For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

JACQUELINE L. CHARLES, Appellant/Plaintiff, **v.** **ARCOS DORADOS USVI, INC.** **d/b/a McDONALD'S RESTAURANT,** Appellee/Defendant.	)))))))))	**S. Ct. Civ. No. 2016-0049** Re: Super. Ct. Civ. No. 336/2013 (STX)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Croix
Superior Court Judge: Hon. Douglas A. Brady

Considered: March 14, 2017
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BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **IVE ARLINGTON SWAN**, Associate Justice.

APPEARANCES:

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OPINION OF THE COURT

SWAN, Associate Justice.

¶ 1 Appellant, Jacqueline L. Charles ("Charles"), appeals the Superior Court's August 19, 2016 memorandum opinion and order, which entered summary judgment against her and in favor of Appellee, Arcos Dorados USVI, Inc. d/b/a McDonald's Restaurant, on the basis that she failed to identify potentially admissible evidence to support a jury finding that the fish fillet sandwich McDonald's Restaurant sold to her, which she partially consumed, proximately caused her injuries. For the reasons explicated below, we affirm the Superior Court's August 19, 2016 memorandum opinion and order granting summary judgment.

I. FACTS

¶ 2 On Saturday, February 16, 2013, Charles purchased two fish fillet meal combos (the "McDonald's sandwich"), including fries and drinks, for herself and her daughter, Keenisha Brown ("Keenisha"), from the McDonald's Restaurant in the Villa La Reine Shopping Center, St. Croix ("McDonald's"). After eating a portion of the sandwich, Charles stated to Keenisha, "this fish ain't taste good . . . me ain't feeling good." (J.A. 25.) When she arrived home shortly thereafter, Charles began to experience "itchiness like in [her] mouth." (J.A. 25.) Keenisha, who also ate one of the McDonald's sandwiches that Charles bought, experienced diarrhea. Based on her symptoms, Charles concluded "something wrong . . . that fish fillet wasn't good or something and discarded the remainder of it." (Appellant's Br. 2; J.A. 25-30.)

¶ 3 Charles reported to McDonald's her queasy reaction from the sandwich. Specifically, that afternoon, Charles telephoned McDonald's' manager, Lornette Kelly ("Kelly"), who, according to Charles, recommended that Charles return to McDonald's to report the incident and to provide her contact information. Acting on Kelly's recommendation, Charles returned to McDonald's that

afternoon and provided her name "and telephone [number] and personal notices or reports of the tainted food incident." (J.A. 62.)

¶ 4 Later that evening, Charles described the inside of her mouth as "blister[ed,] . . . red[, and] . . . swollen . . ." (J.A. 25.) On the following Sunday, Charles' health condition further deteriorated. The itching she was experiencing had progressed to her head and to her "private part," causing her to itch and scratch incessantly. (J.A. 25.)

¶ 5 On Monday, February 19, 2013, Charles consulted Dr. Carmen Cintron ("Dr. Cintron") at Primary Care, PLLC, who administered treatment to Charles. Despite visiting Dr. Cintron and taking the medication that was prescribed for her, Charles claimed she was unable to perform her employment duties for approximately two days because of the debilitating illness allegedly caused by her consumption of the McDonald's sandwich.

II. PROCEDURAL HISTORY

¶ 6 On October 9, 2013, Charles filed a complaint against McDonald's for breach of the implied warranty of fitness of prepared food for the particular purpose of consumption, pursuant to 11A V.I.C. § 2-315. She alleged that on February 16, 2013, she bought and partially consumed a sandwich from McDonald's, which made her gravely ill. Consequently, Charles sought monetary damages for her illness and cost of litigation.

¶ 7 McDonald's filed an answer on November 13, 2013. In its answer, McDonald's denied Charles' allegations and argued that she failed to state a claim upon which relief could be granted and failed to satisfy her obligation to mitigate her damages. McDonald's concluded its answer with a request for dismissal of Charles' complaint.

¶ 8 Both parties subsequently engaged in discovery. The parties also attempted to mediate the case, which resulted in an impasse.

¶ 9 After the close of discovery, McDonald's filed a motion for summary judgment on March 7, 2016, arguing that Charles' complaint failed because the court's record contained "no evidence upon which a jury could base a factual finding as to causation of Charles' claimed illness." (J.A. 12.) (emphasis omitted). Charles filed a response brief in opposition to McDonald's summary judgment motion, arguing that the evidence she provided was "sufficient to sustain a verdict on a claim of strict liability." (J.A. 49-50.) Additionally, Charles filed a motion to strike McDonald's' Exhibits G and H on April 11, 2016, to which McDonald's filed its opposition on May 5, 2016.

¶ 10 Pursuant to an April 19, 2016 order by the Superior Court, McDonald's and Charles also filed supplemental briefs on the state of the law in the Virgin Islands with respect to Charles' claim on May 5, 2016, and May 24, 2016, respectively. McDonald's argued that the implied warranty of fitness for a particular purpose is a valid claim in the Virgin Islands, but that it was inapplicable to Charles' case "because she purchased the fish sandwich for its ordinary use, consumption." (J.A. 82.) Charles, meanwhile, argued that the fish sandwich "was not just for ordinary use or consumption" because it was a "franchised" item marketed specifically as a "fish-fillet sandwich combo." (J.A. 88.) Charles also argued that the theory of strict liability, which she first raised in her opposition to summary judgment, was applicable in the alternative.

¶ 11 The Superior Court held a hearing on the pending motions on August 9, 2016, and by order dated August 18, 2016, construed Charles' complaint asserting a claim for breach of the implied warranty of merchantability, because consumption is the ordinary purpose of a fish sandwich and thus the warranty of fitness for a particular purpose is not applicable; rejected Charles' attempt to add a strict liability claim because it was first raised in the reply to a motion for summary judgment and not in the complaint; denied Charles' motion to strike Exhibits G and H; and granted summary judgment in favor of McDonald's, ultimately dismissing Charles' complaint with prejudice. In

granting summary judgment, the Superior Court held that Charles failed to provide sufficient evidence for a jury to conclude that her consumption of the McDonald's sandwich proximately caused her illness and alleged associated injuries. Charles filed a timely notice of appeal from the Superior Court's entry of summary judgment, and this appeal ensued.

III. JURISDICTION

¶ 12 This Court has jurisdiction over this appeal pursuant to title 4, section 32(a) of the Virgin Islands Code, which provides that "[t]he Supreme Court shall have jurisdiction over all appeals arising from final judgments, final decrees or final orders of the Superior Court, or as otherwise provided by law." Because the Superior Court granted McDonald's' motion for summary judgment and, in so doing, adjudicated all the claims of each party, dismissing the action with prejudice, the August 18, 2016 order is a final order within the meaning of section 32. *Sealey–Christian v. Sunny Isle Shopping Ctr., Inc.*, 52 V.I. 410, 418 (V.I. 2009).

IV. STANDARD OF REVIEW

¶ 13 A review of the Superior Court's award of summary judgment is plenary. *Williams v. United Corp.*, 50 V.I. 191, 194 (V.I.2008). "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Summary judgment is appropriate when a full review of the record reveals "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a); [1] *see also Beard v. Banks*, 548 U.S. 521, 522

[1] At the time that the Superior Court issued its memorandum opinion and order, the Federal Rules of Civil Procedure were applicable to the Superior Court of the Virgin Islands pursuant to former Superior Court Rule 7. *See James v. O'Reilly*, S. Ct. Civ. 2018-0001, 2019 WL 1996919, at *5 (V.I. May 1, 2019) (noting repeal of former Superior Court Rule 7). It is noteworthy that the Virgin Islands Rules of Civil Procedure, which includes Rule 56 addressing summary judgment,

(2006). "The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. "When reviewing an order granting summary judgment, we . . . apply the same test [the Superior Court] applies." *Saldana v. Kmart Corp*., 43 V.I. 361, 364 (V.I. 2001). In applying this test, we do "not weigh the evidence or determine the credibility of witnesses." *Perez v. Ritz-Carlton (Virgin Islands), Inc*., 59 V.I. 522, 527 (V.I. 2013). Instead, we "must view the facts in the light most favorable to the nonmoving party and draw all inferences in that party's favor." *Saldana*, 43 V.I. at 364. We will affirm the Superior Court's ruling granting summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.* (citing FED. R. CIV. P. 56(c)). Importantly, "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Id.* at 364-65 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). Finally, we review the Superior Court's decision regarding the admissibility of evidence for abuse of discretion. *Ritter v. Virgin Islands*, 51 V.I. 354, 359 (V.I. 2009).

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became effective on March 31, 2017, which is after the Superior Court's August 18, 2016 memorandum opinion.

V. DISCUSSION

A. Implied warranty of merchantability in the Virgin Islands[2]

¶ 14 In the Virgin Islands, "a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." 11A V.I.C. § 2-314.[3] To be merchantable goods must be "of fair average quality within the description; and [ ] fit for the ordinary purposes for which such goods are used," among other requirements. 11A V.I.C. § 2-314(2). Additionally, sale is defined in the statute as including the "serving for value of food or drink to be consumed either on the premises or elsewhere." 11A V.I.C. § 2-314(1).

[2] As noted above, Charles originally brought a claim for breach of the warranty of fitness for a particular purpose, which the Superior Court construed as a claim for breach of the implied warranty of merchantability. As neither party contested this construction, and as proximate causation is an element of both claims, this court will address only the implied warranty of merchantability claim. *See* 11A V.I.C. §§ 2-314, 2-315.

[3] 11A V.I.C. § 2-314 provides that:

> (1) Unless excluded or modified (§ 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
> (2) Goods to be merchantable must be at least such as (a) pass without objection in the trade under the contract description; and (b) in the case of fungible goods, are of fair average quality within the description; and (c) are fit for the ordinary purposes for which such goods are used; and (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and (e) are adequately contained, packaged, and labeled as the agreement may require; and (f) conform to the promises or affirmations of fact made on the container or label if any.
> (3) Unless excluded or modified (§ 2-316) other implied warranties may arise from course of dealing or usage of trade.

¶ 15 To state a claim for breach of the implied warranty of merchantability, a plaintiff must allege that (1) goods were sold by a merchant; (2) the good were not merchantable at the time of sale; (3) the plaintiff suffered an injury; (4) the plaintiff's injury resulted from the non-merchantability of the goods; and (5) the seller had notice of the injury. *Freedman v. Chrysler Corp.*, 564 A.2d 691, 697 (Del. Super. Ct. 1989) (quoting *Nielson Equip. Bus. Ctr. Inc. v. Monteleone*, 524 A.2d 1172, 1175 (Del. 1987)); *see also F. E. Myers Co v. Pipe Maint. Inc.*, 599 F. Supp 697, 703 (D. Del. 1984); *Matos v. Nextran, Inc.*, 52 V.I. 676, 685-86 (D.V.I. 2009); *Banks v. Int'l Rental and Leasing Corp*., 49 V.I. 970, 975 (D.V.I. 2008)).

B. Evidence of proximate cause in the implied warranty of merchantability.

¶ 16 On appeal, Charles argues that the Superior Court erred in granting McDonald's' motion for summary judgment in a ruling she characterizes as conclusory. Specifically, Charles contends that the Superior Court "disregarded or discredited [her] ability, as a lay person [sic], to discern what foods are good and fit for human consumption and what foods are not." (Appellant's Br. 4.) Relying on Rule 701 of the Federal Rules of Evidence,[4] Charles argues that she was permitted as a layperson to "testify as to what in her opinion, cause[d] her to break out itching and with blisters as she did." (Appellant's Br. 4.) Charles concludes that as a layperson she presented "substantial evidence, upon which a rational juror could conclude that the itching and blistering which instantly

[4] On April 2010, Act No. 1761 became law, and the Federal Rules of Evidence, including Rule 701 became applicable in the Superior Court. Rule 701 of the Virgin Islands Rules of Evidence, which became effective on March 30, 2017, is identical to Rule 701 of the Federal Rules of Evidence in existence at the time of the Superior Court entered summary judgment. *In re Adoption of Virgin Islands Rules of Evidence*, No. 2017-002, 2017 V.I. Supreme LEXIS 21, at *1 (V.I. Apr. 3, 2017).

appeared in her mouth and on her skin, resulted from the fish [fillet] sandwich which she purchased from McDonald's and immediately consumed." (Appellant's Br. 4.)

¶ 17 In response, McDonald's contends that Charles failed to present specific evidence showing that the McDonald's sandwich proximately caused her injuries. McDonald's argues that "[t]he only causal link between the fish sandwich and Charles' symptoms is that Charles claims a causal link." (Appellee's Br. 3) (emphasis omitted). To further bolster its argument, McDonald's cites *Etienne v. United Corp.*, 44 V.I. 113, 125-26 (D.V.I. 2001), for the proposition that there must be some expert evidence to show a causal link between the fish sandwich Charles ate and the symptoms she experienced. Absent evidence from a medical doctor or other expert witness to support a theory on the causation of her injuries, McDonald's argues that the Superior Court properly granted summary judgment in its favor. We agree.

¶ 18 Because the issue on appeal is whether the McDonald's sandwich that Charles partially consumed proximately caused her injuries, this Court will address only the proximate cause element in Charles' cause of action for breach of implied warranty of merchantability. To prove her claim of breach of implied warranty of merchantability, Charles must show that her injury resulted from the goods' non-merchantability. *Freedman*, 564 A.2d at 697. Importantly, food poisoning cases are governed by the same basic rule of causation that governs other tort cases. *Sarti v. Salt Creek Ltd.*, 85 Cal. Rptr. 3d. 506, 508 (Cal. Ct. App. 2008).

¶ 19 In its motion for summary judgment, McDonald's challenged Charles' ability to provide adequate proof of the element of causation.[5] To survive McDonald's' summary judgment attack,

[5] The question of whether there is proximate cause is ordinarily a question of fact to be submitted to the jury. *See Antilles School, Inc. v. Lembach*, 64 V.I. 400, 412 (V.I. 2016) (discussing the jury's role in causation determinations).

Charles was required to provide sufficient competent evidence—direct or circumstantial—to support all the elements for breach of the implied warranty of merchantability, including the element of proximate causation. *See Williams v. Borough of West Chester*, 891 F.2d 458, 460-61 (3d Cir. 1989) (noting that "affirmative evidence—regardless of whether it is direct or circumstantial—must amount to more than a scintilla, but may amount to less . . . than a preponderance" for summary judgment determination). Charles was permitted to support the causation element with lay testimony that the McDonald's sandwich that she partially consumed caused her injuries, if such a conclusion related to a matter within a layperson's scope of knowledge. *See Money v. Manville Corp.*, 596 A.2d 1372, 1375-76 (Del. 1987). However, "[i]f the matter in issue is one within the knowledge of experts only and not within the common knowledge of laymen, it is necessary for the plaintiff to introduce expert testimony in order to establish a *prima facie* case." *Id.* (*quoting* M.S. MADDEN, PRODUCTS LIABILITY 533 (2d ed. 1988)); *see also Allgoewer v. City of Tracy*, 143 Cal. Rptr. 3d 703 (Cal. Ct. App. 2012); *Mountaire of Delmarva, Inc. v. Glacken*, 487 A.2d 1137, 1141 (Del. 1984); *Weiner v. Wisniewski*, 213 A.2d 857, 858 (Del. 1965); *Laskowski v. Wallis*, 205 A.2d 825, 826 (Del. 1964).

¶ 20 The Virgin Islands case law on food poisoning and the implied warranty of merchantability is sparse and exiguous. Accordingly, we will examine precedents from other jurisdictions.

¶ 21 Typically, lay testimony is not sufficient to prove causation in a food poisoning case; instead, some medical evidence is required. *See Landreneau v. Copeland's Cheese Cake Bistro, L.L.C.*, 7 So.3d 703 (La. Ct. App. 2009) (holding that the opinion of a non-medical expert and the concurrent illness of a friend were insufficient proof of causation in the absence of medical testimony); *contra Sneed v. Beaverman*, 395 P.2d 414, 415 (Okla. 1964); *Williams v. O'Charley's Inc.*, 728 S.E.2d 19 (N.C. Ct. App. 2012); *Johnesee v. Stop & Shop Cos.*, 416 A.2d 956 (N.J. Super.

Ct. 1980). Further, such evidence must not be speculative. *See Young v. Hickory Bus. Furniture*, 538 S.E.2d 912, 916-17 (N.C. 2000) (finding insufficient evidence of causation where the physician's testimony was based purely on speculation and constituted the sole evidence of causation). However, a layperson "who claim[s] to suffer from such common ailments as cold, indigestion, headaches, nausea, or skin rashes [may] testify about the nature and cause of their ailment without the need for expert medical testimony." *Vallinoto v. DiSandro*, 688 A.2d 830, 852 & n.24 (R.I. 1997) (collecting cases). Thus, causation in a food poisoning case may be established by a combination of lay testimony and medical evidence. *See Bussey v. E.S.C. Rests., Inc.*, 620 S.E. 2d 764, 767-68 (Va. 2005) (holding that lay testimony as to the altered taste of food and the time of onset of illness, combined with medical evidence of food poisoning, was sufficient to show causation). In accordance with these general rules, we hold that causation in a food poisoning case may be established by either medical expert evidence alone or a combination of lay evidence and medical evidence based on reasonable inferences drawn from substantial admissible evidence. *See e.g. McCarley v. West Quality Food Service*, 960 S.W.2d. 585, 589 (Tenn. 1998) ("[C]ausation may be established by either expert testimony or through a combination of both expert and lay testimony"); *Landreneau*, 7 So.3d at 706-07.

C. The Superior Court properly granted the motion for summary judgment by McDonald's against Charles in her cause of action for breach of the implied warranty of merchantability.

¶ 22 In support of its summary judgment motion in this case, McDonald's offered as evidence Charles' and Keenisha's depositions, Charles' self-authenticating disclosures, Charles' medical report and invoice from her visit to Dr. Cintron, a copy of an invoice for methylprednisolone that was prescribed by Dr. Cintron, and the McDonald's incident report which Charles completed. In response to McDonald's motion for summary judgment, Charles was required to identify probative

evidence demonstrating a genuine issue of material fact on the issue of causation in order for the court to hold a trial. *See* FED. R. CIV. P. 56(c) and (e). Charles filed her opposition to McDonald's' motion for summary judgment, to which she attached her affidavit regarding the incident, a motion to strike Exhibits G and H, which contain her medical record, and an additional statement of facts not in dispute.

¶ 23 Read in the light most favorable to Charles, the non-moving party, the evidence Charles presented in response to McDonald's' summary judgment motion established that she purchased the sandwich at McDonald's and that she partially consumed it but discarded it before she finished eating it all because it had a peculiar taste. She soon thereafter began to experience itching and swelling over her body, which progressively worsened. She visited Dr. Cintron, who examined her and prescribed medication for her symptoms, and she was unable to go to work for approximately two days because of the symptoms allegedly caused by her consumption of the McDonald's sandwich.

¶ 24 In a trial, Charles, as a layperson, is permitted to testify about her personal symptoms and experience after consuming the McDonald's sandwich. *See In re Commitment of Barbour*, 733 A.2d 1286, 1288 (Pa. Super. Ct. 1999) (observing that a lay witness may testify about their own physical condition but may not testify regarding a medical diagnosis); *Travellers Ins. Co. v. Heppenstall Co.*, 61 A.2d 809, 813 (Pa. 1948) (noting that a lay witness is not authorized to testify to "matters involving the existence or nonexistence of a disease the discovery of which requires the training and experience of a medical expert"); *see also Collins v. Cooper*, 746 A.2d 615, 620 (Pa. Super. Ct. 2000). However, as discussed above, Charles' lay opinion on the cause of her symptoms, based solely on their onset shortly after she partially consumed the McDonald's sandwich, is highly speculative and is not sufficient proof that the sandwich she partially consumed

caused her injuries. *See Morell v. Finke*, 184 S.W. 3d 257, 272 (Tex. App 2005) (citing *Park Place Hosp. v. Estate of Milo*, 909 S.W. 2d 508, 511 (Tex. 1995)). And, as mentioned previously, food poisoning cases are governed by the same basic rule of causation that govern other tort cases. *Sarti*, 85 Cal. Rptr. 3d. at 517. Further, it is well-established that "[a] mere showing that a person became sick subsequent to eating food is insufficient . . ." to establish proximate cause in a food poisoning tort action. 47 AM. JUR. PROOF OF FACTS 3d 47 (1998) (collecting cases); *see also Stewart v. Martin*, 181 S.W.2d 657, 658 (Mo. 1994) ("The unwholesome character of food is not established, nor is a prima facie case made, merely by showing that the plaintiff became sick after eating it."); *Franke's Inc. v. Bennett*, 146 S.W.2d 163, 164 (Ark. 1941) ("We do not think that, the mere fact that a person eats food in a restaurant, hotel or cafeteria and thereafter becomes ill, is of itself sufficient to establish liability on the owner . . ."). Importantly, Charles did not respond to the summary judgment motion with an affidavit or deposition from Dr. Cintron or another physician, offering an opinion that there was a causal linkage between Charles' illness and the McDonald's sandwich that she partially consumed. Notably, Dr. Cintron made no diagnosis about the cause of Charles' injuries and there is no evidence in the record of any reference to the presence of any food borne bacteria in Charles' medical records. Moreover, Charles' Rule 26 disclosure revealed that she had no intention of producing an expert witness at trial.

¶ 25 Based on the allegations in Charles' complaint, and the materials submitted in connection with the motion for summary judgment, this Court concludes that Charles has not sufficiently identified evidence to create a triable issue on her claim for breach of the implied warranty of merchantability. Specifically, Charles failed to come forward in response to the motion by identifying potentially admissible proof of the causal relationship between the sandwich she purchased from McDonald's and partially ate and the injuries she allegedly suffered. Proof of

proximate cause as an element of liability is required for a breach of implied warranty of merchantability cause of action. *See* 11A V.I.C. § 2-314. "With regard to proximate causation, where there is no direct proof, the circumstantial evidence must be sufficient to show that the causation alleged is 'a probability rather than a mere possibility.'" *Bussey*, 620 S.E. 2d at 767 (quoting *Southern States Coop. v. Doggett*, 292 S.E. 2d 331, 335 (Va. 1982)). Essentially, Charles was required to identify evidence that could be sufficient for a jury to rationally find that the consumption of the sandwich was a direct cause of the injury for which she seeks compensation. *See Geisness v. Scow Bay Packing Co.*, 132 P.2d 740 (Wash. 1942) (reversing judgment against a company that canned and packed salmon, which was allegedly unwholesome and fatal to the consumer, because the decedent's physician, who was neither an expert nor knowledgeable on food poisoning, rendered a diagnosis that was speculative). Accordingly, viewing the evidence presented in the light most favorable to Charles, the record indicates that Charles' only evidence of causation is her lay opinion that the sandwich was the proximate cause of her illness. Determining whether the McDonald's sandwich that Charles partially consumed proximately caused her illness requires medical evidence. And, because only a qualified expert may testify to his or her opinion on the issue of proximate cause in accordance with Virgin Islands Rules of Evidence 702, Charles' lay opinion, standing alone, is insufficient to establish causation.[6] Accordingly, the Superior Court properly awarded summary judgment in favor of McDonald's. *See Fuggins v. Burger King*, 760 So.2d 605 (La. Ct. App. 2000); *Landreneau v. Copeland's Cheese*

[6] Because any opinion as to causation in food poisoning cases involves questions of diagnostic medicine and etiology, such opinions are necessarily based upon "scientific, technical or specialized knowledge," and are therefore not properly within the scope of permissible lay witness testimony under Virgin Islands Rule of Evidence 701. As such, Charles' opinion regarding causation may not merely be insufficient, but may also be inadmissible under the rules of evidence. However, because the parties do not raise this issue on appeal, we need not reach it here.

Cake Bistro, L.L.C., 7 So.3d 703 (La. Ct. App. 2009); *Greenup v. Roosevelt*, 267 So.3d 138 (La. Ct. App. 1990).

D. The Superior Court did not abuse its discretion when it included Charles' medical record in deciding McDonald's' motion for summary judgment.

¶ 26 Charles argues that the Superior Court erred when it included Exhibits G and H, which contained personal and confidential medical records, in its determination to award McDonald's summary judgment. Charles argues further that her medical records for 2008 and 2012 are "irrelevant to the treatment for itching, blistering, and skin irritation she sustained due to the consumption of contaminated foods prepared by McDonald's." (Appellant's Br. 7.) Additionally, Charles objects to the Superior Court's consideration of Exhibits G and H on the basis that the exhibits were irrelevant and not in admissible form.

¶ 27 McDonald's argues in response that Charles failed to make a viable argument to support her conclusion that "Exhibits G and H were abusive, or, otherwise, improper under the circumstances" and that the Superior Court was correct to consider Exhibits G and H because they "provide an alternate explanation for Charles' symptoms, [and] are relevant to her claim." (Appellee's Br. 6.) We will review the Superior Court's decision to include Charles' medical records only for abuse of discretion. *People v. Todmann*, 53 V.I. 431, 436 (V.I. 2010).

¶ 28 The Federal Rules of Evidence provide that "[a]ll relevant evidence is generally admissible" and that "[r]elevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." FED. R. EVID. 401. Exhibits G and H, by suggesting that some of Charles' symptoms preceded her consumption of the McDonald's fish sandwich, make it less probable that the sandwich caused those symptoms, which is material to

the determination of the action. Thus, the exhibits are relevant and, as long as such evidence can be "presented in a form that would be admissible in evidence," FED. R. CIV. P. 56(c)(2), the Superior Court properly considered them in adjudicating summary judgment. Accordingly, the Superior Court did not err in denying Charles' motion to strike Exhibits G and H and, consequently, did not abuse its discretion.

VI. CONCLUSION

¶ 29 For the forgoing reasons, we affirm the Superior Court's judgment granting McDonald's' motion for summary judgment and dismissing this action with prejudice as set forth in its memorandum and order dated August 18, 2016, because Charles failed to respond to the motion by identifying potentially admissible material that would support a jury finding that the McDonald's sandwich that she partially consumed proximately caused her injuries.

DATED this 27th day of September 2019.

/s/ Ive Arlington Swan
IVE ARLINGTON SWAN
Associate Justice

ATTEST
VERONICA J. HANDY, ESQ.
Clerk of the Court