

excluding all other causes for the product's failure not attributable to defendant, we reverse the Appellate Division order and dismiss the complaint.

In June 1997, plaintiff John Ramos sustained personal injuries when a transformer designed and manufactured by defendant Howard Industries, Inc. allegedly exploded. According to plaintiff, the explosion occurred shortly after he energized the transformer in the course of his employment as a lineman for nonparty Niagara Mohawk Power Corporation. Initially, plaintiff reported to his employer and doctors that he was injured when he reached out of an aerial bucket while installing the transformer on a utility pole. More than two years later, however, plaintiff claimed that the transformer exploded, the force of which caused him to fall inside the bucket, injuring his back. By that time, the transformer could not be located for inspection or testing to determine the cause of its failure. Plaintiff explained that he failed to promptly disclose the transformer explosion because he feared disciplinary action or the loss of certain employment-related benefits.

In May 2000, plaintiff commenced this products liability action, alleging that the transformer was defectively designed and manufactured. Following discovery, defendant moved for summary judgment dismissing the complaint. In support of its motion, defendant submitted the affidavit of an expert engineer who, after visiting defendant's plant, concluded that its

manufacturing processes, quality control, testing and inspection were "current and state of the art." The expert noted that an internal electrical fault could cause an explosion as described by plaintiff, but concluded that such a defect "would have been readily identified at several stages of the manufacturing process." He stated that, "[g]iven the various stages of testing and inspection, it [was] virtually impossible for a transformer with an internal fault to leave [defendant's] plant." The expert also concluded that defendant's manufacturing processes complied with all applicable industry standards and Niagara Mohawk's specifications, and that the transformer in question would have been individually tested to ensure compliance with such requirements. He posited other possible causes of the explosion, such as Niagara Mohawk employees negligently rewiring or rebuilding the transformer, or the potential creation of "an internal fault" during rewiring by dropping a metal object inside the transformer, "which could cause the transformer to overheat the insulating oil within the tank and result in the cover being forced off the transformer."

In opposition to defendant's motion, plaintiff offered the affidavit of an expert engineer, who asserted that the transformer was defectively designed and manufactured because it "experienced an internal electrical fault due to defective coil/windings and/or insulation." Plaintiff's expert further stated that the "electrical fault generated excessive heat within

the transformer's tank and superheated the oil contained therein" causing "excessive internal vapor pressure to build up, and ultimately produced the explosion." The expert also asserted that two safety devices placed on the transformer by defendant failed to operate and prevent the explosion. In addition, the expert rejected the theories presented by defendant to explain the explosion other than a manufacturing defect.

Supreme Court denied defendant's motion for summary judgment. It concluded that, although defendant's expert's assertion that a defect in the transformer would have been readily identified during the manufacturing process "might be a sufficient statement to obtain summary judgment if other causes of the accident were excluded," here, "other possible causes of the accident have not been excluded by the defendant in the first instance."

The Appellate Division, with one Justice dissenting, affirmed, but for different reasons than Supreme Court. The court held that defendant failed to meet its burden on summary judgment, concluding that its evidence "does not establish as a matter of law that the transformer was not defective and that a manufacturing defect therefore did not cause the explosion" (38 AD3d 1163, 1164 [4th Dept 2007]). That court thereafter granted defendant leave to appeal and certified the following question: "Was the order of this Court, entered March 16, 2007, properly made?" We answer the question in the negative, reverse the order

of the Appellate Division and grant defendant's motion for summary judgment dismissing the complaint.

It is well settled that a products liability cause of action may be proven by circumstantial evidence, and thus, a plaintiff need not identify a specific product defect (see Speller v Sears, Roebuck & Co., 100 NY2d 38, 41 [2003]; Halloran v Virginia Chems., 41 NY2d 386, 388 [1977]; Codling v Paglia, 32 NY2d 330, 337 [1973]). "In order to proceed in the absence of evidence identifying a specific flaw, a plaintiff must prove that the product did not perform as intended and exclude all other causes for the product's failure that are not attributable to defendants" (Speller, 100 NY2d at 41, citing Halloran, 41 NY2d at 388 [other citation omitted]). If, however, a plaintiff is unable to prove both elements, "a jury may not infer that the harm was caused by a defective product unless plaintiff offers competent evidence identifying a specific flaw" (Speller, 100 NY2d at 42).

In Speller, the plaintiffs alleged that a defective refrigerator caused a house fire. The manufacturer and retailer moved for summary judgment dismissing the complaint, offering evidence of an alternative cause of the fire, i.e., a stovetop grease fire. We stated that, "[i]n order to withstand summary judgment, plaintiffs were required to come forward with competent evidence excluding the stove as the origin of the fire" (id. at 42). Based on plaintiff's three expert opinions, which concluded

that the fire originated in the refrigerator and not from the stove, we held "that plaintiffs raised a triable question of fact by offering competent evidence which, if credited by the jury, was sufficient to rebut defendants' alternative cause evidence" (id. at 43). Put another way, we stated, "based on plaintiffs' proof, a reasonable jury could conclude that plaintiffs excluded all other causes of the fire" (id.).

Here, contrary to the Appellate Division's conclusion, defendant established its prima facie entitlement to judgment as a matter of law. Without the product available for testing and inspection (admittedly caused by plaintiff's lengthy delay in reporting the incident), defendant was unable to provide an expert opinion based upon an examination of the transformer. Instead, defendant presented competent evidence demonstrating that its transformers were designed and manufactured under state of the art conditions according to Niagara Mohawk's specifications and that its manufacturing process complied with applicable industry standards. The evidence further demonstrated that each transformer was individually tested before leaving defendant's plant and that in light of such testing and inspection, its expert concluded that it was "virtually impossible for a transformer with an internal fault to leave [defendant's] plant." Defendant's expert affidavit also posited other possible causes of an explosion that may have been introduced while the transformer was rewired or rebuilt by

Niagara Mohawk employees after it left defendant's possession.

Because defendant met its initial burden, in order to defeat summary judgment, plaintiff must raise "a triable question of fact by offering competent evidence which, if credited by the jury, [i]s sufficient to rebut defendant['s] alternative cause evidence" (Speller, 100 NY2d at 43). An expert's affidavit -- offered as the only evidence to defeat summary judgment -- "must contain sufficient allegations to demonstrate that the conclusions it contains are more than mere speculation and would, if offered alone at trial, support a verdict in the proponent's favor" (Adamy v Ziriakus, 92 NY2d 396, 402 [1998] [quoted case omitted]; see also Diaz v New York Downtown Hosp., 99 NY2d 542, 544 [2002] ["Where the expert's ultimate assertions are speculative or unsupported by an evidentiary foundation, . . . the opinion should be given no probative force and is insufficient to withstand summary judgment"]).

Plaintiff failed to present evidence excluding all other causes for the transformer's malfunction not attributable to defendant such that a reasonable jury could find that the transformer was defective in the absence of evidence of a specific defect. Although a plaintiff is not required to identify a specific defect in a circumstantial case, plaintiff's theory here -- that the explosion resulted from a manufacturing defect in the form of an "internal electrical fault" -- is pure speculation. Furthermore, as noted by the Appellate Division

dissent, plaintiff's expert failed to exclude the possibility presented by defendant's expert that the transformer exploded because it was improperly rewired or rebuilt by Niagara Mohawk employees after leaving defendant's possession. In sum, based on plaintiff's proof, a reasonable jury could not conclude that all other causes of the transformer explosion were excluded, and thus, plaintiff's manufacturing defect claim fails as a matter of law.

Accordingly, the order of the Appellate Division should be reversed, with costs, defendant's motion for summary judgment dismissing the complaint granted and the certified question answered in the negative.

Ramos v Howard Industries

No. 26

JONES, J. (dissenting) :

The issue before the Court is whether defendant Howard Industries, Inc. is entitled to summary judgment when the object of the products liability action was unavailable for inspection or testing. Because I think that this question should be answered in the negative, I respectfully dissent.

The majority relies on defendant's evidence, proffered by expert affidavit, that states that "its transformers were designed and manufactured under state of the art conditions" according to specifications and that "its manufacturing process complied with applicable industry standards" (majority opn, at 6). The majority also relies on statements "that each transformer was individually tested before leaving defendant's plant" and that it would be "virtually impossible for a transformer with an internal fault to leave [defendant's] plant" (id.). In my view, this showing is insufficient to entitle defendant to judgment as a matter of law.

The available inference from defendant's bare assertions -- that this transformer could not have left its plant with a defect -- is purely speculative. Defendant's own expert conceded as much: "without the transformer to test and examine, there is simply no evidence or proof that [defendant] sold a

transformer containing a defect."

Yet, defendant's experts proceeded to speculate as to possible causes of the explosion, of course, excluding a manufacturing defect. For example, they posited numerous theories: that a negligent worker could have "inadvertently cause[d] an internal short (fault) by permitting the wires to become kinked;" that a negligent worker could have dropped "an object such as a nut, metal tool or other conductive material" into the transformer; that the transformer may have been rebuilt by Niagara Mohawk; or that a negligent worker could have allowed rainwater to enter the transformer while it was being rewired.

Although the majority correctly states the law in its discussion of Speller v Sears, Roebuck & Co. (100 NY2d 38 [2003]), that case is distinguishable. After the defendant in Speller presented its theory of the cause of the house fire (i.e., grease fire began on top of kitchen stove), plaintiff, who had access to the refrigerator, kitchen and the stove, was able to come forward with competent evidence to exclude the stove as the origin of the fire (see id. at 42-43). With a finite number of potential causes of the fire, it was proper, in that case, to permit possible alternative causes to satisfy movant's initial burden and, indeed, nonmovant's burden. In other words, each party in Speller benefitted by the factual scenario such that, on their respective burdens, each could proffer equally plausible, narrowing theories of causation adequate on a motion for summary

judgment.

Here, on the other hand, defendant speculated as to possible causes of the transformer explosion which, according to its own experts, could not be established, while plaintiff was expected to exclude these very causes. The unique facts surrounding the unavailability of the transformer are equally disadvantageous, and neither party could definitively establish entitlement to judgment as a matter of law. Accordingly, the burden shifting exercise in this case is impractical, thus rendering these facts fundamentally unlike Speller (cf. Speller, 100 NY2d at 43). In sum, by giving credence to defendant's bare, obviously self-serving assertions that permit a weak inference of no defect, the result here unjustifiably disadvantages the nonmovant.

Accordingly, I would hold, as did the Appellate Division, that defendant failed to meet its burden, thus obviating the need to consider the adequacy of plaintiff's submissions in opposition.

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Order reversed, with costs, defendant's motion for summary judgment dismissing the complaint granted and certified question answered in the negative. Opinion by Judge Pigott. Chief Judge Kaye and Judges Ciparick, Graffeo, Read and Smith concur. Judge Jones dissents in an opinion.

Decided March 13, 2008