

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Sommai Ruksujjar et al., :
 :
 Plaintiffs-Appellants, :
 :
 v. : No. 09AP-93
 : (C.P.C. No. 06CVC-10-14283)
 Daniel J. Wilgus d/b/a Wilgus Electric, : (ACCELERATED CALENDAR)
 :
 Defendant-Appellee. :

D E C I S I O N

Rendered on September 24, 2009

Nielsen, Zehe & Antas, P.C., and Robert A. Rutter, Isaac, Brant, Ledman & Teetor, Patrick M. Pickett and Jerry L. Kaltenbach, for appellants.

Gallagher, Gams, Pryor, Tallan & Littrell, LLP, Andrew Kielkopf and Patricia A. Boyer, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Plaintiffs-appellants, Sommai ("Sommai," individually) and Vongdara Ruksujjar, appeal from a judgment of the Franklin County Court of Common Pleas granting the summary judgment motion of defendant-appellee, Daniel J. Wilgus d/b/a Wilgus Electric, on plaintiffs' claim that defendant caused fire damage to plaintiffs' home

when defendant negligently installed wiring during construction. Plaintiffs assign a single error:

THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT TO MR. WILGUS WHERE THERE IS A GENUINE ISSUE OF MATERIAL FACT, AS PROVED BY THE COMPETNG EXPERT OPINIONS AS TO THE CAUSE OF THE FIRE.

Because competing expert opinions as to the cause of the fire create a genuine issue of material fact, we reverse and remand.

I. Procedural History

{¶2} The material submitted with defendant's summary judgment motion, construed in plaintiffs' favor, reveals that a fire on the evening of September 12, 2005 damaged plaintiffs' partly constructed, unoccupied home. To extinguish the fire, responding firefighters were forced to cut a substantial hole in the foyer floor. Given the scene they encountered, firefighters determined the fire originated in an area approximately ten feet in diameter on the ceiling of the basement directly below the foyer. Based on the burn patterns and evidence of arcing and shorting on the cable, Richard Marzola, plaintiffs' fire investigator and expert witness, concluded the failure of the service entrance ("SER") cable caused the fire.

{¶3} Sommai served as the general contractor in constructing the house and had hired defendant to run the electric lines, including the SER cable, to the circuit breakers in the basement of the premises. One of Sommai's workers unrolled the SER cable, and defendant ran it to a circuit breaker through the joists on the ceiling of the basement along the front of the house, traversing the area of origin of the fire. Defendant then secured the

wire with clamps approximately every four feet. While inspecting the scene after the fire, Marzola found two locations outside the area of origin where the gusset plates, the razor-like metal plates that connect the joists, penetrated the SER cable sheathing.

{¶4} On October 30, 2006, plaintiffs filed a complaint against defendant, followed by an amended complaint on November 3, 2006. Plaintiffs asserted defendant negligently installed the SER cable, causing the resulting fire and damage to plaintiffs' house. In response to plaintiffs' complaint, defendant ultimately filed a motion for summary judgment, premised on the opinion of his investigator, Adam Roy, who also concluded the failed SER cable caused the fire. He, however, added that any attempt to attribute fault for its failure was no more than mere speculation because the fire scene provided no way to determine (1) when or how the harm happened, or (2) who among the numerous workers in the basement was responsible for damaging the SER cable during the four-month interval between its installation and the fire.

{¶5} Plaintiffs responded to defendant's motion with their expert, who opined that the person who caused the fire could be determined by systematically eliminating all other causes, a process described in the National Fire Protection Association 921 Guidebook for Fire Investigations ("NFPA 921"). Utilizing that process, Marzola concluded defendant negligently installed the SER cable. In the course of his opinion, Marzola explained why he eliminated the only other possible causes of the fire: a manufacturing defect or possible interference with the SER cable from subsequent subcontracting work performed in the basement.

{¶6} Upon construing the evidence and drawing all reasonable inferences in plaintiffs' favor, the trial court granted defendant's motion and entered summary judgment for defendant on plaintiffs' negligence claim. In its decision, the trial court determined a genuine issue of material fact exists as to whether defendant breached a duty. Specifically, noting the testimony of plaintiffs' expert that physical damage to the SER cable outside the area of the fire's origin occurred at installation, the court found reasonable minds could conclude defendant negligently installed the SER cable. (Mar. 17, 2008 Decision Granting Motion for Summary Judgment, 7-8.)

{¶7} With regard to causation, however, the trial court found that even if defendant breached a duty, plaintiff presented no evidence establishing that defendant's breach of duty proximately caused the fire. The court explained that "[p]laintiff can only identify negligence which in no way caused the fire, cannot identify negligence which did, and cannot eliminate all other reasonable, possible causes." (Decision at 13.) The court reasoned that, because the SER cable within the area where the fire originated was consumed in the fire, plaintiffs' expert could not produce direct evidence of what caused the fault in the portion of the SER cable that started the fire. (Decision at 9.)

II. Assignment of Error

{¶8} Plaintiffs' sole assignment of error contends the trial court erred in granting summary judgment to defendant where a genuine issue of material fact exists in the competing experts' opinions.

{¶9} An appellate court's review of summary judgment is conducted under a de novo standard. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41; *Koos v. Cent.*

Ohio Cellular, Inc. (1994), 94 Ohio App.3d 579, 588. Summary judgment is proper only when the parties moving for summary judgment demonstrate: (1) no genuine issue of material fact exists, (2) the moving parties are entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in its favor. Civ.R. 56; *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 1997-Ohio-221.

{¶10} Pursuant to Civ.R. 56(C), the moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record demonstrating the absence of a material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. The moving party, however, cannot discharge its initial burden under this rule with a conclusory assertion that the non-moving party has no evidence to prove its case; the moving party must specifically point to evidence of a type listed in Civ.R. 56(C), affirmatively demonstrating that the non-moving party has no evidence to support the non-moving party's claims. *Id.*; *Vahila v. Hall*, 77 Ohio St.3d 421, 1997-Ohio-259. Once the moving party discharges its initial burden, summary judgment is appropriate if the non-moving party does not respond, by affidavit or as otherwise provided in Civ.R. 56, with specific facts showing that a genuine issue exists for trial. *Dresher* at 293; *Vahila* at 430; Civ.R. 56(E). See also *Castrataro v. Urban* (Mar. 7, 2000), 10th Dist. No. 99AP-219.

{¶11} In order to establish a cause of action for negligence, the plaintiff must show "[1] the existence of a duty, [2] a breach of the duty, and [3] an injury resulting proximately

therefrom." *Menifee v. Ohio Welding Prod., Inc.* (1984), 15 Ohio St.3d 75, 77. Because the experts agree that the failure of the SER cable caused the fire, plaintiffs were required to present evidence that defendant's breach of duty caused its failure; because no direct evidence existed after the fire, they were compelled to use circumstantial evidence sufficient to permit such an inference.

{¶12} "Circumstantial evidence is not inherently less reliable or certain than direct evidence." *Fogle v. Cessna Aircraft Co.* (Jan. 16, 1992), 10th Dist. No. 90AP-977, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, 272. The weight to be accorded an inference is generally a question of fact. *Donaldson v. N. Trading Co.* (1992), 82 Ohio App.3d 476. An inference will be disregarded as speculative only where, with the evidence construed most strongly for the nonmoving party, reasonable minds cannot help but find that the inference is not supported by the greater weight of the evidence. *Id.*

{¶13} The trial court concluded plaintiffs' evidence created a genuine issue of material fact regarding defendant's breach of duty. The issue, then, is whether plaintiffs' evidence similarly demonstrates a genuine issue of material fact regarding proximate cause. Plaintiffs' expert, Marzola, used the method encompassed in NFPA 921 to eliminate all other causes and thus identify the cause of the fire. Although the method necessarily relies upon indirect, rather than direct, evidence of causation, the method has legal support.

{¶14} As the Supreme Court of Ohio explained in *Gedra v. Dallmer Co.* (1950), 153 Ohio St. 258, "[i]n a negligence action, it is not sufficient for plaintiff to prove that the negligence of defendant might have caused an injury to plaintiff[.]" *Id.* at paragraph two of

the syllabus. Rather, "if the injury complained of might well have resulted from any one of several causes, it is incumbent upon plaintiff to produce evidence which will exclude the effectiveness of those causes for which defendant is not legally responsible." *Id.* As a result, "if the cause of an injury to a plaintiff may be as reasonably attributed to an act for which defendant is not liable as to one for which he is liable," then the plaintiff in such an action "has not sustained the burden of showing that his injury is a proximate result of the negligence of the defendant." *Id.* at paragraph three of the syllabus. *Gedra's* second paragraph "merely states the logical principle that where several reasonable explanations of an event are possible, the disproof of all but one necessarily acts as the proof of that one, and there are cases where this method of proof is the only way in which plaintiff can make his case." *Westinghouse Elec. Corp. v. Dolly Madison Leasing & Furniture Corp.* (1975), 42 Ohio St.2d 122, 127.

{¶15} The evidence plaintiffs submitted in connection with the summary judgment motion indicates Marzola systematically eliminated the other possible causes of the fire based on the representations that were made to him about who worked where and when during construction of the home. Because he had no evidence of either a manufacturing defect in the SER cable or of others working on or around the SER cable after defendant installed it, Marzola concluded defendant's negligent installation of the SER cable caused the fire. Defendant suggests Marzola's opinion is faulty and inadmissible because he did not address all the possible occasions for interference with the wire after defendant installed it.

{¶16} The rule in *Gendra* does not "impose on a plaintiff the burden of always effectively eliminating *all* other possible causes in order to make his case[.]" (Emphasis added.) *Westinghouse* at 127. To do so "would impose a burden of proof analogous to the burden in criminal cases of proof beyond a reasonable doubt." *Id.* Here, even though Marzola may not have addressed every possible interference with the SER cable, the totality of the evidence in the record, if believed, eliminates the other possible causes of the SER cable's failure, supports Marzola's opinion that the failure of the SER cable must have been due to defendant's improper installation, and satisfies plaintiffs' burden to establish proximate cause.

{¶17} Initially, Marzola eliminated a manufacturing defect as a possible cause of the SER cable's failure. He determined that such a defect was not the cause because not only did the SER cable pass the manufacturer's tests, but a defect in the SER cable would have manifested itself sooner after being energized. Marzola further observed that defendant set the cable in place and clamped it every four feet, so he likely would have observed any defect on the outside of the wire. The record thus provides a basis for Marzola's expert opinion that a manufacturing defect did not start the fire.

{¶18} The only other possible cause of the fire lies with one of the workers on the house construction who manipulated the SER cable in such a way to cause its failure. The evidence, at first blush, suggests such interference. When defendant initially examined the scene after the fire, he was convinced someone other than he moved the wire, as it was sagging in the area of origin of the fire. Contrary to defendant's examination, however, Bill Greenwalt, the fire investigator for Jefferson Township,

explained that the SER cable also could have been pulled down as firefighters used a hook to remove some of the burned material above it. In addition, he noted the fire itself could have caused the cable to sag and move as it burned. Similarly, although evidence of new drill holes would have been definitive evidence that the SER cable was altered, no such evidence was presented.

{¶19} The record nonetheless reflects other possible reasons for the sagging cable. Although the SER cable is considerably rigid, it would sag several inches if pulled, or enough to deepen the gusset plate's penetration into the wire and cause the fire. Yet, the record also reveals that in another location, separated from the fire, gusset plate penetration was within a couple inches from the clamp that secured the SER cable in place, demonstrating the penetration did not cause a fire in at least one other area. In the end, the evidence is ambiguous in reflecting whether someone other than defendant manipulated the wire, so each individual must be examined.

{¶20} Sommai performed carpentry work on the basement stairs and ran branch electric wires from the circuit breaker after the SER cable was installed. He stated not only that his work did not involve his being in the area where the fire originated, but that he did not move the SER cable. Because we must construe the evidence in plaintiffs' favor for purposes of summary judgment, his testimony eliminates him as a potential cause. Sommai's assistant, who unrolled the SER cable as defendant set and installed it in the basement of the house, can be eliminated because no evidence suggests simply unrolling the cable could result in fire-causing damage to the cable. Thus, for purposes of

defendant's summary judgment motion, any damage caused during this process resulted from defendant's improperly setting the cable rather than from the manner it was unrolled.

{¶21} Greg Mulbarger, the plumbing installer, stated all his work in the basement was completed before the SER cable was installed. Further, no plumbing installer was on the premises from the date he completed work until after the fire. For purposes of summary judgment, the plumbing installers could not have caused the failure of the SER cable. Similarly, because the painter was on the premises the day of the fire, but did not work in the basement where the SER cable was located, he, too, for summary judgment purposes, could not have caused the cable's failure.

{¶22} Marzola also relied on Brian Craycraft's testimony that the heating and cooling system ("HVAC") work in the basement was done before the SER cable was installed. Craycraft, the supervisor of the HVAC installation, was certain of the chronology because the fee customarily charged when electricity is in place prior to HVAC installation was not charged for plaintiff's house. In contrast, Sommai and defendant originally stated that the HVAC installation occurred after defendant installed the SER cable. Dustin Gregg, the actual HVAC installer, recalled possibly installing a heat run over a SER cable and stated it would not have been dangerous to touch at the time because it was not live. In spite of the contradictory evidence, Craycraft's testimony, if believed, would eliminate the HVAC installers as a cause for the failure of the SER cable because they finished their work before its installation.

{¶23} Under the evidence noted, and apart from improper installation, the security system installers are the only remaining possible cause for the SER cable's failure for

summary judgment purposes. The supervisor and lead installer of the security system, Vongvilay Nouanesengsy, stated that not only did he not touch the SER cable, but his company's practice was to avoid them altogether because it interferes with the security system and is dangerous. Sean Langston, the other primary installer, repeated Nouanesengsy's statements about avoiding SER cables.

{¶24} One other security system installer, Henry Naranjho, was present on the job for a couple days, but the record lacks evidence of whether or not he manipulated the SER cable. Such evidence, construed in plaintiffs' favor, cannot defeat plaintiffs' claim. Instead, it reflects a genuine issue of material fact for a jury to resolve. See *Westinghouse* at 127 (observing that a plaintiff has only failed to prove proximate cause "where the facts from which an inference of probable proximate cause must be drawn are such that it is as reasonable to infer other causes"). In view of the evidence regarding Naranjho, a jury reasonably could conclude defendant was more likely to have improperly installed the SER cable and caused its fault than was Naranjho to have manipulated it in a way that would cause the fire, since defendant set and secured the SER cable himself and did so improperly in places outside the area of origin. Naranjho, by contrast, was at the premises only minimally and was instructed to avoid the SER cable.

{¶25} Defendant, however, points to additional evidence suggesting the security system installers could not be eliminated as a cause of the fire. Greenwalt recalled seeing low-voltage wiring, that only the security system installers used, bundled and zip-tied to the SER cable in one location a few feet outside the area of origin of the fire. Nouanesengsy and Langston both admitted they used plastic zip-ties on this job to

secure their wires to the joists but denied the accuracy of Greenwalt's account. Nouanesengsy stated that, to avoid interference, neither he nor his employees ran wires that close to a high-voltage wire; he would have corrected it had he seen it. Defendant nonetheless contends the evidence of the zip-tie disproves the facts on which Marzola relied to eliminate the security system employees as possible causes of the SER cable's failure.

{¶26} Greenwalt's testimony is the only evidence of the zip-tie; the zip-tie was not photographed, and none of the other investigators noticed it. Indeed, during his deposition Greenwalt acknowledged that a zip-tie's surviving the heat of the fire from a few feet away did not make sense. With that observation, Greenwalt admitted the zip-tie possibly was used to bundle the wires after the fire, though he thought such bundling would be an unusual practice for firefighters. Because such evidence allows the conclusion that the zip-tie was attached after the fire, the zip-tie at most creates a genuine issue of fact for the jury to resolve; it does not establish the security system installers touched the SER cable or disprove the facts on which Marzola relied.

{¶27} Although defendant's expert, Adam Roy, opined all other causes could not be eliminated, his opinion only creates an issue for the jury to resolve in relation to Marzola's opinion. Moreover, Roy never suggested an installation error could not cause a fire four months later. Marzola, by contrast, explained a fire four months after the SER cable was installed could have occurred when the SER cable experienced a heavier load or when the house slowly settled into place, allowing the initially limited gusset plate penetration to increase. Similarly, Greenwalt explained that the fire may have occurred

four months after installation because the penetration damage to the SER cable created a hydrofluoric effect, heating a wooden joist and causing it to dry and turn into highly ignitable carbon slowly over a several-month period.

{¶28} The facts in the record, construed in favor of the plaintiffs, support Marzola's expert opinion that all of other causes may be eliminated, leaving defendant as the proximate cause of the damage to the SER cable that caused the fire. Contrary to the trial court's suggestion, Marzola's methodology was not the same as the reasoning the expert employed in *Mitchell Motor Parts v. Sepick Constr. Co.* (Dec. 30, 1999), 10th Dist. No. 99AP-444. In *Mitchell*, the expert used circular reasoning and concluded a faulty ground caused a surge of electricity entering the premises, because, if the ground were working properly, the surge would never have happened. The trial court in this case concluded Marzola's argument was similar: defendant was negligent because the fire occurred.

{¶29} Marzola, however, did not merely so conclude as an unsupported proposition. Rather, applying a recognized method of deductive reasoning found in NFPA 921 whereby a process of elimination was used to determine the likelihood that defendant proximately caused the fire in this case, Marzola concluded: (1) the only possible cause of the fire was the defendant, and (2) improper installation is the only possible act of the defendant which could have caused the fire. The first conclusion follows from the logical principle that "where several reasonable explanations of an event are possible, the disproof of all but one necessarily acts as the proof of that one." *Westinghouse* at 127. The second is based on Marzola's expertise in the causes of fires.

{¶30} Because the evidence, construed in plaintiffs' favor, demonstrates defendant's negligent installation of the SER cable was a proximate cause of the fire, the trial court inappropriately granted summary judgment to defendant. Accordingly, we sustain plaintiffs' single assignment of error, reverse the judgment of the Franklin County Court of Common Pleas, and remand for further proceedings consistent with this decision.

Judgment reversed and cause remanded.

KLATT and CONNOR, JJ., concur.
