

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2004-CA-002651-MR

BARRISTER FARM, LLC

APPELLANT

v. APPEAL FROM OLDHAM CIRCUIT COURT  
HONORABLE KAREN A. CONRAD, JUDGE  
ACTION NO. 01-CI-00791

UPSON DOWNS FARM, INC.

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; HENRY, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Barrister Farm, LLC, appeals a summary judgment of the Oldham Circuit Court in favor of Upson Downs Farm, Inc., pursuant to a negligence action resulting from a barn fire in which three of Barrister's horses were killed. We affirm.

Upson Downs Farms, Inc. ("Upson Downs") was the boarder of three thoroughbred horses owned by Barrister Farm, LLC ("Barrister"), a Hollie Collie 1999 filly, a Rose Tiara 1999 filly, and a One Ameri 2000 colt. Shortly after 1:00 a.m. on

December 27, 2000, a local police officer observed a barn on fire on the Upson Downs property, located in Oldham County, Kentucky, and alerted the North Oldham Fire Department. The fire department received the alarm for the barn fire at 1:10 a.m. and arrived on the scene at 1:22 a.m. The fire department incident report states that the horse barn was fully involved with fire. The perimeter was contained, and the hay in the center of the barn was allowed to burn. Sadly, seven horses died in the fire, including Barrister's three horses.

The fire department contacted the Oldham County Police Department (OCPD) fire investigator. Interviews with farm and fire personnel were conducted. The scene was examined and the remains of the barn structure were photographed. There was no indication of arson. The resulting OCPD fire investigation report, as did the North Oldham Fire Department incident report, classified the cause of the fire as "undetermined".<sup>1</sup>

On December 28, 2000, a study to determine the origin and cause of the barn fire was begun by Donan Engineering Co., Inc., at the request of Upson Downs' insurer, Chubb Group of Insurance Companies. The investigation was conducted by two certified fire investigators, and numerous photographs were taken of the scene pursuant to the investigation.

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<sup>1</sup> The OCPD report also indicates that weather did not appear to be a cause.

In a letter/fax correspondence dated December 29, 2000, Barrister's owner, Frank Csapo, wrote to Upson Downs requesting copies of the Fire Marshall's and independent investigator's reports and requesting that Upson Downs preserve the fire site until Barrister had a chance to review the reports and possibly send out its own investigators. In a letter dated December 31, 2000, Alex Rankin, the owner of Upson Downs Farm, informed Csapo that the site had been cleared the day his letter was received (December 29) but that it had been photographed and videotaped for the investigation. The letter explained that "the site becomes compromised after several days not to mention the need to deal with the remains of the horses in a respectful manner."

Donan Engineering issued a report, dated January 10, 2001 (hereinafter, the "Donan Report"), setting forth its findings and conclusions as to the cause of the barn fire. The Donan Report indicated that at the time of the fire, Corrigan Electric Company was in the process of inspecting and repairing Upson Downs' various barns' electrical systems. At issue in this case, in the subject barn, Corrigan had found straw and dust in electrical receptacles, and a problem with hay breaking electric lighting globes when thrown from the hayloft; however, these problems were remedied by Corrigan prior to the fire. Also at issue, the report noted evidence was found consistent

with spontaneous combustion of hay but concluded that the age of the hay which had been stored in the barn was outside the timeframe for the normal occurrence of spontaneous combustion. The report analyzed various other possible causes of the fire as well. The report ultimately concluded the cause of the fire as "unknown", based on the facts that no direct cause of the fire was found, and that no competent source of ignition was identified.

On December 21, 2001, Barrister filed suit in Oldham Circuit Court seeking damages for the loss of its three horses. On September 26, 2002, Upson Downs filed a motion for summary judgment on the grounds that Barrister could not prove negligence on the part of Upson Downs as required by KRS 422.280.<sup>2</sup> On November 18, 2002, Barrister filed a motion for

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<sup>2</sup> KRS 422.280, specific to boarding of horses, provides an exception to the general rule that damage to bailed property which was delivered in good condition creates a rebuttable presumption of negligence on the part of the bailee. See Threlkeld v. Breaux Ballard, Inc., 296 Ky. 344, 177 S.W.2d 157 (1944). KRS 422.280, "Liability for damage to or loss of boarded horses - Negligence not presumed", provides:

- (1) As used in this section:
  - (a) The term "boarder" means one who holds out his land, barn or related facilities to others for compensation, by which is meant compensation in any manner, whether money or otherwise, for the custody, care, breeding or selling of horses;
  - (b) The term "owner" means one who has contracted with the boarder for the custody, care, breeding or selling of horses.
- (2) The owner shall be liable for damages to or loss of the horse while in the custody of the boarder except for that damage or loss due to

summary judgment on grounds that Upson Downs' destruction of the fire site, which precluded Barrister from conducting its own investigation, constituted spoliation of evidence. Barrister argued that this spoliation shifted the burden onto the spoliator, Upson Downs, to prove that it was not negligent, and that Upson Downs would be unable to establish adequate proof thereof. In an order entered December 11, 2002, the trial court denied Barrister's motion for summary judgment based on spoliation, finding that the removal or destruction of evidence was unintentional or satisfactorily explained. In the same order, the court reserved ruling on Upson Downs' motion for summary judgment, and granted Barrister additional time in which to further its theories of negligence.

On August 16, 2004, Upson Downs renewed its motion for summary judgment, contending that in the additional time granted by the court, Barrister had failed to produce any evidence of negligence. In a response filed September 14, 2004, Barrister provided an affidavit from G. Lynn Nobles, a certified fire investigator, who had been contacted by Barrister to perform an investigation of the barn fire. The affidavit stated that

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the negligence of the boarder, his agent or employees. Evidence that the owner delivered horses to the boarder and that the horses were damaged or lost while in the care and custody of the boarder shall not be sufficient to create a presumption of negligence on the part of the boarder, or a prima facie case in favor of the owner.

Nobles would testify that spontaneous combustion of hay is a known danger in the horse industry, that hay is a highly flammable substance, and that hay getting into electric lighting bins in a barn could cause a highly dangerous condition. The Nobles affidavit stated that in a situation such as this, he "would normally closely investigate the fire scene and the burned structure and remains, take up-close and detailed photos, and talk to all witnesses or individuals with detailed knowledge about the burned premises" but that in this case there was no fire scene or burned structure to observe. The affidavit stated that the lack of tangible or visual evidence left Nobles "unable to render a conclusive opinion regarding the causation of the fire."<sup>3</sup>

In an order entered December 16, 2004, the trial court granted Upson Downs' motion for summary judgment, from which order Barrister appeals to this Court.

#### **SPOLIATION OF EVIDENCE**

We first address Barrister's argument that Upson Downs' clearing of the fire site, which precluded Barrister from conducting its own investigation, constituted spoliation of evidence. Barrister contends that, per Welsh v. United States, 844 F.2d 1239 (6<sup>th</sup> Cir. 1988), this spoliation shifted the burden

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<sup>3</sup> The Nobles affidavit indicated that he had been provided the Donan Report, a video of the fire aftermath taken by Upson Downs, and a few photographs taken by Upson Downs which he described as unclear.

to the spoliator, Upson Downs, to disprove negligence. In its December 11, 2002, order, denying Barrister's motion for summary judgment, the trial court found as to the issue of spoliation:

Regarding the shifting of the burden of proof due to the spoliation of evidence, both parties rely upon *Welsh v. United States*, 844 F.2d 1239 (6<sup>th</sup> cir. 1988). This Court has reviewed the *Welsh* case and finds it distinguishable from the case at bar. In *Welsh*, the Court found the spoliators were negligent in their handling of evidence. The negligence arose because the evidence was not handled in the way the hospital's policies and procedures mandated it be handled. In the case before this Court, there is no showing that the clearing of the debris left from the fire was done so negligently or with the intent of hiding something. Additionally, Defendant's [sic] preserved evidence by having the sight [sic] video tapped [sic], photographed, and investigated by an engineering company. Hence, the Court finds the removal or destruction of evidence in this matter unintentional or satisfactorily explained.

Spoliation refers to a party's deliberate destruction of evidence. *Monsanto Co. v. Reed*, 950 S.W.2d 811, 815 (Ky. 1997). In the present case, there is no evidence to suggest that Upson Downs was negligent in clearing the fire site, that it did so with the intent of hiding evidence, or that the site was cleared after Csapo's request for preservation was received. The site was investigated, photographed, and videotaped before it was cleared. Barrister claims that the investigation by Donan Engineering was biased in that it was initiated by Upson

Downs' insurer. However, in addition to Donan, the site had also been investigated and photographed by the Oldham County Police Department fire investigators, as to whom no bias is suggested. All reports and photographs were made available to Barrister. Further, it was not unreasonable that the remains of the seven deceased horses needed to be removed expeditiously. Accordingly, we conclude that Upson Downs' clearing of the fire site did not constitute spoliation of evidence.<sup>4</sup>

#### NEGLIGENCE

Barrister further contends that Upson Downs is liable to Barrister under a straight negligence application. A negligence action requires proof of the following four elements: duty, breach of duty, causal connection between the conduct and the resulting injury, and actual loss or damage. Mapother and Mapother, P.S.C. v. Douglas, 750 S.W.2d 430, 431 (Ky. 1988).

It is undisputed that Upson Downs' accepting the horses for boarding created a duty. Barrister contends Upson Downs breached its duty of care by keeping the horses in a barn with known fire hazards, as evidenced by the Donan Report, which provided, in pertinent part, as follows:<sup>5</sup>

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<sup>4</sup> Having concluded that Upson Downs' clearing of the fire site did not constitute spoliation of evidence, we need not address Upson Downs' argument that Monsanto ("missing evidence" instructions), not Welsh (burden-shifting), is the law in Kentucky as to the appropriate remedy for spoliation.

<sup>5</sup> The "Mr. Valentine" referred to in the report is Upson Downs' farm manager, Ed Valentine.

The barn was built in 1993, and supplied with electricity. No natural gas or propane was used. Mr. Valentine relayed that the farm boards horses and that seven were lost to the fire. There was evidence of their remains during the site visit.

Mr. Valentine also relayed that Corrigan Electric Company was in the process of inspecting and repairing various barn's electrical systems at the time of the fire. As a result, Mr. Brandon Gentry, an electrician associated with Corrigan was interviewed via telephone to determine the extent of their work.

Mr. Gentry relayed that their tasks were initially to inspect the barns and conduct routine repairs. However, in the subject barn, Barn 5, they found deposits of straw and dust in the receptacle and light switch boxes. As a result, they were asked to replace all the light switches and receptacles with weather-tight units to prevent dust and debris from entering. In addition, all lights serving the individual stalls were relocated higher because they were being damaged when hay was thrown from the loft. In the process about half of the fixtures were removed.

Two Ground Fault Interrupter (GFI) breakers were added to protect the receptacle circuits. In addition, a 500-watt halogen light was installed on the west end of the barn. Mr. Gentry relayed that all wiring was encased in rigid metal conduit.

According to Valentine, the layout of the barn and original placement of the illumination lights caused a number of globes to be broken when hay was thrown from the second floor loft. Corrigan was asked to move the lights up higher on the supports to prevent this damage. Valentine said that each stall had a switch and receptacle. The

switch controlled the stall lighting and the receptacle was used to supply current to cooling fans in the summer.

Valentine said that no lights were on at the time of the fire, neither interior nor exterior illumination. The only electrical appliance in use was an oil-filled, electric heater and a 5-gallon hot water heater located in the tack room. The heater was used only to keep water pipes from freezing.

As noted above, almost all combustible materials had been consumed at the time of the site visit. The prominent remains of the barn included tin sheets used for the roof and support posts []. Some of a wooden sidewall remained along the north side of the barn [].

Various causes of the fire were considered. The area of the tack room and the oil-filled electric heater and water heaters were studied for their possible contributions []. Studying the two appliances did not reveal excessive electrical arcing or other evidence, which would have suggested the fire occurred in the tack room. In addition, the presence of combustible items, such as hay and wooden supports in this area, while consumed in other areas, did not indicate that the fire began in this area.

The electrical distribution panelboard, reported to have a 200 ampere capacity, was located on the east end of the barn. At the time of the site visit, it had been moved several feet away and was essentially empty []. The electrical service entrance, meter base and distribution area are all on the east end of the barn. These items were identified, but there was no evidence that they were the cause of the fire [].

Since the electrical system had undergone renovations, it was considered as a possible ignition source. However, due to the amount of burning, most wiring was broken at the conduit joints and other sections were simply consumed. There was no evidence at the service entrance of a high current demand, or heavy arcing.

Due to the complete nature of the burn, the area of greatest damage was estimated to be near the center of the east half of the barn. This observation was based on the complete burn of the support posts although Mr. Valentine relayed that some consumption of the remaining posts continued after the fire department's initial response. In addition, the metal mesh stall doors were buckled in this area. Buckling suggests that the fire consumed the loft floor supports and transferred the weight to the doors. In all, two doors, one on each side of the barn (north and south) were buckled, while the remaining doors lay essentially flat on the ground [].

The barn storage loft contained bedding straw on the east end and forage hay on the west end. There were some identifiable remains of the straw in the form of semi-burned yellow strands []. By contrast all of the hay was consumed. The hay storage section of the barn consisted of a white ash with some identifiable blackened strands of hay []. While studying this area, numerous "clinkers" or hard cinder-like objects were noted which are believed to be a by-product of spontaneous combustion [].

However, Valentine relayed that the hay had been grown in Indiana and purchased routinely from the same supplier. Since the fire occurred in December, the hay would have probably been cut and cured some months previously. Normally fires from spontaneous combustion occur with [sic] a few weeks following initial cutting.

In summary, based on the facts known at this time and pending any further study, we are of the opinion that:

The origin of the fire is in the central, east half of the barn. This is based on the following facts:

1. The burn patterns in this area of the structure.
2. Damage to the stall doors in this area.

The cause of the fire is unknown. This is based on the following facts:

1. No direct cause of the fire was found.
2. No competent source of ignition was identified.

The classification of the cause of the fire is *Undetermined* as defined by the attachment to this report. This is based on the following facts:

1. The ignition source is not conclusive.

Barrister contends that the report contains strong evidence of negligence on the part of Upson Downs, in particular that hay, a highly flammable substance, was known to be entering electrical boxes and breaking coverings on electrical lighting globes. Additionally, Barrister contends that the presence of "clinkers", consistent with spontaneous combustion, shows that hay was being improperly stored.

Summary judgment is proper only where the trial court, drawing all factual inferences in favor of the non-moving party, can conclude that there are no issues as to any material fact and that the moving party is entitled to judgment as a matter of law. Fischer v. Jeffries, 697 S.W.2d 159, 160 (Ky.App. 1985). Summary judgment should only be used to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant. Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476 (Ky. 1991).

Barrister contends that a reasonable jury could easily find that the hay caused the fire by spontaneous combustion or by its repeated contacts with the electrical apparatuses in the barn. Barrister contends that the potential fire hazards noted in the barn, the evidence of spontaneous combustion in the hay storage loft, Upson Downs' continued storage of the horses despite the knowledge of potential fire hazards, along with Upson Downs' destruction of the fire site, creates a genuine issue of material fact under which a jury could reasonably conclude that the fire was caused by the negligence of Upson Downs.

In addition to the Donan Report, the record includes the affidavit of Tom Corrigan, a master electrician and owner of Corrigan Electric Co., Inc. Corrigan Electric was hired by

Upson Downs in 2000 to perform repairs on the farm's horse barns in order to make them safer. The affidavit provides that Tom Corrigan has been in the electric business for 35 years and that Corrigan Electric regularly performs work on horse barns. The affidavit lists the electrical work performed on the barn at issue, which included installing dust-tight covers on the electrical fixtures, and indicates that the work was performed from November 20, 2000, to December 20, 2000. The affidavit states that at the time of the fire on December 27, 2000, all necessary electrical repairs in the barn had been completed and all electrical installation had been per National Electrical Code.

With regard to the issue of improper hay storage causing spontaneous combustion to occur (as evidenced by the "clinkers"), the record also contains the affidavit of Alex Rankin. The affidavit states that at the time of the fire, there were two types of hay housed in the barn, timothy grass and bluegrass. The timothy grass hay had been placed in the barn on December 6, 2000. The hay was from a supplier well known to Rankin, and the hay was baled during the spring or summer of 2000 and was housed until sold to Upson Downs. The bluegrass hay was cut and baled on the Upson Downs' farm no later than July 1, 2000. The affidavit provides that Rankin is familiar with horse industry standards for storing hay in barns

housing horses, that there is no industry standard that prohibits the storage of hay in barns housing horses, and that Keeneland and Churchill Downs store hay in barns housing horses.

In its December 16, 2004, order granting summary judgment in favor of Upson Downs, the trial court found:

There are no facts that support that hay was improperly stored in the barn at Upson Downs Farm, Inc. Nowhere in any of the articles cited by the Plaintiff nor in the affidavit of G. Lynn Nobles is there any statement that it is a deviation from the standard in the horse industry to store hay in horse barns. Furthermore, there is no proof that a reasonably, prudent and careful person having similar knowledge and experience would store the hay in a different manner. In fact, hay is stored in the barns at Churchill Downs in Louisville, Kentucky, and in the barns at the Keeneland Race Course. In addition, the farm the plaintiff's horses were boarded at previous to Upson Downs, Triple R Farms, stored hay in the barn. Furthermore, as hay is feed and bedding for horses it would seem impossible to completely eliminate hay from the barn and never have this combustible substance in a horse barn.

There are no facts that support that improperly cured hay was stored in the barn. Normally fires from spontaneous combustion occur within a few weeks following the initial cutting. The hay was older than a few weeks and therefore, was out of the timeframe of spontaneous combustion.

There are no facts that support that Upson Downs had not taken precautions against hay getting into the light switch boxes or that there were known dangers that had not been repaired in the electrical system. Upson Downs Farm had recently

undertaken several electrical improvements/repairs to make the barn safer including changing all of the light switch receptacles, adding dust-tight covers, and all of the electrical improvements/repairs had been completed prior to the fire by Corrigan Electric Company.

The trial court concluded that there was no genuine issue as to a material fact, and, therefore, summary judgment was appropriate.

Having thoroughly reviewed the record, we can add little to the trial court's thorough and well-reasoned analysis above, and adopt its reasoning as our own. As the trial court correctly found, all of the electrical fire hazards cited by Barrister as evidence of negligence had been corrected by Upson Downs prior to the occurrence of the fire. Also, while the presence of "clinkers" is evidence of spontaneous combustion, clinkers per se are not evidence of improper hay storage or evidence of negligence by the barn owner. There was no evidence of improper hay storage. Accordingly, we conclude the trial court correctly found that no genuine issue of material fact existed and that summary judgment in favor of Upson Downs was proper.

**RES IPSA LOQUITUR**

We finally address Barrister's argument that the majority of barn fires do not occur absent some form of negligence, and, therefore, under the circumstances of this

case, a presumption of negligence on the part of Upson Downs is created under the doctrine of *res ipsa loquitur*.<sup>6</sup> The requirements for invoking the *res ipsa loquitur* doctrine are as follows: (1) The defendant must have had full management of the instrumentality which caused the injury; (2) the circumstances must be such that, according to common knowledge and the experience of mankind, the accident could not have happened if those having control and management had not been negligent; and (3) the plaintiff's injury must have resulted from the accident. Vernon v. Gentry, 334 S.W.2d 266, 268 (Ky. 1960), citing Cox v. Wilson, 267 S.W.2d 83 (Ky. 1954).

We need not reach the parties' argument as to what constitutes the instrumentality in this case because the second prong is not satisfied. Cox instructs that in considering the second prong, "it is the court's duty judicially to notice whether as a matter of common experience the accident could not have happened without dereliction in duty on the part of the person charged with the management and operation of the thing." Cox, 267 S.W.2d at 84.<sup>7</sup> We cannot say that a barn fire, such as

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<sup>6</sup> Per Barrister's argument that "[h]orse barns simply do not go up in flames absent some form of negligence. Acts of God are few and far between and there seems to be no abundance of barn arsonists[]", we acknowledge that, per the Oldham County Police Department fire investigation report, there was no evidence that the barn fire was caused by weather or arson.

<sup>7</sup> In Cox, a tire on a school bus blew out, for an unknown reason, causing the bus to run off the road, injuring its occupants. The road was paved, and not rough or uneven. Similar to the present case, no breach of duty could be shown on the part of the bus owner/operator - the tires were well within

occurred under the circumstances of this case, could not occur but for negligence on the part of the barn owner/manager, here, Upson Downs. Accordingly, we conclude the doctrine of *res ipsa loquitur* is not applicable under the facts of this case.

Although the cause of this tragic fire was not determined, "[t]he fact that some mystery accompanies an accident does not justify the application of the doctrine of *res ipsa loquitur*."

Id.

For the aforementioned reasons, the order of the Oldham Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR  
APPELLANT:

Jason C. Vaughn  
Louisville, Kentucky

BRIEF AND ORAL ARGUMENT FOR  
APPELLEE:

Bixler W. Howland  
Louisville, Kentucky

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their life expectancy, and had been inspected by competent persons before the trip. The Cox court rejected the argument that the doctrine of *res ipsa loquitur* applied, as "it cannot accurately be said that ordinarily under similar conditions a tire will not blow out without negligence on the part of the operator of the car." Cox, 267 S.W.2d at 85. "A lack of knowledge as to the cause of the accident does not call for the application of the doctrine. The separate circumstances of each case must be considered . . . ." Id. at 84.