
United States Court of Appeals
for the
Third Circuit

No. 04-2104

DONALD E. MOYER; JAYNE L. MOYER; KAREN L. WEIDNER; MICHAEL T.
WILLIAMS; ROBECCA WILLIAMS; THOMAS C. SECHRIST; PATRICIA D.
SECHRIST; STEVE R. KERN; BONNIE KERN; DAVID P. WEIDNER,

Appellees,

– v. –

UNITED DOMINION INDUSTRIES, INC.,

Appellant.

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Appellant United Dominion Industries, Inc. makes the following disclosures:

- 1) *For non-governmental corporate parties please list all parent corporations.* Appellant United Dominion Industries, Inc. was merged into SPX Corporation effective December 30, 2003. SPX Corporation has no parent corporations.
- 2) *For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock.* Appellant United Dominion Industries was merged into SPX Corporation effective December 30, 2003. No publicly held company holds more than 10% of SPX Corporation's stock.
- 3) *If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests.* Appellant United Dominion Industries was merged into SPX Corporation effective December 30, 2003.
- 4) This is not a bankruptcy appeal.

Dated: October 25, 2004/May 12, 2005

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PRELIMINARY STATEMENT

Plaintiffs are five factory workers employed by Brush Wellman. They and their wives sued Fenn Manufacturing Corp. (“Fenn”), a business unit of appellant United Dominion Industries, Inc.,¹ claiming that the men had developed Hand-Arm Vibration Syndrome (“HAVS”), a nerve and vascular disorder, from using a swaging machine that Fenn manufactured. They alleged that the swager was defectively designed because it emitted excessive vibration, and also claimed a failure to warn of the vibration risk. Although none of the plaintiffs is disabled or has lost a day of work, a dollar of pay, or an hour of overtime due to his injuries, they were awarded damages totaling \$13,450,000.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 over this appeal from a final judgment. The district court (Patrice Tucker, J.) had jurisdiction of this diversity action pursuant to 28 U.S.C. § 1332. Fenn’s post-trial motions were denied on March 31, 2004. On April 21, 2004, it filed a protective notice of appeal, which became effective when the district court entered judgment on the “delay damages” portion of the judgment on July 30, 2004.

ISSUES PRESENTED

1. Whether it was reversible error to exclude proof that (i) the machine plaintiffs used had been grossly misused and ill-maintained by their

¹ Appellant will hereafter be referred to as “Fenn.”

employer, substantially increasing the vibration to which plaintiffs were exposed; and (ii) despite having sold thousands of functionally identical machines, Fenn had never received a claim of vibration-related injury. These issues were raised in Fenn's response to plaintiffs' motion *in limine*; at A524; and in Fenn's post-trial motions, and ruled upon at A16-A22.

2. Whether Fenn is entitled to judgment on plaintiffs' design defect claim because (i) Brush Wellman's misuse of and failure to maintain the swager caused plaintiffs' injuries; or (ii) Fenn's swager is not an unreasonably dangerous product. These issues were raised at A-779 and in Fenn's post-trial motions, and ruled upon at A19-A25.
3. Whether Fenn is entitled to judgment on plaintiffs' failure-to-warn claim because (i) it neither knew nor should have known that swaging could cause HAVS; or (ii) the swager was not unreasonably dangerous absent a warning. These issues were raised at A787-A90 and in Fenn's post-trial motions, and ruled upon at A25-A26.
4. Whether certain plaintiffs' claims were barred by the statute of limitations. This issue was raised at A508-A514 and in Fenn's post-trial motions, and ruled upon at A5-A15.
5. Whether the damages are excessive. This issue was raised in Fenn's post-trial motions and ruled upon at A37-A42.
6. Whether delay damages under Rule 238 are available in a federal case, and when post-judgment interest on such damages began to run. These issues were raised in Fenn's opposition to plaintiffs' motion for entry of judgment, which was granted.

RELATED CASES AND PROCEEDINGS

This case has not previously been before this Court. There are no related cases or proceedings.

STATEMENT OF THE CASE AND OF THE FACTS

1. Background. Swaging is a type of forging in which the machine forms metal through a rapid succession of hammer and die blows; swagers are used primarily to shape the end of a piece of metal – *e.g.*, a section of tube, rod, or wire – into a point. A534-A535. For the last century, swagers have been used to produce thousands of different components and products. A535-A536. Fenn has manufactured metal-forming machinery since 1900. It began producing swagers in 1948 and has sold thousands of the machines since then. A534. Plaintiffs are the only people ever to claim a vibration-related injury from use of a Fenn swager. A1313-A1315.

2. Brush Wellman's purchase and use of the Fenn swager. In 1983, Fenn manufactured and sold to Brush Wellman the Model 3F-2D swager at issue here. A503-A504. Brush Wellman installed the swager in its rod and wire department (the “rod mill”). It became one component of a set of machinery called the bull block, which reduces the diameter of beryllium copper wire. A85-A88; A154.

The bull block is designed to operate as follows: A coil of wire having an outer diameter of up to 0.625 inches arrives at the rod mill resting on a skid. The operator uses a crane to move the coil to a turntable, manually straightens the end of the wire, and feeds it into the swager, which forms the tip into a point. This

process takes only a few seconds. Afterward, the coil is fed into the bull block, pointed end first, and its diameter is reduced to the desired thickness. A87-A88.

The swager's manual included detailed instructions for use and maintenance. A878-A889. Among other advice, the manual instructed the purchaser (i) to "keep the die cavity and cage assembly free of all foreign matter"; (ii) to keep the dies clean; (iii) to ensure that the dies close properly; and (iv) that "[b]oth the hammers and rollers should be periodically removed from machine and stress relieved to reduce the work hardening effects of continued hammering." A882-A884. The manual repeatedly stated that poor maintenance would make swaging far more difficult. "Dirty or oily dies" or "mismatched die segments" would cause the swaged material to "kick back" to the point that feeding is very difficult." A882. Worn parts would require the operator to "lift the cage with the work piece," which "makes feeding extremely difficult." *Ibid.*

Brush Wellman ignored that advice. Consequently, the bull block operation was, in practice, quite different from that described above. The swager was in constant use, but was neither properly maintained nor properly operated. A115. When the dies wore out, the operators used manila cards as "shims" to fill the space between them. A1436. Moreover, the swager was frequently used to process metal too big for its designed capacity. The oversized coils had to be gripped very tightly and great force used to get them into the machine; each had to

be swaged multiple times, and each swage took abnormally long. A115. The abuse and misuse of the swager multiplied plaintiffs' vibration exposure by three to six times. A115; A1421-A1424.

The swager was nonetheless used without incident for approximately a decade after its installation in 1983. A575-A576. In late 1994, David Graeff, Brush Wellman's maintenance manager, and James Carroll, the company's Environmental Health and Safety Coordinator, learned that certain of the bull block operators were complaining of hand problems that they attributed to the swager. *Ibid.* In January 1995, Brush Wellman therefore hired WorkAbility, an ergonomic consulting firm, to "evaluate the swaging operation." A577. WorkAbility's Jeffrey Eckel visited Brush Wellman's plant to observe the bull block operation, reporting the next month that the employees were claiming problems with the swager and noting that "there was a fair amount of vibration involved in pointing the coil." A598. Eckel made various recommendations designed to ameliorate the vibration problem. A598-A599.

In June 1995, Brush Wellman formed a committee charged with "look[ing] into the complaints of swagers." A157. The committee ultimately proposed replacing the 1983 swager with a new Fenn machine equipped with an automatic feed, an expensive feature that would eliminate the need to hold the material being swaged. A137-A140; A157. In 1996, Brush Wellman traded the 1983 swager

back to Fenn for a new model, and later purchased an automatic feed for \$9,200. A503-A504; Ex.D25.

3. *Plaintiffs' claims.* Each plaintiff worked as a bull block operator at various times between the early 1980s and 1997, when this suit was filed. Each also performed many other tasks requiring heavy manual labor. A625-A648. Consequently, all had sustained various injuries and developed various chronic problems unrelated to swaging or vibration by the time of this suit. *Ibid.* All claim, however, that they developed HAVS, a nerve and vascular disorder, from operating the Fenn swager. To varying degrees, they have experienced pain, numbness, weakness, and tingling in their hands, particularly in cold weather.

The plaintiffs' injuries are by no means disabling. All continue to work for Brush Wellman, which reassigned them to jobs that would not exacerbate their injuries and, pursuant to Pennsylvania law, paid their medical expenses. A583-A588. No plaintiff had missed any work or lost compensation due to his alleged injuries. A116; A155; A205-A207; A225-A228; A443-A445. Pursuant to Pennsylvania's workers' compensation statute, plaintiffs cannot sue Brush Wellman for damages.

4. *Proceedings below.* Plaintiffs filed this strict-liability diversity action in the Eastern District of Pennsylvania on September 2, 1997. They claimed that the swager was defectively designed because it omitted an automatic feed and that

Fenn had failed to provide adequate warnings concerning swager-generated vibration.

From the outset, Judge Tucker accepted plaintiffs' position that any evidence bearing on *conduct* – by Fenn, plaintiffs, or Brush Wellman – was irrelevant, and therefore inadmissible, because plaintiffs' claims sounded in strict liability, not negligence. That view led to pre-trial rulings that eviscerated Fenn's defenses. The court precluded Fenn from producing evidence concerning Brush Wellman's abuse of the swager, or evidence that, despite having sold thousands of swagers like Brush Wellman's machine, it had never received any claim of vibration-related injury.² These rulings precluded Fenn from demonstrating that, if plaintiffs were injured by the swager at all, it was only because of greatly increased vibration attributable to mistreatment of the machine.

Relatedly, the court believed it irrelevant to Fenn's duty to warn that Fenn could not have foreseen any vibration hazard. Accordingly, the court permitted plaintiffs' experts to testify that the swager emitted certain levels of vibration, but refused to allow Fenn to elicit, on cross-examination, that those levels of vibration (i) are not considered dangerous by the medical establishment and (ii) are well within the limits set by the only available occupational-safety guidelines. Nor was

² The court issued no written opinion, simply disposing of the *in limine* motions in an omnibus order lacking any statement of reasons. A1624-A1625.

defense expert Dr. Martin Cherniack permitted to testify that as far as medical science can tell, the amount of vibration emitted by a new swager is not dangerous.

Plaintiffs' expert Dr. Scott Jaeger, an orthopedist whose claimed expertise is occupational medicine, testified that each plaintiff is suffering from a form of HAVS known as vibration white-finger or occupational Raynaud's syndrome. A334; A351-A366. David Clark, Ph.D., an ergonomic expert, opined that this condition was caused by exposure to vibration from the Fenn swager (A242), based solely on the statistical improbability that so many bull-block workers would develop HAVS symptoms unless exposed to excessive vibration. Dr. Clark examined neither the plaintiffs nor their coworkers; he relied on reports prepared by others. Neither witness tested the swager. A246-A247; A309-A314.

Dr. Cherniack testified that HAVS generally develops in accordance with a dose-response pattern: the incidence of disease rises gradually along with the length of use. Cherniack testified that he had conducted physical examinations of each plaintiff, and that although all had serious and painful physical problems resulting from many years of strenuous factory work, only Moyer and Kern showed symptoms of HAVS.

Plaintiffs' vocational expert, Dr. Daniel Rappucci, testified that each plaintiff (except Sechrist) would require retraining in a different field to sustain his current level of earnings, without which he would earn lower wages. Sechrist was

considered too old for retraining; Rappucci simply assumed he would take a pay cut. Consistent with Pennsylvania law, Rappucci's purely theoretical analysis disregarded the fact that Brush Wellman has continued to employ each plaintiff without reduction in pay. David Hopkins, plaintiffs' actuarial expert, translated Rappucci's conclusions into financial terms.

The district court denied Fenn's motions for JMOL and sent the case to the jury with a general verdict form. The jury awarded damages as follows: Moyer, \$2,450,000; Kern, \$2,800,000; Sechrist, \$1,600,000; Williams, \$3,400,000; and Weidner, \$2,700,000. This total of \$12,950,000 far exceeded the total of the *top* estimates offered by plaintiffs experts – \$7,154,504. Each man's wife was awarded \$100,000 for loss of consortium.

Fenn moved post-trial for judgment, new trial, or remittitur. While those motions were pending, plaintiffs sought "delay damages" pursuant to Rule 238 of the Pennsylvania Rules of Civil Procedure.³ On February 28, 2003, the court granted plaintiffs' motion. Although accepting that the delay was largely due to factors beyond Fenn's control, the court nevertheless awarded delay damages totaling \$3,242,566. However, judgment on the delay damages was not entered until July 30, 2004.

³ Rule 238 is discussed in greater detail at pages 52-57, *infra*.

SUMMARY OF ARGUMENT

1. Fenn's principal defense was that any dangerous condition associated with the swager was due to Brush Wellman's gross misuse and inadequate maintenance of the machine, which substantially increased the plaintiffs' vibration exposure. But Fenn could not mount that defense because evidence of the misuse and of the prior perfect safety record of Fenn swagers was excluded, a problem compounded by jury instructions under which liability required only a finding that plaintiffs' injuries could have been prevented by adding an automatic feed to the swager. Fenn was also precluded from demonstrating that, under the industrial guidelines for vibration exposure, the Fenn swagers, as designed, were not dangerous.

These rulings were erroneous and require at least a new trial. Moreover, when all of the relevant evidence is considered, it becomes clear that Fenn is entitled to judgment as to design defect, both because plaintiffs did not prove causation and because the highly useful quality of the product, the absence of other claims, and the infeasibility of plaintiffs' expensive alternative design tip the risk/utility calculus decisively against liability.

2. Fenn is likewise entitled to judgment on plaintiffs' failure-to-warn claim. Under Pennsylvania law, a manufacturer has no duty to warn of an unforeseeable risk. Plaintiffs produced no evidence that Fenn's swager would foreseeably

generate a dangerous level of vibration. By excluding most of the evidence bearing on this issue and refusing to instruct the jury about it, the court committed reversible error.

3. The claims of three of the plaintiffs – Moyer, Sechrist, and Kern – are barred by Pennsylvania’s two-year statute of limitations for personal-injury claims. Each man began experiencing symptoms more than two years before suit was filed, and none met his burden of proving that the “discovery rule” tolled the statute of limitations.

4. Liability aside, the damages awards – which totalled \$13.45 million for the five plaintiffs and their wives – are grossly excessive. Plaintiffs’ relatively mild injuries have not prevented them from continuing to work; indeed, even their own experts testified that the injuries are not serious and will not affect plaintiffs’ life expectancies. This Court should order a new damages trial or substantial remittitur.

5. Finally, the district court erred by awarding “delay damages” under a Pennsylvania statute that is inapplicable in federal court, and by awarding post-judgment interest from a date before judgment was entered.

ARGUMENT

I. PLAINTIFFS' DESIGN DEFECT CLAIMS CANNOT STAND.

A. Standards of Review.

The challenged evidentiary rulings and the denial of Fenn's proposed jury instructions rested on errors of law; review is therefore plenary. *United States v. Saada*, 212 F.3d 210, 220 (3d Cir. 2000); *Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 513 (3d Cir. 1997). The court's refusal to grant judgment to Fenn and its risk-utility analysis are likewise reviewed *de novo*. *United States v. Hickman*, 991 F.2d 1110, 1112 (3d Cir. 1993); *Surace v. Caterpillar, Inc.*, 111 F.3d 1039, 1042 (3d Cir. 1997).

B. The Trial Was Fundamentally Flawed: The District Court Excluded Crucial Evidence And Misinstructed The Jury.

1. Evidence of Mistreatment of the Swager

A plaintiff asserting design defect must establish that “the product was *sold* in a defective condition unreasonably dangerous to the user, and that the defect caused plaintiff's injury.” *Phillips v. A-Best Prods. Co.*, 665 A.2d 1167, 1171 (Pa. 1995) (citation omitted) (emphasis added). Accordingly, as discussed fully below, where a product becomes dangerous because of changes in condition occurring after it leaves the manufacturer's hands, there is no liability in negligence *or* strict liability. *Kuisis v. Baldwin-Lima-Hamilton Corp.*, 319 A.2d 914, 920-21 (Pa. 1974); RESTATEMENT (SECOND) OF TORTS § 402A cmt.g. Nor is a manufacturer

liable for injuries arising from misuse of its product. *Phillips v. Cricket Lighters*, 841 A.2d 1000, 1005 (Pa. 2003) (“*Cricket Lighters*”).

The district court precluded Fenn from introducing evidence of Brush Wellman’s mistreatment and misuse of the swager. That evidence bore directly on whether plaintiffs’ injuries resulted from Brush Wellman’s persistent misuse of the swager and not its condition when it left Fenn’s control.

David Graeff of Brush Wellman testified on deposition that the swager was neither properly maintained nor properly operated; at times, the machine was so overused that the dies became red-hot and emitted smoke. A1426. The dies and hammers were not properly cleaned and maintained. A1426-A1430. Moreover, although instructed to incorporate specially-sized components that were appropriate for each project, the operators simply used the same hammers and dies for all jobs, thereby increasing wear and tear on the machine. A1426-A1427. Graeff concluded that the operators “were overusing the swager.” A1339-A1340. He also knew that improper maintenance would cause increased vibration. A1431.

Walter Perun, Fenn’s manufacturing manager, confirmed Graeff’s account. “Components within the machine were quite worn. *** [T]he condition of the tooling was very pitted and chipped.” A1431. Instead of replacing worn-out parts, the operators inserted shims into the machine to keep it operational. When the swager was traded back to Fenn in 1996, Perun found that “what the operators

were using [as shims] were the identification tags from their coils and inserting these manila tags underneath the dies in order to try to compress the dies further to achieve a specific diameter that the machine or what they may require for their drawing application. *** I recall pulling the die out and the red manila tags coming out with it.” A1436; see also A1427 (Graeff).

Because of this abuse, the machine was in effect used not to form metal but to cut it – not the swager’s intended use. The metal chips thus produced accumulated inside the machine, causing its dies and hammers to lock. According to Perun, by 1996 “[t]he machine was very loaded with chips and it is not a chip cutting machine; it’s a swaging machine.” A1434. John Bryzgel, the vice president of Fenn’s machinery division, testified in deposition that because the machine was so “worn out” by 1996, Fenn had to completely replace (rather than rebuild) many of the machine’s main internal components, including “the hammers, the side plates, the dies, the thresh rings, the bearing and so forth.” A1330.

Brush Wellman not only failed to maintain the swager in safe condition but also misused it grievously. The machine was designed to swage solid metal with an outer diameter no greater than .625 inches. In direct contravention of the user’s manual and product literature provided by Fenn, Brush Wellman consistently used the swager to process oversized metal. A1337-A1338. This was confirmed by the

“Memorandum of Justification” prepared by Brush Wellman’s staff in support of their request for a new swager, which states: “[S]ome diameters of metal processed in Reading exceed the operational limits of the swager which may result in excessive vibration.” A1422-A1423. See also A1465-A1467 (Sherman).

The lack of maintenance and misuse substantially increased plaintiffs’ vibration exposure in two respects. First, improper maintenance greatly increases vibration. A651. When the parts of a tool are in balance, the tool runs smoothly. But when permitted to become worn, the parts fall out of balance and the tool vibrates more. A674-A677. Second, because plaintiffs used the machine to swage oversize coils, each coil had to be swaged multiple times and for an abnormally long period each time. See, *e.g.*, A115; A130; A1421-A1424. Likewise, the operators were forced to grip the oversized coils tightly and to use great force pushing them into the machine’s opening. Accordingly, the vibration absorbed by each plaintiff was many times what it would have been had the machine been used properly. See, *e.g.*, A1438.

Under FRE 401, evidence is ordinarily admissible if relevant, *i.e.*, if it has a tendency to make a disputed fact more or less probable. The excluded evidence far exceeded that “low threshold,” *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 784 (3d Cir. 1994). Even if the machine was dangerous when new – which it was not – the fact that it was much *more* dangerous as a result of poor maintenance and

misuse was highly relevant to the jury's task. The error was tremendously prejudicial: the rulings skewed the entire trial by giving the jury an inaccurate understanding of the circumstances under which plaintiffs allegedly were injured. The rulings also relieved plaintiffs of the burden of proving, as Pennsylvania law requires, that their injuries were caused by a defect inhering in the product when sold, rather than by subsequent changes in its condition.

2. Absence of Prior Claims

Fenn sought a pre-trial ruling allowing evidence of the absence of prior vibration-related claims, accidents, or lawsuits relating to the thousands of swagers it has sold since 1950. It proffered evidence that an exhaustive search of the relevant database and paper files revealed not a single claim or lawsuit alleging any vibration-related injury for any product produced by Fenn or United Dominion. A1313-A1315. Judge Tucker excluded the proffered evidence.

In *Spino v. John S. Tilley Ladder Co.*, 696 A.2d 1169, 1172 (Pa. 1997), however, the Pennsylvania Supreme Court stated that the absence of prior accidents similar to the plaintiff's is admissible in strict-liability design defect litigation. The court reasoned that "there is little logic in allowing the admission of evidence of prior similar accidents but never admitting their absence." *Id.*, 1174. Such evidence "tends to disprove causation and is both probative and relevant as to whether the product as designed was unreasonably dangerous." *Id.*, 1173.

Accordingly, if the manufacturer can show that “others were using a product similar to that which caused plaintiff’s injury” and that it likely “would have known about [any] prior, substantially similar accidents involving the product,” evidence of lack of prior claims is admissible. *Ibid.* See also, *e.g.*, *Harley v. Makita USA, Inc.*, 1998 WL 156973, at *7 (E.D. Pa. 1998). Fenn satisfied both of those foundational requirements.

First, Fenn certainly “would have known about [any] prior, substantially similar accidents involving the product.” Plaintiffs conducted a pretrial examination of M. Kathleen DeLoache, United Dominion’s litigation paralegal since 1989. DeLoache’s duties include the maintenance of claim/lawsuit records. She testified that since the mid-1980s, United Dominion’s legal department has maintained a computerized database of all claims and lawsuits filed against the company or any of its subsidiaries or divisions⁴; it also retains paper files of claims/lawsuits for seven years. Significant documents, including settlements and releases, are kept permanently. A1313-A1315. This is precisely the type of evidence described approvingly in *Spino*. See 696 A.2d at 1171-73 (defendant “maintained a chronological log of reported claims”).

⁴ Under company policy, United Dominion divisions forward all claims and lawsuits to United Dominion’s legal department. Fenn complied with that policy. A1328-A1329.

Fenn also established that “others were using a product similar to that which caused plaintiff’s injury.” Of the thousands of Fenn swagers that have been produced since 1948, over 95% were sold without automatic feeds. A534; A550. Accordingly, literally tens of thousands of other workers have used a product similar to the machine that allegedly caused plaintiffs’ injuries. Against this background, Fenn was entitled under *Spino* to inform the jury that there have been no other claims that anyone – including those using improperly maintained machines – developed a vibration-related injury from a Fenn swager.

This evidence was relevant to several hotly disputed issues. Plaintiffs’ design defect claim necessarily asserted that all Fenn swagers lacking an automatic feed are equally dangerous. *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 79 (3d Cir. 1994). Were that so, one would expect to see many claims of swaging-related injury – yet there have been none. That circumstance supports Fenn’s contentions (i) that plaintiffs were not injured as a result of using the swager, but rather from other aspects of their factory jobs, and (ii) that any swager-induced injury was due to the misuse and poor maintenance. The no-claims evidence also bore on whether the swager was “unreasonably dangerous” when it left Fenn’s control -- an indispensable element of a product liability claim under Section 402A, which Pennsylvania has adopted. *Webb v. Zern*, 220 A.2d 853 (Pa. 1966).

3. Scientific Guidelines for Vibration Exposure

The American National Standards Institute (“ANSI”) has issued guidelines “for the measurement and evaluation of human exposure to vibration transmitted to the hand.” A1377-A1399. The International Standard Organization (“ISO”) has issued comparable guidelines. A1400-A1413. Judge Tucker granted plaintiffs’ motion to exclude the guidelines from evidence on the ground that industry standards are relevant only to negligence claims. A406-A407. But Fenn did not seek to avoid liability because it complied with a standard. Rather, it proffered the guidelines to refute plaintiffs’ theory of causation: if a swager, as manufactured, emits minimal amounts of vibration, it is unlikely to cause HAVS.

Exclusion of the standards evidence greatly hampered Fenn’s case. Dr. Cherniack planned to testify to the universally accepted methodology for evaluating cyclic vibration, which involves measuring the vibration and comparing it to the industry guidelines. He would have explained that, based upon those standards, it was unlikely that plaintiffs’ injuries resulted from swager use: there is little to no data demonstrating that injury can result from short exposures to vibration. This testimony was excluded. A654-A658.

The same conceptual error hampered Fenn’s ability to place the testimony of *plaintiffs’* expert witnesses in context. Dr. Jaeger, for example, testified about the amounts of vibration generated by a swager, but Fenn was not permitted to elicit

his admission that, as far as the scientific community knows, that vibration level is not dangerous – especially in light of the short exposure times involved. Without that context, Jaeger’s testimony was highly misleading. A404-A407.

The district court also admitted, over objection (A179-A190), a short, misleading and prejudicial snippet of deposition testimony from plaintiffs’ ergonomist, Carol Stuart-Buttle, stating that the swager produced high vibration without an automatic feed. But Stuart-Buttle’s full deposition made clear that (i) the industry guidelines would not predict that a properly maintained Fenn swager would cause injury; (ii) her opinion that the swager required an automatic feed was based primarily on the complaints of the bull-block operators; and (iii) without the operators’ injuries, “I would not have been able to justify [an automatic feed] from a vibration standpoint [because of the] low dosage.” A942.

4. The Prejudice from the Erroneous Evidentiary Rulings Was Compounded by Instructional Error

In addressing Fenn’s post-trial motions, Judge Tucker did not defend the correctness of the challenged evidentiary rulings. She held merely that those rulings had not been prejudicial, because “there was [some] testimony that was placed before the jury in regard to Brush Wellman’s maintenance of the swager and the changes in the machine,” A16-A17, and defense counsel had referred to the lack of prior claims during closing argument. A19. But the fact that Fenn succeeded in squeezing in *some* evidence and *some* argument on these matters did

not begin to erase the prejudice from the court's categorical rulings on the motions *in limine*, which eviscerated Fenn's principal defense. This is not a case in which the challenged ruling had little practical effect: at every turn, the court sustained plaintiffs' objections to Fenn's attempts to introduce evidence about Brush Wellman's mistreatment of the swager. A524-A530; A762.

In closing, moreover, defense counsel was unable to argue that, if the swager was dangerous at all, that was only because of its changed condition. A793-A795. Accordingly, counsel was reduced to making a vague, unpersuasive argument that the machine became dangerous in the mid-1990s due to some mysterious, unspecified event. A803-A804. Plaintiffs' counsel nimbly capitalized on the situation, arguing that if the machine was not operating as designed, Fenn must have withheld crucial safety information from Brush Wellman: "What was it about that machine that was dangerous? Let [Fenn's counsel] answer that question. He wants to say it wasn't operating as designed. In your mind ask him, 'Well, why not? What should you have been telling them?'" A802. Fenn's counsel, hamstrung by the court's erroneous rulings, could not refute the false implication.

An evidentiary error necessitates reversal unless this Court is "convinced that there is a high probability that the error did not prejudice [the aggrieved party's] substantive rights." *Habecker v. Clark Equip. Co.*, 942 F.2d 210, 216 (3d

Cir. 1991). This Court should “make an assessment of the likelihood that the error affected the outcome of the case” and reverse unless it can “say, with fair assurance, that the judgment was not substantially swayed by the error.” *Malek v. Federal Ins. Co.*, 994 F.2d 49, 54 (3d Cir. 1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)). If Judge Tucker erred in her across-the-board theory that evidence of intervening abuse of the machine, or lack of foreseeability of the harm, belonged only in a negligence case, common sense forecloses any suggestion that the resulting rulings had less than a huge impact on the trial’s outcome.

The prejudice is confirmed by the corresponding error in the jury instructions – error that negated Fenn’s entire defense. Specifically, the court instructed, in language as confusing as it was erroneous:

The manufacturer of a product is the guarantor of its safety. However, the manufacturer is not an insurer for all injuries which may occur. The product must, therefore, be provided with every element necessary to make it safe for use and without any condition that makes it unsafe for its use.

If you find that the product at the time that it left the defendant’s control lacked any element necessary to make it safe for use, or contained any condition that made it unsafe for use, then the product was defective and the defendant is liable for all harm caused by such a defect. ***

In order for the plaintiffs to recover in this case, the defendant’s product must have been a legal cause of harm. The defendant’s defective product is the legal cause of harm whenever it appears that

the defendant's product was a substantial factor in bringing about the harm.

A815-A817.

Thus, if the jury found (i) that the swager was sold without an automatic feed (undisputed); (ii) that the addition of an automatic feed would have made it "safe for use" by reducing plaintiffs' exposure to vibration (also undisputed); and (iii) that plaintiffs' use of the feed-less swager was a "substantial factor" in producing their injuries, the jury had to find for plaintiffs – regardless of whether the swager would have caused plaintiffs' injuries had it not been abused, overused, and ill-maintained by Brush Wellman.

Fenn objected to this instruction (A795-A801) and asked the court instead to instruct that the defendant was "not liable for the defective conditions created by substantial changes in the product occurring after the product has been sold." A1267; A795.⁵ This request was refused, as were requests to instruct (i) that "[a] product is not in a defective condition when it is safe for normal handling and use" (A1269); (ii) that "[m]anufacturers are not responsible for injuries that are due to defects resulting from normal wear and tear" (A1282); or (iii) that "[e]vidence that a machine has not been properly maintained may insulate a manufacturer or seller

⁵ Plaintiffs argued that "substantial change isn't in the case because nobody ever produced any evidence that substantial change was a causative factor." A794. That, of course, was solely because of the erroneous evidentiary rulings discussed above.

from liability for injuries resulting from use of the product” (A1284). All of those proposed instructions were supported by the law. See Point I.C *infra*.

In federal court, “[a] party is entitled to a jury instruction that accurately and fairly sets forth the current status of the law.” *Douglas v. Owens*, 50 F.3d 1226, 1233 (3d Cir. 1995).⁶ See also, *e.g.*, *Posttape Assocs. v. Eastman Kodak Co.*, 537 F.2d 751, 757 (3d Cir. 1976); 9A Wright & Miller, *FED. PRAC. & PROC. CIV.* 2d § 2552 (1995). “[R]efusal of a defendant’s[] proffered instruction is reversible if the instruction is a correct statement of the law, not otherwise covered in the court’s charge, and if the failure to give the instruction substantially impairs the defendant’s defense.” *United States v. Ford*, 184 F.3d 566, 579 (6th Cir. 1999) (citations omitted). The district court’s refusal to give the instructions requested by Fenn both flowed from and compounded the effect of its erroneous evidentiary rulings. A new trial is the only adequate remedy.

⁶ Questions regarding the extent to which the jury must be advised of applicable substantive rules are procedural and are therefore governed, in federal court, by federal law. See *Hisrich v. Volvo Cars of N. Am., Inc.*, 226 F.3d 445, 449 (6th Cir. 2000). But Pennsylvania courts too recognize that the jury should be instructed that, for example, a manufacturer is not liable for accidents or injuries caused by substantial alterations taking place after sale. *Thompson v. Motch & Merryweather Machinery Co.*, 516 A.2d 1226, 1229 (Pa. Super. 1986).

C. Consideration Of All Relevant Evidence Compels Judgment For Fenn On Plaintiffs' Design Defect Claim.

We further submit that Fenn should receive judgment on plaintiffs' design defect theory. Plaintiffs contended that Brush Wellman's abuse did not cause their injuries and that, in any event, the abuse was foreseeable and therefore could not bar recovery even if it was the cause. As we now show, (1) no reasonable factfinder could conclude that plaintiffs' injuries would have occurred without the misuse and improper maintenance; (2) even if those factors were reasonably foreseeable to Fenn, that cannot rescue plaintiffs' claim; and (3) such misuse and lack of maintenance were not in fact foreseeable.

1. Mistreatment of the Swager Caused Plaintiffs' Alleged Injuries

When all the evidence is considered, it becomes clear that any excessive vibration was because the machine was misused and badly maintained – not because it was defectively designed due to the omission of an automatic feed. Accordingly – unless purchaser misuse created a foreseeable risk of vibration-related injury (but see pp. 33-34 *infra*), and Fenn was under a duty to provide a product that would withstand such misuse (but see pp. 28-33, *infra*) – Fenn is entitled to judgment on plaintiffs' design defect claim.⁷

⁷ All of the pertinent evidence, and whatever plaintiffs could muster in opposition, was before the court in connection with Fenn's opposition to plaintiffs' motion to exclude the maintenance/misuse evidence. At the close of plaintiffs' case, Fenn specifically requested that the district court reconsider its grant of that

The automatic feed, which would have added more than \$9,000 to the cost of a \$24,600 machine (Ex.D25), was not designed as a safety feature. It is a processing method, used to swage pieces too short to be hand-held. A551. Fewer than 5 percent of Fenn swagers are ordered with automatic feeds. Moreover, swagers that are to be used for pointing wire – the application for which Brush Wellman purchased its machine – generally lack automatic feeds. *Ibid.* Accordingly, there are thousands of feed-less swagers being operated in factories around the world – and no claims of vibration injury. Significantly, the occupational hazard literature is replete with reports of vibration-related injuries from *other* kinds of tools, as plaintiffs’ expert acknowledged. A238-A242. If swaging without an automatic feed were inherently risky, surely Fenn would have heard about it.

Moreover, the fact that four of the plaintiffs manifested symptoms within a short period strongly suggests that any dangerous characteristics of the swager

motion and consider the evidence in ruling on Fenn’s motion for judgment under Rule 50(a). A518-26. The court refused. A530 (“The court will continue [to] not permit evidence of lack of maintenance or misuse to be admitted in this matter.”) Most of Fenn’s evidence on these matters was excluded at trial, though it was part of the record. In such circumstances, it makes sense for the appellate court to pass upon the JMOL question based on all relevant evidence. See, e.g., *In re Rockefeller Ctr. Props., Inc. Sec. Litig.*, 184 F.3d 280, 289 (3d Cir. 1999) (court of appeals can decide motion to dismiss even after it has been converted into motion for summary judgment); *Fabric v. Provident Life & Accident Ins. Co.*, 115 F.3d 908, 914-15 (11th Cir. 1997); *Shaw v. FBI*, 749 F.2d 58, 63 (D.C. Cir. 1984); 10 Wright & Miller, FEDERAL PRACTICE & PROCEDURE CIV. 3D § 2716 (1998).

were due to Brush Wellman's actions, not the machine's design. The latency period of HAVS is short: it takes approximately six to eight months for someone susceptible to HAVS and using a machine that emits excessive vibration to develop symptoms. A1003. Had the Fenn swager been unreasonably dangerous when it was purchased by Brush Wellman in 1983, one would expect to see vibration-related injuries by the mid-1980s. The record shows the opposite: despite having started in the bull block at different times, all of the plaintiffs (except Sechrist) claim they developed HAVS between late 1994 and early 1996. A267. The logical inference is that misuse of the swager caused a substantial change in its condition at that time, and that it was the change in condition that triggered plaintiffs' injuries. A680-A681.

As discussed above, a design defect claimant must show that the product was unreasonably dangerous *when it left the defendant's control*. *Berkebile v. Brantly Helicopter Corp.*, 337 A.2d 893, 898 (Pa. 1975). "The seller is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful *** ." RESTATEMENT (SECOND) OF TORTS, § 402A, cmt. g. Accordingly, "a manufacturer is entitled to summary judgment when a seller's safe product is made unsafe by subsequent changes." *Myers v. Triad Controls, Inc.*, 720 A.2d 134, 135 (Pa. Super. 1998). Likewise, a manufacturer is not liable for injuries resulting from the plaintiff's misuse of its product. *Cricket*

Lighters, 841 A.2d at 1005. Brush Wellman’s lack of maintenance rendered the swager a wholly different product from the one that left Fenn’s hands, a problem exacerbated by use of the swager to point oversized coils. No reasonable jury could conclude that plaintiffs would have incurred the same injuries even without those factors, which substantially increased their vibration exposure – and Fenn offered a great deal of evidence demonstrating that a new or properly treated swager is a safe product.

2. Fenn is not Liable Even if the Changed Condition or Misuse of The Swager was Foreseeable

Plaintiffs argued below that swager misuse and poor maintenance were foreseeable, and that there is liability even if a properly used and maintained swager would not have caused their injuries. This argument relies primarily on *Parks v. AlliedSignal, Inc.*, 113 F.3d 1327 (3d Cir. 1997), which held that in a strict liability design defect case, “if an intervening *but foreseeable* action is responsible for the major share of a strict products liability injury, that action cannot ordinarily be held to be the legal cause of the injury.” *Id.*, 1334 (emphasis added). The district court accepted plaintiffs’ argument: “it was reasonably foreseeable to Defendant that one of its customers would not properly maintain the swager; would not properly change the dies; and would try to swage an over-size coil. *** Defendant may not simply ignore hazards associated with failing to properly maintain the swager because the Defendant gave the customer a manual

on maintenance.” A22-A23 n.9 (citing *Parks*). That analysis misconstrues Pennsylvania law, in several respects.

First, it is doubtful that *Parks* correctly states current Pennsylvania law. In *Cricket Lighters*, the Pennsylvania Supreme Court barred recovery in strict liability for injuries resulting from misuse of a product, regardless of foreseeability. It stated that Cricket was not liable for failing to place a child safety device on a cigarette lighter, even if “it was reasonably foreseeable that a small child may play with a butane lighter, and that grievous damages could result.” 841 A.2d at 1006-1007. The court reasoned that “strict liability affords no latitude for the utilization of foreseeability concepts such as those proposed by [the plaintiff].” *Id.* at 1006.

Cricket Lighters also sharply criticized *Davis v. Berwind Corp.*, 690 A.2d 186 (Pa. 1997), where the court had ruled that a manufacturer could be liable for injuries arising from substantial changes to a product (there, removal of a safety device from a blender) if those changes were foreseeable. 841 A.2d at 1007. See also *Brantner v. Black & Decker Mfg. Co.*, 831 F. Supp. 454, 459-60 (W.D. Pa. 1993) (“The manufacturer is not *** strictly liable for alterations which, although not intended, are simply foreseeable. To reach any other conclusion would not only disregard the Pennsylvania Supreme Court’s definition of Pennsylvania law, but also launch this court on the trackless and boundless task of imposing freakish and uncontrollable liability on manufacturers.”).

In any event, *Parks* is distinguishable. Long before *Cricket Lighters*, the Pennsylvania Supreme Court made clear that foreseeability of misuse or wear and tear is irrelevant in cases like this one, where plaintiffs do not allege a specific defect in the product when sold, but merely claim that the product must have been defective because it caused them injury. In *Kuisis*, the plaintiff was injured by steel pipe that fell on him when the brake-locking mechanism on a crane became disengaged. He did not identify any specific defect in the brake; instead, he argued by inference that it would not have malfunctioned but for some defect. 319 A.2d. at 919-20. Because the crane had been sold to the plaintiff's employer 20 years earlier and had undergone substantial changes in the interim, however, the court found the plaintiff's claim too speculative as a matter of law:

If there were direct evidence of a specific defect in the locking device present at the time the crane was delivered, we think the enumerated changes would have relevance to the issue of [the manufacturer's] liability only if, individually or in combination, they amounted to a superseding cause of plaintiff's injuries. But we deal here with antecedent rather than superseding causes; *the question is not whether substantial changes in the crane superseded a pre-existent defect as the proximate cause of Kuisis's injuries, but whether the changes were themselves the cause of the defect.* ***

On the evidence here presented, then, the question is whether a jury could reasonably draw the inference that the brake locking mechanism was defective when the crane was delivered to [the employer]. We think that any such conclusion would be no more than a guess. Section 402A does not make manufacturers and sellers insurers of their products. *They are not liable for defects caused by normal wear-and-tear or misuse of a product by its purchaser, however foreseeable these events may be.*

Id.,922 (citations omitted) (emphases added).⁸

Here, as in *Kuisis*, plaintiffs have not pointed to a particular defect that they allege caused the swager to generate an unreasonably dangerous level of vibration. Rather, they contend that the swager must have been defective in some respect when it was delivered to Brush Wellman. Instead of testing the swager and identifying a problem inherent in its design, plaintiffs' expert witnesses – Dr. Jaeger, Dr. Clark, and Ms. Stuart-Buttle – worked backward: they diagnosed plaintiffs with HAVS, and surmised, *post hoc ergo propter hoc*, that if the swager caused plaintiffs to develop HAVS it must have been designed in a manner that generated excessive vibration. See pp. 8-9,20 *supra*.

This is precisely what *Kuisis* forbids. Brush Wellman ordered the swager from Fenn in 1983 and operated it without incident until these plaintiffs reported symptoms in the mid-1990s – a decade later. A268-A269. By then, the machine was in terrible condition as a result of misuse and lack of maintenance, and it was

⁸ See also, *e.g.*, *Hamilton v. Emerson Elec. Co.*, 133 F. Supp.2d 360, 377 (M.D. Pa. 2001) (“lapse of time and continued successful use of the product are automatically fatal evidence of normal wear and tear,” requiring judgment in favor of manufacturer); *Roselli v. General Elec. Co.*, 599 A.2d 685, 689 (Pa. Super. 1991) (defendant was entitled to judgment because plaintiff had “failed to eliminate the realistic possibility the [product] broke because of its use and handling prior to the date of the incident”); *Woelfel v. Murphy Ford Co.*, 487 A.2d 23, 24 (Pa. Super. 1985) (manufacturer entitled to judgment on manufacturing defect claim, where tire had been used safely for 37,000 miles before accident); *Burch v. Sears, Roebuck & Co.*, 467 A.2d 615, 620 (Pa. Super. 1983) (“secondary causes, such as wear, tear, and deterioration may be found to have negated the causal link between the original condition of the product and the accident”).

no longer operating as designed. Particularly in light of the swager's otherwise-perfect safety record, any conclusion that plaintiffs' injuries were caused by the swager itself – rather than by “wear-and-tear or misuse of [the] product by its purchaser,” would be “no more than a guess.” *Kuisis*, 319 A.2d at 922.

In sum, Pennsylvania law bars recovery against Fenn for injuries caused by the misuse of and failure to maintain the swager. Under *Cricket Lighters*, Fenn is not liable for injuries caused by Brush Wellman's abuse and misuse of the swager, which certainly were not within Fenn's intention. Accordingly, those factors preclude liability even if Fenn could have supposed that some users would so severely mistreat its product.

Although it was Brush Wellman, not Fenn, that allowed the swager to fall into such a state of disrepair, Pennsylvania's worker's compensation law prohibits holding Brush Wellman liable for the consequences of its improper actions. In *Davis v. Berwind Corp.*, 640 A.2d 1289 (Pa. Super.), aff'd, 690 A.2d 186 (1997), disapproved on other grounds, *Cricket Lighters*, 841 A.2d at 1067, the Pennsylvania Superior Court discussed the policy reasons why Pennsylvania is loath to shift responsibility from the employer to the manufacturer when the employer is primarily at fault:

[I]n many workplace injuries it is the employer, not the manufacturer, that is the culpable party. Workers' compensation laws, however,

frequently leave the manufacturer as the sole defendant. See 77 P.S. § 72. In our judgment, sending a case of this type to the jury prompts the jury to engage in what has been described as redesigning the product in a negative/hindsight fashion and tailoring the defect to the specific facts of the case. *** Where a deep pocket manufacturer or seller is the only defendant, a jury verdict will likely favor the injured plaintiff. As a result, the limitations on manufacturer liability provided in section 402A are rendered ineffectual, and the path is cleared for absolute liability.

Davis, 640 A.2d at 1299 (citations omitted) (emphasis added). That is precisely what happened here. Brush Wellman's abuse of the swager was the cause of any swaging-related injuries, yet it is the manufacturer, not Brush Wellman, that is left on the hook for millions in damages.

3. Brush Wellman's Misuse and Lack of Maintenance Were Not Foreseeable

In any event, plaintiffs did not prove that Brush Wellman's misuse and failure to maintain the swager were foreseeable. The absence of other vibration-related swaging injuries demonstrates that plaintiffs' injuries would not have occurred but for the peculiar confluence of misuse and lack of maintenance at Brush Wellman. Perhaps Fenn could have predicted that some purchasers would not faithfully follow its user's manual, but the record affords no basis for concluding that the truly extraordinary abuse this swager suffered was foreseeable.

Moreover, for the conditions at Brush Wellman to have been foreseeable, they would have to resemble what Fenn knew about use of its swagers elsewhere. But if they were, and if swaging under those conditions indeed causes HAVS, there

should have been many other complaints of vibration-related disease. The total absence of such complaints impales plaintiffs on the horns of a dilemma: either the grievous conditions at Brush Wellman were atypical and not foreseeable, or plaintiffs' alleged injuries were not caused by the swager. In either case, Fenn is entitled to judgment on the record before the Court.

D. The Fenn Swager Was Not Unreasonably Dangerous.

Because strict liability does not render a manufacturer an insurer of its product, a design defect claim requires the plaintiff to prove that the product was unreasonably dangerous for its intended use. *Azzarello v. Black Bros.*, 391 A.2d 1020, 1026 (Pa. 1978); RESTATEMENT (THIRD) OF TORTS, Reporter's Note II.A (discussing Pennsylvania law). "The finding of a defect requires a balancing of the utility of the product against the seriousness and likelihood of the injury and the availability of precautions that, though not foolproof, might prevent the injury." *Burch*, 467 A.2d at 618.

Here, the evidence adduced before and during trial showed that, as a matter of law, the Fenn swager is not unreasonably dangerous. Each of the factors in the risk/utility analysis applied by Pennsylvania courts, see *Dambacher by Dambacher v. Mallis*, 485 A.2d 408, 423 n.5 (Pa. Super. 1984), supports judgment for Fenn.

The usefulness and desirability of the product – its utility to the user and to the public as a whole. Swagers are utilized in nearly every industrial process, from the construction of aluminum baseball bats to the construction

of a steel tower. Many such processes would be difficult or impossible without swaging.

The safety aspects of the product – the likelihood that it will cause injury and the probable seriousness of the injury. Given that, these are the *first* and *only* claims of swaging-induced vibratory injury, the likelihood that a Fenn swager will cause injury is extremely low. As for gravity of injury: none of the plaintiffs is dead, maimed, or incapacitated, and each continues to be employed by Brush Wellman.

The availability of a substitute product which would meet the same need and not be unsafe. All swagers – indeed, all machines – generate some level of vibration. No substitute product could serve the same purpose without generating vibration.

The manufacturer’s ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility. Even positing that the swager could properly be described as “unsafe,” the automatic feed device that plaintiffs claim would render the machine “safe” would also make it too expensive, increasing its cost by over 35%. Ex.D25. Moreover, automatic feeding is not feasible for all uses and is functionally valuable only for certain limited applications. Fenn offers it as an optional “extra,” but only five percent of purchasers buy it. A550.

The user’s ability to avoid danger by exercise of care in using the product. The complete absence of other swaging-related vibration injury claims leads inexorably to the conclusion that, absent the peculiar combination of misuse and bad maintenance that characterized Brush Wellman’s operations, these plaintiffs would not have been injured.

The user’s anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge or the obvious condition of the product or the existence of suitable warnings or instructions. Fenn supplies a manual with its swagers that explains the machine’s capacity and gives maintenance instructions. Had Brush Wellman complied, its employees would not have been injured.

The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance. Any future

loss can be “spread” only by adding unreasonably to the cost of the equipment.

Thus, plaintiffs failed to meet their burden of proving that the Fenn swager is an unreasonably dangerous product. A manufacturer should not be liable for idiosyncratic injuries allegedly caused by a machine that is highly useful, that has never before caused injury despite widespread use over many decades, and that does not cause injury unless it is grievously abused and misused. Such a machine is not “defective” merely because an unfeasibly expensive feature might have rendered it marginally safer. See *Habecker*, 942 at 215; *Fitzpatrick v. Madonna*, 623 A.2d 322, 327 (Pa. Super. 1993). The liability imposed on Fenn in this case is not strict liability; it is absolute liability, which the courts of Pennsylvania have rejected.

II. FENN IS ENTITLED TO JUDGMENT ON PLAINTIFFS’ FAILURE-TO-WARN CLAIM.

Plaintiffs’ failure-to-warn claim suffers from several fatal weaknesses. First, in strict liability as in negligence, there is no duty to warn of unknown, and not reasonably knowable, risks. When plaintiffs were using the Fenn swager, there was no indication that swager vibration could cause HAVS. Accordingly, Fenn had no duty to warn. Second, even putting aside the question of foreseeability, plaintiffs failed to demonstrate that Fenn’s swager is unreasonably dangerous

without a warning. The district court should have entered judgment for Fenn on the failure-to-warn claim.

A. Standards of Review.

The district court's determination that foreseeability of the risk was irrelevant as a matter of law, and its resulting evidentiary rulings and jury instructions, are reviewed *de novo*. *Hickman*, 991 F.2d at 1112; *Saada*, 212 F.3d at 220.

B. Fenn Neither Knew Nor Should Have Known That Swaging Could Cause HAVS, And Therefore Had No Duty To Warn Of That Risk.

1. Under Pennsylvania Law, There is no Duty to Warn of an Unforeseeable Risk.

Under Pennsylvania law, as elsewhere, “[t]he liability arising from inadequate warnings is not ‘strict’ in the same sense as liability arising from a defect due to fault in manufacture, since a determination of whether an object is unreasonably dangerous without adequate warnings, and thus defective, necessarily involves negligence principles such as reasonableness and foreseeability.” *Ellis v. Chicago Bridge & Iron Co.*, 545 A.2d 906, 912-13 (Pa. Super. 1988). Accordingly, as this Court has observed, when the danger posed by a product is not “reasonably foreseeable,” the product’s manufacturer is not liable for failing to warn of that danger; rather, the “inquiry into the duty to warn revolves around whether the supplier knew, or should have known, of the danger

***.” *Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107, 120 (3d Cir. 1992) (citations omitted). See also, e.g., *1836 Callowhill St. v. Johnson Controls, Inc.*, 819 F. Supp. 460, 464 (E.D. Pa. 1993) (“[i]n a strict products liability case, a duty to warn adheres where the manufacturer has ‘knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger’”) (quoting RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (regarding strict liability)); *Colegrove v. Cameron Machine Co.*, 172 F. Supp.2d 611, 626 (W.D. Pa. 2001). Thus, the plaintiff must show that the risk was foreseeable to the defendant and its peers. *1836 Callowhill St.*, 819 F. Supp. at 464. See also *Hahn v. Richter*, 673 A.2d 888, 890 (Pa. 1996); *Petrucelli v. Bohringer and Ratzinger*, 46 F.3d 1298, 1309 (3d Cir. 1995).

The district court refused to consider foreseeability of risk, invoking the general principle that “negligence concepts have no place in a case based on strict liability.” A32 (quoting *Cricket Lighters*, 841 A.2d at 1006). But Pennsylvania law excepts warning claims from that general principle. In *Colegrove, supra*, the court surveyed Pennsylvania failure-to-warn law, and, while finding it somewhat “impenetrable,” concluded that “[e]mphasizing the foreseeability analysis in these cases makes the most sense out of the nebulous jurisprudence in this area.” 172 F. Supp.2d at 627. The court explained:

The liability arising from inadequate warnings is not ‘strict’ in the same sense as liability arising from a defect due to fault in

manufacturing, since a determination of whether an object is unreasonably dangerous without adequate warnings, and thus defective, necessarily involves negligence principles such as reasonableness and foreseeability.

Id., 628 (quoting *Ellis*, 545 A.2d at 912-13). This prevailing interpretation of Pennsylvania failure-to-warn law has never been rejected by the Pennsylvania Supreme Court, including in *Cricket Lighters* (a design defect case in which the court ruled for the manufacturer), which nowhere suggests that foreseeability of the risk is irrelevant to duty to warn.⁹

Pennsylvania is hardly alone in this respect. To the contrary: “an ***overwhelming majority*** of jurisdictions supports the proposition that a manufacturer has a duty to warn only of risks that were known or should have been known by a reasonable person.” RESTATEMENT (THIRD) OF TORTS, § 2(c) cmt. m (emphasis added) (collecting cases).

⁹ This approach is consistent with the RESTATEMENT (THIRD) OF TORTS, under which the “plaintiff should bear the burden of establishing that the risk in question was known or should have been known to the relevant manufacturing community * * *. Unforeseeable risks arising from foreseeable product use * * * by definition cannot specifically be warned against.” § 2(c) cmt. m. The Pennsylvania Supreme Court has not yet had occasion to decide whether to adopt the RESTATEMENT (THIRD); the appellants in *Cricket Lighters* waived the argument. 841 A.2d at 1008 n.6. However, in his concurring opinion Justice Saylor stated that “adoption of the [Third] Restatement’s closely reasoned and balanced approach * * * represents the clearest path to reconciling the difficulties persisting in Pennsylvania law * * *.” *Id.*, 1021. This Court may fairly anticipate that this will come to pass.

2. Fenn Could Not Reasonably Foresee That Swager Use Would Cause HAVS.

In light of the total absence of prior claims alleging vibration-related injuries from swager use, plaintiffs utterly failed to meet their burden of proving that the risk of HAVS was foreseeable. Indeed, Dr. Clark, plaintiffs' expert, acknowledged that, prior to this case, even he had never heard of "a claimed association between the swaging machine and HAVS." A256. He further admitted that some level of exposure to vibration is perfectly safe, and that he could not quantify "excessive" vibration. A263-A265. Dr. Cherniack agreed. A653-A654.

Further, a search of the world literature reveals only *one* report drawing a connection between swaging and HAVS: a few pages in a thinly distributed book entitled *Vibration White Finger In Industry*, which identified *one* individual who may have developed vibration white-finger from using a swager (not manufactured by Fenn) in a factory in Liverpool, England in the mid-1970s.¹⁰ A1001-A1002. A single report describing a single afflicted individual is clearly insufficient to give rise to a duty to warn, which arises only when the manufacturer knows or should know that the product presents a risk of harm to "a substantial number of the population." RESTATEMENT (SECOND) OF TORTS § 402A cmt. j.

¹⁰ The book noted that the working conditions at that plant were highly unusual, and that the study was not of a sufficient size to be scientifically probative evidence of anything: "It is not suggested that the equivalent industrial processes in other parts of the U.K. are equally hazardous." A1005.

In *Morris v. Pathmark Corp.*, 592 A.2d 331 (Pa. Super. 1991), the court affirmed a directed verdict for a manufacturer on a duty to warn claim upon finding that the plaintiff, who had an allergic reaction to the defendant's hair-straightening product, had failed to show that her reaction was sufficiently common that the defendant reasonably could have anticipated it:

There was no evidence *** that the product had been unsafe or likely to cause harm to a normal consumer. There also was no evidence that the product had contained an ingredient to which a significant number of persons were allergic. In the absence of such evidence, the manufacturer cannot be held to have known of the risk of an isolated and unusual allergic reaction by one such as appellant. It cannot be held liable for failing to warn users of the risk, where the allergic reaction could not reasonably have been foreseen.

Id., 334 (citing RESTATEMENT (SECOND) OF TORTS § 402a cmt. j).¹¹

Here, analogously, plaintiffs' alleged injuries are virtually unique in the history of swager use. If plaintiffs did develop vibration-related injuries from the Fenn swager, those injuries are (i) the result of Brush Wellman's failure to maintain the machine and (ii) so rare as to be idiosyncratic, and certainly not reasonably foreseeable. Plaintiffs' failure-to-warn claim is therefore not viable.

¹¹ This longstanding principle is of wide adherence. See, e.g., *Kaempfe v. Lehn & Fink Prods. Corp.*, 21 A.D. 2d 197, 249 N.Y.S. 2d 840 (1964); *Thomas v. Amway Corp.*, 488 A.2d 716 (R.I. 1985); *Presbrey v. Gillette Co.*, 435 N.E.2d 513 (Ill. App. Ct. 1982); *Mountain v. Procter & Gamble*, 312 F. Supp. 534 (E.D. Wis. 1970); *Tayar v. Roux Labs., Inc.*, 460 F.2d 494 (10th Cir. 1972); *Grau v. Procter & Gamble Co.*, 324 F.2d 309 (5th Cir. 1963); *Merrill v. Beaute Vues Corp.*, 235 F.2d 893 (10th Cir. 1956).

C. At A Minimum, Fenn Is Entitled To A New Trial On Plaintiffs' Warning Claim.

Because the Court believed that evidence of foreseeability of risk was irrelevant, it excluded much other factual evidence bearing on this issue. As discussed at pp. 19-20 *supra*, evidence about the state of scientific knowledge regarding vibration exposure was excluded. In particular, the court prohibited defense expert Cherniack from testifying that, based on the ANSI and ISO standards and the body of available scientific data, plaintiffs' injuries were entirely unforeseeable because there is little to no data suggesting that short exposures to vibration, such as those associated with swaging, are dangerous. A654-A656. If permitted adequate leeway on cross-examination, Fenn could have elicited similar testimony from plaintiffs' experts. A404-A407; A179-A190.

The jury instructions, too, reflected the court's erroneous view of the law. Fenn was entitled to its requested jury charges that a duty to warn adheres only where the risk is reasonably foreseeable; that there is no duty to warn of an unforeseeable danger; and that the plaintiff bears the burden of proving that the risk in question was or should have been known to the relevant manufacturing community. A814-A818.

As a result of these errors, Fenn is – at a minimum – entitled to a new trial.

III. THREE PLAINTIFFS' CLAIMS ARE TIME-BARRED.

A. Standard of Review.

A district court's application of a statute of limitations and tolling principles is subject to plenary review. *Beauty Time, Inc. v. Vu Skin Systems, Inc.*, 118 F.3d 140, 143 (3d Cir. 1997).

B. Analysis.

The claims of plaintiffs Moyer, Sechrist, and Kern are barred by Pennsylvania's two-year statute of limitations for personal injury claims.¹² See 42 Pa. C.S.A § 5524(2); *Bohus v. Beloff*, 950 F.2d 919, 924 (3d Cir. 1991). Plaintiffs' complaint was filed on September 2, 1997. The limitations period for a tort action begins to run when an injury is sustained. *Bohus*, 950 F.2d at 924. "Lack of knowledge, mistake or misunderstanding do not toll the running of the limitations period, even though a party may not discover his injury until it is too late to afford a remedy." *Pitts v. Northern Telecom, Inc.*, 24 F. Supp.2d 437, 440-41 (E.D. Pa. 1998), *aff'd*, 211 F.3d 1262 (3d Cir. 2000). In a repetitive-stress injury case, the statute of limitations is triggered by "the onset of symptoms or the last use of the injury-producing device, whichever is earlier." *Id.*, 442 (citations omitted). Accordingly, each plaintiff sustained his injury when he first began experiencing

¹² We do not contend that the claims of Weidner or Williams are time-barred.

the hand pain that is alleged to be swaging-related, which for Moyer, Sechrist, and Kern antedated September 2, 1995.

The district court nonetheless found that, under Pennsylvania's "discovery rule," plaintiffs' claims were not time-barred. Pennsylvania's policies of finality and repose limit the "narrow" discovery rule and other tolling doctrines to cases where the plaintiff could not have ascertained the salient facts through the exercise of reasonable diligence. *Barnes v. American Tobacco Co.*, 984 F. Supp. 842, 857 (E.D. Pa. 1997); see also *A. McD. v. Rosen*, 621 A.2d 128, 130 (Pa. Super. 1993). Consequently, the plaintiff must prove "that he made reasonable efforts to protect his interests and [that] he was unable to discover the operative facts for his cause of action sooner than he did." *Van Buskirk v. Carey Canadian Mines, Ltd.*, 760 F.2d 481, 487 (3d Cir. 1985). Moreover, "there are very few facts which diligence cannot discover." *Vernau v. Vic's Market, Inc.*, 896 F.2d 43, 46 (3d Cir. 1990).

Judge Tucker found the limitations period tolled for each plaintiff until he was conclusively diagnosed with HAVS and advised that the swager was to blame. See A14-A15. That ruling rests on a misunderstanding of the discovery rule, which delays commencement of the limitations period until "the point where the complaining party knows or reasonably should know [1] that he has been injured and [2] that his injury has been caused by another party's conduct." *Gustine Uniontown Assocs. Ltd. v. Anthony Crane Rental, Inc.*, 842 A.2d 334, 344 n.8 (Pa.

2004). Thus, the question is not when plaintiffs learned that their injuries were caused by the swager, but when each plaintiff was aware of an injury and aware that some other person may be to blame for it. There is no requirement that the plaintiff have identified the particular person at fault and or learned the “medical cause of the injury,” *Bohus*, 950 F.2d at 925. After all, the plaintiff is not required to file suit on the day the claim accrues; he has two years from that day just to gather information justifying a suit.

The standard of reasonable diligence is objective: what matters is not what the plaintiff personally knew but what a reasonable person in the plaintiff’s shoes would have learned from diligent inquiry. *Pocono Int’l Raceway, Inc. v. Pocono Produce, Inc.*, 468 A.2d 468, 471-72 (Pa. 1983); see also *Baily v. Lewis*, 763 F. Supp. 802, 806 (E.D. Pa.), *aff’d*, 950 F.2d 721 (3d Cir. 1991). An examination of their own testimony makes it clear that the three men could each, exercising reasonable diligence, have learned prior to September 2, 1995, that he was injured and that his injuries might be attributable to another party’s conduct – specifically, the operation of one of the machines on which these plaintiffs worked. As a matter of law, therefore, their claims were time-barred.

Donald Moyer. On April 11, 1995, Moyer filled out a discomfort survey for WorkAbility in which he stated that he was suffering from pain and numbness in his hands, and that he believed his discomfort was caused by “*the swager*, and

working with heavy wire.” A119. When asked what might solve the problem, Moyer asked Brush Wellman to “replace [the] swager.” A120.

The district court’s relied on Moyer’s testimony that “no one told him before 1996 that the swager machine was emitting dangerous vibrations,” or that he had developed HAVS. A10. But it does not matter whether Moyer knew that he had HAVS, or that his injuries were specifically caused by swager vibration (which, by his own statements, he in fact suspected by April 1995). By no later than April 1995, Moyer believed that (i) he was experiencing pain and numbness and (ii) the pain and numbness were related to his use of heavy machinery – in particular, the swager. He then had two years to investigate the problem further and to gather enough information to file suit against a particular party.

Steve Kern. Kern testified that his fingers began turning white in the fall of 1993. A202-A203. On October 24, 1993, he visited the company nurse, Jane Krotzer, whose notes of that meeting include the following details: “both hands white, blanched numb – unable *** to straighten digits *** (Raynaud’s?). Told him he should get it evaluated.” A204; see also A209. Krotzer was aware that occupational Raynaud’s could be caused by vibrating tools, and her notes indicated that she believed that to be Kern’s problem. A209-A210. Kern claimed, irrelevantly, not to remember Krotzer telling him this (A204): Krotzer’s testimony demonstrates that if Kern had *asked* about the cause of his injury – *i.e.*, exhibited

the diligence required by the discovery rule – he would have acquired the “salient facts” underlying his claim in October 1993.

Thomas Sechrist. Sechrist worked in the bull block area, including swaging, from 1982 to 1986 and part time from 1990 until the trial in 1999. In June 1993, Sechrist visited Dr. Eric Holm, to whom he described “some numbness in his right hand, especially in the lateral three fingers. He feels his right hand grasp may be diminished.” A148. In June 1995, Sechrist was a member of a Brush Wellman committee charged with “look[ing] into the complaints of swagers.” A157. Clearly, by June 1995 – at the very latest – Sechrist was aware that he (i) was having difficulty with his hands and (ii) the swager was a likely cause of hand problems for several bull-block workers.

The testimony of David Graeff, Brush Wellman’s maintenance manager, and WorkAbility’s Jeffrey Eckel makes it even clearer that plaintiffs’ claims are time-barred. Graeff learned in 1994 that certain bull block operators were complaining of hand problems. Eckel learned in January 1995 that “people who were working on the bull block were experiencing problems with their hands and wrists.” A595. Eckel’s testimony is backed up by the employees’ “Memorandum of Justification,” which reads, in relevant part:

In December 1994, the Reading Plant received word from corporate medical staff that several bull block operators had symptoms in their hands and wrists that were indicative of cumulative trauma/repetitive

motion related injuries. *** Operators attributed these symptoms to vibration caused by swaging operations.

A1421.¹³ Eckel's February 1995 report stated that he had "observed the swager in operation at Brush Wellman and that employees had reported problems that they thought were coming from the [swaging] machine. And I discussed the fact that there was a fair amount of vibration involved in pointing the coil ***." A597-A598. Thus, Brush Wellman employees were complaining prior to January 1995 that swager vibration was causing them to develop hand problems. Eckel's testimony is fatal to plaintiffs' discovery rule argument: clearly, by January 1995 any Brush Wellman employee who had used the swager and had experienced problems with his hands could within two years have determined, by exercising reasonable diligence, the salient facts giving rise to this litigation.

IV. THE DAMAGE AWARDS WERE NOT SUPPORTED BY THE EVIDENCE.

A. Standard of Review.

The decision to uphold the jury's damages awards is reviewed for abuse of discretion. *Smalls v. Pittsburgh-Corning Corp.*, 843 A.2d 410, 414 (Pa. Super. 2004).

¹³ This memorandum, like the other evidence of misuse/poor maintenance, was excluded from evidence.

B. Analysis.

None of the plaintiffs has missed a day of work, a dollar of pay, or even an hour of overtime as a result of his alleged injuries. A116; A155; A205-A207; A426-A429; A443-A445. Each continues to work for Brush Wellman, which has accommodated their injuries by assigning them to much less physically demanding jobs than they previously held. A583-A588. Each plaintiff is physically capable of performing his current job, and none has complained of any difficulty in that regard. *Ibid.* Moreover, pursuant to Pennsylvania's workers' compensation law, plaintiffs already have been compensated for their very modest medical expenses.¹⁴

Nevertheless, the jury awarded \$2.45 million in damages to Donald Moyer, whose only substantial absence from work since he developed HAVS was the result of a disciplinary suspension. A117. The jury awarded \$2.8 million to Steve Kern, who continues to ski, ice-skate, fish, play soccer, and go mountain biking. A194. It awarded \$1.6 million to Thomas Sechrist, a 62-year-old man who has many substantial injuries and illnesses attributable not to vibration or swaging but with a lifetime of heavy factory work and heavy smoking. A149-A154. The jury also awarded \$3.4 million to Michael Williams, who has a herniated disk and a winged shoulder blade (among other injuries) from injuries unrelated to vibration, and yet has refused to accept his doctor's advice to seek physical therapy and

¹⁴ If the plaintiffs were disabled, which they are not, workers' compensation would also cover two-thirds of their salaries. 77 PA.STAT.ANN. § 511.

ongoing medical care. A224-A225; A229-A230. Finally, the jury awarded \$2.7 million to David Weidner, who used the swager for only a bit over one year. A431. Yet Weidner has valuable skills that, ostensibly, he could put to use in a job involving no manual labor: he is trained in computer-assisted design, statistical process control, quality control, and casting defect analysis, and he can read blueprints. A446-A447. Moreover, Weidner has several serious non-vibration-related health problems that pose far greater obstacles to alternative employment than his HAVS.

In order to determine whether these awards were “plainly excessive and exorbitant,” see *Haines v. Raven Arms*, 640 A.2d 367, 369 (Pa. 1994), the courts must consider whether they fell “within the uncertain limits of fair and reasonable compensation or whether the verdict so shocks the sense of justice as to suggest that the jury was influenced by partiality, prejudice, mistake, or corruption.” *Id.* Here, the awards plainly were *not* within the limits of reasonable compensation, and the jury was influenced by partiality. Understandably, the jurors felt sympathetic toward the plaintiffs, five men who have worked hard at difficult, physically demanding jobs and who (to varying degrees) suffer from serious physical problems and injuries – albeit ones largely unrelated to the swager. Strikingly, the jury’s awards were nearly twice the highest estimates of economic damages offered by plaintiffs’ experts. Even assuming a substantial component for

pain and suffering, they remain grossly excessive. The district court's determination to the contrary constituted a clear abuse of discretion.

Pennsylvania courts have determined a framework for evaluating whether a compensatory award is excessive:

1) the severity of the injury; 2) whether the injury is demonstrated by objective physical evidence or subjective evidence; 3) whether the injury is permanent; 4) the plaintiff's ability to continue employment; 5) disparity between the amount of out of pocket expense and the amount of the verdict; and 6) damages plaintiff requested in his complaint.

Smalls v. Pittsburgh-Corning Corp., 843 A.2d 410, 415 (Pa. Super. 2004); see also *Kemp v. Philadelphia Transp. Co.*, 361 A.2d 362 (Pa. Super. 1976). Not one of these factors supports the jury's awards.

Compared with the types of claims that typically give rise to product-liability suits, plaintiffs' injuries are comparatively mild. None of them is maimed, disfigured, or dead. Although Dr. Jaeger testified that plaintiffs' injuries are permanent, they are not serious and involve no decrease in life expectancy. Clearly, the plaintiffs can continue with their employment – they have done so, and have lost no wages or even overtime. Their out-of-pocket expenses consist solely of small medical expenses, which in any case have been paid by Brush Wellman's workers' compensation insurance carrier.

Analysis of the above factors demonstrates that the jury's awards were excessive and did not compensate the plaintiffs for their injuries within the

constraints of the law. Accordingly, this Court should order a new trial as to damages or drastically remit the jury's awards.

V. THE DISTRICT COURT ERRED IN IMPOSING DELAY DAMAGES UNDER PENNSYLVANIA CIVIL PROCEDURE RULE 238.

Pennsylvania's Rule 238 provides that in a civil action seeking money damages for physical injury, death, or property damage, "damages for delay shall be added to the amount of compensatory damages awarded against each defendant" found to be liable to the plaintiff. PA.R.CIV.P. 238(a)(1).¹⁵ The Rule's purposes are to alleviate delay and to encourage settlement. PA.R.CIV.P. 238 cmt (2002) (citing *Laudenberger v. Port Authority*, 436 A.2d 147 (1981)). The district court erred in awarding Rule 238 damages because the rule is inapplicable in federal court.

We acknowledge that this argument was rejected in *Fauber v. KEM Transp. & Equip. Co.*, 876 F.2d 327 (3d Cir. 1989), which held that Rule 238 is substantive rather than procedural and therefore should be applied in diversity cases.¹⁶ We

¹⁵ The damages can cover the period of time running from the date one year after service of original process up to the date of the award, verdict, or decision, excluding any period (i) after the defendant made an offer of settlement or (ii) "during which the plaintiff caused delay of the trial." Rule 238(a)(2),(b)(1).

¹⁶ *Fauber* reasoned that Rule 238 is not in conflict with Federal Rules 11 and 37 because the federal provisions "are meant to sanction and thus deter litigator misconduct, a difference in purpose and effect from that served by Rule 238, which is designed to promote settlement and has the effect of compensating plaintiff for the lost time value of money when a defendant fails to make a reasonable offer of

respectfully submit that *Fauber* was wrongly decided and ask that it be reconsidered.¹⁷

A. Standard of Review.

The applicability of Rule 238 in federal court is a legal question that is reviewed de novo. *Hickman*, 991 F.2d at 1112.

B. Rule 238 Is Preempted By Federal Law.

As a general matter, a federal court sitting in diversity applies federal procedural rules and state substantive law. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Rule 238 imposes a sanction on the defendant for delay in the adjudication of the plaintiffs' claims; it resembles in purpose, but varies in content from, Federal Rules 11, 37, 54, and 68. All are rules designed to encourage settlements, penalize party or attorney misconduct, and reduce the cost of litigation – the very essence of a procedural rule. Accordingly, the federal rules, not the Pennsylvania rule, should be applied by a federal court sitting in diversity.

settlement.” 876 F.2d at 332. *Fauber* did not address Rules 54 and 68, which represent Congress's efforts to encourage settlement; nor did it consider the Supreme Court's inconsistent decision in *Burlington Northern*.

¹⁷ A panel of this Court held in *Kirk v. Raymark Indus., Inc.*, 61 F.3d 147 (3d Cir. 1995) that it was bound by *Fauber* pursuant to Third Circuit Internal Operating Procedure 9.1, which provides that “no subsequent panel overrules the holding in a precedential opinion of a previous panel.” If this Court determines that Procedure 9.1 precludes a ruling in appellant's favor here, Fenn asks that the issue be considered by the Court *en banc*.

This is true even if Rule 238 could properly be viewed as substantive, because this case falls within an exception to the general procedural/substantive division in diversity cases. In *Burlington Northern Railroad v. Woods*, 480 U.S. 1 (1987), the Supreme Court held that a state statute that imposes a penalty for conduct that is governed by the Federal Rules of Civil or Appellate Procedure is not to be applied by a federal court sitting in diversity, even if the state rule could reasonably be characterized as substantive. There, Burlington Northern challenged the Eleventh Circuit’s application of an Alabama statute that imposed an “affirmance penalty” of ten percent of the judgment on any appellant who had posted a bond to stay the judgment.

The Supreme Court first observed that under *Hanna v. Plumer*, 380 U.S. 460 (1965), a state law that conflicts with the Federal Rules is preempted:

The [Federal] Rule must *** be applied if it represents a valid exercise of Congress’ rulemaking authority ***. Rules regulating matters indisputably procedural are a priori constitutional. ***Rules regulating matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either, also satisfy this constitutional standard.*** *** [The Federal Rules of Civil Procedure have] presumptive validity under both the constitutional and statutory constraints.

Burlington Northern, 480 U.S. at 5-6 (emphasis added). Thus, a Federal Rule is preemptive even if it “incidentally affect[s] litigants’ substantive rights.” *Ibid.*

Applying *Hanna*, the *Burlington Northern* Court went on to find the Alabama affirmance penalty preempted by the Federal Rules, and therefore

inapplicable in federal court. The penalty conflicted with FED.R.APP.P. 38, under which a court of appeals can impose “just damages” to penalize a frivolous appeal. *Id.*, 7. The Court found the rules in conflict because (i) the Alabama statute was mandatory, whereas Rule 38 is discretionary, and (ii) the Alabama statute imposed damages for all unsuccessful appeals, whereas Rule 38 penalizes only frivolous appeals and those taken for the purpose of delay. *Id.*, 6. Accordingly, the Alabama statute was preempted. *Id.*, 7-8.

The same reasoning precludes application of Rule 238 here, because it penalizes a defendant for conduct that is expressly governed by the Federal Rules. Rules 11, 37, 54, and 68 – like Pennsylvania’s Rule 238 – are intended to “alleviate delay” and “to encourage defendants to settle meritorious claims as soon as reasonably possible.”¹⁸ See PA.R.CIV.P. 238 cmt (2002). But unlike Rule 238,

¹⁸ Rule 11 allows a district court, in its discretion, to impose penalties on a litigant for filing papers “for any improper purpose,” including delay and harassment. FED.R.CIV.P. 11(b)(1). Its purpose is to deter abuse and to “streamline the litigation process.” FED.R.CIV.P. 11, Advisory Committee Notes, 1993 Amendment. Rule 37 allows a district court to impose sanctions for misconduct in discovery; it, too, is intended to penalize delay. FED.R.CIV.P. 37, Advisory Committee Notes, 1970 Amendment. Rule 54(d) gives district courts discretion to impose costs on the losing party; its purpose, of course, is to limit the expenses of litigation. 4 Wright & Miller, FED.PRAC.&PROC. CIV. 3D § 1029 (2004 Supp.). Rule 68 provides that if the defendant makes a settlement offer that is rejected by the plaintiff, and the judgment finally obtained by the plaintiff is not more favorable than the offer, the *plaintiff* must pay the costs incurred after the making of the offer, even if it prevails at trial. Rule 68 “was intended to encourage settlements and avoid protracted litigation.” 12 Wright & Miller, FED.PRAC.&PROC. CIV. 2D § 3001 (2004 Supp.).

the federal rules are entirely discretionary in their operation.¹⁹ See Rule 11 Advisory Committee Note, 1993 Amendment; *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442-43 (1987). Congress has thus established a scheme that balances the need to deter abuse and to encourage settlement with the recognition that parties have the right to pursue claims and defenses that can reasonably be viewed as meritorious, even if they are not ultimately successful.

Under the federal rules, Fenn clearly would not have been subject to any sanction or penalty for delays that were attributable equally to plaintiffs or to judicial administration.²⁰ Yet, applying Pennsylvania's Rule 238, the district court found such penalty to be required. There is therefore a clear conflict between the two systems. Moreover, the monetary penalties imposed by the two systems are markedly different: Rule 238 damages are based on the amount of the judgment and the length of the delay, whereas the penalties imposed by the federal rules are either entirely in the court's discretion (in the case of Rules 11 and 37) or based on specific costs that resulted from the party's conduct (Rules 54(d) and 68).

¹⁹ Rule 68 is mandatory.

²⁰ The district court itself found that Fenn was not solely to blame for the delays in adjudication of plaintiffs' claims. Plaintiffs' counsel requested, for personal reasons, that trial not even *begin* until September 2000. Moreover, plaintiffs engaged in dilatory motion practice throughout the proceedings below. And, as the court recognized, the remainder of the delay was largely due to administrative problems, including reassignment of the case to several different judges during the pre-trial period.

Even if Rule 238 can properly be characterized as substantive, it *also* could be described as procedural: like the Alabama statute at issue in *Burlington Northern*, it imposes a penalty for litigation conduct. It therefore concerns a matter which, though perhaps “falling within the uncertain area between substance and procedure, *[is] rationally capable of classification as either.*” *Burlington Northern*, 480 U.S. at 5 (emphasis added). Accordingly, it is inapplicable in federal court.

C. Post-Judgment Interest Should Run From The Date Judgment Was Entered.

The district court did not enter judgment on the delay damages until July 30, 2004. Nevertheless, at plaintiffs’ request, it ordered that post-judgment interest on those damages run from February 28, 2003 – the date it decided the Rule 238 issue. Clearly, *post*-judgment interest can begin to run only *after* judgment is entered. Here, any delay in entry of the judgment is entirely plaintiffs’ own responsibility: they could have moved for entry of the judgment immediately upon issuance of the district court’s order. See FED.R.CIV.P. 54(b). To the extent the award of delay damages is not reversed in its entirety, post-judgment interest should run from July 30, 2004 – the date on which judgment was entered.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed. Fenn is entitled to judgment, a new trial, or (at a minimum) a substantial remittitur.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief was produced in Times New Roman (a proportionally-spaced typeface), 14-point type and contains 13,982 words (based on the Microsoft Word word processing system word count function).

Lauren R. Goldman

CERTIFICATE OF BAR MEMBERSHIP

I hereby certify pursuant to LAR 46.1 that I was admitted to the Bar of the United States Court of Appeals for the Third Circuit on May 2, 1994 and am presently a member in good standing of the Bar of this Court.

Dated: May 12, 2005

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