SUPREME JUDICIAL COURT OF THE STATE OF MAINE
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. OXF-24-154

DAVID LEMELIN and LISA LEMELIN,

Plaintiffs/Appellants

v.

CONSTRUCTION CATERERS, INC., ET AL.,

Defendants/Appellees

APPEAL FROM THE MAINE SUPERIOR COURT FOR
OXFORD COUNTY

APPELLEES' BRIEF

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PRELIMINARY STATEMENT

This matter stems from a fire loss that occurred on May 9, 2019, at Plaintiffs/Appellants David Lemelin and Lisa Lemelin's premises. [Appendix ("A.") 20-30]. After suit was filed, the parties engaged in active discovery – at the close of which Defendants/Appellees filed a Motion for Summary Judgment, arguing Plaintiffs/Appellants could not establish a *prima facie* case of negligence. [A. 31-46]. The motion was granted by the Court below. [A. 11-19].

Plaintiffs/Appellants now appeal.

ISSUES PRESENTED

1. Whether the Superior Court was correct in ruling there is no evidence that Defendants were the proximate cause of the fire at Plaintiffs' premises and therefore Defendants were entitled to judgment as a matter of law.

2. Whether Defendants owed an affirmative duty to investigate the smell of smoke when there is no evidence Defendants were the cause of the smoke or fire.

3. Whether the Superior Court abused its discretion in denying Plaintiffs' eighth motion to extend Plaintiffs' expert designation deadline.

STATEMENT OF FACTS

On May 9, 2019, Plaintiffs/Appellants, David Lemelin and Lisa Lemelin (hereinafter, "Plaintiffs"), were the owners of the residential dwelling located at 99 Mount Zircon Road in Peru, Maine (hereinafter, the "premises"). [A. 52]. On May 9, 2019, a fire occurred at the premises. [A. 52]. The Peru Fire Department reported to the scene of the fire and conducted an investigation into its cause. [A. 52]. The Fire

Marshal ultimately could not determine the cause of the fire, and it was ruled accidental. [A. 52-53, 56-57].

Prior to the subject incident, Plaintiffs hired Defendant/Appellee, Construction Caterers, Inc., which is owned by Defendant/Appellee Jon Young, to perform various construction work at the premises, including insulation, sheetrock, V-Match pine, and trim carpentry. [A. 48, 62-63, 65, 124-25]. Defendants/Appellees Kaleb Gatchell, Erik J. Frost, Brandon Windover, and Linwood ("Lenny") Giberson were Jon Young/Construction Caterers' workers (hereinafter collectively referred to as "Defendants") at the subject premises, with Mr. Giberson acting as foreman when Jon Young was not present. [A. 48, 62-63, 78, 93, 125, 236]. During the course of their work, Defendants used a generator outside the premises in order to power their various tools because they were instructed by Plaintiffs not to use the solar power station within the premises. [A. 49, 65-66, 77-78, 94, 103, 125, 236]. During the course of their work, Defendants would remove scrap wood and materials from the premises. [A. 49, 98, 106]. Also working and staying, or temporarily living, at the premises was Plaintiff's friend, Wayne Boutin. Mr. Boutin was performing carpentry work on the home's deck. [A. 49, 64-65, 78, 104]. Unlike Defendants, Mr. Boutin used the solar power station. [A. 49, 65, 94, 103-04].

When Defendants arrived at the premises on the morning of May 9, 2019, they smelled smoke and/or plastic burning. [A. 49, 64, 67-68, 78-79, 95-96, 105]. Mr. Boutin then reported to Defendants that the smell was due to the fact that he, Mr. Boutin, had

thrown some cigarette packs into the fire and that he had also been running a hole-hog drill. [A. 49, 64, 67-68, 78-79, 95-96, 105]. The hole-hog drill is a machine that takes an immense amount of power, which Mr. Boutin had plugged into the solar panel. [A. 49, 66]. Defendants never observed smoke when they arrived at the premises. [A. 49, 80-81, 96, 107, 236-37]. Moreover, Mr. Frost at some point that day opened the basement door and did not observe any smoke. [A. 49, 80-81, 96, 237]. Mr. Frost also had previously observed steam coming from an external pipe connected to the house, but again, he never observed any smoke. [A. 80-81].[1] Mr. Giberson continued to smell smoke on the first floor and Mr. Boutin continued to tell him it was probably just the woodstove. [A. 49, 96]. Following their discussions with Mr. Boutin, Defendants started their work on the second floor of the premises. [A. 50, 79, 95, 105]. That morning, Defendants had used a torpedo heater for a short time period in order to sufficiently warm the space in order to complete portions of their work, which required a certain temperature. [A. 50, 65, 78-79, 81, 96, 106, 237].

At or about noon on May 9, 2019, Defendants left the premises in order to get lunch, drop off one of the workers who was not feeling well, and to grab additional supplies. [A. 50, 64, 66, 79, 105, 237-38]. Mr. Boutin remained at the property [A. 135]. Upon hearing a noise coming from inside the house, Mr. Boutin entered the house

[1] In Plaintiffs' brief, they state Mr. Frost testified that there was no source that existed at the house capable of generating steam. (Plaintiffs' Brief at *2). This statement does not accurately reflect the cited testimony and lacks evidentiary support.

through a sliding door and discovered a wall of smoke. [A. 136]. He then retreated outside and attempted to enter through another door but discovered more smoke. [A. 136]. He observed flames near the ceiling in the front two stairways as well as flames around the basement door on the other side of the house. [A. 136]. He also observed smoke billowing out of the second-floor windows. [A. 136]. Mr. Boutin called 911 and reported the fire to emergency personnel. [A. 136].

By the time Defendants returned from their break, the access road to the premises was blocked off due to the fire at the premises. [A. 50, 64, 66, 96-97]. Mr. Boutin reported that the fire started approximately ten minutes after Defendants left the premises and that the premises was gone within minutes. [A. 50, 64, 66, 97, 107, 238].

The Superior Court issued the Standard Scheduling Order on March 8, 2021, that set June 9, 2021 as Plaintiffs' deadline to designate experts. [A. 3, 16]. Plaintiffs previously filed seven motions to extend that deadline before the Court denied Plaintiffs' eighth motion to extend deadlines. [A. 4-7, 16]. After more than four years after the subject fire, Plaintiffs have not designated an expert to opine as to the cause and origin of this fire. [A. 53]. Further, Plaintiffs have not designated any expert whatsoever in this matter. [A. 48, 124].

SUMMARY OF ARGUMENT

Plaintiffs bear the burden on appeal of demonstrating the Superior Court committed an error of law in granting summary judgment for Defendants. Plaintiffs were obligated to produce *prima facie* evidence supporting each element of their negligence claims. Plaintiffs herein failed to prove Defendants were the proximate cause of the subject fire and, therefore, the trial court properly granted summary judgment in favor of Defendants.

Under Maine common law, to establish proximate cause, Plaintiffs must establish there is a reasonable connection between the acts or omissions of Defendants and the damages Plaintiffs sustained. In the present matter, Plaintiffs have produced no evidence as to the cause and origin of the fire. In fact, the fire's cause and origin remain completely unknown. Nevertheless, Plaintiffs offer purely conclusory allegations, improbable inferences, and unsupported speculation that Defendants are responsible for the fire. When causation is predicated upon and requires a factfinder to engage in pure speculation and conjecture, as is here, a defendant is entitled to summary judgement as a matter of law. Moreover, Plaintiffs have presented no evidence that eliminates other potential causes of the fire, which makes it impossible to speculate as to the likelihood that the fire was caused by any specific source.

Additionally, though Plaintiffs argue Defendants owed a duty to inspect and investigate the odor of smoke Defendants detected upon their arrival to the premises, Defendants, in fact, owed no such duty. As there was no qualifying special relationship

between Plaintiffs and Defendants, Defendants did not owe a duty to act affirmatively to protect Plaintiffs from a hazard Defendants did not create. Further, Plaintiffs did not designate an expert to opine as to the standard of care owed by construction contractors. Such an expert is necessary to establish both the standards of care owed by Defendants as construction professionals as well as how Defendants' alleged conduct breached those standards, which resulted in the subject fire. Consequently, the Superior Court properly entered summary judgment in favor of Defendants and this Court should affirm that judgment.

Finally, Plaintiffs bear the burden on appeal of demonstrating that the Superior Court abused its discretion in denying Plaintiffs' last motion to extend expert deadlines. The Superior Court, which is entitled to considerable deference because it is in the superior position to evaluate credibility, good faith of the parties, and compliance with pretrial orders, expressly found that there was no good cause shown for Plaintiffs' eighth motion to extend deadlines as the deadlines had been previously extended seven times over the course of two years.

STANDARD OF REVIEW

The Law Court reviews a summary judgment ruling *de novo*, "viewing the evidence in the light most favorable to the nonmoving party, to decide whether the parties' statements of material fact and referenced record evidence reveal a genuine issue of material fact." *Brawn v. Oral Surgery Assocs.*, 2006 ME 32, ¶ 10, 893 A.2d 1011. (internal

citations and quotations omitted). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any, establish that there is no genuine issue as to any material fact and that a party is entitled to a judgment as a matter of law. *See* M.R. Civ. P. 56(c).

"A material fact is one that can affect the outcome of the case. A genuine issue of material fact exists when the factfinder must choose between competing versions of the truth." *Dyer v. Dep't of Transp.*, 2008 ME 106, ¶ 14, 951 A.2d 821 (internal citations and quotations omitted). Summary judgment is proper even when "concepts such as motive or intent are at issue, . . . if the non-moving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation." *Id.* When the material facts are not in dispute, or, if the evidence favoring the plaintiff is insufficient to support a plaintiff's verdict as a matter of law, summary judgment may be properly entered for the defendant. *Curtis v. Porter*, 2001 ME 158, ¶ 7, 784 A.2d 18.

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY FOUND THERE IS NO EVIDENCE THAT DEFENDANTS WERE THE PROXIMATE CAUSE OF THE FIRE AT THE PREMISES.

To prevail in a negligence action, Plaintiffs have the burden of proving Defendants owed a duty to Plaintiffs, that Defendants breached that duty, and that said breach proximately caused Plaintiffs' damages. *See Addy v. Jenkins, Inc.*, 2009 ME 46, ¶ 8, 969 A.2d 935. Defendants contend Justice Archer's extensive and thoughtful Order

[A. 11-19] fairly and accurately considered all available testimony, documents, and affidavits and reached the proper conclusion in granting summary judgment based upon Plaintiffs' clear failure to establish proximate cause.

To establish proximate cause, Plaintiffs must establish there is a reasonable connection between the acts or omissions of Defendants and the damages Plaintiffs sustained. *Houde v. Millet*, 2001 ME 183, ¶ 10, 787 A.2d 757; *see also Adams v. Buffalo Forge Co.*, 443 A.2d 932, 938 (Me. 1982)("[T]he plaintiff must prove that . . . the defendant's breach of duty was the actual and legal cause of the injury suffered by the plaintiff."); *Taylor v. Hill*, 464 A.2d 938, 944 n.2 (Me. 1983) ("Negligence alone on the part of an actor is not enough to impose liability. Negligence is actionable only if it proximately caused an injury to another."). A violation of a duty of care toward another is a proximate cause of the damages if the defendant's conduct is a substantial factor in bringing about those damages. *Wing v. Morse*, 300 A.2d 491, 496 (Me. 1973); *Clement v. U.S.*, 980 F.2d 48, 53-54 (1st Cir. 1992). Conduct is a "substantial factor" if it, in fact, caused the damage and the damage was reasonably foreseeable. *Clement*, 980 F.2d at 53-54 (*citing Brewer v. Roosevelt Motor Lodge*, 295 A.2d 647, 652 (Me. 1972)).

A plaintiff's negligence claim fails as a matter of law "if there is so little evidence tending to show that the defendant's acts or omissions were the proximate cause of the plaintiff's injuries [such] that the jury would have to engage in conjecture or speculation in order to return a verdict for the plaintiff." *Houde v. Millett*, 2001 ME 183, ¶11, 787 A.2d 757. "The mere possibility of such causation is not enough, and when the matter

remains one of pure speculation or conjecture, or even if the probabilities are evenly balanced, a defendant is entitled to a judgment." *Id.* (internal quotation and citation omitted). Where a plaintiff merely establishes that damage occurred rather than what caused the damage, the evidence is insufficient as a matter of law to establish liability. *See Addy v. Jenkins*, 2009 ME 46, ¶ 14, 969 A.2d 935 (observing that when the plaintiff only established where she fell and not how she fell, the defendant was entitled to summary judgement).

In *Houde*, the plaintiff brought suit against a landlord for injuries alleged to be suffered as a result of chimney soot being tracked into her kitchen. *Houde*, 2001 ME 183, ¶1, 787 A.2d 757. The plaintiff testified that she cleaned a large amount of soot off of a floor; the next morning she slipped. *Id.* ¶ 12. She alleged that the soot caused her to slip, but she acknowledged that neither she nor anyone else had seen any soot on the floor on the morning of her accident or immediately following her fall. *Id.* Her reasoning for believing it was soot that caused her to fall was based upon the fact that she later found a smudge that looked like a soot stain on the pajamas she had been wearing when she fell. *Id.* The Law Court found that though this evidence "might establish that it [was] *possible* that it was soot that [the plaintiff] slipped on," such evidence was "insufficient to support a finding to that effect.. . . Absent some evidence more directly establishing that the soot was the cause of her fall, a factfinder could not reasonably conclude, without engaging in speculation, that it was soot that caused [the plaintiff] to slip." *Id.* (emphasis in original). The Court held that the plaintiff's "evidence [was]

insufficient as a matter of law to support a finding that the defendant's negligence was the proximate cause of her injuries." *Id.*

A. <u>There is no evidence that Defendants' actions or inactions proximately caused the fire.</u>

The summary judgment record establishes that pure conjecture and speculation would be required in order to find on behalf of Plaintiffs. Accordingly, the Superior Court properly granted judgement in favor of Defendants.

Here, Plaintiffs plainly cannot escape the fatal flaw of their case – i.e. that both the cause and origin of the fire are completely unknown. Without any evidence tending to show the cause and origin of the fire, Plaintiffs are requesting a jury to engage in speculation and conjecture that the fire is nonetheless attributable to Defendants and Defendants alone. However, there is simply no evidence linking Defendants' actions or inactions to the fire itself. Even if Plaintiffs were able to prove that Defendants were negligent via use of a space heater, disposal of cigarettes, and/or, as primarily argued in Plaintiffs' Brief herein, in failing to investigate the smell of smoke upon their arrival to the property hours before the fire– all of which Defendants dispute, Plaintiffs have still produced no evidence directly linking any of those actions or inactions to the fire itself. *See Taylor v. Hill*, 464 A.2d 938, 944 n.2(Me 1983) ("Negligence alone on the part of an actor is not enough to impose liability. Negligence is actionable only if it proximately causes an injury to another.").

The facts in the present matter contain even less support for a negligence action than the facts presented in *Houde*. At least in *Houde*, there was some evidence as to the cause of the fall (i.e. soot had been on the floor the night before the accident). Here, on this record, Plaintiffs cannot identify the cause of the fire. Without knowing the cause of the fire, one cannot even begin the analysis of whether that cause is attributable to Defendants. Absent some evidence more directly establishing that Defendants' actions or inactions were the cause of the fire, a factfinder could not reasonably conclude, without engaging in speculation, that it was Defendants who caused the fire.

With respect to Plaintiffs' theory concerning the odor of smoke, there is no evidence that the odor of smoke smelled by Defendants upon their arrival to the property and an alleged failure to investigate the same, hours before the fire occurred, in any way played a substantial part in bringing about or causing the fire. Plaintiffs' theory that the fire was caused by and/or even linked to the odor of smoke detected by Defendants upon their arrival to the property and Defendants' so-called failure to investigate the same, without any actual evidence that the fire originated from or was connected to this odor, is pure speculation. Moreover, shortly before he discovered the fire, Mr. Boutin, himself, denied smelling any smoke. [A. 135]. Yet, Plaintiffs erroneously insist, without any evidentiary basis or proof, that the smoke smelled by Defendants upon their arrival at the premises hours before the fire, which again Mr. Boutin did not smell immediately before he discovered the fire, is nonetheless directly causally related to a fire that has no known cause.

There is plainly no connection between the fire and negligence alleged other than Plaintiffs' own conclusory, unqualified opinions and unsupported speculation. Plaintiffs are not fire investigators and they are not educated in fire cause and origin analysis. They are not experts in National Fire Protection Association Standards or the state's various Fire Service Laws. Any opinions they have as to the cause and origin of the fire are nothing more than a series of inadmissible guesses. Mere surmise or conjecture showing a possibility cannot be accepted as legal proof of an existing fact. *Michaud v. Steckino*, 390 A.2d 524, 530 (Me. 1978). Plaintiffs offer nothing more than guesses as to what caused the fire and how Defendants can be blamed for it. As Plaintiffs' so-called "evidence" would require nothing more than speculation or conjecture by a jury, Defendants are entitled to judgement as a matter of law. *See Johnson v. Carleton*, 2001 ME 12, ¶ 12, 765 A.2d 571.

Alden v. Maine Cent. R. Co., 112 Me. 515, 92 A. 651, 652 (1914) is instructive, which held "the burden was upon the plaintiff to show by competent evidence that the defendant's locomotive caused the fire." In *Alden*, the court found that the plaintiff did not meet this burden to show competent evidence that the defendant was responsible for a fire because "[t]here was no positive testimony as to the origin of the fire," and the case was "silent as to the starting point" as well as other factors that would have helped establish cause of the fire. *See id.* Like the plaintiff in *Alden*, Plaintiffs here have shown no competent evidence as to the origin of the fire or the starting point of the fire, let alone that Defendants were responsible for the same. Moreover, unlike the

plaintiff in *Alden*, Plaintiffs in the present matter could have availed themselves of the scientific and forensic advancements made over the past one hundred and ten years since the *Alden* decision to set forth competent evidence to establish the cause and starting point of the subject fire.

Rather than setting forth competent evidence as to the cause and origin of the fire, Plaintiffs instead attempt to rely on inferences of proximate cause drawn from unproven, irrelevant, and immaterial facts. Plaintiffs argue an inference of proximate cause can be drawn between claims of alleged breaches of duty with evidence of damages. However, if this were the case, the proximate cause element would be dispensed with entirely because plaintiffs in every case would be allowed to merely submit evidence of an alleged breach of a standard of care along with evidence of damages and a jury would just infer the crucial link between the two. This is plainly not the law within this State.

This Court has stated time and again the fundamental rule that inferences must be based on facts, and not mere possibilities. "An inference must be based upon a probability and not mere possibilities or on surmise or conjecture and must be drawn reasonably and supported by the facts upon which it rests." *Paradis v. Sch. Admin. Dist. No. 33 Sch. Bd.*, 462 A.2d 474, 478 (Me. 1983)(citing *Ginn v. Penobscot Company*, 334 A.2d 874, 880 (Me. 1975)). Moreover, "when a plaintiff seeks to prove his case by inferences drawn from facts, the facts themselves must be proved. Inferences based on mere conjecture . . . cannot support a verdict, and when nothing more is presented by a

plaintiff . . . a nonsuit is in order." *Cyr. Geisen*, 150 Me. 248, 257, 108 A.2d 316, 320 (1954) (internal citations and quotations omitted). Finally, a jury verdict cannot be based upon a mere scintilla of evidence or on pure conjecture. *Gulesian v. Northeast Bank of Lincoln*, 447 A.2d 814, 816 (Me. 1982); *see also Cyr*, 150 Me. At 257 ("[C]onjecture is not proof.").

Plaintiffs assert proximate cause between the fire and Defendants' conduct can be inferred due to manner in which Defendants allegedly left the property that afternoon, the slight discrepancies in explanations as to why Defendants left the property that afternoon, and the fact that the fire chief allegedly heard a Defendant state "what are we doing here, we need to get out of here" after returning to the scene of a raging and ongoing fire. [A. 139]. These "facts" are not evidence as to actual cause and origin of the fire. Like the plaintiff in *Alden*, Plaintiffs here have not shown any competent evidence as to the origin of the fire or the starting point of the fire, let alone that Defendants were responsible for the same. There is nothing in the record to suggest that the result (i.e. the ensuing fire) would have been any different had Defendants left the property later in the day, left the property in a different manner, or stayed at the property while firefighters were on scene. Plaintiffs are attempting to prove proximate cause only by way of vague generalities or improper inferences founded upon speculative conclusions. Though Plaintiffs assert these facts are evidence of a breach of a standard of care, which they are not, and have put forth evidence as to their

incurred damages, the record is wholly devoid of any concrete facts on which to establish the necessary link between those two elements.

The facts are clear. The cause of the subject fire is unknown. Plaintiffs' inability to prove the cause of the fire is fatal to their case. An unknown cause cannot be attributed to any wrongful conduct of Defendants. When the cause is unknown it is impossible for Plaintiffs to prove any connection between their damages and any wrongful conduct attributable to Defendants.

B. Plaintiffs have not ruled out other causes of the fire.

Plaintiffs have presented zero proof as to their ever-changing theories regarding the cause of the fire. Plaintiffs have asserted multiple theories as to the cause of the fire that they attribute to Defendants, including that it was allegedly caused by the disposal of cigarettes, use of a space heater, debris left at the jobsite, as well as their theory involving the odor of smoke detected hours before the fire. In addition to these multiple theories, Plaintiffs have presented no evidence ruling out other potential causes of the fire unattributable to Defendants, such as an electrical fire or fire caused by the tools and materials used by Mr. Boutin. Mr. Boutin, himself, confirmed there were multiple possible points of ignition, stating that when he first discovered the fire, he encountered smoke and flames at multiple points within the premises, including the basement door, multiple stairways, and ceiling. [A. 137]. Likewise, the State Fire Marshal, himself, could not determine the cause of the fire and ruled it accidental. [A. 48, 52-53, 56, 126].

When "the evidence discloses no connection between the injury and the negligence charged, except a bare possibility that the former resulted from the latter, there is nothing for the jury, if it is also possible that the injury may be due to other causes." *Michalka v. Great Northern Paper Co.*, 151 Me. 98, 105, 116 A.2d 139, 143 (Me. 1955). Here, Plaintiffs have submitted no evidence as to the cause of the fire beyond mere speculation. Without any evidence, including expert testimony, concerning the cause and/or origin of the fire, it is impossible to identify any cause or proximate cause of the same. *See Webb v. Hass*, 1999 ME 74, ¶ 20, 728 A.2d 1261 (clarifying that when causation "remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.") (internal citations omitted); *see also Hersum v. Kennebec Water District*, 151 Me. 256, 263, 117 A.2d 334, 338 (1955) ("[i]f, when examined in the light of the known facts, two or more theories remain equally probable and equally consistent with the evidence, the selection of one to the exclusion of others would rest upon mere surmise and conjecture."). Plaintiffs have asserted various theories as to the cause of the fire, which they attribute solely to Defendants. However, just as likely, the fire could have started due to an electrical short circuit, a lithium battery overheating, or some flammable substance, like linseed oil, that can often be used during construction. There is simply no evidence supporting any cause, let alone Defendants' role in that cause.

Without evidence as to the origin or cause of the fire, Plaintiff's theory that Defendants were responsible for the same— whether because of their use of a space

heater, disposal of cigarettes, or their smelling of smoke upon arrival to the property—is utter speculation. This speculation cannot support the inference that the fire was caused by Defendants' actions and therefore Plaintiffs' claims fail as a matter of law.

C. Plaintiffs have failed to designate an expert to offer evidence as to the cause and origin of the fire.

The amount or type of evidence required to prove causation may turn on the complexity of the facts. *See Tolliver v. Dep't of Transp.*, 2008 ME 83, ¶ 42, 948 A.2d 1223 ("Our precedents also indicate that in cases involving complex facts beyond the ken of the average juror, or those potentially involving multiple causes, more substantial evidence of proximate cause may be required."). Defendants posit there are few things more complex than the cause and origin of a fire that resulted in the total destruction of a building. With multiple possible ignition sources and locations for the fire, expert testimony is unquestionably required in the present matter. Without an expert, Plaintiffs have no evidence of the cause of the fire, generally, and, more importantly, no evidence that Defendants' supposed negligence, in particular, caused this fire.

Expert testimony is that what is "concerned with a matter beyond common knowledge so that the untrained layman will not be able to determine it intelligently without that expert help." *State v. Rich*, 549 A.2d 742, 743 (Me. 1988)(internal citations omitted). An expert who is qualified "by knowledge, skill, experience, training, or education" may testify if it will "help the trier of fact to understand the evidence or to determine a fact at issue." M.R. Evid. 702. Given the complex, scientific aspects of

determining the origin and cause of a fire, it is unquestionably an issue for an expert, not a layperson, upon which to comment and opine. Allowing a jury to infer causation on the complex facts in this matter without the aid of expert testimony on the subject and without some showing that Defendants' conduct was more likely than not the cause of Plaintiffs' damages, stretches the jury's role beyond its capacity. *See Merriam v. Wanger*, 2000 ME 159, ¶¶ 16-18, 757 A.2d 778. Not only is there a total absence of evidence that it was more likely than not Defendants' actions that were the cause of Plaintiffs' harm, the record evidence suggests several other potential sources of harm. "Although there may be multiple causes of any one injury, the existence of multiple possibilities makes the need for evidence of [Defendants'] responsibility for causation all the more important." *Id.* ¶ 18

Other jurisdictions have widely accepted that claims regarding the cause and origin of a fire must be supported by expert testimony. *See, e.g.*, *Arnold v. Heritage Enterprises of St. Lucie, LLC*, No. 2:13-cv-14447-CIV-MARTINEZ, 2017 WL 10841696, at *9 (S.D. Fla. July 19, 2017) ("Proving the cause and origin of a fire generally requires expert testimony based on a forensic fire investigation, in accordance with the National Fire Protection Association Standard 921."); *Acker v. Ratteree*, No. 88–733–CIV–KEHOE, 1989 WL 226094 (S.D. Fla. Nov. 30, 1989) (finding the plaintiff failed to meet burden to establish negligence based on total lack of expert testimony on the cause of a boat fire); *State Farm Fire & Cas. Co. v. Niswander*, 7 N.E.3d 295, 299 (Ind. Ct. App. 2014) (expert testimony required to confirm the cause and origin of a fire that

started in a pickup truck); *Cruz v. Furniture Technicians of Houston, Inc.*, 949 S.W.2d 34 (Tex. App. 1997), writ denied (Apr. 29, 1998) (expert testimony required in personal injury claim arising out of a fire near uncovered electrical outlet); *Triangle Dress, Inc. v. Bay State Serv., Inc.*, 356 Mass. 440, 441-42, 252 N.E.2d 889, 891 (1969) (referencing "complete absence of expert opinion testimony" leaving jury "to conjecture and surmise about the cause of the fire without adequately founded essential, expert guidance.").

Here, Plaintiffs did not designate any expert witness to testify regarding the cause and origin of the fire. Without having a cause and origin opinion established by a competent expert who specializes in forensic fire investigations, there would be no way for a jury to readily determine (1) whether Defendants' alleged conduct caused that fire and (2) whether that conduct departed from the standard of care. Without expert testimony, Plaintiffs cannot meet their evidentiary burden.

As Plaintiffs failed to offer any evidence that would tend to show Defendants were the proximate cause of the fire, the Superior Court properly entered judgment in favor of Defendants and this Court should affirm that judgment.

II. DEFENDANTS OWED NO DUTY TO PLAINTIFFS TO INVESTIGATE THE SMELL OF SMOKE.

Plaintiffs argue Defendants owed them a duty to investigate the smoke odor they smelled upon their arrival to the property on the day of the subject fire. This argument fails in two respects. First, Defendants were under no affirmative duty to investigate the

smell of smoke. Second, Plaintiffs have offered no expert opinions as to the standard of care owed by a construction contractor.

A. Defendants had no affirmative duty to investigate the smell of smoke.

Contrary to Plaintiffs' assertions, Defendants owed no duty to inspect the cause and origin of smoke detected on the premises. Plaintiffs' assertions are analogous to the proposition that a person has an affirmative duty to act when faced with a harm not of their own making. Maine law is clear that in claims of nonfeasance, rather than misfeasance, there is no duty of care absent a special relationship between the parties. *See Mastriano v. Blyer*, 2001 ME 134, ¶ 17, 779 A.2d 951 ("absent a special relationship, the law imposes no duty to act affirmatively to protect someone from danger unless the dangerous situation was created by the defendant."). There is no affirmative duty to aid or warn another person in peril unless the party created the danger or the two people had a special relationship that society recognizes as sufficient to create a duty. *See Estate of Cilley v. Lane*, 2009 ME 133, ¶ 17, 985 A.2d 481. The Law Court has stated,

> Maine law does not impose a general obligation to protect others from harm not created by the actor. The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.

Id. ¶ 11 (internal citations and quotations omitted).

In *Estate of Cilley v. Lane*, the plaintiff's decedent accidentally shot himself in the defendant's presence at the defendant's home. Rather than render aid or call 911, the defendant simply walked over to a neighbor's home. The Law Court affirmed the

Superior Court's ruling in favor of the defendant's motion for summary judgement on the grounds that no special relationship existed and therefore the defendant owed no duty to provide or summon aid. *See id.* ¶ ¶ 3-9, 22 ("We adhere to our established precedent and conclude that absent a special relationship or conduct that has endangered another, a person owes no duty to call for aid . . .."). The Law Court noted that one of the primary reasons for limiting duties in cases on nonfeasance is the potential for boundless liability:

> We know of no principle of law by which a person is liable in an action of tort for mere nonfeasance by reason of his neglect to provide means to obviate or ameliorate the consequences of the act of God, or mere accident, or the negligence or misconduct of one for whose acts towards the party suffering he is not responsible. If such a liability could exist, it would be difficult, if not impossible, to fix any limit to it.

Id. ¶ 21 (internal citations omitted).

The established, legal relationships that may give rise to an affirmative duty to render aid and protect include "the relationship between a common carrier and passenger, employer and employee, parent and child, or innkeeper and guest." *Id.* ¶ 17. Special relationships for purposes of a negligence claim are grounded in the notion that a person or entity owed the plaintiff a fiduciary duty. *DeCambra v. Carson*, 2008 ME 127, ¶ 13, 953 A.2d 1163. A fiduciary duty will be found to exist where "the law will recognize both the disparate positions of the parties and a reasonable basis for the placement of trust and confidence in the superior party in the context of specific events at issue." *Id.* (internal citations omitted). A fiduciary duty "does not arise merely because of the

existence of kindship, friendship, **business relationships**, or organizational relationships." *Bryan R. v. Watchtower Bible & Tract Soc. of New York, Inc.*, 1999 ME 144, ¶ 20, 738 A.2d 839 (emphasis added). "Simple recitations of a trusting relationship will not suffice for identifying a fiduciary duty." *Id.* ¶ 21, *see also Dragomir v. Spring Harbor Hosp.*, 2009 ME 51, ¶ ¶ 18-19, 970 A.2d 310 (clarifying that "special relationship" is narrowly defined, stating "We did not, nor do we now, expressly state that any fiduciary relationship would constitute a 'special relation' for purposes of section [Restatement (Second) of Torts §] 315(b). Rather, we recognized that those fiduciary relationships in which there exists a 'great disparity of position and influence between the parties' would qualify as a 'special relation' pursuant to section 315(b).'"). By way of example, the Law Court has found a fiduciary relationship between a hospital and a highly vulnerable psychiatric patient, *id.*, and between a church and a student/altar boy who was sexually abused by a priest. *Fortin v. Roman Catholic Bishop of Portland*, 2005 ME 57, ¶ 34, 871 A.2d 1208. In contrast, "[t]he ordinary buyer-seller relationship, even where the seller has superior bargaining power and knowledge, is not a fiduciary one." *Taylor v. Ford Motor Co.*, No. 06–69–B–W, 2006 WL 2228973, at *4 (D. Me. Aug. 3, 2006).

Here, there is no evidence Defendants caused or created the fire. Likewise, there was no special relationship between Plaintiffs and Defendants that would trigger any affirmative duty for Defendants to act to investigate, warn, or otherwise prevent harm to Plaintiffs that was not of Defendants' own making. The parties were not in disparate positions; one was not superior to the other. There was no fiduciary relationship or any

other special relationship between them. Mere attempts at recitations that Plaintiffs were relying upon Defendants to perform the work for which they were hired does not trigger the special fiduciary relationship needed to impose a duty upon Defendants to act affirmatively to protect Plaintiffs from a danger not of Defendants' own making.[2] Accordingly, no duty was owed to Plaintiffs by Defendants to affirmatively investigate the smell of smoke on the premises. Without any such duty to act, there can be no negligence and Defendants are entitled to summary judgment.

B. Plaintiffs have offered no expert opinions as to the standard of care owed by a construction contractor.

As the Superior Court correctly noted, since Defendants did not owe a duty to act affirmatively to protect Plaintiff from danger unless Defendants caused that danger or there was a special relationship between the parties, Defendants, at most, may have been under the traditional duty to exercise skill and knowledge normally possessed by members of their trade. [A. 18-19]. Yet, as pointed out again by the Superior Court, what that duty entails is entirely unclear because "Plaintiffs have not designated an expert to address the duty owed by Defendants or the conduct alleged to have breached that duty." [A. 19, n. 4]. Expert testimony is required in professional negligence cases where principles of standard of care, breach of the standard of care, and causation are

[2] In their brief, Plaintiffs state Defendant Young knew the property was not Plaintiffs' primary residence and that they resided out-of-state. Plaintiffs further state that Plaintiffs entrusted their property to Defendants with access and control over the property. (Plaintiffs' Brief, at *12). Defendants maintain these contentions contain no citations to the Appendix, are wholly unsupported, and lack evidentiary support.

beyond the ordinary understanding or knowledge of lay persons. *See Mitchell & Davis v. Jackson*, 627 A.2d 1014, 1016-17 (Me. 1993).

In their brief, Plaintiffs argue that "[a] reasonable contractor or employee would have alerted the homeowner or the fire department" about the smell of smoke they smelled when arriving on the property. [Plaintiffs' Brief at *12-13]. Plaintiffs' argument fails as a matter of law because there is no evidence in the record to support the same. The Law Court has held that "a layperson could not say precisely what provisions a general contractor is required to make for the taking of precautions. Expert testimony is, therefore, necessary to establish the duty of a general contractor." *Maravell v. R.J. Grondin & Sons*, 2007 ME 1, ¶ 12, 914 A.2d 709; *see also, Graves v. S.E. Downey Registered Land Surveyor, P.A.*, 2005 ME 116, ¶ 10, 885 A.2d 779 ("The plaintiff in a professional negligence action must establish the appropriate standard of care, demonstrate that the defendant deviated from that standard, and prove that the deviation caused the plaintiff's damages.")

Construction standards involve complex matters including knowledge and understanding of building standards, OSHA regulations, code enforcement, permit regulations, National Fire Protection Association Standards, and more. Here, Plaintiffs failed to designate an expert necessary to establish both the standards of care owed by Defendants as construction professionals as well as how Defendants' conduct supposedly breach those standards that then resulted in the fire and claimed damages. There is no evidence in the record that Defendants were noncompliant with any

applicable construction safety requirements or building codes and standards. Further, Plaintiffs have no admissible evidence to show that Defendants' actions caused or contributed to the fire other than Plaintiff's own self-serving theories and unsupported speculation. These opinions are not entitled to any weight because Plaintiffs are not experts in the field of construction, code enforcement, and/or workplace safety. Some form of competent expert testimony is required to explain whether Defendants conduct deviated from an established standard of care owed by those in the construction field. Competent expert testimony is further required to provide affirmative evidence that the fire and resulting damages would not have occurred but for this supposed deviation. Without an expert, Plaintiffs cannot meet their evidentiary burden of either establishing the duty owed by Defendants as construction professionals or show how Defendants' alleged conduct breached that duty and proximately caused the subject fire.

C. Plaintiffs' attempts to feign issues of material fact should be rejected.

In an effort to divert the Court's attention from the critical facts and issues presented, Plaintiffs attempt to offer immaterial and irrelevant facts so to create the appearance of a genuine issue of material fact. These attempts to misdirect the Court's attention, which are in an effort to disguise the fact that no issues of material fact exist, should be rejected.

Plaintiffs contend there are several disputed facts, including when Defendants smelled smoke while on the property, what conversations were had between

Defendants and Mr. Boutin as to the smell of smoke, and what Defendants did to investigate that smoke.[3] A fact is only material if it can affect the outcome of the case. *Dyer v. Dep't of Transp.*, 2008 ME 106, ¶ 14, 951 A.2d 821, 825. These so-called disputed facts raised by Plaintiff are immaterial to the case as they do not change the fact that Defendants had no affirmative obligation or duty to investigate a danger that was not one of their own creating. Likewise, these so-called disputed facts do not negate the reality that the cause and origin of the fire are completely unknown and to attribute the same to Defendants would be purely speculative.

As Defendants had no affirmative duty to investigate a danger not of their own making and as Plaintiffs have failed to offer any evidence that tends to show Defendants breached a duty of care owed by them, the Superior court properly entered summary judgement in favor of Defendants and this Court should affirm that judgement.

III. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DENYING PLAINTIFFS' EIGHTH MOTION TO EXTEND DEADLINES.

The Superior Court did not abuse its discretion in denying Plaintiffs' eighth motion to extend deadlines. The Law Court reviews a trial court's decision whether to grant or deny a motion to enlarge time to designate an expert witness for an abuse of

[3] Plaintiffs further assert there are other factual disputes that should have precluded summary judgement, including Defendants' alleged use of cigarettes, marijuana, and a space heater. Plaintiffs also maintain there is evidence of Defendants' culpability simply because the fire chief recalled hearing one Defendant state they should leave the scene of an ongoing fire. Not only are these disputed facts unsupported by and contrary to the evidence in the record, even if accept as true, which Defendants deny, these facts have no bearing on the issues of duty and causation that are at the heart of Superior Court's granting of Defendants' motion for summary judgement.

discretion. *Hutz v. Alden*, 2011 ME 27, ¶ 20, 12 A.3d 1174. "The trial court's ruling is entitled to considerable deference because of its superior position to evaluate the credibility and good faith of the parties before it." *Id.* (citing *Dalton v. Quinn*, 2010 ME 120, ¶ 6, 8 A.3d 670). "We have emphasized the need for compliance with pretrial orders, and have stated that sanctions are appropriate when conduct frustrates the beneficent purposes of discovery orders." *Johnson v. Carleton*, 2001 ME 12, ¶ 10, 765 A.2d 571 (internal citations and quotations omitted); *see also Mitchell v. Kieliszek*, 2006 ME 70, ¶ 19, 900 A.2d 719 ("We have consistently held that it is an appropriate exercise of the trial court's discretion to exclude expert opinion testimony when the party seeking to elicit the opinion failed to designate the witness as an expert, or failed to do so in a timely fashion in accordance with pretrial scheduling orders."). Maine Rules of Civil Procedure 6(b) provides that the court may, in its discretion, enlarge the time within which an act is required or allowed to be done "for cause shown." When a request for an enlargement of time is made after the time permitted, however, the court may grant the request only "where the failure to act was the result of excusable neglect."7 M.R. Civ. P. 6(b); *Dalton v. Quinn*, 2010 ME 120, ¶ 7, 8 A.3d 670.

Here, the Superior Court expressly found that there was no good cause shown for further extension following the filing of Plaintiffs' eighth motion to extend deadlines. [A. 267]. Plaintiffs' initial deadline to designate experts for the subject May 2019 fire was June 9, 2021. [A. 16]. Plaintiffs obtained seven different extensions of this deadline over the course of two years and yet they still failed to designate any expert to

opine as to critical issues of the fire's cause and origin or the standard of care owed by construction professionals. Further, Plaintiffs' final motion to extend deadlines, which was filed on or about July 13, 2023 [A. 6], was filed after Plaintiffs' deadline to designate experts, as set forth in the March 15, 2023 order, had already lapsed on May 9, 2023. [See Attachment – A of Defendants' Brief, *30]. The Law Court has repeatedly stressed the importance of enforcing discovery and pretrial orders, particularly as they apply to expert witness designations. *See Hutz*, 2011 ME 27, ¶ ¶ 20-22, 12 A.3d 1174 (holding the court did not abuse its discretion in denying the defendant's motion to enlarge time to designate experts when the deadline for the same had already lapsed three and one-half months earlier.); *Dalton*, 2010 ME 120, ¶ 7, 8 A.3d 670 (holding the court did not abuse its discretion in denying the plaintiff's second request to extend the expert designation deadline because the plaintiff failed to designate an expert before the deadline and failed to move to enlarge the time within which to do so before that date).

Further, Plaintiffs' theory of liability (i.e. that Defendants deviated from a standard of care of construction contractors by failing to investigate the smell of smoke) was not a novel theory that Plaintiffs only developed during the course of discovery and litigation. Such a theory traces back to the original allegations set forth in Plaintiffs' Complaint. Moreover, Plaintiffs deposed Jon Young, the owner of Construction Caterers, in April 2022, well in advance of Plaintiffs' expert designation deadline. Plaintiffs had more than sufficient time to designate a liability expert as to this issue, yet they simply failed to do so. Considering the ample opportunities Plaintiffs had to

designate experts and their decision not to, the Court did not abuse its discretion in denying Plaintiffs' eighth motion to extend deadlines, which again was filed well over two years after the Court's initial scheduling order.

The Superior Court's entry of summary judgment was correct, and it was not an abuse of discretion to deny Plaintiffs' eighth motion to extend expert deadlines. Accordingly, this Court should affirm judgement in favor of Defendants.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Defendants/Appellees respectfully submit that the trial Court's decision granting their Summary Judgment should properly be affirmed.

Respectfully submitted,

DATED: 11/01/2024

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ATTACHMENT - A

STATE OF MAINE
OXFORD, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-21-04

DAVID AND LISA LEMELIN,

Plaintiffs

v.

CONSTRUCTION CATERERS, ET AL.,

Defendant

ORDER

Motion granted/denied.

The standard scheduling order deadlines are extended one hundred and twenty (120) days as follows:

- Plaintiff Expert Witness Designations – May 9, 2023;
- Defendant Expert Witness Designations – August 9, 2023;
- ADR Conference Deadline – July 7, 2023;
- Joinder of Parties Deadline – July 9, 2023;
- Discovery Deadline – November 9, 2023;
- Plaintiff Jury Request Deadline – August 5, 2023;
- Defendant Jury Request Deadline – July 15, 2023;
- Estimated Time Required for Trial – November 24, 2023;
- Exchange of witness and Exhibit Lists – November 24, 2023; and
- Deadline for Filing Motions – August 9, 2023.

Date: 3/15/23

Justice, Superior Court

CERTIFICATE OF SERVICE

I certify that I have served two copies of Appellees' Brief upon counsel for Appellants by depositing same, this date, in the United States Mail, postage prepaid to:

Colton P. Gross, Esq.
Thistle, Weaver, & Morris
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P.O. Box 7030
Portland, Maine 04112-7030

Respectfully submitted,

DATED: 11/01/2024

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