IN THE COURT OF APPEALS OF IOWA

No. 8-617 / 97-1654

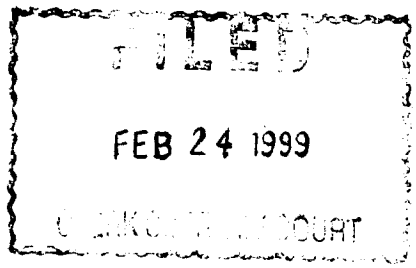
WHITE PIGEON MUTUAL INSURANCE ASSOCIATION,

Plaintiff-Appellant,

vs.

DARWIN THIRTYACRE,

Defendant-Appellee.



Appeal from the Iowa District Court for Johnson County, Lynne E. Brady, Judge.

Plaintiff appeals from an adverse verdict in a negligence action. **AFFIRMED.**

David Scieszinski, Wilton, for appellant.

Christopher L. Bruns of Elderkin & Pirnie, P.L.C., Cedar Rapids, for appellee.

Considered by Sackett, C.J., and Streit and Mahan, JJ.

MAHAN, J.

White Pigeon Mutual Insurance Association appeals from an adverse verdict in a negligence action. White Pigeon contends the district court erred (1) in failing to hold that Darwin Thirtyacre was negligent, and (2) in not applying the doctrine of res ipsa loquitur to the facts of this case. We affirm.

Larry and Scott Ogden owned a combine, a four-row corn head, and a moisture tester which were insured by White Pigeon. This equipment was stored in a corn crib when not in use. On April 18, 1994, the corn crib caught fire and this equipment was destroyed. White Pigeon paid the Ogdens $18,400 on their claim and took an assignment of subrogation rights on the Ogdens' claim against Thirtyacre.

The fire in question started on property rented by Thirtyacre. Specifically, Thirtyacre rented a house, machine shed, and pasture. The Ogdens rented the adjoining crop land and corn crib which stored the equipment which was destroyed.

Thirtyacre had resided on the property for twenty-two years prior to the time of the fire. When he moved to the property, it had two 55-gallon barrels located approximately fifty feet from the corn crib. The barrels had been used to burn trash and Thirtyacre continued using them for this purpose. He burned an average of one 10-gallon container of trash each day for the next twenty-two years.

Thirtyacre routinely assessed the weather upon arriving home from work. Unless it was raining or too windy, he would burn a bag of trash. He would watch the barrel for thirty seconds to one minute after setting the trash on fire and had never

seen burning material escaping from the barrel. In Thirtyacre's experience, it usually takes twenty to twenty-five minutes to burn a 10-gallon bag of trash.

On April 18, 1994, Thirtyacre burned trash in a manner he had routinely done for twenty-two years. The record indicates he had cleaned out the trash barrels and removed all debris and residue one week before. He arrived home from work and decided to burn trash during his evening chores. The day was sunny and the wind at the time was negligible. He lit the trash and watched to make sure it started. He completed his chores and checked on the fire again. It had been burning for approximately twenty-five minutes and appeared to be dying out. He only observed a few wisps of smoke coming from the barrel. Convinced the fire was dying out, Thirtyacre and his wife left for town. Upon returning from town, Thirtyacre found the corn crib had burned and the fire department was on the scene. Thirtyacre does not dispute that his barrel was the source of the spark which started the fire.

After a bench trial, the district court ruled in favor of Thirtyacre, finding he had exercised reasonable care in burning his trash on the day of the fire.

I. STANDARD OF REVIEW. Our scope of review is for errors at law. Iowa R. App. P. 4. The district court's findings of fact are binding upon us if supported by substantial evidence. Iowa R. App. P. 14(f)(1).

II. NEGLIGENCE. White Pigeon contends the district court erred in failing to hold Thirtyacre was negligent. We disagree. In order to prevail on a negligence claim, White Pigeon needed to establish the existence of a duty to conform to a

standard of conduct to protect others, failure to conform to that standard, proximate cause, and damages. *Hartig v. Francois*, 562 N.W.2d 427, 429 (Iowa 1997).

Thirtyacre does not dispute the source of the spark which started the corn crib fire was his burn barrel, nor does Thirtyacre dispute Ogden suffered actual damages as a result of the fire. The only disputed element is whether Thirtyacre failed to conform to the standard of care he owed Ogden.

Thirtyacre owed Ogden the duty to exercise reasonable care in setting fires to burn his trash. *See Jacobs v. Andrews*, 4 Iowa 506, 507 (1857). Whether he exercised reasonable care is a question of fact. *See Johnson v. Svoboda*, 260 N.W.2d 530, 535-36 (Iowa 1977); *Appling v. Stuck*, 164 N.W.2d 810, 814 (Iowa 1969). The district court found Thirtyacre exercised reasonable care in burning his trash on the day of the fire. The district court stated:

> Considering all the facts presented at the trial, the court now finds plaintiff has failed to prove defendant was negligent in any particular way. He started the fire and watched it and followed the same practice he has followed on numerous occasions for a number of years. There had never been any calamity like this previously; therefore, he had no reason to suspect there might be. He was taking reasonable, ordinary precautions to prevent any problems.

After review of the record, we find the district court's finding is supported by substantial evidence and we are bound by it on appeal.

III. RES IPSA LOQUITUR. White Pigeon maintains the district court erred in not applying the doctrine of res ipsa loquitur to the case at bar. We disagree.

The mere occurrence of a fire with resultant injuries or damages does not permit an inference of negligence, as a fire might occur in the absence of negligence. *Northwestern Nat'l Ins. Co. v. Raid Quarries Corp.*, 249 N.W.2d 640, 644 (Iowa 1977). Iowa courts view res ipsa loquitur as a rule of evidence rather than a rule of substantive tort law. *Brewster v. United States*, 542 N.W.2d 524, 529 (Iowa 1996). The two foundation facts for application of the res ipsa doctrine are: (1) exclusive control and management by defendant of the instrumentality which causes the injury, and (2) the occurrence is such as, in the ordinary course of things, would not happen if reasonable care had been used. *Id.* (quoting *Mastland, Inc. v. Evans Furniture, Inc.*, 498 N.W.2d 682, 686 (Iowa 1993)). The applicability of the doctrine is to be determined from common experience. *Wilson v. Paul*, 176 N.W.2d 807, 811 (Iowa 1970). If there is substantial evidence to support both elements, the fact that an injury occurred permits an inference the defendant was negligent. However, it does not compel such an inference. *Brewster*, 542 N.W.2d at 530.

Where the district court sits as finder of the facts, it considers the doctrine in two stages. *Clippinger v. Becker*, 220 N.W.2d 879, 881 (Iowa 1974). The first stage is similar to the consideration a trial court would give the doctrine in a jury case. *Id.* A legal determination is made as to whether the doctrine should be considered. *Id.* If the doctrine is considered, the district court, in place of the jury, next makes factual determinations and on the basis of them applies or refuses to apply the doctrine. *Id.*

We agree with the district court the doctrine did not apply in this case. The record indicates there is sufficient evidence to satisfy the first foundational requirement of control. However, the evidence is insufficient to satisfy the second foundational requirement based on common experience. In other words, the corn crib fire was an occurrence which could happen, in the ordinary course of things, even though reasonable and ordinary care had been exercised.

For these reasons, we affirm the verdict as entered by the district court.

AFFIRMED.