

Res Ipsa Instruction Supports \$700,000 Monroe County Jury Award In Careless-Smoking Case

BY JOE PESKIN

IN NOVEMBER OF 2009, A MONROE COUNTY JURY AWARDED \$700,000 TO HARLEYSVILLE INSURANCE, THE INSURER OF A COMMERCIAL BUILDING IN MARSHALL'S CREEK, PA., THAT WAS DESTROYED BY FIRE AS A RESULT OF CARELESS SMOKING BY AN EMPLOYEE OF AN ELECTRICAL CONTRACTOR. THE JURY DELIBERATED LESS THAN TWO HOURS AT THE END OF A TWO-DAY TRIAL BEFORE FINDING ON BEHALF OF HARLEYSVILLE, WHICH HAD BEEN REPRESENTED BY THE LAW OFFICES OF ROBERT A. STUTMAN, P.C., OF FT. WASHINGTON, PA.

Origin and Cause

The subrogation action brought by Harleysville arose out of a fire that occurred in a commercial building ["Building"] located at Jay Park Plaza, Route 209, Marshall's Creek, Pa., on April 21, 2006. The fire, which destroyed the Building, was first reported to authorities at approximately 6:57 p.m. After firefighters extinguished the fire, several fire investigators, including experts for both parties and the Pennsylvania State Police ["PSP"], commenced an investigation into the origin and cause of the fire. At the conclusion of their respective investigations, all fire investigators determined the fire had originated within the attic of the Building. Harleysville's expert and the PSP agreed with that conclusion and systematically ruled out all potential ignition sources, such as electrical, spontaneous combustion and lightning, except human error.

Res Ipsa Loquitur

In the weeks leading up to the fire, the Building was in the process of undergoing several alterations necessary for its conversion to a children's day care center. As part of the renovation process, the electrical contractor defendant was removing and replacing electrical wiring within the Building. To perform this work, all electricity to the Building was disconnected; therefore, on the day of the fire, the Building was not energized with any electrical power.

On the day the fire occurred, two of the defendant's employees were working inside the Building. One employee worked exclusively on the first floor of the Building where he ran electrical conduit and lines across the ceiling. The second employee, however, worked in the attic of the Building where he removed and replaced electrical wires. While working in the attic, the second employee only possessed hand tools and a flashlight, along with cigarettes and a lighter. After the fire, the second

employee denied smoking in the attic; however, his co-worker had not seen him smoke outside the Building at any time.

By establishing that the fire originated in the attic; was accidental in nature; and the electrical contractor's employee was the only person inside the attic capable of igniting a fire, Harleysville's counsel, the Law Offices of Robert A. Stutman, P.C., was able to obtain from the trial court a res ipsa loquitur jury instruction. The res ipsa instruction enabled the jury to infer the negligence of the electrical contractor even though there was no direct evidence of the defendant's negligence. In tendering the requested instruction to the jury, the trial court ruled that negligence can be logically inferred by a jury where a Plaintiff establishes that: 1) the fire was an event that would not normally happen in the absence of negligence on the part of

Defendant; 2) other than Defendant's negligence, all other possible causes of the fire have been sufficiently eliminated; and 3) Defendant's negligence is within the scope of its duty owed to Plaintiff's insured. *Gilbert v. Corvette's, Inc.*, 457 Pa. 602, 327 A.2d 94 (1974); *Hollywood Shop, Inc. v. Pa. Gas & water Co.*, 411 A.2d 509, 510-512 (Pa.Super. 1979).

Ultimately, Harleysville prevailed on a difficult careless-smoking case by ruling out all potential sources of ignition except the defendant and by relying upon the novel legal theory of res ipsa loquitur. Although the theory of res ipsa loquitur will not be applicable in all cases, it is a very useful tool in cases wholly predicted upon circumstantial evidence, as a res ipsa instruction specifically advises a jury that evidence of negligence can be inferred from circumstantial evidence.

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