2012 IL App (1st) 102873-U

FOURTH DIVISION
May 10, 2012

No. 1-10-2873

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ALAN RUTKOFF, Executor of the Estates of Mark Gordon, Deceased, and Rachelle Gordon, Deceased,	)	Appeal from the Circuit Court of Cook County
Plaintiffs,	)	
v.	)	
SECURITY ASSOCIATES INTERNATIONAL, INC., and KEYTH SECURITY SYSTEMS, INC.,	)	
Defendants and Third-Party Plaintiffs-Appellants	)	
(Harriet Hoyle and Robert Blake,	)	No. 07 L 7966
Third-Party Defendants-Appellees;	)	
Michael Gordon,	)	
Third-Party Defendant;	)	
State Farm Fire and Casualty Company, as subrogee of Mark Gordon and Rachelle Gordon,	)	Honorable Thomas L. Hogan
Intervenor-Plaintiff)	)	Judge Presiding.

PRESIDING JUSTICE LAVIN delivered the judgment of the court.

ORDER

¶ *1* *Held*: The trial court properly granted summary judgment in favor of third-party defendants due to an absence of competent, circumstantial evidence to support any reasonable inference that they failed to properly extinguish their cigarettes and were therefore responsible for the fire that caused decedents' injuries.

¶ 2 This case arises from a fire that ensued at the home of decedents Mark Gordon and Rachelle Gordon in the early morning hours of July 29, 2006. The executor of their estates sought recovery from defendants, including Keyth Security Systems, Inc. (Keyth) and Security Associates International, Inc. (Associates), who were alleged to have been responsible for certain aspects of decedents' home fire detection system. It was alleged that the system failed to function properly at the time of the fire, causing the deaths of Mark and Rachelle. In turn, Keyth and Associates filed third-party complaints seeking contribution from Michael Gordon, decedents' teenage son, and two of his three friends who had been smoking with him in the basement of decedents' home a couple of hours before the fire was reported. It was alleged that third-party defendants' negligence in their use of smoking materials caused the fire and decedents' death, allegedly making them joint tortfeasors along with Keyth and Associates. After considerable discovery, the trial court granted motions for summary judgment filed by third-party defendant Robert Blake and third-party defendant Harriet Hoyle. Keyth and Associates now seek relief in this interlocutory appeal. Because Keyth and Associates failed to present competent evidence from which a trier of fact could determine that these particular third-party defendants were negligent, we affirm the trial court's judgment.

¶ 3 Plaintiff Alan Rutkoff, as executor of decedents' estates, commenced this action on July 31, 2007. The amended complaint raised causes of action against Keyth, Sterling Systems, LTD (Sterling) and Security Systems, Inc. (Systems).[1] Systems was subsequently dismissed from this action, as well as all related claims filed by and against Systems. Similarly, Sterling and all claims against it were dismissed after the trial court approved a settlement between Sterling and plaintiff. The first amended complaint raised counts of negligence and strict liability against Keyth and counts of negligence against Associates. It was alleged, in pertinent part, that Keyth and Associates were responsible for certain aspects of the fire detection system in decedents' home, located at 642 West Fullerton Avenue in Chicago. The system was supposed to include heat, smoke and fire detectors programmed to notify a central monitoring station of any problem. Plaintiff alleged that decedents and the fire department were to be automatically notified in the event of a fire or the detection of smoke. When decedents were in their upstairs bedroom at the time of the fire, however, no alarm or detection was transmitted to the central monitoring station and decedents were not alerted to notify the fire department. As a result, decedents sustained injuries resulting in their deaths. The complaint essentially attributed the system's failures to Keyth and Associates.

¶ 4 In July 2008, Keyth was granted leave to file a third-party complaint seeking contribution from Michael, Harriet and Robert in three separate counts. Keyth's complaint alleged, in

[1]State Farm Fire and Casualty Company, as subrogee of decedents, also filed an intervenor-complaint against Associates, Keyth and Sterling.

pertinent part, that the fire began in decedents' basement when furnishings were ignited by unextinguished smoking materials and that shortly before the fire, Michael, Harriet and Robert had been smoking in the basement. The count against Harriet alleged that she had a duty to exercise reasonable care when smoking and extinguishing smoking materials in order to prevent the ignition of furnishings and to avoid injuries to those in the residence. The count against Robert charged him with the same duty as to his own conduct. In contrast to the count against Michael, which explicitly alleged that he failed to exercise reasonable care with respect to the cigarettes smoked by all three individuals, the counts against Harriet and Robert indicated they failed to exercise reasonable care with regard to only the cigarettes that they smoked individually. Specifically, the complaint alleged Harriet failed to exercise reasonable care when she negligently and carelessly (1) placed unextinguished and smoldering smoking materials in a location from which they ignited basement furnishings; (2) failed to properly extinguish her smoking materials and keep a lookout for unextinguished and smoldering smoking materials near basement furnishings; (3) failed to observe that smoking materials remained unextinguished and smoldering in a location from which furnishings could be ignited; and (4) left the residence while smoking materials remained lit. The count against Robert made the same allegations as to his failure to exercise reasonable care with his own smoking materials. The counts further alleged that their respective negligent acts or omissions proximately caused decedents' deaths and that if Keyth was found liable to plaintiff, it would be at least partially attributable to their negligence. In August 2008, the

trial court granted Associates leave to file a substantially similar third-party complaint seeking contribution from Michael, Harriet and Robert.

¶ 5 Harriet testified in her deposition that on the evening before the fire, she and Michael went out to dinner and left the restaurant at about 11 or 11:30 p.m. They picked up Stewart Peabody and went to Michael's home, where Robert was also present. Harriet was not friends with Robert or Stewart. When they arrived at about midnight, Mark was asleep upstairs and Rachelle, whom Harriet had never seen smoke, was watching television in the living room. The teenagers chatted with Rachelle for 10 to 15 minutes and then went to the basement for approximately 20 minutes to discuss their plans for the remainder of the night. Harriet smoked one cigarette and believed that Michael and Stewart also smoked a cigarette but did not recall if Robert did. Harriet and Michael used an ashtray that was on a table in the middle of the room to extinguish their cigarettes but she did not recall whether Stewart used a bottle for that purpose. She denied that anybody was smoking marijuana or anything in a pipe. When all four individuals left the basement between 12:30 a.m. and 12:45 a.m., the room was not smoky. In addition, Harriet believed that Rachelle was no longer awake at that time because she was not sitting in the living room. When asked whether she recalled any specific efforts to ensure that cigarettes were extinguished before leaving, Harriet answered, "I can't remember if we cleaned up or not, you know. But they certainly were put out, to my knowledge, and I remember putting my cigarette out[.]" Michael and Harriet then went to a couple nearby establishments, while Stewart and Robert went elsewhere. Harriet did not know what

caused the fire.

¶ 6 In his deposition, Robert testified that when he met Stewart, Harriet and Michael at Michael's house, Rachelle opened the back door for them. Rachelle generally smoked cigarettes but was not smoking at that time. After speaking to Rachelle for less than a minute, the four teenagers went downstairs for no more than 30 minutes. They watched television, discussed plans for the night and smoked cigarettes. Robert had only one cigarette and disposed of his ashes and cigarette butt in a ceramic ashtray on the coffee table. He did not remember whether anyone used a bottle for disposal. In addition, no one smoked a pipe or discussed marijuana. About 10 to 15 minutes after smoking his cigarette, Robert left the basement and walked home. Harriet and Michael went out and Stewart went to another friend's house but Robert did not recall whether Stewart left earlier than his companions. When asked whether any efforts were made to ensure that cigarettes were extinguished before they left, Robert answered, "[n]othing special, just basic putting a cigarette out." Robert did not know what caused the fire.

¶ 7 Stewart testified that after he was picked up by Michael and Harriet, they drove to Michael's house and arrived there at 11:30 p.m. or midnight. Robert arrived there separately. They came in the back door and spoke to Rachelle, who was watching television. When she went upstairs to bed, they went downstairs to watch television and discuss what they wanted to do that night. Stewart recalled that Rachelle said she was going to bed because it was late. In the basement, they smoked cigarettes but did not smoke marijuana or a pipe. Stewart believed Michael owned a small pipe but did not

remember what it looked like or recall seeing it that evening. Stewart also testified that Harriet may have owned a pipe but he did not specifically remember her owning one. Stewart disposed of his ashes and cigarette butts in a glass bottle sitting on the glass table. He thought that his companions were using the ashtray sitting on the table but did not specifically recall. At some point between midnight and 1 a.m., Stewart left to go to a party by himself and the other three teenagers remained in the basement. Stewart had no information regarding what caused the fire.

¶ 8 We note that Michael died during the pending litigation and the parties did not take his deposition.

¶ 9 The depositions of several firefighters were also submitted. Captain Al Kiefer testified that his unit was dispatched to the scene at 3:07 a.m. and arrived there a few minutes later. When asked what may have caused the fire, Kiefer answered, "[i]t's all hearsay." He testified there had been some discussion of drug paraphernalia such as a pipe being found, but that he had not seen it himself. Lieutenant Michael Messina also testified that he did not know how long the fire had been burning prior to his arrival and that a chair and a couch in the basement were smoldering when he arrived. He did not participate in the investigation of the fire, did not have an opinion regarding its cause and origin and did not see any evidence of careless smoking. In addition, Chief John Shehan testified that the fire originated in an entertainment area of the basement and the victims were found in a bathtub in the bathroom of the master bedroom. Chief Shehan did not know what caused the fire. He learned that the fire may have started in a couch in the basement but it

was based on rumors that Michael was possibly smoking in the basement.

¶ 10 An incendiary fire fact sheet from the Chicago Fire Department's Office of Fire Investigation listed firefighter Neil Lubomski as the fire marshal and stated that Detective Cella related to him that Michael said he and his girlfriend had been smoking. The fact sheet stated only "there is a possibility that this fire was the result of the misuse of smoking or drug use materials." Police reports were also submitted in discovery, although their admissibility has been challenged on appeal. The reports state, in pertinent part, that Jeffrey Gomez was on a rooftop deck at 629 N. Deming Place at approximately 3 a.m. on July 29, 2006, when he observed smoke and called 911. A report also stated that decedents died from carbon monoxide intoxication as well as the inhalation of smoke and soot.

¶ 11 In March 2010, Harriet moved for summary judgment, arguing, in pertinent part, that there was no evidence that she acted negligently or failed to properly extinguish her smoking materials. In addition, Harriet argued that Keyth and Associates failed to demonstrate proximate cause and their speculation was insufficient. Specifically, she argued that no evidence showed her cigarette caused the fire or that the fire, rather than the alarm failure, was the proximate cause of decedents' injuries. Several documents were attached to Harriet's motion, including her deposition and police reports. Robert also moved for summary judgment, arguing that third-party plaintiffs had presented no evidence of his alleged negligence. He argued there was no evidence that his one cigarette, extinguished in a ceramic ashtray 10 to 15 minutes before he left Michael's

home, was responsible for the fire. Among the attachments to Robert's motion was his deposition and a memorandum in support of his motion, in which he adopted Harriet's argument that there was no evidence of proximate cause.

¶ 12 On May 7, 2010, Keyth and Associates filed a joint combined response to the motions for summary judgment, essentially arguing that Harriet and Robert admitted to smoking in the area where the fire occurred and thus, a trier of fact could infer that they had been negligent. The response also alleged there were reasonable suspicions that a drug pipe was used on the night of the occurrence because a drug pipe was found near the area where the fire originated, Michael owned such a pipe and Hoyle may have also owned one. We note that Stewart did not testify that Michael's pipe was a drug pipe. We also note Stewart testified that he did not know whether Harriet owned a pipe. In addition, notwithstanding the absence of evidence specifying when the fire started, the response alleged that the fire started shortly after the teenagers left Michael's home. Furthermore, the response alleged that the fire department determined the fire originated in the basement and the police determined the cause of the fire was the careless use of smoking materials, citing a police report. The police report attached states, "CAUSE CODE(S): Careless Use of Smoking Materi[al]." At the end of the same report however, it states only that "the careless use of smoking paraphernalia [is] not being ruled out as a causative factor." Thus, when the report is read as a whole, it is clear that a "cause code" does not represent an unequivocal determination as to cause. The response argued that the doctrine of *res ipsa loquitur* would permit a finding of negligence. Also attached to the

combined response was the aforementioned incendiary fire fact sheet, stating it was possible that the fire resulted from the misuse of smoking or drug materials, a photograph of a pipe and several police reports documenting interviews of neighbors and friends of decedents, none of whom reported having first hand knowledge regarding the cause of the fire or the time the fire started.

¶ 13 In reply, Harriet argued the mere possibility that she was responsible for the fire was speculation, conjecture and insufficient to withstand a motion for summary judgment. Harriet added that even if the fire was caused by smoking materials, third-party plaintiffs could only speculate that it was specifically caused by Harriet's one cigarette, particularly in light of testimony that there were three other teenagers who smoked in the home and that Rachelle also smoked. Robert's reply raised substantially similar arguments regarding his alleged role in the fire. He added, in pertinent part, that *res ipsa loquitur* was inapplicable because third-party defendants could not show the instrumentality causing the fire was within his exclusive control. Robert further argued that certain evidence such as police reports, Officer Messina's hearsay testimony and testimony regarding the pipe were inadmissible and could not be considered in the context of a motion for summary judgment. During arguments at a hearing on July 30, 2010, the trial court questioned how third-party plaintiffs could legally connect the smoking material to sufficiently establish the requirement of proximate causation. The court ultimately granted a continuance to August 30, 2010, stating that at the next hearing, "[y]ou either have something or you don't. If you don't, I'm going to grant the motions."

¶ 14 During his deposition taken a mere six days before the scheduled hearing, firefighter Lubomski testified regarding his investigation and the aforementioned incendiary fire fact sheet. He concluded that the fire originated in the recreation area of the basement by the ignition of a Class A combustible source, such as paper or wood, using an open flame source, which included items such as a match, candle, lighter or cigarette. Lubomski testified that the point of origin was somewhere directly below a piece of furniture with a hinged top similar to an ottoman or coffee table. In addition, Lubomski did not speak to Harriet or Michael but Detective Cella relayed to Lubomski that Harriet and Michael said they had been smoking in the basement. Lubomski did not recall if he had been told that Rachelle smoked cigarettes and had never heard of Robert Blake. Furthermore, Lubomski believed he saw paraphernalia at the scene and found it was possible that the fire resulted from the misuse of smoking or drug materials but also stated the fire may not have been caused by the misuse of such materials. He was not aware of any other possible causes and saw no evidence that the fire was caused by an electrical or chemical event. Assuming that the misuse of smoking materials resulted in this fire, Lubomski did not know which person in particular misused the materials. Attached to the deposition was an affidavit executed by Lubomski and the aforementioned incendiary fire fact sheet.

¶ 15 On August 30, 2010, the day of the scheduled hearing, the affidavit of fire protection engineer Dale Wheeler was filed. He essentially stated that he had reviewed the relevant pleadings, depositions, photographs and fire department reports. He noted that the four teenagers were near the fire's point of origin, that Stewart left the scene first, and that "the

three remaining individuals, Michael Gordon, Harriet Blattner- Hoyle and Robert Blake, were smoking in the basement." Thus, Wheeler did not acknowledge Stewart's testimony that he had been smoking before he left, but apparently believed Stewart left before any smoking ensued. Similarly, Wheeler did not acknowledge testimony that Rachelle was a smoker. In addition, Wheeler found there was no evidence that anyone else was in the basement after Michael, Harriet and Robert left. Wheeler stated that the "[d]etermination of the cause of a fire often is [made] by elimination of possible sources" and that "[o]nce certain sources have been eliminated, the remaining possibilities are the cause." Wheeler determined that because there was no evidence of electrical or heating devices or a chemical source, the only remaining likely cause of the fire was ignition by the improper use and disposal of smoking materials. He opined that "the cause of the fire and the deaths of [decedents] was the improper use and disposal of smoking materials by Michael Gordon, Robert Blake and Harriet Blattner-Hoyle." Wheeler did not opine as to the nature of the materials or improper use and disposal. Furthermore, when read as a whole, Wheeler's affidavit suggests that Michael, Harriet and Robert were collectively responsible for the use and disposal of all smoking materials, regardless of which individual smoked and/or disposed of smoking materials.

¶ 16 At the hearing on the summary judgment motions, the trial court noted that Harriet and Robert had only recently received Wheeler's affidavit. The court also noted it had not read Lubomski's deposition, that the court's copy of the deposition was labeled as a rough draft and that the court did not know whether it could take judicial notice of a rough draft.

The court's questions to the parties appeared to have been primarily concerned with whether individuals who were allegedly negligent by causing a fire could be responsible as joint tortfeasors under a complaint alleging negligence based on the failure of a fire detection system. Following arguments, the trial court granted the motions for summary judgment and subsequently entered a written order finding there was no genuine issue of material fact.

¶ 17 On appeal, Keyth and Associates assert the trial court erred by granting summary judgment in favor of Harriet and Robert because a genuine issue of material fact exists based on circumstantial evidence showing they were negligent and as a result, Keyth and Associates are entitled to contribution for any liability they incur in this case. Specifically, they contend that circumstantial evidence would permit a trier of fact to find that Harriet and/or Robert negligently failed to extinguish smoking materials, namely, cigarettes. Appellants raise no argument concerning the alleged drug pipe. We review the trial court's ruling on a motion for summary judgment *de novo*. *Abrams v. City of Chicago*, 211 Ill. 2d 251, 258 (2004). Accordingly, we may affirm on any basis appearing in the record. *Argueta v. Krivickas*, 2011 IL App (1st) 102166, ¶4.

¶ 18 Summary judgment is appropriate where the pleadings, depositions, admissions, affidavits and exhibits on file, when viewed in the light most favorable to the nonmovant, show there is no issue regarding any material fact so that the movant is entitled to judgment as a matter of law. *Abrams*, 211 Ill. 2d at 257 (citing 735 ILCS 5/2-1005(c) (West 2002)). Although a plaintiff is not required to prove his case at the summary

judgment stage, he must present sufficient evidence to create a genuine issue of material fact. *Keating v. 68th and Paxton, LLC*, 401 Ill. App. 3d 456, 470 (2010). Summary judgment in favor of the defendant is proper if the plaintiff has failed to show an essential element of his cause of action. *Johnson v. Ingalls Memorial Hospital*, 402 Ill. App. 3d 830, 843 (2010).

¶ 19 To succeed in a negligence action, a plaintiff must establish that the defendant owed the plaintiff a duty of care, that the defendant breached that duty, and that the breach proximately caused the plaintiff's injury or death. *Merca v. Rhodes*, 2011 IL App (1st) 102234, ¶41. Proximate cause requires cause in fact and legal cause. *Majetich v. P.T. Ferro Construction Co.*, 389 Ill. App. 3d 220, 224 (2009). In addition, cause in fact exists where the defendant's conduct was a material factor in bringing about the injury, whereas legal cause concerns a question of forseeability. *Majetich*, 389 Ill. App. 3d at 224. At the summary judgment stage, a plaintiff does not have to show it is more probable than not that the defendant's negligence proximately caused the plaintiff's injuries. *Gatlin v. Ruder*, 137 Ill. 2d 292-93 (1990). When circumstantial evidence is relied on to support a factual inference however, the factual inference itself must be both reasonable and probable, not merely possible. *Westlake v. House Corp.*, 2011 IL App (1st) 100653, ¶18. Where the nonexistence of a fact is just as probable as its existence, the conclusion that the fact exists is mere speculation, surmise and conjecture and a trier of fact cannot be permitted to make such an inference. *Keating*, 401 Ill. App. 3d at 474. Although proximate cause is usually a question to be determined by the trier of fact, it

may be determined as a matter of law by the court where the facts as alleged demonstrate that the plaintiff would never be entitled to relief. *Abrams*, 211 Ill. 2d at 257-58.

¶ 20 Here, Keyth and Associates have failed to raise a genuine issue of material fact sufficient to withstand summary judgment. No evidence was presented showing the police department or fire department unequivocally determined the fire was caused by the improper disposal of smoking materials, although certain other possible causes were eliminated. Even assuming that improperly disposed of smoking materials were responsible, it is undisputed that Michael, Stewart, Harriet and Robert were all smoking, not just the latter two individuals. Notwithstanding that Harriet and Robert acknowledged they had been smoking, it must still be shown that they actually started the fire. The fire was not reported until approximately two hours after the teenagers had ceased smoking and the record contains no evidence specifying how long the fire had been burning when the fire department was alerted. If, as appellants' position suggests, it was possible that the cigarettes smoked by Harriet, Robert and Michael did not immediately develop into a voluminous fire, surely any unextinguished cigarette smoked by Stewart could similarly have gone undetected for several minutes. In addition, the parties do not dispute that Rachelle was a smoker. Although testimony indicated she went to bed, the record shows nothing that would have prevented her from returning to the basement to smoke after the teenagers had left. In essence, Keyth and Associates urge this court to embrace the language of their expert's affidavit to the effect that the elimination of certain causes ineluctably means that "the remaining possibilities are the

cause" of the fire and the death of decedents. This argument and the supporting language from the expert's affidavit does not approach any legal standard for proof of either negligence or proximate causation.

¶ 21 Nonetheless, for the purpose of summary judgment, we must construe this evidence in favor of the nonmovants. Accordingly, we will assume that the fire was started by the improper disposal of smoking materials and that neither Stewart nor Rachelle smoked cigarettes that were improperly extinguished. We will further assume that a trier of fact could reject the testimony of Harriet and Robert that they recalled extinguishing their respective cigarettes. Notwithstanding all of these assumptions in appellants' favor, they have presented no evidence from which a trier of fact could reasonably infer that Harriet and/or Robert, to the exclusion of Michael, left an unextinguished cigarette smoldering, thereby breaching their respective duties and causing the fire. This theorem essentially would mean that proof of negligence or causation could be reduced to a theoretical exercise solved by multiple choice.

¶ 22 Appellants rely on Wheeler's affidavit, which Harriet and Robert contend may not be considered in opposition to their summary judgment motions. Illinois Supreme Court Rule 191 (eff. July 1, 2002) requires that affidavits in support of or in opposition to a summary judgment motion must be made on the personal knowledge of the affiant who is competent to testify to the facts asserted therein and the affidavit must set forth with particularity the facts that it is based upon. *Lewis v. Rutland Township*, 359 Ill. App. 3d 1076, 1079 (2005). Thus, unsupported opinions, assertions and conclusory statements do

not satisfy Rule 191. *Lewis*, 359 Ill. App. 3d at 1079. Although at trial, an expert witness may give his opinion without disclosing its underlying facts, the same is not true of affidavits at the summary judgment stage. *Landeros v. Equity Property and Development*, 321 Ill. App. 3d 57, 63 (2001). Wheeler claimed to rely on the depositions submitted in this case, including the depositions of Harriet, Robert and Stewart. Neither those depositions nor any other evidence submitted support Wheeler's indication that Stewart left the scene before Michael, Harriet and Robert began smoking. Wheeler did not acknowledge that Stewart himself admitted to smoking. In addition, Wheeler did not specify the nature of the smoking materials or how they may have been improperly used and disposed of. Accordingly, it is highly questionable whether Wheeler's conclusion that the fire was caused by the improper use or disposal of smoking materials by Michael, Robert and Harriet provided underlying facts sufficient to satisfy Rule 191. Even assuming his affidavit was proper, it does not create a genuine issue of material fact.

¶ 23 Wheeler's affidavit indicated only that the three teenagers collectively failed to use and dispose of some smoking materials, regardless of which specific individual smoked them. He did not opine that any specific individual or combination of the three had smoked the cigarette that remained unextinguished and led to the fire. As stated, the complaint did not indicate that Harriet or Robert had been negligent with respect to any smoking materials other than their own and there must be evidence from which a trier of fact could find that these particular third-party defendants acted negligently and caused the fire. Wheeler's affidavit has not eliminated the possibility that it was Michael's cigarette alone

that remained unextinguished. *Cf. American States Insurance Co. v. Whitsitt*, 193 Ill. App. 3d 270, 275 (1990) (where the fire began in the utility room of the defendant's apartment due to the presence of combustible materials near the furnace and water heater, an inference existed that defendant placed it there, precluding summary judgment); *Sandburg-Schiller v. Rosello*, 119 Ill. App. 3d 318, 320-22, 335-37 (1983) (where conflicting evidence existed regarding whether the defendant admitted to having been smoking before a fire originated in his apartment, but the defendant lived alone, the trial court properly denied the defendant's motion for a directed verdict, a judgment n.o.v. and a new trial.) The record before us reveals a stark absence of circumstantial evidence from which a trier of fact could reasonably infer that Harriet or Robert, as opposed to Michael, breached their respective duties by failing to extinguish their cigarettes or that their respective cigarettes were responsible for the fire. See *Brown v. Kidd*, 217 Ill. App. 3d 860, 862, 863, 868 (1991) (summary judgment was proper as to a fire in a building with several occupants when it could not be determined who started the fire, notwithstanding that certain children in the building had previously set fires while playing with smoking materials). The possibility that Harriet or Robert diligently extinguished their cigarettes is just as probable as the possibility that they did not. Accordingly, any suggestion that Harriet or Robert failed to extinguish their cigarette and thus, were responsible for the fire, is pure conjecture and speculation and does not provide factual support for proof of either negligence or proximate causation.

¶ 24 Keyth and Associates also contend that a genuine issue of material fact exists pursuant to

the doctrine of *res ipsa loquitur*, a rule of evidence permitting a trier of fact to find from circumstantial evidence that the defendant acted negligently. *Gatlin*, 137 Ill. 2d at 295-96; *Lynch v. Precision Machine Shop, LTD*, 93 Ill. 2d 266, 274 (1982). Whether the doctrine applies is a question of law to initially be decided by the trial court. *IMIG v. Beck*, 115 Ill. 2d 18, 27 (1986). When a plaintiff invokes *res ipsa loquitur*, he bears the burden of proving all elements of the doctrine. *Dyback v. Weber*, 114 Ill. 2d 232, 242 (1986). Specifically, a plaintiff must show that (1) the instrumentality or agency causing the injury was, at the time the condition causing the injury was created, under the control or management of the party charged with negligence; and (2) the accident occurred under circumstances that would not have occurred in the ordinary course of events if the party charged used proper care while the instrumentality was under his control. *IMIG*, 115 Ill. 2d at 26.

¶ 25 The requisite control element of *res ipsa loquitur* is not a rigid standard, but rather, is a flexible one in which the key question is whether the probable cause of the plaintiff's injury was a cause that the defendant had a duty to the plaintiff to anticipate or guard against. *Heastie v. Roberts*, 226 Ill. 2d 515, 532 (2007). It is enough that the defendant has the right or power of control as well as the opportunity to exercise that right, or that he is under a duty that he cannot delegate. *Lynch*, 93 Ill. 2d at 273. Nonetheless, it must be shown that the plaintiff's injury can be traced to a specific instrumentality or cause for which the defendant was responsible or that he was responsible for all reasonable causes to which the incident could be attributed. *Raleigh v. Alcon Laboratories, Inc.*, 403 Ill.

App. 3d 863, 869 (2010) (citing *Napoli v. Hinsdale Hospital*, 213 Ill. App. 3d 382, 388 (1991)). Thus, the defendant's responsibility for a specific cause of an event is proven by eliminating the *responsibility* of any other person for that cause. *Lynch*, 93 Ill. 2d at 273. A plaintiff is not required, however, to eliminate all other possible *causes* for the injury. *Gatlin*, 137 Ill. 2d at 299; see also *Heastie*, 226 Ill. 2d at525-26, 534 (finding in the context of a motion to dismiss that a plaintiff does not have to show his injuries were more likely *caused* by any particular one of the defendants). In addition, the inference may be drawn where the defendant shares control with another individual. *Lynch*, 93 Ill. 2d at 273; see also *Loizzo v. St. Francis Hospital*, 121 Ill. App. 3d 172, 179-80 (1984) (*res ipsa loquitur* does not apply where negligence may be attributed to one of several individuals and no principle renders them liable *in solido* or where the injury may have been caused by a person who was not a joint actor or was not in control of an injured patient). Furthermore, where *res ipsa loquitur* is to be applied, all parties who could have caused the plaintiff's injuries are joined as defendants. *Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222, 257 (1990).

¶ 26 As stated, Keyth and Associates have not named either Stewart or Rachelle as individuals who could have been responsible for the fire. Thus, Keyth and Associates should not be permitted to invoke *res ipsa loquitur* as evidentiary proof regarding the counts against Harriet and Robert. Nonetheless, assuming that this deficiency does not bar invocation of this doctrine, Keyth and Associates cannot satisfy the requisite control element.

¶ 27 Here, the fire cannot be traced to a specific instrumentality, *i.e.*, a particular individual's

cigarette, and no evidence shows that Michael, Harriet and Robert shared joint control over all cigarettes. In addition, appellants contend neither that Harriet had a right and opportunity to control the cigarettes smoked by Michael and Robert, nor that she had a responsibility to do so. Similarly, it has not been suggested that Robert had a right, opportunity or responsibility to control the cigarettes smoked by Michael and Harriet. Furthermore, nothing suggests that Harriet or Robert had control over the house or the decedents themselves, or that they had a specific duty to the decedents to guard against injuries that could be caused by other individuals' cigarettes. *Cf. Jones v. Minister*, 261 Ill. App. 3d 1056, 1057-58 (1994) (finding that control concerns whether the probable cause of the injury was one which the defendant had a duty to guard against and that the trial court erred in granting summary judgment in favor of four defendant surgeons where all defendants shared exclusive control over the injured patient, notwithstanding that other hospital personnel may have participated in the operation); *Samansky v. Rush-Presbyterian- St. Luke's Medical Center*, 208 Ill. App. 3d 377, 387-88 (1991) (where each of the defendants had a legal duty to exercise due care to guard against the possibility that the catheter line in question might fracture and injure the plaintiff, the plaintiff was not required to present conclusive proof of which defendant exercised control over the catheter line at the time the condition causing the injury was created to defeat a motion to dismiss). As a result, it cannot be established that the instrumentality responsible for the fire was under the control of Harriet or Robert, or was an instrumentality for which they were responsible. Even assuming that one of the third-party defendants negligently

disposed of their cigarettes, resulting in a fire, appellants cannot eliminate the possibility that Michael alone was responsible. *Cf. Brooke Inns, Inc. v. S&R Hi-Fi and TV*, 249 Ill. App. 3d 1064, 1075-78 (1993) (the trial court properly denied the defendant's motion for a directed verdict as to *res ipsa loquitur* where there was evidence that the fire occurred in the attic three hours after the defendant's employee who had been working in the attic may have left a drop light there and the evidence affirmatively revealed that no one else had been there in the interim); *Collgood, Inc. v. Sands Drug Co.*, 5 Ill. App. 3d 910, 914-15 (1972) (where the plaintiffs demonstrated that a fire occurred in an area under the exclusive control of the defendant's agents, *res ipsa loquitur* applied). Nothing short of speculation would permit a trier of fact to determine that Harriet or Robert controlled the instrument leading to the fire and decedents' injuries. Accordingly, *res ipsa loquitur* does not apply to the facts in the matter *sub judice*.

¶ 28 In conclusion, Keyth and Associates are able to show only that four teenagers were smoking in an area where a fire ensued two hours later. This circumstantial evidence is baldly insufficient to establish that Harriet and Robert breached their duty as guests or that such breach caused the fire and decedents' injuries. Because there is no genuine issue of material fact, the trial court properly granted summary judgment in their favor. In light of our disposition, we need not consider the remainder of the parties' arguments.

¶ 29 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 30 Affirmed.