STATE OF MICHIGAN

COURT OF APPEALS

MEEMIC INSURANCE COMPANY, Plaintiff-Appellant,	UNPUBLISHED March 17, 2011
v	No. 295294 Oakland Circuit Court
THE DETROIT EDISON COMPANY, Defendant-Appellee.	LC No. 2008-093946-CZ

MEEMIC INSURANCE COMPANY, Plaintiff-Appellee,	
v	No. 296036 Oakland Circuit Court
THE DETROIT EDISON COMPANY, Defendant-Appellant.	LC No. 2008-093946-CZ

Before: K. F. KELLY, P.J., and BORRELLO and RONAYNE KRAUSE, JJ.

PER CURIAM.

In Docket No. 295294, plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendant in this negligence action. On appeal, plaintiff argues that the trial court erred in finding no issue of fact concerning causation, and abused its discretion in declining to sanction defendant for failing to produce relevant evidence. We affirm.

In Docket No. 296035, defendant appeals as of right from the trial court's order denying its motion for case evaluation sanctions. Defendant argues on appeal that the trial court erred in concluding that its motion was untimely under MCR 2.403(O)(8). We reverse and remand for further proceedings.

I. BASIC FACTS & PROCEDURAL BACKGROUND

This case arises from a fire at the residence of plaintiff's insureds. The fire destroyed the insureds' home and three vehicles. Plaintiff paid the insureds' claim, but brought a negligence and breach of contract action against defendant, alleging that defendant's electrical equipment

caused the fire. Finding no genuine issue of material fact concerning causation because a power outage had halted the current of defendant's electricity to the home of plaintiff's insureds at the time of the fire, the trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff filed a motion for reconsideration of the trial court's order, which was denied. Following the denial of the motion for reconsideration, defendant filed a motion for case evaluation sanctions, which was denied as untimely. Plaintiff now appeals the order granting summary disposition in favor of defendant. Defendant likewise appeals the denial of case evaluation sanctions.

II. SUMMARY DISPOSITION

Plaintiff argues that the trial court erred in finding no issue of fact concerning causation, and abused its discretion in declining to sanction defendant for failing to produce relevant evidence. We disagree.

We review de novo a decision to grant a motion for summary disposition. *Brown v Brown*, 478 Mich 545, 551; 739 NW2d 313 (2007). "We review a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id*. at 551-552 (footnote omitted.) An exercise of the trial court's authority to sanction a party for failing to preserve relevant evidence "may be disturbed only on a finding that there has been a clear abuse of discretion." *Bloemendaal v Town & Country Sports Center, Inc*, 255 Mich App 207, 211; 659 NW2d 684 (2002).

While there are certainly unanswered questions in this factually complex case, the trial court properly granted defendant's motion for summary disposition on causation grounds. Plaintiff attempted to create a question of fact by arguing that a transformer that defendant installed, maintained, removed after the fire, and either lost or destroyed, was a key piece of evidence that plaintiff was unable to examine. As the trial court properly recognized, however, all of the expert testimony proffered in connection with the motion, including the testimony of Michael McGuire, plaintiff's electrical engineering expert, indicates that, if there was no electricity flowing to the house at the time the fire started, the transformer could not have been the cause of the fire. McGuire testified in his deposition that there must be "electrical potential" in order for there to be any potential for defendant's equipment to have caused or contributed to the fire. He acknowledged that, assuming power was out in the whole neighborhood, it would not matter whether he had an opportunity to inspect the transformer. McGuire testified as follows:

> *Q.* Okay. If there's no electrical potential from Detroit Edison flowing to the neighborhood and specifically to the [insureds'] residence, examining the transformer wouldn't be of any benefit to a cause and origin investigation, fair?
>
> *A.* Well I don't know if that's true or not; but if we know with a hundred percent certainty there was no potential a long time before the fire, that might be true.

Q. Might be true?

A. If we know for sure there's no potential.

Q. I want you to assume that that fact is given. Wouldn't you agree then that if there's no way, based upon your testimony so far, that Detroit Edison – Detroit Edison's equipment couldn't possibly be – have caused or contributed to the fire if there's no electrical potential, then whether or not you see the transformer wouldn't matter one way or the other?

A. If the whole neighborhood was out, that's true.

Stewart Trepte, plaintiff's cause and origin expert, deferred to the expertise of an electrical engineer on this question:

> I – so I don't really have a – if the power as you—the question said if the power was off until after the fire happened, I can't right now say how DTE's, the power could have done it. I'm not saying it couldn't happen. I'm just saying that's why I hired an electrical engineer.

Trepte testified it was not within his expertise to look at the transformer and make any determination.

In addition, James Brown, a supervising engineer for defendant, testified that it was impossible for defendant's equipment to have caused the fire if no electrical energy was being supplied to the neighborhood. He noted that, based on the observations in McGuire's written report, McGuire did not see any of the signs normally associated with an electrical fire. He saw uniform deterioration of the electrical equipment, which is consistent with "fire attack with no electrical activity." Brown said that he would have inspected the transformer if it had been available, in order to eliminate more possible causes, but said that there was "good evidence in this case to come to some pretty solid conclusions." Significantly, Brown also noted that the transformer served the insureds' barn, as well as their house, and that there was no damage to any of the electrical equipment in the barn.

Thus, according to all of the evidence, defendant's equipment, and the transformer in particular, could only have caused or contributed to the fire if the power was on when the fire started. And the only evidence concerning the power outage indicates that the fire started before power was restored to the neighborhood. Oakland Fire Department records show that the alarm came in to the fire department at 10:25 a.m., and that the fire department was on the scene at 10:29 a.m. Two of defendant's employees, Larry Kort and Robert Eckhout, who do overhead line work, were dispatched around 7:30 a.m. to address a power outage that affected about 300 homes, including the insureds' home at 765 Countryside Lane. After identifying the cause of the problem, they were able to restore power to at least a majority of those homes. Kort and Eckhout both testified that they reenergized the circuit at approximately 11:00 a.m., by closing a piece of electrical equipment called a recloser. Eckhout testified that 765 Countryside Lane was connected to the distribution serviced by the recloser, and that the power there did not come back on until they closed the recloser around 11:00 a.m. Eckhout also testified that the "fire was going a long time before" he and Kort closed the recloser; he and Kort heard emergency vehicles

(impliedly headed to 765 Countryside Lane) "way before, as [they] were patrolling that distribution circuit." He also indicated that the insureds' residence was "fully engulfed and it was almost totally burned down to the ground" by the time he and Kort arrived after being called to the scene. According to the insureds' neighbor, the power at his house went off at about 4:30 a.m. that day (the time his wife's alarm clock stopped), and did not come back on until after the fire started. The neighbor testified that he knew that because he still had to run his generator after he saw the smoke coming from 765 Countryside Lane. When Trepte interviewed the neighbor, the neighbor said that the power was restored around 11:00 or 11:30 a.m. Although Larry Crowder, a contract fire investigator for defendant, testified that he thought the neighbor had told him that the power came on at "10:30 or 11:00 o'clock, something like that," he also said that the neighbor told him that the power came on "much later in the morning," meaning after the neighbor heard a "big bang," from the fire in the insureds' garage, and after the fire department arrived.

Faced with this unrebutted evidence that the insureds' neighborhood was without power at the time the fire started, plaintiff argues that, because 765 Countryside Lane "had virtually its own power source," it could have had power when the rest of the neighborhood did not. As indicated by the evidence in this case, this argument is premised on a misunderstanding of the function of a transformer. The transformer at issue apparently served only the insureds' home and barn, not other customers, but a transformer merely changes the voltage from one voltage level to another; it does not supply power. The power at 765 Countryside Lane could not have been restored until Kort and Eckhout closed the recloser, because that residence was connected to the distribution circuit serviced by the recloser. In light of the experts' acknowledgment that defendant's equipment could not have caused the fire if power had not yet been restored, combined with this unrebutted evidence that power was restored to the neighborhood *after* the fire started, we agree with the trial court that there was no genuine issue of fact concerning causation.

Plaintiff also claims that "[t]he transformer would have verified whether power was on or off at the time of the fire." Plaintiff is apparently claiming that an inspection of the transformer could have revealed the time of day that the power came back on, but cites no evidence to support this claim. "This Court will not search the record for factual support for a party's claim." *McIntosh v McIntosh*, 282 Mich App 471, 485; 768 NW2d 325 (2009); see also MCR 7.212(C)(7). To the extent plaintiff relies on the supplemental affidavit of McGuire, which it filed on July 28, 2009, for this assertion, we also note that the affidavit was untimely under the court rules, as it was submitted *one day* before the hearing on defendant's motion for summary disposition, MCR 2.116(G)(1)(a),[1] and that defendant vigorously disputes the accuracy of plaintiff's assertion.[2]

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[1] "Unless a different period is set by the court . . . any response to the motion [for summary disposition] (*including briefs and any affidavits*) must be filed and served at least 7 days before the hearing." MCR 2.116(G)(1)(a)(ii) (emphasis added.) Plaintiff filed the supplemental McGuire affidavit on July 28, 2009, *one day* before the hearing on the motion for summary

In any event, the affidavit amounts to little more than McGuire's assertion that he is unwilling to conclude, without inspecting the transformer, that there was no power being supplied to the residence when the fire started, and, therefore, that the transformer was not the cause of the fire. Even still, McGuire does not contradict his deposition testimony that if there was no power, then the transformer could not have been the cause of the fire. He completely ignores the evidence, discussed in detail, *supra*, concerning the power outage. He states that "[t]he only evidence provided to date with regard to the power supply to the [insureds'] home is the internal dispatch records of DTE." And, because those "internal records are simply not reliable," he concludes that the only way for him to confirm the absence of power—and thus rule out defendant's service as the cause of the fire—is to inspect the transformer. In light of all of the documentary evidence presented in connection with the summary disposition motion, much of which McGuire's supplemental affidavit ignores, McGuire's personal unwillingness to rule out the transformer as a cause of the fire without inspecting it does not create a question of fact.

Finally, plaintiff argues that this Court should reverse the grant of summary disposition because the trial court failed to sanction defendant for its failure to produce the transformer. Plaintiff argues that "a presumption should have arisen" that the transformer was adverse to defendant's case. A trial court has the authority to sanction a party for failing to preserve evidence, whether the absence of the evidence arising from "a deliberate act or simple negligence." *Brenner v Kolk*, 226 Mich App 149, 160; 573 NW2d 65 (1997). "[I]n a case involving the failure of a party to preserve evidence, a trial court properly exercises its discretion when it carefully fashions a sanction that denies the party the fruits of the party's misconduct, but that does not interfere with the party's right to produce other relevant evidence." *Id*. at 161. "An appropriate sanction may be the exclusion of evidence that unfairly prejudices the other party or an instruction to the jury that it may draw an inference adverse to the culpable party from the absence of the evidence." *Id*. (footnotes omitted.)

Plaintiff argues that the trial court should have sanctioned defendant by applying a presumption that the missing transformer would have been favorable to plaintiff. But plaintiff fails to articulate any plausible theory of causation, grounded in the available evidence, that would support such a presumption or permit plaintiff to survive the motion for summary disposition even if such a presumption was deemed appropriate. McGuire concluded in his written report that "no physical evidence was found to indicate that a fire was caused by an electrical failure," and Brown noted, based on McGuire's observations, that McGuire did not see

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disposition. The affidavit was not associated with any brief, and there is no indication that plaintiff requested or received leave to file it.

[2] Following the trial court's hearing on the motion for summary disposition, but before the court rendered its decision, defendant filed a motion to strike McGuire as a witness. In support of its motion, defendant submitted an affidavit of Brown, in which Brown states that inspection of the transformer "would not and could not show whether the transformer was supplying power to the [insureds'] residence at the time of the fire, as there would be no physical evidence to support such a conclusion." That the Brown affidavit may not be considered in reviewing the trial court's decision on the motion for summary disposition underscores the impropriety of considering the supplemental McGuire affidavit on appeal.

any of the signs normally associated with an electrical fire. McGuire observed uniform deterioration of the electrical equipment, which is consistent with "fire attack with no electrical activity." Plaintiff fails to support its position with any evidence that a fire caused by a faulty transformer would even be consistent with the physical evidence that does exist. "[C]ausation theories that are mere possibilities or, at most, equally as probable as other theories do not justify denying defendant's motion for summary judgment." *Skinner v Square D Co*, 445 Mich 153, 172-173; 516 NW2d 475 (1994). "To be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation." *Id*. at 164.

> As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any 1 of them, they remain conjectures only. On the other hand, 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 WR Co*, 347 Mich 417, 422; 79 NW2d 899 (1956).]

Given the experts' consensus that inspection of the transformer would be irrelevant assuming that there was no power at the time the fire started, and that the only evidence on that question indicated that there was no power, the trial court did not abuse its discretion by declining to presume, contrary to all of the proffered evidence, that an inspection of the transformer would have revealed that the transformer caused the fire.

III. CASE EVALUATION SANCTIONS

In Docket No. 296035, defendant argues that the trial court erred in concluding that its motion for case evaluation sanctions was untimely under MCR 2.403(O)(8). We agree.

We review de novo a trial court's decision regarding a motion for case evaluation sanctions under MCR 2.403(O). *Ivezaj v Auto Club*, 275 Mich App 349, 356; 737 NW2d 807 (2007). We also review de novo a question involving the proper interpretation and application of a court rule. *Id*.

MCR 2.403(O) provides, in relevant part:

> (1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.
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> (2) For the purpose of this rule "verdict" includes,
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> (a) a jury verdict,

(b) a judgment by the court after a nonjury trial,

(c) a judgment entered as a result of a ruling on a motion after rejection of the case evaluation.

* * *

(8) A request for costs under this subrule must be filed and served within 28 days after the entry of the judgment or entry of an order denying a timely motion for a new trial or to set aside the judgment.

In this case, defendant's motion for case evaluation sanctions was filed within 28 days after the entry of the order denying plaintiff's motion for reconsideration. The trial court concluded that, because it was not filed within 28 days of the order granting summary disposition, the motion was untimely. We disagree. Plaintiff's motion for reconsideration served the same function as a motion for a new trial or to set aside the judgment because the trial court's decision on the motion affected defendant's entitlement to case evaluation sanctions. In *Brown v Gainey Transp Servs, Inc*, 256 Mich App 380, 384; 663 NW2d 519 (2003), "the trial court determined that its order striking, setting aside, and declaring void plaintiffs' motion for a new trial did not constitute a denial for purposes of MCR 2.403(O)(8)." *Id*. at 383. This Court disagreed:

> We conclude that this more expansive interpretation of "deny" is more consistent with the intent and purpose of MCR 2.403(O)(8) than is the construction applied by the trial court. Our Court has reasoned that the rule "includes a provision allowing twenty-eight days after the order disposing of a motion for a new trial or to set aside the judgment in which to request sanctions because these motions may affect whether a party is entitled to the sanctions." In other words, *the logic of the rule is that a party should be able to wait to see whether a pending motion for a new trial is granted before incurring the expense and effort of filing a motion for case-evaluation sanctions*, all of which would be wasted if a new trial is ordered. [*Id*. at 384 (citation omitted; emphasis added).]

In *Braun v York Props, Inc*, 230 Mich App 138, 150; 583 NW2d 503 (1998), the Court applied similar reasoning. The Court stated that MCR 2.403(O)(8) "includes a provision allowing twenty-eight days after the order disposing of a motion for a new trial or to set aside the judgment in which to request sanctions because these motions may affect whether a party is entitled to the sanctions." *Id*. Where the motions for a new trial, judgment notwithstanding the verdict, and remittitur, did not pertain to the parties involved in the request for sanctions, however, "extending the period for filing a motion for sanctions would serve no purpose." *Id*.

In this case, the trial court's decision on plaintiff's motion for reconsideration affected defendant's entitlement to case evaluation sanctions. Plaintiff's motion specifically asks for reversal of the order granting summary disposition in favor of defendant. Under the circumstances, the motion for reconsideration was tantamount to a motion for a new trial or to set aside the judgment for purposes of MCR 2.403(O)(8). Because defendant's motion was filed

within 28 days after the entry of the order denying plaintiff's motion for reconsideration, it was timely.

We affirm the trial court's order granting summary disposition in favor of defendant, but reverse the trial court's order denying defendant's motion for case evaluation sanctions, and remand for further proceedings. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello
/s/ Amy Ronayne Krause