COURT OF APPEALS
DECISION
DATED AND FILED

November 16, 2017

Diane M. Fremgen
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. 2016AP1436 **Cir. Ct. No. 2013CV228**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

AMBER STEINMETZ AND CHRISTOPHER STEINMETZ,

PLAINTIFFS-APPELLANTS,

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

INTERVENOR-PLAINTIFF,

V.

WESLEY CLENDENNING, BARABOO MUTUAL INSURANCE COMPANY AND WISCONSIN REINSURANCE CORPORATION,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Sauk County: GUY D. REYNOLDS, Judge. *Affirmed*.

Before Lundsten, P.J., Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. Amber and Christopher Steinmetz appeal from a judgment in favor of their former landlord, Wesley Clendenning and Clendenning's insurer, Baraboo Mutual Insurance Company (collectively, Clendenning), entered after a jury trial on the Steinmetzes' negligence claim against Clendenning. The Steinmetzes brought suit against Clendenning after the apartment building they resided in was totally destroyed in a fire, asserting causes of action for negligence and, separately, for damages under WIS. STAT. § 704.07(2)[1] and WIS. ADMIN. CODE § ATCP 134.09(7). The circuit court entered summary judgment in favor of Clendenning on the § 704.07(2) and § ATCP 134.09(7) claims, and the negligence claim was tried to a jury, which returned a verdict in favor of Clendenning on the negligence claim. For the reasons discussed below, we affirm.

BACKGROUND

¶2 On October 8, 2012, the four-unit apartment building the Steinmetzes lived in was totally destroyed by a fire and the Steinmetzes lost all their personal possessions that were in their apartment at the time of the fire. The Steinmetzes brought suit against Clendenning, the owner of the apartment building, who they alleged inadvertently caused the fire when he left recently used welding equipment unattended in the apartment building's communal garage. Seeking an unspecified amount of damages, the Steinmetzes asserted causes of

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

action against Clendenning for negligence, for failing to keep the apartment building in a reasonable state of repair as required by WIS. STAT. § 704.07(2), and for constructive eviction under WIS. ADMIN. CODE § ATCP 134.09(7).

¶3 Clendenning moved the circuit court for summary judgment. Clendenning argued that the Steinmetzes: (1) were unable to meet their burden of establishing that his conduct was a substantial factor in causing the fire; (2) have no remedy for any alleged violation of WIS. STAT. § 704.07(2); and (3) were unable to establish that he had constructively evicted the Steinmetzes or had violated WIS. ADMIN. CODE § ATCP 134.09(7). The court granted Clendenning's motion as to the claims that Clendenning violated § 704.07(2) and § ATCP 134.09(7). The court denied Clendenning's motion on the Steinmetzes' negligence claim, and the negligence claim was subsequently tried to a jury.

¶4 Prior to trial, the Steinmetzes submitted proposed jury instructions to the circuit court. The Steinmetzes proposed that the jury be instructed that a violation of the Village of North Freedom Building Code Ordinance 14.14, which adopts WIS. ADMIN. CODE § SPS 314.001 which adopts the National Fire Protection Association model fire code NFPA 1, is negligence per se. *See* WIS JI—CIVIL 1009. The circuit court determined that the jury should not be given this instruction because the Steinmetzes failed to establish that there was some expression of legislative intent that the ordinance or regulation Clendenning allegedly violated provides a basis for the imposition of civil liability, a required element for negligence per se. The Steinmetzes also proposed that the jury be instructed on *res ipsa loquitur*. *See* WIS JI—CIVIL 1145. The circuit court determined that the jury should not be instructed on *res ipsa loquitur* because the test for providing such an instruction was not met in that the Steinmetzes proposed to present evidence fully demonstrating negligence. The court also stated that

whether an instruction on *res ipsa loquitur* is appropriate could be reconsidered at the conclusion of trial after the evidence was actually presented. The parties do not maintain that the Steinmetzes raised the issue of giving the jury an instruction on *res ipsa loquitur* at a later point during trial.

¶5 Also prior to trial, Clendenning moved the circuit court in limine to preclude the Steinmetzes from offering NFPA 1 into evidence. The court granted Clendenning's motion. The court also denied an oral motion by the Steinmetzes for permission to refer to WIS. ADMIN. CODE ch. SPS 314 or NFPA 1.

¶6 The case proceeded to jury trial on the issue of whether Clendenning was negligent and if so, whether Clendenning's negligence was a cause of the fire. The jury found that Clendenning was not negligent. The circuit court entered a judgment dismissing the Steinmetzes' action with prejudice and awarded costs to Clendenning. The Steinmetzes appeal. Additional facts are discussed below where necessary.

DISCUSSION

¶7 The Steinmetzes contend that the circuit court erred in: (1) granting summary judgment in favor of Clendenning on their claims that Clendenning violated WIS. STAT. § 704.07(2) and WIS. ADMIN. CODE § ATCP 134.09(7); (2) failing to instruct the jury on negligence per se and on *res ipsa loquitur*; and (3) prohibiting the Steinmetzes from referring to WIS. ADMIN. CODE ch. SPS 314 and NFPA 1 at trial. We address each contention in turn below.

A. Summary Judgment Rulings

¶8 We review a circuit court's decision to grant or deny summary judgment de novo. ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). We draw all reasonable inferences from the summary judgment materials in the light most favorable to the non-moving party. ***Burbank Grease Servs., LLC v. Sokolowski***, 2006 WI 103, ¶40, 294 Wis. 2d 274, 717 N.W.2d 781. Whether an inference is reasonable and whether more than one reasonable inference may be drawn are questions of law. ***Hennekens v. Hoerl***, 160 Wis. 2d 144, 162, 465 N.W.2d 812 (1991).

1. WISCONSIN STAT. § 704.07(2) Claim

¶9 As we understand the Steinmetzes' briefing, they argue that a landlord has a duty under WIS. STAT. § 704.07(2)(a) not to negligently damage leased premises by fire, and that a tenant has a private statutory cause of action against a landlord who fails to comply with the statute. We are not persuaded.

¶10 First, the Steinmetzes do not develop any factual argument to support their implicit contention that Clendenning violated the landlord duties set forth in WIS. STAT. § 704.07(2)(a). That is, the Steinmetzes do not align alleged facts with their view of the statutory requirements.[2] We reject their argument on

[2] WISCONSIN STAT. § 704.07(2)(a) sets forth the statutory duties of a landlord, which include: "[k]eep[ing] in a reasonable state of repair" those portions of the leased premises that the landlord maintains control over and all equipment under the landlord's control necessary to provide services that the landlord has agreed to furnish; making all necessary structural repairs; where the leased premises are not subject to a local housing code, repair or replace plumbing, electrical wiring, machinery, or equipment furnished with the leased premises that is no longer in (continued)

this basis. *See* ***State v. Pettit,*** 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we may decline to consider undeveloped legal arguments).

¶11 Second, the Steinmetzes fail to persuade us that WIS. STAT. § 704.07(2)(c) creates a private statutory cause of action.

¶12 WISCONSIN STAT. § 704.07(2)(c) provides that "[i]f the premises are damaged by fire … *not* the result of the negligence … of the landlord, [subsection (2)] is inapplicable and either sub. (3) or (4) governs." (Emphasis added.) Subsection (3) addresses the duties of a tenant, and is not relevant here. Subsection (4) addresses the rights of and remedies available to a tenant in the event that leased premises become "untenantable because of damage by fire…," including removal from the leased premises and rent abatement. The Steinmetzes assert that because WIS. STAT. § 704.07(2)(c) specifically provides that subsection (4) is not applicable if a landlord's negligence results in fire damage to the leased premises, the legislature "inten[ded] to hold landlords liable for fire damage caused by their own negligence." They argue that any less protection "would run counter to the purpose" of the statute.

¶13 However, the Steinmetzes do not explain why their interpretation is correct; they simply assert that it is. Thus, this part of their argument also fails for lack of development. *See* ***Pettit***, 171 Wis. 2d at 646-47 ("Arguments unsupported by references to legal authority will not be considered.")

"reasonable working condition"; and in the case of a residential tenancy, compliance with local housing code.

¶14 Moreover, we discern no reason to conclude that WIS. STAT. § 704.07(2) creates a private cause of action. We explained in ***Raymaker v. American Family Mut. Ins. Co.***, 2006 WI App 117, ¶32, 293 Wis. 2d 392, 718 N.W.2d 154, that "WISCONSIN STAT. § 704.07 exists to allocate the duty of repair between the landlord and tenant because, at common law, the landlord had no duty of repair and the tenant was responsible only for repairs necessary to avoid waste." We concluded in ***Raymaker*** that while § 704.07(4) provides a tenant with the remedy of abatement under certain circumstances, "§ 704.07 does not provide a private cause of action." ***Id.*** There is no apparent reason why we are not bound by this holding. *See* ***Cook v. Cook***, 208 Wis 2d 166, 185-90, 560 N.W.2d 246 (1997) (court of appeals is bound by published court of appeals decisions).

¶15 Accordingly, we conclude that the circuit court did not err in granting summary judgment in favor of Clendenning as to this claim.

2. WISCONSIN ADMIN. CODE § ATCP 134.09(7) Claim

¶16 The Steinmetzes contend that the circuit court erred in dismissing on summary judgment their cause of action against Clendenning under WIS. ADMIN. CODE § ATCP 134.09(7).

¶17 WISCONSIN ADMIN. CODE ch. ATCP 134 governs residential rental practices. The introductory note to that chapter provides that "[a] person who suffers a monetary loss because of a violation of [ch. ATCP 134] may sue the violator directly under [WIS. STAT. §] 100.20(5) [] and may recover twice the amount of the loss, together with costs and reasonable attorneys' fees." WISCONSIN ADMIN. CODE § ATCP 134.09(7), which is entitled "Self-Help Eviction," provides that "[n]o landlord may … constructively evict a tenant from a

dwelling unit, other than by an eviction procedure specified under [WIS. STAT. ch.] 799 [].”

¶18 The Steinmetzes claim that they were constructively evicted from their apartment by virtue of the fire that was caused by Clendenning’s negligence in leaving recently used welding equipment unattended. The circuit court concluded that the destruction of an apartment by a fire caused by a landlord’s negligence is not a constructive eviction, and dismissed the Steinmetzes’ WIS. ADMIN. CODE § ATCP 134.09(7) claim on that basis. The Steinmetzes argue that the circuit court “incorrectly found that intent is a required element” of constructive eviction and that the court thus erred in its conclusion that they had not been constructively evicted. We are not persuaded.

¶19 Our supreme court explained in ***First Wisconsin Trust Co. v. L. Wiemann Co.***, 93 Wis. 2d 258, 267, 286 N.W.2d 360 (1980) that “[a] constructive eviction constitutes a breach of the covenant for quiet enjoyment.” A constructive eviction occurs when an act by the landlord or someone acting under the landlord’s authority “so disturbs the tenant’s enjoyment of the premises or so interferes with [the tenant’s] possession of the premises as to render them unfit for occupancy for the purposes for which they are leased.” ***Id.*** at 267-68.

¶20 In ***Wausau Underwriters Ins. Co. v. Dane County***, 142 Wis. 2d 315, 319-320, 323-26, 417 N.W.2d 914 (Ct. App. 1987), we concluded that Dane County did not constructively evict the tenants of a building that was heavily damaged after sparks from a torch being used by Dane County employees started a fire that spread to the leased premises. We observed in ***Wausau Underwriters*** the following longstanding principle: “‘any act of the landlord … which so disturbs the tenant’s enjoyment of the premises as to render them unfit for occupancy for

the purposes for which they are leased, is an eviction ….'" ***Id.*** at 324 (quoted source omitted). We further explained, however, that the code provision contemplates that offending act be "within the contemplation of the landlord." ***Id.*** at 325. We determined that the record in ***Wausau Underwriters*** was "devoid of evidence that the county or its employees, contemplated, expected or intended that a fire would result" from the employees' use of the torch. ***Id.*** We concluded that although the employees' use of the torch was intentional, "because the fire itself was not within the contemplation of the county or its employees, the county did not breach its implied warranties of quiet enjoyment" by constructively evicting the tenant. ***Id.***

¶21 As in ***Wausau Underwriters***, the summary judgment submissions in the present case are devoid of evidence that Clendenning "contemplated, expected or intended that a fire would result" from leaving the recently used welding equipment unattended. *See* ***id.*** Because the evidence does not create a factual dispute that the fire was within the contemplation of Clendenning, we conclude that there is no factual dispute that Clendenning constructively evicted the Steinmetzes. Accordingly, we conclude that summary judgment on the Steinmetzes' WIS. ADMIN. CODE § ATCP 134.09(7) claim was proper.

B. Jury Instructions

¶22 The Steinmetzes contend that the circuit court erred in refusing to provide the jury with their proposed instructions on negligence per se for the violation of a safety statute and *res ipsa loquitur*.

¶23 "A circuit court has broad discretion to instruct a jury." ***Kochanski v. Speedway SuperAmerica, LLC***, 2014 WI 72, ¶10, 356 Wis. 2d 1, 850 N.W.2d 160. For an instruction to be justified, the facts of record must support the

instruction and the instruction must correctly state the law. ***Id.*** We review de novo whether these two criteria are met. ***Id.***

1. Negligence Per Se

¶24 A safety statute is a legislative enactment designed to protect a specified class of persons from a particular type of harm. ***Walker v. Bignell***, 100 Wis. 2d 256, 268, 301 N.W.2d 447 (1981). For a violation of such a statute to constitute negligence per se, it must be demonstrated that: (1) the harm inflicted was the type the statute was designed to prevent; (2) the person injured was within the class of persons sought to be protected; and (3) there is some expression of legislative intent that the statute become a basis for the imposition of civil liability. ***Id.*** at 268-69.

¶25 The Steinmetzes proposed that the jury be given WIS JI—CIVIL 1009, the negligence per se jury instruction for the violation of a safety statute, regulation, or ordinance. Specifically, the Steinmetzes proposed that the jury be instructed that "Village of North Freedom Building Code Ordinance 14.14 which adopts by reference [WIS. ADMIN. CODE §] SPS 314.001 which adopts the NFPA 1," is a safety regulation or ordinance, the violation of which is negligence.[3]

[3] Village of North Freedom Ordinance ch. 14.14 provides: "WIS. ADM. CODE Ind. Chs. 20 through 25 and Chs. 50 through 64, the State Electrical Code, the State Plumbing Code, the State Flammable Liquids Code and the State Well Drilling Code are hereby adopted by reference and the Building Inspector shall enforce the provisions thereof." It is not clear to this court that ch. 14.14 adopted WIS. ADMIN. CODE § SPS 314.001. However, for purposes of this appeal, we will assume, without deciding, that it does.

WISCONSIN ADMIN. CODE § SPS 314.001 provides:

(1) NFPA 1.

(continued)

¶26 The circuit court determined that the jury should not be given WIS JI—CIVIL 1009 because the Steinmetzes failed to establish the third element for negligence per se, that there is some expression of legislative intent that the statute, regulation, or ordinance is a basis for the imposition of civil liability." In challenging this determination, the Steinmetzes assert that "the legislature intended [the failure to comply with] NFPA 1 to create a private cause of action." From their briefing, we understand the Steinmetzes to be arguing that the safety regulation is the Village Ordinance that adopts the NFPA through its adoption of WIS. ADMIN. CODE § SPS 314.001. Thus, in support of their argument, they contend that "WIS. STAT. § 101.02(15)(j) provides all the foundation necessary to find that the legislature intended to create a private [cause of] action against violators of [WIS. ADMIN. CODE ch.] SPS 314." As we explain below, we are not convinced.

¶27 WISCONSIN STAT. § 101.02(15)(j) provides that "[t]he department [of safety and professional services] shall ascertain, fix and order such reasonable standards or rules for constructing, altering, adding to, repairing, and maintaining

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> (a) Adoption of model fire code. NFPA 1, Fire Code—2012, subject to the modifications specified in this chapter, is hereby incorporated by reference into this chapter.
>
> (b) Application of model fire code. The use, operation and maintenance of public buildings and places of employment shall comply with NFPA 1 as referenced in par. (a), except as otherwise provided in this chapter.
>
> (2) Alternate model fire code. Where a municipality has by ordinance adopted requirements of an alternate model fire code and any additional requirements, that, in total, are equivalent to NFPA 1 as referenced in sub. (1), the department will not consider that ordinance to be in conflict with sub. (1); and property owners or managers, or employers, need only comply with that ordinance.

public buildings and places of employment in order to render them safe." This language is a directive to a state agency. It does not address the relationship between landlords and tenants, and thus, does not provide evidence that the legislature intended that a violation of this paragraph, or any administrative code provisions adopted pursuant to the paragraph, including WIS. ADMIN. CODE ch. SPC 314, may form the basis for a private cause of action by a tenant.

¶28 The Steinmetzes do not direct this court to any other basis for concluding that a violation of Village of North Freedom Code Ordinance 14.14 or WIS. ADMIN. CODE § SPS 314.001 is intended to form the basis for imposing civil liability. Accordingly, we conclude that the Steinmetzes have failed to establish that a violation of any of the aforementioned provisions constitutes negligence per se, and that the circuit court did not err in refusing to instruct the jury on negligence per se.

2. *Res Ipsa Loquitur*

¶29 The doctrine of *res ipsa loquitur* is an evidentiary rule that permits a fact finder to infer a defendant's negligence from the mere occurrence of the event. ***Milwaukee Metro. Sewerage Dist. v. City of Milwaukee***, 2003 WI App 209, ¶27, 267 Wis. 2d 688, 671 N.W.2d 346. In order for *res ipsa loquitur* to apply, each of the following must be true: (1) the event in question is of a kind which does not ordinarily occur in the absence of negligence; (2) the agent or instrumentality causing the harm must have been in the exclusive control of the defendant; and (3) "'the evidence offered is sufficient to remove the causation question from the realm of conjecture, but not so substantial that it provides a full and complete explanation of the event.'" ***Peplinski v. Fobe's Roofing, Inc.***, 193 Wis. 2d 6, 17, 531 N.W.2d 597 (1995) (quoting ***Lecander v. Billmeyer***, 171

Wis. 2d 593, 602, 492 N.W.2d 167 (Ct. App. 1992)). Our review of a circuit court's decision to give or not give a res ipsa loquitur instruction varies depending on which of the three elements is being reviewed. *See* ***id.*** at 6. We review a circuit court's decision on the first two elements as mixed questions of fact and law, and a decision on the third element for an erroneous exercise of discretion. ***Id.***

¶30 Prior to trial, the Steinmetzes proposed that the jury be instructed on *res ipsa loquitur*. In denying the Steinmetzes' request, the circuit court did not reference the first two requirements of the doctrine. Instead, the court explained that the Steinmetzes planned to present evidence purportedly fully proving how the fire started and spread and, thus, the causation element of negligence. In effect, the circuit court explained that a *res ipsa loquitur* instruction was unwarranted because the Steinmetzes planned to "'provide[] a full and complete explanation of the event.'" *See* ***id.*** (quoted source omitted). Stated more succinctly, a *res ipsa loquitur* instruction would be superfluous. Our task is, therefore, to determine whether the circuit court properly exercised its discretion in reaching that decision.[4] *See* ***id.*** at 21. The burden to demonstrate that the court's exercise of discretion was erroneous rests on the party asserting the exercise of discretion was improper, in this case the Steinmetzes. ***Colby v. Colby***, 102 Wis. 2d 198, 207-08, 306 N.W.2d 57 (1981).

[4] Because we conclude that the circuit court properly exercised its discretion in determining that the Steinmetzes offered to prove too much on the issue of causation and therefore failed to satisfy the third element, we do not address the Steinmetzes' arguments on appeal as to the first two elements.

¶31 When the circuit court ruled that the jury should not be instructed on *res ipsa loquitur*, the Steinmetzes were proposing to offer evidence on one, and only one, theory of causation—Clendenning negligently left unattended a hot welding torch, which had been in his exclusive control, and the welding torch ignited the fire. The Steinmetzes indicated prior to trial that they would call as a witness North Freedom Volunteer Fire Chief Frank Anstett, who would testify that Clendenning's welding activities ignited the fire.

¶32 This is analogous to ***Peplinski*** in which the supreme court affirmed the circuit court's refusal to instruct the jury on *res ipsa loquitur* where the plaintiff in that case offered evidence on only one theory of causation and the proffered evidence offered a complete explanation of the incident. ***Peplinski***, 193 Wis. 2d at 22. The supreme court determined in ***Peplinski*** that under those circumstances, "an instruction on *res ipsa loquitur* would have been superfluous." ***Id.*** at 23. *See also* ***Utica Mutual Ins. Co. v. Ripon Coop.***, 50 Wis. 2d 431, 440, 184 N.W.2d 65 (1971) (concluding it was error to give a *res ipsa loquitur* instruction where the plaintiff "offered an opinion on exactly where, how, and why the [incident] occurred." ***Mixis v. Wisconsin Public Serv. Co.***, 26 Wis. 2d 488, 498, 132 N.W.2d 769 (1965) (concluding it was error to give a *res ipsa loquitur* instruction where plaintiff asserted a specific theory of causation), and ***Lecander***, 171 Wis. 2d at 604 (*res ipsa loquitur* instruction inappropriate where plaintiff's expert pointed to a specific event that explained the incident in question).

¶33 Relying on ***Utica Mut. Ins. Co.***, 50 Wis. 2d at 440, the Steinmetzes assert that a plaintiff proves too much for purposes of *res ipsa loquitur* only if the plaintiff is able to definitively prove "'where, how and why'" the incident occurred. The Steinmetzes argue that the evidence they intended on proffering at trial did not offer a full and complete explanation of the fire because, as pointed

out by Clendenning in a motion in limine, Anstett testified in his deposition that he could not "definitively prove that [Clendenning's] welding caused the fire."

¶34 The Steinmetzes' reliance on ***Utica*** in support of their argument is misplaced. Nowhere in ***Utica*** does the supreme court hold that only "definitive[]" proof is too much evidence for a *res ipsa loquitur* instruction to be error. Rather, the court concluded that where the plaintiff's expert offered "an opinion" on where, how and why the fire occurred, an instruction on *res ipsa loquitur* was erroneous. *See* ***id.*** As explained above in ¶¶31-32, the Steinmetzes' theory of causation and proposed evidence explained where, how, and why the fire occurred. The Steinmetzes thereby offered "a complete explanation of the incident," which would have rendered a *res ipsa loquitur* instruction superfluous. *See* ***Peplinski***, 193 Wis. 2d at 23. Accordingly, we conclude that the circuit court did not erroneously exercise its discretion in determining that the Steinmetzes failed to satisfy the third element because they provided a full and complete explanation of the incident in question. Therefore, it was not reversible error for the court not to have instructed the jury on *res ipsa loquitur*.[5]

C. Evidentiary Ruling as to WIS. ADMIN. CODE ch. SPS 314 and NFPA 1

¶35 The Steinmetzes contend that the circuit court erred in prohibiting them from referring to WIS. ADMIN. CODE ch. SPS 314 and to NFPA 1, which is adopted by WIS. ADMIN. CODE § SPS 314.001. The Steinmetzes are particularly focused on NFPA 1 § 41.3.5.2. which indicates that a fire watch shall be

[5] In addition, whether the jury should be instructed on *res ipsa loquitur* was raised *prior to trial*, and there is no indication by the parties or the record before this court on appeal that the issue was raised again during or at the end of trial. Accordingly, what evidence was actually presented at trial is not relevant to our determination here.

maintained for at least one-half hour after completion of using a cutting torch or electric welding equipment in order to detect and extinguish smoldering fires. In ruling that the Steinmetzes were not permitted to refer to WIS. ADMIN. CODE ch. SPS 314 and NFPA 1, the circuit court concluded that they are not relevant because ch. SPS 314 applies to fire protection measures in the professional or commercial context, and Clendenning had been welding on his free time and not as part of his profession or occupation.

¶36 We review a circuit court's evidentiary ruling for an erroneous exercise of discretion. *See* ***State v. Hunt***, 2003 WI 81, ¶34, 263 Wis. 2d 1, 666 N.W.2d 771. We will uphold a circuit court's exercise of discretion if the court applied the proper legal standard to the facts and reached a reasonable determination. *See* ***State v. Davidson***, 2000 WI 91, ¶53, 236 Wis. 2d 537, 613 N.W.2d 606. An erroneous exercise of discretion will not be found if a reasonable basis exists for the circuit court's determination. *See* ***State v. Lindh***, 161 Wis. 2d 324, 349, 468 N.W.2d 168 (1991).

¶37 Evidence that is relevant is admissible unless it is otherwise prohibited by the constitutions of the United States or Wisconsin, or by statute or rule. WIS. STAT. § 904.02. Evidence is "relevant" if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT. § 904.01. Evidence that is not relevant is not admissible. ***Id.***

¶38 The Steinmetzes argue that WIS. ADMIN. CODE ch. SPS 314 and NFPA 1 are relevant because they instruct on the standard of ordinary care to which Clendenning was held in light of what they characterize as Clendenning's "special knowledge of welding safety." The Steinmetzes rely on ***Dakter v.***

Cavallino, 2015 WI 67, ¶62, 363 Wis. 2d 738, 866 N.W.2d 656, wherein our supreme court explained the "superior knowledge rule" for negligence. Typically, individuals are negligent if they fail to exercise ordinary care, which is "'that degree of care which under the same or similar circumstances the great mass of mankind would ordinarily exercise.'" ***Id.***, ¶40 (quoted source omitted). However, if an individual has skills or knowledge that exceed those possessed by most others, the individual's skills or knowledge is a circumstance that is taken into account in determining whether the individual behaved as a reasonably careful person. ***Id.***, ¶44. This is called the "superior knowledge rule" and where applicable, the defendant "with special knowledge or skill meets the standard of ordinary care by employing that special knowledge or skill." ***Id.***, ¶¶47-48.

¶39 In ***Dakter***, our supreme court held that the superior knowledge rule applied to the operator of a semi-truck. The court determined that operating a semi-truck requires skill and knowledge that is "not part of the 'ordinary equipment' of a reasonable person." ***Id.***, ¶70. The court observed that in order to operate a semi-truck, an individual must undergo specific training and testing to obtain a commercial driver's license. ***Id.,*** ¶67. The court also observed that federal regulations set forth twenty areas in which commercial motor vehicle operators are required to have "specified knowledge" to obtain a commercial operator's license. ***Id.***, ¶¶76-78.

¶40 The Steinmetzes asserts that the superior knowledge rule applies to Clendenning because he is a "certified welder," and as such, has superior knowledge of welding safety that must be employed to meet the standard of ordinary care. According to the Steinmetzes, part of that superior knowledge is awareness of NFPA 1 § 41.3.5.2., which provides that "[a] fire watch shall be maintained for at least ½ hour after completion of hot work operations …."

See www.nfpa.org/codes-and-standards/all-codes-and-standards/list-of-codes-and-standards/detail?code=1 (last visited Nov. 14, 2017). However, the Steinmetzes fail to show that a certified welder would be required to have knowledge of NFPA 1 § 41.3.5.2. We therefore conclude that the Steinmetzes have failed to establish that WIS. ADMIN. CODE ch. SPS 314 and NFPA 1 are relevant. Accordingly, we conclude that the circuit court did not erroneously exercise its discretion in determining that those rules and regulations were not relevant at trial.[6]

CONCLUSION

¶41 For the reasons discussed above, we affirm.

By the Court.—Judgment affirmed.

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

[6] Clendenning argues that the circuit court did not erroneously exercise its discretion in prohibiting reference to WIS. ADMIN. CODE ch. SPS 314 and NFPA 1 at trial because those rules and regulations apply only to individuals engaged in a profession or trade. We do not reach this issue because we have concluded that the Steinmetzes have failed to show that Clendenning would have knowledge of NFPA 1.