



while using an angle grinder.<sup>2</sup> The angle grinder was a Black and Decker grinder, Model 2750.<sup>3</sup> The accident caused Schieber “serious and painful injuries, including . . . severe laceration to his left forearm resulting in nerve damage, tendinitis, motor and sensory deficits in his upper extremity, . . . severe disfigurement and damage to his bones, . . . all of which are permanent.”<sup>4</sup>

Schieber’s employer, E&J Metal Fabricators, owned about ten angle grinders, including the one that injured Schieber.<sup>5</sup> These grinders would frequently “burn out” from ordinary use, and E&J would have them serviced and often completely rebuilt at Dewalt Tool Company, Black and Decker’s authorized repair center.<sup>6</sup> Normally, all of the rebuilt angle grinders at E&J carried “lock-off buttons,” which require the operator to “click off” the button before the grinder can run.<sup>7</sup> But according to Schieber’s deposition testimony, the rebuilt angle grinder that injured him came back from the repair center without such a lock-off button installed.<sup>8</sup> On the day of the accident, Schieber accidentally depressed the “paddle activator” on the grinder, and because the grinder had no lock-off button, it began to operate.<sup>9</sup> The “rotating

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<sup>2</sup> Compl. ¶ 5.

<sup>3</sup> Pls.’ Sur-reply [Doc. # 27], at 1 n.1.

<sup>4</sup> Compl. ¶ 6.

<sup>5</sup> Report of Thomas J. Cocchiola, P.E. (“Cocchiola Rep.”), at 6.

<sup>6</sup> Deposition of Daniel C. Schieber, Sr. (“Schieber Dep.”), at 55.

<sup>7</sup> Id.

<sup>8</sup> Schieber Dep., at 63.

<sup>9</sup> Cocchiola Rep., at 5.

sanding disk contacted his arm,” causing the injuries.<sup>10</sup> According to Plaintiff’s expert, the accident would have been prevented if the grinder had returned from the repair center with a lock-off button as was customary.<sup>11</sup>

Schieber and his wife, Angela Schieber, filed their four-count Complaint in Pennsylvania state court on August 15, 2005. The Complaint asserts claims against the repairer, Black and Decker (U.S.) Inc., d/b/a DeWalt Industrial Tool Company, and the manufacturer, the Black and Decker Corporation,<sup>12</sup> for (1) product liability; (2) breach of warranty; (3) negligence; and (4) loss of consortium. On September 20, 2005, the Defendants removed the action to this Court. After the close of discovery, the Defendants filed this Motion for Partial Summary Judgment.

## **DISCUSSION**

### **A. Jurisdiction and Governing Law**

In a diversity case such as this,<sup>13</sup> a district court must apply the substantive law of the state in which it sits, including that state’s choice-of-law rules.<sup>14</sup> Therefore, the Court will

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<sup>10</sup> Id.

<sup>11</sup> Id. at 12.

<sup>12</sup> Because the Defendants have brought this motion jointly, and are represented by the same counsel, the Court will refer to them collectively as “Defendants.”

<sup>13</sup> There is no dispute that complete diversity among the parties exists, and that the amount in controversy exceeds \$75,000. See 28 U.S.C. § 1332(a) (2000).

<sup>14</sup> Berg Chilling Sys. v. Hull Corp., 435 F.3d 455, 462 (3d Cir. 2006) (citing Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941)).

apply Pennsylvania substantive law to the merits of this case.<sup>15</sup>

### **1. Summary Judgment Standard Under Rule 56(c)**

Under Federal Rule of Civil Procedure 56(c), the Court should grant summary judgment to the moving party if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.”<sup>16</sup> In making this determination, the Court must “review all of the evidence in the record . . . and draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence.”<sup>17</sup>

Although this standard of review is designed to give the nonmovant the benefit of every doubt, he must still produce enough evidence to persuade a reasonable jury to find for him at trial. Specifically, “the plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.”<sup>18</sup>

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<sup>15</sup> Pennsylvania’s choice-of-law doctrine provides that the law of the state most interested in the outcome of the lawsuit will apply. Griffith v. United Air Lines, Inc., 416 Pa. 1, 22 (1964). The Court notes that the plaintiffs are residents of Pennsylvania, Compl. ¶ 1, and that the accident occurred in Pennsylvania. The Court therefore concludes that Pennsylvania has a substantial interest in the outcome of this case. Noting also that both parties cite to Pennsylvania law in their briefs, the Court is satisfied that application of Pennsylvania products-liability law is appropriate.

<sup>16</sup> Fed. R. Civ. P. 56(c).

<sup>17</sup> Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000).

<sup>18</sup> Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

## **2. Pennsylvania Strict-Products-Liability Law**

Under Pennsylvania law, products-liability cases are governed by the rule from the Restatement (Second) of Torts.<sup>19</sup> The Pennsylvania Supreme Court has paraphrased the rule as follows: “To recover under § 402A, a plaintiff must establish [1] that the product was defective, [2] that the defect was a proximate cause of the plaintiff’s injuries, and [3] that the defect causing the injury existed at the time the product left the seller’s hands.”<sup>20</sup> Defendants do not argue that the first and second elements are not satisfied. Thus, the Court will assume that the absence of a lock-off switch does constitute a defect, and that this defect proximately caused Schieber’s injuries. Concerning the third element, however, Defendants argue that there is no proof that this defect existed at the point of sale.

### **B. Application**

#### **1. Whether the Defect Existed at the Point of Sale**

First, Defendants argue that the grinder probably did have the lock-off switch at the point of sale. After analyzing the inside of the grinder, Defendants’ expert, Stephen L. Vick, concluded that it was a Model 2750-101,<sup>21</sup> which Black and Decker manufactured between 1993 and 1997.<sup>22</sup> Vick also stated at his deposition that “most of the type 101s” were built with lock-

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<sup>19</sup> Webb v. Zern, 422 Pa. 424, 427 (1966) (adopting Restatement (Second) of Torts § 402A (1965) as the law in Pennsylvania).

<sup>20</sup> Davis v. Berwind Corp., 547 Pa. 260, 267 (1997).

<sup>21</sup> Deposition of Stephen L. Vick (“Vick Dep.”), at 20.

<sup>22</sup> Id. at 27.

off switches.<sup>23</sup> Plaintiff has not attempted to rebut this testimony.

Further, nothing in the record establishes when and where the grinder was purchased—which might have permitted an inference about whether the grinder had a lock-off switch at sale. Indeed, Plaintiff has not supplied a sales receipt documenting when E&J bought the grinder. Nor has he provided testimony from any E&J employee to that effect. For example, at his deposition, E&J proprietor Brent Reeb could not remember when he purchased the grinder.<sup>24</sup> And because the grinder lacks a serial number, nameplate, or any other identifying marks,<sup>25</sup> it cannot be traced back to the point of sale. The only evidence even suggesting the time of purchase is that the grinder was manufactured between 1993 and 1997.

Schieber responds, “if the date of manufacture is unknown through the spoliation of product evidence (arguably through Defendants[’] past service to the product) then Defendants[’] factual assertion that the product was not defective when it left Defendants’ hands is still an open question of fact which forestalls summary judgment.”<sup>26</sup> The Court views this as a misapprehension of the procedure under Rule 56(c).

Schieber bears the burden of proof at trial, and thus must prove to the jury that the

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<sup>23</sup> *Id.* at 94. The Court notes that defense counsel points to this testimony as support that “the available evidence establishes that the subject grinder was manufactured with the lock-off button.” Defs.’ Reply Mem., at 3. The Court presumes that this misrepresentation is innocent.

<sup>24</sup> Deposition of Brent W. Reeb (“Reeb Dep.”), at 29.

<sup>25</sup> Vick Dep. at 18.

<sup>26</sup> Pls.’ Sur-reply, at 2. The Court also notes that spoliation of evidence is “the intentional destruction, mutilation, alteration, or concealment of evidence.” Black’s Law Dictionary 1437 (8<sup>th</sup> ed. 1999). Although the record indicates that the angle grinder underwent substantial modification over time, the assertion that Defendants intentionally destroyed or altered the grinder for the purpose of concealment is unsupported.

grinder lacked a lock-off switch at the point of sale. Under Celotex, the moving party can prevail by “pointing out to the district court . . . that there is an absence of evidence to support the nonmoving party’s case.”<sup>27</sup> Accordingly, to reach the jury on this issue, Schieber must himself set forth affirmative evidence that the grinder was defective at sale; he cannot simply point to evidentiary gaps in Defendants’ case. “[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.”<sup>28</sup>

Schieber points to the testimony of his own expert, who opined that the grinder “should have been equipped with [an] integral lock-off button to prevent unintentional operation”;<sup>29</sup> that “Black and Decker should have alerted factory owned service centers and authorized service centers to replace paddle activators when repairing customers’ tools”;<sup>30</sup> and that “the repair center should have inspected the incident angle grinder and replaced the obsolete paddle activator.”<sup>31</sup> All of these opinions address what the repair center should have done with the grinder, but do not tend to prove that the grinder was defective when sold.

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<sup>27</sup> Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

<sup>28</sup> Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986) (internal citations omitted).

<sup>29</sup> Cocchiola Rep., at 12.

<sup>30</sup> Id.

<sup>31</sup> Id.

## 2. Whether the Repair Service is a “Seller” under Section 402A

Schieber’s alternative argument is that the repair service is a “seller” under Section 402A, and therefore, because the grinder left the repair service’s hands without a lock-off switch, strict liability attaches based on that later point of “sale.”

Preliminarily, the Court notes that under Pennsylvania products-liability law, “all suppliers of a defective product in the chain of distribution, whether retailers, partmakers, assemblers, owners, sellers, lessors, or any other relevant category, are potentially liable to the ultimate user injured by the defect.”<sup>32</sup> This is an expansive category, but without a compelling demonstration that the Pennsylvania legislature or courts have extended this category to include repair services, this Court is unwilling to do so now. Schieber urges the Court to apply Section 402A nonetheless, citing one Pennsylvania appellate decision and two U.S. District Court decisions as support. None of those cases, however, applies to liability for servicing or rebuilding a product.

First, Schieber urges the Court to apply Frey v. Harley-Davidson Motor Co.,<sup>33</sup> in which the driver of a used motorcycle, injured in a highway accident, obtained a jury verdict against the dealer based in part on a product defect. The court upheld the imposition of strict liability on the seller—an authorized Harley-Davidson dealer that sold both new and used bikes.<sup>34</sup> Schieber seeks to analogize that decision to this case, arguing that the Defendants’ repair service is similar to the used-motorcycle dealer. But the E&J’s repair service did not sell a rebuilt angle

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<sup>32</sup> Burch v. Sears, Roebuck & Co., 467 A.2d 615, 621 (Pa. Super. 1983).

<sup>33</sup> 734 A.2d 1 (Pa. Super. Ct. 1999).

<sup>34</sup> Id. at 21–22.

grinder to E&J—rather, it received E&J’s burnt-out grinder, and then performed a service for a fee. Thus, the Court does not find this analogy persuasive.

Second, Schieber points to Villari v. Terminix International, Inc.,<sup>35</sup> in which a judge of this Court found that Terminix was subject to strict liability for injury caused by its application of a pesticide called Aldrin. Terminix argued that because it provided both a service—applying the pesticide—and a product—Aldrin, it was not purely a seller, and thus should escape Section 402A liability.<sup>36</sup> The court disagreed, ruling that even under such a “hybrid sale-service transaction,” Section 402A applied to Terminix as the seller of the pesticide.<sup>37</sup> But again, Defendants’ repair service did not sell, but rather rebuilt, an angle grinder for E&J. Because the repair service did not sell E&J a new or used grinder, the Court views this transaction as a pure service transaction—not a hybrid sale-service transaction.

Finally, Schieber suggests that the opinion in Abdul-Warith v. McKee & Co.<sup>38</sup> is persuasive. In that case, the court found that Section 402A liability applied to the manufacturer of a blast furnace at a steel plant, but went on to grant summary judgment to the manufacturer on his strict-liability claim, finding insufficient evidence of a design defect.<sup>39</sup> Again, that case featured a hybrid sales-service transaction, whereas the transaction between E&J and the repair service was purely a service transaction. Moreover, the Abdul-Warith court’s 402A analysis is in

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<sup>35</sup> 663 F. Supp. 727 (E.D. Pa. 1987) (Pollak, J.).

<sup>36</sup> Id. at 729.

<sup>37</sup> Id. at 731.

<sup>38</sup> 488 F. Supp. 306 (E.D. Pa. 1980).

<sup>39</sup> Id. at 312.

dicta, the court finding that the design-defect issue controlled its decision.

## **CONCLUSION**

Therefore, because the record does not support Schieber's theory that the angle grinder had a defect at the point of sale, and because the Court is unwilling to extend the reach of Section 402A to repair services without precedent to do so, the Court will grant Defendants' Motion for Partial Summary Judgment on Schieber's strict-liability claim.

An appropriate Order follows.

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

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**DANIEL C. SCHIEBER, et al.,**

**Plaintiffs,**

**vs.**

**BLACK & DECKER (U.S.), INC., et al.,**

**Defendants.**

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**CIVIL NO. 05-5003**

**ORDER**

**AND NOW**, this 25th day of October, in accordance with the foregoing

Memorandum Opinion, it is hereby

**ORDERED**, that Defendants' Motion for Partial Summary Judgment [Doc. # 22] is **GRANTED**; and it is further

**ORDERED**, that Count One of Plaintiffs' Complaint [Doc. # 1] is **DISMISSED WITH PREJUDICE**. Judgment is entered for Defendants on Count One **ONLY**. All other claims remain.

It is so **ORDERED**.

**BY THE COURT:**

/s/ Cynthia M. Rufe

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**CYNTHIA M. RUFÉ, J.**