[Cite as *Migliori v. Merritt*, 2012-Ohio-3614.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Joseph Migliori	Court of Appeals No. L-11-1136
Appellant	Trial Court No. CI0201002844
v.	
Jo Ann Merritt, aka Jo Ann Clagg, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: August 10, 2012

* * * * *

Francis J. Landry and Katherine A. Pawlak, for appellant.

Peter C. Munger and Nathan R. Boyd, for appellee,
Jo Ann Merritt, aka Jo Ann Clagg.

Gregory A. Harrison, for appellee, Microsoft Corporation.

Bradley B. Gibbs, for appellee, Allstate Insurance Company.

* * * * *

YARBROUGH, J.

I. Introduction

{¶1} Joseph Migliori appeals from a judgment of the Lucas County Court of Common Pleas, granting summary judgment in favor of defendants-appellees, Microsoft Corporation ("Microsoft") and Jo Ann Merritt (a.k.a. Jo Ann Clagg) on his products liability and negligence claims. We affirm.

A. Facts and Procedural Background

{¶2} Migliori and Merritt were neighbors. The origin of this case began on August 12, 2006, when Merritt's house caught fire. The fire subsequently spread to Migliori's home, damaging both his real and personal property.

{¶3} On March 19, 2010, Migliori filed a complaint against Merritt, in which he alleged that the fire started as a result of defective wiring in an unspecified entertainment device or devices in Merritt's home. Migliori further alleged that Merritt negligently failed to use the entertainment device in accordance with warnings issued by its manufacturer, and/or negligently failed to utilize a recall issued by the manufacturer. Alternatively, Migliori alleged that Merritt negligently started the fire by other means. The complaint asserted that Merritt's negligence proximately caused damages to Migliori in excess of $425,000 in real property and $300,000 in personal property.

{¶4} The March 19, 2010 complaint also named five John Does as defendants. The John Does were purportedly merchants, manufacturers, distributors, and designers of

the entertainment devices and their power cords, power supplies, or battery units located inside Merritt's home. Migliori alleged that the John Doe defendants breached an implied warranty that the products were safe for ordinary public use and entertainment. In addition, he alleged that the products were defectively manufactured or defective as manufactured. Notably, this complaint was never amended to substitute real parties for these John Doe defendants.

{¶5} On August 10, 2010, Migliori filed a second complaint relating to the fire, this time naming Microsoft, Allstate Insurance Company ("Allstate"), American Family Insurance Company, and the Jerusalem Township Fire Department as defendants. Migliori later dismissed his claims against American Family Insurance Company and the Jerusalem Township Fire Department. In this complaint, Migliori alleged that the fire began as a result of faulty wiring or a defective power supply for an Xbox manufactured by Microsoft. Consequently, Migliori asserted two products liability claims against Microsoft. Migliori also asserted a claim against Allstate, his home insurance company, alleging that it negligently breached its duty to investigate the cause of the fire and monitor key evidence, in this case the remains of the Xbox. This second case was consolidated with the March 19, 2010 case.

{¶6} On October 12, 2010, Microsoft moved for judgment on the pleadings pursuant to Civ.R. 12(C), arguing that Migliori's claims were barred by the statute of limitations. Later, on December 17, 2010, Merritt moved for summary judgment,

arguing that Migliori failed to present sufficient evidence in support of his claims. Microsoft subsequently joined and supported Merritt's motion. Allstate separately filed a motion for summary judgment on different grounds.

{¶7} On May 11, 2011, the trial court issued its judgment entry granting summary judgment in favor of Merritt, Microsoft, and Allstate, and denying Microsoft's motion for judgment on the pleadings as moot.

B. Assignments of Error

{¶8} Migliori now appeals, asserting two assignments of error:

> I. The trial court committed reversible error in granting summary judgment to defendants Merritt and Microsoft when questions of material fact remained over the cause of the fire.
>
> II. The trial court committed reversible error in granting summary judgment to defendants [sic] Merritt when questions of material fact remained over Merritt's negligence under the doctrine of res ipsa loquitur.

II. Analysis

{¶9} We review an award of summary judgment de novo, applying the same standards as the trial court. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989); *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Under Civ.R. 56(C), summary judgment is appropriate where (1) no genuine issue of material fact exists, (2) the moving party is entitled to

judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, and that conclusion is adverse to the nonmoving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

{¶10} Here, Migliori's complaint is premised on two different theories of the cause of the fire. The predominant theory is that the Xbox located in Merritt's home had a defective power cord or power supply that malfunctioned and started the fire. Under this theory, Migliori asserts that Microsoft is liable because it manufactured the defective Xbox, and he asserts that Merritt is liable because she negligently failed to use the Xbox in accordance with Microsoft's warnings, or she negligently failed to utilize Microsoft's recall notice. The second theory, which pertains only to Merritt, applies the doctrine of res ipsa loquitur, and reaches the conclusion that Merritt must be liable because "in normal, everyday life, electric devices (and houses for that matter) do not catch fire without some form of negligence." We will discuss these two theories in turn.

A. Summary Judgment is Appropriate on Migliori's Theory that the Xbox Caused the Fire

{¶11} This case illustrates the varied burdens of the parties on a motion for summary judgment, where the basis of the motion is the plaintiff's inability to prove an essential element of his or her case.

> [A] party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case. Rather, the moving party must be able to specifically point to some *evidence* of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. However, if the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial." (Emphasis sic.) *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996).

{¶12} To determine whether summary judgment is appropriate in relation to the Xbox theory, we must first analyze whether Microsoft and Merritt have satisfied their initial burden under *Dresher v. Burt*. To do so, Microsoft and Merritt must point to something in the pleadings, depositions, answers to interrogatories, written admissions,

affidavits, transcripts of evidence, and written stipulations of fact that demonstrate that Migliori has no evidence to prove his claims. Here, Microsoft and Merritt contend that expert testimony is required to establish the origin and cause of the fire that destroyed Migliori's home. They argue that without expert testimony Migliori cannot prove that the Xbox was the cause of the fire, and thus he cannot prove it was the proximate cause of his damages. As proof that Migliori will not have any expert testimony, Microsoft and Merritt point to Migliori's deposition and response to interrogatories in which he states that he will not call any expert witnesses to testify.

{¶13} It is a settled rule that, "Unless a matter is within the comprehension of a layperson, expert testimony is necessary." *Ramage v. Cent. Ohio Emergency Servs., Inc.*, 64 Ohio St.3d 97, 102, 592 N.E.2d 828 (1992). Migliori correctly identifies that, "Whether or not 'origin' and 'cause' [of a fire] require an expert opinion for their establishment depends upon the facts and circumstances of each case." *Fid. & Guar. Ins. Underwriters, Inc. v. Gary Douglas Elec., Inc.*, 48 Ohio App.2d 319, 322, 357 N.E.2d 388 (9th Dist.1974). However, we agree with the trial court that in this case, where the cause of the fire was not visually observed and was likely electrical, the specific cause of the fire is beyond the knowledge of a layperson. *See Boardman Molded Prods., Inc. v. St. Elizabeth Hosp. Med. Ctr.*, 7th Dist. No. 89 C.A. 8, 1990 WL 152475 (Oct. 1, 1990) ("It has commonly been held that the cause and origin of a fire are not matters within the common knowledge of a jury * * *.") Therefore, because Microsoft and Merritt have

pointed to evidence in the record, namely Migliori's deposition and answers to interrogatories, which demonstrates that he does not have any evidence in the form of expert testimony to establish the necessary element of causation, we find that they have satisfied their initial burden under *Dresher v. Burt*.

{¶14} We next must determine whether Migliori has satisfied his reciprocal burden to present evidence that demonstrates a genuine issue of material fact exists for trial. Here, Migliori attempts to satisfy that burden by offering a recall notice from Microsoft which stated that a "component failure in a small number of consoles – fewer than 1 in 10,000 – has caused burning inside the console or melting of the power cord where it connects to the console." This recall applied to Xboxes manufactured before October 23, 2003. Migliori also offered an affidavit from his daughter, which established that near the time of the fire, a pre-2003 Xbox was located in Merritt's house. Further, Migliori references an investigative report from a forensic engineer, which concluded, "There was no evidence to indicate that the X-box was the cause of the fire." Migliori attempts to qualify that conclusion though, by arguing that the forensic engineer was unable to examine the Xbox power cord because it was lost sometime after the fire, or destroyed during the fire.

{¶15} Evidentiary issues aside, we find that Migliori has not satisfied his burden of demonstrating a genuine issue of material fact regarding proximate cause. This court has previously stated, "If the plaintiff's quantity or quality of evidence on the issue of

proximate cause requires mere speculation and conjecture to determine the cause of the event at issue, then the defendant is entitled to summary judgment as a matter of law." *Welch v. Bloom*, 6th Dist. No. L-04-1003, 2004-Ohio-3168, ¶ 11.

{¶16} In *Welch,* the plaintiff sued his late father's estate for damages resulting from a slip and fall caused by an accumulation of ice on the father's front door steps. The trial court entered summary judgment for the father's estate. On appeal, the plaintiff argued that a genuine issue of material fact existed as to whether this was a natural accumulation of ice, which would preclude liability. The plaintiff pointed to his deposition testimony that "he believed that water had dripped on to the steps from flood lights above the staircase. He reasoned that during the ice storm which had occurred the previous day, ice accumulated upon the flood lights. The following day, that ice began to melt when the flood lights became hot and water dripped onto the sidewalk and refroze." *Id.* at ¶ 10. This court rejected plaintiff's argument, concluding, "[plaintiff's] testimony is nothing more than speculation that the flood lights caused the formation of ice on the steps rather than the ice storm that occurred the previous evening." *Id.* at ¶ 12.

{¶17} Similarly, Migliori's theory of what caused the fire is nothing more than speculation. Migliori has presented no evidence establishing that the Xbox was the cause of the fire. In fact, the investigative report he included in his opposition to the motion for summary judgment concluded, "There was no evidence to indicate that the X-box was the cause of the fire." At best, to reach Migliori's conclusion based on the evidence, we must

infer from the recall notice and affidavit that Merritt's Xbox was indeed defective, and then infer from the fact that the Xbox was defective that it caused the fire. However, "an inference can not be predicated upon a fact the existence of which rests on another inference." *McDougall v. Glenn Cartage Co.*, 169 Ohio St. 522, 525, 160 N.E.2d 266 (1959). Therefore, because the evidence presented by Migliori requires mere speculation or conjecture to determine the proximate cause of his damages, Microsoft and Merritt are entitled to summary judgment as a matter of law.

{¶18} Accordingly, Migliori's first assignment of error is not well-taken.

B. Application of Res Ipsa Loquitur is not Appropriate Based on the Evidence in this Case.

{¶19} As his second theory, Migliori argues he is able to prove, under the doctrine of res ipsa loquitur, that Merritt's negligence proximately caused the fire. Migliori argues that the application of res ipsa loquitur is appropriate because "in normal, everyday life, electric devices (and houses for that matter) do not catch fire without some form of negligence." We disagree.

{¶20} "[R]es ipsa loquitur is a rule of evidence which permits the trier of fact to infer negligence on the part of the defendant from the circumstances surrounding the injury to the plaintiff." *Hake v. George Wiedemann Brewing Co.*, 23 Ohio St.2d 65, 66, 262 N.E.2d 703 (1970). "The doctrine of res ipsa loquitur is not a substantive rule of law furnishing an independent ground for recovery. * * * [It] does not alter the nature of the

plaintiff's claim in a negligence action; it is merely a method of proving the defendant's negligence through the use of circumstantial evidence." *Jennings Buick, Inc. v. City of Cincinnati*, 63 Ohio St.2d 167, 169-170, 406 N.E.2d 1385 (1980). To benefit from the application of the rule, a plaintiff must adduce evidence in support of two conclusions:

> (1) That the instrumentality causing the injury was, at the time of the injury, or at the time of the creation of the condition causing the injury, under the exclusive management and control of the defendant; and (2) that the injury occurred under such circumstances that in the ordinary course of events it would not have occurred if ordinary care had been observed.
>
> *Hake* at 66-67.

Whether this burden has been met is a question of law to be determined by the trial court. *Id.* at 67. Here, our analysis will focus on the second element, as it is determinative.

{¶21} In support of his argument, Migliori relies on *Gayheart v. Dayton Power & Light Co.*, 98 Ohio App.3d 220, 232, 648 N.E.2d 72 (2d Dist.1994), for the proposition that application of res ipsa loquitur is appropriate "if there is evidence from which reasonable men can believe that it is more probable than not that the injury was the proximate result of a negligent act or omission." We find the facts in *Gayheart* to be distinguishable from the present case.

{¶22} In *Gayheart*, the plaintiffs sued the electric company for negligence when the plaintiffs' barn caught fire, destroying equipment and livestock. The plaintiffs

believed that the fire started because of a surge of electricity on the neutral electricity line. On appeal, the Second District affirmed the trial court's jury instruction on res ipsa loquitur, reasoning that the plaintiffs satisfied their burden of producing evidence on the two elements. As to the first element, the plaintiffs produced expert testimony that the surge on the neutral line was under the exclusive control of the electric company, and that other causes not under its control, such as lightning or car accidents, did not occur on the night of the fire. As to the second element, the plaintiffs produced expert testimony that "in the absence of lightning or car accidents, such a power surge would not occur in the absence of negligence." *Id.* at 231. In addition, the plaintiffs produced testimony that their own wiring in the barn was "up to Code." *Id.*

{¶23} Here, in contrast, Migliori has produced no evidence that in normal, everyday life, electrical fires do not occur in the absence of negligence. Further, Migliori's proposition is too broad. To be entitled to res ipsa loquitur as it applies to Merritt, Migliori must show that electric devices do not catch fire without some form of negligence *on the part of the owner*. We think common sense dictates that this proposition cannot be true. Therefore, because Migliori has failed to satisfy his burden on the second element, we conclude that the application of res ipsa loquitur is not appropriate in this case.

{¶24} Accordingly, Migliori's second assignment of error is not well-taken.

III. Conclusion

{¶25} For the foregoing reasons, the judgment of the Lucas County Court of Common Pleas is affirmed. Migliori is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE