

Our File No.: 115409-01/LDL/djd

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF GREENE

-----x Index No.: 18-0008

THOMAS ALFELD and BETHANY ALFELD,

Plaintiffs,

-against-

APEX TOOL GROUP, LLC and HOME DEPOT
U.S.A., INC.,

Defendants.

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PLAINTIFFS MEMORANDUM OF LAW



Marilyn Farrell, County Clerk

EF2018-8

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Clerk: LAR

**PLAINTIFF'S MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS MOTION FOR SUMMARY JUDGMENT**

Statement of Facts

This lawsuit arises from a product liability occurrence of January 9th 2017. On that day the plaintiff was working as a self-employed Carpenter. A few weeks earlier he had purchased from the Home Depot, a flush cutting needle nose pliers set. It is uncontroverted that this tool was part of Crescent tools and manufactured through the Apex Tool group. The plaintiff was using these pliers for the first time on the day of his incident.

At the time of this occurrence the plaintiff was working on a staircase in a customer's home on Crystal Point Road in Cairo NY. The plaintiff was ready to leave for the day when he observed some pin nails sticking

up and protruding out of the staircase. The plaintiff later learned that these were Hitachi 23 gauge headless pins that were 1 ¼ inches long. He used the needle nose pliers wire cutters to cut portions of the nail that were protruding, in order to make them flush with the staircase surface. The proof has indicated that the plaintiff was not using protective eyewear at the time this incident occurred. As the plaintiff was cutting a nail one of the two blades on the pliers broke off. This blades flew off entering into the plaintiff's eye. The plaintiff was using the wire cutter in a foreseeable manner and for a foreseeable use at the time it failed.

Expert Neal Growney's Comments on EBT

In the accompanying affirmation of Lawrence D. Lissauer and the affidavit of Neal Growney a discussion existed concerning the testimony offered at the depositions. The plaintiff retained Neal Growney as an expert. His affidavit is annexed herewith. He discussed the EBT of Mr. Anderson as part of his analysis. The plaintiff contends that the market was broader than that suggested by the defense. It was not marketed solely through the electronic stream of commerce, as counsel would like this

Court to believe. It was marketed to a larger segment of the population through the Home Depot. We refer to Mr. Anderson's deposition. The Home Depot caters to prospective customers including "do-it-yourself homeowners" and tradesmen engaged in building trades such as carpenters. Growney opines that consumers of the Home Depot do not possess the level of sophistication as that suggested by counsel. Home Depot does not cater solely to professionals in the electronics industry.

Relative to the failure to warn, Mr. Anderson testified that this Low Profile Flush Cut™ 4" 102 mm, wire cutter was not intended to cut nails. Despite this, Apex, kept this knowledge to itself and failed to warn consumers not to cut nails with this device. Apex in fact identified this product as "all-purpose" on the back of its packaging. See Exhibit G to the defendant's moving papers.

The defendants suggest that the product used by the plaintiff, was not to be used by carpenters, although it was marketed for use by carpenters and "do it your-selfers" by the Home Depot and its personnel. It was marketed as an all-purpose cutter. See paragraph 5.8 of Mr. Growney's analysis and report. Mr. Anderson testified these Crescent pliers were intended for electronics applications (i.e., small diameter copper wire). Home Depot is a marketer to

the constructions trade, not just to electronic (trades). Apex knew, or should have known that construction tradesmen were likely to purchase and utilize them in construction, such as for cutting nails. This product as branded was exclusive to the Home Depot.

Apex' statement that these pliers are good for soft wire up to 20 AWG is an inadequate warning as it does not warn they are not to be utilized to cut nails or hard wire, or hard wire above a certain gauge. There is no industry-standard for soft copper wire, per Mr. Anderson's testimony at page 77.

Anderson's Affidavit

Mr. Anderson gave deposition testimony as noted above and also submitted an affidavit in support of the defendant's motion. In the last few paragraphs, (29, 30) Anderson opines that the Plaintiff's use of the Crescent four-and-a-half-inch diagonal micro-shear cutting pliers constituted an improper use or misuse of the product in question in that: 1) Plaintiff was not wearing any eye protection at the time of the alleged incident; 2) the packaging of the Crescent four- and-a-half-inch diagonal micro-shear cutting pliers stated "wire cutter" on the front and on the back: "cuts soft wire up to 20 AWG (0.8 mm); and 3) in that the Hitachi 23 gauge nails are

significantly stronger and the capacity is larger than the tensile strength or the maximum capacity of the soft wires the Crescent four-and-a-half-inch diagonal micro-shear cutting pliers was intended to cut. There were no warnings not to use on the device on nails. Further, this affidavit although not directly contradicting his EBT testimony gives greater specificity in an area that Anderson lacked knowledge in at his EBT, such that he could not answer questions asked of him by the attorney for the plaintiff.

Opinions two and three suggest that the product was marketed to electricians yet this specific product was marketed exclusively through the Home Depot. It is submitted that this product would be used by people of many different sophistication levels who frequent the Home Depot. It is submitted that opinions two and three would not be readily understandable by the average consumer of the Home Depot as explained by the plaintiff's expert. The plaintiff acknowledges that he was not using glasses at the time of the incident. In paragraph 30 Anderson writes: "It is my opinion that I state with a reasonable degree of engineering certainty, that but for the Plaintiffs improper use of the Crescent four-and-a-half-inch diagonal micro-shear cutting pliers on the date of the incident the plaintiffs injuries alleged in the pleadings would not have

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