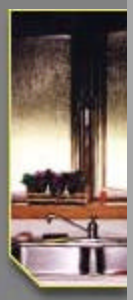

Breaking Legal Developments

Published by:
Peter A. Lynch, Esq.
of Cozen O'Connor
palynch@cozen.com
http://www.cozen.com

04-27-2007

EXECUTIVE SUMMARY: This weekly newsletter covers:

1. MAINE DISTRICT COURT REJECTS DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S STRICT PRODUCT LIABILITY AND NEGLIGENCE CLAIMS REGARDING FIRE CAUSED BY DEFECTIVE EXHAUST FAN UNDER MALFUNCTION AND RES IPSA LOQUITUR THEORIES, EVEN WHERE PLAINTIFF'S EXPERT ADMITS THAT HE IS NOT QUALIFIED TO OPINE WHETHER OR NOT THE FAN WAS DEFECTIVE

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Brief Summary

In Canning v. Broan-Nutone, LLC (D.Me. 2007) 2007 WL 1112355, available at http://www.med.uscourts.gov/opinionssearch/opsearch.asp the United States District Court for the District of Maine denied Defendant's motion for summary judgment against Plaintiff's strict product liability and negligence claims for a fire allegedly resulting from a Broan exhaust fan. Plaintiff's expert opined that the fire originated from the exhaust fan based on a lack of other appliances in the area of origin and opined that the fan must have been defective because fans typically do not generate enough heat to cause a fire absent a defect. Plaintiff's expert could not conclude why or how the fan was defective, and therefore Plaintiff's claims were based on the malfunction theory and res ipsa loquitur. In fact, Plaintiff's expert even admitted at deposition that he is not qualified to opine whether or not the fan was defective. Nonetheless, based on his malfunction theory and res ipsa loquitur testimony that the fan was the only appliance in the area of origin, the court upheld Plaintiff's claims against summary judgment.

Detailed Facts and Ruling

On August 2, 2002, a fire broke out in John and Maribeth Canning's home, causing extensive damage. The fire originated in the area of a Broan-NuTone, LLC (Broan) exhaust fan and the Cannings have asserted damages against Broan claiming its fan was defective and caused the fire. Absent

evidence of a specific defect, the Cannings rely on the malfunction theory, a strict liability analogue to *res ipsa loquitur,* to establish Broan's liability. Broan contends it is entitled to summary judgment, because the Cannings have not established that a replacement motor within the fan was a Broan product. Although the case is extremely close, the record here is so untidy that the resulting ambiguity at this stage favors the non-movant. Because the Court is required to view the evidence in the light most favorable to the Cannings, the Court denies the essence of Broan's motion for summary judgment; it grants Broan's motion only as to the Cannings' claims of breach of express warranty and breach of the implied warranty of fitness for a particular purpose.

I. STATEMENT OF FACT

John C. and Maribeth Canning reside in Augusta, Maine in a house built in the late 1960s. Plaintiffs purchased the house sometime in 1998 and, on August 2, 2002, a fire broke out, causing extensive damage to their house and personal property. The Cannings filed a complaint in state court against Broan, alleging that the fire was caused by a Broan exhaust fan, and alleging negligence, strict liability (14 M.R.S.A. § 221) and breach of express and implied warranties. Broan removed the action to federal court on January 24, 2005.

A. The Origin of the Fire

When the Cannings purchased their house in 1998, the upstairs bathroom contained a NuTone model 8810 exhaust fan. The Cannings and their two children used the fan every day prior to the fire, but never experienced any problems or issues, nor did the fan ever require any maintenance or repairs. The Cannings did not modify the fan before the fire, nor were they aware of any modifications to the fan before purchasing their house in 1998.

Robert Long examined the fire scene to determine the fire's cause and origin. Mr. Long is a certified fire examiner, a former fire investigator for the Maine Fire Marshal's Office, and has been performing fire investigations for eighteen years. Mr. Long concluded that the fan was responsible for the fire.[FN4] In reaching this conclusion, Mr. Long found that under normal operating conditions, an exhaust fan would not generate heat sufficient to start a fire, absent a defect. Mr. Long also eliminated other potential causes of the fire. He excluded owner misuse, saying "[t]he location of the appliance's installation essentially eliminates the possibility of owner misuse." He further excluded the possibility that another appliance caused the fire, as there were no other appliances at the point of origin. In his report, under "Origin and Cause," Mr. Long wrote:

FN4. Defendant objects to the statements of material fact concerning Mr. Long, saying "any part of the allegations ... based on opinions concerning an alleged defect in the Fan is inadmissible in that Mr. Long is self-admittedly not qualified to offer such opinions, nor was he designated by Plaintiffs to do so. In particular, Mr. Long purports in this paragraph to opine that the fire started inside the Fan itself. He has never inspected the inside of the Fan, nor does he have the expertise to render such an opinion." DRPSAMF ¶ 6. In its Reply to the Plaintiffs' Opposition, Defendant states, "Plaintiffs' expert witness, Robert Long, unequivocally concedes that he is not qualified to opine on whether the Fan was defective." *Def.'s Reply Mem. in Supp. of Mot. for Summ. J.* at 4 (Docket # 54) (*Def.'s Reply*).

The Court agrees with Defendant that Mr. Long's own deposition testimony reveals that he does not consider himself qualified to offer opinions as to possible electrical or engineering defects within the fan in question. He stated "[M]y opinion is that the fire started inside the fan enclosure itself. The specific event that triggered it, I don't believe has been identified by any party at this point.... [T]here's numerous things that probably could have happened. I'm not qualified to really answer that." *Long Dep.* at 146: 13-19 (Docket # 50). The limitations of Mr. Long's expertise were made clear at several points during his deposition testimony. Indeed, Mr. Long's ability to make certain determinations was further hampered by the fact that the motor was not disassembled for his inspection. *Long Dep.* at 124: 9-10.

However, the Court does not agree that Mr. Long's expert opinions are outside the scope of what he was designated to offer. Mr. Long is a veteran fire investigator and among the principle charges of a

fire investigator is to determine the cause and origin of a fire. Based on fire patterns, burn patterns and damage to the structure-all matters well-within Mr. Long's area of expertise-he concluded that "the point of fire origin is actually at the exhaust fan or adjacent to the exhaust fan.... [T]hermal patterns ... are indicative that an extreme-high-heat event occurred within the appliance itself and subsequently ignited the surrounding structural materials...." *Long Dep.* at 51: 23-25; 52: 1-4. Therefore, the Court notes the limitations of Mr. Long's expertise, but concludes that his findings as to cause and origin of the fire are within the scope of his expertise and "likely would assist the trier of fact to understand or determine a fact in issue." *Ruiz-Troche v. Pepsi Cola Of P.R. Bottling Co.*, 161 F.3d 77, 81 (1st Cir.1998) .

The fire damage and fire patterns consistently indicate that the fire originated in the second-floor bathroom wall bay where the exhaust fan had been mounted. The Nutone fan was the only appliance at the point of origin. Thermal patterns on the rear of the fan housing indicate that much higher than normal temperatures had occurred at that location. The cause of the fire is directly related to an event involving the fan.

Finally, Mr. Long suggested that the heat source originated from inside the fan rather than outside the fan. PSAMF ¶ 12; *Long Dep.* at 124: 7-17 ("[T]here's been an exceptional amount of thermal exposure at that point, probably from internal.... [I]t appears that it was more ... likely than not an internal exposure versus an external exposure.")

B. The Replacement Motor

Broan sold the fan sometime between 1954 and 1972, when Broan discontinued its production and sale. DSMF ¶ 8; PRDSMF ¶ 8. By August 2, 2002, the fan's original motor had been removed and replaced with a replacement motor. DSMF ¶ 10; PRDMSF ¶ 10. The Plaintiffs may only pursue their various theories of liability if the entire fan, including the replacement motor, was, in fact, a Broan product.

C. The September 28, 2005 Motion for Summary Judgment

On September 28, 2005, Broan moved for summary judgment and on November 2, 2005, the Cannings objected. As originally framed, the critical factual question as to whether the replacement motor was a Broan product remained unresolved. On February 15, 2006, the Court held oral argument and pressed the parties to attempt to resolve this critical, and seemingly demonstrable, factual question. The Court agreed to re-open discovery on this limited issue, to allow the parties to resolve it, and to file a dispositive motion, if necessary, based on facts as established. The same day, the Court granted Defendant's oral motion to dismiss without prejudice its pending motion for summary judgment, and further granted the Cannings' oral motion to amend the Scheduling Order to reopen discovery. After a series of extensions, the parties confirmed that the additional discovery had been completed and on September 15, 2006, Broan filed a new motion for summary judgment; again, the Cannings opposed.

II. DISCUSSION

A. Standard for Summary Judgment

Summary judgment is appropriate only "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 and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *Santoni v. Potter*, 369 F.3d 594, 598 (1st Cir.2004). "Once the movant avers an absence of evidence to support the nonmoving party's case, the latter must adduce specific facts establishing the existence of at least one issue that is both 'genuine' and 'material.' " *Sheinkopf v. Stone*, 927 F.2d 1259, 1261 (1st Cir.1991) (internal citation omitted). An issue is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is "material" if it has the "potential to affect the outcome of the suit under the applicable law." *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 52 (1st Cir.2000) (citation omitted). In applying this standard, the record is viewed in the light most favorable to the nonmoving party. *FDIC v. Anchor Props.* 13 F.3d 27, 30 (1 st Cir.1994).

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C. Strict Liability

Plaintiffs assert a claim for strict liability under 14 M.R.S.A. § 221, saying:

14. The fan manufactured by Defendant was defective and unreasonably dangerous in that it malfunctioned under normal use, resulting in a fire and extensive damage to the Cannings' home.

15. The defective condition in the subject fan rendered it unreasonably dangerous to the Cannings, who were individuals reasonably expected to use the fan.

16. As a direct and proximate result of this defective condition, the Cannings incurred significant property damages.

Compl. at 3. Maine's strict liability statute reads:

One who sells any goods or products in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to a person whom the manufacturer, seller or supplier might reasonably have expected to use, consume or be affected by the goods, or to his property, if the seller is engaged in the business of selling such a product and it is expected to and does reach the user or consumer without significant change in the condition in which it is sold. This section applies although the seller has exercised all possible care in the preparation and sale of his product and the user or consumer has not bought the product from or entered into any contractual relation with the seller.

*10 14 M.R.S.A. § 221. "The Maine Legislature formulated section 221 directly from section 402A of the Restatement (Second) of Torts." *Bernier v. Raymark Indus., Inc.*, 516 A.2d 534, 537 (Me.1986). Products "can be in a defective condition, unreasonably dangerous to the user or consumer as a result of an error in the manufacturing or design process or the failure to warn of a product hazard." *Id.* at 537 n. 3. In a strict liability claim, based on a design defect, the "plaintiff must prove that the product was defectively designed thereby exposing the user to an unreasonable risk of harm. Such proof will involve an examination of the utility of its design, the risk of the design and the feasibility of safer alternatives." *St. Germain v. Husqvarna Corp.*, 544 A.2d 1283, 1285 (Me.1988) (quoting *Stanley v. Schiavi Mobile Homes, Inc.*, 462 A.2d 1144, 1148 (Me.1983) .

1. The Presence of a Design Defect

Broan first argues that there is no evidence in the record that the fan was defective and unreasonably dangerous or that it experienced any malfunction. *Def.'s Mot.* at 3. The Cannings, in turn, argue that the record reflects at least a factual issue concerning the existence of a design or

manufacturing defect in the fan's motor. *Pls.' Opp'n* at 7. The parties rely on three primary cases: *TNT Road Co. v. Sterling Truck Corp.,* 2004 U.S. Dist. LEXIS 13461 (D.Me. July 19, 2004); *Moores v. Sunbeam Prods., Inc.,* 425 F.Supp.2d 151 (D.Me.2006); and *Walker v. Gen. Elec. Co.,* 968 F.2d 116 (1st Cir.1992).

a. *TNT Road Co. v. Sterling Truck Corp.*

In *TNT Road Company,* a fire spontaneously erupted in, and destroyed, a truck. The plaintiffs' fire investigator and expert opined that the fire started in or at the truck's ignition switch. 2004 U.S. Dist. LEXIS 13461, at *3. Based on his examination, the investigator was able to rule out other components as possible causes of the fire. *Id.* at *4. He also made numerous observations concerning the truck's ignition switch which corroborated his conclusion. *Id.* at *6-7. Due to the extensive damage, however, there was no way to confirm the investigator's theory on the cause of the fire. Thus, the crucial question was:

[C] an the plaintiffs prove up a products liability case when their expert can point to circumstantial evidence that [the] switch was the cause and origin of the fire, but cannot point to evidence of a specific defect in the switch or the origin of the defect?

Id. at *15-16. The Magistrate Judge concluded that "the law permits a products liability suit to go forward under the circumstances of this case." *Id.* In its analysis, the Court noted that Maine's strict liability statute was drawn, almost verbatim, from the Restatement and that the Law Court looks to the Restatement, including its commentary, for guidance. *Id.* at *17-18. The Court pointed to the Third Restatement's acceptance of circumstantial evidence for proving a product defect. The Restatement reads:

*11 It may be inferred that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution, without proof of a specific defect, when the incident that harmed the plaintiff:

(a) was of a kind that ordinarily occurs as a result of product defect, and

(b) was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution.

Restatement (Third) of Torts, Products Liability, § 3 (1998). The Court next points to the American Law Institute's commentary:

The most frequent application of this Section is to cases involving manufacturing defects. When a product unit contains such a defect, and the defect affects product performance so as to cause a harmful incident, in most instances it will cause the product to malfunction in such a way that the inference of product defect is clear. From this perspective, manufacturing defects cause products to fail to perform their manifestly intended functions. Frequently, the plaintiff is able to establish specifically the nature and identity of the defect and may proceed directly under § 2(a). But when the product unit involved in the harm-causing incident is lost or destroyed in the accident, direct evidence of specific defect may not be available. Under that circumstance, this Section may offer the plaintiff the only fair opportunity to recover.

Id. at *20-21 (quoting Restatement (Third) Torts, Products Liability, § 3 (1998) cmt. b). The Magistrate Judge ultimately denied the motion for summary judgment, finding that "[t] he plaintiffs here have an expert who has used a reliable investigatory methodology to rule out numerous other possible causes of the fire and to root out a specific component malfunction that would not happen in the absence of a manufacturing defect." *Id.* at *22.

b. Moores v. Sunbeam Products, Inc.

In *Moores,* a fire broke out at the plaintiffs' home. There, the fire investigator identified the source of the fire as a Sunbeam heating pad, which had been left on a recliner. After identifying the heating pad as the heat source, the fire investigator sent the remains of the pad to an electrical engineer for inspection and analysis. 425 F.Supp.2d at 154 . The fire investigators agreed that, assuming plaintiffs' account was accurate, the heating pad was the only source of ignition. *Id.* Defendant then moved for summary judgment on the ground that plaintiffs designated no opinion witness to testify that "the heating pad was defective and caused the fire. Therefore, a critical element of the plaintiffs' Complaint cannot be proven." *Id.* at 155.

The Court framed the issue as "whether the Plaintiffs have produced sufficient evidence, absent direct proof of a specific defect, to survive summary judgment." *Id.* at 156. The Court concurred with *TNT Road Company* and denied the defendant's motion for summary judgment on strict liability grounds. *Id.* at 158. The Court concluded that genuine issues of material fact had been raised that precluded summary judgment, since the fire investigator determined that the origin of the fire was the recliner and eliminated causes other than the heating pad. *Id.* at 157-58.

c. Walker v. General Electric Co.

*12 In *Walker,* a fire broke out in the plaintiffs' home. The fire investigator concluded that the fire originated in the area around a toaster oven and, as such, opined that the toaster itself or the outlet into which it was plugged could have served as the source of ignition. 968 F.2d at 118. A fire analyst generally concurred with the fire investigator's opinion with the notable exception that the analyst found the area of origin to include only the toaster. *Id.* Defendant hired an electrical engineer who testified on cross-examination that he could not point to any specific defect in the toaster nor any design error which might have caused the malfunction. *Id.* There was also uncontradicted testimony that the plaintiffs used the toaster daily, that it functioned properly, and that it never required repair. *Id.* at 117. After plaintiffs rested, defendant moved for a directed verdict, which the court granted. With regard to the strict liability claim, the district court found that the plaintiffs failed to present sufficient evidence showing defect, a necessary element of their claim. *Id.* at 118.

In reviewing the district court's decision, the First Circuit briefly addressed the "malfunction theory." The Court's commentary bears repeating:

Relying on a Third Circuit case interpreting Pennsylvania's products liability law, plaintiffs argue that the application of "a malfunction theory"-whereby proof of a malfunction may be used as evidence to establish a defect-provided a sufficient evidentiary basis to allow the case to go to the jury on the issue of defect. *Sochanski v. Sears, Roebuck & Co.,* 689 F.2d 45 (3d Cir.1982). We disagree. In *Sochanski,* the court carefully specified that the "malfunction theory" did not alter the requirements of section 402(A) of the Restatement (Second) of Torts (also the basis for Maine's strict liability statute). *Sochanski,* 698 F.2d at 50. The court was clear that "evidence of a malfunction, then, is not a substitute for the need to establish that the product was defective." *Id.* In a later Third Circuit case, the court explained that Pennsylvania's "malfunction theory" is simply a specific application of the general rules of proof in products liability cases in that a plaintiff may meet the burden of proving a defect either by pointing to some specific dereliction by the manufacturer in the design or construction of the product or "by showing an unexplained occurrence and eliminating all reasonable explanations for the occurrence other than the existence of a defect ." *Ocean Barge Transport Co. v. Hess Oil Virgin Islands Corp.,* 726 F.2d 121, 124 (3d Cir.1984). Plaintiff remains with the burden of negating other reasonable explanations for the malfunction. *Id* . The court concluded: Thus, the malfunction theory in no way relieves the plaintiff of the burden of proving a defect: it simply allows him to show that a defect is the most likely explanation for an accident by eliminating other reasonable explanations. The plaintiff still

must satisfy the burden of proving that a defect is the most likely cause of the accident, and therefore must negate the likelihood of other reasonable causes. *Id.* at 125.

*13 *Id.* at 120 (some internal citation omitted). In affirming the district court's finding, the First Circuit concluded that "even if we were to borrow from Pennsylvania law, plaintiffs failed to meet their burden of proof in establishing the element of defect since they failed to exclude other reasonable explanations for the malfunction." *Id.* Indeed, both plaintiffs' and defendant's testimony suggested that normal wear and tear could be another reasonable explanation for the toaster's alleged malfunction. *Id.*

d. Analysis

Plaintiffs argue that this case is consistent with *TNT Road Company* and *Moores. Pls.' Opp'n* at 7-8. Plaintiffs further argue that *Walker* is not on point because there the plaintiffs' expert testified that normal wear and tear was an equally likely explanation for the malfunction. *Id.* at 10. Unlike the fire investigators in *Walker,* in this case, Mr. Long has been able to rule out all causes other than a failure of the fan. *Id.* at 11. Defendant argues that this case is on all fours with *Walker,* and "virtually requires that judgment be entered for Defendant." *Def.'s Mot.* at 4. Defendant argues that *TNT Road Company* and *Moores* are inapplicable because, unlike here, the direct evidence of a specific defect was lost or destroyed in the accident. *Def.'s Reply* at 3. Therefore, Defendant argues that Plaintiffs may not benefit from relying on purely circumstantial evidence:

Despite having exclusive possession of the Fan since the Fire, Plaintiffs apparently made the tactical decision not to examine and test it, nor to retain a qualified expert with a "reliable investigatory methodology" to articulate a theory of malfunction. Second, and most importantly, unlike in *TNT* and *Moores,* (a) Plaintiffs here have offered no admissible evidence of *any* electrical malfunction in a particular component, and (b) Plaintiffs' expert by his own admission cannot offer a qualified theory about the nature of a potential defect by tracing the fire to an electrical component that, absent a defect, should not have caused a fire.

Id.

The Court agrees with Defendant that this case is unlike *TNT Road Company* in that the fire investigator was unable to point to an electrical malfunction of any particular component. The case is further unlike *TNT Road Company* and *Moores* in that the fan was not lost or destroyed. Defendant maintains that *TNT Road Company* "emphasized that 'when the product unit involved in the harm-causing incident is lost or destroyed in the accident, direct evidence or specific defect may not be available. *Under that circumstance,* this Section may offer the plaintiff the only fair opportunity to recover.' " *Id.* (emphasis in original) (citation omitted).

It is true that an evaluation of the interior of the replacement motor has never been performed. Yet, the Court cannot agree that the absence of whatever information may have been gleaned from that evaluation is dispositive. Ultimately, this is a fact-intensive inquiry and each of the three cases is readily distinguishable from the case at hand. Here, the single-most compelling factor is that Mr. Long excluded other reasonable explanations for the malfunction. This fact alone makes *Walker* inapposite. [FN9]

FN9. Indeed, this was the basis on which the Magistrate Judge in *TNT Road Company* found *Walker* "easily distinguishable." 2004 U.S. Dist. LEXIS 13461, at *21.

*14 The Court must view the facts in the light most favorable to Plaintiffs, including the fact that their expert, within the bounds of his expertise, concluded that the fire was most likely caused by a thermal event in the interior of the fan and excluded other causes. Although the Cannings are unable to isolate a specific defect, this case is akin to *TNT Road Company* since, once other causes are eliminated, an exhaust fan does not cause a fire absent some defect. The Court concludes that

Plaintiffs have produced sufficient evidence that the fan was defective to withstand summary judgment.

2. Significant Change

Broan next argues that to prevail under section 221, plaintiffs must show that the product reached "the user or consumer without significant change in the condition in which it is sold" and plaintiffs have failed to show that statutory element. 14 M.R.S.A. § 221; *Fuller v. Central Maine Power Co.*, 598 A.2d 457, 460 (Me.1991). Recognizing that Maine's statute is based on the Restatement, Defendant cites to the Restatement for the proposition that a manufacturer "is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful by the time it is consumed." *Def.'s Mot.* at 8 (quoting Restatement (Second) Torts § 402A cmt. g). The commentary to the Restatement goes on to say that "[t] he burden of proof that the product was in a defective condition at the time that it left the hands of the particular seller is upon the injured plaintiff; and unless evidence can be produced which will support the conclusion that it was then defective, the burden is not sustained."

Defendant relies on the affidavit of Gregory M. Bird [FN10] to demonstrate that the fan was a significantly different product-a product for which Broan may not be held liable-as of the time of the fire. Broan has employed Mr. Bird for two years. *Bird Decl.* ¶ 3. As the Director of Product Performance, he is responsible for overseeing and investigating all product liability claims involving Broan products.[FN11] *Id.* Mr. Bird conducted research on the fan and concluded:

FN10. Broan originally filed the affidavit of Mr. Bird on October 7, 2005. *Bird Decl.* (Docket # 15). On November 2, 2005, the Cannings moved to strike the affidavit and on December 13, 2005, the Court denied Plaintiffs' motion. *Mot. to Strike Aff. Of Bird* (Docket # 20); *Order* (Docket # 31). Broan re-filed the affidavit with its renewed motion for summary judgment. Ex. 1 (Docket # 46). The Court notes that, after denying Plaintiffs' motion to strike Mr. Bird's affidavit, Broan most recently filed a slightly different affidavit by Mr. Bird than the one the Court previously reviewed. However, because the changes are not substantively important, the Court relies on the most recent affidavit.

FN11. Mr. Bird is also the Director of Engineering for Kitchen Ventilation. In this capacity, he is responsible for new product development. *Bird Decl.* ¶ 3. He has been in product development and engineering for more than twenty-five years. *Id.*

a. The Fan itself is a NuTone Model 8810, which model was introduced in 1954 and discontinued from production in 1972.

b. After reviewing the design of the Fan's motor, both in person and through photographs, it is clear that it is not the original motor utilized by NuTone in its model 8810 fan.

c. A.O. Smith Electrical Products Company ("A.O.Smith") manufactured the casing for the Fan motor, and said casing design was not introduced by A.O. Smith until sometime in the early to mid-1990s.

d. Given that the model 8810 fan was discontinued from production in 1972, and the A.O. Smith casing design was not utilized until the early to mid-1990s, there is a gap of at least 20 years (and possibly as large as over 40 years) between the time NuTone would have sold the Fan and the time it was modified to replace the original Fan motor.

*15 6. Based on the aforementioned, the Fan motor could not be the original one intended, tested, and approved for use in the Fan.

Bird Decl. ¶ 5-6. Based on Mr. Bird's declaration, Broan included the following: "As of the time of the Fire, the Fan was a significantly different product than when NuTone originally sold the NuTone model 8810 fan. Specifically, the Fan's original motor had been removed and replaced with a replacement

motor (the 'Replacement Motor')." DSMF ¶ 10.[FN12]

FN12. Plaintiffs responded: "Qualified. Plaintiffs admit that the Fan's original motor had been replaced with a JA1M046 motor produced sometime after 1993. Plaintiffs deny that the Fan was a significantly different product than when NuTone originally sold the model 8810 fan, as the statement to that effect is unsupported by the citation, and states a legal conclusion. In any event, the Replacement Motor is model # JA1M046, manufactured by A.O. Smith in compliance with a drawing supplied to it by Broan, and sold by Broan as a replacement motor for its NuTone Exhaust Fan Model 8810." PRDSMF ¶ 10. The Court has already discussed the confusion regarding whether the replacement motor was manufactured by A.O. Smith for Broan. *See supra* Part I.B.2-6.

Mr. Bird's declaration clarifies that the fan was not in its original condition as of the time of the fire. Indeed, the record is replete with information showing that the fan was not operating with its original motor but, rather, was operating with the replacement motor. The next question, then, is whether installing the replacement motor constituted a "significant change" in the condition in which the fan was sold.

The Law Court has stated that it does "not regard a change in the manufacturer's product as significant unless the change relates to the *essential features* and to the safety of the product." *Marois v. Paper Converting Machine Co.*, 539 A.2d 621, 624 (Me.1988) (emphasis in original). The Court went on to say that, "even if a substantive change is made in a product, the manufacturer will not be relieved of liability unless the change was an unforeseen and intervening proximate cause of the injury." *Id .*

Defendant argues that "[t] he motor is *the* essential feature of the Fan and relates directly to its safety-the housing and other component parts are support features to the motor's functioning. Plaintiffs have produced no evidence that the original motor was not entirely safe and free of defect when it left Broan's control...." *Def.'s Mot.* at 11 (emphasis in original). Defendant goes on:

Although Broan could and did foresee that motors in its exhaust fans may eventually need to be replaced, the post-sale installation of a theoretically *defective* replacement motor was "an unforeseen and intervening proximate cause" of any harm that may have resulted. As the drafters of the Model Uniform Products Liability Act ("MULPA") observed, "imposition of liability on a manufacturer or seller in cases in which an alteration or modification was in some manner foreseeable borders on imposing absolute liability ... [even] when intervention by a third party was the principal cause of the accident." *American Law of Products Liability* § 43:16 (paraphrasing MULPA § 112(D), 41 Fed.Reg. 62,714 *et seq.* (1979)).

Def.'s Mot. at 12. Plaintiffs respond by arguing that the replacement motor did not constitute an unforeseen change:

Plaintiffs have established that Broan continues to sell replacement motors for the NuTone Model 8810 Exhaust Fan. There is no question, therefore, that replacement of the fan's motor was not only foreseeable to Broan, it was expected, and accordingly, Broan cannot be relieved of liability based on this change. Finally, Broan argues that Plaintiffs have not established that the installation of the replacement motor was done properly. Broan itself, however, points to the fact that Plaintiffs used the Fan daily without difficultly prior to the day on which it ignited the fire. This is circumstantial evidence that the replacement motor had been installed properly. Nor has Broan offered any evidence describing how improper installation of the replacement motor more than four years prior to the fire could have been the cause of the thermal event that started the fire.

*16 Pls. ' Opp'n at 13-14.

The Court agrees with Defendant that the motor is an essential feature of the fan and that it is directly related to the fan's safety. Indeed, Plaintiffs case is grounded upon their contention that the fire was caused by a malfunction in the interior of the fan. *See* PSAMF ¶¶ 7-13. Thus, the Court readily concludes that there was a significant change in the fan from the condition in which it was originally sold.

However, whether this change was unforeseen unfortunately depends on whether the replacement motor was a Broan product. Affording all reasonable inferences to the Cannings, the Court was unable to find that the replacement motor was not a Broan product. For the purposes of summary judgment, the Court finds that the replacement motor may have been a Broan product, that is, designed and manufactured for Broan.[FN13] Having made this determination, the Court cannot find that installing a Broan replacement motor into a Broan fan, for which the replacement motor was designed, was an unforeseen event. Broan itself acknowledges that "Broan could and did foresee that motors in its exhaust fans may eventually need to be replaced...." *Def.'s Mot.* at 12. Accordingly, the Court denies Defendant's motion for summary judgment on the issue of strict liability.

FN13. Because the Court finds the replacement motor may have been a Broan product, the Court need not address Broan's argument concerning component parts manufacturers.

D. Negligence

Plaintiffs assert a claim for negligence:

10. The fan owned by the Cannings and manufactured by the Defendant was defective.

11. The defect with the fan caused the fire in the Cannings' home on August 2, 2002.

12. The fire and damages incurred by the Cannings were the result of the negligent design or manufacture of the fan by the Defendant.

Compl. at 2-3. To establish negligence, a plaintiff must demonstrate: (1) a duty owed to plaintiff by defendant, (2) a breach of that duty, and (3) that the plaintiff was injured as a result of that breach. *Parker v. Harriman*, 516 A.2d 549, 550 (Me.1986). The Law Court noted that "[i]n actions based upon defects in design, negligence and strict liability theories overlap in that under both theories the plaintiff must prove that the product was defectively designed thereby exposing the user to an unreasonable risk of harm." *Stanley*, 462 A.2d at 1148.

Defendant again cites *Walker* to summarily claim that the absence of evidence of a defect mandates judgment as a matter of law. The Court agrees that the strict liability and negligence analysis is largely the same and continues to find *Walker's* holding inapposite, given the facts of this case. The Restatement again provides guidance:

Negligence and causation, like other facts, may of course be proved by circumstantial evidence.... A *res ipsa loquitur* case is ordinarily merely one kind of case of circumstantial evidence, in which the jury may reasonably infer both negligence and causation from the mere occurrence of the event and the defendant's relation to it.

Restatement (Second) of Torts, § 328D cmt. b. According to the Restatement, *res ipsa loquitur* means:

*17 (1) It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when (a) the event is of a kind which ordinarily does not occur in the absence of negligence; (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff.

Restatement (Second) of Torts, § 328D (1965).

Here, Plaintiffs have analogized to *TNT Road Company* and *Moores* to conclude that fans do not typically generate enough heat to cause a fire, absent a defect. Plaintiffs have excluded other

reasonable causes of the fire, including other appliances and owner misuse. Finally, as a manufacturer-here, again, the Court finds, viewing the evidence in the light most favorable to the Cannings, that the replacement motor was designed and manufactured exclusively for Broan-Broan owes a duty of care to those who use its products. *See generally* Cigna Ins. Co. v. Oy Saunatec, 241 F.3d 1, 16 (1st Cir.2001); *Wellborn v. Cobray Firearms,* 1998 U.S.App. LEXIS 3130, at *13 (10th Cir.1998) (unpublished) ("A manufacturer owes a duty of care to those who use its product. [A] manufacturer is required to exercise reasonable care in the planning, design, and manufacturing of a product in order to insure that it is reasonably safe to use.") (citation and punctuation omitted). Viewing the facts in the light most favorable to Plaintiffs, the Court finds that they have satisfied the doctrine of *res ipsa loquitur* and an inference of negligence is permissible. The Court denies the motion for summary judgment as to the claim of negligence.

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III. CONCLUSION

*19 This decision was an extremely close one. Quite regrettably, many of the critical points of consideration turned on the uncertainty surrounding the question of whether the replacement motor was a Broan product and the procedural posture of the case dictating that all reasonable inferences be drawn in favor of the Cannings. Because the Court cannot definitively conclude that the replacement motor was not a Broan product, it must proceed, at this stage in the proceedings, under the assumption that it was a Broan product. With that as a working assumption, many of the Defendant's subsequent attempts at urging the Court to grant summary judgment necessarily fail.

The Court DENIES summary judgment on the claims of strict liability, negligence, and breach of an implied warranty of merchantability. The Court GRANTS summary judgment on the claims of breach of an express warranty and breach of an implied warranty of fitness for a particular purpose.

SO ORDERED.
(internal citations and unrelated portions omitted).

Mr. Lynch can be reached at Cozen and O'Connor, 501 West Broadway, Suite 1610, San Diego, California 92101, 800-782-3366 (voice), 619-234-7831 (fax), palynch@cozen.com (e-mail), http://www.cozen.com.

Please direct comments, suggestions, stories, and other items to the author by e-mail at palynch@cozen.com