STATE OF MICHIGAN

COURT OF APPEALS

CITIZENS INSURANCE COMPANY,

Plaintiff-Appellant,

and

MICHAEL CAMERON and KAREN CAMERON,

Plaintiffs/Cross-Appellants,

v

DETROIT EDISON,

Defendant-Third-Party Plaintiff-Appellee/Cross Appellee,

and

COMCAST CABLEVISION OF TAYLOR,

Third-Party Defendant.

UNPUBLISHED
May 15, 2001

No. 215510
Wayne Circuit Court
LC No. 96-648679-NZ

Before: Bandstra, C.J., and Wilder and Collins, JJ.

PER CURIAM.

Plaintiff-appellant Citizens Insurance Company of America (Citizens) and plaintiffs-cross appellants Michael Cameron and Karen Cameron (the Camerons) appeal as of right a directed verdict entered in favor of defendant Detroit Edison. We affirm.

This case arises from a fire that occurred at the Camerons' home. Citizens, as subrogee of the Camerons, filed a complaint alleging that defendant breached its duty to provide safe electrical service and that this breach caused power lines to fall onto and energize a Comcast cable wire, which caused overheating that ignited a fire in the basement of the Camerons' home. The court granted defendant's motion for directed verdict on the basis that plaintiffs failed to put

forth sufficient evidence for a jury to conclude that defendant breached its duty or that any act or failure to act by defendant caused the lines to fall.

Plaintiffs first argue that the trial court erred in granting a directed verdict in favor of defendant because plaintiffs presented sufficient evidence to establish a prima facie case of negligence. This Court reviews the trial court's grant of a directed verdict de novo. *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997). A directed verdict is appropriate only where no factual question exists on which reasonable minds could differ. *Id.* When deciding whether to grant a motion for directed verdict, a court must view the testimony and all legitimate inferences from the testimony in the light most favorable to the nonmoving party. *Id.*

A prima facie case of negligence requires the plaintiff to provide proof of four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

A power company owes its customers a duty to exercise reasonable care to reduce potential hazards as far as practicable and an obligation to reasonably inspect and repair wires and other instrumentalities in order to discover and remedy hazards and defects. *Schultz v Consumer Power Co*, 443 Mich 445, 451; 506 NW2d 175 (1993). Here, plaintiffs did not produce evidence from which a jury could infer that defendant breached its duty of reasonable care with regard to the lines that plaintiffs allege caused the fire. First, plaintiffs did not offer evidence to establish what constitutes reasonable maintenance of electrical lines. Further, while plaintiffs did present evidence of defendant's policy of inspecting lines every ten years, plaintiffs presented no evidence regarding when defendant last inspected or serviced the lines that plaintiffs allege caused the fire.

Moreover, plaintiffs failed to produce evidence sufficient to establish causation. "[P]roving proximate cause actually entails proof of two separate elements: (1) cause in fact, and (2) legal cause, also known as 'proximate cause.'" *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). Cause in fact may be established by circumstantial evidence that permits "reasonable inferences of causation, not mere speculation." *Id.* at 163-164. It is not sufficient to present a causation theory, even if supported by evidence, that is just as possible as another theory. *Id.* at 164. "Rather, the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred." *Id.* at 164-165. However, "if there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence." *Id.* at 164, quoting *Kaminski v Grand Trunk W R Co*, 347 Mich 417, 422; 79 NW2d 899 (1956).

Here, two experts opined that the electrical line must have fallen due to a lack of preventative maintenance. Again, however, plaintiff did not present evidence of defendant's conduct in this regard. There was no testimony regarding any maintenance actually performed on the lines, or testimony indicating an absence of maintenance by defendant. Rather, the expert opinions were based on the fact that the line fell and the assumption that no outside forces had interfered with the lines. One of the experts surmised that there was a "weak spot" in the line

and that a possible overload in the lines caused the line to melt at that spot. However, expert conclusions regarding causation that are premised on mere suppositions are not sufficient to establish a causation issue. *Skinner, supra* at 174. Trial testimony provided alternative theories on the cause of the downed power lines, and plaintiffs failed to show what defendant could or should have done that would have prevented the accident. As the trial court stated, "the possibility that the falling of the wire was due to something that Detroit Edison could have seen and remedied is no better than at least several other possibilities about how the wire came to fall."

Viewing the testimony and all legitimate inferences from the testimony in the light most favorable to the nonmoving party, we conclude that plaintiffs did not present evidence from which a jury could conclude that more likely than not, but for defendant's conduct, plaintiffs' injuries would not have occurred. Accordingly, plaintiffs failed to establish a prima facie case of negligence and a directed verdict was appropriate.

Plaintiffs next argue that the doctrine of res ipsa loquitor established a presumption of negligence and precluded the directed verdict. Res ipsa loquitor allows "at least an inference of negligence when the plaintiff is unable to prove the actual occurrence of a negligent act." *Maiden v Rozwood*, 461 Mich 109, 127; 597 NW2d 817 (1999), quoting *Jones v Porretta*, 428 Mich 132, 150; 405 NW2d 863 (1987). Under the doctrine of res ipsa loquitor, an inference of negligence can arise when the plaintiff's injury: (1) ordinarily would not have occurred in the absence of negligence, (2) was caused by an agency or instrumentality within the exclusive control of the defendant, and (3) was not due to any voluntary action or contribution of the plaintiff. *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 193-194; 540 NW2d 297 (1995).

Here, plaintiffs fail the threshold requirement of res ipsa loquitor that the injury be one that ordinarily does not occur in the absence of negligence. Contrary to plaintiffs' assertions, electrical lines do break and house fires do occur in the absence of negligence. Trial testimony showed that electrical lines can break and fall as a result, among other things, of acts of God, such as high winds that may cause the lines to wrap around each other and short out, or a lightning strike. Further, the electrical lines were not within the exclusive control of defendant, but were subject to outside forces. Thus, plaintiffs cannot establish a presumption of negligence under the doctrine of res ipsa loquitor.

Plaintiffs' final argument is that under the doctrine of spoliation, they were entitled to a presumption that had the broken electrical lines been produced by defendant, those lines would have provided evidence unfavorable to defendant. Plaintiffs argued in the trial court that they were entitled to have the jury instructed under SJI2d 6.01, which provides that where a party fails to produce evidence under its control, and gives no reasonable excuse for the failure to produce the evidence, a jury may infer that the evidence would have been adverse to that party. *Ellsworth v Hotel Corp*, 236 Mich App 185, 193; 600 NW2d 129 (1999)

In *Lagalo v Allied Corp*, 233 Mich App 514; 592 NW2d 786 (1999), this Court distinguished between the presumption that destroyed evidence would have been adverse to the party that destroyed it, which is discussed in *Trupiano v Cully*, 349 Mich 568, 570; 84 NW2d 747 (1957), and the inference allowed by SJI2d 6.01:

> *Trupiano* thus stands for the proposition that the *presumption* that nonproduced evidence would have been adverse applies only where there is evidence of intentional fraudulent conduct and intentional destruction of evidence. In contrast, SJI2d 6.01(d) allows only for a permissible *inference* that the evidence would have been adverse. [*Lagalo, supra* at 520.]

This Court then quoted the Supreme Court's explanation of the effect of a presumption in *Widmeyer v Leonard*, 422 Mich 280, 289; 373 NW2d 538 (1985):

> [T]he function of a presumption is solely to place the burden of producing evidence on the opposing party. It is a procedural device which allows a person relying on the presumption to avoid a directed verdict, and it permits that person a directed verdict if the opposing party fails to introduce evidence rebutting the presumption. [*Lagalo, supra* at 520-521.]

Here, there was no evidence presented to show that defendant's employees destroyed the downed power line purposely to deprive plaintiffs of the benefit of the evidence. Rather, the linemen who discarded the downed lines after removing them testified that they were not aware that a fire suspected of being electrical in nature had occurred in a nearby home, and that their disposal of the lines was in keeping with standard business practice. Thus, plaintiffs were not entitled to a *presumption* that the destroyed electrical lines would have been adverse to defendant that would have allowed them to avoid a directed verdict.

Further, the trial court did not abuse its discretion in ruling that plaintiffs were not entitled to have the jury instructed under SJI2d 6.01. *Ellsworth, supra.* The court could reasonably conclude that defendant's employees did not know, and had no reason to know, that the lines could be evidence relevant to a claim against defendant. We thus distinguish this case from *Brenner v Kolk*, 226 Mich App 149, 160-161; 573 NW2d 65 (1997), where this Court concluded that the plaintiff could be sanctioned for failing to preserve key evidence that she knew or should have known would be relevant to litigation.

We also distinguish this case from *Hamann v Ridge Tool Co*, 213 Mich App 252; 539 NW2d 753 (1995). In *Hamann*, the plaintiff's expert examined certain evidence and then gave the evidence to another expert who negligently lost it. *Id.* at 255. This Court found that the trial court erred in allowing the first expert to testify on the basis of his examination of the evidence because defendant had no means of rebutting the evidence. *Id.* at 258. This Court concluded that the defendant had been unfairly prejudiced and that the plaintiff should not be allowed to benefit from its error at the defendant's expense. *Id.* Here, however, neither party had the benefit of the evidence, and any prejudice to plaintiffs is speculative. Accordingly, the trial court did not abuse its discretion in refusing plaintiffs' request for SJI2d 6.01.

Affirmed.

/s/ Richard A. Bandstra
/s/ Kurtis T. Wilder
/s/ Jeffrey G. Collins