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Case against 'careless' smoker survives summary judgment


The Piattini Wine Bar on Newbury Street in Boston engulfed in flames in 2016

Expert opinion on cause of fire passes muster

by Pat Murphy

The insurance carrier for the downstairs tenant of a commercial building in Boston produced sufficiently reliable expert evidence on causation to proceed with a negligence claim against the upstairs tenant for allegedly starting a fire on the premises through careless smoking, a federal judge has ruled.

Plaintiff AmGUARD insured Piattini Wine Bar, which was damaged in a 2016 fire.

AmGUARD sued defendant Landon Richmond, who operated an art gallery above the wine bar, for the damages sustained by its insured. According to the plaintiff, the fire started as a result of the defendant's careless smoking.

The defendant moved for summary judgment, arguing that the opinion of the plaintiff's expert as to the cause of the fire was based purely on speculation and conjecture, whereas a city fire investigator had concluded that the blaze most likely started because of an electrical problem.

But U.S. District Court Judge Richard G. Stearns denied the defendant's motion, concluding that the expert's opinion satisfied the standard for scientific reliability under the U.S. Supreme Court's 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals*.

"It is true, as Richmond argues, that no witnesses observed an open flame in the gallery or smelled marijuana or cigarette smoke permeating Piattini on the date of the fire," Stearns wrote. "'Yet tort law often encounters situations in which there are no witnesses and no direct evidence as to the cause of an event that results in harm. Fire cases are one example.' The absence of direct evidence, in other words, does not by itself defeat a negligence claim."

The 10-page decision is *AmGUARD Insurance Company v. Richmond*, Lawyers Weekly No. 02-166-21.

Circumstantial evidence

One of the insurance company's lawyers, Shannon M. Warren of Westborough, said a key to defeating the summary judgment motion was showing that the expert followed national standards in reaching his conclusions.

"Simply put, our expert's opinion was in compliance with NFPA 921, the standard for determining origin and cause for fire losses," Warren said. "The standard basically allows the consideration of circumstantial evidence."

The discovery of a piece of cardboard covering the vent in the bathroom at the rear of the defendant's art gallery will be a compelling piece of circumstantial evidence going forward, said co-counsel James Yesu.

"It was found by our expert, and the inference there is that, because of multiple complaints by co-tenants and the landlord about smoke emitting from the gallery, the gallery owner put a piece of cardboard in the vent above the toilet in the bathroom where he supposedly smokes," Yesu said.

Personal injury litigator Edward C. Bassett Jr. of Westborough said he could find no fault with Stearns' decision.

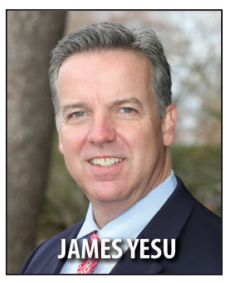
"This is a negligence case, and the law in Massachusetts pretty much says that it's the rare case that you grant summary judgment for a defendant in a negligence case," Bassett said.

Stearns "hit the nail on the head" in rejecting the defendant's argument that the expert's opinion was based merely on "speculation and conjecture," Bassett added.

"In fire cases, many times you're not going to find what the exact cause is," he said. "But all those cases that the judge cites point clearly to the fact that you can have an expert testify that, while they don't know the exact cause, this is the most probable cause based on circumstantial evidence and inferences."

Boston civil litigator Benjamin J. Wish said he agreed with the ruling.

"The court's role as gatekeeper isn't about slamming the door on experts that you don't like or that one party claims may not be particularly reliable," Wish said. "It's making sure that you keep out any [expert] with nothing reliable to add."



According to Wish, Stearns' decision "crystalizes" that the movant needs to show the expert has no evidentiary basis for his opinion in order to prevail on summary judgment when an expert opinion is at play.

Defense counsel John F. Gleavy of South Easton did not respond to a request for comment.

Fire breaks out

According to the plaintiff, the owner of Piattini, Josephine Megwa, and her employees regularly smelled smoke and incense emanating from the defendant's upstairs art gallery. An executive for the manager of the property would later state in deposition testimony that, on several occasions, Megwa had complained to him about the problem. Megwa would also testify that the cigarette smoke problem disappeared once the defendant closed his gallery after the fire. According to the defendant, while he lit candles and burned incense in the gallery, and though he smoked marijuana on a regular basis, he never smoked marijuana or cigarettes in the gallery.

The defendant claimed that at around 5:30 p.m. on Oct. 16, 2016, he smelled smoke in the gallery. He followed the scent and found a stack of boxes burning next to the wall of the bathroom at the rear of the gallery.

AmGUARD Insurance Company v. Richmond

THE ISSUE Did the insurance carrier for the downstairs tenant in a commercial building produce sufficiently reliable expert evidence on causation to proceed with a negligence claim against the upstairs tenant for allegedly starting a fire on the premises through careless smoking?

DECISION Yes (U.S. District Court)

LAWYERS Shannon M. Warren and James Yesu, of Uehlein & Associates, Westborough (plaintiff)
John F. Gleavy of Lynch & Lynch, South Easton (defense)


Damage from the 2016 fire that started in the second-floor art gallery in the Newbury Street building in Boston

According to the defendant, he had last used the bathroom several hours earlier, and no one else had regular access to the facility.

The fire spread and forced an evacuation of the building.

After the fire department put out the blaze, a fire investigator spent 70 minutes at the scene attempting to determine the cause. Finding no evidence of candles, incense, cigarette butts, ashtrays or other smoking materials in the bathroom, the investigator concluded that the cause was electrical.

The plaintiff's fire cause and origin expert, Daniel Roy, determined that the fire was the result of human accident — in other words, consistent with unattended candles, burning incense, or the careless use or disposal of smoking materials.

Roy based his conclusions on inspections of the scene of the fire in November 2016, March 2017 and October 2019.

According to Roy, during his investigation he discovered cardboard covering the vent in the bathroom, which he surmised was intended to prevent cigarette smoke from circulating through the building's air ducts.

The plaintiff's expert further concluded that the burn patterns he observed were inconsistent with an electrical cause of the fire and that there were no other ignition sources near the boxes that ignited.

Negligence case proceeds

In denying the motion for summary judgment, Stearns wrote that the defendant's primary objection to Roy's expert opinion "conflates 'speculation and conjecture' with circumstantial evidence and inferences."

Finding that the plaintiff's negligence claim was not defeated simply because Roy was unable to determine with scientific certainty the exact cause of the fire, Stearns turned to an alternative argument raised by the defendant.

The defendant argued that the plaintiff's expert impermissibly arrived at his conclusions through "negative corpus"; in other words, a process of elimination similar to differential diagnosis.

According to the defendant, such methodology is considered unsound under the National Fire Protection Association's Guide for Fire and Explosion Investigations 921. The guide is the "handbook" relied on by fire causation investigators.

However, Stearns noted that the guide does approve using a process of eliminating alternative causes of a fire so long as a determination of the ignition source is "based on data or logical inferences drawn from that data" or "derived from evidence, observations, calculations, experiments, and the laws of science."

Moreover, Stearns observed that the 1st U.S. Circuit Court of Appeals has long cautioned that the Daubert regime is to be employed at the summary judgment stage "only with great care and circumspection."

More to the point, Stearns found instructive the 1st Circuit's explanation in *Ruiz-Troche v. Pepsi Cola of Puerto Rico Bottling Co*. of a judge's narrow gatekeeper role at the summary judgment stage.

In its 1998 decision, a 1st Circuit panel explained that "Daubert neither requires nor empowers trial courts to determine which of several competing theories has the best provenance. It demands only that the proponent of the evidence show that the expert's conclusion has been arrived at in a scientifically sound and methodologically reliable fashion."

Stearns wrote that Roy's expert report satisfied the *Ruiz-Troche* standard.

"Whether his opinion will ultimately satisfy a jury is a matter for the trial process to determine," Stearns wrote. "'Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky, but admissible evidence.'"