MISSIMER, Plaintiff v. TIGER MACHINE COMPANY, LTD, et al. Defendants

CIVIL ACTION NO. 04-3443

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

2005 U.S. Dist. LEXIS 21559

September 27, 2005, Decided

COUNSEL: [*1] For MISSIMER, Plaintiff: **DAVID E. SCHREIBER, Esq.** SPRING CITY, PA.

For TIGER MACHINE COMPANY, LTD., PATHFINDER SYSTEMS, Defendants: WAYNE A. GRAVER, PHILADELPHIA, PA.

JUDGES: Timothy R. Rice, U.S. MAGISTRATE JUDGE.

OPINION BY: Rice

OPINION

MEMORANDUM

RICE, M. J.

Missimer brought this diversity action against Tiger Machine Company and Pathfinder Systems, the manufacturer and distributor, respectively, of the TG-4, a concrete block manufacturing machine **Missimer** operated during his employment with EP Henry Corporation. The four-count complaint alleges negligence, strict products liability, breach of warranty, and misrepresentation. In anticipation of trial, **Missimer** filed motions in limine to exclude evidence of: 1) EP Henry's pre-incident written reprimand of **Missimer**; and 2) EP Henry's post-incident "investigation report." For the following reasons, I grant these motions.

EP Henry's Pre-Incident Written Reprimand

Missimer seeks to exclude evidence he had been disciplined for failing to follow company procedures prior to his January 2004 accident. John Lindberg, [*2] an employee of EP Henry, gave deposition testimony that **Missimer** had been written-up for not following "lock out" procedures. n1 Lindberg could not recall when the reprimand occurred, but believed the alleged write-up involved

Missimer's handling of a different machine, i.e., the PS-100 cubing/packaging machine. (Def. Resp. Exhibit A).

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The parties indicate there is deposition testimony of a second EP Henry employee named Rich Robinson. Robinson's testimony was not included in the record, but from its description by the parties, it appears to be similar to that of Lindberg. For the same reasons, I will exclude it at trial.
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There is no written reprimand in **Missimer's** personnel file documenting a failure to follow procedures prior to January 2004, but **Missimer** seeks to preclude the testimony of the EP Henry employees. Defendants contend this testimony is relevant because **Missimer's** disregard of safety precautions on one or more prior occasions tends to show **Missimer** had a propensity to cut corners on safety**[*3]** and ignore training and warnings.

The admissibility of evidence ultimately turns on balancing its probative value against the substantial risk of unfair prejudice. Fed. R. Evid. 401; 402; 403; *Diehl v. Blaw-Knox*, 360 F.3d 426, 431 (3d Cir. 2004) (in products liability diversity action governed by Pennsylvania law, "assessment of the dangers of unfair prejudice and confusion of the issues are procedural matters that govern in a federal court notwithstanding a state policy to the contrary"). Generally, all evidence is admissible if it is relevant, i.e., if it tends to make the existence or nonexistence of a disputed material fact more probable than it would be without that evidence. Rules 401 and 402. I may nonetheless exclude relevant evidence if its probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403. There is a strong presumption that relevant evidence should be admitted, and exclusion under Rule 403 mandates that the probative value of evidence**[*4]** must be "substantially outweighed" by the problems in admitting it. *Coleman v. Home Depot, Inc.*, 306 F.3d 1333, 1343-1344 (3d Cir. 2002).

Deposition testimony of the EP Henry employees is only marginally relevant. Its uncertainty and lack of detail would not tend to support defendants' claim that: (1) **Missimer** had a propensity to disregard safety procedures in the past; (2) he must have disregarded them on January 20, 2004; and (3) it was therefore **Missimer's** own conduct which caused the accident. It is also unclear from the record who wrote the alleged reprimand and whether Lindberg had any first-hand knowledge of it. Any slight probative value this testimony might have is substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury. This is especially true where the testimony concerns a document which has not been produced. Allowing the jury to hear questionable evidence of this document would unfairly disadvantage **Missimer** by leading the jury to presume without support that **Missimer's** propensity was to ignore safety regulations. Thus, I will exclude the deposition testimony of Lindberg.

Resolution of this issue may**[*5]** change, however, if **Missimer** attempts to prove his conduct on the day of the accident was accepted and common

practice at EP Henry. Defendants would be permitted to elicit testimony of the EP Henry employees in rebuttal if the employees had first-hand knowledge of a reprimand for such conduct prior to the January 2004 accident. *See* Rule 602. n2

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Defendants contend the employees' testimony is not inadmissible hearsay. Rule 801 defines hearsay as "a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Under Rule 802, hearsay evidence is inadmissible. Here, there is no indication that Lindberg was the author of the alleged reprimand, or that he had other personal knowledge of it. His testimony contains statements made by the declarant who authored the alleged written reprimand, and the statements are being offered to prove the truth of the matter asserted, i.e., that **Missimer** acted unsafely. Thus, without a foundation, his testimony is inadmissible hearsay absent some exception to Rule 802.
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[*6] ***EP Henry's Post-Incident "Investigation Report"***

Missimer also seeks to exclude EP Henry's post-incident investigation report prepared by James Pisarcik, EP Henry's safety director. (Def. Resp. Exhibit A). Pisarcik provided deposition testimony that when he received a telephone call that **Missimer** had been hurt, he drove immediately to that facility to follow up on **Missimer's** condition and to interview any witnesses to the accident. He also went to the hospital to be with **Missimer's** family. A day or two after the accident, Pisarcik visited **Missimer** in the hospital, but did not discuss the accident.

Pisarcik also testified that he conducts an investigation after every accident which includes interviewing the injured party and/or the witnesses, and then examining the location of the accident. This is standard procedure at EP Henry. In this case, however, no one witnessed the accident. Ryan Poignard, a co-worker, heard **Missimer's** scream and saw him come out from behind the control panel holding his arm. Pisarcik interviewed Poignard and memorialized his statement. The report places the blame for the accident on **Missimer's** failing to follow oral instructions and using an**[*7]** unsafe method to make the adjustment.

Missimer contends that the report is irrelevant in a strict products liability case; that it contains inadmissible lay opinion testimony and inadmissible hearsay; that it should be excluded for lack of personal knowledge where neither the author nor the source on which the author relied had personal knowledge of the incident; and that it should be excluded because its probative value is outweighed by its unfair prejudice and likelihood of confusing the jury. Defendants contend that this report is admissible under the business records exception to the hearsay rule.

Rule 803(6) provides that the following is not excluded by the hearsay rule:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from

information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make that memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness . . . unless the source of the information**[*8]** or the method or the circumstances of preparation indicate a lack of trustworthiness.Fed. R. Evid. 803(6).

Thus, the proponent of the documentary evidence must show: (1) that the author of the document had personal knowledge of the matters reported; or (2) that the information he reported was transmitted by another person who had personal knowledge, acting in the course of a regularly conducted activity; or (3) that it was the author's regular practice to record information transmitted by persons who had personal knowledge.

The post-incident investigation report contains at least two levels of hearsay. First, it contains statements and conclusions by EP Henry's safety director who was neither a witness to the accident nor at the facility when the accident occurred. Pisarcik said he did not interview **Missimer** about the accident before he prepared the report. Second, the information Pisarcik included in the report came from the unsworn, out-of-court statement by Poignard, who was also not an eyewitness. **Missimer** provided deposition testimony that he was not aware of an investigation of the accident performed by EP Henry, and that he had not**[*9]** seen the investigation report. (Def. Resp. Exhibit B). After being shown the document during his deposition, **Missimer** pointed out several inaccuracies. No one with personal knowledge of the accident participated in the preparation of the investigation report, and the document does not have the indicia of reliability required to satisfy Rule 803(6). Allowing the admission of this document would be tantamount to permitting a co-worker to testify against **Missimer** without being subject to cross-examination or required to take an oath. *See* Rules 603, 607. Thus, the report has no probative value and any arguable probative value the report might have is substantially outweighed by the danger of misleading the jury and unfair prejudice to **Missimer**. I will grant the motion.

An appropriate Order follows.

ORDER

RICE, M. J.

AND NOW, this 27th day of September, 2005, upon consideration of Plaintiff's motion in limine to exclude EP Henry's alleged pre-incident written reprimand (Document # 31), and Defendants' response thereto (Document # 38), and upon consideration of Plaintiff's motion in limine to exclude evidence of EP Henry's post-incident investigation report**[*10]** (Document # 32) and Defendants' response thereto (Document # 36), it is hereby ORDERED that the motions are GRANTED.

BY THE COURT:

/s/ Timothy R. Rice

U.S. MAGISTRATE JUDGE