STATE OF MICHIGAN

COURT OF APPEALS

JOHNNIE E. CHOATE, Individually, PATRICIA A. WILSON, Individually and as Personal Representative of the Estates of ROBERT TODD CHOATE and STEPHANIE CHRISTINE CHOATE, and the Estate of VIVIAN GALLENBURGER,

Plaintiffs-Appellants,

v

FOREST CITY ENTERPRISES, INC. and HITACHI HOMETEC, LTD.,

Defendants-Appellees,

and

NORTH AMERICAN PRODUCTS, INC., d/b/a CRESTLINE,

Defendants.

and

DILLARD CHOATE, MATTHEW CHOATE, and DIMPLE CHOATE, Individually and as Personal Representative of the Estate of VIVIAN GALLENBURGER,

Plaintiffs-Appellants,

v

FOREST CITY ENTERPRISES, INC., HITACHI HOMETEC, LTD., HITACHI, LTD., and HITACHI SALES CORPORATION,

Defendants-Appellees,

UNPUBLISHED
December 5, 2000

No. 214077
Wayne Circuit Court
LC No. 97-701634-NO

and

NORTH AMERICAN PRODUCTS, INC., d/b/a CRESTLINE, and TOYKO BOEKI,

Defendants.

Before: Owens, P.J., and Jansen and R. B. Burns*, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) and a later order denying plaintiffs' motion for reconsideration. We affirm.

This case arises out of a house fire that occurred on January 17, 1994, in the city of Romulus. The house was owned by Dillard and Dimple Choate. Dillard, Dimple, and their son Matthew were all sleeping upstairs when they heard Vivian Gallenberger, daughter of Dillard and Dimple, yelling "fire" at about 3:45 a.m. Vivian had been sleeping in the basement with Robert and Stephanie,[1] the grandchildren of Dillard and Dimple. Dillard, Dimple, and Matthew went downstairs; however, the kitchen and back porch, which led to the basement, were afire. The three had to retreat upstairs and jump through a window to escape from the fire. Dillard, Dimple, and Matthew suffered fairly minor injuries as a result. Tragically, Vivian, Robert, and Stephanie died as a result of carbon monoxide asphyxiation.

There is no dispute that the fire started at the landing leading to the basement where a kerosene heater had been in operation. The kerosene heater was a Crestline 3510 heater, manufactured in 1982 by defendant Hitachi Hometec, Ltd.[2] The kerosene heater was purchased in 1985 or 1986 by Dillard and Dimple Choate at defendant Forest City Enterprises, Inc. Detective-Sergeant Donald Worden of the Michigan State Police, Fire Marshal Division, initially investigated the fire. Worden's opinion regarding the origin of the fire was the "immediate area of the kerosene heater being operated upon the basement staircase landing off the east end of the enclosed rear porch." Worden's opinion regarding the cause of the fire was that the kerosene heater was being operated in too close a proximity to combustibles.

Plaintiffs, however, allege that the kerosene heater was defective and that the defect caused the fire. More specifically, it is plaintiffs' theory that a leak occurred at the sight gauge,

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[1] The parents of Robert and Stephanie are Johnnie E. Choate and Patricia A. Wilson, who were not in the house during the time of the fire.

[2] Hitachi, Ltd. is the parent company of Hitachi Sales Corporation, the distributor of the kerosene heater.

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

leading to a loss of the partial vacuum in the removable tank. This loss of vacuum allowed the kerosene to escape rapidly from the removable tank to the fixed tank and spill from the fixed tank onto the base plate. The base plate was allegedly too small to hold the kerosene, thus, the kerosene spilled onto the floor (which was carpeted) and caused uncontrolled flames to ignite beyond the heater cabinet. The issue on appeal, as below, was whether plaintiffs had presented sufficient evidence to support their theory surrounding the alleged defect and causation.

We review de novo a trial court's ruling regarding a motion for summary disposition. *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Spiek, supra,* p 337. The court considers the pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted or filed in the action to determine whether a genuine issue of any material fact exists to warrant a trial. *Id.*

First, with regard to the issue of whether the kerosene heater was defective, we believe that there was sufficient evidence to support plaintiffs' theory. The Fire Marshal Division of the State Police delivered the heater to Sadler & Associates for inspection. Billy Sadler, an engineering expert, concluded that the fuel tank sight gauge was a defective design because any type of low level fire would melt the plastic window and allow fuel to spill out and spread. Plaintiffs' expert, Richard Henderson, Ph.D., testified that the kerosene heater suffered very severe fire damage inside the heater, indicating that it was more likely than not that the heater spontaneously flared up and that something happened inside the heater to cause the fire. Dr. Henderson further believed that, when considering the possible problems that could cause an internal spontaneous combustion, it was more likely that the fire was caused by a defect in the sight gauge.

Although we find that these experts presented evidence that the kerosene heater had a defect, the more difficult question is whether that defect actually caused the fire. "It is well settled under Michigan law that a prima facie case for products liability requires proof of a causal connection between an established defect and injury." *Skinner v Square D Co,* 445 Mich 153, 159; 516 NW2d 475 (1994), citing *Mulholland v DEC Int'l Corp,* 432 Mich 395, 415; 443 NW2d 340 (1989). To establish the necessary cause in fact, plaintiffs may show causation circumstantially. *Skinner, supra,* p 163. However, plaintiffs' "circumstantial proof must facilitate reasonable inferences of causation, not mere speculation." *Id.,* p 164. Thus, "a causation theory must have some basis in established fact." *Id.*

> However, a basis in only slight evidence is not enough. Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory. Rather, the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred. [*Id.,* pp 164-165.]

We believe that the trial court properly granted summary disposition in favor of defendants because, despite the experts' testimony, plaintiffs have not presented substantial evidence for a jury to conclude that, more likely than not, the alleged defect in the kerosene heater actually caused the fire. Sadler's opinion as to how the fire started inside the kerosene heater was that once the temperature of kerosene fuel reaches 100 degrees Farenheit in the

removable tank, pressure builds and the fuel overflows to the fixed tank. The fuel then overflows into the base plate and, at 100 degrees, gives off vapors. The vapors are ignited by rising and creating a natural convection. The heat burner then pulls the vapors in and the fire starts inside the heater. However, Sadler also stated that if a fire starts externally,[3] and the temperature in the fuel tank is raised to 100 degrees, the fuel will boil out and the same fire pattern would occur as he described with an internal fire. In fact, Sadler specifically testified that he could not determine, in his opinion, what caused the fire inside the kerosene heater, but that he had some hypotheses. Further, Sadler did not point to any evidence supporting or proving any of his hypotheses and admitted that an external fire could have created the same fire pattern on the heater.

Henderson provided more testimony regarding causation and stated that the only source of ignition in the area "would be something to do with the kerosene heater." Henderson, like Sadler, believed that the fire started inside the heater because there was very severe fire damage inside the heater. Because all the evidence indicated that the fuel inside the heater was kerosene and was not otherwise contaminated, Henderson believed that "something went wrong with the removable tank to allow fuel out in excessive levels beyond what the barometric valve is metering out." Henderson further testified that the only mechanism to allow fuel to escape in excessive levels from the tank is a problem with the sight gauge. He also stated that the spontaneous flare-up was "more likely" a problem with the sight gauge.[4] More specifically, he testified that there must have been a manufacturing defect in the sight gauge assembly that caused the loss of vacuum in the removable tank, *if* his mechanism was correct. Henderson also conceded that there was no evidence that there was any actual problem with the kerosene heater's sight gauge in this case.[5]

Although we find that there is evidence of a defect in the kerosene heater and there is evidence that the heater was the cause of the fire, there is insufficient evidence linking the alleged defect (the sight gauge) with the cause of the fire. While plaintiffs' experts' theories are certainly possible, they have failed to point to any evidence leading to proof that their theories are a reasonable likelihood of probability, rather than a mere possibility. See *Skinner, supra*, p 166. We note additionally that the kerosene heater in question was eight or nine years old at the time of the fire and that Dillard and Dimple Choate had never had any previous problems with the heater. Further, Dimple Choate testified that she refueled the heater at about 8:00 p.m., then lit the heater at 9:00 p.m., she checked the heater three times before going to bed, and last checked the heater at about 11:00 p.m. There was no indication that there were any problems with the heater during that evening.

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[3] For example, it is defendants' theory that the fire started externally when combustible materials, such as curtains, caught fire because the kerosene heater was too close to such material. Further, Sergeant Worden's investigation showed partially burned pieces of fabric near the heater.

[4] We note that Henderson did testify that he inspected the removable tank and did not find any manufacturing defects in that tank.

[5] We note the Henderson testified that he could not determine if there was any defect in the sight gauge after his inspection of it because the sight gauge was destroyed in the fire.

Consequently, we conclude that summary disposition was properly granted in favor of defendants. Plaintiffs' experts' theories were deficient because they lacked a basis in established fact. *Skinner, supra,* p 174. As in *Skinner,* the experts' theories were premised on hypotheses or conjecture, and did not establish a genuine issue of causation. Accordingly, because plaintiffs have failed to create a material factual dispute regarding the issue of causation, defendants are entitled to judgment as a matter of law.

Affirmed.

/s/ Kathleen Jansen
/s/ Robert B. Burns

I concur in result only.

/s/ Donald S. Owens