STATE OF MICHIGAN

COURT OF APPEALS

G. E. PROPERTY & CASUALTY INSURANCE,
as Subrogee of SANDRA VEAL,

Plaintiff-Appellant,

v

THE DETROIT EDISON COMPANY,

Defendant/Cross-Plaintiff-
Appellee/Cross-Appellant,

and

DTE ENERGY,

Defendant/Cross-Plaintiff,

and

THE CITY OF DETROIT,

Defendant/Cross-Defendant-
Appellee/Cross-Appellee.

UNPUBLISHED
September 12, 2006

No. 267989
Wayne Circuit Court
LC No. 04-408833-CK

Before: Saad, P.J., and Jansen and White, JJ.

PER CURIAM.

Plaintiff, G. E. Property & Casualty Insurance (G.E. Insurance), appeals the trial court's grant of summary disposition to defendant, The Detroit Edison Company (Edison), on G.E. Insurance's negligence claim against Edison and Edison cross-appeals the grant of summary disposition to the City of Detroit on Edison's contractual indemnification claim against Detroit. We affirm in part and reverse in part.

I. Grant of Summary Disposition to Edison

G.E. Insurance asserts that the trial court erred when it granted summary disposition to Edison and Edison maintains that summary disposition was appropriate because no evidence shows that Edison caused the fire at the home of G.E. Insurance's subrogor, Sandra Veal.[1]

To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by a 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) (citation omitted). Proof of causation necessitates proof of both (1) cause in fact, and (2) proximate cause. *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). Cause in fact requires a demonstration that "but for" the actions of the defendant, the alleged injury would not have happened. *Id.* at 163. Legal cause or "proximate cause" typically involves an examination of the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences. *Id.* at 163. Cause in fact must be established before proximate cause becomes a relevant issue. *Id.* Our Supreme Court explained in *Skinner*:

> [A] causation theory must have some basis in established fact. However, a basis in only slight evidence is not enough. Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory. Rather, the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred. [*Id.* at 164-165.]

Furthermore, a plaintiff's evidence "must exclude other reasonable hypotheses with a fair amount of certainty," and negligence is not established if the evidence of causation is just as, or equally, consistent with alternative or contradictory hypotheses. *Id.* at 166-167. "[C]ausation theories that are mere possibilities or, at most, equally as probable as other theories do not justify denying a defendant's motion for summary [disposition]." *Id.* at 172-173. In other words, "the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred." *Id.* at 164-165. "However, where several factors combine to produce an injury, and where any one of them, operating alone, would have been sufficient to cause the harm, a plaintiff may establish factual causation by showing that the defendant's actions, more likely than not, were a 'substantial factor' in producing a plaintiff's injuries." *Id.* at 165 n 8.

Here, Edison's expert, Gilbert Fennimore testified that the fire at the Veal residence "was caused by a hot cross fault from the distribution system of the City of Detroit." Specifically, Fennimore explained:

> The distribution lines belonging to the City of Detroit came in contact with the service drop to the residence of the insured. This may have been only a series of momentary contacts as the wind of the storm blew the lines together. The distribution lines of the city are several thousand volts. This caused a power

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[1] We review a trial court's grant or denial of summary disposition de novo. *Brunsell v Zeeland*, 467 Mich 293, 295; 651 NW2d 388 (2002).

> surge in the house. The power surge heated the power strips to the point of igniting nearby combustibles.

This theory was supported by Edison's employee, John O'Callaghan, who stated that, based on his observations immediately after the fire, a Detroit Public Lighting Department ("PLD") wire had made contact with a secondary Edison wire. Fennimore later modified his theory and stated that, if the PLD wire was not energized, there is a possibility that the Edison wire could have caused the fire. A supervisor of Detroit's PLD, Walter Jackson, Jr., stated that if the PLD wire was de-energized, it either could have retained energy or could have transmitted energy sufficient to cause a power surge, if the de-energized PLD wire came into contact with an energized Edison wire. Thus, according to Jackson, the PLD wire caused the fire.

While Fennimore noted the *possibility* that Edison's wire may have caused the fire, this mere possibility is not sufficient to survive summary disposition. "[C]ausation theories that are mere possibilities or, at most, equally as probable as other theories do not justify denying a defendant's motion for summary [disposition]." *Skinner, supra,* pp 172-173). "The mere possibility that a defendant's negligence may have been the cause, either theoretical or conjectural, of an accident is not sufficient to establish a causal link between the two." *Kaminski v Grant Trunk W R Co,* 347 Mich 417, 422; 79 NW2d 899 (1956).

The proofs presented would not permit a reasonable jury to conclude that Edison's wire caused the fire. Rather, it is equally probable that the PLD wire, whether or not it was energized, caused the damage. Accordingly, G.E. Insurance failed to establish a genuine issue of material fact and the trial court correctly granted summary disposition to Edison.

Moreover, we also note that G.E. Insurance presented no evidence that Edison breached any duty to Veal. No witnesses testified that Edison negligently installed or maintained its wires. G.E. Insurance merely asserted that Edison negligently responded to the downed wire condition when it failed to repair the wire immediately. However, the evidence shows that Edison responded to the situation by sending out staff to protect the wires and to prevent the public from coming into contact with them. Moreover, G.E. Insurance failed to submit any evidence that Edison delayed the repair or negligently repaired the wires. Further, no evidence shows the extent of damage caused by the storm, the number of wires down, or how Edison prioritized repairs.

A trial court determines questions of duty, the general standard of care and proximate cause. *Moning v Alfono,* 400 Mich 425, 438; 254 NW2d 759 (1977). Because G.E. Insurance failed to establish causation and failed to show that Edison breached any duty to Veal, the trial court correctly granted summary disposition to Edison.

II. Indemnification

On cross-appeal, Edison asserts that the trial court erred when it granted summary disposition to Detroit on Edison's indemnification cross-claim against Detroit. "An express indemnity contract is construed strictly against its drafter and against the indemnitee; the indemnitor's obligation to indemnify the indemnitee must be described clearly and unambiguously." *Skinner v D-M-E Corp,* 124 Mich App 580, 585; 335 NW2d 90 (1983). Detroit does not deny that it entered into a Power Supply Agreement with Edison or that it

contains an indemnity provision. Power Supply Agreement, § 12. Rather, Detroit contends that it was not authorized to enter into such an agreement pursuant to Const 1963, art 7, § 26.

However, Detroit's argument ignores the authority granted under the Home Rule Act, MCL 117.1 *et seq.* "Michigan is strongly committed to the concept of home rule, and constitutional and statutory provisions which grant power to municipalities are to be liberally construed." *Bivens v Grand Rapids*, 443 Mich 391, 400; 505 NW2d 239 (1993). In addition, MCL 117.4j(3) allows for the inclusion within city charters of:

> Municipal powers. For the exercise of all municipal powers in the management and control of municipal property and in the administration of the municipal government, whether such powers be expressly enumerated or not; for any act to advance the interests of the city, the good government and property of the municipality and its inhabitants and through its regularly constituted authority to pass all laws and ordinances relating to its municipal concerns subject to the constitution and general laws of this state.

Consistent with this provision, Detroit enacted § 7-1204 of its Charter, which provides for the PLD to have general authority to exercise the powers necessary to perform any duties required to carry out its function and purpose of furnishing and selling light and power. Detroit Charter, art VII, § 7-1204. "The charter of a city stands as its 'constitution;' it is 'the definition of [a city's] rights and obligations as a municipal entity, so far as they are not otherwise legally granted or imposed." *Bivens, supra,* pp 400-401. As such, Detroit was authorized to enter into the Power Supply Agreement with Edison. Moreover, the inclusion of the indemnification provision is consistent with the city's authority and does not violate Const 1963, art VII, § 26 as an impermissible "loan [of] its credit."

Detroit's reliance on *Wheeler v Sault Ste Marie*, 164 Mich 338; 129 NW 685 (1911) is misplaced. In *Wheeler*, our Supreme Court held that it was beyond a city's authority to enter into an indemnification agreement. *Id.* at 134. However, the ruling in *Wheeler* was based on case law from other jurisdictions and not on the Michigan Constitution, statutes, or case law. Of greater importance is Detroit's status as a home rule city, and the rule that "home rule cities enjoy not only those powers specifically granted, but they may also exercise all powers not expressly denied." *AFSCME v Detroit*, 468 Mich 388, 410; 662 NW2d 695 (2003) (citation omitted). As discussed in *Detroit v Walker*, 445 Mich 682, 690; 520 NW2d 135 (1994), the Michigan Constitution maintains a system of municipal governance that includes a "general grant of rights and powers, subject only to certain enumerated restrictions instead of the earlier method of granting enumerated rights and powers definitely specified." Based on the failure of Detroit to provide citation to any constitutional provision, other than Const 1963, art 7, § 26, or statutory authority that would restrict Detroit's authority to enter into the indemnification agreement, the trial court incorrectly granted it summary disposition on this issue.

We affirm the trial court's grant of summary disposition to Edison on G.E. Insurance's negligence claim and reverse the trial court's grant of summary disposition to Detroit on Edison's cross-claim for indemnification.

/s/ Henry William Saad
/s/ Kathleen Jansen