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

ANDREW MISSIMER,	**:**	**CIVIL ACTION**
Plaintiff	**:**	
	:	
v.	**:**	**NO. 04-3443**
	:	
TIGER MACHINE COMPANY, LTD,	**:**	
et al.	**:**	
Defendants	**:**	

M E M O R A N D U M

RICE, M. J. **September 26 , 2005**

Andrew 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: 1) preclude charging the jury on assumption of the risk; and 2) exclude evidence of EP Henry's employee safety indoctrination. For the following reasons, I deny these motions.

BACKGROUND

The complaint alleges that on January 20, 2004, while operating the TG-4, Missimer attempted to perform an adjustment at the machine's pinchpoint without turning off the power. Suddenly and without warning, Missimer's hand and/or arm became caught in the machine causing severe and permanent injuries, including a traumatic crush injury to his left arm with nerve damage. If Missimer had turned off the power to perform the adjustment, line production would have halted for up to twenty minutes.

Missimer asserts that the machine must have been improperly designed because the area

of the machine where he was injured was unguarded and lacked adequate warnings. He further contends the manufacturer did not provide a safety cover for the location where he was injured and did not use an existing alternate design which would have permitted the operator of the machine to safely make the routine adjustment.

DISCUSSION

Assumption of the Risk

Missimer insists that the adjustment he was attempting to make was a routine one. Although the TG-4's operating manual contained no instructions on how to perform the adjustment, he followed what he considered to be the usual practice. However, when making the adjustment, Missimer's wrench inadvertently slipped, causing his arm to be caught by a chain and pulled into a gear pulley. Because Missimer expects that defendants will invoke the defense of assumption of the risk, he insists that the defense is precluded as a matter of law.

Evidence of a plaintiff's conduct in a products liability case may be relevant in certain circumstances. Under Pennsylvania law, assumption of the risk remains a complete defense to both strict liability claims and negligence claims. Karim v. Tanabe Mach., Ltd., 322 F.Supp.2d 578, 581 (E.D. Pa. 2004)(quoting Dillinger v. Caterpillar, Inc., 959 F.2d 430, 445 (3d Cir. 1992) (evidence of a plaintiff's conduct is admissible in a strict products liability action to disprove a claim that a product defect was the cause of an accident, if such conduct constitutes: 1) assumption of the risk; 2) misuse of the product; or 3) highly reckless or extraordinarily unforeseeable conduct)); see also Surace v. Caterpillar, et al., 111 F.3d 1039, 1054 (3d Cir. 1997). To prevail under the assumption of the risk defense, a defendant must show that "plaintiff knew of the defect and voluntarily and unreasonably proceeded to use the product or encounter a

known danger." Karim, 322 F.Supp.2d at 581 (quoting Wagner v. Firestone Tire and Rubber Co., 890 F.2d 652, 657 (3d Cir. 1989)). The defense of assumption of the risk requires defendant to show the plaintiff was subjectively aware of the facts which created the danger. A plaintiff assumes the risk only if he fully understands the specific risk and voluntarily chooses to encounter it under circumstances that manifest a willingness to accept it. Id. (quoting Gonzalez v. Brandtjen & Kluge, Inc., 1991 U.S. Dist. LEXIS 14313 (E.D. Pa. 1991)); see also Mucowski v. Clark, 590 A.2d 348, 350 (Pa. Super. 1991) (voluntary assumption of the risk involves a subjective awareness of the risk inherent in an activity and a willingness to accept it).

Assumption of risk is also available in negligence claims. Kaplan v. Exxon Corp., 126 F.3d 221, 224-225 (3d Cir. 1997). In a negligence action, a defendant is relieved of his duty to protect the plaintiff when the plaintiff was aware of the risk and faced it voluntarily. Kirschbaum v. WRGSB Assoc., 243 F.3d 145, 156 (3d Cir. 2001).

Assumption of the risk is a defense in both strict products liability cases and negligence cases in Pennsylvania, and the jury must be instructed on that defense. Under either theory of liability, defendants must be given the opportunity to show that Missimer knew of the danger of attempting to perform that adjustment while the power was on, fully understood the risk, but chose to accept that risk willingly on the day he was injured. Such determinations are uniquely within the jury's province.

EP Henry's "Employee Safety Indoctrination"

Missimer also seeks to exclude evidence of EP Henry's Employee Safety Indoctrination form which Missimer signed on February 7, 2001. This form was designed to certify that the employee had received detailed instructions on his specific job and general precautions outlined

in the employer's safety handbook. Missimer maintains the form is irrelevant in a strict products liability case.

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 must be "substantially outweighed" by the problems in admitting it. Coleman v. Home Depot, Inc., 306 F.3d 1333, 1343-1344 (3d Cir. 2002).

First, I note that Missimer's characterization of his case as solely a strict products liability action is inaccurate especially where Count I of his complaint is for negligence. Thus, I am not persuaded by his argument that negligence concepts, such as the exercise of due care, have no place in this case.[1]

[1]Even if Missimer dismisses the negligence claim, defendants are still entitled to introduce relevant evidence of causation in a strict products liability case. Dillinger, 959 F.2d at 445 .

Second, the Employee Safety Indoctrination form certifies in its second paragraph that Missimer had received detailed instructions in machine safety, including that "servicing/cleaning of equipment is to be performed only when lockout/tagout procedures are followed." This information is highly probative because it tends to support defendants' theory that Missimer was aware of the risks of making adjustments to a machine with its power on, yet nevertheless attempted to do so. Missimer has failed to identify any risk of unfair prejudice or improper use of such evidence. The probative value of this evidence substantially outweighs any danger of unfair prejudice or misleading of the jury in its admittance. Thus, I will deny the motion and admit the Employee Safety Indoctrination form into evidence.

An appropriate Order follows.

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O R D E R

RICE, M. J.

AND NOW, this 26th day of September, 2005, upon consideration of Plaintiff's motion in limine to preclude charging the jury on assumption of the risk (Document #30), and Defendants' response thereto (Document #35), and upon consideration of Plaintiff's motion in limine to exclude evidence of employer's "Employee Safety Indoctrination" form (Document #33) and Defendants' response thereto (Document #37), it is hereby ORDERED that the motions are DENIED.

BY THE COURT:

/s/ Timothy R. Rice

TIMOTHY R. RICE

U.S. MAGISTRATE JUDGE