

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 28, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 02-1422

Cir. Ct. No. 01-CV-132

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**RONALD MCNAMARA, INDIVIDUALLY AND AS SPECIAL
ADMINISTRATOR OF THE ESTATE OF JESSICA
MCNAMARA, DECEASED, AND JACOB MCNAMARA, BY HIS
GUARDIAN AD LITEM, DEAN R. ROHDE,**

PLAINTIFFS-APPELLANTS,

**STATE OF WISCONSIN DEPARTMENT OF HEALTH &
FAMILY SERVICES,**

INVOLUNTARY-PLAINTIFF,

V.

**ALLEN C. BALSIGER AND SOCIETY INSURANCE, A
MUTUAL COMPANY,**

**DEFENDANTS-THIRD-
PARTY PLAINTIFFS-RESPONDENTS,**

V.

AMANDA MCNAMARA,

THIRD-PARTY DEFENDANT.

APPEAL from a judgment of the circuit court for Chippewa County:
RODERICK A. CAMERON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Jacob McNamara and the estate of his sister, Jessica McNamara, (collectively the McNamaras) appeal a summary judgment dismissing their negligence action against their mother’s landlord, Allen Balsiger, and his insurer. They allege that Balsiger failed to install smoke alarms and allowed their mother’s boyfriend to do electrical work resulting in a fire that caused their injuries and Jessica’s death. We affirm the trial court’s conclusion that the McNamaras have no proof that the electrical wiring started the fire and have not established a causal link between their injuries and death and Balsiger’s failure to install a smoke detector.

¶2 The childrens’ mother, Amanda, was in the master bedroom on the main floor of the two-story house when she first became aware of the fire. At approximately 12:30 p.m., her daughter came to her and said “the bathroom was hot.” “Half a second later” Amanda saw smoke coming from the kitchen area. She ran to the kitchen and saw that the adjacent bathroom was on fire. She told Jessica to go outside and attempted to remove Jacob from his highchair. After she succeeded in removing Jacob from the house, she could not locate Jessica. Jessica died in the fire and Jacob sustained serious burns.

¶3 The McNamaras argue that outstanding issues of material fact preclude summary judgment. However, summary judgment is appropriate when, after considering all of the facts and reasonable inferences in the light most favorable to the nonmoving party, the moving party is entitled to judgment as a matter of law. *See Kraemer Bros. v. United States Fire Ins. Co.*, 89 Wis. 2d 555,

567, 278 N.W.2d 857 (1979). The trial court appropriately considered all of the facts and inferences in the light most favorable to the McNamaras and correctly concluded that Balsiger is entitled to judgment as a matter of law.

¶4 The McNamaras' own evidence establishes that a smoke detector was installed in the kitchen area just outside of the bathroom door. It is not relevant whether that detector was installed by Balsiger or McNamara. Amanda's uncontradicted deposition testimony is that she installed a smoke detector in the kitchen near the bathroom door where the fire originated. The night before the fire, she discovered that the battery was dead. She took the smoke detector down and removed the dead battery. She did not replace the battery or inform Balsiger. The tenant is responsible for maintaining any smoke detector or notifying the landlord of any maintenance necessary to make it functional. *See* WIS. STAT. § 101.145(3)(c) (1999-2000). As the trial court noted, if Balsiger had installed the smoke detector instead of her, the result would have been the same. Therefore, the McNamaras have not established a causal link between Balsiger's negligent failure to install a smoke detector and their injuries and death.

¶5 The McNamaras fault Balsiger for not installing a smoke detector with AC primary power and a standby battery. No law requires a landlord to install such a system. "Guidelines" that "recommend" hardwired smoke detectors in all new construction are not required by law and would not be applicable to this existing rental structure. Balsiger's negligence cannot be predicated on his failure to exceed statutory requirements.

¶6 The McNamaras also fault Balsiger for failing to install smoke detectors on each floor of the dwelling. Construing the evidence in the light most favorable to the McNamaras, no smoke detectors were installed in the basement or

second story. The McNamaras offer no evidence, however, that additional smoke detectors on other levels would have provided an earlier warning that the fire started. Because the McNamaras have not established any causal link between Balsiger's negligent failure to install smoke detectors and their injuries and death, the trial court properly granted summary judgment.

¶7 The McNamaras also contend that Balsiger was negligent for allowing rewiring work to be performed by an unqualified person. However, they presented no expert witness who would state to a reasonable scientific certainty that defective wiring caused the fire. Several witnesses opined that Jessica may have started the fire while playing with a cigarette lighter or matches. The cause of this fire must be established by expert testimony. Without the assistance of expert testimony, the jury would be required to speculate on the cause of the fire. *See Cramer v. Theda Clark Memorial Hosp.*, 45 Wis. 2d 147, 152, 172 N.W.2d 427 (1970). After sufficient time for discovery has passed, the party with the burden of proof at trial must demonstrate the existence of any challenged element essential to their case. *See Transportation Ins. Co., v. Hunzinger Const. Co.*, 179 Wis. 2d 281, 291, 507 N.W.2d 136, 140 (Ct. App. 1993). Because the McNamaras were unable to produce any expert witness who would testify to a reasonable scientific certainty that defective wiring caused the fire, the trial court properly concluded that their claim should not be presented to a jury for its speculation.

¶8 Balsiger also argues that the trial court should have stricken an affidavit of Robert Whitemore, an expert witness retained by the McNamaras, because his affidavit contradicts his earlier testimony. We need not resolve that dispute because, even considering Whitemore's affidavit, no expert witness

averred that defective wiring caused the fire and the McNamaras have not established a causal link relating to Balsiger's failure to install a smoke detector.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).

