STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. OXF-24-154

DAVID AND LISA LEMELIN
Appellant

v.

CONSTRUCTION CATERERS, INC., ET AL.
Appellee

ON APPEAL FROM THE MAINE SUPERIOR COURT FOR OXFORD COUNTY

BRIEF OF APPELLANT DAVID AND LISA LEMELIN

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STATEMENT OF FACTS & PROCEDURAL HISTORY

This claim involves a fire that occurred at a residence in Peru, Maine, during the course of renovations in the spring of 2019. Specifically, on the morning of May 9, 2019, a fire occurred while work was being performed on the interior of the home by employees of Construction Caterers, Inc. Tragically, the fire destroyed the entire dwelling. The event resulted in a total loss of the dwelling leaving only the foundation. The employees of Construction Caterers were contracted to complete insulation, sheetrock, woodwork, and various carpentry and finish work. The Lemelins hired Wayne Boutin, a personal acquaintance, to build two external decks on the property.

On May 9, 2019, the crew members arrived at the residence between 7:00 a.m. and 8:30 a.m. (Appendix at 250.) The smell of smoke was apparent to all four of the workers upon their arrival. (App. at 79.) The Defendants were unable to testify with certainty regarding who was present at the property on the day of the fire. (App. at 95.) In fact, it is in dispute as to whether a Mikey Frost, another worker for Construction Caterers, was present at the property on the day of the fire. *Id*.

The crew smelled smoke upon arrival and told Wayne that they smelled smoke (App at 137.) Wayne swore via affidavit that the crew only mentioned the smell of smoke once in the morning. (App. at 137.) Defendant Erik Frost testified that he opened a basement door and briefly looked into the basement upon arrival the

morning of the fire. *Id*. Linwood Gyberson testified that no one checked the basement in the morning, rather, Mr. Frost looked in the basement before the crew left for lunch. (App. at 96.). Mr. Frost testified that he saw that the basement was black and did nothing further. (App. at 80).

At his deposition, Mr. Frost claimed that he observed steam coming from an external pipe on the back of the residence. (App. at 81.) Mr. Frost agreed in his deposition that no such source existed at the home capable of generating steam. (App. at 82.) In an earlier statement to investigator Gary Simard, Mr. Frost indicated that he saw smoke coming from the external pipe on the back of the home. (App. at 80.) Via sworn affidavit Wayne Boutin testified that as they stood watching the home burn to the ground, Mr. Frost told Wayne Boutin that he smelled and saw smoke coming from a protrusion or pipe in the back of the home earlier that morning. (App. at 136, 137.) The entire crew took no further steps to investigate the smell of smoke or find the source of the smoke. (App. at 81.) The crew did not alert Jon Young, the owner of Construction Caterers, that they smelled or saw smoke on the property (App. At 80.)

It is in dispute, and unclear to the crew themselves, who was acting as foreman on the jobsite when Jon Young was not present (App. at 78, 93, 104.) The crew drank on the jobsite, smoked marijuana on the jobsite, and smoked cigarettes inside the home. (App. at 135, 136, 137.) Defendant Erik Frost testified at his deposition that

a kerosene heater was used by the crew on the morning of the fire for ten minutes. (App. at 78.) Defendant Kaleb Gatchell testified that the torpedo heater was on and off all morning on the day of the fire. (App. at 105, 106.)

Around noon the crew was observed by Wayne Boutin leaving the property shouting obscenities seemingly flustered and in a rush. (App. at 110.) The reasons provided for their sudden departure include a sick co-worker, a co-worker complaining of others getting in his way, the crew ran low on materials, or the crew was leaving to get lunch. (App. at 116.) It was not common for the crew to leave for lunch or take lunch breaks. (App. at 104.) In fact, it was uncommon for them to leave the jobsite before the end of the workday. *Id.*

Local Fire Chief, William Hussey, was behind the crew as they returned to the property on May 9, 2019. (App. at 117.) In fact, Chief Hussey overheard one of the crewmembers suggest that they should not be there and that they should get out of there. (App at 110.)

On March 8, 2023, Plaintiffs filed a motion to extend scheduling order deadlines and a request for a 26(g) conference to address on-going discovery issues concerning the scheduling of depositions. (App. at 262, 263.) A 26(g) conference was held on April 26, 2023. (App. at 264.) The Superior Court issued a Procedural Order on April 26, 2023, ordering the parties to file a joint status report on May 26,

2023, updating the Court as to the scheduling of the depositions of named defendants Linwood Giberson and Erik Frost. *Id*.

On May 26, 2023, counsel for defendants confirmed the scheduling of the deposition of Erik Frost, to take place on June 15, 2023, but had not yet secured the participation of the named defendants Linwood Giberson and Kaleb Gatchell. (App. At 265.)

Following the completion of Mr. Giberson's deposition, Plaintiffs' filed a consented to motion to extend scheduling order deadlines on July 7, 2023; including an extension of Plaintiffs' deadline to designate experts. (App. at 267.) That Order was denied on July 14, 2023. *Id*. Plaintiffs renewed their motion on September 8, 2023, citing that the remaining depositions had still not occurred. (App. at 7.) That motion was denied on September 15, 2023. *Id.* The deposition of defendant Linwood Giberson did not occur until October 6, 2023, and the deposition of defendant Kaleb Gatchell did not occur until November 9, 2023. (App. at 141, 100.)

After protracted discovery due to the above-referenced difficulties in locating and scheduling the depositions of several defendants, Defendants filed a motion for Summary Judgment on December 20, 2023. (App. at 8.) Plaintiffs filed their Opposition on January 12, 2024, Defendants Replied on January 26, 2024, and Plaintiffs responded February 2, 2024. *Id*. The Oxford County Superior Court issued

their Order granting Defendants' Motion for Summary Judgment on March 14, 2024. Plaintiffs timely appealed. *Id*.

STATEMENT OF THE ISSUES PRESENTED

A. Should the Superior Court have found that the evidence presented by Plaintiffs created genuine issues of material fact sufficient to overcome summary judgment?

B. Did the omission or inaction by Defendants following the apparent and continuous smell of smoke at the residence create a sufficient causal connection to the resultant damages?

C. Did the Superior Court abuse its discretion by denying Plaintiffs' unopposed Motion to Extend Scheduling Order Deadlines?

ARGUMENT

I. THE SUPERIOR COURT ERRED IN RULING THAT PLAINTIFFS DID NOT PRESENT EVIDENCE SUFFICIENT TO CREATE A GENUINE ISSUE OF MATERIAL FACT.

The Superior Court, by refraining from conducting a full analysis of the negligence at issue, failed to address the existence of critical evidence presented by the Plaintiffs regarding the existence of several genuine issues of material fact. Plaintiffs' Opposition to Defendants' Motion for Summary Judgement presented numerous issues of material fact supported by sworn affidavits. These facts generate issues of material fact sufficient for a jury to find in favor of the plaintiffs.

This Court reviews an "entry of a summary judgment de novo, considering the evidence in the light most favorable to the non-moving party." *Jorgensen v. Department of Transportation,* 2009 ME 42, ¶2, 969, A.2d at 914. A fact is material if it has the capacity to affect the outcome of the case. *Lewis v. Concord Gen. Mut. Ins. Co.*, 2014 ME 34, ¶ 10, 87 A. 3d 732. "A genuine issue of material fact exists when there is sufficient evidence to require a factfinder to choose between competing versions of the truth at trial." *Lever v. Acadia Hosp. Corp.,* 2004 ME 35, ¶ 2, 845, A.2d 1178. Lastly, a "judgment as a matter of law is improper if any reasonable view of the evidence could sustain a finding of proximate cause." *Houde v. Millett*, 2001 ME 183, ¶11, 787 A.2d 757, 759.

The Superior Court in its Order Granting Defendants' Motion for Summary Judgment cites *Millett*. In *Millett*, the plaintiff slips on soot and suggests that the smudge on her pants evidenced that the soot was dragged into her kitchen by a chimney worker. *Id* at ¶7. In that case, this Court affirmed summary judgment for the defendant suggesting the evidence was not sufficient to establish causation. *Id* at ¶12. The facts of *Millett* are distinguishable from the present matter. In the Lemelins' case, there is significant evidence that the crew mismanaged the project and wholly failed to investigate the presence of smoke on the day of the fire. Specifically, the crew smelled smoke at the property all morning and did not call local fire department or Jon Young. Even more troubling, defendant Erik Frost testified that he saw smoke protruding from the back of the building and did nothing to investigate the source of the smoke. In fact, the crew dismissed the smell of smoke for the entirety of the morning before rushing out of the property moments before the property was engulfed in flames.

Additionally, through depositions and sworn affidavits, Plaintiffs presented evidence that the Defendants drank and used drugs while on the job, the Defendants were untruthful about their usage of the torpedo heater on the morning of the fire, the Defendants were untruthful about who was present at the job site on the day of the fire, and finally one of the Defendants acknowledged, within earshot of the local fire chief, that the crew should not have come back to the property after leaving.

In this matter, there are genuine issues of material fact for trial and those facts, if found, would support a determination that Defendants breached their duty to investigate the smell and presence of smoke on the premises. Likewise, Defendants could also be found to have breached their duty due to their omission or inaction in alerting the homeowner, calling Jon Young, or calling the fire department. Lastly, a factfinder could infer that had the present employees of Construction Caterers acted reasonably, the fire that occurred could have been prevented.

The record before the Superior Court evidenced that Defendants testified at their depositions that they smelled smoke and a plastic burning smell all morning while working at the job site. The Superior Court acknowledges a very important fact that is in dispute; whether the Defendants were told by Wayne that the smell was coming from the woodstove. Plaintiffs presented evidence through sworn affidavit, that Wayne Boutin denied suggesting he threw anything into the woodstove to the crew. There is also a genuine issue of material fact as to whether members of the crew continued to tell Wayne Boutin that they smelled smoke all morning, including in the stairwells; or rather, if they only mentioned it briefly upon arriving. A jury could reasonably find that Defendants breached a duty to Plaintiffs by not acting in a reasonable manner and either investigating the source of the smell, calling the fire department to further investigate the smell of smoke or by contacting Jon Young.

Likewise, the Superior Court failed to address evidence regarding Erik Frost. There is a genuine issue of material fact as to whether Defendant Erik Frost smelled and observed smoke coming from a protrusion or pipe in the back of the house on the morning of the fire. Even if the jury believes that Mr. Frost briefly opened the basement door and did not see smoke in the basement, a jury could reasonably find that such a cursory investigation was unreasonable in the light of the apparent risk of the presence of smoke—namely that a fire was already present or about to start on the property. Moreover, there are genuine issues of material fact as to when Mr. Frost looked into the basement—ranging from them time of the crew's arrival at the property between 7:00 and 8:30 a.m., to just prior to leaving the property after 12:15 p.m. Given the inconsistent statements of the Defendants themselves on this issue, not to mention other inconsistent statements, a jury could determine that Mr. Frost and the crew fabricated the story about looking down into the basement to see if smoke was present. Depending on what a jury finds, there is certainly enough evidence to establish that the Defendants omission in not further investigating the presence of smoke on the property led to the Plaintiffs' loss. If the source of the smoke had been determined upon arrival at the jobsite, it is reasonable to infer that the fire that destroyed Plaintiffs' property approximately 4-hours later could have been prevented. Moreover, a jury could rely on the same facts, in addition to the facts

that Jon Young knew of alcohol and drug use on the property, to support a finding that he was negligent in his supervision of his employees.

The conduct and failings of the Defendants presented in Plaintiffs' evidence in this case constitute genuine issues of material fact sufficient to overcome summary judgment because if accepted a jury could find that the Defendants inactions caused, or substantially contributed to, the plaintiffs resultant damages.

A. DEFENDANTS' FAILURE TO MEANINGFULLY ACT IN RESPONSE TO THE CONTINUED SMELL OF SMOKE WAS NEGLIGENT.

Sufficient evidence exists such that a factfinder could determine that the Defendants were negligent when they did not investigate the continued smell of smoke at the property on the day of the fire, and that their failure to do so caused the resultant damages. The Superior Court, by granting Summary Judgment, signals that contractors have little to no duty, whatsoever, to reasonably investigate the smell of smoke while on a jobsite.

A prima facie case of negligence requires a plaintiff to establish: (1) a duty of care owed to plaintiff, (2) a breach of that duty, (3) an injury, and (4) causation, that is a finding that the breach of the duty of care was a cause of the injury. *See Toto v. Knowles*, 2021 ME 51, ¶ 9, 261 A.3d 233. The existence of a duty of care is a question of law to be resolved by the Court. *Reid v. Town of Mount Vernon*, 2007 ME 125, ¶ 14, 932 A.2d 539. A breach of a duty of care is usually a question of fact.

Id. This Court has stated that: "Duty involves the question of whether the defendant is under any obligation for the benefit of the particular plaintiff. When a court imposes a duty in a negligence case, the duty is always the same—to conform to the legal standard of reasonable conduct in the light of the apparent risk. *See Searles v. Trustees of St. Joseph's College*, 1997 ME 128, ¶ 5, 695 A.2d 1206.

Defendants Construction Caterers and Jon Young, by way of contract, warranted that all work would be completed in a good workmanlike manner. When entering the contract, Mr. Young knew that the property was not Plaintiffs' primary residence and that they resided out-of-state. Plaintiffs entrusted Defendants with access and control over their property while they were absent during the renovations and expected Defendants to perform in a workman like manner, protect the property, and notify them if any dangerous conditions arose on the property. Clearly, given the contractor-homeowner relationship in this matter, Defendants were under an obligation for the benefit of the Plaintiffs. *See Searles*, 1997 ME 128, ¶ 5.

A common adage applies to this case: "where there's smoke, there's fire." A reasonable contractor and reasonable employees of that contractor would have further investigated the smell of smoke that was present all morning at the jobsite. A reasonable contractor or employee would have alerted the homeowner or the fire department under such circumstances. Certainly, a reasonable contractor, or employee of the contractor, would have thoroughly investigated the observance of

smoke emanating from a protrusion or pipe from the back of the dwelling, as well as contacted the homeowner or the fire department. The Superior Court relies on fire cases that are all distinguishable by a common theme; none of them reference smoke a single time. While the cases certainly address fire related damages, none of the case relied upon by the Superior Court involve a defendant with actual knowledge of the presence of smoke.

It is admitted by all parties that there was a smell of smoke at the property, that the Defendants knew of the smoke and did nothing to intervene. It flows logically that a reasonable contractor would have met their duty, investigated, intervened, and inevitably prevented the forthcoming fire.

II. THE SUPERIOR COURT ERRED RULING THAT NO CAUSAL CONNECTION BETWEEN THE DEFENDANTS' INACTION AND THE RESULTANT DAMAGES EXIST.

The Superior Courts election to explore only the element of causation in its negligence analysis was erroneous. Second, the trial court failed to consider the Plaintiffs' position that Defendants can be held negligent for damages due to their failure to investigate the presence of smoke on the day of the fire. Further, sufficient evidence was presented by Plaintiffs tending to prove that it was more likely than not that Defendants' failure to investigate the continuous smell of smoke caused, or significantly contributed to, the circumstances which caused to the total loss of the

Plaintiffs' property. A fire is a reasonably foreseeable consequence of failing to investigate the smell of smoke.

One of the issues in this matter is whether a plaintiff can establish a prima facie case for negligence stemming from property loss caused by fire through the use of circumstantial evidence when the exact cause and origin of the fire cannot be determined. The amount of circumstantial evidence presented in this matter is sufficient for a jury to reasonably infer that Defendants' actions, or complete failure to act, led to the loss of the Lemelin's property.

Causation is a question of fact, requiring proof that there is some reasonable causal connection demonstrated in the record between the act or omission of the defendant and the damage that the plaintiff has suffered. *Estate of Smith v. Salvesen*, 2016 ME 100, ¶ 21, 143 A.3d 780 (quoting *Estate of Smith v. Cumberland Cnty.*, 2013 ME 13, ¶ 17, 60 A.3d 759) (quotation marks omitted). "Causation need not be proved directly but may be inferred if the inference flows logically from the facts and is not unduly speculative." *Estate of Smith*, 2016 ME 100 at ¶ 21. Evidence is sufficient to support a finding of proximate cause if the evidence and inferences that may reasonably be drawn from the evidence indicate that the negligence played a substantial part in bringing about or actually causing the injury or damage and that the injury or damage was either a direct result or a reasonably foreseeable consequence of the negligence. *See Shaw v. Bolduc*, 658 A.2d, 235-36 (Me. 1995).

The reasoning of other courts addressing the issue of causation in cases involving fire prove instructive. For instance, when discussing the use of circumstantial evidence and the proof for plaintiffs in cases involving fire, the Louisiana Fourth Circuit Court of Appeal wrote: "Although the circumstances surrounding the occurrence of a fire may give rise to an inference that a particular defendant was negligent, that negligence is not presumed from the mere happening of the fire, because there can be many causes of fire. The determination of preponderance depends on whether the *evidence taken as a whole* shows that the particular defendant's negligence was the most plausible or likely cause of the fire." *Morales v. Houston Fire and Casualty Company, Inc.*, 342 So.2d 1248, 1250 (La. App. 4 Cir. 1977) (emphasis added).

In *Alden v. Maine C. R. Co*., 112 Me 515, 92 A. 651 (1914 Me.), the Supreme Judicial Court considered a case involving circumstantial evidence and a fire that damaged the plaintiff's land. The Court determined that the plaintiff fell short *at trial* of proving that a passing locomotive emitted sparks that caused twenty acres of Plaintiff's timber to catch fire. *Id* at 516. (emphasis added). The Court explained that when a plaintiff seeks to establish a case by inference drawn from fact, such inferences must be drawn from facts proved and not just based upon probability. *Id.* at 518. The plaintiff in *Alden* was unable to produce any testimony or other evidence that would allow an inference or finding that sparks seen falling from the engine of

the train by a witness at a right of way approximately an hour prior to the fire starting could have travelled to plaintiff's land and damage his property. *Id.* at 517-18. The record was devoid of information regarding the weather, the direction of the wind, the condition of the grass and the location of the burned area with reference to the right of way where the sparks were seen falling from the train. *Id.* at 518.

The present case is distinguishable from *Alden.* Facts exist in the present case that show more than a probability that the negligent acts of the Defendants more likely than not resulted in the fire and that reasonable investigation by the Defendants could have prevented the fire. First, there is a non-party witness, Wayne Boutin, who observed the entire crew leaving the property in a hurried manner yelling profanities just minutes prior to the discovery of the fire. Testimony of the Defendants themselves, and that of Wayne Boutin who observed the crew over time, shows that it was not the crews' habit to leave the property during the workday and that it was something that they rarely, if ever, did.

Second, there is conflicting testimony from the Defendants concerning the reason that the crew all left the jobsite in the middle of the day. There is testimony that Brandon Windover, now deceased, was sick and needed to be brought home. However, Defendant Kaleb Gatchell testified at his deposition that Mr. Windover was not sick that day. Erik Frost told Wayne Boutin shortly after returning to the property after the fire that the crew left to take Mr. Windover home because he was

complaining that everyone was in his way while working that morning. A factfinder could make a reasonable inference that the Defendants are not credible and that their inconsistent statements are merely an attempt to cover up for the true reason that they left in a hurry that day; namely, that their actions played a role in starting the fire, or they were aware of the fire.

Lastly, and most damaging for Defendants, is Chief Hussey's statement that he arrived at the scene of the fire as the crew returned to the property and heard one of the Defendants tell the others that they should not be there and that they should leave. A jury could reasonably infer that such a statement from one of the Defendants is akin to an admission that the crew's acts caused the fire, that they knew of the fire, and that they failed to do anything at all to prevent it.

This is not a case involving complex facts. The facts, as the Plaintiffs would present them to a jury, are straightforward and simple. A crew of workers entrusted with the Plaintiffs' home, arrived in the morning to work on the home, smelled smoke all morning, saw smoke protruding from the rear of the building, and did absolutely nothing to find the source of the smoke. Adoption of the Superior Court's reasoning creates an extremely dangerous precedent. It signals to contractors that they have no obligation to investigate possible risk or potential damage that could occur at a customer's home. In instances involving fire, it suggests the greater the damage to the property the greater the likelihood of insulation from liability to the

contractor because the more severe the fire, the more difficult it becomes to determine cause and origin.

Based on the above, this Honorable Court should remand the case to move forward to trial on all Counts because there exists sufficient evidence that would allow a reasonable factfinder to infer that the Defendants' negligent actions, and failure to investigate, resulted in the total loss of the Plaintiffs' home.

III. THE SUPERIOR COURT ABUSED ITS' DISCRETION IN DENYING PLAINTIFFS CONSENTED-TO MOTION TO EXTEND DEADLINES.

Plaintiffs filed a consented to motion to extend all scheduling order deadlines that was improperly denied by the Superior Court without any prior indication from the Court that such a position was forthcoming. The extension of the Scheduling Order deadlines would not have prejudiced the parties. This case involves five individual defendants and a corporation. The five individuals, all of whom as it turned out had different recollections, different stories, and conflicting explanations of the events that transpired on May 9, 2019, needed to be deposed. In a case of this nature, which turns heavily on the facts as they were recited under oath by the Defendants, Plaintiffs could not have been reasonably expected to designate an expert prior to the completion of all depositions.

This Court reviews trial court orders supervising and managing proceedings for an abuse of discretion. *See Geary v. Stanley,* 2007 ME 133, ¶ 12, 931 A.2d 1064; *see also* M.R. Civ. P. 16(a)-(b). "The touchstone of determining whether the

court has properly exercised its discretion is whether in a given case that discretion is exercised in furtherance of justice." *Unifund CCR Partners v. Demers,* 2009 ME 19, ¶ 8, 966 A.2d 400 (alterations omitted) (quotation marks omitted).

Plaintiffs, for over two years, diligently and continuously requested the scheduling of necessary depositions in this matter. Understanding the difficulties presented with multiple Defendants scattered throughout Oxford County, Plaintiffs extended the courtesy and collegiality to opposing counsel that is the welcomed custom here in Maine. Acknowledging the necessity of these depositions, both parties agreed to extended scheduling order deadlines multiple times. The basis for the final request that was ultimately denied, was no different than the prior requests. The grounds for this request are specified in Plaintiffs' July 7, 2023, Consented-To Motion to Extend Deadlines; Plaintiffs' September 7, 2023, Motion to Stay Deadlines Pending Status Conference; and are clearly documented in the Court's April 26, 2023, Procedural Order. A judicial economy argument does not withstand scrutiny as the discovery deadline in this matter was not until November 9, 2023. If the Court was concerned with efficiency or judicial economy, it could have simply refused to extend the discovery deadline and granted the remaining scheduling order deadlines.

Plaintiffs showed cause for their request, the motion was consented to and would not have prejudiced either party. As stated above, if there was a concern

regarding judicial economy there was no prior indication, and the court could have tailored the order by keeping the current discovery deadline as it was. For these reasons, Plaintiffs respectfully request this Court remand with instruction to reset deadlines and allow this matter to proceed.

CONCLUSION

Appellants David and Lisa Lemelin respectfully request this Court remand to the Superior Court and instruct that this matter proceed to trial consistent with the foregoing reasons, and others that this Court deems sound and just.

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Certificate of Service

I hereby certify that on September 16, 2024, I caused two copies of the Brief for Appellant to be served upon the following counsel of record via regular U.S. Mail:

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