

STATE OF MICHIGAN
COURT OF APPEALS

JAMES DARATONY and DARLYN DARATONY,

UNPUBLISHED
November 13, 1998

Plaintiffs/Counter Defendants-Appellants,

v

No. 202562
Leelanau Circuit Court
LC No. 95-003609 NZ

ROBERT L. BUMGARDNER BUILDER,

Defendant/Counter Plaintiff-Appellee,

and

MANITOU CUSTOM HOMES, INC., d/b/a
MANITOU SUNSET CONSTRUCTION, and
F & L PAINTING, INC.,

Defendants-Appellees.

Before: Whitbeck, P.J., and Cavanagh and Neff, JJ.

PER CURIAM.

Plaintiffs James and Darlyn Daratony appeal as of right the order granting defendants' motion to exclude plaintiffs' expert's testimony, the orders dismissing plaintiffs' claims against defendant Manitou Custom Homes, Inc., (Manitou) and defendant F & L Painting, Inc. (F & L), and partially dismissing plaintiffs' claims against defendant Robert L. Bumgardner, Builder (Bumgardner). We affirm.

Plaintiffs argue that the trial court abused its discretion when it granted defendants' pretrial motion to exclude the testimony and evidence of their expert, Dan Jones, with regard to the cause and origin of the fire. The trial court determined that Jones spoiled the fire scene and irreparably prejudiced defendants' ability to formulate a defense when he prevented defense experts from examining the fire scene for three weeks, did not keep any record of where anything was found, and discarded evidence that he did not find significant. Jones admitted at his deposition that anyone coming onto the fire scene after he had been through with it would have a difficult time determining the cause of the fire.

Accordingly, defendants were unable to challenge or respond to any evidence Jones uncovered. We find no abuse of discretion because the trial court's remedy denied plaintiffs the fruits of their expert's misconduct but did not prevent them from producing other relevant evidence. See *Brenner v Kolk*, 226 Mich App 149, 161; 573 NW2d 65 (1997). The exclusion of evidence that unfairly prejudiced the defendants was an appropriate sanction under the circumstances. See *id.*

Plaintiffs next contend that the trial court abused its discretion when it ruled that Sergeant Dale Hardy of the Michigan State Police could not offer an opinion at trial regarding the probable cause of the fire. We disagree. First, in answers to defendants' interrogatories, plaintiffs had stated that the substance of Hardy's testimony could be found in the police report he filed following the fire, which concluded that the cause of the fire was undetermined. The answers to the interrogatories were never supplemented, as required by MCR 2.302(E), to inform defendants that Hardy's testimony would go beyond the information in his official report. Where a party has not reasonably supplemented its responses, the court may enter an order providing for sanctions which may include prohibiting the party from introducing designated matters into evidence. MCR 2.302(E)(2); MCR 2.313(B)(2)(b). In this case, the portions of Hardy's testimony that plaintiffs sought to introduce at trial were substantively different than that disclosed during discovery.

In addition, it is well established that one of the prerequisites to the admission of expert testimony is that there be facts in evidence to support the expert's opinion. *Mulholland v DEC Int'l Corp*, 432 Mich 395, 411, 414; 443 NW2d 340 (1989). In this case, Hardy admitted that he had no evidence to support his conclusion that the cause of the fire was electrical. Therefore, we find that the trial court did not abuse its discretion in refusing to allow the testimony.

Next, plaintiffs assert that the trial court erred in granting defendants' motions for directed verdict with regard to plaintiffs' negligence claims and in failing to employ the doctrine of *res ipsa loquitur* to shift the burden of producing evidence with regard to causation to defendants. When evaluating a motion for directed verdict, the court must consider the evidence in the light most favorable to the nonmoving party, making all reasonable inferences in the nonmoving party's favor. *Locke v Pachtman*, 446 Mich 216, 223; 521 NW2d 786 (1994). If the evidence presented could lead reasonable jurors to disagree, a directed verdict should not be granted. *Lamson v Martin (After Remand)*, 216 Mich App 452, 455; 549 NW2d 878 (1996). A trial court's grant or denial of a directed verdict is reviewed de novo. *Meagher v Wayne State Univ*, 222 Mich App 700, 707-708; 565 NW2d 401 (1997).

Causation is an essential element of any negligence claim. *Lawrenchuk v Riverside Arena, Inc*, 214 Mich App 431, 432; 542 NW2d 612 (1995). The Supreme Court has stated,

To be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation.

* * *

[A]t a minimum, a causation theory must have some basis in established fact. However, a basis in only slight evidence is not enough. Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory. 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. [*Skinner v Square D Co*, 445 Mich 153, 164-165; 516 NW2d 475 (1994).]

In the present case, the experts who testified at trial uniformly stated that the cause of the fire could not be determined. Therefore, because plaintiffs could show only the mere possibility of causation, the trial court did not err in granting a directed verdict for defendants with regard to plaintiffs' negligence claim. See *id.*; *Mulholland*, *supra* at 416, n 18.

For the same reason, the circuit court did not err in refusing to employ the doctrine of *res ipsa loquitur*. Although this Court has previously applied the doctrine in the context of a home fire, see *Evans v Van Kleek*, 110 Mich App 798, 804; 314 NW2d 486 (1981), the doctrine may not be invoked where there is a complete lack of circumstantial evidence establishing causation, *Stefan v White*, 76 Mich App 654, 661-662; 257 NW2d 206 (1977).

Plaintiffs also contend that the trial court erred in granting F & L's motion for directed verdict with regard to their negligence claim. It was undisputed at trial that F & L's employee, Jeffrey Stinebaugh, was the last person to leave the premises and did not turn off the electrical power before leaving. The trial court found that Stinebaugh's failure to turn off the lights was "in and of itself harmless unless acted upon by other force[s] for which the Defendant was not responsible."¹ As discussed previously, all the experts who testified at trial stated that the cause of the fire could not be determined. Consequently, the trial court did not err in granting F & L's motion for directed verdict because plaintiffs presented no evidence from which it could be demonstrated that the failure to turn off the power caused the fire. See *Skinner*, *supra* at 163-165.

Finally, plaintiffs challenge the trial court's grant of a directed verdict to defendant Manitou with regard to their breach of contract claim, which was premised on the theory of partnership by estoppel. In order for a partnership by estoppel to exist, (1) the defendant must have represented himself as a partner or consented to another person's representation that he is a partner of one with whom he is not partners; and (2) the person to whom the false representation is made must have detrimentally relied on that representation. *American Casualty Co v Costello*, 174 Mich App 1, 9; 435 NW2d 760 (1989). Plaintiffs established neither of these elements. Thus, the trial court did not err in granting a directed verdict to defendant Manitou on the breach of contract claim.

Affirmed.

/s/ William C. Whitbeck

/s/ Mark J. Cavanagh

/s/ Janet T. Neff

¹ The court also found that although F & L may have breached a contractual duty to plaintiffs to comply with work rules, the breach of this duty did not give rise to a duty in tort because it was not foreseeable that the failure to turn off the lights would create a risk of harm. Plaintiffs have not appealed this ruling.