IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

MARIA S. MIDCAP, individually and as Administratrix of the Estate of TERRY L. MIDCAP, NATALIA MIDCAP, SHARON MIDCAP, CARLA MIDCAP, and ALLSTATE INSURANCE COMPANY a/s/o TERRY MIDCAP (deceased) and MARIA S. MIDCAP,	:	C.A. No. 01C-03-042 WLW
Plaintiffs,	:	
v.	:	
SEARS, ROEBUCK AND CO., EAST BAY TRANSPORT, INC., and SOUTHERN STATES MILFORD COOPERATIVE, INC.,	:	
Defendants.	:	

Submitted: September 9, 2003
Decided: September 12, 2003

ORDER

Upon Defendant Southern States Milford Cooperative, Inc.'s Motion for Summary Judgment. Denied.

I. Barry Guerke, Esquire, Parkowski Guerke & Swayze, P.A., Dover, Delaware, attorneys for the Midcap Plaintiffs.

Paul R. Bartolacci, Esquire, Cozen O'Connor, Philadelphia, Pennsylvania, attorneys for Plaintiff Allstate Insurance Company.

William J. Cattie, III, Esquire, Cattie and Fruehauf, Wilmington, Delaware, attorneys for Defendant Sears, Roebuck and Co.

Daniel P. Bennett, Esquire, Heckler & Frabizzo, Wilmington, Delaware, attorneys for Defendant Southern States Milford Cooperative, Inc.

WITHAM, J.

Maria S. Midcap, et al. v. Sears, Roebuck and Co., et al.
Civil Action No. 01C-03-042 WLW
September 12, 2003

I. Introduction

By agreement of the parties and approval by the Court, Defendant Southern States Milford Cooperative, Inc.'s Motion for Summary Judgment was heard at the pre-trial conference conducted on September 9, 2003. Plaintiffs oppose the motion. Because there are questions of fact to be decided by the jury regarding the standard of care applicable to the Defendant and on the issue of proximate cause, and for the reasons outlined below, the motion for summary judgment is ***denied***.

II. Background and Arguments of the Parties

This is a tort case. Mr. Midcap was killed when a propane leak resulted in an explosion in his home. Plaintiffs allege that the combined negligence of Sears (from whom the Midcaps purchased the propane gas stove), East Bay Transport (Sears' delivery agent), and Southern States Milford (the Midcap's propane supplier at the time of the accident) caused the death of Mr. Midcap. Plaintiffs' expert prepared a report claiming that each Defendant is negligent in this tragic event. The expert bases Southern States' negligence on their failure to conduct a GAS check of the gas system in the residence, supplying propane to cylinders which were beyond the certification date, using an automatic changeover regulator which was past the recommended replacement date of the manufacturer, and failing to require the installation of a gas detector.

Defendant Southern States filed this motion for summary judgment claiming that Plaintiffs failed to establish that Southern States had a duty to inspect the appliances and conduct the GAS check recommended by the expert. In support of

this, Defendant relies on two decisions by the Michigan and Minnesota appellate courts.[1]

III. Analysis

Superior Court Civil Rule 56(c) provides that judgment "shall be rendered forthwith 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."[2] The moving party bears the initial burden of showing that no material issues of fact are present.[3] The burden then shifts to the nonmoving party to demonstrate that there is a genuine issue of material fact.[4] Summary judgment should only be granted when, after viewing the record in a light most favorable to the non-moving party, there is no genuine issue of material fact.[5] This Court stated previously, "If a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts, or to clarify the application of the law, summary judgment

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[1] *Giwan v. Fuel Gas Co.*, 607 N.W.2d 116 (Mich. Ct. App., 1999), *app. denied*, 618 N.W.2d 591 (Mich. 2000); *Garrison v. Farmer's Cooperative Exchange*, C.A. No. C1-00-657, 2000 Minn. App. Lexis 1145 (Minn. Ct. App., Nov. 8, 2000).

[2] Super. Ct. Civ. R. 56.

[3] *Martin v. Nealis Motors, Inc.,* 247 A.2d 831,833 (Del. 1968).

[4] *Id.*

[5] *Oliver B. Connors & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. 1973); *see also McCall v. Villa Pizza, Inc.*, 636 A.2d 912 (Del. 1994).

is inappropriate."[6] The Delaware Supreme Court stated, "Generally, issues of negligence either on the part of a defendant or of a plaintiff, or questions of proximate cause, are, except in rare cases, questions of fact which ordinarily should be submitted to the jury to be resolved."[7]

To prevail in a negligence action a plaintiff must show, by a preponderance of the evidence, that the defendant's negligent act or omission breached a duty of care owed to the plaintiff such that it proximately caused injury to that plaintiff.[8] Plaintiffs' burden is to establish that Southern States failed to exercise the care of a reasonably prudent person under these circumstances. The jury itself must define and apply the standard of care if the standard has not been fixed by judicial decision or legislative enactment.[9]

In the present case, neither party can point to Delaware law that establishes the standard of care applicable to Southern States in this case. Defendant relies on a case from Michigan in which the court concluded that the gas supplier did not have a duty to conduct a gas check. However, Michigan law clearly states that a gas supplier does not have a duty to inspect or maintain the internal lines and appliances owned by the customer. No such law has been stated or referred to in Delaware.

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[6] *Christiana Marine Service Corp. v. Texaco Fuel and Marine Marketing,* 2002 WL 1335360 (Del. Super.).

[7] *Watson v. Shellhorn & Hill, Inc.,* 221 A.2d 506, 508 (Del. 1966).

[8] *Culver v. Bennett,* 588 A.2d 1094 (Del. 1991).

[9] *Delmarva Power & Light v. Stout,* 380 A.2d 1365 (Del. 1977).

Delaware law provides that a gas supplier "is liable for injuries from gas caused by its negligence, but is not an insurer."[10] A gas company is "bound to guard against any contingency, combination of circumstances or accidents which a person of ordinary intelligence would have foreseen as probable."[11] The Supreme Court further stated that "each case is to be decided in light of its own facts, with due regard to the surrounding circumstances, and whether or not the subsequent act was normal and expect[ed]."[12] Because each case is to be decided on its facts, this is a question for the jury to decide, and thus is not appropriate for summary judgment.

Defendant's additional argument that Plaintiffs have failed to establish that Defendant's action or inaction was the proximate cause of the accident fails as well. Viewing the evidence in the light most favorable to Plaintiffs, the necessary causation has been established. Plaintiffs' expert concluded that the inaction of Southern States was a cause of the explosion and thus the death of Mr. Midcap. In addition, the Delaware Supreme Court has stated that in all but the rarest cases, proximate cause is a question of fact to be decided by the jury.[13] This is not that rare case. Therefore, the issue of proximate cause is not proper for summary

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[10] *Suburban Propane Gas Corp. v. Papen,* 245 A.2d 795, 798 (Del. 1968).

[11] *Id.*

[12] *Id.*

[13] *Watson v. Shellhorn & Hill, Inc.,* 221 A.2d at 508.

judgment.

IV. Conclusion

For the foregoing reasons, Defendant's motion for summary judgment is ***denied***. IT IS SO ORDERED.

/s/ William L. Witham, Jr.
J.

WLW/dmh
oc: Prothonotary
xc: Order Distribution
File