

295 Fed.Appx. 530

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Third Circuit LAR, App. I, IOP 5.7. (Find CTA3 App. I, IOP 5.7) United States Court of Appeals, Third Circuit.

Matthew P. HAROLD; Linda Harold, His Wife.

v.

BLACK & DECKER U.S., INC.; DeWalt Industrial Tool Company; ABC Corporation, 1-5 (representing presently unknown manufacturers, designers, distributors, assemblers, testers, servicers/repairers, inspectors, and/or sellers of the tool in question; XYZ Corporation, 6-10 (unknown entities who removed any warnings and/or safety devices)). Black & Decker U.S., Inc., Appellant.

No. 07-1674.

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Argued May 13, 2008.

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Opinion filed: Oct. 7, 2008.

On Appeal from the United States District Court for the District of New Jersey (D.C. No. 04-cv-02427), District Judge: Hon. [Patty Shwartz](#).

Attorneys and Law Firms

[David R. Kott](#), Esquire, (Argued) McCarter & English, Newark, NJ, for Appellant.

[Adam L. Rothenberg](#), Esquire, (Argued) Levinson Axelrod, Edison, NJ, for Appellee.

Before: [McKEE](#) and [ROTH](#), Circuit Judges, PADOVA^{*}, District Judge.

Opinion

OPINION

[ROTH](#), Circuit Judge:

****1** Black & Decker (U.S.) Inc., appeals from an adverse jury verdict in a products liability case. Black & Decker argues that the District Court erred in excluding its evidence of lack of prior accidents involving the product in question and in its jury instructions. We conclude that the proffered evidence was admissible. We will, therefore, vacate the judgment of the District Court and remand this case for a new trial.

I. BACKGROUND

Because we write primarily for the benefit of the parties, we will only briefly review the facts and the proceedings below.

Matthew Harold was injured while using a DeWalt Model DW568 Rotary Hammer, which was designed and manufactured by Black & Decker. Harold was standing on a ladder and using the DW 568 to drill a hole in a concrete ceiling when the bit bound up.¹ As a result, Harold fell off the ***531** ladder and suffered two [broken fingers](#). The parties did not agree on the underlying cause of the accident.

During trial, Black & Decker offered into evidence records which showed a lack of prior accidents involving the DW568. The records consisted of two electronic databases: a thirteen month record of every phone call to a customer complaint hotline and a record of every claim of loss filed against Black and Decker in the last twelve years. Harold opposed the admission of this evidence. The District Court excluded it as more prejudicial than probative.

Following trial, the jury found in response to special written interrogatories that the product was defective because it was sold with inadequate warnings. The jury awarded \$492,548.38 to Harold for medical costs, lost income, and pain and suffering. After its request for a new trial was denied, Black & Decker appealed.

The District Court had jurisdiction over this case under [28 U.S.C. § 1332](#). We have jurisdiction over the final order of the District Court pursuant to [28 U.S.C. § 1291](#). We review the District Court's decision to exclude the proffered evidence for abuse of discretion. *Moyer v. United Dominion Indus., Inc.*, 473 F.3d 532, 542 (3d Cir.2007).

II. DISCUSSION

Black and Decker asks us to reverse the verdict against it because of the exclusion of the evidence of lack of prior accidents and because of the phrasing of the jury charge. Because we find in favor of Black and Decker on the question of the exclusion of evidence, we need not reach the issue of the jury charge.

The admissibility of evidence of prior accidents turns on the question of whether its probative value outweighs its prejudicial effect. *Forrest v. Beloit Corp.*, 424 F.3d 344, 354 (3d Cir.2005). Generally, the defendant must establish a foundation for admissibility that shows “(a) *similarity*-the defendant must show that the proffered testimony relates to substantially identical products used in similar circumstances; (b) *breadth*-the defendant must provide the court with information concerning the number of prior units sold and the extent of prior use; and (c) *awareness*-the defendant must show that it would likely have known of

prior accidents had they occurred.” *Id.* at 358. This burden will be satisfied when, as here, a company has maintained a comprehensive database of claims made and lawsuits brought against itself and its subsidiaries. *Moyer*, 473 F.3d at 546-47.² Since Black and Decker has sold thousands of rotary hammers functionally identical to the DW568 at issue here, the proffered testimony was admissible, and its exclusion was error under *Moyer*. *Id.* at 547.

III. CONCLUSION

**2 For the foregoing reasons, we will vacate the judgment entered by the District Court and remand this case for a new trial.

All Citations

295 Fed.Appx. 530, 2008 WL 4483501

Footnotes

- * Honorable [John R. Padova](#), United States District Judge for the Eastern District of Pennsylvania, sitting by designation.
- 1 Binding occurs when the drill bit fails to clear the hole being drilled and concrete material builds up in the hole, “jamming” the bit.
- 2 We note that the District Court did not have the benefit of the guidance provided by *Moyer*, as the decision in that case was published after the District Court’s exclusion of the proffered evidence.