ORDER OF COURT

NOW, this 3rd day of March, 1993, the Court hereby:

1. Remands the Master's Report to the Master for the purpose of recalculating the value of the two trucks and two trailers currently in the possession of the defendant which constitute marital property, and

2. Affirms the Master's Findings pertainig to all other items of marital property.

Exceptions are granted to the Plaintiff and the Defendant.

PATRIOTIC ORDER SONS OF AMERICA, WASHINGTON CAMP #665 VS. BUMBAUGH AND WIFE, C.P. Civ. Div., Franklin County Branch, No. A.D. 1990-320

Tort Action--Negligence--Res Ipsa Loquitur sought to be invoked--Restatement of Torts (2d) §328D cited--Court's refusing to charge Point of binding instructions thereon--Verdict adverse to Plaintiff and Motion for New Trial--Potential invasion of province of Jury--Court's duty, sua sponte, to instruct on subject of a partially erroneous Point for Charge--Limitation on such duty.

1. A point for charge which included, *inter alia,* the following words, was rejected as an invasion of the function of the jury: "I charge you that the type of accident here involved is of a kind which ordinarily does not occur in the absence of negligence," and "I charge you that other causes have been sufficiently eliminated since it is established defendant had exclusive control of the instrumentality here involved, or owed a nondelegable duty to the plaintiff at the time when the negligence claim would have occurred."
2. In this case, evidence was presented about the Defendant and the Plaintiff, which if believed and found more credible than conflicting evidence presented by the Plaintiff, would permit the jury to reach a conclusion contrary to the requested point for charge, and therefore, the point for charge was inappropriate.
3. The point for charge could reasonably be construed by the jury as constituting an instruction for a directed verdict in favor of the Plaintiff, when there was conflicting evidence which would prevent the direction of a verdict.
4. If the Plaintiff produces sufficient evidence to raise an inference of *Res Ipsa Loquitur,* then the Plaintiff is entitled to have the jury instructed on this evidentiary rule, even though the Defendant has produced a quantity of contrary evidence.
5. Where the Plaintiff has furnished the Court with a written proposed point for charge which, although partially erroneous, sufficiently alerts the Court that an important issue needs to be addressed in its jury charge, omission of an instruction on the important issue is grounds for reversal where the issue is not otherwise covered in the charge and the objecting party has been prejudiced.
6. Restatement of Torts (2d) §328D, on *Res Ipsa Loquitur,* is cited and quoted, as the law of Pennsylvania.
7. Comment (a) of Restatement of Torts (2d) §328D, subsec. 1, is quoted.

8. The application of the doctrine of *Res Ipsa Loquitur,* in fire cases, should be predicated upon the particular facts and circumstances occurring in the individual case; not upon the mere occurrence of a fire.

9. If there is any other cause than negligence, to which the injury may with equal fairness be attributed, the inference of negligence cannot be drawn.

10. In the instant case, testimony of the Fire Chief and Deputy Fire Chief, indicated that a very strong point of origin of the fire was a crack in the fireplace wall, which the chief could not say could have been seen on the Defendants' side of the fireplace, and the jury could have concluded that the fire was the result of a spark traveling through the crack to the point of ignition, as suggested by the Deputy Chief.

11. The Fire Chief also testified that this type of fireplace was common in Franklin County, and that these types of fireplaces were constructed to be used and actually were used, for decades, and thus, the jury could have concluded that the use of this particular fireplace by the Defendants did not constitute negligence.

12. An expert witness testified that the fire was caused by the phenomenon of pyrophoric carbonization; that from the Defendant's living room, the fireplace appeared sound and it would have been asking a lot to expect the Defendant not to use the fireplace, that for the Defendant to have determined the number of courses of brick in the firebox and that the wooden beams were against the firebox would have required a large amount of structural damage; thus, the jury could have found that the use of the fireplace by the Defendants was not a negligent act.

13. The testimony of the Defendant, as to the work he did before putting the fireplace into service, and his examination of the fireplace and chimney with the conclusion that they looked "quite healthy," and that he believed the fireplace to be safe, and that he did use the fireplace from one to three times a week during cool weather from January, 1988 to October 24, 1989, could have led the jury to the conclusion that the Defendant was not negligent.

14. The Plaintiff offered expert testimony which, if believed, could have warranted a verdict for the Plaintiff, and so this was not a case in which the Plaintiff was unable to produce arguable evidence of specific acts of negligence and therefore compelled to rely upon the doctrine of *Res Ipsa Loquitur,* and therefore, the Court had no duty, *sua sponte,* to charge the jury on this doctrine, and it was the exclusive function of the jury to determine what weight to give that evidence.

Jeffrey S. Evans, Esquire, Counsel for Plaintiff
William A. Addams, Esquire, Counsel for Defendant

JOHN W. KELLER, S.J., January 11, 1993:

The plaintiff is an association with its principal place of business located in the Village of Quincy, Quincy Township, Franklin County, Pennsylvania. The plaintiff owns real estate improved with a brick structure used as a lodge. The defendants also own real estate in the Village of Quincy and that real estate is improved with a three story frame residence. The north wall of the plaintiff's lodge building is separated from the south wall of the defendants' residence by a space of between two and four inches.

In the early evening of October 24, 1990, the defendants kindled a fire in the fireplace in their first floor living room. The outer wall of the living room and the fire place is separated from the north wall of the plaintiff's lodge building by a space of between two to four inches. The fire in the defendants' fireplace spread through the structural log beams of the defendants' home and then spread to the south wall of the plaintiff's lodge building causing substantial fire damage. By amended complaint filed November 13, 1990, the plaintiff alleges the defendants' negligence and carelessness caused its loss and it seeks to recover the cost to repair the damage to the lodge building. The case was tried by a jury on August 4 and 5, 1992. The jury returned a verdict for the defendants and against the plaintiff.

The plaintiff filed a timely motion for new trial on August 17, 1992. Pursuant to order of court dated September 1, 1992, an argument conference was held on the record in chambers on September 29, 1992 at 3:00 o'clock p.m. An order was orally entered at the time of the argument conference and reduced to writing on October 8, 1992 which dismissed the plaintiff's second motion for a new trial and further provided:

> The court will accept briefs and hear argument on plaintiff's motion number 1 for a new trial limited to the issue of whether the point for charge number 4 as presented was applicable to the facts

in the case or in the alternative, if not applicable, whether the court then had a responsibility sua sponte to charge the jury on the issue of res ipsa loquitur with the facts that the court found applicable as presented by the evidence.

Argument was scheduled for 9:30 a.m. on November 5, 1992.

By agreement of counsel with the approval of the court, oral argument was waived and the matter submitted to the court for disposition on written briefs of counsel. This matter is now ripe for disposition.

The plaintiff's first post trial motion provides:

Now comes the Patriotic Order Sons of America, Washington Camp #665, the plaintiff in the above captioned action, by their Attorney Jeffrey S. Evans, Esquire, and in support of their Motion for a new Trial, pursuant to Pa.R.C.P. 2271.1(a)(1) states:

1. The Court erred in refusing to give Instruction No.4 as requested by Plaintiff to which ruling Plaintiff has an automatic exception pursuant to Pa.R.C.P. 227. The refusal of the Court to give the aforesaid instuction prejudiced the rights of Plaintiff in that:

A. The requested instruction was taken from Pa. SSJI (Civ) Section 5.08 the doctrine of Res Ipsa Loquitur;

B. The evidence presented at trial namely that:

i. this was a fire the type of which does not ordinarily occur absent negligence;

ii. the Defendant had exclusive control over the fireplace and performed or attempted to perform all maintenance or repairs due on firebox and determined it fit for use;

iii. Defendants and Plaintiff were adjoining land owners whose buildings were separated by no more than 2 to 4 inches and that as a result Defendant owed a duty to Plaintiff to correct any conditions, which uncorrected, create an unreasonable, foreseeable risk of harm to Plaintiff;

iv. the foreseeable harm actually occurred shortly after Defendants began to use the fireplace;

showed that the instruction as requested, was applicable and appropriate to this case;

C. Plaintiff, as a result of the Court's refusal to so instruct, bore the burden of showing that the Defendant acted negligently which was impossible in that only Defendant maintained and/or serviced the firebox outside the presence of Plaintiff or its witnesses;

D. The Court's refusal to so instruct deprived the Plaintiff of the opportunity to infer Defendant's negligence from the circumstances surrounding this fire;

E. The jury was not informed that it could, given the evidence presented, reasonably infer that Defendant had been negligent, despite the lack of direct proof of Defendant's negligence.

2. The verdict was against the charge of the Court in that:

A. The uncontradicted evidence of trial showed that:

i. Defendant, prior to using the fireplace in question, was aware of the approximate age of his residence and the living room fireplace; that the fireplace was built along the inside of the outer log wall of his residence; that the firebox was not constructed of firebrick; that the fireplace had been left in an unusable condition by the previous owner; that there were loose spots in the mortar of the firebox; and that the fireplace was built along the inside of the outer log wall of his home which was approximately 2 to 4 inches from Plaintiff's building; and

ii. the evening of the fire Defendant had a fire in the living room fireplace; and

iii. the cause of the fire was heat transference through the firebox wall into the log wall of Defendant's home and the origin was in the logs directly behind the firebox.

B. That, given the age of Defendant's building and fireplace and the proximity of the fireplace, within defendant's residence, to the building of the Plaintiff, the risk and degree of danger involved when Defendant kindled a fire in the fireplace was extremely, if not unreasonably, high.

C. The Court, after defining negligence, then instructed the jury that the amount of care required to be exercised by Defendant to meet the standard of care had to be determined in keeping with the degree of danger involved. Given the uncontradicted evidence, cited above, and Defendant's lack of expertise with regard to fireplace maintenance, construction and/or repair, the jury could not lawfully reach the conclusion that Defendant met the standard of care without disregarding the Court's instruction.

Wherefore, Plaintiff requests that this Honorable Court grant its request for a new trial.

Pursuant to the provisions of the order of October 8, 1992, supra, the issues raised by post trial motion number 1 were limited to

"Whether the point for charge number 4 as presented was applicable to the facts in the case or in the alternative, if not applicable, whether the court then had a responsibility sua sponte to charge the jury on the issue of res ipsa loquitur with the facts the court found applicable as presented by the evidence."

Plaintiff's request to point for charge number 4 provides:

4. The Plaintiff must establish the Defendant's negligence by the greater weight of the evidence. He may do this by circumstantial evidence, that is, by proving facts and circumstances from which negligence may be reasonably inferred. You may infer that the harm suffered by the Plaintiff was caused by negligence of the Defendant if you find the following three factors to have been present:

a. That the accident here involved is of a kind which ordinarily does not occur in the absence of negligence. In this connection, you may consider the general knowledge of the community, the evidence of the parties, or expert testimony.

I charge you that the type of accident here involved is of a kind which ordinarily does not occur in the absence of negligence.

b. That other responsible causes, including the conduct of the Plaintiff and third persons, have been sufficiently eliminated by the evidence. But it is not necessary that the Plaintiff exclude all of the possible causes for his injuries; evidence that is more likely than not that Plaintiff's injuries were caused by Defendant's negligence is sufficient to permit the inference. In this connection, if you find that the Defendant had exclusive control, of the instrumentality here involved at the time when the negligence claimed would have occurred. You may determine that such other causes have been sufficiently eliminated.

I charge you that other causes have been sufficiently eliminated since it is established Defendant had exclusive control of the instrumentality here involved, or owed a nondelegable duty to the Plaintiff at the time when the negligence claimed would have occurred.

c. That the negligence claimed is within the scope of Defendant's duty to the Plaintiff.

Although Defendant is not required to offer an explanation for the occurrence of the accident, if he does so, it is for you to weigh that explanation in relation to all the evidence to determine whether negligence by the Defendant may be reasonably inferred. If the Defendant chooses to remain silent, it is for you to determine whether or not you will infer that the Defendant was negligent from the happening of the accident under the circumstances developed by the evidence. Pa. SSJI (Civ) Section 5.08.

The language of the plaintiff's requested point for charge that:

I charge you that the type of accident here involved is of a kind which ordinarily does not occur in the absence of negligence.

. . .

I charge you that other causes have been sufficiently eliminated since it is established defendant had exclusive control of the instrumentality here involved, or owed a nondelegable duty to the plaintiff at the time when the negligence claim would have occurred.

constitutes a complete usurpation of the function of the jury. Evidence presented about the defendant and the plaintiff would, if believed and found to be more credible than conflicting evidence presented by the plaintiff would permit the jury to reach a conclusion contrary to the requested charge. In our judgment plaintiff's requested point for charge number 4 could reasonably be construed by the jury as constituting an instruction for a directed verdict in favor of the plaintiff.

The reasons hereinafter set forth for not sua sponte charging the jury on the issue of res ipsa loquitur are equally applicable to our refusal to grant plaintiff's requested point for charge number 4 as submitted.

In *Sedlitsky v. Pareso,* 400 Pa. Super. 1, 3, 582 A.2d 1314 (1990) the Superior Court held:

. . . . On this appeal, we determine that once the plaintiff produces sufficient evidence to raise an inference of res ipsa loquitur, the

plaintiff is entitled to have the jury instructed on this evidentiary rule even though the defendant has produced a quantity of contrary evidence. We also determine that where the plaintiff has provided the court with a written proposed point for charge which, although partially erroneous, sufficiently alerts the court that an important issue needs to be addressed in its jury charge, omission of an instruction on the important issue is grounds for reversal where the issue is not otherwise covered in the charge and the objecting party has been prejudiced . . . .

The Supreme Court of Pennsylvania adopted the Restatement (2nd) of Torts §328D in *Gilbert v. Korvette's Inc.*, 457 Pa. 602, 327 A.2d 94 (1974). §328D Res Ipsa Loquitur states:

(1) It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when
(a) the event is of a kind which ordinarily does not occur in the absence of negligence;
(b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and
(c) the indicated negligence is within the scope of the defendant's duty to the plaintiff.
(2) It is the function of the Court to determine whether the inference may reasonably be drawn by the jury, or whether it must necessarily be drawn.
(3) It is the function of the jury to determine whether the inference is to be drawn in any case where different conculsions may reasonably be reached.

The comment on Comment (a) of subsection (1) of §328D provides:

Type of event. The first requirement for the application of the rule stated in this Section is a basis of past experience which reasonably permits the conclusion that such events do not ordinarily occur unless someone has been negligent. There are many types of accidents which commonly occur without the fault of anyone. The fact that a tire blows out, or that a man falls down stairs is not in the absence of anything more, enough to permit the conclusion that there was negligence in inspecting the tire, or in the construction of the stairs, because it is common human experience that such events all too frequently occur without such negligence. On the other hand there are many events, such as those of objects falling from the defendant's premises, the fall of an elevator, the escape of gas or water from mains or of electricity from wires or appliances, the derailment of trains or the explosion of boilers,

where the conclusion is at least permissible that such things do not usually happen unless someone has been negligent. To such events res ipsa loquitur may apply.

Basis of conclusion. In the usual case the basis of past experience from which this conclusion may be drawn is common to the community, and is a matter of general knowledge, which the court recognizes on much the same basis as when it takes judicial notice of facts which everyone knows. It may, however, be supplied by the evidence of the parties; and expert testimony that such an event usually does not occur without negligence may afford a sufficient basis for the inference. Such testimony may be essential to the plaintiff's case where, as for example in some actions for medical malpractice, there is no fund of common knowledge which may permit laymen reasonably to draw the conclusion. On the other hand there are other kinds of medical malpractice, as where a sponge is left in the plaintiff's abdomen after an operation, where no expert is needed to tell the jury that such events do not usually occur in the absence of negligence.

Permissible conclusion. The plaintiff's burden of proof (see § 328 A) requires him to produce evidence which will permit the conclusion that it is more likely than not that his injuries were caused by the defendant's negligence. Where the probabilities are at best evenly divided between negligence and its absence, it becomes the duty of the court to direct the jury that there is no sufficient proof. The plaintiff need not, however, conclusively exclude all other possible explanations, and so prove his case beyond a reasonable doubt. Such proof is not required in civil actions, in contrast to criminal cases. It is enough that the facts proved reasonably permit the explanation. This conclusion is not for the court to draw, or to refuse to draw, in any case where either conclusion is reasonable; and even though the court would not itself find negligence, it must still leave the question to the jury if reasonable men might do so.

In *Hollywood Shop v. Pa. Gas & Water Company,* 270 Pa. Super. 245, 411 A.2d 509 (1979), the plaintiff/appellee sought to recover for damages suffered to its store as a result of a water main break. Plaintiff's expert witness had no opportunity to inspect or perform tests on the thirteen foot piece of the main that was removed after the break occurred, but testified that in his opinion because the break was corrosion due to electrolysis and that the continued use of the water main from 1888 to 1972 was inconsistent with good industry standards. Defendants/Appellants' expert witness testified that the break was not caused by electrolysis but rather by undue stresses from some type of abnormal external loading and that the stresses could have been

caused either by movements in the ground or by some activity above the ground or by a combination of them. The trial judge refused to grant plaintiff/appellee's request for a res ipsa loquitur instruction because it had offered specific evidence of negligence. The en banc trial court granted plaintiff/appellee a new trial concluding that the judge had erred. The Superior Court affirmed the decision of the court en banc concluding the appellee was unable to prove the exact cause of the water main break. They had to rely on an expert who could only opine that the cause of the break was that the water pressure inside the main was too great to withstand given its corroded condition. The Superior Court observed:

> We note, however, that this holding is limited to the facts of this case, which lies somewhere between the case in which the plaintiff brings in no evidence of specific acts of negligence, and therefore must rely on the res ipsa loquitur inference alone, and the case in which the defendants' negligence 'can be clearly and indubitably ascertained' from the plaintiff's evidence, *Farley v. Philadelphia Traction Company*, supra, and therefore the plaintiff need not rely on the res ipsa loquitur inference at all. *Hollywood Shop*, 370 Pa.Super. at 252, 253.

The plaintiff strongly relies upon the case of *Wengers, Inc. v. F. W. Woolworth Co.*, 26 Cumb. L.J. 93 (1976). The plaintiff suffered fire damages to its merchandise as a result of smoke from a fire in the vacant store room used by the defendant for the storage of trash which the evidence established included ashes and butts from cigarette ash receptacles. The storeroom/trash storage room was 125 feet long by 30 feet wide. It had a gravel floor, no windows and no lights, the only electrical wiring being at the mall walkway into the room. The defendant had a key to the door opening onto a parking area and it was near that door that the trash was stored and was found burning. The mall manager had a key to the door at the opposite end of the room, opening onto the mall walkway and the evidence indicated the manager did not recall entering the room for about two weeks prior to the fire.

The trial judge sitting without a jury rendered a verdict for the plaintiff for the damages incurred and found that the doctrine of res ipsa loquitur applied. Post trial motions were filed, and the court en banc sustaining the plaintiff's verdict held:

> The circumstances surrounding this fire are that ashes and butts from cigarette ash receptacles were included in the trash and that the trash was stored in cardboard boxes. This trash was normally placed in the storeroom each night when the store closed. It was also shown that fires in an enclosed room such as this storeroom may remain undetected for a considerable period of time due to incomplete combustion or smoldering. The fire was in the trash, which was in a locked room with a gravel floor and no electrical wiring near the trash. There is no evidence of arson or vandalism or any particular cause of the fire, other than the theory adopted by plaintiff that an unextinguished cigarette butts from the store's dining area smoldered for a period of time before igniting the cardboard cartons and remaining trash. Based on these facts, it is a reasonable conclusion that this fire is an event that would not normally occur in the absence of negligence. *Wenger's Inc.*, 26 Cumb.L.J. at 96.

In *Lanza v. Poretti*, 537 F.Supp. 777 ((1982) E.D. Pa.), the plaintiff sought to recover fire damages suffered by his fashion design business conducted on the second floor of the premises and above the first floor beauty salon of the defendant. A jury returned a verdict for the defendant. Post trial motions included the contention that the court had erred in refusing requested instructions on the doctrine of res ipsa loquitur. The motion was denied and the court observed:

> As dictated by §328 D, the applicability of the doctrine depends, in the first instance, upon whether the event causing damages ordinarily does not occur in the absence of negligence. . . . (citations omitted) Since a fire of unknown origin is one of many accidents that as a matter of common knowledge frequently occur without anyone's fault, the rule of res ipsa loquitur is generally given limited application in such cases. . . . (citations omitted) While the Pennsylvania Supreme Court has not specifically addressed this issue, I believe the correct view is that the application of res ipsa in fire cases should be predicated upon the particular facts and circumstances occurring in the individual case; not upon the mere occurrence of a fire. . . . (citations omitted) Accordingly, only the facts are presented from which it is reasonable to conclude that a particular fire is an event that would not normally occur in the absence of negligence, is the initial requirement for application res ipsa loquitur satisfied.
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> The record in the instant case established that plaintiff has failed to satisfy this threshold requirement. Rather than establishing

that the instant fire was a kind which ordinarily would not occur absent negligence, competent evidence was adduced at trial suggesting that the fire could have been equally attributed to arson. There, as here, it is established that one of several sources might have caused the fire, and the purposes underlying the doctrine would not be furthered by its application. To permit the jury to infer negligence by the type of circumstantial evidence envisioned by §328 D where two inconsistent and equally lacking causes exist, conflicts with the core value of the rule which allows the inference of negligence to be drawn where the probabilities favor that deduction. I find support for this reason in several Pennsylvania cases. In *Norris v. Philadelphia Electric Company,* 334 Pa. 161, 5A2d 114 (1939), the Pennsylvania Supreme Court declined to apply to res ipsa loquitur rule, stated:

> It is essential that it shall appear that the transaction in which the accident occurred was in the exclusive management of the defendant, and all the elements of the occurrence within its control, and that the result was so far out of the usual course that there is no fair inference that it could have been produced by any other cause than negligence. If there is any other cause apparent to which the injury may with equal fairness be attributed, the inference of negligence cannot be drawn. *Lanza*, 537 F.Supp. at 787, 788.

The court also observed:

> Moreover, the record established that the other expert witnesses called by the plaintiff were at odds as to the exact cause of the fire. One suggested arson as a cause, the other believed careless smoking was the cause of the blaze. Thus, the jury was well aware that alternative causes were proper by the plaintiff, and both theories were ably argued to the jury. *Lanza,*537 F. Supp. at 786.

In *Halsband v. The Union National Bank of Pittsburgh*, 318 Pa. Super. 597, 465 A.2d 1014 (1983), the estate of the deceased pilot of a small aircraft was sued by the estates of the deceased passengers to recover for their deaths. The plaintiff's two expert witnesses testified to various errors the deceased pilot had committed in the process of preparing for and taking off and concluded that the fatal accident was caused by pilot error, inexperience, and low proficiency under the then exisitng circumstances. Expert witnesses for the defendant testified to a mechanical idiosyncracy discovered in the type of plane involved which could cause engine failure and the conditions existing at

take off. The pilot would have no way of knowing of the problem or how to prevent it because the flight handbook for the aircraft contained no information on the subject. Therefore, pilot error was not the cause of the fatal accident. The trial judge concluded that the doctrine of res ipsa loquitur did not apply to the context of the evidence. The jury returned a verdict in favor of the defendant. Post trial motions for a new trial were filed and the court en banc granted the new trial concluding that the trial court erred in refusing to charge the jury on the doctrine of res ipsa loquitur.

The Superior Court affirmed the decision of the court en banc observing that the court

> "determined that in accordance with *Hollywood Shop, Inc. v. Pa. Gas & Water Co.* 270 Pa. Super. 245, 411 A.2d 509 (1979), since appellee's have not presented evidence of the 'exact' cause of the accident, res ipsa charge was required." *Halsband,* 318 Pa. Super. at 602.

Responding to the appellant's contention that the appellees had failed to meet the burden imposed under Section 328(1)(a) and (b) of the Restatement of Torts, the Superior Court held:

> Examination of the record in this case clearly shows that the accident was 'an event . . . of a kind which ordinarily does not occur in the absence of negligence.' The wreckage was raised from Lake Michigan, and inspected. No evidence was introduced to show that the report of the National Transportation and Safety Board revealed the failure of any component of the plane which could explain the accident. Although a left engine of the plane was not recovered . . . . the right engine of the plane was examined, and nothing was found to indicate any mechanical malfunction' . . . . The plane was capable of flying well on one engine alone . . . . Under these circumstances, it would indeed be unusual for an accident of this type to occur in the absence of negligence.
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> . . .
>
> Appellant's principal claim is that 'other responsible causes were not 'sufficiently eliminated by the evidence.' Specifically, appellant argues that in providing an alternate explanation to the accident (the possibility of engine failure due to peculiarities of the Beach-craft bonanza), it has precluded the sufficient elimination of 'other responsible causes.' We do not find this

argument convincing. *Halsband*, 318 Pa. Super at 603, 604.

Parenthetically at this point we should note that the notes of testimony have not been transcribed and we must therefore rely upon the notes made during the trial of the case when considering the evidence presented to the court and the jury. We find the following evidence significant and determinative of the issue here presented.

Steven Swope, Deputy Fire Chief for the Mont Alto Fire Company was called by the plaintiff. He responded to the 2:15 a.m. call to the defendant's home fire and participated in an inspection of properties of the plaintiff and defendant with Pennsylvania State Trooper Michael Marchowsky and Fire Insurance Investigator Thomas Jones and testified:

1. The defendant's fireplace was made of brick and mortar and looked old.

2. Looking from the plaintiff's property through the hole created by the fire into the defendant's fireplace he could see light through a crack in the firebox wall. The crack was a very strong point of origin of the fire from the D shaped marks.

3. He did not have a written report. He felt that crack was a source or means for a spark to travel through to the point of ignition.

4. Thomas Jones rapped the brick at the point of the crack with the handle of the hammer and the brick fell into the firebox by the fireplace.

5. The crack was three or four courses of brick from the floor of the firebox, on the defendant's side of the firebox.

6. He did not remember whether the crack was horizontal or vertical. It was at a point where sparks or heat came through. He could not say how wide the crack was. He understood Mr. Jones was an expert fire investigator and heard him say the fire was due to heat transference.

7. He did not know whether the brick broke or not after Mr. Jones tapped it out.

8. He has been involved in an estimated 75 to 100 actual structural fires and up to 300 chimney fires.

Richard J. Betz, Chief of the Mont Alto Fire Department, was called as a witness for the plaintiff and he testified:

1. He has had twenty years experience as a fire fighter and five years as chief of Mont Alto Fire Department.

2. He has been involved in 1600 to 2000 fires with 500 being structural fires. 150 to 200 of the fires involved fireplaces.

3. He was on the scene of the fire here under consideration and inspected the defendant's fireplace twice, once between 4:30 and 5:00 a.m. after the fire was extinguished when he did a "walk through" and then again at 5:38 a.m. before he left the fire scene.

4. From the 5:38 a.m. inspection, he was in the plaintiff's lodge and observed the rear of the defendant's fireplace through the hole in the two walls. He could see a light shining through the fireplace. There was an opening in it about the height of the width of a brick and the maximum one quarter inch in width. At that time there were no bricks removed or missing.

5. The bricks of the fireplace appeared to be against the structural beams of the defendant's dwelling.

6. There are thousands of fireplaces with this type of construction in Franklin County. There are also a lot of fireplaces without flue liners or special fire boxes.

7. The crack he observed in the defendant's firebox was in a vertical direction the height of a brick and narrower than a pencil width. He could not say if the same size crack could be seen on the defendant's side of the fireplace.

8. A lot of water was put on the fire from the plaintiff's side. Cold water put on hot bricks will at times cause the brick or blocks to crack.

9. He would not recommend using fireplaces such as this one without a protective insert in the firebox.

10. These type fireplaces were constructed to be used and were used for decades.

11. Air dampening devices such as doors changed the construction and equation of heat.

12. He had never seen exposure of another building as in this case and that should be a factor in whether or not to use the defendant's fireplace.

Timothy S. May was called by the plaintiff and qualified as an expert witness on fire investigations. He testified:

1. He has investigated over 5000 fires during his career, 75% of them being structural fires and of that 75%, 10% involved fireplaces or chimneys.

2. He inspected the plaintiff's premises and fire damage on May 21, 1991 to determine the area of origin and cause of the fire. The origin was a firebox in the adjacent building. The defendant's fireplace was not there when he made his investigation.

3. In addition to his investigation, he relied upon photographs of the fire scene, statements provided him, all reports and the deposition of the defendant, Richard E. Bumbaugh.

4. The fire was the result of heat transference from the fireplace into the combustible wood member adjacent to the fireplace.

5. In response to a hypothetical question that:

a. the defendant's fire place was not safe to use at any time without major renovations because it was 100 years old; deteriorated with time; the bricks and mortar were dry with heat and age; the wood timber also dried out due to heat in the fire place. None of the safety standards since 1911 were satisfied.

b. Use of the fireplace on October 24, 1989 was not reasonable without first bringing the fireplace up to code standards.

c. To assure the safety of the fireplace, the defendant should have had it relined - actually it would have been better to replace it rather than repair it.

6. The important facts presented in the hypothetical question were the age of the building and fireplace; the age of the brick and construction material and the fact that nothing had been done to bring the fireplace up to approved standards with a flue line, fire bricks etc.

7. The carbonization of the wood over years of heat and the deterioration of the fireplace made it unsafe for use.

8. The logs or wooden timbers would have deteriorated if not exposed to fire heat but it accelerated the deterioration.

9. The fireplace was an accident about to happen. There was no way a reasonable person could use the defendant's fireplace. Everything was going against using it.

The defendant Richard E. Bumbaugh testified as on cross-examination in plaintiff's case in chief and the case in chief of the defense. He testified:

1. He and his wife purchased the pre-Civil War home in 1986.

2. In January, 1988, he decided to open and use the fireplace in their living room. He removed the carpeting from the floor of the firebox, the paneling from the sides of the firebox and the sheet metal top which sealed off the chimney from the firebox. He used a wire brush and acid to remove dust and paint from the bricks and he repointed loose mortar between the bricks by replacing it with new mortar.

3. There was no flue liner in the fireplace and no damper in the chimney.

4. He did not check to determine whether there was any insulation between the bricks and the wall because there was no way to do that.

5. He did use fireplace for ornamental fires and to take the chill off the room from one to three times a week during cool weather from January, 1988 until October 24, 1989. After the fire went out, he initially closed off the fireplace from the room using a plywood board with fire retardant on it to keep heat in the house from going up the chimney, but later he had purchased and installed a glass door at the front of the fireplace.

6. On the evening of October 24, 1989, he had built a fire in the fireplace between 6:00 and 6:30 p.m. to take the chill off the room and believed the fire was out between 9:30 and 10:00 p.m. and closed the doors to the fireplace.

7. When he was preparing the fireplace for use, it was apparent to him that it had not been used for a while.

8. Prior to using the fireplace, he did not have a professional chimney sweep clean the chimney but he used his chimney brushes to scrape and clean the chimney. While cleaning the chimney and repairing the capping, he observed that the chimney at the top of the roof had double courses of brick. He could not tell how many courses of brick were below the roof level and only after the fire he learned that there was only one course of bricks.

9. The fireplace and chimney looked "quite healthy" to him and he believed they were safe. He used the fireplace without incident in 1988 and through 1989 until the fall when the fire occurred.

10. He had cleaned the chimney in the fireplace one month and one day before the fire and at that time observed no cracks in the firebox. The mortar was not loose and the structure apeared sound throughout.

11. He did not suspect there was any problem with the fireplace.

12. His son, Andy, awakened him shortly after 2:00 a.m. and said there was smoke in his room. He detected the odor of smoke in the house and found the door near the plaintiff's property hot. He had his family leave the house and then called the Mont Alto Fire Department.

Thomas W. Jones was called by the defendants and qualified as an expert witness. He testified:

1. He was with the Pennsylvania State Police for 26 years and a fire marshal for Troop G, retired in 1986 and is now employed as a Fire and Systems Investigator for Loss Analysis, Inc.

2. On the morning of October 27, 1989, he visited the fire scene and investigated the fire here in question in the company of Fire Chief Swope and Adjuster Myers.

3. It was obvious the fire had occurred at the rear of defendant's fireplace and spread into the plaintiff's building.

4. He checked the ignition source and concluded the origin of the fire was obvious, the only possibility was from the beams behind the firebox.

5. He did not notice any cracks in the fireplace wall. If there were any, it would not have surprised him. He had put a hole in the fireplace wall by hitting a brick with a hammer several times to knock it out. The brick was not loose. He knocked the brick out to see how many courses of brick were in the firebox and found only one course.

6. The fire was caused by heat passing through the brick and mortar for many years into the beams against the firebox, drying the wood out and eventually breaking it down. It is called the phenomenon of pyrophoric carbonization. The wood eventually begins to glow and then bursts into flame.

7. He was only able to determine that the firebox had only one course of brick and that the wooden beams were against the brick near the firebox after the fire and by knocking out a brick in the firebox.

8. Before the fire, the only way any one could have determined the number of courses of brick in the firebox and that the wooden beams were against the firebox would have been by doing a large amount of structural damage to see what was there.

9. From the defendant's living room, the firebox appeared sound, and in his opinion it would have been asking a lot to expect the defendant not to use the fireplace.

10. Pyrophoric carbonization is the application of heat over months or years, and he assumed the fireplace had been fused off and on for a hundred years.

11. He did not know that the fireplace had not been used by prior owners since 1970.

12. There was no way the defendant could have known about the beam touching the firebox without damaging the structure. Defendant could assume the beam was fairly close but that would just be an assumption.

13. With the beam butting up against the masonry of the firebox, heat could not dissipate and in time a fire would occur. No one knew what was back there, logs, planks or masonry until the firebox was opened.

By reason of the court's refusal to approve and give plaintiff's requested point for charge number 4, the plaintiff had an automatic exception. The plaintiff at no time during the course of the trial requested the court to instruct the jury on the doctrine of res ipsa loquitur. At the conclusion of the charge the court inquired whether it had made any misstatements of fact and whether there had been any failure to charge on any substantial matter. Counsel for the plaintiff did not except to the court's

charge or request the court to supplement the charge given by instructing the jury on the doctrine of res ipsa loquitur.

Section 328D of the Restatement of Torts provides inter alia:

> (1) it may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when
>
> > (a) the event is of a kind which ordinarily does not occur in the absence of negligence. . .

In the case at bar, we have the testimony of Deputy Fire Chief Swope and Fire Chief Betz that each observed from the plaintiff's property a crack in the fireplace wall. Chief Betz described the opening as being about the height of the width of a brick and the maximum width of one quarter of an inch. The deputy chief testified the crack was a very strong point of origin of the fire from the V-shaped marks. The chief could not say if the same size crack could have been seen on the defendant's side of the fireplace. Thus, the jury could have concluded that the fire was the result of a spark travelling through the crack to the point of ignition as suggested by the deputy chief.

Fire Chief Betz testified to experience with one hundred fifty to two hundred fires which involved fireplaces. He expressed the opinion that there are thousands of fireplaces with this type of construction in Franklin County and a lot of fireplaces without flue liners or special fireboxes. Those type fireplaces were constructed to be used and were used for decades. Thus, the jury could have concluded that the use of this particular fireplace by the defendants did not constitute negligence.

Expert witness Jones testifed that the fire was caused by the phenomenon of pyrophoric carbonization; that from the defendants' living room, the fireplace appeared sound and it would have been asking a lot to expect the defendant not to use the fireplace; that the only way the defendant could have determined the number of courses of brick in the firebox and that the wooden beams were against the firebox would have been by doing a large amount of structural damage. Thus, the jury could have found that the use of the fireplace by the defendants was not a negligent act.

The defendant's testimony as to the work he did before putting the fireplace in service; his examination of the fireplace and chimney with the conclusion they looked "quite healthy" and he believed it safe and the fact that he did use the fireplace from one

to three times a week during cool weather from January, 1988 to October 24, 1989 could have led the jury to the conclusion that the defendant was not negligent.

To the contrary, plaintiff's evidence by Chief Betz that he would not recommend using fireplaces such as the defendants without a protective insert in the firebox and the strong testimony of plaintiff's expert Timothy S. May that the fireplace "was an accident about to happen"; that there was no way a reasonable person could use it; and it should have been relined or better yet replaced to constitute direct evidence of the defendants' negligence which if believed could have warranted the jury in returning a verdict for the plaintiff.

This case was well and fairly tried by both parties. If the jury found the plaintiff's evidence of defendants' negligence to be more credible, it could have readily concluded that defendants' negligence was clearly and indubitably ascertained. If found from the defendants' evidence that they had done all that a reasonable person could be expected to do under the existing and reasonably known circumstances, then the plaintiff failed to sustain its burden of proving that defendants' negligence was the more probable explanation. This is not a case where the plaintiff was unable to produce arguable evidence of specific acts of negligence and was compelled to rely on the res ipsa loquitur inference. From the evidence presented, we are not persuaded that it was reasonable to conclude that this unfortunate fire would not have normally occurred in the absence of defendants' negligence. That is the initial triggering prerequisite for the application of res ipsa loquitur.

In *Halsband v. The Union National Bank of Pittsburgh, supra,* the Superior Court referring to *Hollywood Shop, Inc. v. Pennsylvania Gas & Water Co., supra,* observed

> ". . . since appellees have not presented evidence of the 'exact' cause of the accident, res ipsa charge was required."

Halsband, 318 Pa.Super. at 602. In the case at bar, the plaintiff did present evidence of the exact cause of the fire. It was the exclusive function of the jury to determine what weight to give that evidence.

ORDER OF COURT

NOW, this 11th day of January, 1993, the plaintiff's post trial motion for a new trial is denied.

Exceptions are granted the plaintiff.

THE MILTON S. HERSHEY MEDICAL CENTER, ET. AL. V. STATE FARM INSURANCE COMPANY, C.P. Franklin County Branch, No. A.D. 1992-298

Insurance - Medical Expenses - Subject Matter Jurisdiction - Punitive Damages

1. Where an insurer denies medical benefits based on a peer review organization's determination the plaintiff may appeal to the Court the finding of medically unnecessary treatment.

2. A plaintiff has standing to sue her insurance company for refusal to pay her health care providers for services rendered.

3. A plaintiff may pursue punitive damages under 42 Pa. C.S. Section 8371 based on bad faith denial of medical benefits.

Bradley R. Bolinger, Esq., Attorney for Plaintiff
Rolf Kroll, Esq., Attorney for Defendant

OPINION AND ORDER

WALKER, J., December 8, 1992:

FINDINGS OF FACT

Plaintiff, Linda S. Hershey, was injured in an automobile accident on November 8, 1990. Plaintiffs, Dr. F. Todd Wetzel and The Milton S. Hershey Medical Center treated and provided services to Ms. Hershey. Dr. Wetzel and Hershey Medical Center submitted bills to Ms. Hershey's insurance carrier, defendant State Farm Insurance Company.

Pursuant to 75 Pa. C.S. § 1797, defendant State Farm submitted the bills to a Peer Review Organization (hereinafter

"PRO") to determine the necessity of treatment provided to Ms. Hershey. State Farm refused to pay certain medical expenses, asserting that the PRO deemed them unnecessary. In addition, State Farm refused to pay Ms. Hershey's wage loss benefits, which are presently accruing.

Plaintiffs requested a peer review reconsideration in accordance with 75 Pa. C.S. § 1797(b) (2). Based upon the PRO's reconsideration report, State Farm again refused to pay the medical bills.

Plaintiffs filed this suit to recover the cost of medical treatment and services, as well as wage lfoss benefits, that the defendant refused to pay. This opinion addresses the following preliminary objections raised by the defendant:

A. The court lacks subject matter jursdication.
B. The complaint lacks conformity to rule of law.
C. The insured lacks standing.
D. Punitive damages under 42 Pa.C.S. §8371 are not available in the instant case.

DISCUSSION

The court will address each preliminary objection individually.

A. Subject Matter Jurisdiction

Defendant asserts this court lacks subject matter jurisdiction because the defendant complied with the requirements of 75 Pa. C.S. § 1797. Section 1797 provides specific procedures to follow in reviewing the necessity of an insured's medical expenses. Defendant argues that compliance with these procedures renders a decision to deny payment of medical expenses final and unappealable. This court does not agree.

Section 1797 sets forth the following procedures for determining the necessity of medical care provided to an injured person:

> (b) Peer review plan for challenges to reasonableness and necessity of treatment.