

STATE OF VERMONT

**SUPERIOR COURT
Rutland Unit**

**CIVIL DIVISION
Docket No. 433-7-14 Rdev**

**METROPOLITAN PROPERTY AND CASUALTY INSURANCE COMPANY,
Plaintiff**

v.

**ROUNDS HEATING SERVICE, INC. and
SID HARVEY INDUSTRIES, INC.,
Defendants**

DECISION

Defendant Sid Harvey Industries, Inc.'s Motion for Summary Judgment (MPR 2)

This matter came before the Court on Defendant Sid Harvey Industries, Inc.'s Motion for Summary Judgment. Harvey's motion is opposed by both the Plaintiff and by co-defendant Rounds Heating Service, Inc. The Plaintiff is represented by Attorney John F. Evers, Rounds is represented by Attorney Richard H. Wadhams, and Harvey is represented by Attorney Richard J. Windish. For the reasons set forth below, the motion is denied.

Background

On December 18, 2011, the hot water boiler in the home of Laurretta and Edwin Brunelle in North Clarendon exploded violently, causing damage to the Brunelles' property.

The Brunelles usually left their boiler switched off. They used an emergency switch to turn the boiler on only when they needed hot water. Before the explosion, Laurretta had turned on the boiler so that she could have hot water to wash dishes. The explosion occurred after she had finished washing the dishes.

The Plaintiff, the Brunelles' insurer, paid \$204,242.65 for property damage resulting from the explosion, and brought this claim in pursuit of its subrogation rights.

Rounds is in the business of servicing and maintaining residential water boilers, and serviced the Brunelles' boiler on November 16, 2011, approximately a month before the explosion. The Plaintiff claims that Rounds was negligent in the course of servicing the boiler.

Harvey is in the business of selling boiler parts. It remanufactured and sold the aquastat device installed by Rounds in the Brunelles' boiler. The Plaintiff claims that a defect in the aquastat caused the boiler to continue heating the water until it boiled into steam, and that the pressure of the steam inside the boiler caused the explosion. The Plaintiff advances three theories of liability against Harvey: negligence, breach of implied warranty of merchantability, and strict products liability.

The parties engaged engineering experts who examined the site of the Brunelles' property and the remnants of the boiler after the explosion. The Plaintiff engaged Mr. Stuart S. Morrison, P.E., of Morrison Engineering, PC in Voorheesville, New York. Rounds engaged Mr. J. Lester MacLaughlin of J. Lester MacLaughlin & Co., Inc. of Everett, Massachusetts.

Neither of the experts identified any specific manufacturing defect in the aquastat that would have caused the malfunction, and neither offered any explanation of why the aquastat malfunctioned. The aquastat was too badly damaged in the explosion to be tested directly for functionality.

Mr. Morrison was deposed and testified that there were two possible installation errors that could have caused the aquastat malfunction: (1) improper wiring, and (2) deformation of a capillary tube. There was no evidence suggesting that either of these errors were in fact committed in the course of the installation of the aquastat in the Brunelles' boiler. Mr. Morrison also testified that it was possible that the manner in which the Brunelles used the emergency switch to turn off the boiler except when they needed hot water could have concealed either an installation or a manufacturing defect in the aquastat.

Rounds submitted an affidavit from its principal, Mr. William M. Rounds, stating that he personally installed the aquastat in the Brunelles' boiler and that he did so without error. Mr. Rounds also stated that if the aquastat had been improperly wired, it simply would not have functioned. Mr. MacLaughlin provided a supplemental report in which he opines that, granting the truth of Mr. Rounds's affidavit, it is more probable than not that the cause of the aquastat malfunction was a failure of the rebuilt control. Mr. Morrison submitted an affidavit in which he

opines that, assuming the truth of Mr. Rounds's affidavit, it is probable that the cause of the aquastat malfunction was a defect present at the time of installation.

Legal Standard

Summary judgment is appropriate if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. V.R.C.P. 56; *In re Holbrook*, 2016 VT 13, ¶ 28. The nonmoving party is entitled to the benefit of all reasonable doubts and inferences. *Morisseau v. Hannaford Bros.*, 2016 VT 17, ¶ 12 (quoting *McKinstry v. Fecteau Residential Homes, Inc.*, 2015 VT 125, ¶ 10).

Analysis

The parties do not dispute that the aquastat malfunctioned, causing the boiler to continue heating the water until it became steam and explosively destroyed the boiler. Harvey's motion addresses only the issue of causation, which is an essential element of each of the Plaintiff's theories of liability. If the aquastat malfunction was caused by a defect in the manufacture of the aquastat, Harvey could be held liable. But if the malfunction was caused solely by improper installation of the aquastat, there would be no grounds for holding Harvey liable. Harvey mounts no other challenge to the legal adequacy of the Plaintiff's claims at this time.

Harvey argues that it is entitled to summary judgment because the facts developed in discovery do not include any direct evidence of any defect in the aquastat. Harvey correctly notes that there is no evidence identifying any specific defect in the aquastat. Harvey is also correct in noting that the evidence does not conclusively rule out the possibility that the aquastat malfunction occurred as a result of an installation error.

However, as the Plaintiff points out in its opposition materials, the facts developed in discovery do provide circumstantial evidence that would be sufficient to support an inference that there was a defect in the aquastat. Circumstantial evidence is sufficient to prove causation in a products liability or warranty case, but the propounding party must adduce evidence that, when given the benefit of all reasonable doubts and inferences, could support a reasonable jury determination on the question of causation. *Travelers Insurance Companies v. Demarle, Inc. USA*, 2005 VT 53, ¶ 10; see also *Powers v. Hayes*, 172 Vt. 535 (2001).

The circumstantial evidence here, given the benefit of all reasonable doubts and inferences, would fairly support an inference of fault. A reasonable jury could find that the aquastat malfunction must have been caused either by an installation defect or a manufacturing defect. A reasonable jury could believe Mr. Rounds and find that an installation defect is unlikely. A reasonable jury could credit the opinions of the experts and thereby find, even without any direct evidence of a specific manufacturing defect, that some manufacturing defect was the cause of the aquastat malfunction.

Harvey cites *Hayes v. New York City Dept. of Corrections*, 84 F.3d 614, 619 (2d Cir. 1996), and *Brown v. Henderson*, 257 F.3d 246, 252 (2d Cir. 2001), for the proposition that a self-serving affidavit that contradicts a witness's prior testimony is insufficient to raise a genuine factual issue. Harvey argues that Mr. Morrison's affidavit contradicts his prior testimony and cannot defeat summary judgment.

This argument is based on the "sham affidavit doctrine," and most courts throughout the country have adopted a version of it. A leading civil procedure treatise provides this helpful explanation of the doctrine:

It seems quite clearly correct to conclude that an interested witness who has given clear answers to unambiguous questions cannot create a conflict and resist summary judgment with an affidavit that is clearly contradictory, without providing a satisfactory explanation of why the testimony is changed. If such an explanation is proffered, a credibility question is presented; without it, there are no facts suggesting why a credibility question exists and the nonmoving party should not be allowed to manufacture a question of fact to delay resolution of the suit.

10A Wright, Miller & Kane, Federal Practice and Procedure § 2726 (3d ed. 1998).

There is a difference between a self-serving affidavit that contradicts prior sworn testimony without explanation, as in *Hayes*, and refined testimony based on greater specificity or information, such as in *Northern Security Insurance Co., Inc. v. Rossitto*, 171 Vt. 580, 581 (2000) (mem.). In this case, the pertinent inquiry is whether there has been a change, and whether there is a satisfactory explanation for any change.

It is not clear that there has been any second contradictory sworn statement or testimony on the part of Mr. Rounds. Harvey seems to seek to apply the doctrine to Rounds on the grounds that Mr. Rounds made a self-serving affidavit statement after the original deposition testimony of Rounds's expert, Mr. Morrison. Mr. Rounds's affidavit is dated January 7, 2016, and is attached to Rounds's response to

the summary judgment motion. The record indicates that the issues in the case evolved as the discovery process was ongoing, but not that Mr. Rounds contradicted a prior sworn statement of his own.

In Mr. Morrison's affidavit of February 1, 2016, he specifically refers to new information that was given to him by Mr. Rounds after Mr. Morrison's own initial investigation, Morrison Affidavit, 2 ("Since that time, Mr. Rounds has provided sworn testimony, in the form of an affidavit, that..."). He also acknowledges that his affidavit statement is an opinion based on facts from others that he himself cannot confirm but only assumes. *Id.* ("Although I am not able to personally verify the truth of either statement...if I were to assume that that information provided by Rounds as to installation is accurate, and that the information provided by the Brunelles as to a month of uneventful operation is accurate, then it is my opinion...").

Harvey alleges two points of contradiction. First, it claims that Mr. Morrison's acceptance of Mr. Rounds's assertion that he did not miswire the aquastat contradicts Mr. Morrison's prior testimony that a wiring installation error could have caused the aquastat to malfunction. The context of Mr. Morrison's prior testimony shows that he was addressing the entire range of theoretically possible installation errors that might have caused the aquastat malfunction, whereas in his later affidavit, he narrowed his analysis to a hypothetical opinion based on new facts arising out of Mr. Rounds's affidavit that he explicitly stated he used only conditionally and could not verify.

Second, Harvey claims that Mr. Morrison's conclusion regarding the likelihood that the aquastat malfunction was caused by a defect present at the time of installation contradicts his prior testimony that the Brunelles' routine use of the emergency switch could have masked an installation defect. In his affidavit, Mr. Morrison does not deny the possibility that the Brunelles' use of the emergency switch masked an installation defect. He simply opines hypothetically, assuming conditionally the truth of the facts in Mr. Rounds's affidavit, the probability that a manufacturing defect caused the aquastat to fail. This is fully consistent with his previous testimony.

Harvey characterizes the affidavits of Mr. Rounds and Mr. Morrison and the supplemental report of Mr. MacLaughlin as "self-serving," and asserts that they raise only "sham issues of fact." Mr. Rounds's affidavit, his first sworn testimony in the case, appears to be a function of ongoing discovery and refinement of facts during the pretrial process, as in *Northern Security*, 171 Vt. at 581. Harvey's "sham

issue” argument is inapplicable to Mr. Morrison, who, in his affidavit, gives a new opinion based on a refined set of facts developed during the discovery process, after his initial investigation, without asserting those facts as true. An expert’s opinion based on hypothetical facts can understandably change depending on changes in assumed facts.

Plaintiff has shown that there is a genuine issue as to the material fact of whether the aquastat failed due to a manufacturing defect and a sufficient basis for the factual issue to be decided by the jury. To the extent that Harvey means to impugn the credibility of the Mr. Rounds, Mr. Morrison, or Mr. MacLaughlin, it can certainly cross examine them at trial. The court will not weigh the evidence on summary judgment.

To prevail on summary judgment, it is not enough for Harvey to show merely that it is possible that an installation error rather than a manufacturing error was the cause of the malfunction. For summary judgment to be appropriate, the movant must show that the evidence cannot fairly support a reasonable inference of causation at all. Harvey has not done so, and its motion is therefore denied.

ORDER

For the reasons set forth above, Defendant Sid Harvey Industries, Inc.’s Motion for Summary Judgment is *denied*.

Dated this _____ day of April, 2016.

Mary Miles Teachout
Superior Court Judge