

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>ANTHONY PULLINS</b>	:	<b>CIVIL ACTION</b>
	:	
<b>v.</b>	:	<b>NO. 03-5343</b>
	:	
<b>STIHL INC.</b>	:	

**MEMORANDUM AND ORDER**

**Kauffman, J.**

**May 19, 2006**

Plaintiff Anthony Pullins (“Plaintiff”) brings this product liability action against Stihl Incorporated (“Defendant”) alleging that he was injured when using a machine manufactured by Defendant. The Complaint includes claims for negligence (Count One), strict liability (Count Two), breach of warranty (Count Three), and negligent and intentional infliction of emotional distress (Count Four). Plaintiff seeks to recover damages, fees and costs.

Now before the Court is Defendant's Motion to Exclude Expert Witnesses and Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56. For the reasons stated below, the Court will grant both Motions.

**I. Background**

On August 29, 2003, Plaintiff commenced this action in the Court of Common Pleas of Philadelphia County. The matter was removed on September 23, 2003, pursuant to this Court's diversity jurisdiction under 28 U.S.C. § 1332. The facts underlying the Complaint are not in dispute.

On September 19, 2001, Plaintiff was using a gasoline powered, hand-held, Stihl cut-off machine, model TS 400 ("TS 400") that was designed, manufactured and distributed by Defendant. Complaint at ¶ 5; Memorandum of Law in Support of Plaintiff's Answer to Motion

for Summary Judgment ("Response") at 1. Plaintiff was using the TS 400 to cut plywood flooring as part of a demolition project his employer had been engaged to perform. Response at 1. After Plaintiff finished cutting through the plywood floor, he turned the TS 400 off and was preparing to set it down on the floor. Complaint at ¶ 6. The details of what happened next are unclear.<sup>1</sup> The still rotating blade managed to come into contact with the back of Plaintiff's lower left leg, causing the partial severing of his Achilles tendon, among other injuries. Response at 2. Plaintiff alleges that a design defect in the TS 400 caused his injury.

In its Motion to Exclude Expert Witnesses and Motion for Summary Judgment, Defendant argues that: (1) Plaintiff's expert witnesses' testimony fails to meet the requirements for admissibility defined in Daubert v. Merrell Dow Pharm., 509 U.S. 579 (1993) and Fed. R. Evid. 702; and (2) since Plaintiff is unable to establish a prima facie negligence, breach of warranty or strict liability case based on a theory of design defect without expert testimony, summary judgment is appropriate.<sup>2</sup>

## **II. Legal Standard**

In deciding a motion for summary judgment pursuant to Fed. R. Civ. P. 56, the test is "whether there is a genuine issue of material fact and, if not, whether the moving party is entitled to judgment as a matter of law." Med. Protective Co. v. Watkins, 198 F.3d 100, 103 (3d Cir.

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<sup>1</sup> Plaintiff attempted to recreate the accident in a demonstration performed before his counsel and expert witness. Defendant's Motion to Exclude, Exh. L. However, it is unclear exactly how the blade of the machine managed to come into contact with the back of Plaintiff's left leg and Plaintiff has testified that "It happened so fast. I can't remember how it happened." Deposition of Anthony Pullins ("Pullins Dep.") at 166:23-24.

<sup>2</sup> Defendant makes additional arguments in support of its Motion for Summary Judgment based on theories of assumption of risk and misuse. Because this Court will grant summary judgment based on exclusion of Plaintiff's experts, it need not reach those issues.

1999) (quoting Armbruster v. Unisys Corp., 32 F.3d 768, 777 (3d Cir. 1994)). “[S]ummary judgment will not lie if the dispute about a material fact is ‘genuine,’ that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The Court must examine the evidence in the light most favorable to the non-moving party and resolve all reasonable inferences in that party’s favor. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986) (citing United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)). However, “there can be ‘no genuine issue as to any material fact’ . . . [where the non-moving party’s] complete failure of proof concerning an essential element of [its] case necessarily renders all other facts immaterial.” Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

The party moving for summary judgment bears the initial burden of showing the basis for its motion. See Shields v. Zuccarini, 254 F.3d 476, 481 (3d Cir. 2001). If the movant meets that burden, the onus then “shifts to the non-moving party to set forth specific facts showing the existence of [a genuine issue of material fact] for trial.” Id.

### **III. Analysis**

#### *A. Motion to Exclude the Expert Reports and Testimony of David Hoeltzel and James Lennen*

Plaintiff retained two experts to support his contention that his injuries were caused by a defect in the design of the TS 400. David Hoeltzel ("Hoeltzel") was initially retained to testify about the defective design; James Lennen ("Lennen") was subsequently engaged by Plaintiff as an additional expert on the issue of defective design. After deposing both of Plaintiff's experts and reviewing their reports, Defendant moved for summary judgment, arguing that Plaintiff's

claims should be dismissed because neither expert's testimony met the admissibility standards articulated in the Supreme Court's seminal Daubert decision and, therefore, Plaintiff could not establish a prima facie case of liability.

1. Daubert

Fed. R. Evid. 702 states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In Daubert, the Supreme Court found that Rule 702 “clearly contemplates some degree of regulation of the subjects about which an expert may testify.” 509 U.S. at 589. As a result, Daubert established a “gatekeeping role for the [trial] judge.” Id. at 597.

The trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.

Id. at 592-93.

Although Daubert was decided in the context of scientific knowledge, in Kumho Tire Co., Ltd. V. Carmichael, the Supreme Court extended its holding to include “technical or other specialized knowledge.” 526 U.S. 137 (1999). To assess an expert’s methodology under Rule 702, Daubert and Kumho Tire, the Third Circuit has held that a district court should consider the following factors: “(1) whether a method consists of a testable hypothesis; (2) whether the method has been subjected to peer review; (3) the known or potential rate of error; (4) the

existence and maintenance of standards controlling the technique's operation; (5) whether the method is generally accepted; (6) the relationship of the technique to methods which have been established to be reliable; (7) the qualifications of the expert witness testifying based on the methodology; and (8) the non-judicial uses to which the method has been put.” In re Paoli Railroad Yard PCB Litigation, 35 F.3d 717, 742 (3d Cir. 1994) (“Paoli II”). In applying the standard prescribed by Daubert and Paoli II, the Court concludes that both of Plaintiff's experts should be precluded from testifying.

**a. David Hoeltzel**

Hoeltzel's proffered testimony is contained in a report dated August 21, 2003 and an oral deposition taken on September 1, 2005. Hoeltzel was to testify that the TS 400 was defectively designed in that it suffered from a “blade drive mechanism-induced reaction torque” that caused it to rotate to the right. Specifically, in his report, Hoeltzel concluded that the Plaintiff's injury was the result of: “(1) [o]ngoing blade rotation with the engine turned off; (2) [r]otation of the saw body resulting from a blade drive mechanism-induced reaction torque; [and] (3) [a]bsence of a warning message alerting the user to saw body rotation resulting from a blade drive mechanism-induced torque reaction.”

The method Hoeltzel employed to arrive at his conclusions can only be described as exactly the kind of “junk science” that Daubert sought to purge from the federal courts. Hoeltzel conducted two tests in order to generate his findings, both of which were captured on videotape. See Defendant's Motion to Exclude, Ex. L. The first part of the videotape, which lasts about ten minutes, depicts the first of Hoeltzel's two tests. This test, conducted inside Plaintiff's counsel's conference room, consists of Hoeltzel hanging the TS 400 by some kind of strap attached to two

desk chairs and letting the machine run at idle. In this test, one observes some movement of the TS 400. The second test, apparently conducted in Hoeltzel's driveway, involved a similar process, but a different model of cut-off machine.<sup>3</sup> The machine is left to dangle on a strap and run at idle. Again, one observes some movement in the machine. In addition to this test, Hoeltzel made some attempts to measure the time it takes for the blade to stop rotating after the TS 400 is switched off. These twenty or so minutes are the entirety of testing conducted by Hoeltzel, the product of which is his "blade drive mechanism-induced reaction torque" theory.

If there were any doubt as to the inadequacy of Hoeltzel's testing after watching the videotape, it is resolved by an examination of his deposition testimony, in essence, a candid admission that the tests he performed cannot survive Daubert scrutiny. Starting with the first of eight guideposts, "whether a method consists of a testable hypothesis," Hoeltzel fails to clear the hurdle. See Paoli II at 742. At his deposition, Hoeltzel testified that he was told that the machine he first tested was the one that injured Plaintiff, but he could not recall what model it was. Hoeltzel Dep. at 55. In addition, Hoeltzel testified that he does not know what material the strap was made of during the first test. Id. at 181. Hoeltzel's lack of knowledge about fundamental aspects of his testing method requires the conclusion that his method does not consist of a testable hypothesis and, furthermore, is evidence of the haphazard manner in which the tests were conducted.

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<sup>3</sup> The second test involved a different machine from the one at issue in this case. Hoeltzel Dep. at 187. Hoeltzel testified that he couldn't remember what model machine was used in the second test but that it was "irrelevant." Id. at 188. The Court, however, disagrees. Because this is a case alleging design defect, the model of the machine being tested is manifestly relevant.

The second guidepost established by Paoli II requires the Court to consider “whether the method has been subjected to peer review.” See Paoli II at 742. Hoeltzel admits that he knows of no one else who has considered his theory. Hoeltzel Dep. at 154. As for his methods being subjected to peer review, there is little to submit.

The third and fourth guideposts defined in Paoli II concern the “known and potential rate of error” as well as the “existence and maintenance of standards controlling the technique’s operation.” See Paoli II at 742. In this case, the potential rate of error is beyond measurement. Again, Hoeltzel is not certain about fundamental aspects of the first test, such as the material that was used to suspend the machine. In addition, Hoeltzel made no effort to measure or quantify in any way the rotation force he believes is responsible for the accident. Hoeltzel Dep. at 149. Without such information, there is no way to evaluate the product of the test.

The Court must also consider the “general acceptance” of an expert’s methods or theories. See Paoli II at 742. While this is not a necessary precondition for the admissibility of scientific evidence, it is clear that neither Hoeltzel’s method or theory could be described as generally accepted in the scientific community. In addition, the Court cannot assess the relationship between Hoeltzel’s technique and “methods which have been established to be reliable.” Finally, Hoeltzel has no expertise that would allow him to testify competently about the TS 400 considering that, prior to his engagement by Plaintiff, he had never seen a hand-held cut-off machine. Hoeltzel Dep. at 67.

The Third Circuit has held that, although “Daubert does not require a paradigm of scientific inquiry as a condition precedent to admitting expert testimony, it does require more than [a] haphazard, intuitive inquiry[.]” Oddi v. Ford Motor Co., 234 F.3d 136, 156 (3d Cir.

2000). The sum total of Hoeltzel's testing consisted of hanging a cut-off machine by a strap made of unknown material, letting the machine run at idle even though it had been shut off at the time of the accident, and observing a slight swaying motion. Based on this observation, and nothing else, Hoeltzel arrived at his theory of design defect. Hoeltzel's inquiry can only be described as haphazard and intuitive; accordingly, the Court will exclude his testimony.

**b. James Lennen**

Lennen's proffered testimony consists of a report dated March 18, 2005, a supplemental report dated March 14, 2006, an Affidavit dated December 23, 2005, and a deposition taken on July 14, 2005.<sup>4</sup> Lennen was engaged by Plaintiff after it appeared that Hoeltzel might not be able to testify due to an illness. As a result, Lennen did not conduct any of his own testing, but instead relied on Hoeltzel's videotape to provide him with the information upon which he based his opinion, which apparently is in some disagreement with Hoeltzel's theory. Lennen Dep. at 189, 289. When asked whether he agreed with Hoeltzel's theory, Lennen responded, "I'm not sure; I've been thinking about that." Id. In contrast to Hoeltzel's "blade drive mechanism-induced reaction torque" theory, Lennen believes that the accident was caused by excessive "vibrations" coming from the machine. Id.

It is uncertain how Lennen arrived at such a conclusion. He has never observed a TS 400 when it was running nor has he started one himself, two acts that would be essential prerequisites to understanding the "vibrations" of the TS 400. Id. at 78. Lennen has virtually no knowledge about cut-off machines such as the TS 400. He admits that everything he knows about the TS

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<sup>4</sup> Defendant moved to exclude the supplemental report on the grounds that it was filed after the discovery deadlines. The Court will exclude the report, not based on untimeliness however, but for the reasons given above pursuant to Daubert and Fed R. Evid. 702.

400 comes from the owner's manual and expressly disclaims expertise in the design of hand-held cut off machines such as the TS 400. Id. at 85-86. Like Hoeltzel, Lennen has made no effort to reconstruct the accident and was unable to explain how the accident occurred. Id. at 92. Finally, Lennen is mistaken as to what type of blade was on the TS 400 at the time of the accident, a central issue in the case. Id. at 161.

Lennen might have been able to develop a theory about design defect by relying on figures generated by other studies of the TS 400, but he did not do so. Lennen neither measured any of the allegedly responsible "vibrations," nor did he obtain such figures from any other source. Id. at 93. In fact, the entire universe of information that Lennen considered when formulating his "vibrations" theory came from the TS 400 owner's manual. Id. at 175.

Applying any of the factors elucidated in Paoli II, Lennen falls short of the mark. His method does not consist of a testable hypothesis nor has it been subjected to peer review. The method by which Lennen arrived at his theory, reading an owner's manual and reviewing twenty minutes of videotape, could not be considered to be generally accepted, nor does it have any relationship to methods which have been established as reliable. Finally, his qualifications as an expert witness, based on the methodology, are unacceptably low.

On the basis of fifteen hours work which included reviewing Plaintiff's deposition testimony, meeting with a Stihl dealer, reviewing Mr. Hoeltzel's report and videotape, and meeting with Plaintiff's counsel to look at the TS 400, Lennen developed his "vibration" theory. This work can only be described as "haphazard" and "intuitive." Accordingly, Daubert requires its preclusion. See Oddi v. Ford Motor Co., 234 F.3d 136, 156 (3d Cir. 2000); see also Paoli II

at 742 (An “expert’s opinion must be based on the methods and procedures of science rather than on subjective belief or unsupported speculation.”).

*B. Motion for Summary Judgment*

Having determined that Plaintiff’s experts are precluded from testifying, the Court must consider whether Plaintiff is able to make a design defect claim without expert testimony.

In Pennsylvania, to prevail on a claim of defective design in a product liability action, a plaintiff must prove (1) that the product was defective, (2) that the defect existed when it left the hands of the defendant, and (3) that the defect caused the harm. Ellis v. Chicago Bridge & Iron Co., 376 Pa. Super. 220, 226 (1988). Before reaching causation, however, a Plaintiff must first satisfy the threshold inquiry as to whether there is a defect. Riley v. Warren Manufacturing, Inc., 455 Pa. Super. 384, 390 (1997). This is true whether the Plaintiff is suing in negligence, strict liability or breach of warranty. McKenna v. E.I. Du Pont, 1988 WL 71271 at \*2 (E.D.Pa. Jun. 30, 1988).

The Third Circuit has held that expert testimony is generally required in a case where a design defect is alleged. Oddi v. Ford Motor Company, 234 F.3d 136, 159 (3d Cir. 2000); see also Gower v. Savage Arms, Inc., 2002 U.S. Dist. LEXIS 11261, at \*6 (E.D.Pa. June 12, 2002); Booth v. Black & Decker, 166 F. Supp. 2d 215, 222 (E.D.Pa. 2001); McKenna at \*2. While there may be some instances when a defective condition can be established through non-expert evidence, that is not the case when the inner-workings of a machine unfamiliar to the public at large are at issue. See Oddi 234 F.3d at 159. Additionally, even if a jury could find such a defect

absent expert testimony, Plaintiff has offered no other evidence of defective design.

Accordingly, the Court will dismiss his claim.<sup>5</sup>

#### **IV. Conclusion**

For the foregoing reasons, Defendant's Motions to Exclude and for Summary Judgment will be granted.<sup>6</sup> An appropriate Order follows.

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<sup>5</sup> The Court has sufficient evidence of the proffered testimony of the Plaintiff's experts to exclude them without a Daubert hearing. Oddi v. Ford Motor Company, 234 F.3d 136, 153 (3d Cir. 2000) (holding that with sufficient evidentiary record there is no need for district court to conduct Daubert hearing).

<sup>6</sup> Although Defendant does not argue directly for the dismissal of Count Four of the Complaint alleging Intentional and Negligent Infliction of Emotional Distress, it does seek the dismissal of the entire Complaint. Plaintiff makes no argument in any of its responsive pleadings in support of Count Four. In order to prevail in an action for negligent infliction of emotional distress, a Plaintiff must first establish that there was negligence. Spencer ex rel. Estate of Tate v. Eckman, 2005 WL 711511, at \*3 (E.D. Pa. Mar. 28, 2005). As the Court finds that Plaintiff has not met this burden, this claim will also be dismissed. Similarly, in an action for intentional infliction of emotional distress, a Plaintiff must first establish extreme and outrageous conduct. Hoy v. Angelone, 456 Pa. Super 596, 609-10 (1997). In this case, the alleged extreme and outrageous conduct was the Defendant's design of an allegedly defective product. As Plaintiff has failed to prove defect, this claim cannot survive.

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<b>ANTHONY PULLINS</b>	:	<b>CIVIL ACTION</b>
	:	
<b>v.</b>	:	<b>NO. 03-5343</b>
	:	
<b>STIHL INC.</b>	:	
	:	
	<b><u>ORDER</u></b>	

**AND NOW**, this 19<sup>th</sup> day of May, 2006, upon consideration of Defendant's Motions to Exclude Expert Witnesses (docket nos. 48 and 72) and Motion for Summary Judgment (docket no. 50) and the responses thereto, it is **ORDERED** that the Motions are **GRANTED** for the reasons set forth in the accompanying memorandum. Judgment is entered in favor of Defendant. The Clerk of the Court shall mark the case **CLOSED**.

**BY THE COURT:**

/s/ Bruce W. Kauffman

**BRUCE W. KAUFFMAN, J.**