

IN THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

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APPEAL NO. 31947

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KENNETH G. BENNETT, ROSILYN K. BENNETT, REBECCA A. BENNETT, and BOB  
BENNETT HOMES, INC., a West Virginia corporation,

Appellants,

vs.

ASCO SERVICES, INC., a West Virginia corporation; ADEMCO GROUP, a Division of Pittway Corporation, a foreign corporation; PITTHWAY CORPORATION, a foreign corporation; SYSTEM SENSOR, a foreign corporation; HONEYWELL, INC., a foreign corporation; CHEMETRONICS CARIBE, INC., a foreign corporation; KIDDE-FENWAL, INC., a foreign corporation; TOYOTA MOTOR CORPORATION, a foreign corporation; TOYOTA MOTOR MANUFACTURING, KENTUCKY, INC., a foreign corporation; TOYOTA MOTOR MANUFACTURING, U.S.A., INC., a foreign corporation; TOYOTA MOTOR SALES U.S.A., INC., a foreign corporation; COBB AND COULSON AUTO SALES, INC., d/b/a C&C DODGE TOYOTA, a foreign corporation; and OHIO FARMERS INSURANCE COMPANY, a foreign corporation, WESTFIELD INSURANCE COMPANY, a foreign corporation; WESTFIELD COMPANIES, a foreign corporation; WESTFIELD GROUP, a foreign corporation;

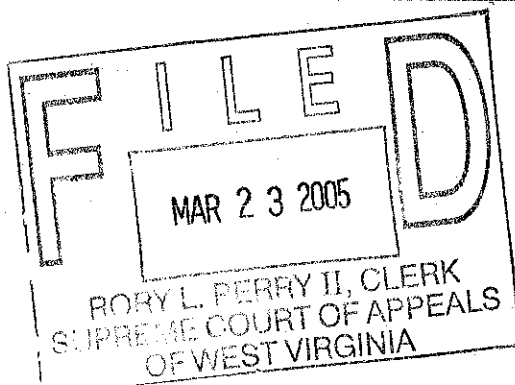
Appellees.

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REPLY BRIEF OF APPELLEES CHEMETRONICS CARIBE, INC.,  
and KIDDE-FENWAL, INC.

From the Circuit Court of Wood County  
Civil Action No. 00-C-133

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## **I. PROCEDURAL HISTORY**

The instant matter arises out of a fire that occurred at the Plaintiffs' home on March 25, 1998. On March 23, 2000, on the eve of the expiration of the statute of limitations, Plaintiffs filed an action, seeking damages for the sum they believe they were underinsured. Plaintiffs have alleged numerous causes of action and theories of liability against several original defendants, including the alarm company ASCO Services, Camry manufacturer Toyota Motor Corporation, and their homeowners and auto insurance company Ohio Farmers Insurance Company/Westfield Group.

The Defendants, Chemetronics Caribe, Inc., and Kidde-Fenwal, Inc., (collectively "Chemetronics") were joined in the litigation by the Plaintiffs' Third Amended Complaint on October 11, 2002, nearly two and one half years after litigation began, and less than a year before this matter was scheduled for trial. Chemetronics manufactures and distributes heat sensors. Plaintiffs allege that Chemetronics heat sensors were installed by the Defendant alarm company in their home. Plaintiffs further allege that the Chemetronics heat sensors did not function properly and were the proximate cause of the damage to the home. Plaintiffs have made identical allegations against the manufacturers of each of the component parts to the alarm system.

Plaintiffs assert five causes of action against Chemetronics and the other component manufacturing defendants: Count I negligent product manufacture; Count II negligent/defective product design; Count III breach of warranty; Count IV failure to warn of the dangerous/defective condition of a product; and Count V misrepresentation. Plaintiffs

have essentially alleged that all of the alarm components, although manufactured by different entities, were defective on March 28, 1998.

Without evidence of a defective condition, Plaintiffs could not make a prima facie case for any of the causes of action alleged. On that basis, as well as on the basis of the statute of limitations and the doctrine of spoliation, Chemetronics brought forth a Motion for Summary Judgement as to all claims and cross-claims. On December 11, 2003, by Orders of Court of the Honorable Robert A. Waters, all Appellees' Motions for Summary Judgement were granted. The Plaintiffs filed an appeal seeking relief from the December 11, 2003 Court Orders.

## **II. COUNTER-STATEMENT OF THE FACTS**

### **A. Events Prior to March 25, 1998**

Plaintiffs resided in a home located at 1001 56<sup>th</sup> Street, Vienna, Wood County West Virginia, since its construction was completed in 1995. The home was built by Mr. Bennett himself, who owns and operates the construction business "Bob Bennett Homes, Inc."

In early 1995, Mr. Bennett contacted Defendant ASCO Services and indicated that he was interested in a fire and burglar alarm system for his new home. Mr. Bennett had worked with ASCO Services in connection with other homes built by his construction business. Working with Kevin Cline and Stephen McCauley of ASCO Services, Mr. Bennett designed the alarm system and purchased the necessary components. The installation of the system was primarily performed by Mr. Cline and Mr. McCauley.

After home construction was completed, the alarm system was activated and operational sometime in November of 1995. From that time, up until the fire that occurred on March 25, 1998, the Bennetts subscribed to a monthly monitoring service provided by ASCO Services. For a monthly fee, ASCO Services monitored the signals being transmitted from the Plaintiffs' alarm system. These signals were sent via telephone line to a computer at an ASCO monitoring station where an operator monitors the data for potential problems and contacts the appropriate police or fire officials when indicated. Additionally, the alarm system sent a daily test signal to the ASCO monitoring station indicating that the battery back-up for the system had appropriate power.

Although ASCO provided a monitoring service, no regular maintenance was provided on the system by ASCO or Plaintiffs. However, on October 31, 1997, the alarm was triggered and a technician from ASCO was sent to the Plaintiffs' home to check out the system. It is unclear exactly what type of service was performed at that time, but the problem was resolved.

No other problems were detected with the system and it continued to send regular test signals to the ASCO monitoring station every day until February 10, 1998. The records of the daily test signal from February 10, 1998, to March 25, 1998, have not been located or produced by ASCO. Defendant ASCO maintains those records were destroyed in a flood and/or lost when lightning struck their operations center. (See the deposition of Kevin Cline, pp. 123-124, attached hereto as Exhibit "A". See also the deposition of Jacqueline Hileman, pp.20-22, attached hereto as Exhibit "B"). These documents would have

provided valuable information as to what portion of the alarm system was triggered on March 25, 1998.

**B. Events of March 25, 1998**

Sometime after 1 a.m. on March 25, 1998, Mrs. Bennett was just drifting off to sleep in her room on the second floor when she heard the gas furnace come on. Immediately thereafter, she smelled smoke and heard an alarm going off. Mrs. Bennett ran into her daughter Rebecca's room and told her to get out of the house. Mrs. Bennett then ran down to the first level where the three car garage and her husband's bedroom were located. Mrs. Bennett first went to the garage where she saw fire that appeared to be burning in the vicinity of her daughter's Toyota Camry, which was parked in the center stall of the garage. She then ran to awake her husband and tell him of the fire. (See deposition of Rosilyn K. Bennett, pp. 99-105, attached hereto as Exhibit "C").

As Mrs. Bennett was shouting at her husband to get out of the house, the telephone rang at approximately 1:18 am. On the telephone was the ASCO operator who was inquiring as to whether the Bennetts needed assistance. Mr. Bennett told the operator to call a fire truck. (See deposition of Kenneth G. Bennett, p. 93, attached hereto as Exhibit "D"). The Vienna Fire Department responded and arrived at the scene at approximately 1:27 a.m. (See Report of Vienna Fire Department, attached hereto as Exhibit "E").

**C. After the fire**

On the morning after the fire, the Bennetts contacted their automobile and homeowners insurance companies. They informed the investigators of their belief that the

Camry was the source of the fire, and that they felt the alarms system had not responded properly.

On March 26 and 27, 1998, Robert Stewart, certified fire investigator, conducted a cause and origin investigation at the home, at the request of the insurers. (See Deposition of Robert Stewart, p. 22, attached hereto as Exhibit "F"). Mr. Stewart prepared a complete report which he submitted to the insurers. In his report, Mr. Stewart found that the cause of the fire was "undetermined"; however, he was reasonably certain that the origin of the fire could be narrowed to the garage area. (See Exhibit "F", p. 36). Based upon his findings, Mr. Stewart recommended that the insurers retain a cause and origin expert with specific expertise in automobiles to examine the Camry as a potential cause of the fire. (See Exhibit "F", p. 68).

The insurers retained W.L. Davidson to investigate the Camry. On April 13, 1998, Mr. Davidson examined the Camry at Hilltop Auto Wrecking, where the insurers had the car stored after taking possession of the vehicle. (See Deposition of W.L. Davidson, p. 21, attached hereto as Exhibit "G"). After performing his investigation, Mr. Davidson concluded that the cause of the fire must be considered "undetermined". He noted the presence of electrical activity in the Camry, but could not say with reasonable certainty whether it was the cause of the fire or a result of the fire. Mr. Davidson concluded that there was no evidence to support a subrogation claim against Toyota. (See Report of W.L. Davidson attached hereto as Exhibit "H").

Approximately one month after the fire, Mr. Bennett contacted the insurance company to ask if he could have the fire scene demolished and the lot cleared. Rodyen Browning, the adjuster for Westfield, contacted the other insurance company involved and then gave Mr. Bennett permission to clear the debris, which was done on or about April 28, 1998. (See Deposition of Rodyen Browning, pp. 18-19, attached hereto as Exhibit "I").

Westfield paid the Plaintiffs the policy limits for their home, the contents and the vehicles. No subrogation action was pursued by Westfield based on the "undetermined" cause and origin of the fire. The Camry was subsequently salvaged.

Early in the course of discovery, on or about June 5, 2000, employees of ASCO identified Chemetronics as the manufacturer of the heat sensors they believed they installed in Plaintiffs' home. (See ASCO's Responses to Plaintiffs' Request for Production of Documents dated June 5, 2000, attached hereto as Exhibit "J").

The actual heat sensors have never been inspected or tested by anyone in connection with this lawsuit because they were destroyed and disposed of when the residence was demolished shortly after the fire on April 28, 1998.

Discovery in this matter closed on September 5, 2003. Plaintiffs have offered four expert witnesses to support the multitude of claims they have brought against the numerous defendants. Each of these experts have been deposed on their conclusions and opinions. To date, no one has been able to identify or to demonstrate the existence of a defect in the Chemetronics' heat sensors. Nor have Plaintiffs been able to positively identify Chemetronics as being the manufacturer of the heat sensors in the garage. Mr.

Bennett, who participated in the design of the system, initially stated that there were combined heat and smoke detectors in the garage. Chemetronics does not manufacture that type of heat sensor.

Chemetronics moved for summary judgment on the basis that no genuine issue of material fact exists, and that the Plaintiffs' claims against this Defendant are barred by the applicable statute of limitations. Chemetronics was neither joined nor given notice of this litigation until 2½ years after the Complaint was filed, and 4½ years after the underlying incident. Plaintiffs have failed to bring forth any evidence which could entitle them to the benefit of the discovery rule in this case. Plaintiffs failed to undertake a reasonable investigation to identify the manufacturer of the heat sensors prior to the expiration of the statute and then failed to act with reasonable promptness when the identity was disclosed by original Defendant ASCO at a very early point in discovery.

**III. COUNTER-STATEMENT OF THE QUESTIONS INVOLVED ON APPEAL**

A. WHETHER THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR IN DETERMINING THAT THE APPLICABLE STATUTE OF LIMITATIONS RELATIVE TO THE PLAINTIFFS' PRODUCT LIABILITY CLAIMS HAD EXPIRED?

SUGGESTED ANSWER: NO.

B. WHETHER THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR IN DETERMINING NO GENUINE ISSUE OF MATERIAL FACT EXISTS THUS PRECLUDING PLAINTIFFS' PRODUCT LIABILITY CLAIMS?

SUGGESTED ANSWER: NO.

C. WHETHER THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR IN GRANTING SUMMARY JUDGMENT ON THE BASIS OF SPOILIATION BECAUSE THE PLAINTIFFS HAVE NO EVIDENCE THAT THIS DEFENDANT'S PRODUCT WAS IN ANY WAY DEFECTIVE?

SUGGESTED ANSWER: NO.

#### IV. STANDARD OF REVIEW

Pursuant to W. Va. R. Civ. P. 56, summary judgment is proper where the record demonstrates that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Brady v. Deals on Wheels, Inc., 208 W.Va. 636, 542 S.E.2d 457 (2004). Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove. Brady v. Deals on Wheels, Inc., 208 W.Va. at 641; citing Williams v. Precision Coil, Inc., 194 W. Va. 52, 459 S.E.2d 329 (1995).

In response to a motion for summary judgment, mere allegations are insufficient to show that there is a genuine issue for trial. Miller v. City Hospital, 197 W.Va. 403, 475 S.E.2d 495 (1996). Once a party makes a motion for summary judgment, the non-moving party must "(1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure". Williams v. Precision Coil, Inc., Syl. Pt. 3. The circuit court's function at the summary judgment stage is not to weigh the evidence and

determine the truth of the matter, but is to determine whether there is a genuine issue for trial. Kidd v. Mull, 215 W.Va. 151, 595 S.E.2d 308 (2004).

An appellate court applies a plenary review to a circuit court's entry of summary judgment. W. Va. Fire & Cas. Co. v. Stanley, 602 S.E.2d 483, 489 (2004). A circuit court's entry of summary judgment is reviewed *de novo*. Bowyer v. Hi-Lad, Inc., 2004 W. Va. LEXIS 197 (2004); Gallapo v. Wal-Mart Stores, Inc., 197 W. Va. 172, 475 S.E.2d 172 (1996); Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994). The Supreme Court of West Virginia has held that "if a summary judgment is entered under Rule 56... it is a dismissal with prejudice..." W. Va. Fire & Cas. Co. v. Stanley, 602 S.E.2d at 497; citing U.S. Fidelity & Guaranty Co. v. Eades, 150 W. Va. 238, 144 S.E.2d 703 (1965).

## V. ARGUMENT

### A. **Plaintiffs' claims are barred by the statute of limitations and were properly dismissed by the Circuit Court.**

The gravamen of Plaintiffs' claims sound in products liability and are therefore governed by the two-year statute of limitations contained in West Virginia Code 55-2-12. It is undisputed that Plaintiffs suffered their alleged damages on March 28, 1995, but did not file suit against Chemetronics until October 11, 2002. Under these facts, Plaintiffs' claims against Chemetronics are barred by the applicable statute of limitations. It is obvious that Plaintiffs intend to rely on the "discovery rule" to rebut this motion. In cases where all the facts regarding the existence of the injury and the identity of the

manufacturer of the instrument of injury is not immediately known, the Supreme Court of Appeals has recognized the so-called "discovery rule":

**In product liability case, the statute begins to run when the plaintiff knows, or by the exercise of reasonable diligence should know, (1) that he has been injured, (2) the identity of the maker of the product, and (3) that the product had as causal relation to his injury.**

Syllabus point 1, Hickman v. Grover, 178 W.Va. 249, 358 S.E.2d 810 (1987).

The Court further clarified this rule in Cart v. Marcum, 188 W.Va. 241, 423 S.E.2d 644 (1992), stating that:

**Mere ignorance of the existence of a cause of action or the identity of the wrongdoer does not prevent the running of the statute of limitations; the "discovery rule" applies only when there is a strong showing by the plaintiff that some action by the defendant prevented the plaintiff from knowing of the wrong at the time of the injury.**

See Chancellor v. Shannon et al., 200 W.Va. 1, 488 S.E.2d 1 (1997), citing Cart, supra.

In Cart, the Court made it clear that a plaintiff seeking to benefit from the discovery rule must demonstrate that he made a reasonable effort to discover the cause of action or the identity of the wrongdoer. Additionally, the plaintiff must make a "strong showing" that he was prevented from discovering the nature of the harm or the identity of the wrongdoer by "fraudulent concealment on the part of the wrongdoer, an inability on his part to comprehend the injury or other extreme hardship." Cart, supra.

In the present matter, no evidence has been produced even suggesting that Chemetronics attempted to conceal a "wrongdoing". With regard to "the inability to comprehend the injury", Plaintiff Mr. Bennett has testified that he believed on the day of

the fire that the alarm system had not functioned properly in some manner. Mr. Bennett told the fire chief and the investigators for the insurance company of his belief that the alarm system malfunctioned. Finally, Mr. Bennett was involved in the design and purchase of the system and had some knowledge of the components used and their placement in the home. Based upon these facts, Plaintiffs cannot make the strong showing needed to benefit from the discovery rule.

Furthermore, the Plaintiffs have made no showing of "reasonable diligence" in attempting to identify the manufacturer of the heat sensors located in their own garage. In fact, to date, it has not been conclusively established that Chemetronics actually manufactured the heat sensors in question. Having been destroyed, the Plaintiffs are unable to produce the actual heat sensors or any receipts or documentation regarding the same. Mr. Bennett testified that the devices in his garage were a combination of heat and smoke detectors. However, Chemetronics does not manufacture this type of device for consumer use. Mr. Cline and Mr. McCauley, the ASCO employees who installed the devices, testified that they "believed" the heat sensors were Chemetronics, based upon the fact that it was their usual brand of choice. (See Exhibit "A", pp. 37-38). (See Deposition of Stephen McCauley, p. 15, attached hereto as Exhibit "K"). Notably, Mr. McCauley agreed that it is possible they used a different brand in the Bennetts' home. (See Exhibit "K", p. 23). Certainly, Mr. Bennett, a home builder who describes himself as being very conscious of safety, very possibly could have insisted upon the more expensive combination detectors. He would have a better recollection of what devices were installed

in his particular home. Clearly, there is uncertainty as to whether Chemetronics is even the proper party to this case.

The same standard has been applied to the discovery rule in tort cases as in products liability for the discovery rule. In Gaither v. City Hospital, 199 W.Va. 706, 487 S.E.2d 901 (1997):

In tort actions, unless there is a clear statutory prohibition to its application, under the discovery rule the statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence should know (1) that the plaintiff has been injured, (2) the identity of the entity who owed the plaintiff the duty to act with due care, and who may have engaged in the conduct that breached that duty, and (3) that the conduct of that entity has a casual relation to the injury.

Syllabus point 4 of Gaither v. City Hospital, Inc. 199 W.Va. 706, 487 S.E.2d 901 (1997).

Even under this more lenient standard for the application of the discovery rule, Plaintiffs' claims against Chemetronics were properly dismissed. Assuming that Plaintiffs could not know the identity of the manufacturer of the heat sensors until their lawsuit was filed in March of 2000, they learned of Chemetronics identity from ASCO Services shortly thereafter.

On June 5, 2000, Defendant ASCO Services provided Plaintiffs, in response to requests for production of documents, specification sheets on the Chemetronics 600 series

heat detectors. (See Exhibit "J"). These documents contain the current web address for Chemetronics, where any pertinent contact information may be found.

Assuming that Plaintiffs could not have learned Chemetronics identity prior to that date with all reasonable diligence, it is undisputable that the statute of limitations would have begun as of June 5, 2000, the date the identify of Chemetronics was disclosed. However, Plaintiffs waited until October 11, 2002, to join Chemetronics, a move that has placed this Defendant at a considerable disadvantage given the fact that discovery had been ongoing for over two years and this matter was scheduled for trial in less than one year.

Based on the above, there is no genuine issue of material fact for the jury. Under the most generous interpretation of the discovery rule, Plaintiffs failed to bring their claim against Chemetronics within the statute of limitations and their claims were properly dismissed with prejudice.

**B. Plaintiffs have no evidence that Chemetronics heat detectors were negligently designed.**

In this case, Plaintiffs have alleged all the possible products liability theories, including defective design, defective manufacture and failure to warn. When a products liability theory is founded on a theory of defective design, a plaintiff does not need to show that errors were made in its manufacture. Rather, a plaintiff must show that the properly made product is nevertheless defective because its design is unreasonably dangerous for its intended use. Syl. Pt. 4, Morningstar v. Black and Decker Mfg. Co., 162 W.Va. 857, 253

S.E.2d 666 (1979).

In proving such a defect, the particular product is not necessary. All such products manufactured in that particular way would be defective because of their design.

In this case, Plaintiffs have produced no evidence that the Chemetronics 600 series heat detectors are defective. In Plaintiffs' Responses to Request for Admissions, the Plaintiffs stated the following in Response to the Requests number 1 and 3:

1. **There exists no documentation conclusively proving that the heat sensors placed in Plaintiffs' home were manufactured by this Defendant.**

**RESPONSE: ...plaintiff is not aware of any document being produced which conclusively establishes the subject matter of this request.**

3. **Plaintiffs are unable to articulate a specific identifiable defect in the Defendant's product.**

**RESPONSE: Plaintiffs can neither fully admit nor deny this request at this time.**

**See deposition testimony of Plaintiffs' alarm expert Jeffrey Zwirn.**

(See Plaintiffs' Responses to Request for Admissions attached hereto as Exhibit "L").

The only evidence offered on this topic from the Plaintiffs, the deposition testimony of Jeffery Zwirn in particular, actually establishes the complete opposite.

**Q. Assuming that the model designation has been accurately reported, you did determine that that is a UL acceptable product?**

**A. A UL listed product, yes, sir.**

**Q. Is there any history or any records available to you that has referenced any reported problems with the heat sensors in particular, at any time, at the Bennett residence?**

**A. No.**

**Q. You cannot identify a particular defect with respect to the three heat sensors located in the garage; is that true?**

**A. That is correct.**

(See Deposition of Jeffery Zwirn, p. 75, 75-76, and 81, attached hereto as Exhibit "M").

**Q. Are you aware of any opinions or any investigation which indicates that any of the component parts of the fire system and particularly the heat sensors did not function as they should have?**

**A. I am not.**

(See Deposition of Jack Lane deposition, p. 85, attached hereto as Exhibit "N").

**Q. You cannot testified (sic) that that self-contained unit was defective to malfunctioned in any way?**

**A. I didn't investigate the heat sensor.**

(See Deposition of Peter Vallas, p. 168, attached hereto as Exhibit "O").

The above evidence is insufficient to allow the Plaintiffs to proceed to trial on a theory of defective design and therefore, the Circuit Court properly dismissed that claim on summary judgment.

- C. Plaintiffs are not entitled to proceed to trial on the theory of *res ipsa loquitur* with regard to their claims of a manufacturing defect because their own experts admit that other possible causes exist.**

Without evidence of a design defect, Plaintiffs must prove that there was a manufacturing defect in all three of the particular Chemetronics heat sensors placed in Plaintiffs' home. In this theory of products liability, defect means a flaw that makes a particular product different from what its condition should be. Plaintiffs must offer sufficient evidence of a defect present at the time the heat sensors left the hands of Chemetronics as an essential element of their case. See Morningstar, 162 W.Va. at 857.

It is undisputed that Plaintiffs have no direct evidence of a defect or flaw in the three Chemetronics heat sensors. All of the relevant evidence was destroyed in April of 1998 when the home was demolished and transported to a landfill near Vienna, West Virginia. The heat sensors in Plaintiffs' home have never been examined in connection with these claims that they malfunctioned on March 25, 1998. Of particular importance is the fact that, despite Mr. Bennett's claims from the beginning that the alarm system in the garage failed, Chemetronics was not even given notice of the possibility of a claim until this lawsuit was filed, four and one-half years later.

In order to circumvent the fact that they have found no evidence of a defective condition in Chemetronics' product, it was anticipated that the Plaintiffs would heavily rely on the evidentiary rule of *res ipsa loquitur* should they have been permitted to proceed to trial. Although not specifically plead in the Third Amended Complaint, Plaintiffs have argued that, but for the negligent manufacture of the heat sensors, the alarm system should have provided a more reasonable and timely warning of the fire so as to allow the Plaintiffs to contain and eliminate the fire. However, the evidence developed to date is insufficient to allow the Plaintiff to proceed to trial on that doctrine.

Under the rule of *res ipsa loquitur*, the West Virginia Supreme Court of Appeals has held that "in the absence of evidence to the contrary, in *res ipsa loquitur* cases, the mere fact of a damage causing event occurs . . . suffices for liability . . ." Peneschi v. National Steel Corp., 170 W.Va. 511, 517, 295 S.E.2d 1,7 (1982). However, it is incorrect to state that *res ipsa loquitur* "dispense[s] with the requirement that negligence must be proved by him who alleges it." Peneschi, 170 W.Va. at 520, 295 S.E.2d at 10.

The standard for the application of *res ipsa loquitur* was set forth in Syllabus Point 4 of Foster v. City of Keyser, 202 W.Va. 1, 501 S.E.2d 165 (1997):

**Pursuant to the evidentiary rule of *res ipsa loquitur*, it may be inferred that harm suffered by the plaintiff is caused by the negligence of the defendant when (a) the event is of a kind which ordinarily does not occur in the absence of negligence; (b) other responsible causes, including the conduct of the plaintiff and third persons are sufficiently eliminated by the evidence; and (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff.**

In applying this rule, the circuit court must make the preliminary determination that the evidence the plaintiff intends to produce is indeed circumstantial evidence that will lead to a reasonable inference of negligence by the jury, not simply evidence that would force the jury to speculate to reach a conclusion of negligence. Beatty v. Ford Motor Company, 574 S.E.2d 803 (2002).

In Beatty v. Ford Motor Company, the Supreme Court reviewed the granting of summary judgment in favor of the defendant in this products liability action. Plaintiff was operating a van manufactured by Ford when he lost control of the vehicle and crashed. Upon exiting the vehicle, plaintiff, an experienced mechanic, noticed that the "drag link", a mechanism that controls the steering of the vehicle, was severely damaged.

Plaintiff filed suit contending that the drag link broke due to some inherent manufacturing or design defect by Ford. Plaintiff brought claims under strict liability and negligence under the theory of *res ipsa loquitur*, maintaining that "the drag link that connects the pittman arm broke and it should not have done such". The circuit court found that this was not sufficient evidence to prove negligence and granted Ford summary judgment.

In upholding the circuit court's finding of summary judgment, the Supreme Court applied the three part Foster test. With regard to the first element, the Court found that there was a substantial possibility that the rain soaked highway or the plaintiff's carelessness in operating the van could have contributed to the accident. Thus, the plaintiff

did not sufficiently show that the accident was the kind that did not occur in the absence of Ford's negligence.

Secondly, the evidence of record revealed that there was no documentation of the operation and maintenance of the high-mileage van. This left open the possibility that poor maintenance and the conduct of third persons could be to blame for the accident. Thus, Plaintiffs could not eliminate other responsible causes.

Applying the Foster test to the evidence in the present matter, the result is the same as in Beatty. Plaintiffs allege that the loss of their personal would not have occurred if the alarm system had worked properly because they would have had the opportunity to eliminate or contain the fire. This is a purely speculative conclusion. The fire caused the damage to Plaintiffs' personal belongings and Plaintiffs have not alleged the heat sensors caused the fire. Plaintiffs can only guess that the loss would have been less if they had been alerted to the fire sooner. Thus, the evidence does not show that this is the type of loss that does not occur in the absence of negligence on the part of the heat sensor manufacturer.

Secondly, Plaintiffs have failed to meet the second element of the test. Plaintiffs have not even produced any evidence that the alarm system failed. The undisputed facts demonstrate that the monitoring station did receive a signal from the Bennetts' home on March 25, 1998, an operator did call the Bennett home and spoke to Mr. Bennett, and at the request of Mr. Bennett, the fire department was dispatched.

Plaintiffs' theory against Chemetronics, simply put, is that in the absence of a simultaneous manufacturing defect in all three of the Chemetronics heat sensors in the garage, the alarm system would have triggered an audible alarm inside the home and would have alerted the monitoring station minutes sooner. However, the Plaintiffs have made identical allegations against the manufacturers of the smoke detectors, the control panel and the other components of the system. Any one of the Defendants' components could have malfunctioned, if any, contributing to a delay, if any, in the response of the monitoring company. There are many, many possible theories of liability alleged by the Plaintiffs, none of which have been sufficiently eliminated to allow the application of res ipsa loquitur in this case.

Further, there exists no record of inspection or maintenance of the heat sensors installed in Plaintiffs' garage. Thus, it is unknown what their condition was at the time of the fire. Alterations to the heat sensors could have been done by technicians of ASCO or the Plaintiffs after one of the various "false alarms" and service calls Plaintiffs have alleged.

Additionally, Chemetronics heat sensors could have been improperly installed by ASCO, the alarm company. Although no evidence has been produced, Plaintiffs' own experts have testified that they are unable to eliminate other possible causes.

**Q. Sir, my last question had involved whether you can identify a specific defect with respect to the heat sensors in the garage. I think the sum of your answer was, you believed there was either a hardware or an installation problem with respect to the alarm system. Is that a fair characterization?**

**A. Yes.**

**Q. Can you tell us which it was of those two?**

**A. No...**

(See Zwirn Deposition, Exhibit "M", p. 81).

**Q. You cannot render an opinion today as to whether the heat sensors in and of themselves were defective or malfunctioned?**

**A. I've answered that question and I don't know because I haven't explored that particular issue and whether it can even be done.**

...

**Q. Do you not know whether that was because of a defect within the system or a defect within the heat sensor or something else?**

**A. And as answered, I have not explored that issue and I have not been asked to explore that issue.**

(See Vallas Deposition, pp. 170-172, attached hereto as Exhibit "O").

No evidence has eliminated the multitude of other possible responsible causes for a delay or failure of the alarm system.

Further, Plaintiffs have not even conclusively established that the alarm system did not work exactly as it was supposed to work. It is undisputed that the alarm company telephoned the Bennetts contemporaneous to their discovery of the fire. The alarm company was responsible for calling the fire department.

Therefore, Plaintiffs have not satisfied the second element of the test and cannot use the doctrine of *res ipsa loquitur* to establish their *prima facie* case for negligence. The evidence developed to date could not lead to a reasonable inference of negligence on the part of Chemetronics. Such a conclusion would be based on pure speculation by a jury and is therefore, insufficient for a jury's consideration.

**D. Plaintiffs cannot establish a prima facie case for strict products liability because reasonable secondary causes for the alleged malfunction exist.**

In Count II of their Complaint, Plaintiffs allege that Chemetronics manufactured its heat sensor and "placed it into the stream of commerce in an unreasonably dangerous, unsafe, and/or inherently defective condition which rendered it unfit and unsafe for its intended use." To date, Plaintiffs have failed to identify just what that defective condition was.

West Virginia has adopted a cause of action for strict products liability, which relieves the plaintiff from proving that the manufacturer was negligent in some particular fashion during the process and permits proof of the defective condition of the product as the principal basis of liability.

A plaintiff is not required to identify a specific defect that caused the loss to establish a strict liability cause of action, but instead may do so by circumstantial evidence. To establish a prima facie case of strict liability by circumstantial evidence, a plaintiff must again prove three elements. As stated in Anderson v. Chrysler Corp., 184 W.Va. 641, 403 S.E.2d 189 (1991):

Circumstantial evidence may be sufficient to make a prima facie case in a strict liability action, even though the precise nature of the defect cannot be identified, so long as the evidence shows that a malfunction in the product occurred that would not ordinarily happen in the absence of a defect. Moreover, the plaintiff must show there was neither abnormal use of the product nor a reasonable secondary cause for the malfunction.

As in the doctrine of *res ipsa loquitur*, strict liability requires that reasonable secondary causes be sufficiently eliminated to make a prima facie case. Again, Plaintiffs'

own expert have been unable, within a degree of reasonable certainty, to say whether all three heat sensors were defective or whether there was improper installation or a defect in one of the other various components.

**E. Plaintiffs are unable to make a prima facie case for the remaining causes of action without proof, either through the application of res ipsa loquitur or strict liability, that a defective condition existed.**

In addition to the claims for negligent manufacture and design and strict products liability, Plaintiffs have brought claims against Chemetronics for breach of express and implied warranties, failure to warn of a dangerous condition and misrepresentation. All of these cause of action are founded upon the existence of a defect or flaw in a product which proximately caused Plaintiffs' injury. However, as Plaintiffs have failed to produce any evidence of the existence of a defect or defective condition, they simply may not maintain these actions.

**1. Breach of Express and Implied Warranties.**

Express warranties result from statements made amounting to representations or affirmations of fact about the characteristics of the goods sold. Implied warranties result as consequence of goods being sold and are of two types: implied warranty of fitness for a particular purpose and the implied warranty of merchantability. See Prosser & Keeton on Torts, 5<sup>th</sup> Ed. §95A.

Plaintiffs' underlying basis for the warranty claims is the bare assertion that all three Chemetronics heat sensors simply did not work. However, the products are not available to prove definitively whether they did in fact perform as expected and Plaintiffs' experts

are unable to eliminate other reasonable causes for the alleged failure of the alarm system.

2. Failure to Warn.

A manufacturer or seller is subject to liability for failure to warn about a risk or hazard inherent in the way a product is designed. It is well established that,

There can be no negligence in failing to warn about a risk in the absence of evidence that would justify a finding that a manufacturer or other seller knew or in the exercise of ordinary care should have known about it.

Prosser & Keeton on Torts, 5<sup>th</sup> Ed. § 96. Plaintiffs' experts have admitted that there is no evidence of a design defect with regard to Chemetronics 600 series heat sensors. Therefore, Plaintiffs' claim must fail.

3. Misrepresentation.

The Restatement Second of Torts §402B discusses a seller's liability for misrepresentation of the character or quality of a product.

One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though

- (a) it is not made fraudulently or negligently, and
- (b) the consumer has not bought the chattel from or entered into any contractual relation with the seller.

Plaintiffs have not alleged specific "misrepresentations" on the part of Chemetronics. Essentially, they claim that Chemetronics falsely advertised or sold its heat sensors as "effective" in detecting fires.

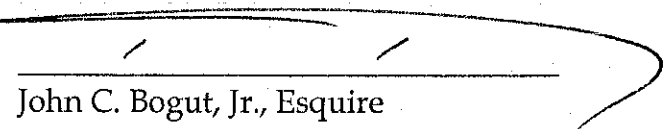
Again, Plaintiffs have produced no evidence that either, these particular heat sensors were defective or that the overall design was flawed. Without this threshold evidence of a untrue statement, there can be no misrepresentation.

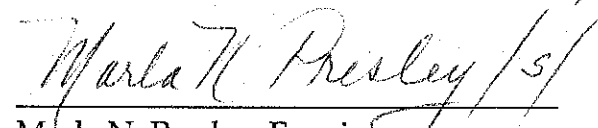
## VI. CONCLUSION

Summary judgment was properly entered in favor of the Defendant Chemetronics because the Plaintiffs' claims are barred by the statute of limitations. Furthermore, the Circuit Court did not error in granting Chemetronics' Motion for Summary Judgment because Plaintiffs can not meet their burden of proof under any of their multitude of claims to show that each of the three heat sensors contained a defect which caused their damages. The only evidence offered by the Plaintiffs has been pure speculation: speculation offered by their experts that either the heat sensors failed or they were not installed properly or some other component failed; and speculation as to the very fact that Chemetronics manufactured the heat sensors in question here. Such conjecture is insufficient to support Plaintiffs' claim for over \$1 million in damages and would force a jury to guess what actually happened. Therefore, the Plaintiffs' appeal should be denied.

WHEREFORE, for these reasons and those appearing to the Court, Chemetronics respectfully requests that this Court enter an Order denying the Plaintiffs' appeal.

Respectfully submitted,

  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Reply Brief of Appellees Chemetronics Caribe, Inc. and Kidde-Fenwal, Inc. was served on the following counsel of record by first class U.S. mail, postage pre-paid, or by hand delivery, this 16th day of March, 2005.

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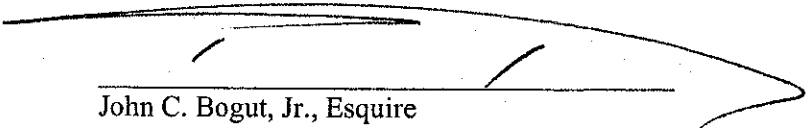
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