STATE OF MICHIGAN

COURT OF APPEALS

CITIZENS INSURANCE COMPANY,

Plaintiff-Appellant,

v

BRADFORD WHITE CORPORATION,

Defendant,

and

CLASSIC WATER CONDITIONER, d/b/a HOMEOWNER'S PLUMBING,

Defendant-Appellee.

UNPUBLISHED
November 28, 2000

No. 218608
Livingston Circuit Court
LC No. 97-015795-NP

Before: Kelly, P.J., and Whitbeck and Collins, JJ.

PER CURIAM.

Plaintiff Citizens Insurance Company appeals as of right from the trial court's order granting judgment notwithstanding the verdict (JNOV) to defendant Classic Water Conditioner, doing business as Homeowner's Plumbing.[1] Plaintiff brought its negligence action as subrogee of its insured clients, Douglas Sederholm (Sederholm) and Agnes Sederholm, whose home was damaged in 1996 by a fire involving a water heater installed by defendant in 1995. The jury found defendant fifty-five percent negligent. The trial court granted defendant's motion for JNOV on the basis that no reasonable juror could have found defendant negligent on the evidence presented. We reverse the order granting JNOV and remand for reinstatement of the jury verdict.

A motion for JNOV should be granted only when the evidence, viewed in the light most favorable to the nonmoving party, is insufficient to create an issue for the jury. *Pontiac School Dist v Miller, Canfield, Paddock & Stone,* 221 Mich App 602, 612; 563 NW2d 693 (1997). "If

[1] Defendant Bradford White Corporation settled with plaintiff on the second day of trial and is not a party to this appeal. For purposes of clarity, we use the singular "defendant" to refer to Homeowner's Plumbing only.

the evidence is such that reasonable people could differ, the question is for the jury and JNOV is improper." *Id.*

Plaintiff argues that JNOV was improper in this case because plaintiff presented evidence sufficient to create questions of fact for the jury with regard to whether defendant was negligent and whether its alleged negligence was the cause of the fire. Defendant contends that JNOV was proper because plaintiff did not present evidence sufficient to create a question with regard to whether its conduct was the proximate cause of the fire. Specifically, defendant contends that because plaintiff failed to pinpoint the ignition source of the fire, it could not prove that defendant's conduct caused the fire. "[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).

> The cause in fact element generally requires showing that "but for" the defendant's actions, the plaintiff's injury would not have occurred. On the other hand, legal cause or "proximate cause" normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences. A plaintiff must adequately establish cause in fact in order for legal cause or "proximate cause" to become a relevant issue. [*Id.* at 163. (citations omitted).]

Cause in fact may be established by circumstantial evidence that permits "reasonable inferences of causation, not mere speculation." *Id.* at 163-164. "[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." *Id.* at 164. 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.*, quoting *Kaminski v Grand Trunk W R Co*, 347 Mich 417, 422; 79 NW2d 899 (1956). "All that is necessary is that the proof amount to a reasonable likelihood of probability rather than a possibility." *Skinner, supra* at 166, quoting 57A Am Jur 2d, Negligence, § 461, p 442.

Here, uncontroverted trial testimony showed that in 1990, defendant installed a Bradford White through-the-wall (TTW) water heater in Sederholm's home. At that time, defendant also installed a vent tube that directed gases out of the home. Defendant replaced the 1990 TTW water heater in 1995 with a newer version of the Bradford White water heater, a TTW2. Defendant installed the TTW2 in the same location as the 1990 unit, but did not replace the existing vent tube. Plaintiff's theory was that defendant's failure to replace the existing vent tube when it installed the TTW2 or its installation of the vent tube near insulation around the water pipes, without sufficient clearance between the two, created a pyrophoric condition which caused either the vent tube or the insulation to ignite.

Dan Terski, an experienced fire investigator, testified that his investigation showed that the fire was slow-burning and that it began immediately above the water heater. Terski further testified that the only combustible materials at the point of origin of the fire were the vent tube from the water heater and the insulation around the water pipes; he eliminated everything else.

Terski identified the heat source as the vent tube, through which hot gases from the water heater traveled out of the house, and testified that the heat alone, without flame, could ignite material that has been subject to constant heating over a period of time, resulting in a pyrophoric condition. He explained as follows:

> I believe that the insulation material was in contact with the vent tube. I think the vent tube caused a deterioration of that insulation material, which ignited it eventually. This could be over a long period of time; the heating coming from the vent tube has lowered the ignition of the – insulation material in those pipes, eventually igniting those pipes or the insulation material.
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> [I]t's called a pyrophoric condition. Basically, it's the constant heating over a long period of time which lowers the ignition temperature of the combustible that's in contact with it. We see it above furnaces, above water pipes that are constantly heated; it will lower the ignition point.

The jury also heard testimony that the risk of ignition from a pyrophoric condition decreases as the clearance between the combustible material and the heated surface increases. Detailed, conflicting evidence was presented with regard to how much clearance was required between the vent tube and combustibles. The jury heard testimony that the 1990 heater required a six-inch clearance, and that information on the TTW2 indicated that clearance for that water heater could be as little as one inch. However, both Terski and Neil Hepner, a licensed mechanical engineer, testified that, with regard to the TTW2 as installed, they believed there was zero clearance between the vent tube and insulation. Further, it was uncontroverted that the installers failed to replace the 1990 vent tube when they installed the TTW2, although the manufacturer sent a new vent tube with the TTW2. Moreover, the service manual for the TTW2 instructed that only specified equipment should be used with the water heater, and the older vent tube, which had a different part number from the vent tube included with the TTW2, was not a specified part. The jury also heard testimony that the 1990 heater subjected the vent tube to severe operating conditions, including continuous heating over a period of five years, that likely had a deteriorating effect on the tube.

In granting defendant's motion for JNOV, the trial court stated that there was no evidence to show when, or by whom, the insulation was installed. However, the record reveals conflicting testimony with regard to who installed the insulation. Defendant's installers testified that it was not their normal practice to install insulation and defendant's billing invoices did not indicate that insulation had been used. The evidence also showed, however, that defendant's invoices did not always completely detail all of the materials and labor expended for each job. Furthermore, plaintiff presented evidence that the homeowner did not install the insulation and that the homeowner believed it was installed with the water heater.

We find that this evidence was sufficient to create a question for the jury with regard to causation. Contrary to defendant's assertions, plaintiff does not need to pinpoint what specifically ignited the fire in this case in order to prove causation. "Absolute certainty cannot be achieved in proving negligence circumstantially; but such proof may satisfy where the chain of circumstances leads to a conclusion which is more probable than any other hypothesis reflected

by the evidence." *Skinner, supra* at 166, quoting 57A Am Jur 2d, Negligence, § 461, p 442. The evidence was sufficient to support plaintiff's theory that, more likely than not, the fire occurred because the vent tube and/or insulation ignited, due to their pyrophoric condition. Furthermore, because the jury could reasonably conclude that defendant improperly installed both the vent tube and the insulation, it is not critical to identify which material ignited first.

The evidence in this case was not merely slight nor did it equally support several theories. Plaintiff's theory offered a logical sequence of cause and effect borne out by the many facts in evidence. *Skinner, supra* at 164. Because the evidence was sufficient to create a material issue for the jury, the trial court erred when it granted defendant's motion for JNOV. *Pontiac School Dist, supra* at 612.

Reversed and remanded for reinstatement of the jury verdict. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ William C. Whitbeck
/s/ Jeffrey G. Collins