

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**August 20, 2002**

Cornelia G. Clark  
Clerk of Court of Appeals

**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.

**Appeal No. 01-3205  
STATE OF WISCONSIN**

**Cir. Ct. No. 99-CV-211**

**IN COURT OF APPEALS  
DISTRICT III**

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**GESSLER ACQUISITION CORPORATION, D/B/A THE  
MATADOR RESTAURANT, AND CAPITOL INDEMNITY  
CORPORATION,**

**PLAINTIFFS-RESPONDENTS,**

**v.**

**LOUIE'S REFRIGERATION SERVICE, INC., D/B/A  
LOUIE'S REFRIGERATION, AND CINCINNATI INSURANCE  
COMPANY,**

**DEFENDANTS-APPELLANTS.**

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APPEAL from a judgment of the circuit court for Lincoln County:  
GLENN H. HARTLEY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Louie's Refrigeration Service, Inc., and its insurer appeal a judgment that compensates Capitol Indemnity Corporation for payments

it made on a fire insurance policy. The jury found that Louie's workman started the fire at the Matador restaurant by negligent use of a propane torch. Louie's argues that the trial court should have granted its motion for directed verdict because the evidence did not establish that Louie's workman was negligent and Capitol's expert's testimony was irrelevant and invited the jury to speculate as to the cause of the fire. Louie's also argues that it is entitled to a new trial based on two evidentiary errors: (1) the court improperly allowed one of Capitol's experts to play a videotape of an experiment that did not replicate the conditions at the Matador restaurant and allowed hypothetical questions without proper foundation; and (2) the court disallowed four exhibits that Louie's contends Capitol's witness showed bias and motivation.<sup>1</sup> We reject these arguments and affirm the judgment.

¶2 The trial court properly denied Louie's motion for directed verdict. Directed verdict is not appropriate because the evidence, and reasonable inferences from the evidence, viewed most favorably to Capitol, provide an adequate basis for the jury's finding that Louie's workman negligently caused the fire. See *Millonig v. Bakken*, 112 Wis. 2d 445, 456, 334 N.W.2d 80 (1983). Several restaurant workers saw the workman using a propane torch and periodically setting it on top of the freezer. One witness testified that the flame came within four inches of the ceiling. Jack Sanderson, a fire investigator with fifteen years' experience, testified and presented a videotaped experiment that demonstrated the characteristics of the ceiling material, milkboard. He showed

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<sup>1</sup> Louie's also argues that *res ipsa loquitur* does not apply in this case and that it is entitled to a new trial in the interest of justice. We will not separately address these issues because Capitol did not plead or argue *res ipsa loquitur* and concedes that its recovery is not based on that theory. Louie's arguments in support of the request for a new trial in the interest of justice merely repeat arguments that we reject in this decision.

that it was possible to apply flame to the coated side of the milkboard and ignite the backside of the board. He also testified that gases emitted from the propane torch would be the same temperature two inches above the actual flame, that when the flame was taken away from the milkboard, it would still be hot enough to burn paper, that there would be no smoke under the milkboard and that a fire above the milkboard in the attic area could start long after the torch was removed. Sanderson, two other expert witnesses for Capitol, and Louie's expert witness opined that Louie's workman's use of the torch as described by restaurant employees would not be an appropriate use of the torch. Capitol's experts testified that it was not necessary for the flame to come into direct contact with the milkboard to start the fire above the milkboard hours later, and opined that Louie's workman's improper use of the torch caused the fire. The jury assesses the weight and credibility of testimony. That evidence is sufficient to defeat a motion for directed verdict.

¶3 Louie's argues that its workman cannot be negligent because none of the restaurant employees who saw him use the torch was concerned or alarmed at his behavior. That is not the test for negligence. It is the jury's function, not that of restaurant employees, to determine whether the workman breached his duty of ordinary care by setting a burning torch inches from the ceiling.

¶4 Louie's argues that Capitol's experts' opinions are based on mere speculation or conjecture and are incredible as a matter of law. The experts eliminated numerous other possible causes of the fire. Sanderson's experiment demonstrated how the fire could have ignited hours after Louie's workman left the scene. The evidence is not mere speculation or conjecture, but rather a reasonable extrapolation from the available evidence. Their opinions and the jury's findings are not contrary to the laws of nature or fully established conceded facts. *See*

*Posnanski v. City of West Allis*, 61 Wis. 2d 461, 466 n.2, 213 N.W.2d 51 (1973). Therefore, their testimony is not incredible as a matter of law.

¶5 The trial court properly exercised its discretion when it allowed Sanderson to present a videotaped demonstration of the effects of burning milkboard. The demonstration did not purport to replicate many aspects of the fire. Rather, it showed that applying heat to the coated side of milkboard will cause smoke and smoldering on the opposite side, where it might go unnoticed in the attic area. Because the jury might not be familiar with the characteristics of milkboard when heat is applied, the experiment was designed to assist the jury in determining the cause of the fire. Although Sanderson's experiment involved direct application of flame to the coated side of the milkboard, there is little danger that the experiment confused the jury because Sanderson did not purport to replicate the conditions under which the fire started.

¶6 Likewise, although a hypothetical question posed to Sanderson assumed direct contact of the flame to the ceiling, Louie's was not prejudiced by that question. The point of the question was to establish the smoldering characteristics of milkboard and the time delay in starting the fire. Capitol's other expert witnesses testified that direct application of flame to the ceiling was not necessary to produce the same result. Although the question assumed direct contact of the flame with the ceiling, there is no danger that the jury's verdict was affected by focusing on that irrelevant distinction.

¶7 The trial court also properly exercised its discretion when it excluded four exhibits that Louie's contends showed Capitol's bias and interest. As the subrogated insurer that paid for the fire damage, Capitol's interest in finding a negligent party is self-evident. The documents offered do not establish

witness bias. Rather, they show Capitol's assessment of its own expert's credentials and activities in this case. A party's assessment of witnesses' credibility is not relevant. Because determination of witnesses' credibility is the exclusive province of the jury, opinion evidence as to their credibility is not admissible. *See State v. Romero*, 147 Wis. 2d 264, 278, 432 N.W.2d 899 (1988). Other proffered exhibits show the experts' consideration of other possible causes of the fire. The trial court did not prohibit questions regarding the theories that the experts explored and ultimately rejected. The documents were unnecessary and could potentially confuse the jury.

*By the Court.*—Judgment affirmed.

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

