THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

HILLSBOROUGH, SS.
NORTHERN DISTRICT

05-C-0321

NATIONWIDE INSURANCE COMPANY

as subrogor for

STEPHEN AND CARLA ALLEN

v.

ALPHONSE KROETEN, SHAWN HOWARD, LAURA HUBACZ, KEITH DESHARNAIS, JASON BRAGDON, AND DANIEL BUCCIANO

ORDER ON PENDING MOTIONS FOR SUMMARY JUDGMENT

The plaintiff, Nationwide Insurance Company, as subrogor for Stephen and Carla Allen ("the Allens"), has brought a civil action against multiple defendants, Alphonse Kroeten, Shawn Howard, Laura Hubacz, Keith Desharnais, Jason Bragdon, and Daniel Bucciano (collectively "the defendants"), alleging separate claims of negligence against each of them. In its Order On Plaintiff's Motion To Allow Entry Of Amended Declaration, see Doc. No. 25a, the Court allowed the plaintiff to amend its declaration to add a seventh count alleging *res ipsa loquitur* against all the defendants. Presently before the Court are: (1) Laura Hubacz's ("Hubacz's") Motion for Summary Judgment; (2) Jason Bragdon's ("Bragdon's") Motion for Summary Judgment; and (3) the plaintiff's Motion for Partial Summary Judgment On Damages. For the reasons set forth herein, Hubacz's

motion is GRANTED; Bragdon's motion is DENIED; and the plaintiff's motion is GRANTED.

The Court set forth the relevant alleged facts in its previous Order On Plaintiff's Motion To Allow Entry Of Amended Declaration. See Doc. No. 25a. Therefore, the Court will refer to specific facts as they become pertinent to each motion. The Court addresses each motion in turn.

Hubacz's Motion for Summary Judgment

Hubacz moves for summary judgment on all counts alleged against her, namely Counts III and VII. She argues that "the uncontradicted evidence developed in discovery demonstrates that defendant Hubacz *did not smoke at all* [the] night [of the fire]" and that "[e]ach and every one of the young men present that night (Hubacz was the only young woman) has confirmed in sworn testimony that she did not smoke." (Hubacz's Mot. For Summ. J., ¶ 5) ("Hubacz's Mot.") (emphasis in original). In support of her motion and arguments, Hubacz submits her own affidavit in which she swears, "I have never smoked cigarettes and neither smoked any nor disposed of any, whether carefully or negligently, on the night in question . . . [and,] I had nothing to do with handling, lighting or controlling any incense, or any other combustible material of any kind, on the night of the fire." Id. at Ex. 1. Further, Hubacz's counsel attests that the deposition transcripts of the other individuals present on the night of the fire establish that Hubacz did not smoke on the night in question.

The plaintiff objects, arguing that the evidence indicates that Hubacz was among the group of persons smoking in the barn on the night of the fire, and alternatively, Hubacz "had a duty to make sure ignited materials, including incense and cigarettes,

were extinguished when she left the 'area of origin' [of the fire]." (Pls.' Obj. To Hubacz's Mot., ¶ 13.) In support of its objection, the plaintiff submits excerpts from the deposition testimony of four individuals present the night of the fire, including Hubacz; two police reports; Hubacz's statement to the police written on the night in question; and Shawn Howard's ("Howard's") statement to the police written on that same night. Relying on these documents, the plaintiff contends that "there is no basis on the facts developed to date" on which "to grant Ms. Hubacz's motion for summary judgment." Id.

In response to the plaintiff's objection, Hubacz asserts that the evidence relied upon by the plaintiff in its objection is inadequate proof or inadmissible as multiple hearsay. Further, Hubacz argues that she had no legal duty to make sure that all the cigarettes were extinguished prior to leaving the barn. The Court agrees.

In ruling on Hubacz's motion for summary judgment, the Court must address whether the parties have satisfied the requirements set forth in RSA 491:8-a. That statute provides, in relevant part:

> Any party *seeking* summary judgment shall accompany his motion with an affidavit based upon personal knowledge of admissible facts as to which it appears affirmatively that the affiants will be competent to testify. The facts stated in the accompanying affidavits shall be taken to be admitted for the purpose of the motion, unless within 30 days *contradictory affidavits* based on personal knowledge are filed *or* the opposing party files an *affidavit* showing *specifically* and *clearly reasonable* grounds for believing that contradictory evidence can be presented at trial but cannot be furnished by affidavits....

N.H. REV. STAT. ANN. 491:8-a, II (Supp. 2005) (emphasis added); see also Omiya v. Castor, 130 N.H. 234, 237 (1987) (examining an affidavit filed in opposition to a motion for summary judgment to determine whether it satisfied the requirements of RSA 491:8-

a). In Omiya, the New Hampshire Supreme Court explained how RSA 491:8-a operates with regard to parties opposing a motion for summary judgment:

> [T]he opponent's filing must be supported by one or more affidavits or refer specifically to affidavits, pleadings, depositions, answers to interrogatories or admissions on file which establish the existence of a disputed issue of material fact. While the moving party must file at least one affidavit based on the personal knowledge of a person who would be competent to testify at trial, the opposing party may file an affidavit which only shows reasonable and specific grounds for believing that evidence disputing the moving party's affidavits can be produced at trial. However, the opposing party's response must do more than give notice of his objection to the motion or dispute the facts set forth in the moving party's affidavit. It must set forth specific facts showing the existence of a genuine issue for trial. Mere denials or vague and general allegations of expected proof are not enough . . . .

130 N.H. at 237 (quotations and citations omitted). Finally, the Omiya Court reiterated its previous explication of RSA 491:8-a, stating:

> While the party opposing summary judgment may not rest upon mere denials, he may respond by an affidavit setting forth specific contradictory facts, and incorporating by reference existing products of discovery . . . . Furthermore . . . RSA 491:8-a, II requires only the party *seeking* summary judgment to submit an affidavit based upon personal knowledge of admissible facts. No such requirement pertains to the party *opposing* a motion for summary judgment . . . .

Id. at 238-239 (quotations and citations omitted) (emphasis in original).

Based on the aforementioned standard, the plaintiff here could defeat summary judgment by submitting "a counter-affidavit based on personal knowledge *or* by submitting an affidavit showing specifically and clearly reasonable grounds for believing that contradictory evidence can be furnished at trial but cannot be furnished by affidavits or by reference to the product of discovery proceedings, provided [it] sets forth specific

facts showing the existence of a genuine issue for trial." Id. at 239 (quotations and citations omitted) (emphasis in original). The plaintiff has not submitted any affidavits in support of its objection, but has referenced products of discovery by attaching excerpts from various deposition transcripts, police reports, and written statements to the police. However, in reviewing these submissions, the Court concludes that they are inadequate to defeat summary judgment.

In her motion for summary judgment, Hubacz submitted her own affidavit swearing that she did not smoke or handle any incense on the night of the fire. Therefore, this submission rebuts both Counts III and VII by providing evidence that Hubacz did not cause the fire in any manner. In an effort to refute Hubacz's evidence, the plaintiff claims that the following statement by Howard to the police indicates that Hubacz was smoking on the night of the fire: "We had a small getogether (sic) with friends out in the barn. We were smoking cigarettes but were careful with them." (Pls.' Obj. To Hubacz's Mot., Ex. 8.) This statement, however, does not specifically reference or identify Hubacz as a person that was smoking that night. The word "we" conclusively implicates only Howard, the person who made the statement. Further, the statement fails to indicate in any manner that Hubacz handled incense during the night. Thus, Howard's vague statement regarding the activities of the night cannot adequately contradict Hubacz's evidence such that summary judgment is inappropriate on Counts III and VII.

The plaintiff also relies on a police report for the proposition that Hubacz admitted to the Fire Marshall that she was smoking on the night of the fire. This report is written by Officer Lavallee of the Goffstown Police Department, and states, in relevant part, "I

did speak with the Fire Marshall when he arrived on scene. The 5 people in the house where (sic) called back to the scene at his request to speak with him. He did interview all of them and did relay the following information to me. The 5 people where (sic) in the barn for a majority of the evening playing video games and smoking marijuana and cigarettes." (Pls.' Obj. To Hubacz's Mot., Ex. 7, p. 4, ¶ 5.) In reviewing this report, the Court finds that the plaintiff's reliance on it for the purpose of defeating summary judgment is misplaced.

As with Howard's previously referred to statement, the report simply references vague statements that "the 5 people" allegedly made to the fire marshal, without documenting statements specifically made by Hubacz. There is no indication that Hubacz herself admitted to smoking or handling incense. Further, the plaintiff has not submitted any affidavit to support its objection, let alone one that authenticates the police report. See 73 AM. JUR. 2D § 50 (2001) ("Exhibits that have not had a proper foundation laid to authenticate them cannot support a motion for summary judgment"). Moreover, the report itself constitutes multiple hearsay and would not be admissible at trial. See Rand v. Aetna Life & Casualty Co., 132 N.H. 768, 772 (1990) (finding that the alleged testimony of a witness, which was offered in the affidavit of plaintiff's counsel, "was inadmissible hearsay, and was therefore improper for an affidavit offered in opposition to a summary judgment motion"). The plaintiff has also not indicated that the fire marshal will testify, or has testified, that Hubacz admitted to him that she was smoking. Therefore, the Court concludes that the plaintiff has not referenced or provided *specific* contradictory evidence rebutting Hubacz's affirmation that she was not smoking or handling cigarettes on the night of the fire.

Finally, in support of its objection, the plaintiff proffers various excerpts from deposition testimony indicating that Hubacz may or may not have been awake at the time the last group of individuals went to sleep. According to the plaintiff, while Hubacz testified in her deposition that she went to sleep at approximately 12:00 a.m., other individuals have testified to the effect that Hubacz was perhaps still awake later, or at about 2:30 a.m., and Hubacz appears to have indicated in a statement to the police that she was still awake at about 2:30 a.m. Based on these contradictions, the plaintiff contends that, because Hubacz may have been a part of the last group of individuals who were in the barn, Hubacz had a duty to make sure all the cigarettes and other combustible materials were carefully disposed of prior to going to sleep. The Court disagrees.

According to the New Hampshire Supreme Court,

> All persons have a duty to exercise reasonable care not to subject others to an unreasonable risk of harm. Whether a defendant's conduct creates a risk of harm to others sufficiently foreseeable to charge the defendant with a duty to avoid such conduct is a question of law because the existence of a duty does not arise solely from the relationship between the parties, but also from the need for protection against reasonably foreseeable harm. Thus, in some cases, a party's actions give rise to a duty. Parties owe a duty to those third parties foreseeably endangered by *their conduct* with respect to those risks whose likelihood and magnitude make the conduct unreasonably dangerous.

Remsburg v. Docusearch, Inc., 149 N.H. 148, 153 (2003) (quotations and citations omitted) (emphasis added). However, there is a notable distinction "between active misconduct working positive injury to others and passive inaction or a failure to take steps to protect them from harm." W.P. Keeton, D. Dobbs, R. Keeton & D. Owen, PROSSER & KEETON ON THE LAW OF TORTS § 56, at 373 (5th ed. 1984). For liability

based on passive inaction, "it is necessary to find some definite relation between the parties, of such a character that social policy justifies the imposition of a duty to act." Id. at 374. Thus, according to the Restatement (Second) of Torts § 315,

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
>
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) a special relation exists between the actor and the other which gives to the other a right to protection.

RESTATEMENT (SECOND) OF TORTS § 315 (1965); Cf. Powell v. Catholic Med. Ctr., 145 N.H. 7, 11-12 (2000) (upholding the trial court's jury instruction regarding the duty to provide a warning to third persons, where the instruction was based upon Restatement (Second) of Torts § 315). The Restatement further explains,

> In the absence of either one of the kinds of special relations described in this Section, the actor is not subject to liability if he fails, either intentionally or through inadvertence, to exercise his ability so to control the actions of third persons as to protect another from even the most serious harm. This is true although the actor realizes that he has the ability to control the conduct of a third person, and could do so with only the most trivial efforts and without any inconvenience to himself.

Id. at cmt. b.

In this case, the plaintiff claims that Hubacz had a duty to extinguish the cigarettes of other persons. However, the plaintiff has neither asserted nor provided any proof of a special relation between Hubacz and the Allens such that Hubacz would have a duty to control the actions of the other individuals present that night. It was also not Hubacz's active conduct that created the risk of harm to the property. While Hubacz could have, with little or no effort, ascertained whether the cigarettes were extinguished,

she had no duty to do so. Furthermore, the plaintiff has submitted no evidence that Hubacz had any control over the incense in the apartment. Rather, the sole evidence before the Court regarding Hubacz's involvement with incense is Hubacz's own affidavit, in which she swears that she did not handle the incense that night. Therefore, the Court cannot find that Hubacz had a duty to extinguish the smoking materials or incense prior to leaving the barn.

The purpose of summary judgment is to "separate what is formal or pretended in denial or averment from that which is genuine and substantial so that only the latter may subject a suitor to the burden of trial." Omiya, 130 N.H. at 237 (quotations and citations omitted). Here, the plaintiff's entire objection relies upon documents that only vaguely support its claims, but that do not provide specific evidence rebutting that evidence proffered by Hubacz. Because the plaintiff has not submitted any evidence contradicting Hubacz's declaration that she was not smoking or handling any incense on the night of the fire, the Court concludes that no genuine issues of material fact remain regarding the claims against Hubacz. Accordingly, for the reasons set forth above, Hubacz's motion for summary judgment is GRANTED.

Bragdon's Motion for Summary Judgment

Bragdon moves for summary judgment on Counts V and VII of the plaintiff's declaration, arguing that "there is no evidence that [he] was negligent, that he was a proximate cause of the fire, that he was a joint tortfeasor or that the doctrine of res ipsa loquitur would apply to the facts of this case as they relate to him on the night and day of the fire in question." (Bragdon's Mot. For Summ. J., p. 1) ("Bragdon's Mot."). Based on his deposition testimony, Bragdon declares, "On the night/morning of the fire, he had

disposed of his cigarettes by stomping them out and putting them in an ashtray. He did not dispose of the cigarettes in a careless way, and did not see anybody else dispose of cigarettes in a hazardous, risky or careless manner." Id. at 2. Relying on this testimony, Bragdon contends that he acted reasonably in extinguishing his smoking materials. He further asserts that he had no duty to determine that other cigarettes and combustibles were extinguished. Additionally, Bragdon advances that "he was not among the last group of smokers to leave the barn the morning of the fire," id., and that he went to sleep between 1:00 a.m. and 1:30 a.m., id. at 11. Based on this testimony, Bragdon argues, among other things, that he could not have been present at the time the last cigarette was disposed. Therefore, Bragdon avers that he is entitled to summary judgment on Count V.

Bragdon further contends that the plaintiff has provided no evidence supporting its *res ipsa loquitur* claim. In support of this argument, Bragdon maintains that (1) "barn fires are not the kind of accident that does not ordinarily occur in the absence of negligence[,]" id. at 13; (2) the cigarettes were not in the joint control of the named defendants because, among other things, the plaintiffs can provide no evidence indicating that all the named defendants were in the barn at the same time; (3) the cigarettes were not in the exclusive control of the defendants because other individuals besides the named defendants were present in the barn throughout the night; and (4) the Allens contributed to the cause of the fire by "allowing friends of their son to come over without the [Allen's] supervision[,]" id. at 15; see also generally id. at 11-19. Thus, Bragdon asserts that he is entitled to summary judgment on Count VII.

The plaintiff objects, arguing that material issues of fact remain regarding Counts V and VII against Bragdon. The plaintiff asserts that Bragdon's deposition testimony contains several conflicting statements and also conflicts with the testimony of other individuals. Specifically, the plaintiff proffers that Alphonse Kroeten ("Kroeten") testified that, when he went to bed at approximately 2:30 a.m., he did not see anyone asleep in the room in which Bragdon and he were supposed to sleep that night. Based on this testimony and the testimony of others, the plaintiff contends that, when viewing the evidence in favor of it, the evidence "fairly places Mr. Bragdon out of bed and smoking with the last group of smokers at 2:30 AM." (Pls.' Obj. To Bragdon's Mot., p. 6.)

In reviewing the deposition testimony submitted by the parties, the Court concludes that genuine issues of material fact remain regarding Counts V and VII. First, Bragdon's assertion that he did not carelessly dispose of his cigarettes is a question of fact that is not suitable for the Court to assess on summary judgment. The *reasonableness* of Bragdon's disposal of his cigarettes is a matter for the jury to determine in light of the facts of the case and Bragdon's credibility. Second, while Bragdon maintains that he went to bed between 1:00 a.m. and 1:30 a.m., there is conflicting evidence regarding whether Bragdon actually went to sleep at this time. Further, it appears that Bragdon's own testimony conflicts in a manner that poses credibility issues. These conflicts give rise to genuine issues of material fact that must be resolved by a jury. Therefore, summary judgment is inappropriate on Count V.

Finally, the Court finds that the plaintiff has submitted sufficient evidence to defeat summary judgment on the *res ipsa loquitur* claim. While Bragdon may be correct that barn fires which have *unknown* causes are not of the type that do not ordinarily

occur without someone's negligence, see Barrister Farm, LLC v. Upson Downs Farm, Inc., 2006 WL 319344 (Ky. App. 2006) (cited by Bragdon in support of his motion), the fire at issue in this case is reported to have a *known* cause, that is, the careless disposal of smoking materials. Fires caused by disposal of smoking materials are not ordinarily caused without someone's negligence. Though the Court denies summary judgment, it emphasizes it has made no ruling as of yet as to whether *res ipsa loquitur* is to be presented to the jury.

Further, the Court agrees that the evidence indicates that other individuals were present on the night of the fire. However, Bragdon has not submitted specific evidence demonstrating that any of those individuals were present when the smoking materials were allegedly carelessly disposed such that these individuals had control over the smoking materials. Therefore, in viewing the evidence in a light most favorable to the plaintiff, the Court cannot grant summary judgment to Bragdon. The Court notes that the plaintiff still has the burden of sufficiently establishing at trial that the named defendants had joint and exclusive control of the smoking materials in connection with *res ipsa loquitur.*

Additionally, the deposition testimony contains some discussion regarding observations of sparks associated with an outlet located in the barn. However, this evidence is inadequate to conclusively demonstrate that the plaintiff has not sufficiently eliminated other causes of the fire. The plaintiff has submitted the fire marshal's report, which cites disposal of smoking materials as the cause of the fire. Thus, viewing the evidence in a light most favorable to the plaintiff, the Court concludes that summary judgment is inappropriate at this time. Again, the Court emphasizes that the plaintiff has

the burden of sufficiently establishing entitlement to having *res ipsa loquitur* considered by the jury.

Accordingly, the Court concludes that genuine issues of material fact remain regarding Counts V and VII such that summary judgment is inappropriate at this time. Therefore, Bragdon's motion is DENIED.

Plaintiff's Motion For Partial Summary Judgment

The plaintiff moves for partial summary judgment on damages, arguing that "there is no material dispute that the losses in this matter amount to at least $104,939.67 ($80,000 real property loss + $24,308.37 personal property loss + $381.30 reasonable and foreseeable expenses that flowed directly from the lost use of the property caused by the fire + $250.00 deductible)." Mot. at 3. None of the named defendants has objected to this motion. Accordingly, because no objection has been filed, the plaintiff's motion is GRANTED.

SO ORDERED.

Date: 6/9/06

JOHN M. LEWIS
Presiding Justice

REC'D JUN 12 2006