ATTORNEYS FOR APPELLANTS:

DAVID R. PHILLIPS
JEFFREY S. STURM
Sturm & Phillips
Valparaiso, Indiana

DANIEL A. SAWOCHKA
MELISSA B. COHEN
Cohen & Sawochka
Merrillville, Indiana

ATTORNEYS FOR APPELLEE:

TERENCE M. AUSTGEN
ELIZABETH M. BEZAK
Singleton, Crist, Austgen & Sears, LLP
Munster, Indiana

IN THE
COURT OF APPEALS OF INDIANA

DENNIS BAIR and DIANE BAIR,	)	
	)	
Appellants-Plaintiffs,	)	
	)	
vs.	)	No. 45A03-0509-CV-443
	)	
UNITED STATES STEEL CORPORATION,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Jeffery J. Dywan, Judge
Cause No. 45D11-0211-CT-260

December 18, 2006

MEMORANDUM OPINION – NOT FOR PUBLICATION

BAKER, Judge

Appellants-plaintiffs Dennis L. Bair (Bair) and Diane Bair (Diane) (collectively, the Bairs) appeal from a judgment on the evidence entered in favor of appellee-defendant United States Steel Corporation (U.S. Steel) regarding their claim for negligence and premises liability. Specifically, the Bairs contend that the trial court abused its discretion in "excluding, limiting, and disregarding" the testimony of two purported expert witnesses that they intended to call at trial to testify regarding the causation of Bair's injuries. Appellants' Br. p. 14. The Bairs also argue that judgment on the evidence was improperly granted for U.S. Steel because the trial court "misstated or misconstrued the evidence, and disregarded inferences favorable" to them. Appellants' Br. p. 28. Concluding that the trial court properly excluded the testimony of the Bairs' expert witnesses and finding that judgment on the evidence was warranted in favor of U.S. Steel, we affirm the judgment of the trial court.

FACTS

On May 7, 2001, Bair was an ironworker for an independent contractor known as BMI Furnco (Furnco) at U.S. Steel's facility in Gary. Furnco had been retained by U.S. Steel to rebuild three of its coke ovens. Specifically, Furnco's task was to tear down and rebuild the refractory brick lining of the ovens. U.S. Steel's coke oven battery #2 is a massive structure that is comprised of fifty-seven separate ovens. The ovens are adjacent to each other and are nearly three feet wide, forty feet long, and two stories deep. Coal is converted to coke by heating it at temperatures in excess of 2000 degrees for fourteen to thirty hours. The heat

drives impurities from the coal in the form of coke oven gas. According to U.S. Steel's Material Data Safety Sheet for coke ovens, particulate matter and gases are emitted from the ovens. Moreover, the carbon monoxide component of coke oven gas ranges from 5-7%, and the OSHA standard for permissible carbon monoxide exposure is fifty parts per million based on an average eight-hour exposure.

For the project, Furnco provided all the equipment on the job, including personal protective equipment, respirators, safety equipment, and burning torches. Furnco also supplied instructions concerning the respirator that filtered out the particulate matter.

On May 7, 2001, Bair and his co-workers were scheduled to work a ten-hour shift from 7:00 a.m. to 5:00 p.m. at the ovens. The ironworkers arrived on the topside of the battery at approximately 7:30 a.m. and received instructions from Furnco personnel. The ironworkers were divided into pairs, and there were two teams of "buddies" on top of the battery. Bair's "buddy" was Fred Summers. Appellants' App. p. 945, 947, 961. Approximately five to ten minutes into the project, Bair got "real hot" and told Summers that he did not "feel right" and was having trouble breathing. Id. at 1193. As a result, Bair took a five-minute break and drank some water. After returning to the project, Bair began to feel dizzy again, was unable to catch his breath, and began to experience chest pains. Bair took another break and returned to work a third time, when he once again began to experience lightheadedness and dizziness. Bair finally left the topside of the battery.

At some point, Furnco's safetyman, Dennis Klochan, was notified that Bair was not feeling well. Klochan immediately went to the work site and did not observe any emissions

or unusual smoke. Klochan spoke with several individuals, including Bair's foreman. Two of Bair's co-workers also felt "dizzy and light headed," but they attributed those feelings to the extreme heat. Id. at 967, 986, 1232. Those employees continued working after taking several breaks.

A U.S. Steel ambulance was called to the scene where Bair was given oxygen. Bair was transported by ambulance to Methodist Hospital in Gary and was diagnosed with chest pain and near syncope. Diane, a nurse at St. Mary's Hospital, made arrangements to have her husband transferred to that facility. Dr. Mark Carter had been Bair's family physician since 1998 and examined Bair on May 7 at St. Mary's. Dr. Carter did not suspect carbon monoxide exposure at that time and observed no symptoms of carbon monoxide poisoning.

That same day, and again on May 23, 2001, Dr. Zlatan Stepanovic, a cardiologist, examined Bair. He concluded that Bair had not experienced a heart attack and diagnosed him with "heart burn symptoms compatible with unstable angina." Appellants' App. p. 930. Dr. Stepanovic also indicated that Bair's symptoms suggested an "environmental cause." Id. at 998-99. When Bair was discharged from the hospital, the confusion and headaches persisted, and Dr. Carter was of the opinion that those problems were permanent.

Thereafter, Dr. Carter referred him to Dr. Abu-Aita, a neurologist. Dr. Abu-Aita ordered an EEG, MRI and SPECT scan. The results of those tests ruled out stroke, vascular, and seizure problems. Dr. Abu-Aita entertained "the possibility of early dementia." Appellee's App. p. 120-21. With no obvious explanation for Bair's symptoms, Dr. Carter suggested the possibility of chemical exposure or poisoning. After conferring with Diane,

Dr. Carter suspected that Bair could have been exposed to carbon monoxide poisoning on May 7. However, Dr. Carter did not know the type of equipment that Bair used or the type of fumes that were emitted from the oven. Moreover, Dr. Carter acknowledged that every symptom that Bair experienced could be explained by something other than carbon monoxide exposure.

Thereafter, Bair was referred to Dr. Joseph Fink, a neuropsychologist for further evaluation and testing. Those test results confirmed that Bair was suffering from cognitive and memory deficits because of brain damage. At that time, Dr. Fink suggested the possibility of carbon monoxide poisoning. Following a second clinical interview, Dr. Fink concluded that Bair's condition was consistent with acute carbon monoxide poisoning. This diagnosis was reached following a series of additional testing and Dr. Fink's review of medical literature and records. The tests ruled out stroke, tumor, substance abuse, neuro-degeneration and several obscure diseases.

Before the alleged carbon monoxide poisoning, Bair had previously experienced some number of medical complaints and conditions. For instance, in 1998, Bair had "flatlined" during oral surgery and complained of lightheadedness. Appellee's App. p. 4, 107. Bair also had pre-existing high blood pressure, diabetes, complaints of his "eyes not focusing right," shortness of breath, wheezing, emphysema, and gastrointestinal problems that resulted in surgery on April 6, 2001. Id. at 22-26, 28, 30-31, 108-112. Bair also underwent a pulmonary function test on March 5, 2001, and the results showed "moderate to severe restriction." Id. at 118-19. Bair began taking Monopril for his blood pressure in May 2001. The side effects

of this drug include dizziness, headaches, confusion, shortness of breath, low blood pressure, chest pains, memory disturbances, and tremors.

As a result of the May 7, 2001 incident, the Bairs filed a premises liability action against U.S. Steel on November 12, 2002, seeking compensation for the injuries that Bair sustained as a result of the alleged carbon monoxide poisoning. The Bairs retained Dr. David Penney, a toxicologist, to review the case. Dr. Penney holds a Ph.D. and specializes in carbon monoxide toxicity. He has authored or edited several texts on the subject and has published a number of peer-reviewed articles on carbon monoxide toxicity in scientific journals. Dr. Penney also teaches medical students at Wayne State University and has received several research grants in his field. He consults on carbon monoxide issues for various national and international entities, including the United States Navy, the Environmental Protection Agency, Underwriters Laboratories, the Centers for Disease Control, and the World Health Organization. Dr. Penney does not have any formalized education in toxicology, nor does he hold any degrees in that field. He is not a medical doctor and he did not provide any treatment to or testing on Bair.

During the discovery process, Dr. Penney reviewed Bair's medical records, deposition transcripts, and all other items produced by U.S. Steel. He also interviewed the Bairs and obtained information from their family and friends. Ultimately, Dr. Penney wrote a lengthy narrative report in which he opined that Bair had been acutely poisoned by carbon monoxide. However, no evidence was introduced at trial documenting any specific level of carbon monoxide in or around the Furnco worksite during the time that Bair worked. No medical

tests performed on Bair confirmed the presence of any carbon monoxide in his body on or after May 7, 2001.

Prior to trial, U.S. Steel filed several motions to exclude Dr. Fink and Dr. Penney's testimony. Following a hearing, the trial court excluded Dr. Fink's opinion that stated "the most logical etiological explanation for Mr. Bair's problems was carbon monoxide exposure on May 7, 2001." Id. at 11.

In arriving at this result, the trial court determined that:

> In performing a differential diagnosis[1], the medical expert must first rule in all scientifically based potential causes. Then, through the process of scientific testing and evaluation, the medical expert must rule out potential causes until only one or a few remain. None of the causes ruled in may be based upon guess or speculation, any more than potential causes may be ruled out by guess or speculation. Each step in the process must be supported by the facts and a reliable scientific methodology.
>
> Further, at the foundation of Dr. Fink's opinion is the supposition of plaintiff and his spouse, weeks after the occurrence, the plaintiff may have been exposed to carbon monoxide on the day of the incident in question. Plaintiffs have not demonstrated that this supposition is factually accurate or scientifically reliable, or that a practitioner such as Dr. Fink would rely upon such supposition in arriving at a final diagnosis.

Appellants' App. p. 11. Dr. Fink did not testify at the trial.

The trial court also issued an order with respect to Dr. Penney's opinions. While those opinions were not barred from admission into evidence, the Bairs were cautioned that

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[1] A differential diagnosis is a standard scientific technique of identifying the cause of a medical problem by eliminating the likely cause of a medical problem until the most probable one is isolated. A reliable differential diagnosis is typically performed after performing a physical examination, taking a medical history, and reviewing clinical tests, including laboratory tests, and generally is accomplished by determining the possible causes of the patient's symptoms and then eliminating each of these potential causes until reaching one that cannot be ruled out or by determining which of those that cannot be ruled out is the most likely. Lennon v. Norfolk and W. Ry. Co., 123 F.Supp.2d 1143, 1153 (N.D. Ind. 2000).

any proffered opinions must be founded upon "a reliable factual and scientific basis." Appellants' App. p. 14. The trial court also ordered that the "plaintiffs shall not inquire of Dr. Penney as to any opinion in the presence of the jury until the plaintiffs have established that the opinion is founded upon a reliable factual and scientific basis and have first obtained the court's ruling that the opinion is admissible, outside the hearing of the jurors." Id.

At the trial that commenced on August 8, 2005, Dr. Carter was permitted to testify as to his diagnosis of carbon monoxide poisoning over U.S. Steel's objection. At the conclusion of the testimony, U.S. Steel moved unsuccessfully to strike his testimony based upon admissions that he made during cross-examination establishing that his purported differential diagnosis of carbon monoxide poisoning was unreliable, unscientific, and based solely on Diane's opinion that her husband had been exposed to the gas. At the conclusion of the Bairs' case, the trial court granted U.S. Steel's motion for judgment on the evidence.

In relevant part, the trial court's order provided as follows:

> The Plaintiffs . . . alleged that the Defendant failed to prevent emissions. Defendant argues persuasively that the Defendant had no duty to prevent emissions. Even Plaintiffs' own experts say carbon monoxide comes out of coke ovens. The EPA permits 50 parts per million permissible exposure over eight hours, permissible concentration over eight hours. The Plaintiffs haven't produced evidence of the level of exposure.
>
> The contract doesn't require U.S. Steel to prevent all accidents. It only required U.S. Steel to have these programs in place, and there's no evidence that the violation of that provision occurred, or that that violation caused the injuries.
>
> Next argument by the Plaintiffs was that U.S. Steel failed to require proper equipment. Again, the contractor required U.S. Steel to recommend proper equipment. It was Furnco's obligation under the statute to provide proper—the proper equipment for its employees. U.S. Steel didn't provide the personal

protection equipment. It simply recommended it.

> And there's no evidence . . . that U.S. Steel violated OSHA or state regulations. There is evidence that coke ovens are dirty, dusty places, but there's no specific evidence that there was a dirty, dusty cloud hitting the Plaintiff on that day or that, in fact, there was any level of carbon monoxide caused by the coke oven that day.
>
> The mere presence of Mr. Bair at that location on that day, the mere fact that there is smoke coming out of coke batteries from time to time in various concentrations doesn't support the inference that the Plaintiffs claim to make here.
>
> And the last point to make, because it goes to Plaintiffs' argument, while that Dr. Carter's diagnosis supports the inference that there was carbon monoxide on that date. Remember that Dr. Carter made that inference himself because the Plaintiffs said there was carbon monoxide on that date or could be carbon monoxide on that date. And the quantity—or I should say the qualitative analysis of his testimony just does not allow that inference to be made. Because in cross-examination, he clearly admitted that he couldn't support that diagnosis, though it was the one he used. To make that diagnosis in his office and to try to treat the Plaintiff and to do what he can for him is one thing, but to use that as an evidentiary basis in a Court of law is quite another. Dr. Carter's testimony qualitatively is not sufficient to support that type of an inference.

Id. at 92-95. The Bairs now appeal.

DISCUSSION AND DECISION

I. Exclusion of Expert Testimony

The Bairs first contend that the trial court improperly excluded the expert testimony of Drs. Fink and Penney. Specifically, the Bairs argue that excluding this testimony was error because the trial court "improperly applied the analytical framework of its reliability analysis and further ignored or misperceived evidence properly before it." Appellants' Br. p. 18.

In resolving this issue, we first note that a trial court enjoys broad discretion in ruling

on the admission of expert testimony. Suell v. Dewees, 780 N.E.2d 870, 874 (Ind. Ct. App. 2002). An abuse of discretion occurs when a lower court's decision is clearly against the logic and effect of the facts and circumstances or when the trial court misinterprets or misapplies the law. Wright v. Mount Auburn Daycare/Preschool, 831 N.E.2d 158, 162 (Ind. Ct. App. 2005), trans. denied. Whether an individual qualifies as an expert witness is within the trial court's sound discretion, and we will reverse only upon a showing that the trial court abused its discretion. Mitchell v. State, 813 N.E.2d 422, 431 (Ind. Ct. App. 2004), trans. denied.

In this case, the Bairs had the burden of establishing the foundation and reliability of the scientific principles and tests upon which their expert's testimony is based. Prewitt v. State, 819 N.E.2d 393, 410 (Ind. Ct. App. 2004), trans. denied. In accordance with Indiana Evidence Rule 702:

> (a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.
>
> (b) Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.

In construing these provisions, "it is obvious that a trial court is required to determine whether an expert's testimony rests on a reliable foundation and whether the reasoning or methodology underlying the testimony is scientifically valid." Ind. Mich. Power Co. v. Runge, 717 N.E.2d 216, 236 n.17 (Ind. Ct. App. 1999). The appropriate inquiry for a trial court exercising its gatekeeping function is the general scientific principles applied and the

general methodology employed by the expert. Sears Roebuck and Co. v. Manuilov, 742 N.E.2d 453, 460 (Ind. 2001). Moreover, an expert "cannot rely solely on his or her own status, intellect or intuition to support an opinion admissible to aid the trier of fact." Id. Testimony under Rule 702 must be "more than a subjective belief or unsupported speculation." Armstrong v. Cerestar USA, Inc., 775 N.E.2d 360, 366 (Ind. Ct. App. 2002). Also, opinions and diagnoses contained in medical records must meet the requirements for expert opinions under Evidence Rule 702. Walker v. Cuppett, 808 N.E.2d 85, 97 (Ind. Ct. App. 2004). As this court observed in Runge:

> Where a lay trier of fact cannot possibly determine the precise etiology of the injury without guidance from expert opinions, there is a risk that the jury would make irrational findings of causation based upon the siren-like allure of opinions stated by highly qualified experts. Thus, an expert's opinions must have some basis other than hypothesis before the opinion may have the privilege of being assailed by cross-examination.

717 N.E.2d at 237.

A. Dr. Fink

Turning to the circumstances here, we first note that Bair did not call Dr. Fink to testify at trial. However, during the fifth day of the trial, Bair's counsel planned to offer the deposition of Dr. Fink. Appellee's App. p. 103. Bair's counsel was of the opinion that the deposition "touches upon the Court's" earlier order concerning Dr. Fink's opinion and, therefore, Bair's counsel sought to "tender the deposition as an offer of proof as to what he would testify if he were present." Id. The trial court did not allow Bair's counsel to submit the entire deposition as an offer to prove and instructed him that he needed to "be more specific." Id. at 103-04. The trial court then stated, "if you want to use Dr. Fink's testimony,

then use it. If you don't want to do that, then make that election." Id. at 105. After another witness testified, the trial court asked Bair's counsel if he was going to offer Dr. Fink's deposition. Id. at 106. Bair's counsel declined and rested his case without calling Dr. Fink as a witness or making any offer to prove concerning any of his proposed testimony.

In considering the above, it is apparent that the pretrial order excluding one of Dr. Fink's opinions was a preliminary ruling because the language of the order provided that it "was based upon the record before this court." Appellants' App. p. 11. In order to properly preserve error with respect to the pretrial ruling, Bair should have asked specific questions of Dr. Fink as directed by the trial court. He then should have awaited a ruling on the admissibility of the answer to the question. Put another way, if the trial court excluded Dr. Fink's opinion, Bair should have made a proper offer to prove. The trial court would then have been permitted to make a final ruling on that testimony and Bair would have preserved a proper record for appeal. However, because the Bairs attempted to argue the propriety of the pretrial order for the first time on appeal without allowing the trial court an opportunity to review its order, they have waived the issue. See Dowdell v. State, 720 N.E.2d 1146, 1150 (Ind. 1999) (holding that the failure to offer excluded materials constitutes a waiver of the issue on appeal).

Waiver notwithstanding, we again observe that Dr. Fink's opinions were required to satisfy the requirements of Evidence Rule 702 before they could be admitted at trial. Walker, 808 N.E.2d at 97. Here, there is no evidence that a medical doctor ever reviewed a safety data sheet that might have shown that exposure could have caused the same symptoms

experienced by Bair. Moreover, there was no showing that Bair's physicians had any information concerning any level or duration of Bair's alleged exposure to carbon monoxide.

Even so, Bair directs us to Norfolk Southern Railway Co. v. Estate of Wagers, 833 N.E.2d 93 (Ind. Ct. App. 2004), trans. denied, for the proposition that "when chemicals are known, and their harmful effect recognized, specific proof of the extent of exposure is not necessary." Appellants' Br. p. 22. In Wagers, the plaintiff's expert witness was a physician who opined that the decedent's exposure to diesel fumes and asbestos contributed to his diagnosis of lung cancer although he was unable to apportion the degree of contribution between those and the plaintiff's lengthy history of cigarette smoking. The physician relied upon the decedent's coworkers' description of the presence of diesel fumes and asbestos at the work site. The defendant moved to exclude the expert's testimony for lack of reliable foundation as to the degree of exposure, arguing that such anecdotal evidence was insufficient to form a basis for the expert's causation opinion. On appeal, we determined that specific evidence of the level of exposure was not necessary because the carcinogenic qualities of diesel fumes and asbestos were well established.

Unlike the circumstances here, the facts in Wagers established that there was no dispute that the plaintiff was reliably diagnosed with and died of lung cancer. More specifically, in Wagers, the plaintiff had suffered long-term workplace exposure to asbestos fibers and diesel fumes and exhaust on a daily basis for his entire twenty-one-year career as a trackman and machine operator. Id. at 100. Also, Wagers did not analyze a permissible exposure level under OSHA. Rather, the Wagers court observed that the plaintiff had "more

than a casual exposure to diesel fumes" and that the physician's opinion was "based on a specified level of exposure." Id. at 106, 108.

As noted above, Bair's alleged exposure to carbon monoxide occurred for a period of approximately one and one-half hours. Dr. Fink was not certified in industrial medicine, and U.S. Steel disputed whether the underlying alleged exposure had actually occurred and the ultimate diagnosis of carbon monoxide poisoning. Moreover, Dr. Fink's analysis did not include a reference to any heat-related problems, any of Bair's pre-existing medical conditions, or the medication that Bair was taking on May 7, 2001. To be sure, Bair never established that Dr. Fink performed any type of reliable differential diagnosis that would rule in or rule out various causes of Bair's symptoms. Hence, we cannot say that the trial court abused its discretion in excluding Dr. Fink's conclusion "that the most logical etiological explanation . . . was carbon monoxide exposure on May 7, 2001," even if Bair had properly preserved the issue for appeal.

B. Dr. Penney

The Bairs also contend that the trial court erred in excluding and limiting Dr. Penney's testimony. In essence, the Bairs argue that the trial court erred in refusing to permit Dr. Penney to testify as to his forensic analysis of this case.

In resolving this issue, we first note that Dr. Penney presumed that Bair was exposed to carbon monoxide on May 7, 2001, as a result of information stemming from a number of Dr. Penney's questionnaires. Appellants' App. p. 150-56, 1075. And, contrary to the Bairs' assertions, Dr. Penney was permitted to testify as to his "forensic analysis" in terms of the

methodology that he used. That methodology included: 1) identifying "a likely source of carbon monoxide"; 2) determining whether there might have been unreasonable amounts of carbon monoxide present at the individual's location at the time he was affected; 3) determining if there were symptoms consistent with carbon monoxide exposure; and 4) examining how the individual reacts after exposure. Id. at 1122. Specifically, Dr. Penny testified that his "logical conclusion" is that if a person has a symptom consistent with carbon monoxide poisoning, "the likelihood is very high" that the individual was exposed to that gas. Appellants' App. p. 1112.

In essence, the basis of Dr. Penney's opinion was that because Bair displayed symptoms, the level of carbon monoxide at U.S. Steel must have exceeded the levels established by OSHA. Id. at 1079. Hence, Dr. Penney's own methodology presumes exposure if an individual self-reports symptoms and a carbon monoxide source is present. In our view, such a presumption is the type of false-cause reasoning that does not satisfy the requirements of Evidence Rule 702. Even Dr. Penney acknowledged that it is not possible to accurately determine what level of carbon monoxide Bair would have to be exposed to in order to cause his self-reported residual effects, especially given Bair's prior medical history and the type of work that he was doing. Id. at 1087-88. Dr. Penney admitted that any correlation between the level of exposure and manifestation of symptoms is "very loose" and not reliable. Id. at 1085-86. Hence, the scientific reliability requirements of Evidence Rule 702 were not met. As a result, the trial court did not abuse its discretion in excluding Dr. Penney's testimony.

II. Judgment on the Evidence

The Bairs next claim that the trial court erred in granting U.S. Steel's motion for judgment on the evidence. Specifically, the Bairs argue that the trial court misconstrued the evidence that was presented and failed to draw inferences from the evidence presented that established U.S. Steel's negligence.

In resolving this issue, we initially observe that we apply the same standard on review as a trial court in determining whether to grant a motion for judgment on the evidence. Topp v. Leffers, 838 N.E.2d 1027, 1031 (Ind. Ct. App. 2005). We will only consider the evidence and reasonable inferences most favorable to the non-moving party. Id. As we recognized in Daub v. Daub, 629 N.E.2d 873, 877 (Ind. Ct. App 1994):

> In a jury trial, a court should withdraw the issues from the jury and enter judgment on the evidence in favor of the defendants when, at the close of the plaintiff's evidence, there is a total absence of evidence or reasonable inferences on at least one essential element of the plaintiff's case.

Moreover, if the evidence fails to create a reasonable inference of an ultimate fact, but merely leaves the possibility of its existence open for surmise, conjecture or speculation, there is no evidence of probative value as to that ultimate fact and a Trial Rule 50 motion should be granted. Pearson v. First Nat'l Bank of Martinsville, 408 N.E.2d 166, 171 (Ind. Ct. App. 1980). A two-step analysis of all the direct and circumstantial evidence should occur in considering whether to grant a motion for judgment on the evidence. Specifically, as this court observed in Court View Centre, LLC v. Witt:

> First, [the court] must determine whether (a) quantitatively, reasonable evidence supporting the burdened party's allegations is absent, that is, none at all exists. If so, the motion is to be granted. If such evidence is present,

> however, the court must then determine whether (b) qualitatively, a reasonable inference the burdened party's allegations are true logically may be drawn from such evidence. Qualitative failure in this sense, occurs if the trial court reasonably can say, either: 1) the witness(es) presenting such evidence is (are) not credible, or 2) the inference the burdened party's allegations are true may not be drawn without undue speculation.

753 N.E.2d 75, 80-81 (Ind. Ct. App. 2001).

In order to prove negligence, the plaintiff must show the following: 1) a duty owed by the defendant to the plaintiff; 2) a breach of that duty; and 3) injury to the plaintiff resulting from the defendant's breach. Rhodes v. Wright, 805 N.E.2d 382, 385 (Ind. 2004). Negligence cannot be inferred from the mere fact of an accident. Pelak v. Ind. Indus. Serv., Inc., 831 N.E.2d 765, 769 (Ind. Ct. App. 2005). Rather, all elements of negligence must be supported by specific facts or reasonable inferences that might be drawn from those facts, and an inference is not reasonable when it rests on nothing more than speculation or conjecture. Id.

In this case, the trial court granted U.S. Steel's motion for judgment on the evidence on the basis that the Bairs failed to establish any of the elements of negligence. And, even were we to assume solely for argument's sake that U.S. Steel owed a duty to the Bairs, the fact that they failed to prove the level of carbon monoxide to which Bair was allegedly exposed means that they did not establish a breach of that duty. In Outlaw v. Erbrich Products Co., Inc., 777 N.E.2d 14 (Ind. Ct. App. 2002), this court determined that

> When an expert witness testifies in a chemical exposure case that the exposure has caused a particular condition because the plaintiff was exposed and later experienced symptoms, without having analyzed the level, concentration or duration of the exposure to the chemicals in question, and without sufficiently accounting for the possibility of alternative causes, the expert's opinion is

> insufficient to establish causation because it is based primarily on the existence of a temporal relationship between the exposure and the condition and amounts to subjective belief and unsupported speculation.

Id. at 29 (emphasis added).

In this case, no evidence was presented as to the permissible carbon monoxide exposure level for the approximate one and one-half hours that Bair was on top of the battery or for the portion of that time that Bair claims to have been exposed. And there was no evidence that Bair inhaled or absorbed the alleged gas. That said, a jury would have to infer: 1) the source of the carbon monoxide; 2) the amount of carbon monoxide present at the Furnco worksite; 3) the length of time that Bair was exposed to carbon monoxide; and 4) that Bair inhaled and absorbed the gas. In essence, the Bairs would be requesting that the jury merely speculate that the levels exceeded the permissible level of carbon monoxide as established by OSHA for the time that Bair was working on the battery. To be sure, the Bairs offered no evidence as to the specific source of his alleged exposure to the carbon monoxide. No analysis was performed on the equipment and materials that Bair used and no tests were conducted with respect to the fumes that were emitted from the ovens.

Furthermore, even assuming that U.S. Steel breached a duty to Bair, Bair failed to offer competent medical evidence with respect to causation during his case-in-chief. The only medical doctor who testified concerning causation was Dr. Carter. And, as noted above, Dr. Carter was Bair's family physician who is not an expert in carbon monoxide poisoning and has no specialized knowledge of industrial medicine. Appellee's App. p. 37. Dr. Carter has taken no advanced courses in carbon monoxide since graduation from medical school;

nor did he perform any research or consult any medical treatise to determine what possible causes needed to be considered before a differential diagnosis could be made in this case. Id. at 41. Additionally, Dr. Carter admitted that the basis of his opinion that Bair may have been exposed to carbon monoxide came from Bair and his wife, and he had no knowledge of any amount of carbon monoxide that Bair may have been exposed to, inhaled, or absorbed on May 7, 2001. Tr. p. 973. Moreover, Dr. Carter did not even consider the possibility of carbon monoxide exposure until June 20, 2001, nearly six weeks after the incident when Diane suggested the diagnosis. Appellee's App. p. 59. Dr. Carter also agreed that Bair's prior health problems may have accounted for some of Bair's symptoms while working at U.S. Steel on May 7. Id. at 54. In essence, it was the Bairs' unreliable and self-reported diagnosis of carbon monoxide poisoning that purported to establish U.S. Steel's liability, inasmuch as Dr. Carter's opinion concerning causation was totally discredited on cross-examination. Hence, the trial court found—and correctly so—that Bair's self-reported carbon monoxide exposure was inadequate to prove causation. Thus, we conclude that the trial court properly granted U.S. Steel's motion for judgment on the evidence.

The judgment of the trial court is affirmed.

VAIDIK, J., concurs.

CRONE, J., concurs in result.