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No. 19-1301

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Counsel for Plaintiffs
Corey Eckhart, Kathleen
Eckhart, Lisa Nemeth,
and Colleen Kulp

Counsel for Additional
Defendants
Kathleen Eckhart and
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Counsel for Defendant
Lowe's Home Centers, LLC

Counsel for Defendant
Hearn Enterprises, Inc.

Matika, J. - March 25, 2020

This Memorandum Opinion addresses the "Defendant, Lowe's Home Centers, LLC's Preliminary Objections to Plaintiffs' Complaint"

filed in this matter on July 25, 2019 ("Defendant Lowe's Preliminary Objections"). The Court held argument with respect to Lowe's Preliminary Objections on November 7, 2019 (the "November 7, 2019 Argument").

In accordance with the Order that follows this Memorandum Opinion, Defendant Lowe's Preliminary Objections shall be **GRANTED IN PART** and **DENIED IN PART**.

I. FACTUAL AND PROCEDURAL BACKGROUND.

A. The Nature of the Complaint - the July 13, 2018 Fire.

Plaintiffs Corey Eckhart, Kathleen Eckhart, Lisa Nemeth, and Colleen Kulp (collectively, "Plaintiffs") have filed a June 24, 2019 Complaint (the "Complaint") against Lowe's Home Centers, LLC ("Lowe's") and Hearn Enterprises, Inc. ("Hearn") ("Lowe's" and "Hearns" collectively, "Defendants").

Plaintiffs allege that, prior to July 13, 2018, the Eckharts purchased a propane tank from Lowe's for use at the Eckharts' property located at 245 Lehigh Avenue in Palmerton (the "Eckhart Property") and had said propane tank filled with gas by Hearn. See Complaint at ¶¶10, 12.

Plaintiffs allege substantial property damage caused by a July 13, 2018 fire that originated after the propane tank used by the Eckharts on the Eckhart Property failed, leaked propane gas, ignited, and thereafter caused fire, heat, smoke, and soot to

spread to and damaged the Eckhart Property as well as Lisa Nemeth's property located at 243 Lehigh Avenue and Colleen Kulp's property located at 247 Lehigh Avenue. See generally, Complaint at ¶¶8 - 15. Particularly, Plaintiffs allege neither personal injuries nor use of the subject propane tank by Lisa Nemeth or Colleen Kulp. See generally, Id.

B. The Structure of the Complaint.

Plaintiffs' organize their Complaint into four counts denominated:

"Count I - Negligence[;] Plaintiffs v. Lowe's Home Centers, LLC[,]"

"Count II - Strict Liability[;] Plaintiffs v. Lowe's Home Centers, LLC[,]"

"Count III - Breach of Express and Implied Warranties[;] Plaintiffs v. Lowe's Home Centers, LLC[,]" and

"Count IV - Negligence[;] Plaintiffs v. Hearn Enterprises, Inc."

See generally, Complaint.

In "Count I - Negligence[;] Plaintiffs v. Lowe's Home Centers, LLC[,]" Plaintiffs allege that the negligent and careless failure of Lowe's to exercise reasonable care in myriad ways in connection with the subject tank and the sale thereof resulted in damages to Plaintiffs. See Complaint at ¶¶19 [Second] - 21.

In "Count II - Strict Liability[;] Plaintiffs v. Lowe's Home Centers, LLC[,]" Plaintiffs allege that Lowe's assembled, tested,

inspected, sold, distributed, marketed, and placed the subject propane tank into the stream of commerce in a dangerous and defective condition. See Complaint at ¶¶22-30.

In "Count III - Breach of Express and Implied Warranties[;] Plaintiffs v. Lowe's Home Centers, LLC[,]" Plaintiffs allege that "Lowe's had reason to know the particular purpose to which the subject product would be used (i.e. residential application) and they were being relied on to furnish a suitable product." See Complaint at ¶32. Plaintiffs assert that "[t]hus Lowe's breached the implied warranty of fitness for a particular purpose... as it was prone to leakage, failure[,] and ignition under normal operation." See Id. Plaintiffs further allege that "Lowe's breached its implied warranty of merchantability... in that the subject product was not fit for the ordinary uses for which the subject product was used" and that "Lowe's breached any and all express warranties made or relating to the subject product..." See Complaint at ¶¶33, 34.

In "Count IV - Negligence[;] Plaintiffs v. Hearn Enterprises, Inc.[,]" Plaintiffs allege that Hearn's negligent and careless failure to exercise reasonable care in myriad ways in connection with the subject tank and the filling thereof resulted in damages to Plaintiffs. See Complaint at ¶¶37 - 39. See also Complaint at ¶19 [First] ("Defendant Hearn was negligent in filling the tank

with propane gas before the fire as it failed to fully inspect the tank for safety and advise Plaintiffs Eckhart of all deficiencies and dangerous conditions of the tank as required, which would have prevented this loss.").

C. Lowe's Preliminary Objections.

Lowe's has filed four preliminary objections denominated:

"I. Demurrer: Motion to Strike / Dismiss Count I [Negligence] of Plaintiffs' Complaint as to Plaintiffs Lisa Nemeth and Colleen Kulp[,]"

"II. Demurrer: Motion to Strike / Dismiss Count II of Plaintiffs' Complaint [Strict Liability] as to Plaintiffs Lisa Nemeth and Colleen Kulp[,]"

"III. Demurrer: Motion to Strike / Dismiss Count III of Plaintiffs' Complaint [Breach of Express and Implied Warranties] as to Plaintiffs Lisa Nemeth and Colleen Kulp[,]" and

"IV. Motion to Strike Plaintiffs' Complaint in its Entirety for Failure to Comply with Rule of Law or Court."

See generally Defendant Lowe's Preliminary Objections. Lowe's first three preliminary objections stand in the nature of demurrers that pertain solely to Plaintiffs Lisa Nemeth and Colleen Kulp.¹

¹ Lowe's fourth preliminary objection, "IV. Motion to Strike Plaintiffs' Complaint in its Entirety for Failure to Comply with Law or Rule of Court[,]" requests that this Court strike the Complaint in its entirety pursuant to Rule 1028(a)(2) of the Pennsylvania Rules of Civil Procedure because Plaintiffs failed to include a verification executed by any Plaintiff in derogation of Rule 1024 of the Pennsylvania Rules of Civil Procedure. Plaintiffs conceded at the November 7, 2019 Argument that this preliminary objection has been mooted by the July 25, 2019 filing of a substitute verification. Accordingly, Preliminary Objection IV shall be **DENIED AS MOOT** and addressed no further herein. See Defendant Lowe's Preliminary

II. DISCUSSION.

A. Preliminary Objection Standard.

Rule 1028(a)(4) of the Pennsylvania Rules of Civil Procedure permits the filing of a preliminary objection based upon "legal insufficiency of a pleading (demurrer)." See Pa.R.C.P. 1028(a)(4).

A demurrer addresses whether, on the facts averred, the law indicates with certainty that no recovery can be possible. See *Bayada Nurses, Inc. v. Com., Dept. of Labor and Industry*, 8 A.3d 866 (Pa.Super. 2010). When deciding legal issues raised by preliminary objections in the nature of a demurrer, this Court must resolve issues solely on the basis of the pleadings - without consideration of testimony or evidence beyond the Complaint. See *Weiley v. Albert Einstein Medical Center*, 51 A.3d 202 (Pa.Super. 2012). See also *Kirschner v. K&L Gates, LLP*, 46 A.3d 737 (Pa.Super. 2012); *Hess v. Fox Rothschild, LLP*, 925 A.2d 798 (Pa. Super. 2007). When ruling on a preliminary objection, this Court

Objections at ¶¶46 - 50. See also Pa.R.C.P. 1028(2) (Permitting the filing of a preliminary objection based upon "failure of a pleading to conform to law or rule of court..."); Pa.R.C.P. 1024(a) ("Every pleading containing an averment of fact not appearing of record... shall state that the averment... is true upon the signer's personal knowledge or information and belief and shall be verified."); Pa.R.C.P. 1024(c) (The verification shall be made by one or more of the parties...").

should resolve any doubt against the objecting party. See *Koken v. Steinberg*, 825 A.2d 723 (Pa.Cmwlth. 2003).

This Court in so deciding must admit as true the material facts set forth in the subject pleading as well as all inferences reasonably deducible therefrom. See *Cooper v. Frankford Health Care System, Inc.* 960 A.2d 134 (Pa.Super. 2008). This Court need not accept as true conclusions of law, unwarranted inferences, allegations, or expressions of opinion." See *Bayada Nurses, Inc. v. Com., Dept. of Labor and Industry*, 8 A.3d 866 (Pa.Super. 2010). A court properly grants a preliminary objection in the nature of a demurrer when the contested pleading proves legally insufficient. See *Weiley v. Albert Einstein Medical Center*, 51 A.3d 202 (Pa.Super. 2012).

B. Lowe's First Preliminary Objection - "I. Demurrer: Motion to Strike / Dismiss Count I [Negligence] of Plaintiffs' Complaint as to Plaintiffs Lisa Nemeth and Colleen Kulp[.]"

In its first preliminary objection, "I. Demurrer: Motion to Strike / Dismiss Count I [Negligence] of Plaintiffs' Complaint as to Plaintiffs Lisa Nemeth and Colleen Kulp[.]" Lowe's contends that Count I of the Complaint must be dismissed or stricken as to Plaintiffs Lisa Nemeth and Colleen Kulp because neither can establish the requisite elements of a negligence claim. See Defendant Lowe's Preliminary Objections at ¶¶11 - 21. Lowe's

particularly contends that it owes no duty to Plaintiffs Lisa Nemeth and Colleen Kulp. See Lowe's Preliminary Objections at ¶¶15 - 19. With respect to this preliminary objection, Lowe's counsel conceded at the November 7, 2019 Argument that "I'll be honest, I don't know that that's quite as strong an argument[]" and that "I think there [] is something questionable there."

"It is axiomatic that in order to maintain a negligence action, the plaintiff must show that the defendant had a duty 'to conform to a certain standard of conduct;' that the defendant breached that duty; that such breach caused the injury in question; and actual loss and damage." *Phillips v. Cricket Lighters*, 841 A.2d at 1008 quoting *Morena v. South Hills Health System*, 462 A.2d 680, 684 n. 5 (Pa. 1983). A duty may arise from common law, statute, or contract. See *AMCO Insurance Co. v. Emery & Assocs., Inc.*, 926 F.Supp.2d 634 (W.D.Pa. 2013).

To determine the existence of a duty, a court "...must weigh the following five factors: '(1) the relationship between the parties; (2) the social utility of the [] conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the [defendant]; and (5) the overall public interest in the proposed solution.'" See *Phillips v. Cricket Lighters*, 841 A.2d 1000, 1008 (Pa. 2003) quoting *Althaus v. Cohen*, 756 A.2d 1166, 1168 (2000).

An entity's duty arises when it engages in conduct that foreseeably creates an unreasonable risk of harm to others. See generally, *Charlie v. Erie Insurance Exchange*, 100 A.3d 244 (Pa.Super. 2014). A particularly stringent standard of care applies with respect to items impacting the sale of flammable gas. "The power of uncontrolled gas and electricity to destroy and disfigure is so great, that upon their purveyors the law imposes the 'highest standard of care practicable.'" See *Karle v. National Fuel Gas Distribution Corp.*, 448 F.Supp. 753, 759 (W.D.Pa. 1978) (internal citations and footnote omitted). "The responsibility of a gas company is to see to it that the flammable commodity it is selling is contained within a casing, formidable to withstand the pressure or violence to which it could foreseeably be subjected." See *Id.*

Additionally, "[p]rivacy of contract, however, is not an essential prerequisite to the existence of a duty, as the law may operate under certain circumstances to impose a duty in favor of a third party against one operating under a contract, without reference to the terms of the contract." See *Sharpe v. St. Luke's Hospital*, 821 A.2d 1215, 1220 n.3 (Pa. 2003). "The relationship between the parties does not have to be a specific, legally defined relationship, e.g., bailor-bailee, licensor-licensee, or business

invitee, to give rise to duty necessary for negligence claim." See *Charlie v. Erie Insurance Exchange*, 100 A.3d at 254.

In the instant matter, Plaintiffs allege generally that Lowe's and Hearn's acted collectively as purveyors of a flammable gas and its container. Guided by the Court's obligation to resolve any doubt against the objecting party, the stringent standard set forth in *Karle v. National Fuel Gas Distribution Corp.*, *supra*, and upon so weighing the factors set forth in *Phillips v. Cricket Lighters*, *supra*, the Court cannot find that Lowe's owed no duty to Defendants Lisa Nemeth and Colleen Kulp.

With respect to the *Phillips v. Cricket Lighters* factors, the Court particularly notes that (1) no direct relationship exists between Lowe's and Defendant's Lisa Nemeth and Colleen Kulp, (2) no social utility exists in the sale of an allegedly defective product, (3) uncontrolled fire caused by an ignited flammable gas housed in an allegedly defective tank is foreseeable, (4) the consequence of imposing a duty upon Lowe's - based upon the balance of this Court's Memorandum Opinion and Order - offers a potential judicial remedy to Defendants Lisa Nemeth and Colleen Kulp, and (5) the public has an interest in such an overall outcome.

The Court accordingly **DENIES** Lowe's first preliminary objection. Count I of the Complaint shall be not dismissed or stricken as to Plaintiffs Lisa Nemeth and Colleen Kulp.

C. Lowe's Second Preliminary Objection - "II. Demurrer: Motion to Strike / Dismiss Count II of Plaintiffs' Complaint [Strict Liability] as to Plaintiffs Lisa Nemeth and Colleen Kulp[.]"

In its second preliminary objection, "II. Demurrer: Motion to Strike / Dismiss Count II [Strict Liability] of Plaintiffs' Complaint as to Plaintiffs Lisa Nemeth and Colleen Kulp[.]" Lowe's contends that the Complaint must be dismissed or stricken as to Plaintiffs Lisa Nemeth and Colleen Kulp because neither enjoy the status as a "user" of the subject propane tank and that therefore neither can successfully maintain a strict liability claim. See Defendant Lowe's Preliminary Objections at ¶¶22 - 32.

Pennsylvania follows Section 402A of the Restatement (Second) of Torts with respect to products liability actions. See *Riley v. Warren Manufacturing, Inc.*, 668 A.2d 221, 224 (Pa.Super. 1997). In order to successfully maintain a strict liability claim under Section 402A, a plaintiff must establish the existence of "(1) a product; (2) a sale of that product; (3) a user or consumer; (4) defective condition, unreasonably dangerous; and causation - that the product caused physical harm to the ultimate user or consumer or to his property." See *Id.* at 226-227 quoting *Schriner v. Pennsylvania Power and Light Co.*, 501 A.2d 1128, 1132 (Pa.Super. 1985).

With respect to the requirement that a plaintiff be a "user or consumer" of an allegedly defective product, "users" include those who passively enjoy the benefit of the product, but not casual bystanders who may come in contact with the product. See *Riley v. Warren Manufacturing, Inc.*, 668 A.2d at 227 citing Restatement (2d) Torts §402A, Comments (1) and (c). In order to successfully maintain a strict liability claim under Section 402A plaintiff must demonstrate that he or she constitutes an intended user of the allegedly defective product. See *Id.* at 229.

In the instant matter, the Complaint contains no allegations that either Plaintiff Lisa Nemeth or Plaintiff Colleen Kulp purchased, used, or passively enjoyed the benefits of the allegedly defective propane tank. Accordingly, neither Plaintiff Lisa Nemeth nor Plaintiff Colleen Kulp can establish a strict liability claim under Section 402A. The Court accordingly GRANTS Lowe's second preliminary objection. Count II of the Complaint shall be dismissed with prejudice as to Plaintiffs Lisa Nemeth and Colleen Kulp.

D. Lowe's Third Preliminary Objection - "III. Demurrer: Motion to Strike / Dismiss Count III of Plaintiffs' Complaint [Breach of Express and Implied Warranties] as to Plaintiffs Lisa Nemeth and Colleen Kulp[.]"

In its third preliminary objection, "III. Demurrer: Motion to Strike / Dismiss Count III [Breach of Express and Implied

Warranties] of Plaintiffs' Complaint as to Plaintiffs Lisa Nemeth and Colleen Kulp[,]” Lowe’s contends that the Complaint must be dismissed or stricken as to Plaintiffs Lisa Nemeth and Colleen Kulp because neither enjoy the status as a “user” of the subject propane tank and that therefore neither can successfully maintain an express warranty claim or implied warranty claim. See Defendant Lowe’s Preliminary Objections at ¶¶33 - 45.

1. Implied Warranties.

In Pennsylvania, “[t]he implied warranties of merchantability [i.e., fitness for intended purpose] and fitness for a particular purpose arise by operation of law under the Uniform Commercial Code (UCC), 13 Pa.C.S.A. §§2314, 2315, and serve to protect buyers from loss where goods purchased are below commercial standards or unfit for the buyer’s purpose.” See *Turney Media Fuel, Inc. v. Toll Brothers, Inc.*, 725 A.2d 836, 840 (Pa.Super. 1999).²

² The implied warranty of merchantability states, in pertinent part:

(b) **Merchantability standards for goods.**-- Goods to be merchantable must be at least such as:

- (1) pass without objection in the trade under the contract description;
- (2) in the case of fungible goods, are of fair average quality within the description;
- (3) are fit for the ordinary purposes for which such goods are used;
- (4) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved;

The protections of both express and implied warranties extend to "any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty." See 13 Pa.C.S.A. §2318. Additionally, the Pennsylvania Supreme Court has permitted individuals who have been injured in person while using a product to recover under either the warranty of merchantability or the implied warranty of fitness for a particular purpose. See

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- (5) are adequately contained, packaged, and labeled as the agreement may require; and
 - (6) conform to the promises or affirmations of fact made on the container or label if any.

See 13 Pa.C.S.A. §2314(b).

The implied warranty of fitness states:

Where the seller at the time of contracting has reason to know:

- (1) any particular purpose for which the goods are required; and
- (2) that the buyer is relying on the skill or judgment of the seller to select or furnish suitable goods;

there is unless excluded or modified under section 2316 (relating to exclusion or modification of warranties) an implied warranty that the goods shall be fit for such purpose.

See 13 Pa.C.S.A. §2315.

terms of the warranty to the third party (either directly, or through an intermediary); and (2) the third party is aware of the specific terms of the warranty, and the party issuing the warranty.").

Plaintiffs Lisa Nemeth and Colleen Kulp have made no such allegations. Accordingly neither can maintain successfully an express warranty cause of action.

3. Disposition of Lowe's Third Preliminary Objection.

For the reasons delineated *supra*, neither Plaintiff Lisa Nemeth nor Plaintiff Colleen Kulp can establish an express or implied warranty claim. The Court accordingly **GRANTS** Lowe's third preliminary objection. Count III of the Complaint shall be dismissed with prejudice as to Plaintiffs Lisa Nemeth and Colleen Kulp.

III. CONCLUSION.

For the foregoing reasons, Defendant Lowe's Preliminary Objections shall be **GRANTED IN PART** and **DENIED IN PART**, in accordance with the accompanying order of court of even date.

BY THE COURT:


Joseph J. Matika, J.

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CLARK COUNTY
PROTHONOTARY

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ORDER OF COURT

AND NOW, this 25~~th~~ day of March, 2020, upon consideration
of

- the July 25, 2019 "Defendant, Lowe's Home Centers, LLC's Preliminary Objections to Plaintiffs' Complaint,"
- the July 25, 2019 "Memorandum of Law in Support of Defendant, Lowe's Home Centers, LLC's Preliminary Objections to Plaintiffs' Complaint,"
- the October 23, 2019 "Plaintiffs' Response to Defendant, Lowe's Home Centers, LLC's Preliminary Objections,"
- the October 23, 2019 "Brief in Support of Plaintiffs' Response in Opposition to Lowe's Home Centers, LLC's Preliminary Objections,"

and upon consideration of the November 7, 2019 oral argument thereon, and upon comprehensive review of this matter, it is hereby **ORDERED and DECREED** that the July 25, 2019 Defendant, Lowe's Home Centers, LLC's Preliminary Objections to Plaintiffs' Complaint shall be **GRANTED IN PART and DENIED IN PART**.

Defendant, Lowe's Home Centers, LLC's Preliminary Objections denominated:

"II. Demurrer: Motion to Strike / Dismiss Count II of Plaintiffs' Complaint as to Plaintiffs Lisa Nemeth and Colleen Kulp;" and

"III. Demurrer: Motion to Strike / Dismiss Count III of Plaintiffs' Complaint as to Plaintiffs Lisa Nemeth and Colleen Kulp"

are **GRANTED**.

Count II of Plaintiffs' Complaint [Strict Liability] is hereby **DISMISSED WITH PREJUDICE AS TO PLAINTIFFS LISA NEMETH AND COLLEEN KULP**.

Count III of Plaintiffs' Complaint [Breach of Express and Implied Warranties] is hereby DISMISSED WITH PREJUDICE AS TO PLAINTIFFS LISA NEMETH AND COLLEEN KULP.

Defendant, Lowe's Home Centers, LLC's Preliminary Objection
denominated:

"I. Demurrer: Motion to Strike / Dismiss Count I of Plaintiffs' Complaint as to Plaintiffs Lisa Nemeth and Colleen Kulp"

is DENIED.

Defendant, Lowe's Home Centers, LLC's Preliminary Objection
denominated:

"IV. Motion to Strike Plaintiffs' Complaint in its Entirety for Failure to Comply with Rule of Law or Court"

is DENIED AS MOOT.

Defendant, Lowe's Home Centers, LLC, shall file an answer to the remaining count - Count I - within thirty (30) days from the date hereof.

BY THE COURT:


Joseph J. Matika, J.