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 PLAINTIFF'S MOTION FOR REARGUMENT
DENIED

Submitted: April 26, 2011
Decided: June 15, 2011

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ABLEMAN, J.

I.

The cases before the Court arose from two separate after-hours fires at Five Guys Famous Burgers & Fries, a Hockessin restaurant operated by Quinta Essential Foods, LLC ("Quinta"). The fires occurred in August and November 2007. Both fires apparently originated in similar locations within the lower interiors of deep-fryer units manufactured by Defendant Pitco Frialator, Inc. ("Pitco"). Quinta's insurer, Plaintiff State Farm Fire & Casualty Company ("State Farm"), filed the instant subrogation actions for breaches of warranty and negligence against Pitco; Pitco's parent company, the Middleby Corporation ("Middleby"); American Kitchen Machinery & Repair Co. ("American Kitchen"), which sold and installed both fryers; and Invensys Controls and Robertshaw, which State Farm alleged manufactured gas control valves in both fryers. Invensys Controls and Robertshaw were granted summary judgment after discovery revealed that another manufacturer had produced and supplied the control valves.[1]

By opinion dated April 12, 2011, the Court granted summary judgment in favor of Defendants Middleby, Pitco, and American Kitchen (collectively, "the moving defendants") on the basis that State Farm lacked evidence from which a

[1] *State Farm Fire & Cas. Co. v. Middleby Corp.*, 2011 WL 683883 (Del. Super. Feb. 8, 2011).

reasonable jury could conclude that the "acts, omissions, or products for which the moving defendants would be responsible caused the fires."[2] As the Court explained, State Farm's experts did not theorize as to the specific cause of either fire. With regard to the August fire, State Farm offered a "one-and-a-half-page report [which] briefly . . . 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] State Farm's fire investigator found that the November fire "resulted from an electrical or mechanical malfunction within the Pitco Fryer" and stated that "[f]urther 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."[4] It is unclear that State Farm obtained the recommended additional analysis, and no additional reports or opinions were disclosed to the Court or the defendants.

In its decision, the Court rejected State Farm's argument that *res ipsa loquitur* applied. The Court found that the facts of these cases did not "warrant an inference of negligence of such force as to call for an explanation or rebuttal" from the moving defendants:

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[2] *State Farm Fire & Cas. Co. v. Middleby Corp.*, 2011 WL 1632341, at *3 (Del. Super. Apr. 12, 2011).

[3] *Id.* at *2.

[4] *Id.* at *1.

> [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. . . . 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 [its experts].[5]

Summary judgment was appropriate, the Court concluded, because State Farm failed to provide "the additional expert opinions required to expand [its expert fire investigators'] opinions about the origins of the fires into theories regarding the fires' causes."[6] The Court further held that State Farm had not addressed "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," and had not made a showing that the fryers were under the defendants' management or control at the time any negligence likely occurred.[7]

II.

State Farm now petitions for reconsideration of the Court's April 2011 summary judgment opinion, arguing that the Court disregarded factual disputes and failed to consider the facts in the light most favorable to the plaintiff. State Farm submits that the Court's opinion is at odds with its discussion of *res ipsa*

[5] *Id.* at *5.

[6] *Id.* at *6

[7] *Id.* at *5.

loquitur principles in *Moore v. Anesthesia Services, P.A.*,[8] in which the Court permitted a plaintiff to proceed to trial with product liability claims based upon a theory of "conditional" *res ipsa loquitur*. According to State Farm, this Court grafted extra requirements onto the elements of *res ipsa loquitur* and improperly burdened State Farm with the task of proving those requirements in response to the moving defendants' summary judgment motions.

In response, Pitco and Middleby depict State Farm's petition as a "rehash" of its opposition to their summary judgment motions.[9] They note that *Moore* was not raised in State Farm's original opposition, and suggest that it does not support State Farm's position. Finally, Pitco and Middleby argue that summary judgment was appropriate because State Farm presented no support for the application of *res ipsa loquitur* to the facts of these cases.

III.

The Court will treat State Farm's petition for reconsideration as a motion for reargument pursuant to Superior Court Civil Rule 59(e).[10] A motion for reargument is granted only if "the Court has overlooked a controlling precedent or

[8] 966 A.2d 830 (Del. Super. 2008).

[9] American Kitchen's response to State Farm's petition was untimely filed without explanation, and will not be considered. Nevertheless, even without the benefit of American Kitchen's arguments, the Court concludes that State Farm has not demonstrated that reargument is warranted.

[10] State Farm properly filed a separate petition in each case. As the content of both filings appears identical, the Court will refer to the petition or motion in the singular.

legal principles, or the Court has misapprehended the law or facts such as would have changed the outcome of the underlying decision."[11] A motion for reargument is not an opportunity for a party to revisit arguments already decided or to present new arguments not previously raised.[12]

IV.

After reviewing State Farm's motion and the summary judgment opinion, the Court finds no basis upon which to allow reargument. As an initial matter, the Court is satisfied on the facts of these cases that it did not act prematurely in deciding the applicability of *res ipsa loquitur* at the summary judgment stage. Delaware Rule of Evidence 304(c) states that "whether or not the doctrine is applicable should be determined at the close of the plaintiff's case." The permissive wording of Rule 304(c) admonishes the Court to consider the factual development of the case in determining when the applicability of *res ipsa loquitur* is properly considered, but it "does not force the Court into any particular course of action."[13] Rule 304 was intended to restate existing case law,[14] which included

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[11] *Kennedy v. Invacare Corp.*, 2006 WL 488590, at *1 (Del. Super. Jan. 31, 2006) (citation omitted).

[12] *Plummer v. Sherman*, 2004 WL 63414, at *2 & n.7 (Del. Super. Jan. 14, 2004); *see also Hennegan v. Cardiology Consultants, P.A.*, 2008 WL 4152678, at *1 (Del. Super. Sept. 9, 2008) (citing *Denison v. Redefer*, 2006 WL 1679580, at *2 (Del. Super. Mar. 31, 2006)); *Kennedy*, 2006 WL 488590, at *1.

[13] *Orsini v. K-Mart Corp.*, 1997 WL 528034, at *4 (Del. Super. Feb. 25, 1997).

[14] D.R.E. 304 cmt.

cases in which *res ipsa loquitur* was found inapplicable at the summary judgment stage.[15] Thus, the Court has repeatedly held that "the stage at which the applicability of *res ipsa loquitur* may be considered should be determined on a case-by-case basis considering the nature of the contentions, the sufficiency of the factual showing and the applicable standards of the doctrine."[16] Consistent with Rule 304(c), the Court will not decide the applicability of *res ipsa loquitur* before "the facts in the case have been so fully developed [that] they can be tested against the doctrine."[17]

The Court was cognizant of Rule 304(c) when it determined that *res ipsa loquitur* was not applicable to either of State Farm's actions against the moving defendants. Discovery in both cases was closed before the defendants moved for summary judgment. The major—though not sole—flaw in State Farm's argument for the application of *res ipsa loquitur* arose from its failure to develop expert opinions that supported any inferences of negligence against the moving

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[15] *E.g.*, *Hornbeck v. Homeopathic Hosp. Ass'n of Del.*, 197 A.2d 461, 466 (Del. Super. 1964) (concluding upon motion for summary judgment that "there are no facts in the record, when considered in a light most favorable to plaintiff, which indicate, absent scientific assistance, that the [plaintiff's injury] was more probably tha[n] not due to the negligence of all or any of [the] defendants so as to authorize the use of the doctrine of *res ipsa loquitur*").

[16] *Lacy v. G.D. Searle & Co.*, 484 A.2d 527, 530 (Del. Super. 1984); *see also Thomas v. St. Francis Hosp., Inc.*, 447 A.2d 435, 438 (Del. 1982) ("No *res ipsa* inference of negligence is warranted under the facts here. Summary judgment as to the *res ipsa* allegations was proper." (internal citations omitted)).

[17] *Denson v. Acme Markets, Inc.*, 1996 WL 769216 (Del. Super. Nov. 25, 1996).

defendants or suggested that the fires were such as did not ordinarily occur if those controlling the fryers exercised proper care. Because State Farm was obliged to timely disclose its experts' opinions during the discovery process, these omissions could not be cured at trial. Therefore, based upon the record, the closure of discovery, and the nature of the parties' arguments, the Court properly decided the applicability of *res ipsa loquitur* upon defendants' summary judgment motions.

The Court remains convinced that its decision to grant summary judgment was substantively correct. Under Rule 304(b), the following circumstances must exist for *res ipsa loquitur* to 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.

Contrary to State Farm's assertions, the Court did not misapply Rule 304(b) or the burden-shifting framework for deciding summary judgment motions in the underlying opinion, nor did it draw factual inferences against the plaintiff.

State Farm's reliance upon *Moore* is misplaced. In *Moore*, this Court denied a medical suture manufacturer's summary judgment motion where the plaintiff had "sufficiently shown . . . [that] he may, during the course of trial, be able to meet all of the elements of the *D.R.E.* 304(b)."[18] The plaintiff, Roland Moore, underwent a carotid endarterectomy to remove plaque from one of his carotid arteries.[19] Moore experienced complications after the procedure, including agitation and loss of consciousness. Emergency surgical intervention showed a large hematoma at the site of the first surgery. After the second emergency surgery, Moore's doctors determined that he had experienced a stroke, which resulted in permanent impairment.[20]

During discovery, the surgeon who performed Moore's initial procedure suggested that the complications might have been caused by a defect in the suture she used, although the suture was discarded by the hospital after the emergency invention. The nurse who assisted the treating surgeon, on the other hand, recalled the surgeon remarking that she might have tied the suture too tightly during the endarterectomy.[21] Moore filed suit based on two alternative theories of liability,

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[18] 966 A.2d at 842.

[19] *Id.* at 832.

[20] *Id.*

[21] *Id.*

asserting medical negligence claims against the medical personnel and product liability claims against the suture's manufacturer. The suture manufacturer moved for summary judgment, arguing in part that *res ipsa loquitur* was inapplicable because Moore could not assign it a "greater probability of negligence" than the defendants against whom he asserted medical negligence claims.[22]

The defendant manufacturer's summary judgment motion in *Moore* raised the issue of whether the plaintiff could proceed to trial on a theory of "conditional" *res ipsa loquitur*. Moore opposed summary judgment based upon his expert's opinions, which covered his alternative theories of liability. Moore's expert identified potential mistakes by the treating surgeon, but also opined that if the surgeon and other medical personnel were "in no way responsible for the failure of the suture line," then Moore's injuries were caused by one of two possible types of manufacturing defects in the suture.[23] The Court found that if the jury concluded that there was no medical negligence, Moore had presented sufficient evidence from which he might be able to establish the applicability of *res ipsa loquitur* against the suture manufacturer during the presentation of his case at trial.

Moore is so factually distinguishable from the cases at bar that it offers little assistance to the Court beyond its generalized discussion of the elements of *res*

[22] *Id.* at 833.

[23] *Id.* at 838.

ipsa loquitur. In *Moore*, the plaintiff presented expert testimony to support theories of negligence against either the medical defendants *or* the suture manufacturer. Moore's expert opined that the medical personnel were not negligent as a factual matter, the only available explanation for Moore's symptoms had to be one of two particular types of manufacturing defects (an inclusion in the polymer melt that formed the suture, or an inconsistency in the manufacturing process). Because the parties all conceded that the plaintiff was generally healthy prior to the initial procedure, the *Moore* Court found that the *undisputed* facts before it at the summary judgment stage supported that "such occurrences do not normally happen without negligence."[24] Furthermore, Moore could not have been contributorily negligent, as he "was under anesthesia during the surgery."[25]

Here, by contrast, State Farm has not offered a basis upon which negligence could be inferred as to *any* of the defendants. While Moore's expert described the possible defects attributable to the suture manufacturer in the event that the medical defendants were found not liable, State Farm's experts do not ascribe any particular product defect or negligence to the moving defendants. In addition, unlike in *Moore*, the plaintiff's involvement in the events leading up to the litigated accidents is at issue: the moving defendants have contested State Farm's

[24] *Moore*, 966 A2d at 840.

[25] *Id.*

allegations that the fires resulted from their negligence, and Quinta controlled the fryers for more than two months before each fire.

State Farm also cites to *Moore* for the proposition that at the summary judgment stage, "it is the defendant's burden to 'produce evidence which will destroy the inference of negligence, or so completely contradict it that the jury could not reasonably accept it.'"[26] This language is codified in Rule 304(c)(2), which provides that when *res ipsa loquitur* is determined to be applicable, a defendant is not entitled to a *directed verdict* unless "evidence has been produced which will destroy the inference of negligence on his part, or so completely contradict it that the jury could not reasonably accept it." Neither *Moore* nor Rule 304(c)(2) address a scenario in which the plaintiff failed to demonstrate that an "inference of negligence" arose in the first instance, which is the situation presented to the Court here. Simply put, the moving defendants did not have to produce evidence to "destroy" an inference that never existed. The moving defendants showed the absence of evidence to support an element of State Farm's claims, which sufficed under Civil Rule 56(c) to shift the burden to State Farm to demonstrate the existence of material factual disputes.[27]

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[26] *Id.* at 841 (quoting *Del. Coach Co. v. Reynolds*, 71 A.2d 69, 75 (Del. 1950)).

[27] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979); *see also Burkhart v. Davies*, 602 A.2d 56, 60 (Del. 1991) ("[T]he moving party is entitled to summary judgment, as a matter of law, if the nonmoving party fails to make a sufficient showing on an essential element of his or her case with respect to which he or she has the burden of proof. Therefore, when the nonmoving party

State Farm suggests that the Court imposed an unnecessary burden upon it by stating in the summary judgment opinion that State Farm had not "eliminated the possibility" that Quinta or its employees had been contributorily negligent. The Court agrees that at the summary judgment stage, a plaintiff need not present evidence that would conclusively eliminate or "exclude [its] own conduct as a responsible cause," as required for *res ipsa loquitur* to apply under Rule of Evidence 304(b)(4). Rather, the Court's inquiry must focus upon whether there is sufficient evidence to create a triable issue—in other words, whether there is an adequate basis to conclude that *res ipsa loquitur* could be found applicable at the close of the plaintiff's evidence at trial.

When the Court's comment is read in context, it is clear that the Court considered the issue of the defendants' management or control of the fryers in tandem with the issue of Quinta's potential responsibility, and that neither the evidence nor any inferences to be drawn from the available facts supported that State Farm would have been able to exclude Quinta's conduct as a responsible cause at trial.[28] Other than statements made by Quinta employees that power to the

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bears the ultimate burden of proof, summary judgment is proper if the moving party can show a failure of proof concerning an element that is essential to the nonmoving party's case." (internal citation omitted)).

[28] 2011 WL 1632341, at *5 ("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

fryers was switched off before each blaze, and an inference from the plaintiff's fire investigators' reports that no arson was involved, the record is devoid of any evidence regarding the post-sale use, cleaning, maintenance, or modification of either fryer.

State Farm argues that this absence of evidence is irrelevant, as "there is no evidence that the internal workings of the thermostat[s] were altered" and "no allegation by defendants' expert that this fire was the result of negligence by employees of plaintiff's insured."[29] State Farm's position rests on two incorrect assumptions. First, State Farm presumes that it has provided evidence from which the trier of fact could reasonably infer that the internal workings of the thermostats caused the fires. As explained at length in the underlying summary judgment opinion, it has not. Second, State Farm wrongly implies that the moving defendants bear the burden of proof with regard to causation. In essence, State Farm seeks a ruling that Rule of Evidence 304(b)(4) does not apply until and unless a defendant presents a theory of causation that places the plaintiff at fault. The plain language of the rule belies this reading: for *res ipsa loquitur* to apply, the

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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.").

[29] Pl.'s Pet. for Reconsideration 4.

"evidence must exclude [the injured party's] own conduct as a responsible cause" when the injured party "has participated in the events leading up to the accident." The operative facts (the injured party's participation in the events that led to the injury), and not the opposing party's theory of the case, are the appropriate "trigger" for the Rule 304(b)(4) inquiry. A different rule risks unfairly placing the initial burden of proof upon defendants to disprove the applicability of *res ipsa loquitur* and thus their own liability. Such a framework would contravene Rule 304(a)(1)'s recognition that the doctrine of *res ipsa loquitur* "is a rule of circumstantial evidence, *not affecting the burden of proof*."[30]

The Court can conceive factual scenarios in which an absence of evidence regarding the use and maintenance of an allegedly injury-causing apparatus would favor awaiting trial to determine the applicability of *res ipsa loquitur*. Indeed, if Quinta's potential responsibility were the only element for which State Farm's evidentiary showing was deficient, the Court likely would not have granted summary judgment; however, the near-total lack of evidence tending to eliminate the possibility that Quinta or its employees played a role in causing the fires must be considered in light of the other missing pieces in the State Farm's evidence. Even if State Farm were permitted to offer evidence at trial regarding Quinta's conduct, it still has not shown any evidence tending to establish that the fires were

[30] D.R.E. 304(a)(1) (emphasis added).

such that in the ordinary course of events would not have occurred "if those who [had] management and control use[d] proper care" or that the facts "warrant an inference of negligence of such force as to call for an explanation or rebuttal" from the moving defendants.[31] Accordingly, the Court concludes that it did not act improperly in denying State Farm the opportunity to proceed to the jury on the issue of Quinta's potential negligence.

State Farm also contends that the Court erred in concluding that the first element of *res ipsa loquitur* was not met, because the Court should have found that "[f]ryers do not normally ignite within the area of the thermostat housings if those who have management or control exercise [or] use proper care."[32] As a matter of common sense, the Court accepts that commercial fryers do not ordinarily ignite internally when inactive. What the Court cannot accept on common sense alone is the proposition that shut-down commercial fryers do not ordinarily ignite internally unless those in management or control fail to exercise proper care. While the Court is generally loathe to admit gaps in its knowledge, it confesses abject ignorance as to why or how a fire would develop in the internal components of an inactive deep-fryer. It cannot expect a jury of laypersons to possess greater knowledge regarding this specialized issue.

[31] D.R.E. 304(b).

[32] Pl.'s Pet. for Reconsideration 3.

Moreover, the reference in Rule 304(b)(1) to "those who have management and control" must be considered in light of Rule 304(b)(3)'s requirement that the injury-causing instrumentality have been "under the management or control" of the defendants "at the time the negligence likely occurred." State Farm has not identified what, if any, negligence "likely occurred" to cause the fires. Therefore, nothing in the record supports that State Farm would be able to establish at trial that the moving defendants exercised management or control over the fryers at the time of the negligent conduct.

V.

Although the Court has taken this opportunity to clarify its conclusions regarding its Rule 304(b)(4) analysis, State Farm's petition has not shown that the Court misapprehended the facts or the law such that the outcome of the underlying summary judgment opinion should have been different. Accordingly, for the reasons discussed herein, State Farm's motion for reargument is **DENIED**.

IT IS SO ORDERED.

/s/
Peggy L. Ableman, Judge

Original to Prothonotary
cc: All counsel via File & Serve