

STATE OF MICHIGAN  
COURT OF APPEALS

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BADGER MUTUAL INSURANCE COMPANY,  
as Subrogee of BOULEVARD LOUNGE, d/b/a  
BOULEVARD LOUNGE,

UNPUBLISHED  
March 23, 2004

Plaintiff-Appellant,

v

CONSUMERS ENERGY COMPANY,

No. 243769  
Midland Circuit Court  
LC No. 01-004352-NZ

Defendant-Appellee.

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Before: Zahra, P.J., and Cavanagh and Cooper, JJ.

PER CURIAM.

In this negligence action, plaintiff Badger Mutual Insurance Co., as subrogee of Boulevard Lounge, appeals as of right from the trial court's order granting summary disposition in favor of defendant, Consumers Energy Co., pursuant to MCR 2.116(C)(10). We reverse and remand for further proceedings.

On June 13, 2001, two electrical power lines controlled by defendant fell onto the roof of the Boulevard Lounge and started a fire which resulted in property damage. As its property insurer, plaintiff paid Boulevard Lounge in excess of \$60,000. Thereafter, plaintiff filed a negligence claim against defendant. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that plaintiff could not establish breach of duty or causation where there was no evidence that the power lines were overloaded at the time of the incident. The trial court granted defendant's motion.

On appeal, plaintiff argues that the trial court erred because it established genuine issues of material fact with regard to both the breach of duty and causation elements. We agree. We review a trial court's decision on a motion for summary disposition de novo to determine whether the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Id.* at 120. The court should consider the documentary evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* The court may not assess credibility or determine facts. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW3d 475 (1994). If the evidence offered fails to establish a genuine issue of any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4); *Maiden, supra*.

We conclude that, when viewed in the light most favorable to plaintiff, the evidence plaintiff submitted in response to defendant's motion for summary disposition was sufficient to demonstrate genuine issues of material fact regarding the breach of duty and causation elements of its negligence claim. In brief, plaintiff submitted expert testimony from William Kirchmeier that the power lines that fell were in a deteriorated condition, contained a number of splices, and could not carry whatever load they were carrying at the time of the incident. He further opined that splices can cause power lines to fail under high voltage stress. As circumstantial evidence that the lines were under such stress on the day of the fire, plaintiff submitted evidence that the lines were serving 1,395 consumers, including an ice arena, and the temperature outside was almost eighty-five degrees with fifty percent humidity. In addition, Kirchmeier testified that defendant could have avoided this accident by having fewer splices in the lines and by conducting appropriate load studies. Kirchmeier also noted the existence of numerous splices in close proximity to the burned areas of the power lines. Further, plaintiff submitted a statement from one of defendant's supervisors which indicated that "the cause of the burning wire might have been the load placed on the wire due to the hot weather conditions and power usage, or a deteriorated wire."<sup>1</sup> Plaintiff also submitted evidence refuting other possible causes of the line failure.

We conclude that plaintiff's evidence was sufficient for a jury to reasonably find that defendant breached its duty to exercise reasonable care to reduce potential hazards and to reasonably inspect and repair the wires. See *Schultz v Consumers Power Co*, 443 Mich 445, 451; 506 NW2d 175 (1993). Contrary to the dissenting opinion, we conclude that regardless of when these power lines were last inspected by defendant their deteriorated state and general condition (multiple splices) were sufficient to, at least, create a genuine issue of material fact as to whether the maintenance on such lines was "reasonable." In the case relied on by the dissent, *Citizens Ins Co v Detroit Edison*, unpublished opinion per curiam of the Court of Appeals, issued May 15, 2001 (Docket No. 215510), no such obvious potential defects were present in the power lines at issue. Further, when viewed in the light most favorable to plaintiff, plaintiff's evidence "support[s] a reasonable inference of a logical sequence of cause and effect." *Skinner, supra* at 174. Accordingly, plaintiff's evidence was sufficient to create a genuine issue of material fact with respect to the breach of duty and causation elements of its negligence claims and the trial court erred in granting summary disposition in favor of defendant under MCR 2.116(C)(10).

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Jessica R. Cooper

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<sup>1</sup> We recognize that this statement constitutes hearsay within hearsay as it was contained in an incident report but the incident report is a public record, MRE 803(8), and the statement was a party admission under MRE 801(d)(2)(D).

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ZAHRA, P.J. (*dissenting.*)

I respectfully dissent.

I agree with the trial court that plaintiff failed to produce evidence to create a genuine issue of material fact regarding whether defendant breached its duty to plaintiff. To establish a prima facie case of negligence, a plaintiff must prove the following: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). An electric power company must exercise reasonable care to reduce potential hazards as far as practicable and owes a duty to reasonably inspect and repair wires and other instrumentalities in order to discover and remedy hazards and defects. *Schultz v Consumers Power Co*, 443 Mich 445, 451; 506 NW2d 175 (1993). As noted by the trial court, this case is similar to *Citizens Ins Co v Detroit Edison*, unpublished opinion per curiam of the Court of Appeals, issued May 15, 2001 (Docket No. 215510),<sup>1</sup> where this Court concluded that the plaintiffs failed to show an electric company's breach of duty where the plaintiffs failed to present evidence establishing (1) what constitutes reasonable maintenance of electrical lines or (2) when the defendant last inspected or serviced the lines that allegedly caused the fire.

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<sup>1</sup> Although an unpublished Court of Appeals opinion has no binding precedential effect, MCR 7.215(C)(1), it may be used as persuasive authority. *Slater v Ann Arbor Public Schools Bd of Ed*, 250 Mich App 419, 432; 648 NW2d 205 (2002).

Here, as in *Citizens Ins Co*, plaintiff presented no evidence to establish what constitutes reasonable maintenance of electrical lines or when defendant last inspected or serviced the lines. Plaintiff's expert testified that load studies would have revealed the problem with the line that caused the fire and that these load studies should have been done on electrical lines periodically. But plaintiff's expert did not testify specifically how often the load studies should be conducted. Furthermore, plaintiff presented no evidence showing when defendant last conducted a load study or any other type of inspection of the line at issue. There was evidence that it was defendant's policy to conduct overhead inspections on all circuits every four years, but no evidence regarding when defendant had actually last inspected the line that cause the fire. Therefore, I conclude that plaintiff failed to satisfy the breach of duty element of negligence, without which his claim must fail. I would affirm the trial court's grant of defendant's motion for summary disposition.

/s/ Brian K. Zahra