negligence by proving that he has been injured by a casualty of a sort that normally would not have occurred in the absence of the defendant's negligence. WILLIAM L. PROSSER, LAW OF TORTS §§ 39, 40 (4th ed.1971) (calling ***res ipsa loquitur*** a "simple matter of circumstantial evidence"). As noted, the Restatement (Second) of Torts § 328D formulates the evidentiary theory of ***res ipsa loquitur*** as follows:

- (1) It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when
 - (a) the event is of a kind which ordinarily does not occur in the absence of negligence;
 - (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and
 - (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff.
- (2) It is the function of the court to determine whether the inference may reasonably be drawn by the jury, or whether it must necessarily be drawn.

- (3) It is the function of the jury to determine whether the inference is to be drawn in any case where different conclusions may reasonably be reached.

Rest. (Second) Torts § 328D. **See also Gilbert**, 457 Pa. 602, 327 A.2d 94 (adopting **res ipsa loquitur** as defined in the Restatement (Second) of Torts § 328D).

Quinby v. Plumsteadville Family Practice, Inc., 589 Pa. 183, 199-200, 907 A.2d 1061, 1071 (2006) (footnotes omitted). “**Res ipsa loquitur** is neither a doctrine of substantive law nor a theory of recovery; rather, it is a rule of circumstantial evidence.” **Toogood v. Rogal et al.**, 573 Pa. 245, 256, 824 A.2d 1140, 1146 (2003) (plurality).

The doctrine of **res ipsa loquitur** allows plaintiffs, without direct evidence of the elements of negligence, to present their case to the jury based on an inference of negligence. The key to the doctrine is that a sufficient fund of common knowledge exists within a jury of laypersons to justify raising the inference. Instead of directly proving the elements of ordinary negligence, the plaintiff provides evidence of facts and circumstances surrounding his injury that make the inference of the defendant’s negligence reasonable. “The gist of **res ipsa loquitur** . . . is the inference, or process of reasoning by which the conclusion is reached. This must be based upon the evidence given, together with a sufficient background of human experience to justify the conclusion. It is not enough that plaintiff’s counsel can suggest a possibility of negligence.” Prosser & Keeton, *The Law of Torts* § 39, p. 243 (5th ed.1995). This theory relieves the plaintiff of having to prove causation directly.

Id. at 256-257, 824 A.2d at 1146.

Judge Massiah-Jackson made the following findings of fact:

1. On April 30, 2010, the two story garage behind 125 North 63rd Street, Philadelphia, Pa., collapsed.
2. There was no one inside the small building at the time. The owners, Defendants Charles and Paula Johnson were not at home.
3. Plaintiff Edward Brooks and his wife live at 127 North 63rd Street. Mr. Brooks testified that he heard a loud noise and felt shaking. He ran out the front door onto 63rd Street.
4. The walls and roof of his garage were significantly damaged. Photographs were presented at trial.
5. The Brooks' three story residence was also damaged: windows became loose, the roof had to be replaced, tiles in the bathrooms fell and repairs [were] needed, rear kitchen and bedrooms needed repair, and, the entire exterior was repaired.
6. The deposition testimony of Mary Lorman, who lives at 123 North 63rd Street confirmed that after large rumbling noises and [an] explosion, Mr. Johnson's garage collapsed. Her garage and residence were also damaged.
7. All of the witnesses and residents testified the Philadelphia Gas Works had been digging in the streets on 63rd Street and in the neighborhood in the weeks prior to the explosion and collapse on April 30, 2010.
8. According to Action News Reports "The force of the blast was so strong it shattered the windows of a pizza shop about a block away. No one was injured in this blast, though a number of people around the scene were evacuated from their homes." Chopper 6HD photos were introduced at trial.

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9. After an investigation, the Philadelphia Fire Marshall concluded the cause of the building collapse was "Undetermined."
10. The Philadelphia Gas Works fuel line on all the homes of Felton Street and 63rd Street were inspected. PGW made odor meter checks in the three properties involved. They conferred with the Fire Department. PGW Field Services Department concluded that PGW was not responsible for the explosion and building collapse.

Trial court opinion, 8/13/13 at 1-2.

Judge Massiah-Jackson concluded that Brooks failed to eliminate other responsible causes and failed to establish that the harm was more likely than not caused by the Johnsons. Brooks failed to rule out other causes of the collapse, including a gas leak or vibrations caused by PGW's drilling. (***Id.*** at 4-5.)

The record supports the trial court's conclusions. There was testimony that PGW had been digging in the area for several weeks. (Notes of testimony, 7/30/13 at 69.) Mary Lorman testified that PGW was working on the street every day and using jackhammers. (***Id.*** at 73-74.) It is certainly possible that the building collapse was caused by a gas leak or PGW's extensive activities in the area.

According to Brooks, the Johnsons stored flammable substances such as paint and gasoline in the garage. (Brooks' brief at 13.) However, Charles Johnson testified that he did not store oil-based paint in the garage. (Notes of testimony, 7/30/13 at 69.) While Mr. Johnson did keep some

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gasoline in the garage, there was no evidence that the gasoline ignited, causing a fire or explosion. The Fire Marshal stated that the cause of the incident was undetermined.

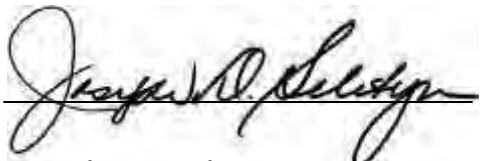
Brooks notes that according to PGW's own report, there were no gas leaks detected and "all gas equipment was intact and was probably not the cause of the incident." (Plaintiff's Exhibit 7 at 2.) As Judge Massiah-Jackson observes, the Fire Marshal's report that the cause of the incident was "undetermined" and PGW's conclusion that it was "probably not the cause" is not a substitute for the requirement that Brooks eliminate other responsible causes. (Trial court opinion, 8/13/13 at 5.) Brooks did not offer any testimony to rule out other possible causes of the collapse, including tremors or vibrations resulting from PGW's ongoing digging in the immediate vicinity of the garage.

The bottom line is that the cause of the explosion/collapse is simply unknown. It is certainly not a necessary inference that the garage collapsed due to the Johnsons' negligence. Since Brooks failed to satisfy the requirements of Section 328(D) by sufficiently eliminating other responsible causes, including PGW, the theory of *res ipsa loquitur* was inapplicable. The trial court's verdict in favor of the defendants was fully supported by the evidence.

Judgment affirmed.

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Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/13/2014