AMY BRODSKY, Administratrix of the Estate of Max Brodsky, Deceased, and AMY BRODSKY, Individually and as Parent and Natural Guardian of Amanda Autumn Brodsky, Appellant v. MILE HIGH EQUIPMENT COMPANY, d/b/a Ice-O-Matic, Inc.; COPELAND CORPORATION; EMERSON ELECTRIC COMPANY; AMY BRODSKY, Administratrix of the Estate of Max Brodsky Deceased, Individually and as Parent and Natural Guardian of Amanda Autumn Brodsky, Appellant v. MILE HIGH EQUIPMENT COMPANY; d/b/a ICE-O-MATIC, INC.; COPELAND CORPORATION; EMERSON ELECTRIC COMPANY

No. 02-1844, No. 02-1930

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

69 Fed. Appx. 53; 2003 U.S. App. LEXIS 11998; 20 OSHC (BNA) 1177

March 10, 2003, Submitted Under Third Circuit LAR 34.1(a)
April 18, 2003 , Filed

PRIOR HISTORY: Appeal from the United States District Court for the Eastern District of Pennsylvania. (D.C. Civil Action No. 99-cv-03464). District Judge: Honorable John P. Fullam.

Brodsky v. Mile High Equip. Co., 2002 U.S. Dist. LEXIS 11379 (E.D. Pa., Feb. 19, 2002)
Brodsky v. Mile High Equip. Co., 2002 U.S. Dist. LEXIS 11380 (E.D. Pa., Mar. 25, 2002)

DISPOSITION: Affirmed.

COUNSEL: For AMY BRODSKY, Administratrix of the Estate of Max Brodsky Deceased, Individually and as Parent and Natural Guardian of Amanda Autumn Brodsky, Appellant: Brian E. Appel, Groen, Laveson, Goldberg & Rubenstone, Jenkintown, PA.

For Mile High Equip, Appellee: Robert M. Cavalier, Matthew S. Marrone, Lucas & Cavalier, Philadelphia, PA.

For Copeland Corp, Appellee: Robyn F. McGrath, Sweeney & Sheehan, Philadelphia, PA.

For Emerson Elec Co, Appellee: Robyn F. McGrath, Sweeney & Sheehan, Philadelphia, PA.

JUDGES: Before: RENDELL, AMBRO and MAGILL *, Circuit Judges.

* Honorable Frank J. Magill, Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

OPINION BY: AMBRO

OPINION:

[*54] AMBRO, Circuit Judge

This is a product liability case involving an ice machine that electrocuted appellant Amy [**2] Brodsky's husband, Max Brodsky. After a jury found in favor of the defendants, Amy Brodsky - individually, as administratrix of her husband's estate and as guardian of her daughter (in all capacities, "Brodsky") - sought a new trial, arguing that the District Court had erroneously admitted evidence relating to industry standards and Occupational Safety and Health Administration ("OSHA") citations and fines issued as a result of the accident. [*55] The District Court denied both the motion and a subsequent motion for reconsideration, and this appeal followed. We affirm both denials.

1. Facts and Procedural History

The ice machine that caused Max Brodsky's death was purchased by Quality Beverage from Mile High Equipment Company ("Mile High"), and installed in a restaurant. Because the machine did not properly manu-

facture ice, Quality Beverage replaced it and took the malfunctioning machine to its warehouse. Five months later, Max Brodsky was instructed to assist with repairs to the machine and, upon beginning the repairs, was electrocuted. The cord (or cords) and the plug that connected the machine to the electrical source mysteriously disappeared almost immediately after the [**3] accident. OSHA investigated the accident, and assessed penalties against Quality Beverage for its failure properly to train Max Brodsky's co-workers in electrical matters.

Brodsky brought an action in the Eastern District of Pennsylvania as the administratrix of Max Brodsky's estate and on behalf of herself and her daughter against, inter alia, Mile High. The complaint principally alleged a strict liability claim stemming from a design defect in the ice machine. Brodsky claimed the machine was defectively designed because it was not equipped with a cord and a plug to connect it to a power source and because a temperature-control device should have prevented (but did not prevent) the problem that Max Brodsky was attempting to correct at the time of his death. Mile High contended that the design of the machine was not defective, and, in the event that it was defective, Quality Beverage's intervening negligence was a superseding cause of Max Brodsky's death.

After a five-day trial held in July 2001, the jury returned a verdict in favor of defendants. Brodsky filed a motion for a new trial, unaccompanied by any briefs. The District Court, concluding that denying the motion on procedural [**4] grounds was inappropriate because of the seriousness of the case, reviewed the transcript of the trial without any briefing, and denied the motion on the merits. The Court concluded that the admission of evidence regarding current industry practice, including approval by Underwriters Laboratories ("UL"), n1 was not error because the jury had been instructed that compliance with those practices did not shield the defendants from liability. The Court further concluded that the admission of the "limited references to the OSHA findings and sanction" was not error because the evidence was relevant to the issue whether the intervening negligence of Quality Beverage personnel was a superseding cause of Max Brodsky's death.

> n1 Underwriters Laboratories "is a private, nonprofit corporation that establishes standards and specifications for products in a wide variety of industries." Sessions Tank Liners, Inc. v. Joor Mfg., Inc., 827 F.2d 458, 467 (9th Cir. 1987).

On March 25, 2002, the District Court [**5] denied Brodsky's motion for reconsideration of its decision not to grant a new trial. The District Court concluded that the introduction of evidence regarding industry standards was not erroneous because "all of the evidence now complained about was admitted without objection, and was either introduced by plaintiff or because plaintiff had opened the door to such evidence." The Court reaffirmed its conclusion that the citations and fines imposed by OSHA on Quality Beverage were properly admitted only to show intervening and superseding negligence on the part of Quality Beverage.

[*56] **2. Discussion**

Brodsky makes two arguments on appeal. Neither is persuasive to us. First, she argues that the District Court committed reversible error by admitting evidence of compliance with industry standards to show that there was no design defect. Second, she claims that the admission of evidence that OSHA had issued citations to Quality Beverage, and that Quality Beverage had paid fines as a result of those citations, was reversible error. She further alleges that the jury instructions given by the District Court failed to cure the prejudicial effects of either of these two errors.

a. Admission [**6] of Evidence Relating to Industry Standards

Under Pennsylvania law, it is error to allow defendants in strict product liability actions to introduce evidence of industry standards relating to the level of care exercised by the manufacturer or the safety of the product. See Blacker v. Oldsmobile Division, General Motors Corp., 869 F. Supp. 313, 314 (E.D. Pa. 1994) (citing Lewis v. Coffing Hoist Division, Duff- Norton Co, Inc., 515 Pa. 334, 343, 528 A.2d 590 (1987)). The Pennsylvania Supreme Court has concluded that admission of this evidence impermissibly injects negligence concepts into a strict liability action. Lewis, 515 Pa. at 343. Because negligence is irrelevant in a strict liability action and risks misleading the jury about the applicable standard of liability, the evidence is deemed inadmissible. Id.

In this context, Brodsky argues that she is entitled to a new trial because the District Court allowed the admission of evidence relating to industry standards, including evidence of UL approval. We disagree. Brodsky herself made mention of these standards in her case-in-chief, thereby opening the door for defendants to rebut that evidence. [**7] Markovich v. Bell Helicopter Textron, Inc., 805 F. Supp. 1231, 1239 (E.D. Pa. 1992) (rejecting argument that industry standards were impermissibly introduced because "it was the plaintiffs who opened the door to the introduction of industry standards"). The District Court properly allowed defendants to rebut the evidence introduced by Brodsky. 805 F. Supp. at 1240 ("Having introduced this testimony during their case-in-chief, the plaintiffs cannot preclude the defendants from

offering testimony in their case-in-chief in order to rebut the statements.") (citing Leaphart v. Whiting Corp., 387 Pa. Super. 253, 564 A.2d 165, 171 (Pa. Super. 1989)). Further, to ensure that admitting this evidence did not affect the outcome of the trial, the District Court instructed the jury that the admitted evidence did not shield the defendant from liability. Because admission of this evidence was not error, the District Court correctly denied the motion for a new trial.

b. Admission of Evidence Relating to OSHA Violations

Brodsky's second contention of error relates to the admission of evidence relating to OSHA citations and fines imposed on Quality Beverage as a result of [**8] OSHA's conclusion that Quality Beverage had failed properly to train its employees regarding electrical matters. Brodsky argues that through these references "the notion of Quality Beverage's 'negligence' was injected throughout the lawsuit, and the confusion it caused was not curable by limiting instruction."

We are persuaded that it was not error for the District Court to allow the admission of this evidence. Because the claim against Mile High was one arising in strict liability, it would be improper for the notion of Mile High's negligence to be injected throughout the lawsuit (absent its injection by Brodsky herself) by the introduction [*57] of OSHA safety standards. See, e.g., Colegrove v. Cameron Machine Co., 172 F. Supp. 2d 611, 617 (W.D. Pa. 2001) (noting that OSHA standards are inadmissible to show lack of care on the part of the defendant in a strict liability action) (citing Sheehan v. Cincinnati Shaper Co., 382 Pa. Super. 579, 555 A.2d 1352, 1354 (Pa. Super. 1989)). But the evidence in this case did not relate directly to OSHA standards, but to OSHA citations and fines. Further, the evidence of OSHA citations and fines was not admitted [**9] to show Mile High's negligence, but Quality Beverage's negligence. Part of Mile High's defense was that, even if the design of its product were defective, Quality Beverage's intervening negligence was a superseding cause of Max Brodsky's death. References to the fact that OSHA had found that Quality Beverage failed properly to train its employees were, therefore, relevant. Because the evidence did not relate to Mile High's negligence, there was no danger of jury confusion.

Finally, as the District Court noted, any evidence about whether Quality Beverage's negligence was a superseding cause was rendered irrelevant by the jury's verdict. Because the jury concluded that Mile High's design was not defective, it did not reach the issue of a possible superseding cause.

* * *

For these reasons, we affirm the District Court.

By the Court,

/s/ Thomas L. Ambro

Circuit Judge

AMY BRODSKY, Administratrix of of the Estate of Max Brodsky, Deceased, and AMY BRODSKY, individually and as parent and natural guardian of AMANDA AUTUMN BRODSKY v. MILE HIGH EQUIPMENT COMPANY, d/b/a ICE-O-MATIC, INC. and COPELAND, INC. and EMERSON ELECTRIC

CIVIL ACTION NO. 99-3464

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

2002 U.S. Dist. LEXIS 11380

March 25, 2002, Decided
March 25, 2002, Filed

SUBSEQUENT HISTORY: Affirmed by Brodsky v. Mile High Equip. Co., 2003 U.S. App. LEXIS 11998 (3d Cir. Pa., Apr. 18, 2003)

DISPOSITION: [*1] Plaintiff's Motion for Reconsideration was denied. Plaintiff's Motion for a New Trial was DENIED.

COUNSEL: For AMY BRODSKY, ADMINISTRATRIX OF THE ESTATE OF MAX BRODSKY, DECEASED, AMY BRODSKY, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN, OF AMANDA AUTUMN BRODSKY, PLAINTIFFS: BRIAN E. APPEL, GROEN LAVESON GOLDBERG & RUBENSTONE, JENKINTOWN, PA USA.

For MILE HIGH EQUIPMENT COMPANY d/b/a ICE-O-MATIC, INC., DEFENDANT: ROBERT M. CAVALIER, LUCAS AND CAVALIER, PHILA, PA USA.

For COPELAND CORPORATION, EMERSON ELECTRIC CO., DEFENDANTS: DONALD J. P. SWEENEY, SWEENEY, SHEEHAN & SPENCER, PHILA, PA USA. ROBYN F. MC GRATH, SWEENEY, SHEEHAN & SPENCER, PHILA, PA USA.

For MILE HIGH EQUIPMENT COMPANY d/b/a ICE-O-MATIC, INC., CROSS-CLAIMANT: ROBERT M. CAVALIER, LUCAS AND CAVALIER, PHILA, PA USA.

JUDGES: Fullam, Sr., J.

OPINION BY: Fullam, Sr.

OPINION:

MEMORANDUM AND ORDER

Fullam, Sr. J.

March 25, 2002

On February 19, 2002, I entered an Order denying plaintiff's Motion for a New Trial. Plaintiff has now filed a Motion for Reconsideration of that Order, and has, for the first time, filed a brief in support of the original motion for a new trial. The filing comes more than seven months after the conclusion of the trial and the filing of a *pro forma* [*2] motion for a new trial.

Since the plaintiff has also filed a Notice of Appeal, I will address briefly the arguments made in the plaintiff's brief, which were disposed of without extended discussion in my February 19, 2002 Memorandum.

Plaintiff makes two main arguments. The first is "The Court erred in admitting evidence of industry-wide practices and compliance with manufacturing standards." While it is true that, in the course of the trial, some such evidence was admitted, plaintiff has no reason for complaint on that score.

Throughout plaintiff's case in chief, there were numerous references to Underwriters Laboratories ("UL") standards and defendants' purported compliance with those standards; all of this evidence came in without objection or motion to strike. Some references to UL emerged when plaintiff's counsel was arguing with defense witnesses on cross-examination as to whether defendants' products were adequately tested at the factory, and the reason for various tests.

At the very outset of the trial, plaintiff's counsel received permission, over defendants' objections, to show to the jury another ice-cube machine model which did have an extension cord attached (as plaintiff [*3] contended the model in question should have had); and, throughout the trial, there were constant comparisons between the subject machine and various other industry models. Defendants' basic position was that it was not feasible to supply this type of ice-cube machine with a cord and plug, because (a) it was preferable to hard-wire such machines; (b) there were too many variations in the type of receptacle such machines would be plugged into; and (c) the places in which such machines would be installed varied so widely that the length of the appropriate electrical connection cord could not be determined in advance. Plaintiff was, of course, permitted to refute these assertions by reference to other models of ice-making machines, and defendants were entitled to dispute such refutation by reference to industry practices. This type of evidence could not properly have been totally excluded, since both sides had the right to produce expert testimony in support of their own positions, and to challenge the expertise of the opponent's experts, as well as the substance of their testimony. In short, all of the evidence now complained about was admitted without objection, and was either introduced [*4] by plaintiff or because plaintiff had opened the door to such evidence.

Finally, and more importantly, the jury was properly instructed that if the product was defectively designed and caused injury to the plaintiff's decedent, defendants would be liable regardless of whether the device complied with UL requirements or industry-wide practices. ("And the fact that everybody designs a product a certain way does not shield them from liability if, in fact, the product is defective and that defect caused injury.") There was no objection to the charge.

The fact that plaintiff's decedent's employer had been cited and punished for OSHA violations in connection with this accident was admitted only for its bearing on the issue of intervening and superseding negligence on the part of the employer. While I am satisfied it was properly admitted for that purpose, and that the charge adequately explained the situation to the jury, the issue is of no present moment, since, having determined that the product was not defective, the jury did not reach the issue of superseding cause.

It should also be noted that the verdict was in accord with the overwhelming weight of the evidence, which showed that [*5] the machine had sustained damage after it left defendants' control, and that the superseding negligence of plaintiff's employer was the likely cause of the accident.

For all of the foregoing reasons, plaintiff's Motion for Reconsideration will be denied.

An Order follows.

ORDER

AND NOW, this 25th day of March 2002, upon consideration of plaintiff's Motion for Reconsideration IT IS ORDERED:

1. Plaintiff's Motion for Reconsideration is DENIED.

2. Plaintiff's Motion for a New Trial is DENIED.

John P. Fullam, Sr. J.

AMY BRODSKY, Administratrix of the Estate of Max Brodsky, deceased, et al. v. MILE HIGH EQUIPMENT COMPANY, et al.

CIVIL ACTION NO. 99-3464

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

2002 U.S. Dist. LEXIS 11379

February 19, 2002, Decided
February 19, 2001, Filed

SUBSEQUENT HISTORY: Affirmed by Brodsky v. Mile High Equip. Co., 2003 U.S. App. LEXIS 11998 (3d Cir. Pa., Apr. 18, 2003)

DISPOSITION: [*1] Motion for a new trial was denied.

COUNSEL: For AMY BRODSKY, ADMINISTRATRIX OF THE ESTATE OF MAX BRODSKY, DECEASED, AMY BRODSKY, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF AMANDA AUTUMN BRODSKY, PLAINTIFFS: BRIAN E. APPEL, GROEN LAVESON GOLDBERG & RUBENSTONE, JENKINTOWN, PA USA.

For MILE HIGH EQUIPMENT COMPANY d/b/a ICE-O-MATIC, INC., DEFENDANT: ROBERT M. CAVALIER, LUCAS AND CAVALIER, PHILA, PA USA.

For COPELAND CORPORATION, EMERSON ELECTRIC CO., DEFENDANTS: DONALD J. P. SWEENEY, ROBYN F. MC GRATH, SWEENEY, SHEEHAN & SPENCER, PHILA, PA USA.

For MILE HIGH EQUIPMENT COMPANY d/b/a ICE-O-MATIC, INC., CROSS-CLAIMANT: ROBERT M. CAVALIER, LUCAS AND CAVALIER, PHILA, PA USA.

JUDGES: Fullam, Sr., J.

OPINION BY: Fullam, Sr.

OPINION:

MEMORANDUM AND ORDER

Fullam, Sr. J.

February 19, 2002

After a five-day trial in July 2001, the jury returned a verdict in favor of the defendants in this product-liability case. Plaintiffs filed a timely motion for a new trial, in skeleton form, reserving the right to file additional reasons after receiving the trial transcript. The motion was not accompanied by a brief of any kind. The defendants filed answers to the motion for a new trial, but did not file [*2] briefs either.

Eventually, the notes of testimony were transcribed and filed. Counsel for the parties were notified, and, in early October 2001 picked up their respective copies of the trial transcript. But nothing further has occurred.

Because this was a very serious case - plaintiffs' decedent was electrocuted while assisting in repairing an ice cube machine manufactured by the defendant Mile High Equipment Company - I prefer not to simply dismiss the motion for a new trial for lack of prosecution, but have reviewed a copy of the transcript of the trial, and have carefully considered the issues raised by plaintiffs' motion. I have concluded that the motion must be denied, on the merits.

Plaintiffs' decedent was employed by Quality Beverage, a long-time dealership of Mile High Equipment Company. The ice machine in question was purchased by Quality Beverage from Mile High, for installation in a Chinese restaurant in Bryn Mawr. Upon installation, the machine did not properly manufacture ice. When Quality Beverage sent a repairman to the restaurant, he tried to effect temporary repairs by by-passing a water control arrangement, but the machine still did not work properly, and a repairman [*3] felt a tingling sensation when he touched the machine. Quality Beverage thereupon replaced the machine with a different model, and removed the offending machine to its own warehouse. Five months later, plaintiffs' decedent was assigned to assist in attempting to repair the machine. Almost immediately

upon beginning the repairs, the decedent was electrocuted.

Plaintiffs contend that the ice machine was defective for two reasons: (1) because it was not equipped with a cord and plug for connection to electrical power source (this had to be supplied and affixed by the purchaser); and (2) because a temperature-control device should have, but did not, prevent the problem which necessitated the repairs the decedent was undertaking.

Everyone agrees that, if the machine had been properly grounded at the time, the accident could not have occurred. The accident occurred because the machine was not properly grounded, either because the plug was not a three-prong, groundable plug, or because the ground wire of the three-way plug was not properly affixed to the machine, or because, if a two-prong extension cord was used, it was not plugged into the correct kind of receptacle. There was evidence [*4] which could have supported any or all of these possibilities, but those issues could not be conclusively resolved, because, almost immediately after the accident, the cord or cords and the plug mysteriously disappeared and have not been located. Some time after the accident, OSHA conducted an investigation and assessed penalties against Quality Beverage for not having properly trained decedent's coworkers in electrical matters.

Plaintiffs seek a new trial because the court permitted evidence to the effect that the machine had received Underwriters Laboratory approval; evidence that the practice of the industry was not to supply cord and plug with this type of machine (allegedly because of the wide variety of receptacles which might be used by the purchasers, and because many purchasers preferred to "hardwire" such machinery - i.e., to have the machine permanently connected to the electricity supply line); and evidence of the OSHA action. The jury was instructed that, while they could consider the Underwriters Laboratory approval and alleged industry practice, neither U.L. approval nor industry practice protected the defendants from liability for supplying a defective product; the [*5] real issue was whether the product was defective in either or both of the respects argued by the plaintiff. I am satisfied that, in light of the charge to the jury, no error was committed.

A principal argument of the defendants was, not only that the ice machine was not defective, but that, even if it had been, the intervening negligence of Quality Beverage's personnel operated as a superseding cause of the accident. On that issue, the limited references to the OSHA findings and sanction was plainly relevant. Indeed, it is at least arguable that I should have entered judgment in favor of the defendants as a matter of law on that issue: To rule otherwise would mean that the defendants should have foreseen that their own dealer, experienced in the field, would not realize that equipment of this type needed to be properly grounded.

Finally, plaintiffs contend that it was error to permit evidence concerning the search for, and inability to find, the cord, plug, and/or extension cord which had been in use at the time of the accident. The lack of merit in this contention is self-evident.

The motion for a new trial will be denied.

ORDER

AND NOW, this 19th day of February 2002, upon [*6] consideration of plaintiffs' Motion for a New Trial, IT IS ORDERED:

That the motion is DENIED.

John P. Fullam, Sr. J.