NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 12-1454

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INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,
a/s/o UNIONVILLE-CHADDS FORD SCHOOL DISTRICT,
Appellant

v.

ELECTROLUX HOME PRODUCTS, INC.

_____

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 2-10-cv-04113)
District Judge: Honorable R. Barclay Surrick

_____

Submitted Pursuant to Third Circuit LAR 34.1(a)
January 8, 2013

Before: RENDELL, FISHER and JORDAN, *Circuit Judges*.

(Filed: April 2, 2013)

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OPINION OF THE COURT

_____

FISHER, *Circuit Judge*.

Appellant, Indemnity Insurance Company of North America ("Indemnity"), as subrogee of the Unionville-Chadds Ford School District ("School District"), brought suit against Electrolux Home Products, Inc. ("Electrolux") alleging strict liability and breach

of warranty. After a trial and a jury verdict in favor of Electrolux, the District Court entered a judgment in favor of Electrolux, from which Indemnity now appeals. We will affirm.

I.

We write principally for the parties, who are familiar with the factual context and legal history of this case. Therefore, we will set forth only those facts necessary to our analysis.

This matter stems from a fire that occurred at the Unionville-Chadds Ford High School on July 23, 2009. As a result of the fire, the School District submitted a claim to its insurance provider, Indemnity. Indemnity paid the claim and filed suit against Electrolux to recover the money paid to the School District. The suit alleged causes of action sounding in strict liability and breach of warranty. Indemnity specifically alleged that the fire was caused by a malfunction within the internal wiring of a Frigidaire refrigerator that was manufactured by Electrolux.

Before trial, Electrolux filed a Motion for Summary Judgment, alleging, *inter alia*, that Indemnity spoliated evidence by failing to preserve a metal can and its contents, which were next to the refrigerator at the scene of the fire. Electrolux asserted that the fire was caused by a spontaneous combustion in the metal can. The District Court denied Electrolux's Motion for Summary Judgment but granted Electrolux's request that the jury be instructed that they could draw an adverse inference based on Indemnity's failure to

preserve the evidence. The District Court found that because Indemnity's experts had the authority to remove items from the scene when they conducted an investigation on July 29, 2009 (before Electrolux had been informed of the fire), and did in fact preserve some items, Indemnity bears responsibility for not preserving the metal can and its contents – evidence that the experts should have known would be discoverable and would likely be destroyed if not preserved at that time. A-63-69. The District Court also stated that although it was granting Electrolux's request for an adverse inference instruction, Indemnity would have an opportunity at trial to rebut Electrolux's claims regarding the importance of the metal can and the possibility of spontaneous combustion. A-69.

Electrolux also filed a Motion in Limine to preclude evidence regarding the location of the refrigerator's manufacture in China. Electrolux claimed that the location of the refrigerator's manufacture was irrelevant and unfairly prejudicial under Rules 401 and 403, respectively, of the Federal Rules of Evidence ("FRE"). The District Court granted Electrolux's motion, holding that "[t]he relevance of the place of manufacture of the subject product in this case is tenuous at best." A-89. Also, in regard to unfair prejudice, the District Court stated:

> "We are satisfied that the prejudicial effect of this evidence substantially outweighs any probative value that it may have. In recent years, considerable public attention has focused on products manufactured in China, feeding the perception that Chinese-made goods are not safe. For example, a November 2007 poll found that 65% of registered voters believed that products imported from China were not safe, with another 8% unsure. (FOX News/Opinion Dynamics Poll, Nov. 13-14, 2007, *available at*

> http://www.foxnews.com/projects/pdf/112007_thanksgiving,_china_toys_web.pdf.)"

A-89.

Immediately prior to jury selection, the Courtroom Deputy explained to counsel that each side had three peremptory challenges and that the challenges were to be exercised "back and forth." A-93. Indemnity was given the first peremptory challenge. After each side exercised one peremptory challenge, Indemnity passed on its next two opportunities. A-94. When Electrolux exercised its third and final challenge, Indemnity attempted to exercise an additional challenge, but was initially prevented from doing so. A-94-96. The District Court explained that "[i]f you don't make a strike, then you give up your right to make that strike." A-95. Despite this statement, the District Court allowed Indemnity to exercise a second peremptory challenge, but not a third. A-96.

Prior to the parties' opening statements, Indemnity moved to sequester witnesses. The District Court, with regard to Electrolux's expert, declined to do so, stating, "I think an expert should be permitted to hear testimony. He has got to come in here and offer his opinion and he can listen to the testimony before he does that." A-103.

After closing arguments, the District Court instructed the jury as follows:

> "I'm talking now, ladies and gentlemen, about the metal can that you heard about and its contents. Ladies and gentlemen, if you find that the plaintiff could have produced the evidence and that the evidence was within his or her control and that this evidence would have been material in deciding among the facts in dispute in this case, then you are permitted, but you are not required to, infer that the evidence would have been unfavorable to the plaintiff."

A-169. In addition, following a brief sidebar and immediately before jury deliberation, the District Court stated that "with regard to the charge that I gave you at the end of the instructions with regard to the adverse inference from the failure to have the can available, you should understand that a party that anticipates litigation has an affirmative duty to preserve relevant evidence." A-177.

After the jury returned a unanimous verdict in favor of Electrolux, the District Court entered a judgment in favor of Electrolux. Indemnity now appeals from that judgment.

II.

The District Court had diversity jurisdiction over this action under 28 U.S.C. § 1332. We have appellate jurisdiction under 28 U.S.C. § 1291.

We review for an abuse of discretion the District Court's rulings that are relevant to this appeal. *See Kirk v. Raymark Indus.*, 61 F.3d 147, 153 (3d Cir. 1995) and *Fedorchick v. Massey-Ferguson, Inc.*, 577 F.2d 856, 858 (3d Cir. 1978) (peremptory challenges); *Bull v. United Parcel Serv., Inc.*, 665 F.3d 68, 73-77 (3d Cir. 2012) (spoliation of evidence); *United States v. Zehrbach*, 47 F.3d 1252, 1264 (3d Cir. 1995) (articulation of jury instructions); *United States v. Vosburgh*, 602 F.3d 512, 538 (3d Cir. 2010) (exclusion of evidence under FRE 403); *United States v. Agnes*, 753 F.2d 293, 306 (3d Cir. 1985) (sequestration of witnesses under FRE 615), *abrogated on other grounds by Smith v. Borough of Wilkinsburg*, 147 F.3d 272 (3d Cir. 1998).

III.

A.

The District Court did not abuse its discretion in prohibiting counsel for Indemnity from exercising a third peremptory challenge. According to Rule 47 of the Federal Rules of Civil Procedure, a "court must allow the number of peremptory challenges provided by 28 U.S.C. § 1870." Section 1870, in turn, provides that "[i]n civil cases, each party shall be entitled to three peremptory challenges." Apart from this requirement, a district court is given considerable discretion in regard to the procedure and order of exercising peremptory challenges. *See Fedorchick*, 577 F.2d at 858.

Here, the Courtroom Deputy informed each party that peremptory challenges would be exercised "back and forth," A-93, and the District Court gave each party the opportunity to exercise three peremptory challenges. Counsel for Indemnity, in what seems to have been an attempt at gamesmanship (to use two peremptory challenges after counsel for Electrolux exhausted her challenges), chose to accept the jury as constituted during his second and third opportunities to exercise peremptory challenges. A-94. The District Court did not abuse its discretion in determining that Indemnity's attempted use of the final two challenges was improper and unfairly prejudicial to Electrolux.

B.

The District Court did not abuse its discretion in determining that spoliation occurred or in deciding that the jury could draw an adverse inference as a result of the

spoliation. Spoliation occurs where "the evidence was in the party's control; the evidence is relevant to the claims or defenses in the case; there has been actual suppression or withholding of evidence; and, the duty to preserve the evidence was reasonably foreseeable to the party." *Bull*, 665 F.3d at 73. Here, as recognized by the District Court, Indemnity's experts had an opportunity (before Electrolux knew about the fire) to preserve the metal can and its contents. A-64. Also, despite the fact that the experts should have known that the metal can and its contents would be discoverable and likely destroyed if not preserved at that time, they decided not to preserve the metal can. *Id.* Electrolux was thus unable to expound upon its theory of the case. Therefore, the District Court did not abuse its discretion in determining that spoliation occurred.

The District Court also did not abuse its discretion in determining that an adverse inference instruction was warranted due to the spoliation. "The unexplained failure or refusal of a party to judicial proceedings to produce evidence that would tend to throw light on the issues authorizes, under certain circumstances, an inference or presumption unfavorable to such party." *Gumbs v. Int'l Harvester, Inc.*, 718 F.2d 88, 96 (3d Cir. 1983). Such an inference or presumption permits the trier of fact to conclude that the unpreserved evidence "would have been unfavorable to the position of the offending party." *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 78 (3d Cir. 1994). Thus, when the District Court instructed the jury that it was permitted (but not required) to

"infer that the evidence would have been unfavorable to the plaintiff," A-169, the District Court did not abuse its discretion.[1]

C.

The District Court did not abuse its discretion in precluding evidence regarding the refrigerator's place of manufacture in China. FRE 401 provides that evidence is relevant (and thus eligible to be admitted) if "it has any tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action." FRE 403, in turn, provides that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice."

We agree with the District Court that the relevance of the place of manufacture, in this case, is tenuous at best, and that to the extent the place of manufacture may be somewhat relevant, it was within the District Court's discretion, in this instance, to hold that the probative value of the place of manufacture in China was substantially outweighed by a danger of unfair prejudice.

[1] Indemnity also argues that the District Court misled the jury by initially stating that the jury was not required to make an adverse inference, but later stating that "with regard to the charge that I gave you at the end of the instructions with regard to the adverse inference from the failure to have the can available, you should understand that a party that anticipates litigation has an affirmative duty to preserve relevant evidence." A-177. This argument is without merit.

D.

Finally, the District Court acted within its discretion in refusing to sequester the expert witness in this case. FRE 615 provides that "[a]t a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony . . . . But this rule does not authorize excluding . . . a person whose presence a party shows to be essential to presenting the party's claim or defense." The "essential" exception applies most often in cases involving expert witnesses. There is little, if any, reason for sequestering a witness who is to testify as an expert and not to the facts of the case. *Morvant v. Constr. Aggregates Corp.*, 570 F.2d 626, 629 (6th Cir. 1978). Where a party seeks to except an expert from sequestration so that the expert can hear firsthand the testimony of witnesses, the decision whether to permit the expert to remain is within the discretion of the trial judge and should not normally be disturbed on appeal. *Id.* at 630.

Here, the District Court declined to sequester the expert witness, stating, "I think an expert should be permitted to hear testimony. He has got to come in here and offer his opinion and he can listen to the testimony before he does that." A-103. We will not disturb the District Court's ruling on appeal.

IV.

For the above stated reasons, we will affirm the District Court's judgment in favor of Electrolux.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

INDEMNITY INSURANCE COMPANY	:	
OF NORTH AMERICA A/S/O	:	NO. 2:10-cv-04113
UNIONVILLE-CHADDS FORD	:	
SCHOOL DISTRICT	:	
v.	:	
ELECTROLUX HOME PRODUCTS, INC.	:	JURY TRIAL DEMANDED

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT, ELECTROLUX HOME PRODUCTS, INC.'S MOTION FOR SUMMARY JUDGMENT

Defendant, Electrolux Home Products, Inc. ("Electrolux"), by and through its counsel, Nicolson Law Group, files the within Memorandum of Law in Support of Electrolux Home Products, Inc.'s Motion for Summary Judgment seeking entry of judgment as a matter of law pursuant to Federal Rule of Civil Procedure 56.

I. PROCEDURAL HISTORY

This action was instituted by the Plaintiff, Indemnity Insurance Company of North America ("Indemnity Insurance" or "Plaintiff"), on or about August 16, 2010 in the United States District Court for the Eastern District of Pennsylvania. *See* Plaintiff's Complaint (ECF 1). Plaintiff's Complaint alleges causes of action sounding in Negligence (Count I), Strict Liability (Count II) and Breach of Warranty (Count III) against Electrolux. *See id.*

This matter arises out of a fire that occurred on July 23, 2009 at Unionville High School. Following the fire, Unionville-Chadds Ford School District ("School District") submitted an insurance claim to Plaintiff. Thereafter, Plaintiff filed the instant action against Electrolux seeking to recover the money paid to the School District pursuant to its contract of insurance. In the Complaint, Plaintiff alleges that a fire "originated from a Frigidaire compact refrigerator in the hallway to the school gymnasium" and the fire was "caused by a malfunction within the

internal wiring of the refrigerator." Plaintiff's Complaint (ECF 1), ¶¶ 6 and 8. On September 17, 2010, Electrolux filed an Answer to Plaintiff's Complaint with Affirmative Defenses and denied all liability to Plaintiff. *See* Defendant's Answer to Plaintiff's Complaint with Affirmative Defenses (ECF 4).

II. STATEMENT OF FACTS

In January/February 2008, Steven Iezzi, Head Athletic Trainer at Unionville High School, purchased a Frigidaire brand, compact refrigerator. *See* Deposition Testimony of Steven J. Iezzi, pages 11-12, attached hereto as Exhibit "A". According to Mr. Iezzi, the refrigerator was needed to store ice packs for the girls' volleyball team. *See id*. at 13. Mr. Iezzi transported the refrigerator to Unionville High School via his personal vehicle from Lowe's or Home Depot in Delaware where he purchased the product. *See id*. at 14. The refrigerator was kept in the athletic trainer's room in the high school. *See id*. at 17. Mr. Iezzi testified that the refrigerator was plugged in from the time of purchase through June 3, 2008 and from August 15, 2008 through June 3, 2009[1] for a total of 14-15 months. *See id*. at 16-17. Mr. Iezzi testified that the refrigerator never needed service and he never had any problems with the refrigerator. *See id*. at 26 and 28. Mr. Iezzi testified that the product worked properly in that the refrigerator kept bottles of Gatorade cold and the freezer section kept the ice packs frozen. *See id*. at 28. Ricky Hostetler, Supervisor of Buildings and Grounds for the Unionville-Chadds Ford School District, corroborated Mr. Iezzi's testimony that the product functioned flawlessly in that he never "received any work orders for repairs" to the compact refrigerator. *See* Deposition Testimony of Ricky L. Hostetler, pages 8-11, attached hereto as Exhibit "B".

On July 23, 2009, a fire occurred at Unionville High School during the school's summer break. James McLimans, Project Manager and Systems Coordinator for Unionville-Chadds Ford

[1] The refrigerator was unplugged during the summer months to save energy. *See* Exhibit "A" at 14-15.

School District, discovered the subject fire. *See* Deposition Testimony of James McLimans, pages 8 and 15-16, attached hereto as Exhibit "C". Mr. McLimans testified that he was outside "looking at surveying stakes" when was notified that the high school's fire alarm was activated. *Id*. at 16. He walked to the gymnasium and he observed the fire from across the main gym. He observed from across the gym that the double doors to the main gym were closed and were well involved in fire. *See id*. at 22. He further testified that the foam padding on the walls to either side of the double doors was also well involved at that time. *See id*.

Mark Kline, Head Custodian at Unionville High School, testified that earlier on the day of the fire, July 23, 2009, portable items, including the refrigerator, were removed from the athletic trainer's room and placed in the hallway outside the athletic trainer's room[2] by members of the custodial staff so the floor could be painted and the room cleaned. *See* Deposition Testimony of Mark Kline, pages 7 and 14-17, attached hereto as Exhibit "D". The refrigerator was plugged into a outlet in the hallway below a water cooler. *See id*. at 21. Mr. Kline testified that the floor of the trainer's room was painted on the day of the fire. *See id*. at 16. He passed through the yellow hallway during the afternoon of the fire and observed the custodial staff preparing to leave for the day. *See id*. at 23. Mr. Kline left school at 3:00 p.m. *See id*. at 35. According to the Po-Mar-Lin Fire Company report, the fire alarm time is noted as 4:39 p.m. *See* Report of Po-Mar-Lin Fire Company, attached hereto as Exhibit "E".

Following the fire, a metal can was found among the fire debris and the can and its contents were observed by various witnesses following the fire. *See* Figure 1 and 2 below.

[2] This hallway is commonly referred to as the "yellow hallway". *See* Exhibit "A" at 46.

Figure 1. Photograph taken by Pennsylvania State Trooper Fire Marshal David Cornetta on July 23, 2009.

Mr. Kline testified that he observed the metal can, as depicted in Figure 2, without a cover and he noted something that "[l]ooked like a rag or something down inside the can." *See* Deposition Testimony of Mark Kline, pages 46-47, attached hereto as Exhibit "D". Mr. Hostetler testified that he saw the container in the hallway and it "had a few rags in it". *See* Deposition Testimony of Ricky L. Hostetler, page 23, attached hereto as Exhibit "B".

Figure 2. Photograph taken by Pennsylvania State Trooper Fire Marshal David Cornetta on July 23, 2009.

The Plaintiff retained SEA, Ltd. following the fire and fire investigator, Aaron D. Redsicker, C.F.I. conducted a scene investigation on July 28, 2009. *See* Report of Aaron D. Redsicker, C.F.I. and Robert A. Neary, P.E., C.F.E.I., page 1, attached hereto as Exhibit "F". Mr. Redsicker testified that he was retained by Edward Reday, from School Claims Services, Inc. and while he was at the scene, he called Mr. Reday and gave him the name of the manufacturer of the refrigerator and water cooler, as both components were in the area of fire origin. *See* Deposition Testimony of Aaron D. Redsicker, C.F.I., pages 21 and 27, attached hereto as Exhibit "G". Mr. Redsicker was able to discern the brand name of the compact refrigerator - "Frigidaire . . . was clearly displayed on the front, top door of the refrigerator." *Id.*

at 28. However, despite the clearly visible brand name on the refrigerator, Plaintiff failed to provide Electrolux with an opportunity to inspect the fire scene.

While at the fire scene, Mr. Redsicker collected several items as evidence, including the "refrigerator with duplex outlet and remains of the power cord;" the water cooler; and "the contents that were in and immediately adjacent to that metal can that was on the floor adjacent to the plastic cart." *See id*. at 53. With regard to the last item, Mr. Redsicker testified that he collected "paper remains" found outside the metal can and "cloth remains" found inside the metal can. *Id*. at 54. Mr. Redsicker testified that he collected the paper and cloth remains "in case someone wanted to make the contention later that [they] could be part of the cause of the fire." *Id*. at 53-54. He learned through Mr. Hostetler that the public fire officials[3] considered that the fire was caused by spontaneous heating of the rags in the metal can. *See id*. at 53.

Mr. Redsicker failed to properly preserve these items by comingling the paper and cloth remains and he failed to collect all of the cloth remains from inside the metal can. *See id*. at 54. He further failed to collect and preserve the metal can and the lid from the fire scene. *See id*. at 55-56. As such, the cloth remains left inside the metal can, the metal can and its lid were destroyed and never made available to Electrolux for inspection.

Defendant Electrolux retained an electrical engineer, Thomas J. Bajzek, P.E., C.F.E.I. to examine the evidence collected from the fire scene at Unionville High School. Mr. Bajzek attended a lab examination on March 17, 2011 at SEA, Ltd.'s facility in Maryland, which was Electrolux's first opportunity to examine the evidence Mr. Redsicker collected from the fire

[3] Russell Kilmer, Deputy Chief Fire Marshal with the Chester County Fire Marshal's Office, conducted an origin and cause investigation of the subject fire. *See* Deposition Testimony of Russell Kilmer, page 9, attached hereto as Exhibit "H". Mr. Kilmer testified that spontaneous combustion could not be ruled out as a cause of the fire. *See id*. at 62-63.

scene. At the inspection, Mr. Bajzek and Electrolux learned that critical evidence was not preserved by Plaintiff and was not available for inspection.

Following the lab examination, the parties exchanged expert reports in accord with the deadlines ordered by this Court. On behalf of Plaintiff, Mr. Redsicker and Mr. Neary offered the following opinions to a reasonable degree of scientific certainty:

> - The fire originated in the hallway area identified as the "Yellow Mat" hallway, between the two gymnasiums and the trainer's area.
> - Specifically, the fire originated inside a compact Frigidaire refrigerator.
> - The source of ignition was an electrical short-circuiting event on the copper conductor that connected the temperature control device to the compressor relay.
> - The cause of the fire was the ignition of nearby combustible materials from the electrical arcing event on the temperature control conductor. The fire was caused by a manufacturing or design defect. Due to the extent of fire-related damage, the specific reason for the failure cannot be determined.

See Report of Aaron D. Redsicker, C.F.I. and Robert A. Neary, P.E., C.F.E.I., page 1, attached hereto as Exhibit "F". (emphasis supplied). At deposition, Mr. Neary conceded that he cannot identify a specific cause for the short-circuiting event on the copper conductor. *See* Deposition Testimony of Robert A. Neary, P.E., C.F.E.I., page 38, attached hereto as Exhibit "I".

While Electrolux was not invited to inspect the fire scene, Mr. Bajzek reviewed photographs of the fire scene and noted that "[t]he can with the burned rags is located in the center of the fire area" and the fire "pattern is consistent with a fire originating near the . . . can and is not consistent with a fire originating in the compressor compartment of the refrigerator as opined by experts for the plaintiff." Report of Thomas J. Bajzek, P.E., C.F.E.I., page 4, attached hereto as Exhibit "J". On behalf of Defendant Electrolux, Mr. Bajzek offered the following opinions to a reasonable degree of scientific certainty:

> 1. The origin of the fire was not in the compressor compartment of the subject refrigerator.
> 2. There is no evidence of any failure or defect in the subject refrigerator as the cause of the fire.
> 3. The fire scene was not made available for inspection by a representative of Electrolux Home Products. Evidence from the fire scene was not preserved, eliminating data pertaining to the cause of the fire.
> 4. Spontaneous ignition of rags in the can . . . cannot be ruled out as the cause of the fire.
> 5. The cause of the fire remains undetermined.

Id. at 9.

III. STATEMENT OF QUESTION INVOLVED

A. Whether, under Pennsylvania law, Electrolux is entitled to summary judgment on Count I – Negligence of Plaintiff's Complaint, as Plaintiff cannot establish a prima facie case of negligence?

Suggested Answer: Yes.

B. Whether, under Pennsylvania law, Electrolux Home Products, Inc. is entitled to summary judgment on Count II – Strict Liability of Plaintiff's Complaint, as Plaintiff cannot establish a prima facie case of strict liability?

Suggested Answer: Yes.

C. Whether, under Pennsylvania law, Electrolux Home Products, Inc. is entitled to summary judgment on Count III – Breach of Warranty of Plaintiff's Complaint, as Plaintiff cannot establish a prima facie case of breach of warranty?

Suggested Answer: Yes.

D Whether, under Pennsylvania law, Electrolux Home Products, Inc. is entitled to summary judgment, or alternatively entitled to an adverse inference jury instruction, on the grounds that Plaintiff spoliated critical evidence?

Suggested Answer: Yes.

IV. LEGAL ARGUMENT

A. Standard of Review

Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." F.R.C.P. 56(c). In considering a motion for summary judgment, the court draws "all reasonable inferences from the record in favor of the non-moving party." *Huston v. Procter & Gamble Paper Products Corp.*, 568 F.3d 100, 104 (3rd Cir. 2009) (citation omitted). "Where the record taken as a whole could not lead a reasonable trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Id.* (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (citation omitted)).

B. Count I – Negligence must be dismissed as a matter of law, as Plaintiffs cannot establish a prima facie case of negligence against Electrolux.

In order for Plaintiffs to recover on a theory of negligence against Electrolux, they bear the burden of proving the following elements:

> (1) the existence of a duty or obligation recognized by law, requiring the actor to conform to a certain standard of conduct; (2) a failure on the part of the defendant to conform to that duty, or a breach thereof; (3) a causal connection between the defendant's breach and the resulting injury; and (4) actual loss or damage suffered by the complainant.

Atcovitz v. Gulph Mills Tennis Club Inc., 571 Pa. 580, 586, 812 A.2d 1218, 1222 (2002) (citing *Orner v. Mallick*, 515 Pa. 132, 527 A.2d 521, 523 (1987) (citing *Morena v. South Hills Health System*, 501 Pa. 634, 642, 462 A.2d 680, 684 n. 5 (1983))). "[A] plaintiff asserting liability on grounds of negligence must connect [the] injury with a specific defect in the manufacture or

design of a product." *MacDougall v. Ford Motor Co.*, 214 Pa. Super. 384, 387, 257 A.2d 676, 678 (1969). The *MacDougall* Court further stated that "[t]he evidentiary requirements of negligence law demand proof that injury is proximately caused by a specific defect in design or construction because liability hinges upon whether the accident could have been avoided by the exercise of reasonable care"." *Id*. at 391. In order for a plaintiff to prove that a defendant breached its duty, it must show that the defendant failed to conform to a certain standard in the design or manufacture of the product and the product, therefore, was not fit for its intended use. *See Harsh v. Petroll*, 840 A.2d 404 (Pa. Cmwlth. 2003).

In *Van Horn v. Reinhard Flynn Inc.*, Mr. Van Horn alleged he was seriously injured when he test drove a 1996 Chevrolet Tahoe. *See Van Horn v. Reinhard Flynn Inc.*, 2003 WL 22719334, 62 Pa. D. & C. 4th 358, 359 (Carbon Cty.). Plaintiffs claimed that the cruise control on the vehicle failed to disengage when Mr. Van Horn braked while rounding a left-hand curve in the road. *See id*. at 360. Plaintiffs' claim was premised on strict liability and negligence and the Defendants moved for summary judgment. *See id*. at 360-61.

In analyzing whether summary judgment should be granted as to the negligence claim, the Court noted that Plaintiffs' negligence claim was vulnerable to attack because Plaintiffs must identify the specific defect that caused the cruise control to allegedly malfunction, then establish how Defendant's conduct deviated from the requisite standard of care, and establish that the deviation was a substantial factor in causing the accident such that Defendant can be held responsible for Plaintiffs' injuries. *See id*. at 373. The Court found that the Plaintiffs' burden of proof required expert testimony, which Plaintiffs failed to obtain. *See id*. "Expert testimony [is] necessary when the subject matter of the inquiry is one involving special skills and training not

common to the ordinary layperson." *Id*. (citing *Storm v. Golden*, 371 Pa. Super. 368, 376, 538 A.2d 61, 64 (1988)).

> Frequently, the jury, or the court trying a case without a jury, is confronted with issues which require scientific or specialized knowledge or experience in order to be properly understood. Certain questions cannot be determined intelligently merely from the deductions made and inferences drawn from practical experience and common sense. On such issues, the testimony of one possessing special knowledge or skill is required in order to arrive at an intelligent conclusion . . . . In these matters, where laymen have no knowledge or training, the court and jury are dependent on the explanations and opinions of experts.

Id. (citations omitted).

In *Van Horn*, the Court noted that "other than plaintiffs' claim that the cruise control failed to disengage when Mr. Van Horn stepped on the brake pedal," the Court does not know the specific cause of the failure. *Van Horn*, 62 Pa. D. & C. 4th at 375. The Court does not know whether the claimed defect is a design defect or a manufacturing defect. *See id*. The Court does not know what "inspections or tests are required to discover the specific defect involved, whether such inspections or tests are extraordinary or routine, or even whether the defect was discoverable in advance of the accident." *Id*. The Court does not know whether the defect was a latent or hidden defect and not able to be discovered upon reasonable inspection by the Defendants. *See id*. The Court stated that the answers to the foregoing questions are not "so simple, and the lack of skill or want of care so obvious, as to be within the range of ordinary experience and comprehension of even non professional persons." *Id*. (citing *Brannan v. Lankenau Hospital*, 490 Pa. 588, 598, 417 A.2d 196, 201 (1980)). "Nor are the answers within the ability of the average person of ordinary intelligence to determine on their own." *Id*.

Given the critical nature of the unanswered questions to Plaintiffs' negligence claim, the Court explained that "[a]bsent the assistance and explanation of a qualified expert, the jury's

verdict on this claim can be nothing more than speculation or conjecture." *Id*. (citing *Schmoyer v. Mexico Forge Inc.,* 437 Pa. Super. 159, 163, 649 A.2d 705, 707 (1994) ("the trial court has a duty to prevent questions from going to the jury which would require it to reach a verdict based on conjecture, surmise, guess or speculation"). As a result, the Court granted Defendant's motion for summary judgment on the negligence claim.

The instant matter is strikingly similar to the *Van Horn* case. Here, the Plaintiff admittedly cannot point to a specific defect within the compact refrigerator. In fact, Plaintiff's retained electrical engineering expert, Mr. Neary conceded that he cannot identify a specific cause for the short-circuiting event on the copper conductor. *See* Deposition Testimony of Robert A. Neary, P.E., C.F.E.I., page 38, attached hereto as Exhibit "I". As such, like the Van Horn Plaintiffs, the Plaintiff in the present matter is without any assistance or explanation from a qualified expert as to the specific failure that occurred with regard to the compact refrigerator.

Summary judgment is proper when an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action, which, in a jury trial, would require the issues to be submitted to a jury. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Here, Plaintiffs have no evidence that there was a defect in the subject refrigerator and that such defect caused the fire at Unionville High School. Without the ability to produce such evidence essential to Plaintiff's negligence cause of action, summary judgment must be granted in favor of Defendant Electrolux.

C. Count II – Strict Liability must be dismissed as a matter of law, as Plaintiffs cannot establish a prima facie case of strict liability against Electrolux.

It is well-settled that in order to recover on a theory of strict liability, a plaintiff must demonstrate that (1) "the product was defective," (2) "the defect caused the plaintiff's injury" and (3) "the defect existed at the time the product left the manufacturer's control." *Barnish v. KWI*

Building Co., 602 Pa. 402, 411-12, 980 A.2d 535 (2009) (citing *Rogers v. Johnson & Johnson Products, Inc.*, 523 Pa. 176, 565 A.2d 751, 754 (1989) (citing *Dansak v. Cameron Coca-Cola Bottling Co., Inc.*, 703 A.2d 489 (Pa. Super. 1997); RESTATEMENT (SECOND) OF TORTS § 402A(1)(b))).

In certain cases of alleged defect, where a plaintiff is unable to offer any evidence of a specific defect, a plaintiff may rely on the malfunction theory of product liability, which relieves a plaintiff of the obligation to present direct evidence of the defect and permits a plaintiff to use circumstantial evidence to establish a defect in a product. *See Woodin v. J.C. Penney Co., Inc.*, 427 Pa. Super. 488, 492, 629 A.2d 974, 976 (1993). The Pennsylvania Supreme Court adopted the malfunction theory in *Rogers v. Johnson & Johnson Products, Inc.*, 523 Pa. 176, 565 A.2d 751 (1989). The malfunction "theory encompasses nothing more than circumstantial evidence of product malfunction." *Rogers*, 565 A.2d at 754. The malfunction theory permits "a plaintiff to prove a defect in a product with evidence of the occurrence of a malfunction and with evidence eliminating abnormal use or reasonable, secondary causes for the malfunction." *Id*. Both the Pennsylvania Superior Court and a number of federal courts applying Pennsylvania law "have noted that while the plaintiff need not demonstrate the actual product defect, the plaintiff cannot depend upon conjecture or guesswork." *Barnish*, 602 Pa. at 414 (citing *Dansak*, 703 A.2d at 496) (internal quotations omitted). "Under Pennsylvania law, the application of a malfunction theory provides a means of proving a defect, but does not alter the basic requirements of section 402A of the Restatement (Second) or Torts." *Sochanski v. Sears, Roebuck and Co.*, 689 F.2d 45, 50 (3d Cir. 1982).

The Pennsylvania Supreme Court examined the malfunction theory in the case of *Barnish v. KWI Building Co.* There, employees working at a particleboard manufacturing facility were

injured after an explosion at the factory. *See Barnish*, 602 Pa. at 410. In 1991, GreCon sold a spark detection system for use in at the factory. *See id*. at 409. "The system was designed with multiple sensors to detect sparks along a conveyor belt system carrying combustible raw materials." *Id*. The sensors, installed in 1991, operated for ten years without incident. *See id*. On February 13, 2011, several plant employees observed "a glowing ember the size of a small football on the conveyor." *Id*. at 410. Despite the presence of the ember, none of the sensors activated a response to the ember and an explosion and fire resulted causing injuries and death to employees at the factory. *See id*.

The Plaintiffs instituted an action based upon strict liability against GreCon and GreCon filed a Motion for Summary Judgment, which was granted by the trial court and affirmed on appeal by the Pennsylvania Superior and Supreme Courts. *See Barnish v. KWI Building Co.*, 916 A.2d 642 (Pa. Super. 2007); *Barnish*, 602 Pa. 402, 980 A.2d 525 (2009).

The Pennsylvania Supreme Court noted that "[i]n order to survive summary judgment, the plaintiff must present evidence to create a question of material fact on each element of the claim." *Id*. at 420. The Court found that the Plaintiffs "failed to present evidence, circumstantial or direct, that the product was defective at the time it left the manufacturer's control." *Id*. at 421. "To the contrary, the Plaintiffs admitted in their brief in opposition to summary judgment that the sensors functioned properly prior to the explosion and fire." *Id*. "Moreover, the Plaintiffs failed to present any explanation as to how the sensors could function properly for 10 years and yet be defective at the time the sensors left the manufacturer's control." *Id*. The Court concluded that Plaintiffs therefore "failed to place evidence in the record to create a genuine issue of material fact regarding a necessary element of their claim for strict liability under Section 402A of the RESTATEMENT (SECOND) OF TORTS." *Id*. (citing *Ertel Patriot News Co.*, 544 Pa. 93, 674 A.2d

1038, 1042 (Pa. 1996) ("We have a summary judgment rule in this Commonwealth in order to dispense with a trial of a case (or, in some matters, issues in a case) where a party lacks the beginnings of evidence to establish or contest a material issue.")).

The *Barnish* Court further concluded that "a plaintiff's admission of prior successful use is relevant to the analysis because it is in direct conflict with the inference to be drawn from the occurrence of a malfunction." *Id*. at 421-22. The Court held "that a plaintiff's acknowledgment of prior successful use undermines the inference that the product was defective when it left the manufacturer's control." *Id*. at 422.

The facts of *Barnish* are remarkably similar to those before the Court in the present matter. The product in this matter operated continuously for 14-15 months without incident. Further, as in *Barnish*, Plaintiff in this matter has failed to present evidence, circumstantial or direct, that the product was defective at the time it left the manufacturer's control. Even in viewing the facts in the light most favorable to the Plaintiff, it is undisputed that the compact refrigerator operated without incident for 14-15 months prior to the fire. Plaintiff has failed to offer any explanation as to how the compact refrigerator could function flawlessly for 14-15 months and yet be defective at the time it left the manufacturer's control. Because Plaintiff has not created a genuine issue of material fact regarding a necessary element of their claim for strict liability under Section 402A of the RESTATEMENT (SECOND) OF TORTS, this Court should follow the *Barnish* Court holding and enter summary judgment in favor of Electrolux on Plaintiff's strict liability cause of action.

D. Count III - Breach of Warranty must be dismissed as a matter of law, as Plaintiffs cannot establish a prima facie case of breach of warranty against Electrolux.

In Count III of Plaintiff's Complaint, Plaintiff alleged that Electrolux breached both express and implied warranties. *See* Plaintiff's Complaint (ECF 1). To establish breach of warranty, "plaintiffs must show that the [product at issue] was defective". *Altronics v. Repco, Inc.*, 957 F.2d 1102, 1105 (3d Cir. 1993). A plaintiff is permitted to use circumstantial evidence to establish a defective product pursuant to the malfunction theory. *See id.*

As discussed above in Section "C" which is incorporated herein by reference, the Plaintiff cannot establish that the subject compact refrigerator was defective under the malfunction theory. The same analysis requires this Court to find that there was no malfunction in the compact refrigerator for purposes of Plaintiff's breach of warranty claim. *See Indemnity Insurance Company of North America v. Gross-Given Manufacturing Company*, 2010 U.S. Dist. LEXIS 2258 (E.D. Pa. Jan. 12, 2010) (granting summary judgment in favor of manufacturer-defendant on plaintiff's strict liability and breach of warranty claims). As such, summary judgment must be granted in favor of Defendant Electrolux on Plaintiff's breach of warranty claim.

E. Alternatively, Electrolux is entitled to summary judgment on the grounds that Plaintiff spoliated critical evidence from the fire scene.

Defendant Electrolux moves for summary judgment on the grounds that Plaintiff failed to preserve a critical piece of evidence in this matter; the metal can and its contents. "A party which reasonably anticipates litigation has an affirmative duty to preserve relevant evidence." *Bowman v. American Medical Systems, Inc.*, No. 96-7871, 1998 U.S. Dist. LEXIS 16082, at *8 (E.D. Pa. 1998 Oct. 9, 1998) (citing *Baliotis v. McNeil*, 870 F.Supp. 1285, 1290 (M.D. Pa. 1994)). "Where evidence is destroyed, sanctions may be appropriate, including the outright

dismissal of claims, the exclusion of countervailing evidence, or a jury instruction on the spoliation inference." *Id*. (internal quotations omitted). "The appropriate sanction will depend on the facts and circumstances of the case." *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 81 (3d Cir. 1994).

In *Schmid*, the Third Circuit set forth a balancing test as to whether sanctions should be appropriate where evidence is lost. *See id*. at 81. The *Schmid* court held that the key considerations in a product liability case in deciding whether to sanction the plaintiff for destruction of the product are: (1) degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and where the offending party is seriously at fault, will serve to deter such conduct by others in the future. *See id*.

1. The degree of fault of Plaintiff

In *Tenaglia v. Proctor & Gamble, Inc.*, the Pennsylvania Superior Court affirmed the trial court's entry of summary judgment in favor of the Defendant and in doing so, the Court found that the Plaintiff, either through inadvertence or neglect, bore a degree of fault for the spoliation of the evidence at issue. *See Tenaglia v. Proctor & Gamble, Inc.*, 737 A.2d 306 (Pa. Super. 1999). In *Tenaglia*, the Plaintiff was injured while opening a cardboard box containing packages of Pampers diapers manufactured by Defendant. *See id*. at 307. The cardboard box remained in an aisle in the store following the incident; however, the box was ultimately destroyed. *See id*. In analyzing the first prong of the spoliation test, the Court found that the Plaintiff had the opportunity and ability to preserve the evidence by taking control or possession of the cardboard box before it was destroyed. *See id*. at 308.

When compared to the present matter, the Plaintiff, a sophisticated insurance company, was in control of the fire scene following the fire and failed to preserve a critical piece of evidence. The metal can and its contents are visible in photographs taken at the fire scene. *See* Figure 1 and 2 above. Like in *Tengalia*, here, it is clear that the Plaintiff had the opportunity and the ability to preserve the crucial evidence of the metal can and its contents by taking control of it and ensuring that the evidence was not destroyed. Plaintiff was able to preserve items from the fire scene Mr. Redsicker chose to collect, which demonstrates that Plaintiff possessed sufficient authority over the fire scene to retain the metal can and its contents. *See* Exhibit "G" at 53. The evidence at issue was located in the area of fire origin as determined by Mr. Redsicker. Through the neglect of the Plaintiff, the evidence was not properly preserved and Defendant Electrolux was never provided with an opportunity to examine this evidence. As such, under the first prong, the Plaintiff bears overwhelming responsibility for the complete loss of the metal can and its contents.

2. The degree of prejudice to the Defendant

"[A] defendant in a products liability case is entitled to summary judgment when loss or destruction of evidence deprives the defense of the most direct means of countering plaintiff's allegations." *Schmid*, 13 F.3d at 80 (citation omitted). Under the second prong, a court must examine the degree of prejudice suffered by the opposing party, here Defendant Electrolux. In *Pia v. Perrotti*, the Plaintiff and "her experts removed and retained only the metering cabinet and some other items involving the building's electrical wiring . . . leaving the remaining electrical equipment in place." *Pia v. Perrotti*, 718 A.2d 321, 323 (Pa. Super. 1998). In analyzing the second prong under the spoliation test, the Court found that the absence of electrical equipment resulted in prejudice to the Defendants. *See id*. at 325. At trial, the Plaintiff placed the metering

cabinet in front of the jury and argued that the fire originated in the wires negligently installed b Defendants. *See id*. The jury was led to believe that the metering cabinet was the source of the fire. *See id*. The Defendants were "unable to rebut this theory with evidence of alternative causes because they had no access to the other electrical equipment in the area." *Id*.

In the instant matter, Defendant Electrolux is significantly prejudiced, to an extent greater than the Defendant in *Pia*, by Plaintiff's destruction of the metal can and its contents, as this evidence is a potential alternative cause of the fire at issue. Without this evidence, Defendant Electrolux is unable to successfully rebut the Plaintiff's allegations, like in *Pia*, with evidence of an alternative cause of the subject fire. As such, Electrolux is severely prejudiced in that it cannot present a viable alternative cause of the fire at issue given Plaintiff's destruction of critical evidence.

3. Availability of a lesser sanction

The courts should "select the least onerous sanction corresponding to the willfulness of the destructive act and the prejudice suffered by the victim." *Schmid*, 13 F.3d at 79 (citation omitted). In the case of *Bowman v. American Medical Systems, Inc.*, the Court concluded that dismissal of the Plaintiff's action was the appropriate sanction under the circumstances. *See Bowman*, 1998 U.S. Dist. LEXIS 16082, at *14. There, the Court found that Plaintiff bore responsibility for spoliation of the evidence at issue. *See id*. The Court found that the degree of prejudice suffered by the Defendant was prohibitively high given that the evidence at issue was completely destroyed and no examination of the evidence was ever conducted by the Defendant. *See id*. The Court concluded that any lesser sanction would be inadequate and that dismissal of Plaintiff's action on the basis of spoliation of evidence was warranted. *See id*. at *15. "The Court recognize[d] that dismissing Plaintiff's action is a drastic measure, and should be used only

as a last resort." *Id*. (citation omitted) (internal quotations omitted). "Nonetheless, no sanction other than outright dismissal is appropriate given the culpability of the Plaintiff for the spoliation of the evidence and the impossible task Defendant would have to face defending this action as a result of it." *Id*.

In this matter, as in the *Bowman* case, the Plaintiff bears overwhelming responsibility for the loss of the metal can and its contents and as a result, Defendant Electrolux is severely prejudiced in its defense of Plaintiff's claims of product defect.

As such, Defendant Electrolux respectfully requests that this Honorable Court grant summary judgment in favor of Electrolux on the basis of spoliation of evidence by the Plaintiff. In the alternative, if the Court denies summary judgment in favor of Defendant Electrolux, Electrolux respectfully requests a spoliation charge to be read to the jury at the trial of this matter.

V. CONCLUSION

Accordingly, Defendant, Electrolux Home Products, Inc., respectfully requests that summary judgment be entered in its favor and Plaintiff's Complaint be dismissed with prejudice.

NICOLSON LAW GROUP

BY: /s/ Cheryl M. Nicolson

CHERYL M. NICOLSON, ESQUIRE
MELISSA L. YEMMA, ESQUIRE
Attorney I.D. No. 57422/92194
Rose Tree Corporate Center II
1400 N. Providence Road, Suite 4045
Media, PA 19063
(610) 891-0300
nicolson@nicolsonlawgroup.com
yemma@nicolsonlawgroup.com

Attorneys for Defendant,
Electrolux Home Products, Inc.

DATE: October 4, 2011

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

INDEMNITY INSURANCE COMPANY	:	
OF NORTH AMERICA A/S/O	:	NO. 2:10-cv-04113
UNIONVILLE-CHADDS FORD	:	
SCHOOL DISTRICT	:	
v.	:	
ELECTROLUX HOME PRODUCTS, INC.	:	JURY TRIAL DEMANDED

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Defendant, Electrolux Home Products, Inc.'s Memorandum of Law in Support of Motion for Summary Judgment was served electronically, on the date stated below, upon the following:

Dennis J. Crawford, Esquire
Law Offices of Dennis J. Crawford
619 South White Horse Pike
Audubon, NJ 08106

NICOLSON LAW GROUP

BY: /s/ Cheryl M. Nicolson
CHERYL M. NICOLSON, ESQUIRE
MELISSA L. YEMMA, ESQUIRE
Attorney I.D. No. 57422/92194
Rose Tree Corporate Center II
1400 N. Providence Road, Suite 4045
Media, PA 19063
(610) 891-0300
nicolson@nicolsonlawgroup.com
yemma@nicolsonlawgroup.com

Attorneys for Defendant,
Electrolux Home Products, Inc.

DATE: October 4, 2011