

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 8, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 99-1593

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

WEST BEND MUTUAL INSURANCE COMPANY,

PLAINTIFF-RESPONDENT,

V.

NORTHEASTERN MUTUAL INSURANCE COMPANY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Door County:
JOHN D. KOEHN, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Northeastern Mutual Insurance Company (the liability insurer) appeals a judgment awarding West Bend Insurance Company (the fire insurer) damages based on the jury's verdict finding that Rose LeMieux negligently caused a fire that damaged an apartment. Northeastern argues that there is insufficient evidence to establish that LeMieux negligently caused the fire

and that this court should overturn the judgment or grant a new trial in the interest of justice. We reject these arguments and affirm the judgment.

¶2 When reviewing the sufficiency of the evidence, this court must consider all credible evidence and reasonable inferences therefrom in the light most favorable to the jury's findings. *See Weiss v. United Fire & Casualty Co.*, 197 Wis. 2d 365, 388, 541 N.W.2d 753 (1995). While West Bend could not establish precisely how LeMieux started this fire, it presented sufficient circumstantial evidence that it was started by her smoking materials. It could not be started by her cigarette in the absence of negligence.

¶3 The negligent use of smoking materials can be established by eliminating other possible causes of the fire. *See Maryland Cas. Co. v. Penn. Nat'l Mut. Cas. Ins.*, 81 Wis. 2d 248, 262, 260 N.W.2d 380 (1977).¹ Calvin Phillipps, West Bend's expert witness, opined that the fire was caused by an ember or cigarette butt coming in direct contact with clothing on the floor.² Phillipps interviewed various witnesses before examining the damaged apartment. Some of the witnesses' statements to Phillipps were inconsistent with their testimony at trial. Resolving the discrepancies is the jury's function. *See Graves v. Travelers Ins. Co.*, 66 Wis. 2d 124, 136-37, 224 N.W.2d 389 (1974). The jury could reasonably find that Phillipps's detailed investigation eliminated any possible source of the fire except smoking materials.

¹ Northeastern argues that direct evidence of smoking is required. The cases it cites from other jurisdictions have no precedential value. Wisconsin allows proof by circumstantial evidence. *See Maryland Cas. Co. v. Penn. Nat'l Mut. Cas. Ins.*, 81 Wis. 2d 248, 262, 260 N.W.2d 380 (1977).

² It was also possible that a cigarette lighter could have been lit by a ten-year-old child who had been sleeping in the same room. However, no evidence was presented suggesting that the child handled the lighter or started the fire.

¶4 The flames ignited thirty to forty-five minutes after LeMieux left the apartment. Although she denied having ever smoked in the bedroom, other witnesses testified they had seen her smoke in the bedroom on other occasions. She admitted that she smoked in the apartment when her parents were not home. It is undisputed that they were not home thirty to forty-five minutes before the fire was discovered. Her smoking materials were present in the bedroom. When she reported to work in a restaurant downstairs from the apartment, she was holding a pack of cigarettes in her hand. Phillipps's elimination of other possible causes of the fire, the absence of evidence that the child started the fire, the contradictions to LeMieux's testimony about smoking in the bedroom and the timing of the fire provide sufficient circumstantial evidence that LeMieux's negligent use of smoking materials started the fire.

¶5 Northeastern argues that Phillipps was unable to substantiate that LeMieux started the fire because Phillipps could not eliminate the possibility that someone else started the fire. It is not the expert witness's function to determine who started the fire. His job was to determine how the fire was started. The totality of the evidence presented by West Bend establishes who started the fire. This case is not analogous to cases Northeastern cites in which there was no circumstantial evidence that would single out one party over another as the one causing the fire.

¶6 Northeastern points to evidence that other people were present in the bedroom after LeMieux left and did not see or smell any smoke. While a smoldering fire from a cigarette would ordinarily cause some smoke before it ignited, the jury could reasonably have determined that the other family members had been in the bedroom so soon after the ember had been discarded that the smoke was not noticed by them.

¶7 Northeastern has established no basis for reversal or a new trial in the interest of justice. Its argument is based on the assertion that justice has miscarried because West Bend breached its equitable obligation to preserve evidence essential to the claim. West Bend did not preserve an overhead light or an electric baseboard heater. It did retain the cigarette lighter, a curling iron, a hair dryer and the electrical outlet that the hair dryer was plugged into. At the time the other materials were discarded, West Bend had no reason to believe they were significant. Phillipps had examined the ceiling light and determined that the wires and insulation were in perfect condition. Phillipps eliminated the baseboard heater as a cause of the fire by examination of the flame patterns, his familiarity with the type of heater and the fact that the heater could not have started the fire if it was turned off. Because the fire occurred in August, it was unlikely the heater would have been turned on. A witness testified that it was not turned on. Under these circumstances, we conclude that justice has not miscarried by West Bend's failure to preserve items that had been eliminated as a cause of the fire.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (1997-98).

