

VERMONT SUPERIOR COURT

SUPERIOR COURT  
Orange Unit

CIVIL DIVISION  
Docket No. 103-5-10 Occv

William Birch  
Plaintiff

v.

Alan Jesseman  
Defendant

DECISION ON MOTION FOR SUMMARY JUDGMENT

Defendant moves for summary judgment on the grounds that Plaintiff does not have an expert to establish the cause and origin of the fire which is the subject of this action. Plaintiff, proceeding pro se, asserts he does not need an expert to support his claim of a "basic lack of standard of care" by Defendant and that the fire was more severe due to Defendant's negligence.

Facts not in Dispute

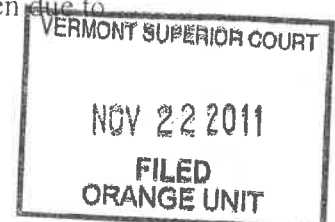
On May 6, 2007, a fire destroyed the Colby Block in Fairlee, Vt. The building was owned by the Defendant, Alan Jesseman.

The fire was extensive, destroying the entire building, which consisted of residential and business units. The Vermont State Police and the Vermont fire marshal concluded the fire was accidental in nature with the exact cause undetermined. The fire marshal also concluded that the fire started on the deck of the second floor apartment. The fire marshal felt the most likely cause was the improper disposal of smoking materials, although due to the extent of damage an electrical cause could not be ruled out.

The Plaintiff was a commercial tenant in the building. His business, Birch Antiques, was destroyed in the fire.

Shortly after the fire, Plaintiff retained a fire consultant, William McCarthy, to investigate the fire. Mr. McCarthy also felt the fire started on the second floor porch and agreed a specific cause could not be determined. Plaintiff has apparently consulted with another expert, Robert Malanga, although his opinions have not been disclosed at present.

Plaintiff has no expert to identify the cause of the fire. It is unclear for the information before the court if Plaintiff himself witnessed the fire in any respect. Plaintiff also has no expert to opine that the fire was made more extensive than it otherwise would have been due to Defendant's negligence.



Defendant asserts the absence of such expert opinions are fatal to Plaintiff's claims.

### Discussion

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, referred to in the statements required by Rule 56(c)(2), show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." V.R.C.P. 56(c)(3). The party moving for summary judgment has the burden of demonstrating that no genuine issue of material fact exists and that he is entitled to judgment as a matter of law. *Price v. Leland*, 149 Vt. 518, 521 (1988). The non-moving party has the burden of setting forth specific facts showing a genuine dispute for trial. V.R.C.P. 56(e). The purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (citation omitted). Summary judgment is mandated where the non-moving party fails to make a showing sufficient to establish the existence of an element essential to his or her case, and on which she has the burden of proof at trial. *Poplaski v. Lamphere*, 152 Vt. 251, 254-55 (1989); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

A Plaintiff seeking recovery in damages for the negligence of another must establish duty, breach of duty, causation, and damages. *Barber v. LaFromboise*, 2006 VT 77, 180 Vt. 150. Expert testimony is permissible when scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. V.R.E. 702.

The question of whether expert testimony is required is a question of sufficiency of the evidence, which is to be resolved on a case by case basis. See Reporter's Notes to V.R.E. 702. For example, issues of medical causation usually, but not always, require expert testimony. Where a violation of the appropriate standard of care is so apparent as to be understood by the lay trier of fact expert testimony is not required. *Senesac v. Associates in Obstetrics and Gynecology, Inc.*, 141 Vt. 310 (1982).

There is no reason why the requirement for expert testimony should be any different for a claim arising out of a fire loss. In many, or even most, cases the cause of a fire may be beyond the ken of the lay person. See, e.g., *Simmons v. Briggs Equipment Trust*, 221 S.W.3d 109 (Tex. Ct. App. 2006). In those situations, allowing the case to proceed without expert testimony is to invite speculation and conjecture.

In *City of Cedarburg Light & Water Commission v. Allis-Chalmers Manufacturing Co.*, 149 N.W.2d 661 (Wis. 1967), the court noted that "[t]here may be cases where the issue of causation ... involves technical, scientific or medical matters which are beyond the common knowledge or experience of jurors," concluding that "lack of expert testimony in such cases results in an insufficiency of proof." "Such cases" do not include all cases involving fire, but only cases where the cause of the fire is beyond the common experience of average jurors.

However, a jury may consider the cause of a fire without expert testimony in certain circumstances, such as where there is an eye witness to testify as to what actually occurred. *Worthy v. Ivy Community Center, Inc.*, 679 S.E.2d 885 (N.C. App. 2009). As the *Worthy* court stated:

We have found no case in North Carolina holding that an eye witness' testimony regarding the cause of a fire is insufficient as a matter of law. Instead, traditionally, plaintiffs have confronted the argument that their claims for injuries resulting from a fire were barred by the lack of direct or eye witness testimony. A century ago, our Supreme Court rejected this contention: "The cause of the fire is not required to be shown by direct and positive proof, or by the testimony of an eye-witness. It may, as we have seen, be inferred from circumstances, and there are many facts like this one, which cannot be established in any other way." *Simmons v. John L. Roper Lumber Co.*, 174 N.C. 220, 225, 93 S.E. 736, 738 (1917). Thus, while "[t]here can be no liability [for a fire] without satisfactory proof," such proof may be "direct or circumstantial evidence, not only of the burning of the property in question but that it was the proximate result of negligence and did not result from natural or accidental causes." *Phelps v. City of Winston-Salem*, 272 N.C. 24, 31, 157 S.E.2d 719, 724 (1967). Necessarily, direct evidence—as with an eye witness—can be sufficient proof.

Our Supreme Court observed in *Phelps*, 272 N.C. at 28, 157 S.E.2d at 722, that "[p]roof of the origin of fires usually presents a difficult, if not impossible, problem. It is extremely rare that direct evidence is available; consequently, as in this case, circumstantial evidence is the only available method in a large majority of actions, either civil or criminal." See also *Fowler-Barham Ford, Inc. v. Indiana Lumbermens Mut. Ins. Co.*, 45 N.C.App. 625, 628, 263 S.E.2d 825, 827, disc. review denied, 300 N.C. 372, 267 S.E.2d 675 (1980) ("Ordinarily, there is no direct evidence of the cause of a fire, and therefore, causation must be established by circumstantial evidence."). We need not address whether expert testimony might be necessary in a case relying only upon circumstantial evidence because this case presents the "extremely rare" and out-of-the-ordinary case in which there was an eye witness. Whether this direct evidence is credible is a question for the jury. 679 S.E.2d 889,890.

If the Plaintiff can establish that the cause of this fire was within the common knowledge of lay persons, expert testimony is not required in order to submit the case to the jury. *Young v.*

*Fire Insurance Exchange*, 182 P.3d 911 (Utah Ct. App. 2008); *Petchel v. Collins*, 796 N.E.2d 886 (Mass. Ct. App. 2003).

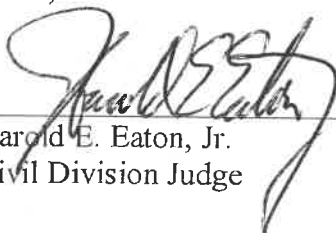
Thus, expert testimony may, or may not be required concerning the cause of the fire in this instance. The record before the court in this context does not allow for that determination. In the event of an eyewitness to the start of the fire or other circumstances bringing the alleged cause within the common knowledge of the jurors, an expert is not required. However, the jury is not permitted to use speculation or conjecture to establish the cause of the fire. *Simmons v. Briggs Equipment Trust*, 221 S.W.3d 109 (Tex. Ct. App. 2006).

A somewhat different situation is presented with respect to Plaintiff's theory that the fire would not have resulted in as much damage as occurred had the Defendant not been negligent with respect to conditions in the building. The viability of such a theory depends on many factors, including source of the fire, burn times, available fuel, ambient conditions, response times, and weather conditions to name only a few. Even with expert testimony this theory may be speculative. Without expert testimony such a theory appears to be too speculative to submit to a jury. *Metropolitan Property and Casualty Insurance Co. v. Deere and Co.*, 25 A.3d 571 (Conn. 2011). However, at this point the benefit of all doubt in construing the facts must be given to the Plaintiff and the factual record is not sufficient to enable the court to determine that Plaintiff's proof is insufficient to remove this theory from the realm of speculation. *Butler v. Pittway Corp.*, 770 F.2d 7 (2d Cir. 1985); *Caiazzo v. Volkswagenwerk A.G.*, 647 F.2d 241 (2d Cir. 1981)(expert testimony required to establish enhanced injuries from lack of crashworthiness). *Stow v. Peterson*, 204 F.Supp.2d 40 (D. Me. 2002).

A verdict may not be based upon speculation or conjecture. *Bailey v. Central Vermont Railway*, 113 Vt. 433 (1943). Defendant's motion for summary judgment is being denied at this time because of the exacting standard applied to summary judgment motions and the absence of a complete record upon which the court may assess the evidence. However, the court will not allow the case to be submitted to the jury based solely upon speculation as to either the cause or extent of the fire.

Accordingly, Defendant's motion for summary judgment is **DENIED**. The Court will evaluate the evidence at the time of trial to determine if Plaintiff's theories as to causation and/or the claimed role of any electrical code violations on the extent of the fire are too speculative to be submitted to the jury without expert testimony.

Dated at Chelsea this 22 day of November, 2011.

  
Harold E. Eaton, Jr.  
Civil Division Judge

