

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

STATE FARM FIRE & CASUALTY)
CO. (as subrogee of Quinta Essential)
Foods, LLC d/b/a Five Guys)
Famous Burgers & Fries),)

Plaintiff,)

v.)

C.A. Nos. 09C-08-216 PLA
09C-08-217 PLA

THE MIDDLEBY CORPORATION,)
PITCO FRIALATOR, INC.)
(MAGIC KITCH'N),)
INVENSYS CONTROLS,)
ROBERTSHAW, and AMERICAN)
KITCHEN MACHINERY)
& REPAIR CO., INC.,)

Defendants.)

UPON DEFENDANTS THE MIDDLEBY CORPORATION
AND PITCO FRIALATOR, INC.'S MOTIONS FOR SUMMARY JUDGMENT

GRANTED

UPON DEFENDANT AMERICAN KITCHEN MACHINERY
& REPAIR CO., INC.'S MOTIONS FOR SUMMARY JUDGMENT

GRANTED

Submitted: March 24, 2011

Decided: April 12, 2011

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Defendant American Kitchen Machinery & Repair Co., Inc.

ABLEMAN, J.

I.

Quinta Essential Foods, LLC (“Quinta”) owns the Hockessin restaurant Five Guys Famous Burgers & Fries, which experienced two deep-fryer conflagrations within a three-month period in 2007. The first fire occurred in the early morning hours on August 26, 2007, in a deep-fryer manufactured by Defendant Pitco Frialator, Inc. (“Pitco”). The fryer was a three-fryer unit, and the fire originated in the area of the far left section. Following the August incident, Quinta ordered a new Pitco fryer to replace the damaged unit. On November 12, 2007, another after-hours fire occurred in this replacement unit, also beginning in the left-most fryer.¹ Both fryers were sold and installed by Defendant American Kitchen Machinery & Repair Co., Inc. (“American Kitchen”).

Plaintiff State Farm Fire & Casualty Company (“State Farm”), which insures Quinta, filed separate subrogation actions based on each fire. State Farm claims that the two fires caused more than \$180,000 in damages. In both actions, State Farm alleged breach of warranty and negligence against the following defendants: Pitco; The Middleby Corporation (“Middleby”), which is Pitco’s parent company;

¹ For convenience, the Court will refer to these events as the August fire (which is the subject of C.A. No. 09C-08-216) and the November fire (which is the subject of C.A. No. 09C-08-217).

American Kitchen; and Invensys Controls and Robertshaw, which allegedly manufactured gas control valves incorporated into the Pitco fryers.²

State Farm obtained an expert report concerning the August fire from Paul J. Boerner, a certified fire and explosion investigator. Boerner's one-and-a-half-page report briefly described the damage to the fryer and concluded that "[b]ased on the location of the most severe fire damage and the lowest burn, the fire originated at the thermostat housing within the interior controls of the fryer" and was accidental.³

With regard to the November fire, State Farm has submitted the expert report of fire investigator Michael Schaal. In his report, Schaal concluded that the fire began within the lower section of the fryer, and indicated a need for follow-up analysis:

It has been determined that the area of fire origin was located in the lower section of a Pitco Deep Fryer. . . . The cause of the fire resulted from an electrical or mechanical malfunction within the Pitco Fryer. *Further analysis of the subject fryer should be conducted by an electrical and/or mechanical engineer to determine the specific cause of the fryer's failure.* . . . It was also revealed during the course of our investigation that there is a voluntary recall by Invensys (Robertshaw) who announced an industry wide recall of certain 7000 series gas

² On February 8, 2011, the Court granted summary judgment in favor of Invensys Controls and Robertshaw, finding that "[v]iewed in the light most favorable to State Farm, the record does not contain evidence from which a reasonable jury could conclude that an Invensys [or Robertshaw] product caused either fire." *State Farm Fire & Cas. Co. v. Middleby Corp.*, 2011 WL 683883, at *2 (Del. Super. Feb. 8, 2011).

³ Defs. Pitco and Middleby's Mot. for Summ. J. (C.A. No. 09C-08-216), Ex. B.

valves, which are located in the subject fryers. The gas valve was manufactured by Robertshaw from February 2003 to August 2004. . . . Further analysis of the subject fryer should be conducted by an electrical and/or mechanical engineer to determine the specific failure of the subject fryer.⁴

Despite the highlighted language, State Farm apparently never obtained a further opinion regarding the specific cause of the November fire.

During the course of discovery in these cases, Pitco and Middleby obtained their own expert evaluations of both fryers. Their expert, certified fire investigator Eric Moeckl, disputed the conclusions drawn by Plaintiff's experts without offering an opinion as to the specific cause of either fire. As to both fryers, Moeckl identified Honeywell as the manufacturer of the gas valves rather than Invensys or Robertshaw, and therefore disregarded the recall of Invensys/Robertshaw valves.

Based upon a burn pattern on the bottom face of a grease drain located in the lower control section of the fryer involved in the August fire, Moeckl concluded that the fire originated below the thermostat housing, and was not caused by a defect in the thermostat or thermostat housing.⁵ Moeckl further explained the reasons for his conclusions as follows:

⁴ Defs. Pitco and Middleby's Mot. for Summ. J. (C.A. No. 09C-08-217), Ex. B (emphasis added).

⁵ Defs. Pitco and Middleby's Reply (C.A. No. 09C-08-216), Ex. G, at 6.

If the origin was the thermostat, one would expect to see different burn patterns. Burn patterns were observed at the bottom face of the grease drain, which would not be expected if the fire originated at the thermostat. In addition, one would expect to find indications of electrical activity at the origin of the fire. . . .

The [Origin & Cause report authored by Paul Boerner] did not identify a defect in the thermostat. The thermostat would have been defective if it could not regulate the oil temperature, as it was intended, or if the electrical wiring connected to the thermostat had a defect. If the thermostat did not regulate the oil temperature, then the capillary tube (which shuts off the fryer burner if the oil overheats) would also have to be defective [for a fire to result]. In addition, if both the thermostat and the capillary tube were defective, then the oil would have overheated inside the fryer kettle, and the origin of the fire would have been outside of the controls area. Electrical beading, as a result of electrical activity, would be observed if the electrical wiring was defective, however, this was not the case.⁶

Moeckl also observed that the gas valve to the fryer had been left in an on position, although “[t]he installation manual required this valve to be turned off when the fryer was not in use.”⁷

In his report on the November fire, Moeckl identified a “V-shaped burn pattern . . . on the exterior left door” and a burn pattern on the bottom face of a grease drain located in the lower portion of the left unit’s controls area, which he viewed as evidence that “the fire had attacked the fryer from below” and did not originate from a defect or malfunction in the controls.⁸ Based upon statements

⁶ *Id.*

⁷ *Id.* at 5.

⁸ Defs. Pitco and Middleby’s Reply (C.A. No. 09C-08-216), Ex. H, at 6.

from the restaurant's manager that the circuit breakers were off at the time of the fire, as well as damage patterns inconsistent with electrical activity or a gas leak, Moeckl ruled out electrical defects or a mechanical malfunction in the gas control valve as possible causes.

II.

By their joint motions for summary judgment, Pitco and Middleby contend that State Farm has not offered any evidence that they proximately caused the fires. Middleby is not mentioned in any of State Farm's evidence. Pitco emphasizes that the only relevant discovery material State Farm has disclosed consists of Schaal's expert report regarding the November fire, which states that further analysis was required to determine the specific cause, and Boerner's expert report on the August fire, which states that the fire originated in the thermostat housing and was accidental. According to Pitco and Middleby, neither report represents adequate evidence establishing that a Pitco or Middleby product was defective or proximately caused either fire.

Along similar lines, American Kitchen's motions argue that State Farm has not adduced any evidence that the installation process played a role in causing either fire. American Kitchen notes that the installation process did not require any electrical wiring or work on any of the internal components of the fryers, which

were complete as delivered and needed only to be plugged in and connected to the gas line.

State Farm responds by suggesting that the doctrine of *res ipsa loquitur* should apply in these cases, as the fires consumed the fryers' thermostats and damaged other components, rendering it impossible for State Farm to prove a specific defect in either fryer through direct evidence. Moreover, State Farm notes that the parties do not dispute that the fires began inside the Pitco fryers, both of which were relatively new units. Under these circumstances, State Farm argues that a jury could infer from the circumstantial evidence that the moving defendants' negligence caused the fires.

With regard to American Kitchen's motions, State Farm further submits that it may be entitled to maintain a strict liability action. State Farm bases its position on Delaware's version of § 2-318 of the Uniform Commercial Code (UCC), which extends sellers' warranties to "any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty."⁹ State Farm suggests that Delaware's Article 2 "does not preempt claims by a subrogated insurance carrier," and that "the equitable principles of

⁹ 6 Del. C. § 2-318.

subrogation [should] operate to protect the innocent third party” by permitting the insurer to maintain a strict liability action.¹⁰

III.

When considering a motion for summary judgment, the Court examines the record to ascertain whether genuine issues of material fact exist and to determine whether the moving party is entitled to judgment as a matter of law.¹¹ Initially, the burden is placed upon the moving party to demonstrate that its legal claims are supported by the undisputed facts.¹² If the proponent properly supports its claims, the burden “shifts to the non-moving party to demonstrate that there are material issues of fact for resolution by the ultimate fact-finder.”¹³ Summary judgment will only be granted if, after viewing the evidence in the light most favorable to the non-moving party, no material factual disputes exist and judgment as a matter of law is appropriate.¹⁴

IV.

The Court finds that *res ipsa loquitur* does not apply in these cases based upon the evidence proffered by State Farm. State Farm’s experts do not even

¹⁰ Pl.’s Opp’n to Def. American Kitchen’s Mot. for Summ. J. (C.A. No. 09C-08-216), at 3.

¹¹ Super. Ct. Civ. R. 56(c).

¹² E.g., *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 879 (Del. Super. 2005).

¹³ *Id.* at 880.

¹⁴ *Id.* at 879-80.

theorize as to probable causes of the fires, and a lay jury cannot attribute the fires to a defect in the fryers or a problem with their installation in the absence of expert testimony. Because State Farm has not offered any evidence to support that acts, omissions, or products for which the moving defendants would be responsible caused the fires, the defendants are entitled to summary judgment.

As explained by Delaware Rule of Evidence 304(a), *res ipsa loquitur* is a rule of circumstantial evidence which allows the trier of fact to draw an inference of negligence from the occurrence of an accident, provided certain elements are established. Because *res ipsa loquitur* acts only to permit an inference, it does not affect a plaintiff's burden of proof or create a presumption of negligence. Rule 304(b) sets forth the circumstances under which *res ipsa loquitur* will apply:

- (1) The accident is such as, in the ordinary course of events, does not happen if those who have management and control use proper care; and
- (2) The facts are such as to warrant an inference of negligence of such force as to call for an explanation or rebuttal from the defendants; and
- (3) The thing or instrumentality which caused the injury must have been under the management or control (not necessarily exclusive) of the defendants or their servants at the time the negligence likely occurred; and
- (4) Where the injured person participated in the events leading up to the accident, the evidence must exclude his or her own conduct as a responsible cause.

Although Rule 304 calls for the applicability of *res ipsa loquitur* to be decided at the close of the plaintiff's evidence, this Court has long recognized that "the stage

at which a court may consider the applicability of *res ipsa loquitor* is determined on a case-by-case basis considering the nature of the contentions, the sufficiency of the parties' factual showing[s], and the doctrine's applicable standards.”¹⁵

Defendants rely in part upon this Court's decision in *Smigelski v. Smith*¹⁶ for the proposition that the cause of a fire may not be proven by reliance upon *res ipsa loquitur*. The Court would not go so far as to make such a categorical conclusion, but *Smigelski* does offer significant guidance.

In *Smigelski*, a tow-truck operator was injured when he responded to a fire call involving a truck owned by a freight line and operated by one of its employees. As the plaintiff attempted to extinguish the fire in the truck's rear wheel area, a wheel light assembly exploded, causing pieces of the assembly to strike the plaintiff.¹⁷ By his complaint, Smigelski alleged that the defendant freight line failed to conduct adequate maintenance and care of the truck, failed to train and adequately supervise its employee-driver, and was otherwise negligent. Smigelski also sued the driver, alleging that he caused the fire by negligently “riding the brakes” and failing to properly maintain the brakes and tires. As a

¹⁵ *Orsini v. K-Mart Corp.*, 1997 WL 528034, at *4 (Del. Super. Feb. 25, 1997) (citing *Lacy v. G.D. Searle & Co.*, 484 A.2d 527, 530 (Del. Super. 1984)).

¹⁶ 1990 WL 161242 (Del. Super. Oct. 23, 1990).

¹⁷ See *Smigelski v. Smith*, 1990 WL 123012, at *1 (Del. Super. July 17, 1990), *reh'g granted*, 1990 WL 161242.

result of discovery violations, the Court precluded the plaintiff from presenting expert testimony on liability.¹⁸ The employee who was driving at the time of the fire could not be located, but a companion driver who operated the truck during part of the same trip testified at his deposition to conducting a routine check of the tires, brakes, and other parts at the outset of the trip and finding no anomalies. The companion driver was asleep immediately prior to the fire. No specific information was available to explain the events leading up to the fire or the fire's cause.¹⁹ The defendant freight line moved for summary judgment, which the plaintiff opposed on the ground that *res ipsa loquitur* would permit the trier of fact to infer the existence of negligence.

The Court in *Smigelski* found that a reasonable person could conclude from the evidence presented that the fire “originated in or around the wheel mechanism, brakes or tires.”²⁰ In applying the elements of *res ipsa loquitur*, the Court was “called upon to determine whether . . . from the circumstances of the injury reasonable persons could conclude that the injury would not have happened in the absence of some negligence on the part of the defendant.”²¹ Answering that

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ 1990 WL 161242, at *2.

²¹ *Id.*

question, the Court noted, required the parties to supply “some assistance . . . concerning the likelihood of fire occurring at or near the rear wheels of a trailer being pulled by a truck tractor *and probable causes of such fire.*”²² In the absence of such “assisting” evidence, the Court lacked “experience or knowledge with which to make the determination called for,” and could not find that *res ipsa loquitur* was applicable. When the parties were unable to proffer further evidence in response to the Court’s inquiries, the Court granted summary judgment based upon the plaintiff’s failure to present evidence from which negligence or causation could be established.²³

Although in the cases at bar the plaintiff has presented expert reports, those reports leave State Farm in no better position than the plaintiff in *Smigelski*. At the most, a jury accepting State Farm’s experts’ opinions could reasonably conclude that the November fire originated within the fryer, and that the August fire began within the thermostat housing. Yet, as *Smigelski* aptly explains, a plaintiff’s proffer of evidence as to where a fire originated within a piece of machinery does not necessarily warrant an inference of negligence. This Court has no knowledge of the internal workings of commercial deep-fryers, nor how those components can catch fire when a fryer is not in active use. Schaal’s suggestion that an “electrical

²² *Id.* (emphasis added).

²³ *Smigelski v. Smith*, 1990 WL 199825 (Del. Super. Nov. 30, 1990).

or mechanical malfunction within the Pitco fryer” caused the November fire is far too nonspecific to offer any help, and does not exclude the possibility of negligence by Quinta’s employees.

State Farm thus provides no information from which this Court or a lay jury could draw reasonable, non-speculative inferences about the probable cause or causes of fires originating in the locations identified by Schaal and Boerner. Without even circumstantial evidence suggesting probable causes of the fire, the Court cannot conclude that the facts “warrant an inference of negligence of such force as to call for an explanation or rebuttal” from the defendants, as required for *res ipsa loquitur* to apply under Rule 304(b).

State Farm also fails to establish that the third and fourth elements of *res ipsa loquitur* are satisfied. The moving defendants were not in control of the fryers in the time period immediately preceding either fire, and State Farm has not eliminated the possibility that the fryers may have been modified post-sale or subject to improper or inadequate use, cleaning, or maintenance in such a way as to have caused the fires. Accordingly, the Court cannot find that the fryers were “under the management or control” of the defendants at the time the negligence likely occurred, as the Court cannot discern whether the fires were caused by conditions existing in the fryers at the time of delivery and installation or resulted from subsequent events. This uncertainty further means that Plaintiff has not

excluded the conduct of Quinta agents or employees as potential causes of the fires.

State Farm contends that it is relieved from establishing a specific causal mechanism because of damage to the affected fryers' thermostat housings; however, the destruction of the thermostats would not prevent a qualified expert from opining as to possible or probable causes based upon the locations of the fires' origins. The proper expert opinion *could* permit a jury to infer negligence and causation from circumstantial evidence (*i.e.*, the damage patterns inside the fryers and other facts surrounding the fires). In fact, the expert retained by Pitco and Middleby used this methodology to develop opinions countering State Farm's allegations about where the fires originated and ruling out certain possible causes. Yet State Farm has not obtained the additional expert opinions required to expand Schaal and Boerner's opinions about the origins of the fires into theories regarding the fires' causes.

The flaw in State Farm's approach is particularly evident with respect to the November fire. The origin and cause report authored by Schaal, State Farm's own expert, repeatedly stated that an electrical or mechanical engineer should be consulted to determine the specific cause of the fire. The Court is unaware if State Farm followed up on this clear recommendation, but it never disclosed any additional experts or expert reports during discovery. *Res ipsa loquitur*, where

applicable, permits an inference to be drawn from circumstantial evidence; it cannot excuse or remedy State Farm's failure to pursue necessary expert analysis of circumstantial evidence that was readily available to it.

The authorities cited by State Farm, *General Motors Corp. v. Dillon*²⁴ and *Gebelein v. Hopkins Trucking, Inc.*,²⁵ are distinguishable. Both cases involved automobile accidents in which plaintiffs relied upon *res ipsa loquitur* without proffering expert testimony. In *Dillon*, the plaintiff alleged that the steering column on a new vehicle he owned for four days abruptly "popped" out and pulled to the left, causing him to make a sudden, 90-degree turn into two parked cars.²⁶ At trial, a defense expert "offered an in-depth explanation of the operational characteristics of the energy absorbing steering column with which [the plaintiff's] car was equipped," and explained that the steering column was designed to collapse upon impact.²⁷ The defense expert denied that the column could have acted in the way the plaintiff described prior to his vehicle colliding with the parked cars.

²⁴ 367 A.2d 1020 (Del. 1976).

²⁵ 1993 WL 543981 (Del. Super. Dec. 14, 1993).

²⁶ 367 A.2d at 1021.

²⁷ *Id.* at 1022.

The Delaware Supreme Court held that the trial court did not err in refusing to direct a verdict in the vehicle manufacturer's favor because the principles of *res ipsa loquitur* supported the jury's finding of negligence. As the *Dillon* Court explained, "[the] sudden sequence of events occurring in the operation of a new automobile delivered only four days earlier is sufficient to lead reasonable persons to conclude that the injury to [plaintiff] would not have occurred had there not been some operational defect in the vehicle and thus negligence on the part of the appellants."²⁸

In *Gebelein*, the plaintiff alleged that she lost control of her car on Interstate 95 while attempting to avoid a tire that separated from a damaged trailer being towed by one of the defendants.²⁹ The plaintiff alleged that the trailer was hauled in an unsafe condition, and relied upon *res ipsa loquitur* to support her negligence claims against the towing company and the trailer's owner. This Court held that "[t]he infrequency of vehicle wheels coming off permits an inference by reasonable persons that the falling off of the wheel involved some negligence on the part of the defendants."³⁰

²⁸ *Id.* at 1023.

²⁹ 1993 WL 543981, at *1.

³⁰ *Id.* at *3.

In both *Dillon* and *Gebelein*, a jury that accepted the plaintiff's factual evidence could reach a reasonable conclusion, based upon lay knowledge and common sense, that the litigated accident resulted from a relatively specific problem or defect (*i.e.*, the collapse of the steering column in *Dillon*, and the detachment of the tire in *Gebelein*) which would not have arisen in the absence of the defendants' negligence, and to which the plaintiff could not have contributed. Here, by contrast, expert testimony would be necessary for lay jurors to conclude that the fires occurred because the fryers were defective or improperly installed. Moreover, State Farm has not offered evidence excluding the possibility of negligence by Quinta's employees, which is problematic when restaurant personnel had control of the fryers for at least two months leading up to both fires. While *Dillon* and *Gebelein* illustrate situations in which *res ipsa loquitur* can assist a plaintiff who is unable for reasons beyond his or her control to articulate precisely *how* a defendant was negligent, they are inapposite where the plaintiff cannot show that the circumstances warrant an inference that the defendant was negligent in the first instance.

The evidentiary gaps which militate against the application of *res ipsa loquitur* are fatal to State Farm's negligence and breach of warranty claims. While the existence of proximate cause is generally a jury question, the issue will not reach the jury where a reasoned decision "may require an understanding and

analysis of issues beyond the ken of a typical jury.”³¹ As previously discussed, lay jurors cannot be expected to draw conclusions about the cause of a fire that began in the internal components of an inactive commercial deep fryer without expert guidance. State Farm essentially concedes that it has not articulated any specific acts of negligence or breaches of warranty attributable to any of the moving defendants, and it therefore cannot establish that the defendants’ products or conduct caused the fires. Thus, not only is *res ipsa loquitur* inapplicable, but State Farm has also failed to raise a triable issue as to the moving defendants’ liability.³²

IV.

For the foregoing reasons, the Motions for Summary Judgment filed by Defendants Pitco, Middleby, and American Kitchen are hereby **GRANTED**.

IT IS SO ORDERED.

/s/
Peggy L. Ableman, Judge

Original to Prothonotary
cc: All counsel via File & Serve

³¹ *Cruz v. G-Town Partners, L.P.*, 2010 WL 5297161, at *14 (Del. Super. Dec. 3, 2010) (quoting *Mazda Motor Corp. v. Lindahl*, 706 A.2d 526, 533 (Del. 1988)).

³² The Court also rejects State Farm’s argument that it may be entitled to maintain a strict liability action because 6 *Del. C.* § 2-318 extends sellers’ warranties only to “natural persons.” Section 318 of Article 2 addresses third-party beneficiaries of sellers’ warranties. State Farm is not maintaining its actions as a third-party beneficiary, but rather as the subrogee of Quinta, the buyer of the goods and direct recipient of the warranties.