

pursue the bad faith claim for punitive damages as provided by §8371. 75 Pa.C.S.A. §1797, as is presently constructed, is ripe for misinterpretation. It is dangerous to banish 42 Pa.C.S.A. §8371 as a remedy for insureds who have attempted to settle a dispute outside the legal system by first submitting that claim to a PRO if they are then refused payment of medical treatment, services and merchandise as a result of a peer review performed in bad faith.

The relationship between the insurers and the PROs must not be allowed to run unchecked. Courts must be permitted to examine this relationship to ensure that the Legislature's intent is not being misapplied to the detriment of insureds and their health care providers. Accordingly, this court is allowing plaintiffs to proceed with a bad faith claim under 42 Pa.C.S.A. § 8371.

ORDER OF COURT

December 8, 1994, defendant's motion for partial summary judgment is denied.

Defendant is ordered to comply with the March 4, 1993 order compelling defendant to provide discovery to plaintiffs' counsel within forty-five (45) days of this order.

RONALD L. KANNER and GREGORY and : JANET STINE vs.
BOROUGH OF CHAMBERSBURG and AMERICAN METER
COMPANY Franklin County Branch, No.A.D. 1994 -354

Defendants filed motions for summary judgment, claiming that one of the party plaintiffs destroyed evidence which was essential to the defense. The complaint alleged defendants were responsible for fire damage to plaintiffs' duplex due to negligent installation, failure to warn, and/or defective design of a pressure regulator which was in the gas line servicing the damaged duplex. The subject pressure regulator allegedly failed, and caused overpressurization in a hot water heater causing a torch like flame to emanate from the hot water heater. Several months after the plaintiff building owner's insurance company investigated the fire scene and examined the hot water heater, but before the defendants had examined it, the hot water heater was discarded by the building owner.

The Court denied the motions for summary judgment, holding that in a product liability action, where the alleged defective product is still fully available for examination by the defendants, summary judgment is an inappropriate remedy for destruction of evidence where there is no indication that the destruction was precipitated by an improper motive.

1. In a product liability case, destruction of the allegedly defective product component is a sufficient basis for summary judgment in favor of the defendant.
2. Defendants in a product liability action do not bear the burden of proving the existence of secondary cause or abnormal use, but rather only need identify other possible non-defect oriented explanations.
3. Where a party destroys evidence that is relevant to its case the logical inference is that the evidence must have been damaging to that party's position.
4. The remedy of summary judgment as a deterrent to deliberate spoliation of evidence is not appropriate where there is no indication of an improper motive and where the party deprived of the evidence is not unfairly limited in defending the claim.

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OPINION AND ORDER

KAYE, P.J., September 15, 1995:

OPINION

Before the Court are motions of the defendants Borough of Chambersburg, and American Meter Company, for summary

Before the Court are motions of the defendants Borough of Chambersburg, and American Meter Company, for summary judgment against the plaintiffs Ronald L. Kanner and Gregory and Janet Stine. Plaintiffs oppose the motions. The pertinent facts, and reasonable inferences drawn therefrom, in a light most favorable to the plaintiffs,¹ follow.

FACTS

On January 8, 1994, a duplex located at 155-159 North 4th Street in Chambersburg, Pennsylvania, and owned by plaintiff Kanner, was destroyed by fire. At the time of the fire, co-plaintiffs Gregory and Janet Stine resided in the 155 side of the building and Mark R. Farley, not a party to these proceedings, resided in the 159 side.

The fire began at about 5:30 o'clock a.m. The weather conditions were particularly severe, with sleet and icy conditions reported. Inside both sides of the duplex it was reported to be very cold. Each home was equipped with its own furnace and its own hot water heater. These appliances were connected to a single gas supply pipe emanating from a single meter and pressure regulator attached to the Borough of Chambersburg's high pressure street main. This line emerges from the ground in front of the 155 porch where the pressure regulator and meter are located. The pressure regulator and meter are owned by the Borough. The pressure regulator was manufactured by American Meter Company.

Shortly before 5:30 o'clock a.m. on January 8th, Mr. Farley awoke in the 159 residence and heard a "hissing" noise. He located the noise as coming from the basement. Upon entering the basement he determined that there was a gas leak coming out of the area of a control button on the hot water heater. He eventually pressed this button which stopped the hissing sound. When he released the button the hissing sound resumed, so he again depressed the button. Deciding to return upstairs, he released the button and began to move toward the stairs, when a very large flame "like a blowtorch" emerged from the hot water heater. The flame went up to the ceiling of the basement.

¹ See *Faiella v. Bartoles*, 102 Pa.Cmwlt. 258, 517 A.2d 1019 (1986).

Within five days after the resulting house fire, two inspectors representing Mr. Kanner's insurer had inspected the building. Both inspectors concluded that the flames had initiated at the water heater in the basement of 159 North 4th Street. The water heater was examined, but the inspectors were not able to determine the make or the identity of the manufacturer of the water heater due to fire damage. The pressure regulator from outside the residence was also examined and tested and was determined to be functional. After these tests were completed the subject hot water heater was transported to Mr. Kanner's personal residence for storage. The charred water heater remained at Mr. Kanner's residence from January until May. In May, Mr. Kanner discarded the hot water heater and its current disposition is unknown.

In September of 1994, the present action was filed by plaintiffs alleging that the cause of the fire was overpressurization of the gas line feeding the hot water heater, which resulted from a failure of the pressure regulator to function properly. The alleged cause of this malfunction is unnecessary exposure to the weather elements, allowing moisture within the mechanism which froze rendering the regulator ineffective. The Borough of Chambersburg was alleged to have been negligent and careless in installing the regulator with the vent outlet in a horizontal direction when it knew or should have known that moisture could enter and freeze, and in installing the regulator in a location where it was exposed to the elements. Defendant American Meter Company, as manufacturer of the subject pressure regulator, was alleged to be liable for the fire damages as a result of their sale of a defective product and their failure to provide proper installation instructions and warnings.

The defendants each filed a motion for summary judgment. They claim that the hot water heater that was discarded by Mr. Kanner is essential to their defense, and that summary judgment should be granted against the plaintiffs because of the destruction of this evidence.

DISCUSSION

A motion for summary judgment may be granted only where the pleadings, depositions, answers to interrogatories, admissions on file and supporting affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a

matter of law. Pa.R.C.P. 1035(b). In ruling on this motion the Court must examine the record in the light most favorable to the non-moving party and grant the motion only in cases which are clear and free from doubt. *Elder v. Nationwide Insurance Co.*, 410 Pa. Super. 290, 599 A.2d 996 (1991). Also, in a products liability case, destruction of the allegedly defective product component is a sufficient basis for summary judgment. *Roselli v. General Electric Co.*, 410 Pa. Super. 223, 599 A.2d 685 (1991).

Plaintiffs allege that the subject pressure regulator was the cause of the fire and that it was negligently installed and/or defective. Defendants have had an opportunity to examine the subject pressure regulator. Since the allegedly defective product is available, the basis for summary judgment presented in *Roselli* is inapplicable. In *Roselli*, the alleged defective product which caused plaintiffs harm was discarded before the defendant American Meter Company had the opportunity to examine it or determine who had manufactured it. In the instant case it is contended that the pressure regulator malfunctioned, causing the fire at the hot water heater. Although the hot water heater was discarded, it is not the alleged defective product. *Roselli*, and the other cases cited by the defendants present situations where the defendants were unable to examine or observe the alleged defective product or condition and were tasked with refuting that same condition. For example in *DeWeese v. Anchor Hocking Consumer and Industrial Products Group*, 427 Pa. Super. 47, 628 A.2d 421 (1993), an allegedly defective glass pitcher was discarded before anyone could ascertain the identity of the manufacturer. *DeWeese*, like *Roselli*, presents a clearly different factual scenario than the instant case.

In the case *sub judice*, any prejudice suffered by the defendants would be as a result of their inability to produce physical evidence of one of the possible explanations for the fire. However, under Pennsylvania law, defendants in a products liability action do not bear the burden of proving the existence of secondary cause or abnormal use, but rather only need identify other *possible* non-defect oriented explanations. *Schwartz v. Subaru of America, Inc.*, 851 F.Supp. 191, 193 (E.D.Pa. 1994). The plaintiffs continue to have the burden of proof in such matters, and this burden protects defendants. The inability of the defendants to examine this hot water heater does not prevent defendants from suggesting to a jury that it could have been

the primary or a secondary cause of the fire. The unavailability of the hot water heater does create a problem for the plaintiffs. The logical inference which may be drawn by a jury, where a party destroys evidence relevant to its case, is that the evidence must have been damaging to that parties' position. See 2 Wigmore, Evidence §278 (Chadburn rev. 1979).

The Court is not inclined to grant the harsh remedy of summary judgment here. The prejudice, if any, caused by the plaintiffs to the defendants, is only to one possible avenue of defense. That defense is one which the plaintiffs must dissuade the jury from accepting. Additionally, there was no indication of an improper motive which prompted Mr. Kanner's disposal of the evidence. It merely appears that months after his insurance company had inspected the water heater and had paid his claim of damages, he discarded the item from his garage. As Mr. Kanner's interest in this matter is primarily as a subrogor, there appears no improper motive for his disposing of this evidence. The remedy of summary judgment as a deterrent to deliberate spoliation of evidence is therefore not appropriate here.

The final determination which the Court must make is to determine whether, in the absence of this hot water heater, the plaintiffs have established a *prima facie* case which presents a question of fact for a jury. We hold that there is a legitimate question of causation and sufficient evidence has been presented from which a jury could find that a malfunction of the pressure regulator caused the fire at the hot water heater. Since the pressure regulator is available for inspection, a jury could also find that it was defectively designed or manufactured. The evidence, in a light most favorable to the plaintiffs, suggests that the furnaces from each residence as well as the hot water heater experienced some sort of malfunction the morning of the fire. These appliances are all dependent upon the proper function of the pressure regulator here at issue. The explanation of the insurance companies' investigators regarding the effects of the icing conditions presents a plausible theory of the case. There is sufficient evidence available from which a jury could reasonably find for the plaintiffs, including determining that the product at issue is defective. Because of the availability of this evidence for both parties examination, plaintiffs have advanced a question of material fact which is appropriate for a jury and their case will withstand these motions for summary judgment. The failure of a

plaintiff, Kanner, to preserve the hot water heater as evidence may make it difficult for the plaintiffs to persuade the jury from accepting it as a primary or secondary cause of the fire. However, there is sufficient evidence from which a jury could reasonably find for the plaintiffs.

ORDER OF COURT

NOW, September 15, 1995, the defendants' Motions for Summary Judgment are DENIED for the reasons set forth in the attached Opinion.

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