At an IAS Term, Part 13, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 4th day of April, 2008.

P R E S E N T:

HON. HERBERT KRAMER,

Justice.

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MARIE PIERRE-LOUIS, as Administratrix of the Estate of CASSANDRA PIERRE-LOUIS, Deceased, and MARIE PIERRE-LOUIS, Individually,

Plaintiff,

- against -

DELONGHI AMERICA, INC. et al.,

Defendants.

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Index No. 27690/04

The following papers number 1 to 10 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2, 4-5
Opposing Affidavits (Affirmations)	6, 7, 8
Reply Affidavits (Affirmations)	9, 10
_____ Affidavit (Affirmation)	
Other Papers Memorandum of Law	3

Upon the foregoing papers, defendant Matthew McCall moves for an order, pursuant to CPLR 3212, granting him summary judgment dismissing the instant complaint. Defendants DeLonghi America, Inc. (DeLonghi) and Home Depot U.S.A., Inc. (Home Depot) move for an order, pursuant to CPLR 3212, granting them summary judgment dismissing all claims asserted against them in the instant action, as well as all claims asserted

against them in *Allstate Ins. Co. v Darden* (Kings County Sup Ct Index No 16931/04), *Tower Ins. Co. of N.Y. v DeLonghi America, Inc.* (Kings County Sup Ct Index No 15198/06) and *Darden v DeLonghi America, Inc.* (Kings County Sup Ct Index No 75133/05).

The instant action, as well as the associated and third-party actions, were commenced as a result of a fire that occurred on January 13, 2003. The subject fire damaged the buildings located at 62 and 66 Paerdegat 1st Street and claimed the life of Cassandra Pierre-Louis, decedent of plaintiff Marie Pierre-Louis. According to the New York City Fire Department, a portable oil heater, manufactured by defendant DeLonghi America, Inc., sold by defendant The Home Depot, Inc., and purchased by defendant Antoneen Y. Darden (sued herein also as Antoneen McCall), caused a fire in the basement of 66 Paerdegat 1st Street. This building was owned by Darden, who lived there with her sons, defendants Matthew McCall and Marques McCall.

On the date of the fire, decedent was a guest of Marques McCall. She later perished as a consequence of the fire. The fire also damaged 62 Paerdegat 1st Street, which is owned by Rick E. Britton and Charmaine Stewart-Britton, the subrogors of plaintiff Allstate Insurance Company in one of the associated actions. Plaintiff commenced the instant action on or about August 31, 2004. Defendants now seek summary judgment.

In support of his motion, Matthew McCall contends that he is entitled to summary judgment because of "the absence of adequate proof that plaintiff's accident was foreseeable" by him. It is undisputed that Matthew McCall removed the subject heater from the packaging and plugged it in. It is also undisputed that the subject heater subsequently

ignited, starting the subject fire. However, he asserts that, although there is an allegation that he improperly operated the subject heater—specifically, an allegation that he plugged the heater in while it was upside-down—assuming that he violated a duty of care, any damage to the buildings, as well as decedent's death, was not a foreseeable consequence of operating the heater while it was upside-down. Implicit in this argument is the assertion that the fire and consequences thereof were solely and proximately caused by a defect in the subject heater. For this reason, argues Matthew McCall, the instant action should be dismissed as asserted against him.

In opposition to the motion by Matthew McCall, and in support of their motion for summary judgment, DeLonghi and Home Depot contend that they are entitled to summary judgment on two grounds. First, DeLonghi and Home Depot assert that their submissions in support of this motion indicate, prima facie, that there was no defect in the subject heater. DeLonghi and Home Depot argue that no party can demonstrate the existence of an issue of fact as to whether the heater was defective. Second, DeLonghi and Home Depot assert that, assuming arguendo that any party can demonstrate an issue of fact as to any defect in the subject heater, no party has a viable cause of action based on a failure to warn because any alleged failure to warn was not the proximate cause of the accident. Indeed, DeLonghi and Home Depot argue that Matthew McCall improperly set up and operated the subject heater, and the actions of Matthew McCall were thus negligent. Therefore, argue DeLonghi and Home Depot, the negligence of Matthew McCall was the sole and proximate cause of the fire and consequences thereof.

In support of their arguments, DeLonghi and Home Depot note the examination before trial testimony of DeLonghi's witness, Giacomo Ceola, as well as the examination before trial testimony of Matthew McCall and Marques McCall. DeLonghi and Home Depot also submit the affidavit of materials scientist Charles R. Manning, Jr.

Manning avers that, in connection with the litigation resulting from the subject fire, he inspected the remains of the subject heater as well as exemplars of the same model. He states that based on his inspections, the subject heater was placed upside-down when it was used. He tested the operation of an upside-down exemplar and noted the result: operating the an exemplar heater upside-down causes smoke to emanate from the heater and oil (described by Manning as "cold") to leak if a spot weld breaks.

Manning concludes that operating an upside-down heater cannot cause a fire in the absence of "combustibles". He further concludes that based on his inspection and testing, the subject heater was not defective, did not malfunction, and did not cause the subject fire.

Ceola testified that he is the approval manager for DeLonghi S.p.A., an Italian business entity and sole parent company of DeLonghi America, Inc. He stated that he is responsible for standards and handles claims against DeLonghi entities. He further stated that he, too, inspected the subject heater and performed tests on exemplar models, and concluded substantially the same as did Manning.

Ceola also testified that the heater model met or exceeded all industry safety standards, including safety testing standards promulgated by Underwriters Laboratories ("UL"). He stated that UL safety standards did not require testing of the heater model placed

in any position other than upright or tipped over. He noted that the model was not equipped with an automatic switch that would shut the heater off if the heater tipped over because, at the time the model was manufactured, a "tip-over" switch would either require mercury (which, according to Ceola, was not then legally permitted as part of "tip-over" switches in the United States) or would be ineffective. In any event, stated Ceola, the company equipped some versions model with "tip-over" switches and submitted these models for UL testing. The tests indicated that a "tip-over" switch would not have interrupted operation of the subject heater if it were used upside down.

Lastly, Ceola offered testimony about labels and markings contained on the heater, the box in which the heater was packaged and the instruction manual. Ceola stated that the consumer had to attach "legs" (plastic supporters) to the heater, and that the legs could only be attached if the heater was upright. Ceola also testified that the pictures of the heater that were on the box and the drawings contained in the instruction manual provided examples to the consumer of an upright heater. Lastly, Ceola testified that there was a warning to the consumer against using the heater while it is not upright and that use of the heater in any non-upright position could cause a hazardous condition.

Marques McCall testified at his examination before trial that he did not read the heater operating instructions or observe any warning labels on the heater before the fire. Marques McCall further testified that as far as he knew, his brother Matthew McCall was the only person to have ever used the subject heater. Marques McCall also testified that he did not observe any objects on top of or near the heater at any time.

Matthew McCall testified at his examination before trial that he did not remember seeing instructions when he opened the box containing the subject heater. He also testified that he did not notice any items in the box, such as wheels or plastic supporters, that would have needed to be attached to the heater. Also, he testified that he did not see any labels or stickers attached to the subject heater, other than labels of numbers near the temperature dial. He further testified that he did not remember where he placed the heater relative to any furniture in the basement.

DeLonghi and Home Depot advance various arguments to support their contention that they are entitled to summary judgment. DeLonghi and Home Depot claim that the subject heater was safety-tested under the stringent standards of DeLonghi and Underwriters Laboratories. DeLonghi and Home Depot contend that there is no evidence that it was necessary for the subject heater to have been equipped with a safety "tip-over" switch, claiming that there was no indication that any users of the subject heater had operated the subject heater while it was placed upside-down. Moreover, argue DeLonghi and Home Depot, any such switches either were illegal under United States law or would not have effectively prevented the subject fire. DeLonghi and Home Depot also contend that even if the subject heater had been constructed with a safety "tip-over" switch, the switch would not have prevented heating of the unit in an upside-down position and thus would not have prevented the subject accident.

DeLonghi and Home Depot assert that both the operating manual for the subject heater and labels stuck to the subject heater contained displays and instructions that indicated the

proper way to position the subject heater. DeLonghi and Home Depot also assert that the manual and labels contained warnings against operating the heater while the heater is in a non-upright position. Lastly, DeLonghi and Home Depot assert that tests of exemplar heaters operated while placed upside-down did not indicate any defect in the exemplar heaters—specifically, the tests did not cause the exemplar heaters to ignite.

DeLonghi and Home Depot state that the above arguments indicate that they have demonstrated prima facie entitlement to judgment as a matter of law. DeLonghi and Home Depot contend that they have demonstrated that there was no defect in the subject heater. DeLonghi and Home Depot further assert that no party can demonstrate an issue of fact as to any defect in the subject heater, and thus no viable causes of action exist against DeLonghi and Home Depot. Lastly, DeLonghi and Home Depot assert that even if there were an issue of fact as to whether the subject heater was defective, plaintiff cannot prevail on a theory of failure to warn because warnings were contained in stickers affixed to the subject heater and in the subject operating manual.

The court denies the instant motion. Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it should only be employed when there is no doubt as to the absence of triable issues (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The movant seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman*

v City of New York, 49 NY2d 557, 562 [1980]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). For the movant to prevail, it must clearly appear that no material and triable issue of fact is presented (*Di Menna & Sons v City of New York*, 301 NY 118 [1950]) If the existence of an issue of fact is even arguable, summary judgment must be denied (*Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, 146 AD2d 572 [1989]). Also, the parties opposing a motion for summary judgment are entitled to every favorable inference that may be drawn from the pleadings, affidavits and competing contentions (*Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2003]; *see also Akseizer v Kramer*, 265 AD2d 356 [1999]). Indeed, the trial court is required to accept the opponents' contentions as true and resolve all inferences in the manner most favorable to opponents (*Henderson v City of New York*, 178 AD2d 129, 130 [1991]; *see also Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1987]; *Strychalski v Mekus*, 54 AD2d 1068, 1069 [1976]; *McLaughlin v Thaima Realty Corp.*, 161 AD2d 383, 384 [1990]). The movant has the burden of establishing their prima facie entitlement to judgment as a matter of law by affirmatively demonstrating the merit of their claim or defense, rather than by pointing to gaps in the plaintiff's proof (*Nationwide Prop. Cas. v Nestor*, 6 AD3d 409, 410 [2004]; *Katz v PRO Form Fitness*, 3 AD3d 474, 475 [2004]; *Kucera v Waldbaums Supermarkets*, 304 AD2d 531, 532 [2003]). Lastly, it is generally improper for a trial court to grant a motion for summary judgment in an action that alleges negligence, as the issue of whether the parties acted reasonably is almost always a question for the trier of fact (*Johannsdotter v Kohn*, 90 AD2d 842 [1982]; *see also Chahales v Garber*, 195 AD2d 585 [1993]; *Ugarriza v Schmieder*, 46 NY2d 471 [1979]).

Here, no movant has demonstrated the absence of triable issues of material fact as to potential liability. Turning first to the arguments of DeLonghi and Home Depot, the court notes that a manufacturer such as DeLonghi is under a nondelegable duty to design and produce a product that is not defective (*Sage v Fairchild-Swearingen Corp.*, 70 NY2d 579, 586 [1987]). Moreover, Home Depot is subject to liability for selling the subject heater (*Commissioners of State Ins. Fund v City Chemical Corp.*, 290 NY 64, 69 [1943]).

A product is defective when it contains a manufacturing flaw, is defectively designed or is not accompanied by adequate warnings (*Liriano v Hobart Corp.*, 92 NY2d 232, 237 [1998]; *Robinson v Reed-Prentice Div. of Package Mach. Co.*, 49 NY2d 471, 478 [1980]).* "Regardless of the theory asserted, certain issues are present in every products liability case. On no ground may there be recovery unless: (1) the product in question is shown to have been defective or harmful in some way, that is, to have had an element capable of causing injury; (2) the defect has caused bodily injury or has caused damage to some property other than the defective product; (3) the defendant manufacturer's or seller's act or omission with respect to the product is shown to be causally related to the harm for which it is sought to hold such person liable; and (4) the party sought to be held liable for the injury is identified with the party shown to have actually been, or to have had the status of, its manufacturer or seller" (86 NY Jur 2d, Products Liability § 2).

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* DeLonghi and Home Depot' arguments seem to only address the three common products liability allegations, and do not address the other causes of action pleaded by plaintiff herein and Pierre-Louis in the associated action, such as breach of warranty and negligence. It appears, however, that the distinction between the defect concepts in tort law and in implied warranty theory has little or no effect in most cases (*Denny v Ford Motor Co.*, 87 NY2d 248, 262 [1995]).

DeLonghi and Home Depot have not demonstrated, prima facie, that the design of the subject heater was not inherently dangerous or defective. The court notes that it is undisputed that oil can leak out when similar heaters are operated upside-down, as the expert opinions proffered by DeLonghi and Home Depot indicate that a "spot weld" in the heating oil container may break when the heater is operated upside down. Moreover, it is undisputed that there was no automatic cut-off if the heater was not operated while upright. For these reasons, issues of fact exist as to whether DeLonghi and Home Depot are liable under products liability doctrine (*see e.g. Milazzo v Premium Tech. Servs. Corp.*, 7 AD3d 586, 588 [2004] [defendant failed to make prima facie showing that the design, without a treadle guard, of its machine that when activated caused bracing arm to come loose and strike plaintiff in face was not inherently dangerous or defective]).

However, assuming arguendo that DeLonghi and Home Depot had demonstrated prima facie entitlement to judgment as a matter of law on a design defect theory, the motion would nevertheless be denied. Although DeLonghi did not have a duty to design invincible, fail-safe, and accident-proof products incapable of wearing out (*see e.g. Aparicio v Acme Am. Repair*, 33 AD3d 480, 481 [2006]; *Mayorga v Reed-Prentice Packaging Mach. Co.*, 238 AD2d 483, 484 [1997]), it did have a duty to design the subject heater to avoid any unreasonable risk of harm to anyone who is likely to be exposed to the danger when the product is used in the intended manner or an unintended yet reasonably foreseeable use (*see e.g. Garrison v Clark Mun. Equip.*, 241 AD2d 872, 873 [1997]; *Micallef v Miehle Co.*, 39 NY2d 376, 385-386 [1976]). A products liability cause of action may be proven by

circumstantial evidence, and thus, a plaintiff need not identify a specific product defect (*Speller v Sears, Roebuck & Co.*, 100 NY2d 38, 41 [2003]; *Halloran v Virginia Chems.*, 41 NY2d 386, 388 [1977]; *Codling v Paglia*, 32 NY2d 330, 337 [1973]). A defectively designed product is one that is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use—a product that the utility thereof does not outweigh its inherent danger (*see e.g. Scarangella v Thomas Built Buses,* 93 NY2d 655, 659 [1999]; *Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 107 [1983]).

Since the opposition to the motion indicates includes expert opinion that the subject heater was defective, describes why, explains how it could have been made safer, and concludes that was feasible to do so, the trier of fact must make the risk-utility analysis (*see e.g. Wengenroth v Formula Equip. Leasing*, 11 AD3d 677, 680 [2004]; *Ramirez v Sears, Roebuck & Co.*, 286 AD2d 428, 430 [2001]; *Garrison v Clark Mun. Equip.*, 241 AD2d 872, 874 [1997]; *Gokey v Castine*, 163 AD2d 709, 711 [1990]; *Gardner v Dixie Parking Corp.*, 80 AD2d 577, 578 [1981]).

Also, DeLonghi and Home Depot have not demonstrated prima facie entitlement to judgment as a matter of law dismissing manufacturing defect claims. Given that the "spot weld" apparently broke on the subject heater before oil leaked out, DeLonghi and Home Depot have not established that plaintiff's injuries were not caused by a manufacturing defect in the subject heater (*Rachlin v Volvo Cars of N. Am.*, 289 AD2d 981, 982 [2001]; *Graham v Walter S. Pratt & Sons Inc.*, 271 AD2d 854 [2000]).

The court notes that, although DeLonghi and Home Depot have proffered expert opinions based on tests of exemplar heaters that did not ignite, there is no factual dispute as to whether the subject heater actually caught flame. Indeed, it appears that Marques McCall is the last person who saw the subject heater before the fire spread, and he testified at his examination before trial that he saw the heater on fire—specifically, "with smoke coming out of the top and small flames at the top" (Examination Before Trial transcript of Marques McCall, p 34). Thus, the expert opinions may only be used to demonstrate an issue of fact with respect to the credibility of Marques McCall's testimony (*cf. Ramos v Howard Indus., Inc.*, ___ NY3d ___, 2008 NY Slip Op 02081 [2008] [where allegedly defective product unavailable for inspection defendant demonstrated prima facie entitlement to summary judgment by submitting expert evidence that similar products were designed and manufactured under state of the art conditions and applicable industry standards]).

Moreover, the court rejects the contention advanced by DeLonghi and Home Depot that there is no evidence supporting a claim based on a failure-to-warn theory. DeLonghi and Home Depot are subject to liability if DeLonghi failed to provide adequate warnings regarding the use of the subject heater (*Rastelli v Goodyear Tire & Rubber Co.*, 79 NY2d 289, 297 [1992]). The extent of a plaintiff's knowledge of the hazard is generally reserved for the trier of fact (*Lichtenstein v Fantastic Mdse. Corp.*, 46 AD3d 762, 764-765 [2007]; *see also Liriano*, 92 NY2d at 241; *Bruker v Fischbein*, 2 AD3d 254, 255 [2003]). Indeed, "in all but the most unusual circumstances, the adequacy of a warning is a question of fact" (*Nagel v*

Brothers Intl. Food, 34 AD3d 545, 547-548 [2006], quoting *Montufar v Shiva Automation Serv.*, 256 AD2d 607 [1998]; *Polimeni v Minolta*, 227 AD2d 64, 67 [1997]).

Here, Matthew McCall, who removed the subject heater from the package, set the heater up and plugged it in, testified that he did not remember seeing instructions packaged with the subject heater when he opened the package and removed the heater. He also testified that he did not notice any labels or stickers on the subject heater other than the temperature dial. There is thus an issue of fact as to whether DeLonghi adequately warned of the risks associated with the foreseeable use and misuse of the subject heater (*see e.g. Magadan v Interlake Packaging Corp.*, 45 AD3d 650, 652-653 [2007]).

Counsel for DeLonghi and Home Depot has interpreted this testimony to mean that Matthew McCall observed the instruction manual and labels affixed to the heater, and ignored the indication of how the heater should have been positioned as well as the consequences of operating the heater while it was not upright. However, this court cannot do the same, since it may not decide whether the examination before trial testimony of Matthew McCall is credible in determining the instant summary judgment motion (*Krupp v Aetna Life & Cas. Co.*, 103 AD2d 252 [1984] [The credibility of witnesses should not be determined on affidavits]) and must resolve every reasonable inference against DeLonghi and Home Depot (*see e.g. Boyd v Rome Realty Leasing Ltd. Partnership*, 21 AD3d 920 [2005]; *Mitchell v Fiorini Landscape*, 253 AD2d 860, 861 [1998]).

The court also rejects DeLonghi and Home Depot' contention that plaintiff cannot establish proximate cause. "Where causation is disputed, summary judgment is not

appropriate unless only one conclusion may be drawn from the established facts" (*Kriz v Schum,* 75 NY2d 25, 34 [1989]). Although the submissions indicate that Matthew McCall may have misused the subject heater, misuse does not bar recovery but instead is relevant on the issues of intervening cause and apportionment of fault (86 N.Y Jur 2d, Products Liability § 98; *Schafer v Standard Ry Fusee Corp.*, 200 AD2d 564, 565 [1994]; *Sheppard v Charles A. Smith Well Drilling & Water Sys.*, 93 AD2d 474 [1983]). Moreover, there is no indication that this accident had one sole proximate cause (*see e.g. Argentina v Emery World Wide Delivery*, 93 NY2d 554, 560 [1999]). Lastly, the issue of proximate causation in products liability should not be decided summarily (*see e.g. Rios v Johnson V.B.C.*, 17 AD3d 654, 655-656 [2005]).

Lastly, Matthew McCall has also not demonstrated the absence of triable issues of material fact. Initially, the court notes that Matthew McCall did owe decedent a duty of care: "to conform to the legal standard of reasonable conduct in the light of the apparent risk" (*Waters v New York City Hous. Auth.*, 116 AD2d 384, 386 [1986], *affd* 69 NY2d 225 [1987]). Resolving all inferences in plaintiff's favor in deciding the summary judgment motion of Matthew McCall (*Brandes v Incorporated Vil. of Lindenhurst*, 8 AD3d 315 [2004]; *Genova v Regal Mar. Indus.*, 309 AD2d 733, 734 [2003]), the court must assume that a reasonable person would not have improperly operated the subject heater while it was upside-down. Moreover, Matthew McCall is not entitled to summary judgment on the ground that the consequences of his alleged negligent actions were not foreseeable, since the inferences concerning what is foreseeable are resolved for the trier of fact (*Derdiarian v Felix Contr.*

Corp., 51 NY2d 308, 315 [1980], *rearg denied* 52 NY2d 784 [1980]). Indeed, this court cannot, as a matter of law, decide whether the fire was a foreseeable consequence of an operated upside-down heater or whether any alleged defect in the subject heater was a competing proximate cause of the fire (*see e.g. Gray v Amerada Hess Corp.*, 48 AD3d 747 [2008]; *see also Phelan v Ferello*, 207 AD2d 874, 875 [1994]; *Arena v Ostrin*, 134 AD2d 306 [1987]).

For the reasons stated above, and resolving all inferences in plaintiff's favor (*Brandes v Incorporated Vil. of Lindenhurst*, 8 AD3d 315 [2004]; *Genova v Regal Mar. Indus.*, 309 AD2d 733, 734 [2003]), Matthew McCall, DeLonghi and Home Depot have not demonstrated prima facie entitlement to judgment as a matter of law dismissing the negligence and products liability causes of action asserted against them. The burden did not shift to the opponents of the motion to raise a triable issue of fact (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]), and Matthew McCall, DeLonghi and Home Depot are thus not entitled to summary judgment. Accordingly, the instant motion by defendant Matthew McCall, as well as the motion by defendants and third-party defendants DeLonghi America, Inc. and Home Depot U.S.A., Inc. are denied.

The foregoing constitutes the decision and order of the court.

E N T E R,

J. S. C.