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 INVENSYS CONTROLS AND ROBERTSHAW'S MOTIONS FOR SUMMARY JUDGMENT
GRANTED

Submitted: February 2, 2011
Decided: February 8, 2011

Amanda L. H. Brinton, Esq., LAW OFFICES OF AMANDA L. H. BRINTON, Wilmington, DE, Attorney for Plaintiff

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ABLEMAN, J.

I.

These cases arise from two separate fires at the Five Guys Famous Burgers & Fries restaurant in Hockessin, Delaware. The first fire occurred in the early morning hours on August 26, 2007, prior to the restaurant's opening, and apparently originated in a deep-fryer manufactured by Defendant Pitco Frialator, Inc. ("Pitco"). The fryer was a three-fryer unit, and the fire started in the far left section. Following the August incident, the restaurant's owners ordered a new Pitco fryer to replace the damaged unit. On November 12, 2007, another after-hours fire erupted in this replacement unit, also originating in the left-most fryer.[1]

Plaintiff State Farm Fire & Casualty Company ("State Farm"), which insures the restaurant's owner, Quinta Essential Foods, LLC, filed separate subrogation actions based on each fire. In both actions, State Farm alleges breach of warranty and negligence against the following defendants: Pitco; The Middleby Corporation, which is Pitco's parent company; American Kitchen Machinery & Repair Co., which allegedly sold and installed the fryers; and Invensys Controls and Robertshaw (collectively, "Invensys"), which allegedly manufactured gas control valves incorporated into the Pitco fryers. State Farm claims that the two fires caused more than $180,000 in damages.

[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).

On January 4, 2011, Invensys moved for summary judgment in both cases, arguing that State Farm has not established the cause of either fire or shown that Invensys products were components in the fryers at issue. In response, State Farm argues that the defendants bear the burden of disproving that their products caused the fires. State Farm suggests that Invensys' motions highlight factual disputes between the parties that render summary judgment inappropriate.

II.

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.[2] Initially, the burden is placed upon the moving party to demonstrate that its legal claims are supported by the undisputed facts.[3] 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."[4] 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.[5]

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[2] Super Ct. Civ. R. 56(c).

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

[4] *Id.* at 880.

[5] *Id.* at 879-80.

III.

For the reasons discussed herein, the Court concludes that State Farm bears the burden of proof as to all elements of its claims against Invensys. Viewed in the light most favorable to State Farm, the record does not contain evidence from which a reasonable jury could conclude that an Invensys product caused either fire. Therefore, Invensys' Motions for Summary Judgment must be **GRANTED**.

The August Fire

As to the August fire, nothing in the record supports that Invensys manufactured the controls used in the original Pitco fryer involved in that incident. Plaintiff's liability expert, Paul J. Boerner, concluded in his expert report that the fire was accidental, and originated in the thermostat housing within the fryer's interior controls.[6] Boerner's report did not identify the manufacturer of the interior controls. Invensys has supplied an affidavit from Brye Davis, its Director of Product Risk Engineering, stating that he has inspected the fryer unit involved in the August fire and that none of the three gas control valves contained in the unit were Invensys products. Joseph J. Erdelsky, Invensys' liability expert, concluded that the damaged control from which the fire originated was not manufactured by Invensys, but was "of the same construction" as "an exemplar in the adjacent

[6] Def. Invensys' Mot. for Summ. J. (C.A. No. 09C-08-216), Ex. D.

fryer," which was labeled as a Honeywell product.[7] In its answers to interrogatories, Pitco, the fryer's manufacturer, stated that it installed Honeywell gas valves in the fryer model at issue.[8]

Plaintiff has offered the expert report of fire investigator Michael Schaal, which states that the Pitco fryer he inspected contained Invensys gas valves. However, Schaal's report does not address the *August* fire, or the fryer involved in it, other than to mention that the replacement fryer involved in the November incident was "the same manufactured fryer by Pitco," and that the damage caused by the two fires was similar.

Although the fryer involved in the November fire may have been the same make and model as its predecessor, it was a different unit, newly purchased after the August fire, and nothing in the record supports even an inference that both units contained identical valve components. The undisputed evidence before the Court consists of a discovery response from the fryer's manufacturer and an expert analysis of the fryer that both clearly identify Honeywell, not Invensys, as the manufacturer of the controls used in the fryer involved in the August fire.

State Farm relies upon *Summers v. Tice*[9] to argue that because it has filed suit against multiple alleged tortfeasors, the Court should shift the burden of proof

[7] *Id.*, Ex. F.

[8] *Id.*, Ex. G.

[9] 199 P.2d 1 (Cal. 1948).

to the defendants to prove that their products did not cause the fires. This argument misconstrues *Summers v. Tice*, and ignores prior case law in this jurisdiction. In *Summers v. Tice*, the plaintiff was struck in the face by birdshot after two quail hunters each fired in his direction. Both hunters had an unobstructed view of the plaintiff and were aware of his location. The California Supreme Court held that because both defendants acted negligently, and were "in a far better position [than the plaintiff] to offer evidence to determine which one caused the injury," the burden shifted to each defendant to attempt to disprove his liability.[10] The rule of *Summers v. Tice* has been adopted by Restatement (Second) of Torts § 433B, which states that "[w]here the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm."

State Farm fails to recognize that *Summers v. Tice* does not shift the plaintiff's initial burden to prove that each of the multiple defendants acted tortiously.[11] The record before the Court concerning the August fire contains nothing to indicate that any Invensys controls were involved, let alone that an

[10] *Id.* at 4.

[11] *See* RESTATEMENT (SECOND) OF TORTS § 433B cmt. g ("The rule stated in Subsection (3) applies only where it is proved that each of two or more actors has acted tortiously, and that the harm has resulted from the conduct of some one of them. On these issues the plaintiff has still the burden of proof."); *Cuonzo v. Shore*, 958 A.2d 840, 844 (Del. 2008) ("To permit burden shifting, both [defendants] must have been negligent.").

Invensys product caused the fire. Indeed, even if the Court were to apply (or misapply) burden-shifting on the issue of negligence, Invensys' undisputed evidence that it was not the manufacturer of the controls incorporated into the first fryer would entitle it to summary judgment with regard to the claims arising from the August fire.

Moreover, this Court has previously considered and rejected burden-shifting in the products liability context where the result would be tantamount to implementing alternative liability or market-share liability. In *Nutt v. A.C. & S. Co.*, an asbestos-exposure personal injury case, plaintiffs urged the Court to place the burden of product identification on the defendants to show that their products were not present at plaintiffs' work-sites, "because identification of the manufacturer's product by the workers is a virtual impossibility due to the lack of labeling on the products."[12] The Court concluded that adopting the plaintiffs' position would in effect establish market-share liability, which it had previously declined to apply under Delaware law, or alternative liability. Imposing alternative liability, the Court held, would represent "a change in traditional tort law" that must be accomplished by the legislature.[13] In the nearly twenty-five years that have passed since *Nutt*, the legislature has not authorized collective liability under

[12] 517 A.2d 690, 694 (Del. Super. 1986).

[13] *Id.*

either the market-share or alternative liability theories, and the Court perceives no reasoned basis for it to impose such a change now.

Finally, State Farm argues that a factual dispute exists as to whether Honeywell or Invensys manufactured the gas control valves because Pitco has filed a cross-claim against Invensys, which "would not make sense to assert . . . if Pitco was certain that [Invensys] did not manufacture the component parts."[14] State Farm further contends that "Pitco did not join Honeywell as an additional defendant in the lawsuits which it would have or should have done if it believed Honeywell was the actual manufacturer of the subject component parts."[15]

Pitco's cross-claim against Invensys was filed with its Answer to State Farm's Complaint, prior to discovery in either case. The cross-claim, which briefly asserts claims for contribution or indemnification from its co-defendants in the event Pitco is found liable to State Farm, is not defendant-specific. Pitco expressly states that its cross-claim is made "[w]ithout admitting the liability of any party."[16]

Contrary to State Farm's argument, Pitco's cross-claim does not constitute evidence supporting that Invensys manufactured the controls at issue. Rather, it merely indicates that Pitco was protecting itself in the event that the evidence

[14] Pl.'s Resp. to Def. Invensys' Mot. for Summ. J. ¶ 4.

[15] *Id.*

[16] Def. Pitco's Ans. to Pl.'s Compl. (C.A. No. 09C-08-216), at 5.

would have substantiated a claim for contribution or indemnification against any of the other parties State Farm had chosen to join as defendants. Similarly, the fact that Pitco has not attempted to bring Honeywell into the case is not a circumstance under Invensys' control, nor is it evidence linking Invensys controls to the original fryer.

Therefore, based upon the absence of any evidence establishing a genuine dispute of material fact as to product identification or causation, Invensys' Motion for Summary Judgment as to State Farm's claims related to the August fire must be granted.

The November Fire

Invensys is also entitled to summary judgment in State Farm's second case, which is based upon the November fire, albeit for slightly different reasons. Remarkably, both Invensys and State Farm rely upon the report of State Farm's expert, Michael Schaal, which recounts his investigation of the November fire. The relevant portions of the report state as follows:

> 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 valves, which are located in the subject fryers. The gas valve was manufactured by Robertshaw from February 2003 to August 2004.

> Pitco manufacturing dates from February 2003 to October 6, 2004. . . . It was reported that there has been three reports of flash-fires involving three reports of injury. *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*.[17]

Schaal's report also noted that "[a]s a result of our findings, the services of Mr. Robert Simpson, Electrical Engineer, were retained in order to conduct an electrical engineering analysis and site examination of the electrical components within the fryers."[18] Invensys states that State Farm has not disclosed any other expert reports, nor has State Farm provided any additional expert opinions to the Court.

In support of its motion, Invensys has presented another affidavit from Brye Davis, in which Davis denies that Invensys manufactured any of the gas control valves incorporated into the fryer involved in the November fire.[19] Invensys again relies upon Joseph Erdelsky's expert report, which identified Honeywell as the manufacturer of the controls based upon a comparison to the undamaged controls in the same unit.[20] Based upon these submissions, Invensys contends that there is no evidence that it manufactured the controls contained in the replacement fryer.

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[17] Def. Invensys' Mot. for Summ. J. (C.A. No. 09C-08-217), Ex. D (emphasis added).

[18] *Id.*

[19] *Id.*, Ex. E.

[20] *Id.*, Ex. F.

Furthermore, Invensys offers an interrogatory response from Pitco stating that the replacement fryer in which the November fire began had been manufactured between June 25 and June 29, 2007.[21] Invensys argues that this response, as well as statements from the owner of Quinta Essential Foods confirming that the fryer involved in the November fire was a "brand new unit" purchased after the August blaze,[22] establish that the recall of Invensys control valves manufactured in 2003 and 2004 is a red herring. Invensys contends that the record is devoid of any evidence to suggest that its products caused the November fire.

As discussed above, State Farm bears the burden of proof as to its claims against Invensys. Causation of a fire that began within the interior components of a commercial deep-fryer is not a matter within the ordinary knowledge of a layperson, and State Farm therefore must provide expert testimony on the issue.[23] While Schaal's expert report would suffice to raise a factual dispute regarding whether the replacement fryer contained Invensys control valves, neither his report

[21] *Id.*, Ex. B.

[22] *Id.*, Ex. C.

[23] *See, e.g.*, *Reybold Group, Inc. v. Chemprobe Techs., Inc.*, 721 A.2d 1267, 1270 (Del. 1998) ("While there may be some warranty claims that do not need expert testimony, typically expert testimony is required to prove causation in a claim for breach of the implied warranty of merchantability."); *Fatovic v. Chrysler Corp.*, 2003 WL 21481012, at *3 (Del. Super. Feb. 28, 2003).

nor any other evidence before the Court presents a triable issue as to causation of the November fire.

The recall of Invensys controls incorporated into Pitco fryers manufactured in 2003 and 2004 is meaningless without, at the very least, evidence from which a jury could reasonably conclude that the November fire was caused by an Invensys control valve. State Farm has not offered such evidence. Schaal's report offers no opinion as to causation, just a broad suggestion that the fire resulted from "electrical or mechanical malfunction" within the fryer. Although Schaal describes the fryer as containing Invensys controls, he does not actually attribute either possible type of malfunction to an Invensys product. Bracketing his discussion of the recall is a repetitive but crucial disclaimer that another expert or experts should be retained to opine as to the specific cause of the fire. Whether or not another expert report was obtained, State Farm has not timely provided it to Invensys or the Court.[24] For the reasons discussed previously, neither Pitco's cross-claim nor its failure to join Honeywell constitute evidence raising a factual dispute as to whether an Invensys product could have caused the fire. Accordingly, summary judgment

[24] Because State Farm's response to Invensys' motions "incorporated" its expert's report without attaching it, the Court requested that State Farm file a copy. Frankly, the request was made with the expectation that State Farm had intended to incorporate a *different* report than the Schaal report that had already been provided by Invensys, since Schaal repeatedly explained that State Farm would need to retain another expert to opine as to the specific cause of the November fire.

must be granted in Invensys' favor as to State Farm's claims arising from the November 2007 fire.

IV.

On a final note, the Court observes with some chagrin that State Farm's response presented the issue of burden-shifting without any reference to *Nutt v. A.C. & S. Co.*, which is directly on-point, or to *Cuonzo v. Shore*, which would have highlighted for counsel that *Summers v. Tice* permits burden-shifting only as to the element of causation. Although *Nutt* concededly does not cite to *Summers v. Tice*, *Cuonzo* does—in fact, it was the only previous Delaware case the Court found that discussed *Summers v. Tice*, and should have been located by Plaintiff's counsel upon even a cursory attempt at researching State Farm's position. State Farm's response "undercut" the Court's four-page length limitation by more than a page, such that the Court cannot infer that counsel might have omitted reference to either case because she faced difficulty fitting her arguments into the space allotted.

Several other defendants in these cases followed Invensys in moving for summary judgment, and State Farm's responses to these pending motions are not yet due. While the Court assumes that Plaintiff's counsel simply did not find *Cuonzo* or *Nutt* in researching her response to Invensys' motions, this assumption is necessarily a one-time event. The Court endeavored to complete this opinion as expeditiously as possible in hope that it may clarify and narrow the issues in the

remaining motions. State Farm's counsel would be well-advised to bear in mind the obligations to disclose known adverse legal authority under Delaware Lawyers' Rule of Professional Conduct 3.3(a)(2) and to certify that any opposition to a motion is presented with a proper purpose and supported by nonfrivolous legal contentions pursuant to Superior Court Civil Rule 11. Counsel need not agree with the Court's decision here, nor with the prior Delaware cases it has relied upon; however, the method for voicing that disagreement is not to omit relevant case law, but rather to distinguish it or to offer, per Rule 11(b)(2), "a nonfrivolous argument for the extension, modification, or reversal of existing law."

As to the motions currently under consideration, based upon State Farm's failure to provide any evidence against Invensys regarding causation of either fire, and its failure to offer evidence of product identification with respect to the August 2007 fire, Invensys' Motions for Summary Judgment are hereby **GRANTED**.

IT IS SO ORDERED.

/s/
Peggy L. Ableman, Judge

Original to Prothonotary
cc: All counsel via File & Serve