IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

MARK ABBATE,	:	
	:	C.A. No. 09C-02-013 WLW
Plaintiff,	:	
	:	
v.	:	
	:	
WERNER CO. and LOWE'S HOME CENTERS, INC.,	:	
	:	
Defendants.	:	

Submitted: October 28, 2011
Decided: January 19, 2012

ORDER

Upon Defendant Lowe's Home Centers, Inc.'s
Motion for Summary Judgment.
Granted in part; Denied in part.

Jeffrey J. Clark, Esquire of Schmittinger & Rodriguez, P.A., Dover, Delaware; attorneys for the Plaintiff.

Armand J. Della Porta, Jr., Esquire of Marshall Dennehey Warner Coleman & Goggin, Wilmington, Delaware; attorneys for Defendant Lowe's Home Centers, Inc.

Mary Sherlock, Esquire of Weber Gallagher Simpson Stapleton Fires & Newby, LLP, Dover, Delaware; attorneys for Defendant Werner Co.

WITHAM, R.J.

ISSUE

Whether Defendant Lowe's is entitled to summary judgment on Plaintiff's claims of negligence, breach of express warranty, breach of implied warranty of merchantability, and breach of implied warranty of fitness for a particular purpose?

FACTS

Mark A. Abbate (hereinafter "Plaintiff") brings suit against Werner Co. and Lowe's Home Centers, Inc. in relation to an allegedly defective ladder produced by Werner and allegedly sold to Plaintiff's employer Delaware Electric Signal by Lowe's and used by Plaintiff. According to Plaintiff, on July 7, 2007, he was using said ladder when an allegedly faulty leg brace on the ladder split during proper use causing him to fall off the ladder and onto a railing resulting in serious bodily injury.

Lowe's moves for summary judgment on all claims which are negligence, express warranty, implied warranty of merchantability, and implied warranty of fitness for a particular purpose.

Standard of Review

Summary Judgment

Summary judgment should be granted only if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[1] The facts must be viewed in the light most favorable to the non-

[1] Super. Ct. Civ. R. 56(c).

moving party,[2] and all reasonable inferences must be drawn in favor of the non-moving party.[3] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the circumstances.[4] However, when the facts permit a reasonable person to draw but one inference, the question becomes one for decision as a matter of law.[5] The movant bears the burden of demonstrating that a genuine issue of material fact does not exist.[6] Should the movant satisfy his burden, then the non-movant must prove that genuine issues of material fact exist.[7] Mere bare assertions or conclusory allegations do not create a genuine issue of material fact for the non-movant.[8]

Negligence

The elements of negligence are duty, breach, causation, and harm.[9] Negligence

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[2]*Guy v. Judicial Nominating Comm'n*, 659 A.2d 777, 780 (Del. Super. 1995).

[3]*Lundeen v. Pricewaterhousecoopers, LLC*, 2006 WL 2559855 (Del. Super. Aug. 31, 2006).

[4]*Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

[5]*Wooten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

[6]*Lundeen*, 2006 WL 2559855, at *5 (*citing Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979)).

[7]*Id.* (*citing Moore* 405 A.2d at 681).

[8]*Id.* (*citing Sterling v. Beneficial Nat'l Bank, N.A.*, 1994 WL 315365, at *3 (Del. Super. Apr. 13, 1994)).

[9]*Jones v. Crawford*, 1 A.3d 299, 302 (Del. 2010).

must be stated with particularity in the complaint.[10]

Applicability of Delaware Uniform Commercial Code

6 *Del. C.* § 2-102 states, in part: "Unless the context otherwise requires, this Article applies to transactions in goods . . . ."

6 *Del. C.* § 2-104(1) states:

> (1) "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

Express Warranty

6 *Del. C.* § 2-313 states:

> (1) Express warranties by the seller are created as follows: (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise. (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description. (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model. (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or

[10]Super. Ct. Civ. R. 9(b).

> a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

Implied Warranty of Merchantability

6 *Del. C.* § 2-314 states:

> (1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. . . . (2) Goods to be merchantable must be at least such as (a) pass without objection in the trade under the contract description; and (b) in the case of fungible goods, are of fair average quality within the description; and (c) are fit for ordinary purposes for which such goods are used; and . . . (f) conform to the promises or affirmations of fact made on the . . . label if any.

A successful claim for the implied warranty of merchantability must prove: "(1) that a merchant sold the goods; (2) which were defective at the time of sale; (3) causing injury to the ultimate consumer; (4) the proximate cause of which was the defective nature of the goods; and (5) that the seller received notice of the injury."[11]

Implied Warranty of Fitness for a Particular Purpose

6 *Del. C.* § 2-315 states:

> "Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose."

[11] *Reybold Group, Inc. v. Chemprobe Techs., Inc.*, 721 A.2d 1267, 1269 (Del. 1998).

"The buyer need not provide the seller with actual knowledge of the particular purpose for which the goods are intended or of his reliance on the seller's skill and judgment, if the circumstances are such that the seller has reason to perceive the purpose intended or that reliance exists."[12] No recovery is available under this theory where a product is used for its ordinary purpose.[13]

DISCUSSION

In order to sufficiently plead negligence, a defendant must be notified of what duty was breached, who breached it, what act or failure to act breached the duty, and the party upon whom the act was performed.[14] Although Plaintiff appears to have met the standard for pleading with particularity, he must also meet the summary judgment standard once movant has adequately proven that there are no genuine issues of material fact. Mere bare assertions or conclusory allegations do not create a genuine issue of material fact for the nonmovant.[15] There are no depositions of Lowe's employees available to the Court, nor is there discovery of Lowe's practices regarding the inspection of its goods. Evidence Plaintiff provides for Lowe's negligence includes the engineering report that the ladder was defective. Plaintiff also appears

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[12]*Neilson Bus. Equip. Ctr., Inc. v. Monteleone*, 524 A.2d 1172, 1175-76 (Del. 1987).

[13]*Atamian v. Ryan*, 2006 WL 1816936, at *4 (Del. Super. June 9, 2006) (*citing Dilenno v. Libbey Glass Div.*, 668 F.Supp. 373, 376 (D. Del. 1987)).

[14]*Myer v. Dyer*, 542 A.2d 802, 805 (Del. Super. 1987).

[15]*Id.* (*citing Sterling v. Beneficial Nat'l Bank, N.A.*, 1994 WL 315365, at *3 (Del. Super. Apr. 13, 1994)).

to allege the application of negligence *per se*[16] through his expert who states that the ladder did not comply with "ANSI standard A-14.5."[17] This attempt to use negligence *per se* is misplaced. In *Toll Bros., Inc. v. Considine*, the Delaware Supreme Court discussed the history of negligence *per se* and its applicability in tort.[18] The Court noted, "It has long been recognized that a legislative body may substitute its enactments for the general negligence standard of conduct required of a reasonable person."[19] The ANSI standard certainly is not a legislative enactment or regulation, and thus does not qualify for negligence *per se*. Nevertheless, the Delaware Supreme Court has found that failure to adhere to standards or practices not ratified by the State may constitute evidence of negligence.[20] Thus, the fact that Plaintiff's expert has stated that the ladder at hand did not meet ANSI standards may be evidence that

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[16]*See* Am. Compl. at ¶ 17(d).

[17]Glancey Dep. at 31. It is unclear from the submissions to the Court, but it appears ANSI is an abbreviation for the American National Standards Institute.

[18]706 A.2d 493 (Del. 1998).

[19]*Id.* at 495. Ultimately, the Delaware Supreme Court rejected the use of OSHA standards as negligence *per se* as they contained the disclaimer that federal regulations alone do not "enlarge state common law rights, duties or liabilities," and the federal regulations had not been formally approved by the State. *Id.* at 496-97. The Court found, however, that the federal regulations could provide "a standard that is part of the total mix of what is reasonable conduct under the circumstances." *Id.* at 498. *Delaware Elec. Co-op., Inc. v. Duphily*, 703 A.2d 1202, 1209 (Del. 1997) ("Thus, Simmons' failure to adhere to NESC standards is some evidence of negligence . . . not negligence *per se*.").

[20]*See Price v. Blood Bank of Delaware, Inc.*, 790 A.2d 1203, 1212-13 (Del. 2002); *Delaware Elec. Coop., Inc. v. Duphily*, 703 A.2d 1202, 1209 (Del. 1997).

Lowe's was negligent in selling such a ladder. Plaintiff has presented enough evidence to create a genuine issue of material fact on his case for negligence against Lowe's. Summary judgment is denied.

As preliminary matters on the warranty claims, the ladder is indisputably a "good," Lowe's is a "merchant" of ladders, and under 6 *Del. C.* § 2-318, the purchase of the ladder by Plaintiff's employer, Delaware Electric Signal, does not prevent him from recovering under theories of express or implied warranty.[21] Addressing the express warranty claim, Plaintiff presented several exhibits[22] which collectively stand for the assertion that the ladder was not up to the standard stated by Werner. Exhibit B shows the sticker on the ladder which states that it is suitable for use up to 250 pounds of weight, combined for the user and his materials. Plaintiff weighed 180 pounds at the time of the alleged accident and presumably was not using 70 pounds of materials on his ladder. The engineering report states, "Specifically, the subject ladder possesses design defects such that it is not capable of withstanding the forces generated in the rear side rail during foreseeable use."[23]

6 Del. C. 2-313(1)(b) states, "Express warranties by the seller are created as follows: . . . Any description of the goods which is made part of the basis of the

[21]6 *Del. C.* § 2-318 states, "A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section."

[22]Exs. B-G.

[23]Ex. C at 10.

bargain creates an express warranty that the goods shall conform to the description." Looking at this section alone, it is ambiguous with regard to whether the seller must impart the description which becomes the basis of the bargain or whether the description of the goods may be imputed to the seller even when the seller makes no statement, and the description is placed there by the manufacturer. The Uniform Commercial Code's (hereinafter "UCC") official commentary may be applied by analogy to the sale of goods governed by the state UCC in the reconciliation of any express warranty disputes.[24] The Delaware Supreme Court has stated that UCC commentary demonstrates that its warranty provisions should be construed and applied liberally for the buyer.[25] Nevertheless, comment 5 to 6 *Del. C.* § 2-313 appears to favor the seller, here Lowe's, when there is no evidence that Lowe's made any statement regarding the good:

> Paragraph (1)(b) makes specific some of the principles set forth above *when a description of the goods is given by the seller*. A description need not be by words. Technical specifications, blueprints and the like can afford more exact description than mere language and if made part of the basis of the bargain goods must conform with them.[26]

Moreover, the fact that promises and affirmations of fact on labels are covered as a part of the threshold for merchantability for 6 *Del. C.* § 2-314(2)(f) under the implied

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[24] *Bell Sports, Inc. v. Yarusso*, 759 A.2d 582, 592 (Del. 2000).

[25] *Id.*

[26] (italics added).

warranty of merchantability lends to this Court's view that an express warranty should not arise in this situation.[27]

Plaintiff urges that *Pack & Process, Inc. v. Celotex Corp.*[28] governs in this case. The *Pack & Process* court stated:

> Whether or not an affirmation of fact or promise was part of the basis of the bargain of a modified contract is a question of fact properly left for the jury. The burden is on the defendant to prove the absence of reliance in order to discount the contention that express warranties were 'a basis for the bargain.' Proof of reliance, however, is not necessary to create an express warranty.
>
> Viewing the facts in a light most favorable to the plaintiff, the record reveals evidence of statements made to the plaintiff by the defendant from which it may reasonably be inferred that the defendant created express warranties.[29]

The basis of the bargain and who has the burden of proving it is not the issue here. The difficulty for Plaintiff lies in the fact that Werner created and affixed the description of the ladder, not Lowe's. There is no evidence of a conversation with a Lowe's salesperson, only evidence that the ladder was sold by Lowe's. Plaintiff placed no evidence before the Court that Lowe's advanced any affirmation of fact or

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[27]Comment 10 to 6 *Del. C.* § 2-314 also provides support: "Paragraph (f) applies, on the other hand, wherever there is a label or container on which representations are made, even though the original contract, either by express terms or usage of trade, may not have required either the labeling or the representation."

[28]503 A.2d 646 (Del. Super. 1985).

[29]*Id.* at 659.

promise, description, or sample of this ladder. With no genuine issue of material fact, this issue is ripe for summary judgment. Lowe's is entitled to summary judgment in its favor on the express warranty claim. To decide otherwise here, would blur the lines between express warranties and implied warranties. The Court believes that this ruling is supported by 6 *Del. C.* § 2-313 and its associated comment and 6 *Del. C.* § 2-314 and its associated comment. Further, the factual situation in this case is sufficiently distinguishable from *Pack & Process, Inc.* given that plaintiff in that case brought forth alleged statements of defendant from which express warranties could be inferred. In this case, where the seller takes no action that could be construed as an express warranty, the buyer remains protected through an implied warranty as is explained below.

Regarding the implied warranty of merchantability claim, there is a genuine issue of material fact. Lowe's argues that such a claim must fail because Plaintiff's experts have no evidence that Lowe's sold goods that were not merchantable at the time of sale. Plaintiff presents an extensive materials engineering report that advances evidence of both design and manufacturing defects when the ladder was tested after the accident. This report creates a genuine issue of material fact as to whether the ladder was defective at the time of sale, and therefore, whether the ladder was fit for its ordinary purpose and whether it conformed with the promises or affirmations made on its label.[30] Therefore, summary judgment is denied on this

[30] 6 *Del. C.* § 2-314.

claim.

Lowe's is entitled to summary judgment on the implied warranty of fitness for a particular purpose claim. No recovery is available under this theory where a product is used for its ordinary purpose.[31] There is no genuine issue of material fact that either Plaintiff or his company purchased the ladder for any purpose other than to use the ladder as it would normally be used. There is no genuine issue of material fact that the ladder was used for any purpose other than as a ladder. The ladder was used for its ordinary purpose, and thus no recovery is available on this theory.

CONCLUSION

Lowe's motion for summary judgment is hereby ***granted*** for the express warranty claim and the implied warranty of fitness for a particular purpose claim. The motion is ***denied*** for negligence and implied warranty of merchantability claims.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh

[31] *Atamian*, 2006 WL 1816936, at *4.