SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

P.O. BOX 746
COURTHOUSE
GEORGETOWN, DE 19947

Robert K. Pearce, Esquire
Ferry, Joseph & Pearce, P.A.
824 Market Street, Suite 904
P.O. Box 1351
Wilmington, DE 19899

Thomas J. Stumpf, Esquire
Stumpf, Vickers & Sandy, P.A.
8 West Market Street
Georgetown, DE 19947

Re: ***Christopher S. Powell, et al. v. Ernest and Beatrice Megee***
C.A. No. 02C-05-031-RFS

Date Submitted: October 1, 2003
Date Decided: January 23, 2004

Dear Counsel:

This is my decision regarding Defendants, Beatrice and Ernest Megee's Motion for Summary Judgment. The motion is granted in part and denied in part for the reasons set forth herein.

STATEMENT OF THE CASE

Around November of 1997, Christopher and Donna Powell began renting a home, owned by Beatrice Megee and managed by Ernest Megee. Initially, a one-year written lease may have been entered into; however, another lease was not drafted after the end of the year, and the Powell's continued to rent the home, paying on a monthly basis. On February 23, 2003, the house was destroyed in a fire. (If there was a lease, the only copy was apparently destroyed in the fire.) According to the State Fire Marshal's report, the fire originated with a gas hot water heater located in the utility room at the rear of the house. The investigator concluded that a single stage regulator, located outside the house, could have been adversely affected by inclement weather, icing over and

causing the system to "over pressure" and to "over [flame] to the hot water heater burner." The parties agree that the fire resulted from a malfunction of the regulator.

The Powell's brought suit for personal injuries and property damage, claiming 1) the Megees were negligent in placing the regulator in its location; 2) not shielding it from weather; 3) the regulator was old and did not have the safety devices newer regulators have; 4) the Megees were negligent in not conducting inspections of the heating system and 5) in not providing maintenance for the regulator. They allege the Megees should have known of the unsafe condition of the regulator. The Powell's also claim the Megees were negligent as a matter of law for failure to comply with Delaware Landlord-Tenant law § 5305(a)(2), (4), and (5).

The Megees claim they did not install the regulator or the gas tank but that they did provide the hot water heater. Mr. Megee says he does not know whether the regulator was there when the Powells began renting the home, but the Powells claim it was already there. In addition, Mr. Powell states that Mr. Megee told him he could use the tanks and the regulator that the previous tenants had left there. According to a private investigation conducted on behalf of Beatrice Megee, the company providing gas service normally provides the equipment, such as the regulator and gas tanks. However, the service provider for the Powells, Halls Gas, claims it did not provide either the regulator or the gas tanks used by the Powells.

Defendants filed this Motion for Summary Judgment alleging that the Megees have no common law and no statutory duty to maintain or repair the regulator. They also claim that Ernest Megee has no ownership interest in the property and is not a landlord and thus cannot be found negligent.

DISCUSSION

A. Standard of Review

This Court will grant summary judgment only when no material issues of fact exist, and the moving party bears the burden of establishing the nonexistence of material issues of fact. *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979). Once the moving party meets its burden, the burden shifts to the nonmoving party to establish the existence of material issues of fact. *Id*. at 681. The court views the evidence in a light most favorable to the nonmoving party. *Id*. at 680.

Where the moving party produces an affidavit or other evidence sufficient under *Superior Court Civil Rule 56* in support of its motion and the burden shifts, the nonmoving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial. *Super. Ct. Civ. R. 56(e)*; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Generally, actions based on negligence are not a proper subject for summary judgment. The moving party must show the absence of all material issues of fact relating to negligence. *Ebersole v. Lowengrub*, 180 A.2d 467, 469 (Del. 1962). Only after a moving defendant produces evidence of "necessary certitude negating the plaintiff's claim" does the burden shift to the plaintiff to show a genuine issue of material fact exists. *Id*. at 470.

B. Common Law Negligence

The plaintiffs charge the defendants with common law negligence in ¶ 6 of the complaint. In the not too distant past, the tenant took a dwelling as he found it. If there was no express covenant to repair, the landlord could not be found liable for injuries caused by a defect in the premises. *See Grochowski v. Stewart*, 169 A.2d 14, 16 (Del. Super. Ct. 1961). Since that time, Delaware has passed the Landlord-Tenant Code which superseded the common law approach, and landlords are

required to provide a safe unit fit for renting "at all times during the tenancy." *See Pierce v. Indian Landing Creek Properties,* 1991 WL 113580 (Del. Super. Ct.); *Hand v. Davis*, 1990 WL 96583, at *2 (Del. Super. Ct.); *Ford v. Ja-Sin*, 420 A.2d 184, 186 (Del. Super. Ct. 1980); 25 *Del. C.* § 5305(a)(2). The adoption of the Code does not mean, however, that there can be no action at common law for negligence. On the contrary, it

> [extended] landlord liability under an ordinary negligence standard to all defects, latent or otherwise in the rental unit of which the landlord was aware or should have been aware which endanger the health, welfare or safety of the tenant or occupant during the term of the tenancy.

Rosenberg v. Valley Run Apartments Assoc., Del. Super. Ct., No. 1143, 1973, Walsh, J. (April 29, 1976), Letter Op. at 3, *aff'd*, Del. Supr., No. 121, 1976 (May 17, 1977) (referring specifically to the effect § 5303(a)(2) had on the common law approach).

Later Delaware courts have found, "[t]he duty of the landlord is to maintain the premises in a reasonably safe condition, and to undertake any repairs necessary to achieve that end." *Norfleet v. Mid-Atlantic Realty Co.*, 2001 WL 282882, at *6 (Del. Super. Ct.), *citing*, *Hand,* 1990 WL 96583, at *2 (citations omitted). Thus, if a landlord can be found to have breached this duty and an injury found to have resulted as a proximate cause of that breach, liability may ensue. *See New Haverford v. Stroot*, 772 A.2d 792, 798 (Del. 2001).

Whether there can be an action for common law negligence in this case turns on who had a duty to inspect and, if necessary, repair the regulator. Both parties agree that the regulator was defective and that the defect caused the fire. This is confirmed by the findings in the Fire Marshal's report and in the investigation done for Beatrice Megee. If it is the case that the landlord or property manager has a duty to inspect the regulator, and since it is agreed the regulator was defective, then it follows that the Megees should have been aware of the defect and could be found liable for the resulting harm to the Powells.

The Landlord-Tenant Code also provides that a landlord shall "[m]aintain all electrical, plumbing and other facilities supplied by the landlord in good working order." 25 *Del. C.* §5305(a)(5). While the Code itself cannot establish a standard of care, such that it would provide a basis for negligence *per se* (see discussion, *infra*), it does establish a bare minimum standard. *See Norfleet v. Mid-Atlantic Realty Co.*, 2001 WL 695547, at *4 (Del. Super. Ct.). In order to prevail at common law, Plaintiffs must first establish some standard beyond that articulated in the statute. *Id*. At the same time that the Code cannot be used to establish a standard, however, it does tell us that as part of the landlord-tenant relationship, the landlord has a duty to provide a safe rental unit, to keep the unit in good repair and to maintain any electrical or other facilities that she supplies. *See Kuczynski v. McLaughlin*, 2003 WL 22048234, at *3 (Del. Super. Ct.) (distinguishing duty of care from standard of care). *See also* 25 *Del. C.* § 5305(a)(2), (4), and (5). The word supply means, "to provide that which is required or desired by; satisfy the needs or wishes of; furnish with or as if with supplies, provisions, or equipment." Webster's Third New Int'l Dict. 1968. *See also Ryan v. State*, 791 A.2d 742, 743 (Del. 2002) ("It is settled law that, if a statute is unambiguous, no interpretation is necessary and the plain meaning of the language in the statute controls.")

Defendants cite *Cannon v. Tull*, 1994 WL 315376, at *2 (Del. Super. Ct.) in support of the idea that the regulator could not have been supplied by the Megees if they did not actively install it themselves. There, the presiding judge, after a bench trial, declined to find that an extension cord, supposedly on the premises of a restaurant when the Plaintiff-tenants began operating it, was supplied by the landlord. Based on the present state of the record, this Court cannot come to the same conclusion regarding the regulator for several reasons. In *Cannon*, the facts did not adequately show that the landlord had supplied the cord. It had not been used while the landlord had been

operating the restaurant and mysteriously appeared only when the plaintiffs began operating the restaurant. Indeed, the judge accepted the testimony, supported by photographs, of the landlord that the extension cord had not been present while he was using the premises. *Id*. at *1.

Here, Mr. Megee is not sure whether the regulator was there before the Powells leased the property or not, and he may even have told Mr. Powell he could use this regulator, possibly placed there by previous tenants. Unlike the situation in *Cannon*, the Megees have not provided this Court with overwhelming proof that they did not provide the regulator, such that it could find summary judgment on their behalf. In addition, an extension cord is something that can be bought at any time at a hardware store. Common sense tells us that an extension cord is not an item normally supplied by a landlord, or even one that a tenant might ever expect a landlord to supply. A regulator, however, is a horse of a different color. It is attached to the house by a gas line and is normally supplied by someone other than the tenant. Moreover, the *Cannon* court expressed doubt that an extension cord could even be considered an "electrical, plumbing or other facility" (although the judge refrained from deciding the case based upon that doubt).

In another case addressing facilities supplied by the landlord, *Brown v. Robyn Realty Company*, 367 A.2d 183, 191 (Del. Super. Ct. 1976), the court found that alleged defects in a stove and an oven, and the allegation that the refrigerator did not function well, established a breach of duty because they sufficiently evidenced a violation of § 5303(a)(5) (the predecessor to § 5305(a)(5)).[1] Like a regulator, a refrigerator, stove and oven are typically items that are supplied with the rental unit. Mr. Powell has alleged that Mr. Megee told him he could use the regulator and tanks left behind by previous residents.[2] A jury, believing Mr. Powell, could reasonably infer that the Megees had in effect supplied the regulator and therefore that any maintenance of the regulator

was the responsibility of the Megees.

Because the record shows there was some deviation from how regulators are normally handled and provided, i.e. that the Megees may have told the Powells they could use it and that Halls Gas, the Powells gas supplier, did not provide it, as a gas company normally does, the Powells have at least shown preliminarily that the Megees constructively supplied the regulator and thus may have taken on the responsibility of inspecting and maintaining it. There is no indication in the record that the Megees ever inspected or repaired the regulator. In addition, there is no written lease delineating who was responsible for the maintenance of the regulator. Because the Megees and the Powells cannot agree on where the regulator came from and whose responsibility it was, there exists a genuine issue of material fact. The Court finds that the issue of whether the Megees were negligent at common law in failing to repair or inspect the regulator is one appropriately left to a jury to decide.

Furthermore, since a jury could at least find that the regulator was placed on the premises by Megee's former tenant, the question arises as to whether the duty to provide a safe place and to keep a unit in good repair was breached. In other words, assuming another tenant left the regulator and Beatrice Megee, as owner, and Ernest Megee, as property manager, regained possession of the property and sought to rent it to others, what is the standard of care expected of a landlady and property manager in similar circumstances? The Megees acknowledge that the regulator was necessary to the operation of the hot water heater which they supplied. Should they inventory and inspect a gas regulator left by a former tenant that is part of the rental property? If an inspection would have revealed a dangerous condition, should the regulator have been repaired and replaced?

In this regard, expert testimony is required, for this information is beyond the ordinary experience of jurors. Plaintiffs must establish the standard of care regarding the inspection and

maintenance of a regulator in the marketing of a rental unit. The court in *Norfleet* found that an expert would be helpful to prove standard of care in every landlord-tenant negligence case. *Id*. *See also Miley v. Harmony Mill Ltd. P'ship*, 826 F. Supp. 824, 826 (D. Del. 1993) (requiring Plaintiff to produce "a witness with expertise of the Delaware real estate community"). Plaintiffs will have to provide someone familiar with the real estate community to testify regarding standard of care in order to show negligence under ¶ 6 of the complaint. The expert should testify as to what the reasonably prudent landlord and property manager would have done under similar circumstances. For example, he or she could testify that a reasonably prudent landlord or property manager who leased a house with a regulator already installed would have had the regulator inspected or would have made sure it was in rentable condition. *See Norfleet*, 2001 WL 695547, at *6 (advising the parties about the expert's testimony). In the alternative, the Plaintiffs can provide an appropriate regulation, rule or code provision which sets forth a specific standard of conduct, such that there could be a claim for negligence *per se* (other than the Landlord-Tenant Code - see discussion, *infra*). *See* 25 *Del. C*. § 5305(a)(4) (requiring landlord to make all repairs necessary to keep rental unit and appurtenances in as good a condition as required *by law*); *Norfleet*, 2001 WL 282882, at *4 ("On its face, § 5303(a)(1) cannot support a negligence per se claim, [sic] it must do so vicariously through other regulations and codes.").

C. Negligence *Per Se*

Violation of a statute, created for the safety of a class of persons, is negligence *per se*. *Sammons v. Ridgeway*, 293 A.2d 547, 549 (Del. 1972). The Powells allege in ¶ 7 of the complaint that the Megees failed to comply with Delaware Landlord-Tenant law § 5305(a)(2), (4), and (5), which provide:

> (a) The landlord shall, at all times during the tenancy:
> . . .
> (2) Provide a rental unit which shall not endanger the health, welfare or safety of the tenants or occupants and which is fit for the purpose for which it is expressly rented;
> . . .
> (4) Make all repairs and arrangements necessary to put and keep the rental unit and the appurtenances thereto in as good a condition as they were, or ought by law or agreement to have been, at the commencement of the tenancy; and
> (5) Maintain all electrical, plumbing and other facilities supplied by the landlord in good working order.

25 *Del. C*. §5305.

To prove negligence *per se* for the violation of a statute, a plaintiff must show that the statute was created for the safety of others and that the plaintiff is a member of the class of persons it was designed to protect. *D'Amato v. Czajkowski*, 1995 WL 945562, at *2 (Del. Super. Ct.). In addition, it must be shown that the statute "[sets] forth a standard of conduct which was designed to avoid the harm plaintiff suffered." *Id*., *citing*, *Wealth v. Renai*, 114 A.2d 809, 811 (Del. Super. Ct. 1955). Finally, the defendant must have failed to comply with the standard of conduct set out in the code. *D'Amato*, 1995 WL 945562, at *2.

Delaware courts have invariably held that the Landlord-Tenant Code § 5305(a) cannot support a claim of negligence *per se* because it does not set forth specific standards of conduct. *See Norfleet*, 2001 WL 282882, at *4 (interpreting an earlier version of this section[3], 25 *Del. C.* § 5303(a)(1),(2)); *Lemon v. White Clay Ltd. P'ship*, 1995 WL 161590, at *4 (Del. Super. Ct.) (no negligence *per se* claim under 25 *Del. C*. § 5303(a)(2),(4)); *Hand*, 1990 WL 96583, at *3 (recognizing that *Rosenberg* and *Loss & Miller* had held there was no tort liability for violation of § 5303(a)(2),(5) respectively; finding neither 5303(a)(4) nor (1) could support a claim of negligence *per se*); *Loss & Miller, P.A. v. Foulk Road Medical Ctr., Inc*., Del. Super. Ct., C.A. No. 77C-AU-33, 3, Christie, J., (March 16, 1981) (no absolute liability for a landlord under § 5303(a)(5)); *Rosenberg*

v. Valley Run Apartment Associates, Del. Super. Ct., No. 1143, 2, Walsh, J., (April 29, 1976) (no negligence *per se* claim under 25 *Del. C.* § 5303(a)(2)); *Miley v. Harmony Mill Ltd. P'ship*, 803 F. Supp. 965, 969-70 (D. Del. 1992) (referring to all of § 5303(a); finding plaintiffs claim of negligence *per se* was precluded as a matter of law). Accordingly, Defendants Motion for Summary Judgment shall be granted as to the issue of negligence *per se.*

D. Liability of Mr. Megee

A cause of action exists against Mr. Megee for common law negligence. Because a relationship exists between Mr. Megee as manager of the property, and the Powells as tenants, there exists the first prong of a negligence claim, i.e. a duty to maintain the property or to do whatever it is that property managers do. As long as the Powells can prove a breach of the standard of care for a property manager (by expert testimony), together with proximate cause and damages, Mr. Megee can be found negligent, albeit as manager and not as landlord.

CONCLUSION

For the reasons set forth herein, Defendants Motion for Summary Judgment is granted in part and denied in part.[4] The Plaintiffs must retain an expert by Friday, March 12, 2004. At that time, they shall provide Defendants with the substance of the facts and opinions of the expert and a summary of the grounds for each opinion. If the Plaintiffs fail to do so, the Court will revisit the denial of summary judgment on the remaining claims of the complaint. Also, with this point in mind, a status conference is scheduled for Friday, March 19, 2004 at 9:00 a.m.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary

ENDNOTES

1. Defendants mistakenly rely on this case to assert that there can be no breach of duty for providing a defective regulator unless a landlord agrees to supply "water, hot water, heat and electricity" as described in § 5305(b)(2) of the Code. *Cf. Robyn*, 367 A.2d at 191 (finding the allegation that there was no heat and hot water during the winter to be insufficient to establish a breach of duty when the landlord did not agree to supply heat and hot water). Defendants fail to distinguish, however, between the provision of utilities and the provision of equipment used to process and facilitate the receipt of those utilities. The former is addressed in § 5305(b)(2) and the latter is considered in § 5305(a)(5).

2. Superior Court Civil Rule 56(e) requires that facts in affidavits submitted for summary judgment review must be admissible under the rules of evidence. *See Hopfenverwertungsgenossenschaft Hallertau v. Pabst Brewing Co.*, 1986 WL 6597, at *2 (Del. Super. Ct.) (refusing to weigh testimony in affidavit of witness, when he was not properly established as an expert pursuant to Delaware Rules of Evidence 702 and 703). Mr. Powell's statement in his deposition about what Mr. Megee allegedly told him would not be hearsay because it qualifies as an admission by a party-opponent. D.R.E. 801(d)(2).

3. The relevant paragraphs in the earlier version of the Code, 25 *Del. C.* §5303(a)(2),(4) and (5), are virtually identical to § 5305(a)(2),(4) and (5), the only change being in ¶ 5 where the original designation, "him," was later replaced by the more gender-neutral term, "landlord."

4. In their reply, Defendants claim a Superior Court decision, *Lewis v. Route 13 Outlet Market, Inc.*, 1995 WL 654070, supports their position. *Lewis*, however, concerned an injury to a guest on leased property and discussed whether or not the landlord controlled the premises. This is a different issue than the one before the Court in this case.