
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

REPLY BRIEF FOR APPELLANT

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INTRODUCTION

Fenn has sold thousands of swaging machines over the past 50 years. Tens of thousands of workers have used Fenn swagers to sharpen countless millions of wires. All of those machines are functionally identical, varying in size but sharing the same basic parts and mechanical structure. Plaintiffs do not claim that the particular swager at Brush Wellman was defectively manufactured but that it and its fellows were all defectively designed. Were that so, one would expect to have seen an epidemic of swaging-related HAVS. Yet prior to this case, there were *no* claims attributing vibration-related injury to a Fenn swager.

The swager at issue in this case was built and sold in 1983. If it was dangerous when it left Fenn's control, one would have expected to hear complaints starting in the mid-1980s. In fact, however, the machine was used without incident for at least seven years, and all but one of the plaintiffs in this case developed their injuries more than ten years after the machine was purchased by Brush Wellman.

The explanation is simple: the Fenn machine is not unreasonably hazardous. It does not, unless abused and misused, emit dangerous amounts of vibration, something Fenn stood ready to prove at trial through evidence that the swager had been misused and poorly maintained, and that, at the time plaintiffs developed their injuries, it had ceased working as it was designed to work. Fenn also proffered evidence that a badly maintained and misused swager gives off much more

vibration than a properly used and maintained machine. Finally, it proffered evidence of its swager's perfect safety record. All of that evidence was excluded at trial. Fenn is entitled to judgment, because its swaging machine is not unreasonably dangerous. At a minimum, Fenn is entitled to a new trial at which it will be permitted to establish that the plaintiffs' injuries resulted from the machine's dilapidated condition.

Plaintiff's warning claim fails for the same reason their design defect claim fails: the swager was not unreasonably dangerous without a warning. The warning claim has an additional, fatal weakness: under Pennsylvania law, a manufacturer is not liable, in strict liability *or* in negligence, for failure to warn of a risk that was not "reasonably foreseeable" at time of sale. Fenn clearly could not have foreseen these plaintiffs' injuries; apart from one or two isolated cases in Liverpool in the mid-1970s, these are the first and only reported cases of swaging-related HAVS in recorded history. Accordingly, Fenn had no duty to warn.

I. THE DESIGN DEFECT CLAIM CANNOT STAND.

A. Erroneous Evidentiary Rulings And Jury Instructions Necessitate A New Trial.

1. Evidence Of Poor Maintenance And Misuse Was Relevant And Admissible.

Plaintiffs contend (Br. 11) that the court was justified in "precluding the admission of Fenn's proffered evidence of misuse or improper maintenance

because [Fenn] failed to present proof of a causal connection between those factors and a dangerous increase in vibration levels.” That contention is inaccurate in several respects.

a. *Plaintiffs misstate the legal standard for admissibility.*

At the threshold, plaintiffs misstate the applicable legal standard. Fenn did not need to *prove* a causal link to have the evidence admitted. FRE 401 supplies the governing standard: evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Accordingly, the changed condition of the swager was relevant (and thus admissible, see FRE 402), if it merely made a disputed fact – here, whether the plaintiff’s injuries resulted from a defect in the swager that existed when it left Fenn’s control – more or less likely. Even if a new swager was dangerous (which, as discussed below, it was not), the fact that it was much more dangerous due to lack of maintenance and to misuse was highly relevant to the jury’s inquiry. Fenn’s offer of proof far exceeded the “low threshold” of FRE 401. See Fenn Br. 15-16; *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 784 (3d Cir. 1994).

Plaintiffs rely principally (Br. 11) on *Sheldon v. West Bend Equipment Corp.*, 718 F.2d 603 (3d Cir. 1983), for the proposition that Fenn had to provide “expert evidence” conclusively demonstrating a causal link between the

misuse/abuse and plaintiffs' injuries. But *Sheldon* simply holds that a change in a product's condition can relieve the manufacturer of liability only if the change caused the injury. 718 F.2d at 607-608. This proposition, which we ourselves acknowledged in our opening brief (at 27-28), does little to advance plaintiffs' ball. Causation is a jury question, and *Sheldon* does not suggest that competent evidence of causation, such as that suggesting that the misuse and ill-maintenance caused the plaintiff's injuries, should be excluded. *Lewis v. Rego Co.*, 757 F.2d 66, 71 (3d Cir. 1985). In any event, as next discussed, Fenn proffered ample evidence – from both expert and lay witnesses – to go to the jury on this point.

b. Fenn's proffer demonstrated that the misuse and poor maintenance substantially increased swager vibration, and that increased vibration makes vibratory injury more likely.

Plaintiffs concede that Fenn's offer of proof demonstrated that the swager was routinely used on wire of greater diameter than the machine's capacity; that the swager was not maintained properly and was rarely if ever cleaned out as it was supposed to be; and that the operators failed to use specially-sized components and instead used the same hammers and dies for all of their jobs. Plaintiffs argue that this evidence was inadmissible, however, because Fenn drew no causal link between it and their injuries. Their characterization of the record is as inaccurate as their discussion of the legal standard.

It is undisputed that an increase in vibration exposure makes vibratory injury more likely. Fenn Br. 8. Accordingly, Fenn's evidence regarding misuse and lack of maintenance was relevant – and thus admissible – if Fenn showed that those factors tended materially to increase vibration exposure. Fenn's offer of proof was clearly adequate in that regard.

1. When a tool's parts are permitted to wear out, they fall out of balance and the tool vibrates more. See Fenn Br. 15-16. Both John Bryzgel (vice-president of Fenn's machinery division) and Walter Perun (Fenn's manufacturing manager) testified at their depositions that badly maintained machines generate more vibration than machines that receive proper care. Plaintiffs assert (Br. 9) that Perun's testimony "does not even address causation," but in the deposition excerpt included in Fenn's proffer Perun testified specifically that machines, including swagers, generate more vibration when even slightly off balance. A1439.¹ The proffered testimony of David Graeff, Brush Wellman's maintenance manager, was that "it's pretty apparent" that "improper maintenance could cause personal injury due to an increase in vibration." A1431.

¹ Plaintiffs' complaint (Br. 10) that Bryzgel's testimony was not "evidence of a causative link" is off base. Bryzgel testified about Brush Wellman's maintenance failures; the testimony of other lay and expert witnesses linked those failures to plaintiffs' injuries. See A1444-A1445.

The operators' misuse of the machine likewise increased their vibration exposure. Plaintiff Donald Moyer testified that he had "to hold that coil tight, grip and push real hard to get that coil into the swaging machine" and had to "tak[e] the lead end of the coil and *** swage it multiple times." A115. The court excluded Fenn's proffered evidence explaining what necessitated that extra effort: the Memorandum of Justification (see Fenn Br. 14-15), which stated that "[t]he operators are handling additional coils of larger diameter material requiring a higher frequency of swaging." A1421-A1424. See also A1335-A1337 (Graeff); A1438 (Perun). If a worker must swage an oversized piece of metal three to six times more than proper-sized materials in a properly maintained machine would require (see Fenn Br.5), he will be exposed to that much more vibration. And, as discussed below, the tighter grip and greater force needed to shove oversized coils into the machine further multiplied vibration exposure.

2. Plaintiffs assert that Fenn was "unable to identify any expert witness who could testify that the supposed misuse and improper maintenance of the swager caused the vibrations to increase to levels that were dangerous to the men who used the product." Pl. Br. 8. As noted, however, Fenn was not required to prove conclusively that the misuse and maintenance failures caused plaintiffs' injuries. Indeed, at trial it contended that the plaintiffs did not in fact suffer from HAVS; it could hardly be obliged to prove the contrary. Rather, what it sought to

demonstrate was that if plaintiffs suffered swager-induced HAVS, it was most likely caused by misuse and maintenance failures that made the machine more dangerous.

And Fenn *did* proffer expert testimony to that effect. Dr. Cherniack testified that when a tool falls out of balance (as the Brush Wellman swager did when the operators used cardboard tags rather than specialized parts to compress the dies), “that can cause increased momentum and force going into the hands.” A675. At his deposition, the relevant excerpts from which were included in Fenn’s offer of proof, he went into greater detail, explaining that “impact, balance and fit of the copper rod would all be factors” in the level of vibration exposure. A1476. He further explained the relationship between maintenance and tool balance (A1476-A1478) and the impact of swaging oversized wire on the amount of vibration exposure (A1482).²

Even plaintiffs’ own experts agreed that poor maintenance increases vibration – and therefore the likelihood of vibratory injury. Carol Stuart-Buttle,

² Plaintiffs grossly mischaracterize Cherniack’s deposition testimony in claiming (Br. 9) that he “lacked any expertise in this area.” The testimony on which they rely is irrelevant to maintenance; it concerns the type of calculation performed by Dr. Martin to measure precisely the waves of vibration emitted by a swager. A1345-A1346. In addition to teaching medicine at Yale and the University of Connecticut, Cherniack directs the Ergonomics Technology Center of Connecticut and is a senior NIOSH researcher with particular expertise in “hand arm vibration” and “musculoskeletal and upper extremity disorders.” A611-A614. He was fully qualified to testify about the effects of maintenance on vibration.

plaintiffs' ergonomist, testified that lack of maintenance causes increased vibration, and conceded that the Brush Wellman "machines had not been routinely maintained." A936. Plaintiffs' other expert, Dr. Clark, likewise conceded that "maintenance is a consideration" in determining the amount of vibration emitted by a machine. A270-A271.³

c. The error was highly prejudicial.

The district court's erroneous evidentiary rulings require reversal unless it is "**highly probable** that the error[s] did **not** contribute to the judgment." *Renda v. King*, 347 F.3d 550, 556 (3d Cir. 2003) (emphasis added). Plaintiffs' harmless error argument, relying on the fact that *some* evidence of misuse and poor maintenance came in, is groundless. First, the vast majority of Fenn's most effective proof on this point was excluded. For example, Judge Tucker excluded the Memorandum of Justification prepared by management of the Reading plant, with the input of the bull block operators, in support of their request for a new swager. That memorandum specifically attributed the plaintiffs' hand injuries to misuse and poor maintenance:

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

³ Clark's and Jaeger's separate opinion that a new swager generates "enough" vibration to cause harm, see Pl. Br. 33, goes to weight, not to admissibility.

vibration caused by swaging operations. *** The swager was found to provide a tremendous amount of vibration to the fingers, hands and arms. A degree of numbness existed in the extremities for a very short period of time after swaging material. Additional information was also revealed as a result of the investigation. That information is as follows:

1. The operators are handling additional coils of larger diameter material requiring a higher frequency of swaging larger material.
2. The large diameter material is approaching approximately 5/8" or larger which is outside the operational limits of the existing Fenn swager. ***
4. The swager no longer operates in the manner designed by the manufacturer.
5. The swager is not hammering the material properly as BeCu Chips, Flakes and dust are evident in and around the machine.

[A Fenn] representative indicated that due to heavy use, age and lack of routine maintenance, the inner workings of the swager are out of tolerance and need machining. ***These inner workings are causing employees to be over-exposed to the excessive vibration.***

A1421-1422. The trial judge also excluded the portions of the swager operating manuals that emphasized the importance of proper maintenance. A878-A889.

During plaintiffs' case, defense counsel was unable to cross-examine plaintiffs' witnesses about the conditions at Brush Wellman and the effect of those conditions on the vibration generated by the swager. In particular, had defense counsel not been constrained by the court's order, he would have cross-examined Dr. Clark extensively about the likelihood that plaintiffs' injuries resulted from the

misuse and poor maintenance; instead, the court sharply limited his cross-examination. A266-A267.

At the close of plaintiffs' case, defense counsel unsuccessfully sought reconsideration of the ruling and asked the court to consider the maintenance/misuse evidence in ruling on Fenn's Rule 50(a) motion. A530. Had the judge rescinded her ruling, David Graeff and Craig Sherman (Brush Wellman's manufacturing manager) would have testified extensively about Brush Wellman's misuse of the swager and its maintenance failures. Bryzgel would have talked about the effect of wear and misuse on machine operation. And Perun would have testified about the condition of the swager upon its return to Brush Wellman and about the effect of poor maintenance on the machine's operation. See Fenn Br. 4-6,13-15; pp. 5-6 *supra*; A1465-A1467.

Second, the in limine ruling prevented counsel from mounting any kind of effective argument, either in opening or in summation, that the plaintiffs' injuries were attributable to Brush Wellman's abuse of the swager, not Fenn's design. A few passing references in an argument, combined with a few questions dropped into a cross-examination, is clearly no substitute for a carefully constructed opening argument, followed by the development of evidentiary support, followed by a summation that flows logically from the party's case, followed by jury instructions that accurately explain the law. See pp. 20-23 *infra*.

Third, even if the excluded evidence was somehow cumulative – which it was not – the verdict could not stand. The exclusion of relevant evidence is not harmless error if the evidence, even if ostensibly addressing a topic partially covered by other evidence, is the offeror’s “best evidence” of a fact in dispute and is more effective or persuasive than other evidence that was admitted. *Diehl v. Blaw-Knox*, 360 F.3d 426, 433 (3d Cir. 2004); *Renda*, 347 F.3d at 556-57.

Finally, as noted in our opening brief (at 21), plaintiffs’ counsel unfairly capitalized on the absence of evidence of misuse and poor maintenance in summation. “[A] litigant is unduly prejudiced when his opponent is successful in preventing the admission of evidence on a particularly crucial issue in dispute, and then points to the absence of such evidence in closing argument.” *Diehl*, 360 F.3d at 433 (citations omitted).

In sum, the district court’s blanket ruling precluded Fenn from responding to plaintiffs’ case on causation. It cannot be viewed as “harmless” within any reasonable definition of that term.

2. The Evidence Of The Absence Of Prior Claims Was Likewise Relevant And Admissible.

a. *Fenn met the standards set forth in Spino.*

Fenn moved pretrial for a ruling allowing evidence of the absence of any prior vibration-related claims, accidents, or lawsuits arising from use of its swaging machines. See Fenn Br. 16-18. Under Pennsylvania law, such evidence is

admissible on a showing (i) that defendant would likely have known about prior, substantially similar accidents or injuries attributable to the product, and (ii) others were using a product similar to that allegedly causing plaintiff's injury. *Spino v. John S. Tilley Ladder Co.*, 696 A.2d 1169, 1173 (Pa. 1997). Fenn's proffer demonstrated (i) that an exhaustive search of Fenn's files revealed no claims alleging any vibration-related injury caused by any Fenn or United Dominion product, and (ii) that Fenn had produced thousands of machines that were functionally identical to Brush Wellman's. Judge Tucker nonetheless barred the evidence.

1. In defending that ruling, plaintiffs again misstate the law. Quoting *Spino*, they assert (Br. 16) that evidence "that no lawsuits have been filed, no claims have been made or that the defendant has never heard of any accidents" is inadequate to meet *Spino's* first foundational requirement. But that portion of *Spino* was distinguishing an Arizona case in which the defendant had no records – electronic or paper – to back up its officer's claim that he personally could remember no such claims. Fenn's business records and testimony, by contrast, constituted exactly the type of showing *Spino* said *would* be adequate. See 696 A.2d at 1171-74 (defendant "maintained a chronological log of reported claims" and defendant's president testified "that there were no prior similar claims of which [the defendant] was aware").

Plaintiffs also claim – in an argument that goes to weight, not admissibility – that because HAVS is a latent dose-response disease, “it is likely that a manufacturer would not be informed that operators of its machines were suffering from HAVS.” Pl. Br. 18. That argument is in fact highly implausible. Fenn has sold swagers since 1950, and workers have engaged in swaging in massive numbers for nearly a century. While diagnostic methods have improved over time and awareness of HAVS has increased, nevertheless, as plaintiffs themselves argued, the world literature is replete with reports of vibration-related injuries arising from *other* kinds of tools. See A238-A242; A988-A1085. If swaging without an automatic feed were grievously injurious to workers using Fenn’s swagers, surely Fenn would have heard reports to that effect. Moreover, the latency period for swaging-related HAVS is short: according to the Taylor-Pelmear study, on which plaintiffs rely so heavily, it is 6 to 8 months. A1003.⁴ See also A313 (Dr. Jaeger’s testimony to same effect).

Plaintiffs’ other arguments on this point rest entirely on misstatements of the record. They assert, for example, that “Fenn destroyed all records of claims and lawsuits which were over seven years old.” Br. 17. But Kathleen DeLoache, United Dominion’s litigation paralegal since 1989, testified that the destruction

⁴ Plaintiffs also contend (Br. 18) that the Taylor-Pelmear study refutes Fenn’s showing that there were no other claims, but (as their own expert Dr. Clark testified unequivocally, see A258), the swaging machine in that study was *not* a Fenn machine.

policy applied only to hard copies: “When I said only final documentation papers are kept or final disposition papers are kept, I meant that as far as the hard copy. Information is kept on the database forever.” A1312.

2. In discussing *Spino*’s second foundational requirement – the presence of other “substantially similar” products on the market – plaintiffs argue that only Model 3F-2D machines are relevant for this purpose. Br. 14-15. But Bryzgel testified that *all* Fenn 3F swaging machines are “basically the same as far as all the internal parts go. All the parts are interchangeable ***. The motor size may have changed over the years *** but basically it’s the same machine.” A537. Moreover, other Fenn model swagers differ from the 3F machines only in size. A538-A539. Plaintiffs’ assertion that Fenn “failed to provide information which distinguished between the various other swager models that it sold and the 3F 2 die swager at issue here,” Br. 15, is thus contradicted by the record.⁵

Plaintiffs also contend (Br. 15) that Fenn’s offer of proof was inadequate because it “could not show how many 3F 2 die swagers were sold or used with

⁵ Plaintiffs misstate the legal standard, asserting that Fenn was required to establish that its other products were “substantially *identical* to the one at issue and used in a setting sufficiently similar to those surrounding the product at the time of the accident.” Br. 14 (emphasis added). But the quoted language comes from *Spino*’s description of a First Circuit case applying Maine law. *Spino*, 696 A.2d at 1173. When the *Spino* court set forth the Pennsylvania rule, it did not require that the other products be identical; rather, it required that they be “*similar* to that which caused plaintiff’s injury.” *Id.* (emphasis added).

automatic feeds.” In fact, Fenn presented proof that fewer than 5 percent of all swagers are sold with automatic feeds, and that *no* swager used to point wire – Brush Wellman’s use – is equipped with that feature. A550-A551.

b. The error was highly prejudicial.

Plaintiffs again attempt to minimize the impact of the district court’s error, arguing (Br. 19) that Fenn was permitted to ask some of the witnesses who testified at trial whether they personally had heard of other swaging-related claims of vibratory injury. That testimony was, of course, a poor substitute for the excluded proof that Fenn, *as a corporation*, had never received such a claim, despite having sold *thousands* of swaging machines that were functionally similar to the Brush Wellman model.

Plaintiffs similarly assert that the error was harmless because defense counsel was permitted to state, in closing argument, that Fenn was unaware of prior similar claims. Again, however, the ability to make passing reference to a fact that would have been a centerpiece of the defense was a wholly inadequate substitute. Had Fenn not been barred from pursuing the subject, defense counsel could have stressed the meticulous record-keeping of United Dominion and Fenn and forcefully brought home the point that for decades, there have been thousands of Fenn swaging machines in use around the world processing millions of tons of

metal; if those machines were defective, surely this would not be the first and only complaint regarding their dangerousness.

3. The District Court's Exclusion Of The Standards For Measuring Vibration Ensured That The Jury Had No Way Of Assessing Whether The Swager Was Dangerous.

In order to analyze vibration exposure, an expert considers both the frequency of the vibration emitted by the machine and length of the exposure; he then consults the ANSI and ISO guidelines to determine whether the total exposure thus calculated is hazardous. A652-A654. In our opening brief (at 19-20), we argued that it was error to preclude Fenn from making any reference to those guidelines. Plaintiffs offer a number of arguments in response, none of which has merit.

Plaintiffs' basic argument (Br. 27) is that the guidelines were properly excluded because their claims sounded in strict liability, whereas industry standards are relevant only to negligence. It is true that, as plaintiffs' cases indicate, a defendant cannot defeat a strict liability claim simply by showing that it complied with the industry standards prevailing at the time of manufacture, and thus cannot be faulted for the plaintiff's injury. *Holloway v. J.B. Sys., Ltd.*, 609 F.2d 1069, 1073 (3d Cir. 1979) (industry standards in place at time of manufacture are not admissible "as evidence of the reasonableness of [the defendant's] inaction"); *Lewis v. Coffing Hoist Div., Duff-Norton Co., Inc.*, 528 A.2d 590, 594

(Pa. 1987) (industry customs are inadmissible “to prove that the quality or design of the product in question comports with industry standards or is in widespread industry use”); *Santiago v. Johnson Mach. & Press Corp.*, 834 F.2d 84, 85 (3d Cir. 1987) (district court erred in instructing jury that in determining whether a defect existed, it should consider whether product was state of the art at the time it was manufactured).

As we have pointed out (Fenn Br. 19), however, Fenn offered the ANSI and ISO standards for a wholly different purpose: to support its contention that, based on all currently available scientific knowledge, a new swager emits insufficient vibration to have caused the plaintiffs’ injuries. Such use of a measurement standard is perfectly legitimate even in a strict liability case.⁶ See *Rexrode v. American Laundry Press Co.*, 674 F.2d 826, 832 (10th Cir. 1982) (in strict liability case, distinguishing between use of industry standards to prove due care, which is impermissible, and use of such evidence to prove absence of a feasible alternative design, “a factor which we would agree is extremely relevant in a design defect determination”); *Carter v. Massey-Ferguson, Inc.*, 716 F.2d 344, 348 (5th Cir. 1983) (“[i]ndustry custom is relevant in a strict liability case if it has any bearing on the condition of the product”); Thomas R. Malia, Annotation, *Products*

⁶ Defense counsel attempted to draw this distinction at oral argument on the motion in limine; plaintiffs’ effort (Br. 22) to portray the argument as inconsistent with our position on appeal is baseless.

Liability: Admissibility of Defendant's Evidence of Industry Custom or Practice In Strict Liability Action, 47 A.L.R.4th 621, § 9 (2004) (in a strict liability action, industry custom may be relevant to disprove causation); *Reese v. Chicago, Burlington & Q.R. Co.*, 303 N.E.2d 382, 385 (Ill. 1973) (in strict liability action, industry standards and guidelines are admissible to show that a product was misused).⁷

Plaintiffs also argue that “Fenn fails to explain in its brief how industry standards that specifically relate to *oscillatory* vibration are somehow admissible to show that a machine which emits *impact* vibrations does not cause HAVS.” Pl. Br. 21 (emphasis in original). That argument is both simplistic and misleading. A swager, like every other machine, emits *two* kinds of vibration: oscillatory (or cyclic) vibration and impact (or impulse) vibration. A654-A664; A668-A669. Neither the material cited in plaintiffs’ brief nor anything else in the record supports their attribution of their injuries on appeal solely to impact vibration; none of the witnesses considered the effects of each kind of vibration separately.⁸ While

⁷ Any confusion in the jurors’ minds could have been handled through an appropriate limiting instruction that the guidelines were offered only for their bearing on causation and that compliance with guidelines does not absolve a defendant in a strict-liability case.

⁸ Plaintiffs rely primarily on Martin’s deposition and report for this proposition. But Martin never said anything to that effect, and his analysis rested entirely on the ISO guidelines. See A1103 (vibration was “computed according to ISO 5349 recommendations”). Clearly, he viewed those standards as the most

the ANSI and ISO guidelines measure oscillatory vibration, there is no comparable standard for impact vibration; its effect on human beings is currently being tested. A668-A670. Accordingly, the ANSI and ISO guidelines represent the only available method for measuring vibration exposure. To the extent that they are an inadequate predictor of injuries partially due to impact vibration, that goes to weight, not admissibility.

Third, plaintiffs argue (Br. 22) that the error was harmless because Dr. Cherniack was permitted to testify that there was little data suggesting that short exposures to vibration could cause injury. Plaintiffs again miss the point: Cherniack was not permitted to make the much stronger and more affirmative statement that according to all available scientific data, short exposures *do not* cause injury. Brush Wellman's misuse and maintenance failures substantially increased both the amount of vibration that the swager emitted and, more relevantly here, the operators' exposure time. Thus, the erroneous exclusion of the misuse/maintenance testimony worked in tandem with exclusion of the ANSI/ISO guidelines to weaken Fenn's case on causation dramatically. Moreover, divorced

relevant tool for measuring the effects of the swager's vibration. Nor did Jaeger testify that plaintiffs' injuries resulted solely from impact vibration or that the ANSI/ISO standards were irrelevant; indeed, he relied on Martin's findings. A312-A314.

from the scientific standards on which they were based, Dr. Cherniack's opinions were far less persuasive.

Finally, plaintiffs suggest that there is no record support for our assertion that Fenn would have been able to elicit Dr. Jaeger's admission that the available scientific data suggests that the vibration emitted by a properly maintained swager is not dangerous. Dr. Jaeger conceded that both vibration level and exposure time are key variables in measuring vibration exposure. A408-A409. As discussed below (at p. 27), his conclusion that a new swager emits a hazardous level of vibration was based *entirely* on the first of those variables; he did not take the second into account. It is undisputed that the guidelines do not consider the short exposure times associated with swaging to be dangerous; had they been admissible, Jaeger would have had to admit that his conclusion was at odds with the guidelines.

4. The Jury Instructions Belie Plaintiffs' Harmless Error Arguments.

As we have discussed, none of the district court's three principal evidentiary errors was harmless; each one, standing alone, deprived Fenn of a key aspect of its defense, and their compounded effect on Fenn's case was profound. But even were there merit to plaintiffs' contention that the evidentiary restrictions were harmless, the defects in the jury instructions would still be fatal to their case. Those defects, discussed in detail at Fenn Br. 20-24, took away Fenn's entire

defense. The district court's charge (reproduced at Pl. Br. 29) boiled down to an instruction that if the jury found that the swager was a substantial factor in causing plaintiffs' injuries and if it would have been safer with an automatic feed, it should find for the plaintiffs. Fenn Br. 22-23. Although the court did instruct that a plaintiffs' verdict required the jury to find that "the defect existed when the product left the defendant's control," A814-A815, it offered no explanation of what that meant: it refused to instruct the jury that Fenn should not be held liable if the injuries were caused by (i) substantial changes that took place in the machine after sale; (ii) misuse; (iii) defects resulting from normal wear and tear; or (iv) a failure to maintain the machine.

Plaintiffs' primary response is that the instructions were based on the Pennsylvania pattern charge. Br. 28. But plaintiffs do not deny that the adequacy of jury instructions is a matter of federal law. See Fenn Br. 24 n.6. Under federal law, "[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). Fenn's proposed instructions met that standard, whereas the instructions actually given conveyed a distorted and grievously incomplete picture of governing Pennsylvania law.

Plaintiffs also argue (Br. 29-31) that the court correctly rejected Fenn's proposed instructions because of the lack of evidence that anything that happened

to the swager after it left Fenn's control might have caused the plaintiffs' injuries. Plaintiffs thus seek to enforce a double whammy: first, proof of causation is erroneously excluded; then, the court refuses to instruct on a theory of defense that is legally sound under Pennsylvania law because there is no evidence to support it. Plaintiffs' related argument (Br. 30) that the "intended use" language in the pattern charge was inapplicable because there was no evidence of misuse suffers the same defect: Fenn's offer of proof demonstrated that the Brush Wellman operators routinely misused the swager. See p. 6 *supra*.

Had Fenn been permitted to present its defense, there would have been ample evidence supporting (indeed, as we argue below, compelling) the conclusion that plaintiffs' injuries, if caused by the swagers at all, were attributable to shoddy maintenance and misuse. In that event, Fenn would have been entitled to the instructions it sought – which, as plaintiffs themselves assert (Br. 30, 31), were refused only because of lack of evidence regarding poor maintenance and misuse as a causal factor. In short, plaintiffs' argument regarding the instructions cannot coexist with their argument that any error in the evidentiary rulings was harmless because Fenn was able to adduce some minimal evidence in support of its position.

Finally, plaintiffs advance a wholly unsupported waiver argument: they contend that Fenn "agreed with the charge that was given," with only two limited exceptions. Br. 29-30. That is simply inaccurate. Defense counsel repeatedly

objected to the district court's refusal to give the instructions that it proposed. The district court acknowledged those objections, and indeed granted Fenn "an exception to any denials." A801. See also, *e.g.*, A795; A799-A800.⁹

B. Fenn Is Entitled To Judgment.

In our opening brief, we argued (at 25-32) that Fenn was entitled to JMOL because taking all of the relevant evidence into account leads inexorably to the conclusion that if plaintiffs indeed developed HAVS as a result of swaging, it was only because Brush Wellman so grievously misused and failed to maintain the Fenn machine. Plaintiffs do not contest our argument (Br. 27-28) that, under Pennsylvania law, a manufacturer is not liable for injuries that result from misuse of its product, or for injuries caused by a substantial change in the product's condition (including wear and tear and maintenance failures). Nor do they dispute that the manufacturer is absolved of liability even if the misuse or substantial change was foreseeable. *Id.*, 28-32.

⁹ Plaintiffs erroneously suggest (Br. 30) that Fenn's objection to the charge was inadequate because Fenn assumed that plaintiffs had the burden of proving that their injuries resulted from a defect that was present in the product when it was sold. "Proving that a defect in the crane existed at the time of the accident and that it was the proximate cause of [his] injuries was, however, only part of [plaintiff's] burden; he had also to prove that the defect was present when the crane came into [his employer's] possession." *Kuisis v. Baldwin-Lima-Hamilton Corp.*, 319 A.2d 914, 920-21 (Pa. 1974)

Plaintiffs' response relies *entirely* on the assertion that there was sufficient evidence to find that a new swager generates a dangerous amount of vibration. But that assertion is not supported by the evidence. Neither Dr. Bernard Martin, who performed a more refined and sophisticated measurement on a 1998 swager, nor Carol Stuart-Buttle, who performed a gross measurement on a 1996 swager, testified that a new swager emits a dangerous amount of vibration.

Plaintiffs assert (Br. 32), misleadingly, that Dr. Martin, the vibration expert retained by Fenn, "tested a new 3F 2 die swager and found that the vibration *** was 'high.'" Although Martin did observe that "the level of vibration *measured on the coil* is high," he emphasized the need to take other factors "into account to evaluate the severity of exposure when [the subject is] performing the work in an industrial setting," because the amount of vibration on the coil is not the same as the amount experienced by the worker. A1105. Those factors included, *inter alia*, the amount of force needed to grip the coil; the exposure duration; and the interval of time between successive uses of the machine. A1105-A1106. *After taking all of the relevant factors into account, Martin concluded that the vibration exposure arising from the use of a new swager was within permissible limits. Ibid.* See also A176; A1102-A1116; A862 (Martin: "[I]f I say the number is high, it has *** almost no significance if I don't specify for how long that vibration is generated.").

Stuart-Buttle’s recommendation that Brush Wellman install an automatic feed was based on the bull-block operators’ own belief that their hand problems resulted from vibration – not on the results of testing a new machine. A914-A917; A928-A929; A939-A940. Deeming a precise measurement of vibration to be “out of my realm of expertise,” Stuart-Buttle took what she termed a “ballpark” estimate of the vibration generated by the machine in the “worst-case scenario” of repeated swaging over the course of a maximally busy day. A917-A920; A969.¹⁰ Even that ballpark estimate, moreover, was well below the threshold limit values identified by ANSI. A960. The most that Stuart-Buttle could say in support of her recommendation was that injury is “not necessarily impossible” at those levels of exposure. A961.¹¹

¹⁰ The excerpts of Stuart-Buttle’s testimony reproduced in plaintiffs’ brief simply confirm that her recommendation that an automatic feed be purchased was based not on her measurement of the vibration emitted by a new swager, but rather on “the physical effort that is also entailed on the job. ***I would not have been able to justify it from a vibration standpoint and saying that it was low dosage,*** but I would have said the combination would have been a very beneficial point. So professionally, ***from an ergonomics standpoint,*** I would have recommended it.” Br. 25-26 (quoting A941-A942) (emphasis added). As with Martin, Stuart-Buttle’s observation that there was “a high vibration on some of the wires,” Pl. Br. 32 n.6, is meaningless when divorced from the short exposure times at issue.

¹¹ Plaintiffs’ contention (Br. 24-25) that Fenn did not object to the introduction of a misleading excerpt of Stuart-Buttle’s testimony (see Fenn Br. 20) is baseless. Fenn moved to preclude plaintiff from reading the deposition into the record, on the specific ground that Stuart-Buttle’s conclusion that the swager generated a high level of vibration was meaningless when divorced from the exposure time and from the ANSI and ISO guidelines. Defense counsel argued: “You can’t take only

Only Martin and Stuart-Buttle tested a new swager. Plaintiffs assert that their other experts, Jaeger and Clark, “accepted Dr. Martin’s vibration measurements in reaching their conclusions that a new model 3F 2 die swager was dangerous ***.” But although Jaeger testified that the vibration emitted by a new machine was of a dangerous *frequency* (see A312), he acknowledged Martin’s opinion that the bull-block *exposure times* (the other key variable, see pp. 24-26 *supra*) were so low that a new swager did not present a risk of HAVS. A410. Because he had not tested a machine himself, Jaeger was unable to offer any opinion as to whether the short exposure times associated with proper use of a well-maintained swager could give rise to injury. *Ibid.*

Dr. Clark, like Jaeger, did not test a swager – old or new. A254-A255. Nor did he evaluate the plaintiffs’ use of the swager; he did not observe conditions at Brush Wellman or consider the operators’ exposure times as contrasted to those associated with a new or properly maintained swager. Like Stuart-Buttle, Clark based his conclusion that the swager was dangerous on the plaintiffs’ own accounts

vibration level, that’s not scientifically correct. By the same token you can’t only take time of exposure. That is scientifically incorrect. You need both. *** If the ruling is that the standards or actual guidelines can’t come into evidence *** [I]t is junk science to have Stuart-Buttle’s testimony because there’s nothing, even if we take her vibration levels, we take her time of measurement, the time of exposure, there’s nothing to compare it to. And further, your Honor, whether or not the guidelines come in, you can’t have one half of the equation as we have here.” *Id.*, 5, 7.

of their injuries, not on an examination of a new swager or on an analysis of the vibration that it admitted. A247.

Here, and throughout their brief, plaintiffs rely heavily on the Taylor-Pelmear study. That study was conducted at an unusually hazardous plant in Liverpool, England in the 1970s. The swaging machine used at that plant was not a Fenn machine. A258.¹² And the study group was not of a sufficient size to produce scientifically probative evidence. A1005. More fundamentally, plaintiffs grievously distort the study's results. They claim (Br. 33), for example, that "as a result of exposure to vibration while swaging, six of the 20 swager operators were diagnosed with Stage 4 on the Stockholm Diagnostic scale for HAVS." This is false: the study itself states that only *one* of the subjects manifested swaging-related HAVS, and his case was a moderate one. A1001-A1002. The six subjects who were diagnosed with severe HAVS had all been removed from the study because they had been exposed to vibration from many *different* kinds of machinery; the study does not suggest that their injuries were attributable to

¹² Plaintiffs' assertion that a new Fenn swager vibrates at a higher level than that in the Taylor-Pelmear study (Br. 34 & n.9) is meaningless: as Martin and Jaeger both observed, the frequency of the vibration is only one of many factors that determine the likelihood of injury. See pp. 25-27 *supra*.

swaging.¹³ Plaintiffs also cite to Dr. Jaeger’s testimony, but although Jaeger mentioned the Taylor-Pelmeur study, he provided no details.

C. The Fenn Swager Was Not Unreasonably Dangerous.

1. In Examining The Risk/Utility Factors, The Court Should View The Evidence Objectively – Not In The Light Most Favorable To The Plaintiffs.

Our opening brief (at 34-36) argued that each factor in the Pennsylvania risk/utility test militates in favor of judgment for Fenn. As also noted (at 12), this Court reviews the district court’s risk/utility analysis *de novo*. Plaintiffs contend that in determining whether Fenn is entitled to judgment, “the evidence must be viewed in the light most favorable to the verdict winners and every fair and reasonable inference must be drawn in their favor.” Pl. Br. 6. While that is a generally correct principle, it is inapplicable to the risk/utility “finding” below.

The district court itself “view[ed] the evidence in a light most favorable to the plaintiffs” in conducting the risk/utility analysis. A24 (citing *Burch v. Sears, Roebuck & Co.*, 467 A.2d 615, 618-19 (Pa. Super. Ct. 1983)). However, upon

¹³ Ironically, plaintiffs contend that *we* have misstated the results of the study by relying on “a follow-up study after 18 of the 20 operators in the initial study had been removed from the swager because of the hazardous vibration exposure.” Pl. Br. 33 n.8, citing A1001. But here too it is plaintiffs who misstate the record. There was only one study – the one referenced by Fenn, in which a single person was found to have swaging-related HAVS. The 18 operators who were removed from the study’s group were taken out because of histories of exposure to many different types of vibration. A999-A1000 (of the 33 people in the Liverpool plant, 18 were rejected on the basis of their occupational history; 2 were exposed to vibration; and 13 were placed in a control group).

determining that the evidence, viewed in that light, *could* support a finding that the swager was unreasonably dangerous, the district court removed the risk/utility question from the jury's consideration. The jury instructions, drawn directly from *Azzarello v. Black Bros. Co.*, 391 A.2d 1020 (Pa. 1978), did not ask the jury to consider the risk/utility factors. See A23 ("The question of whether a product is unreasonably dangerous is a question of law."); Fenn Br. 22-23; A815-A817. See also *Motter v. Everest & Jennings, Inc.*, 883 F.2d 1223, 1227 (3d Cir. 1989) ("Under Pennsylvania law, a trial judge must evaluate the risks of a product versus its social utility in determining whether the issue of the defective product is to be submitted to the jury.").

As a result of the way the district court approached the issue, *neither the court nor the jury* ever actually considered whether the swager's utility outweighs its risks. As one commentator has observed:

[I]f the court is required to view the evidence on the cost-benefit factors in the light most favorable to the plaintiff, and if (as most scholars and some courts have concluded) the *Azzarello* instruction does not permit the jury to consider cost-benefit factors at all, then *neither the court nor the jury has the authority to actually decide whether the true benefits of the proposed alternative design outweigh the true costs*. In other words, under this view of the division of the decisional power, neither the court nor the jury determines whether the product is in fact unreasonably dangerous or defective.

John M. Thomas, *Defining “Design Defect” in Pennsylvania: Reconciling Azzarello and the Restatement (Third) of Torts*, 71 TEMP. L. REV. 217, 231-32 (1998) (emphasis added).

As Thomas suggests, it cannot be right that, although the risk-utility balance is a central ingredient of Pennsylvania product liability law, *no one, neither court nor jury, ever determines whether the product meets or fails the test*. Indeed, such an approach is manifestly unfair to defendants and raises severe due process problems. While it may be that, in light of the Seventh Amendment, the issue should be submitted to the jury so long as it implicates a genuine factual dispute,¹⁴ in this instance neither party sought a jury determination of the issue of unreasonable dangerousness. The solution, in such circumstances, is to have the issue decided by the court. While the district court never did so, application of *de novo* review in which this Court considers all of the evidence in an evenhanded matter in evaluating whether the risks associated with a Fenn swager outweigh its utility will suffice to rectify the problem.

¹⁴ See *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 537-38 (1958) (noting the “strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts”; federal practice, which “assigns the decisions of disputed questions of fact to the jury” controls over any contrary state rule); *Hollinger v. Wagner Mining Equip. Co.*, 667 F.2d 402, 410 n.11 (3d Cir. 1981) (noting, but not reaching, the apparent conflict between *Byrd* and the notion that the district court should decide the “unreasonably dangerous” issue without giving it to the jury).

2. All Of The Risk-Utility Factors Favor Judgment For Fenn.

As a substantive matter, plaintiffs contest only five of the seven risk/utility factors. None of their arguments addresses the problem at the heart of their case: that the Fenn swager is a safe product that has caused, at most, fairly minor injuries to these five individuals in the course of decades of use by thousands of workers – and therefore cannot be deemed “unreasonably dangerous” by any standard.

1. ***Likelihood and gravity of injury.*** The only point plaintiffs make with regard to this factor is the unsubstantiated assertion (Br. 35) that “the likelihood that a Fenn Swager will cause injury is high.” This is hardly very persuasive when there is no evidence that ***anyone else ever was injured by a Fenn swager.*** Nor can they escape the fact that even if the plaintiffs do experience severe pain in their hands, none of them suffered fatal or seriously disabling injuries; their injuries are clearly at the less grave end of the spectrum.

2. ***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.*** Plaintiffs do not dispute that (i) adding an automatic feed would increase the cost of the swager by more than a third; (ii) a feed is functionally useful for only a few of the swager’s many applications; and (iii) most purchasers do not elect to buy and pay for an automatic feed even though it is an available option. A534; A550-A551.

3. ***The user’s ability to avoid the danger by exercise of care.*** Plaintiffs’ only argument on this point is that they could not have avoided injury by proper swager use because a new swager generates a dangerous amount of vibration. Even if there were some basis for that assertion (but see pp. 24-27 *supra*), it would not change the fact that the vastly greater vibration exposure that resulted from the conditions at Brush Wellman could have been avoided through the exercise of due care.

4. *The user's anticipated awareness of the dangers, and the avoidability of the dangers.* Plaintiffs ignore the point that they would not have been injured, or would have had a greatly reduced risk of injury, had Brush Wellman followed the instructions in the manual that Fenn issued with the swager.

5. *Feasibility of spreading the loss.* In response to our argument that any "loss" could be spread only by making the swager unreasonably expensive, plaintiffs contend that Brush Wellman itself installed a new swager with an automatic feed after receiving its operators' complaints of hand injuries. The fact that a single customer installed a machine with an automatic feed after its employees had complained for a year and brought a lawsuit against the swager's manufacturer does not demonstrate that it is "feasible" for Fenn to increase the price of *all* of its swagers by more than a third in order to add a feature that is unnecessary, unwanted by the vast majority of its customers, and would render the machine unsuitable and unwieldy for many customers and applications.

Under Pennsylvania law, a manufacturer cannot be held strictly liable for rare injuries of a comparatively modest character, especially when extreme misuse and abuse of its product greatly amplified any slight risk it may have carried. Such a product is not unreasonably dangerous, even if the manufacturer could theoretically have made it even safer by adding a feature that would drive up the price by a third and substantially diminish its usefulness. See *Habecker v. Clark Equip. Co.*, 942 F.2d 210, 215 (3d Cir. 1991); *Fitzpatrick v. Madonna*, 623 A.2d 322, 327 (Pa. Super. 1993). The district court erred in sending this case to the jury.

II. PLAINTIFFS' WARNING CLAIM LIKEWISE CANNOT STAND.

We have argued that plaintiffs' warning claim fails because – in addition to the fact that the swager was not unreasonably dangerous without a warning – the

plaintiffs' injuries were totally unforeseeable, and under Pennsylvania law there is no duty to warn of an unforeseeable risk. Plaintiffs' counter-arguments rest almost entirely on distortions of the case law and the record.

A. Fenn Had No Duty To Warn.

1. Pennsylvania Imposes No Duty To Warn Of An Unforeseeable Risk.

Plaintiffs' principal argument is that because ““negligence concepts have no place in strict liability law,”” the foreseeability (or lack thereof) of a risk is irrelevant in a strict-liability failure-to-warn case. Pl. Br. 40 (quoting *Phillips v. Cricket Lighters*, 841 A.2d 1000, 1006 (Pa. 2003)). As this Court and the Pennsylvania courts have repeatedly recognized, however, warning claims represent an exception to that general rule. See cases cited at Fenn Br. 37-38.

Plaintiffs attempt to distinguish the many Pennsylvania cases holding that there is no duty to warn of an unforeseeable risk, ignoring the language of broad and general applicability employed by the courts. For example, they contend that *Colegrove v. Cameron Machine Co.*, 172 F. Supp. 2d 611, 626 (W.D. Pa. 2001), and *Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107, 120 (3d Cir. 1992), are limited to cases in which the defendant “manufacture[d] a component part, where the part itself is not unreasonably dangerous and the danger arises because of the application in which the part was used.” Pl. Br. 42-43. The cases, however, do not support that distinction.

In *Fleck*, the Court started with the proposition that, as a general matter, a manufacturer cannot be expected to warn of an unforeseeable risk. 981 F.2d at 118-19. Next, the Court recognized a subsidiary principle: that a manufacturer of a component part often cannot be expected to foresee all the risks that could result from the part's incorporation into a final product. It then rejected the idea that the product before it was a component part and concluded that because the risks were foreseeable, the manufacturer did have a duty to warn. *Id.* Thus, the character of the product did not determine the relevance of foreseeability; the decision rested on the general principle that the “inquiry into the duty to warn revolves around whether the supplier knew, or should have known, of the danger ***.” *Id.*, 120.¹⁵

In *Colegrove*, the court undertook an extensive analysis of Pennsylvania precedent on strict liability warning claims before concluding 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. *Colegrove* quoted approvingly from *Ellis*, a Pennsylvania Superior Court case explaining that “[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

¹⁵ Conversely, in *Petrucelli v. Bohringer*, 46 F.3d 1298, 1309 (3d Cir. 1995), the Court found that the manufacturer of a component part could *not* have foreseen the relevant risks and therefore could not be held strictly liable for a failure to warn.

object is unreasonably dangerous without adequate warnings, and thus defective, necessarily involves negligence principles such as reasonableness and foreseeability.’” 172 F. Supp.2d at 628 (quoting *Ellis*, 545 A.2d at 912-13). That general principle was nowhere limited to cases involving component part manufacturers.

Plaintiffs’ efforts to confine our other cases to their particular facts is similarly misguided. In *1836 Callowhill Street v. Johnson Controls, Inc.*, 819 F. Supp. 460 (E.D. Pa. 1993), the court unambiguously endorsed the role of foreseeability analysis in strict-liability failure-to-warn cases. *Id.*, 464 (“[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”) (citations omitted). The fact that the court then found that the defendant *should* in fact have foreseen the relevant risk (see Pl. Br. 43) is obviously immaterial. See also *Ellis*, 545 A.2d at 913.

The Pennsylvania Supreme Court has never rejected foreseeability of the risk as part of a strict-liability failure-to-warn claim. Fenn Br. 37-39. In *Berkebile v. Brantly Helicopter Corp.*, 337 A.2d 893 (Pa. 1975), the court did *not*, contrary to plaintiffs’ assertion (Br. 30), hold that a manufacturer has a duty to warn of an unforeseeable risk. The decedent was killed in a helicopter crash. His estate sued

the manufacturer, claiming (*inter alia*) that the manual and cockpit warnings were inadequate because they did not alert the pilot to the need to activate the plane's autorotation system immediately upon engine failure. The case had nothing to do with unforeseeable risks, as the defendant was well aware of the risk of engine failure. The question instead concerned the adequacy of the warnings provided with respect to a known risk (see *id.*, 902), and the language relied on by plaintiffs was addressed to that distinct context.

In *Dambacher*, the plaintiff was injured in a car accident; the driver had installed both radial and non-radial tires, which made the car more difficult to control. The defendant, which had manufactured the radial tires, knew of that danger; the issue was whether it should have embossed a label on its product that would have notified consumers of the risk. The Superior Court specifically *declined* to address the question whether a manufacturer has a duty to warn of an *unforeseeable* risk: “We *** need not now consider whether when a seller alleges that at the time of the sale it could not have known the dangers of its product, the reasonableness of its conduct may be considered.” *Dambacher v. Mallis*, 485 A.2d 408, 428 n.9 (Pa. Super. 1984). Thus, the Superior Court did not read *Berkebile* – which it discussed at length – to have answered that question.

The *only* case that plaintiff cites that actually supports its position is *Carrecter v. Colson Equip. Co.*, 499 A.2d 326, 330 (Pa. Super. 1985), a 20-year-

old Superior Court decision. In light of all the *subsequent* authority – from this Court, the Pennsylvania courts, and from the district courts in this Circuit – holding that a manufacturer should not be held liable for failure to warn of an unforeseeable risk, *Carrecter* is plainly a derelict on the waters of Pennsylvania law that cannot control this case.

2. The Risk That A Fenn Swager Could Cause HAVS Was, And Remains, Wholly Unforeseeable.

As we discuss above and in our opening brief (at 39-41), plaintiffs' injuries were entirely idiosyncratic and unforeseeable. Plaintiffs' arguments to the contrary are without merit. They again invoke the Taylor-Pelmeur study; as we have explained, that study – in which *one* individual developed HAVS as a result of using a non-Fenn swaging machine – could not have put Fenn on notice that its swager could cause vibratory injury. See pp. 27-28 *supra*; Fenn Br. 40; RESTATEMENT (SECOND) OF TORTS § 402A cmt. j; *Morris v. Pathmark Corp.*, 592 A.2d 331 (Pa. Super. 1991).¹⁶

Plaintiffs assert (Br. 44) that Fenn could have foreseen the risk of harm if it had tested the swager. That assertion is contradicted by the testimony of every

¹⁶ Plaintiffs have no response to the fact that their own expert in vibratory injury, Dr. Clark, had never heard of a link between swaging and vibratory injury until he was retained in this case. A263-A265. Nor do they address Dr. Cherniack's proffered, but excluded, testimony that the ANSI and ISO guidelines would not predict injury arising from swager use.

expert witness in this case – including those retained by the plaintiffs – all of whom found that if one measured the vibration emitted by a properly used and maintained swager, and compared the results to the existing scientific guidelines, one would conclude that the swager would not cause vibratory injury. See pp. 23-28 *supra*. In any event, Pennsylvania law does not recognize an independent “duty to test” on the part of manufacturers. See *Oddi v. Ford Motor Co.*, 234 F.3d 136, 143-44 (3d Cir. 2000); *Viguers v. Philip Morris USA, Inc.*, 837 A.2d 534, 541 (Pa. Super. Ct. 2003).

B. At A Minimum, Fenn Is Entitled To A New Trial On The Warning Claim.

Plaintiffs offer no response to our argument that, at a minimum, Fenn is entitled to a new trial on the warning claim because the district court excluded the evidence bearing on the foreseeability of the risk, including the ISO and ANSI guidelines; the evidence that the machine was dangerous only as a result of Brush Wellman’s combination of misuse and poor maintenance; and the absence of prior claims. Nor do plaintiffs address our contention (Fenn Br. 42) that a new trial is necessitated by the erroneous jury instructions on the warning claim.

Even if the Court rejects all of the foregoing arguments, it must remand for a new trial on this claim if it determines that the abuse/misuse evidence should have been admitted on the design defect claim. That evidence was equally relevant to the warning claim: if the swager was dangerous only as a result of misuse and/or a

substantial change in its condition, it was not “unreasonably dangerous in the absence of a warning,” and Fenn cannot be held strictly liable on any theory.

III. THE STATUTE OF LIMITATIONS BARS THE CLAIMS OF PLAINTIFFS MOYER, KERN, AND SECHRIST.

We argued (Br. 43-48), that the two-year statute of limitations bars the claims of plaintiffs Moyer, Kern, and Sechrist. Although plaintiffs nominally recognize the applicable legal standard (see Pl. Br. 46-47), their argument boils down to a contention that their causes of action did not accrue until they learned that they might have swaging-related HAVS. “It was only in 1996, well within two years of the filing of suit, that the plaintiffs were made aware that they had suffered an injury and the injury was caused by the conduct of a third party. *This occurred when Mr. Moyer was diagnosed by Dr. Wigley* and when plaintiffs’ employer hired a second ergonomist, Carol Stuart-Buttle, to determine *what part of the work the plaintiffs did was causing the problem with their hands.*” Pl. Br. 52-53 (emphasis added). See also *id.*, 50-51.

This argument has at least three major flaws. First, under the discovery rule, the plaintiff need not know the medical cause of his injury for the limitations period to begin to run; rather, he has to be able to learn, with the use of reasonable diligence, only that he has an injury that was caused by another party. *Bohus v. Beloff*, 950 F.2d 919, 924 (3d Cir. 1991). Second, the plaintiffs did not have to know *what* other party had caused the harm, or even that they had the right to sue

anyone at all; they just had to have reason to believe that their injuries were work-related. *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1125 (3d Cir. 1997). And third, it does not matter what the plaintiffs, individually or collectively, believed about the cause of their injuries. What matters is what an objective reasonable person in their shoes could have learned through the exercise of reasonable diligence. *Id.*, 1124. Such a person clearly could have learned – and indeed, the record demonstrates that each of these three plaintiffs *did* in fact learn – prior to September 2, 1995 that he had developed hand injuries that might be attributable to another party’s conduct.

In support of their argument that the absence of a clear medical diagnosis tolled the statute of limitations, plaintiffs rely on a host of inapposite cases. *Bohus*, for example, is a medical malpractice case. It holds that if a doctor belittles a patient’s symptoms in order to cover up his own malpractice, that tolls the patient’s claim against *that doctor*. Similarly, *Corbett v. Weisband*, 551 A.2d 1059, 1068 (Pa. Super. 1988), held that the plaintiff’s medical malpractice claim was tolled for the period during which the defendant himself had misdiagnosed her illness.¹⁷ In *Trieschock v. Owens Corning Fiberglass Co.*, 511 A.2d 863 (Pa. Super. 1986), the plaintiff had no reason to know that he had asbestosis (a silent disease that is

¹⁷ Moreover, *Corbett* was decided under an outdated Pennsylvania rule, under which the statute was tolled until the plaintiff had reason to know the *causal link* between the defendant’s conduct and her injury. See 551 A.2d at 310 n.8.

painless until it becomes symptomatic) unless and until a doctor diagnosed it. In *Burnside v. Abbott Laboratories*, 505 A.2d 973 (Pa. Super. 1986), the plaintiff's health problems were misdiagnosed by her doctor, who affirmatively told her that they were unrelated to her mother's ingestion of DES. She "made no further inquiry because she was experiencing no pain." *Id.*, 989. The limitations period began to run when she learned *from other sources* – a television show and a social worker – that her condition might be DES-related; contrary to plaintiffs' position, it was not tolled until she was definitively diagnosed by a doctor. *Ibid.* In *Mazur v. Merck & Co.*, 742 F. Supp. 239 (E.D. Pa. 1990), as in these other cases, the plaintiff experienced symptoms that were viewed as ambiguous by the medical personnel who were the only source of information about her illness.

Here, by contrast, there is a vast amount of evidence suggesting that the plaintiffs *themselves* believed that they were suffering from swager-induced injuries. Accordingly, their misdiagnosis contention – the heart of their argument – must fail. It is undisputed that in January 1995, two years and nine months before this suit was filed, Brush Wellman was investigating complaints that the swager was injuring the hands of the bull-block operators. Plaintiffs try to minimize the importance of that investigation, asserting that its purpose was "to evaluate the work activities of all the employees in [the] plant." Pl. Br. 52. But Jeffrey Eckel, the consultant retained by Brush Wellman to handle the inquiry,

testified that its chief purpose was to follow up on complaints about swager-related injuries. A594-A598.¹⁸ Accordingly, the discovery rule ceased at that point to toll the claims of any plaintiff who had by then exhibited symptoms. Insofar as there was any confusion or misdiagnosis, it was corrected by the general belief among Brush Wellman workers, prevailing by January 1995, that the swaging machine was causing hand injuries.¹⁹

Many of the arguments presented on behalf of the individual plaintiffs are unsupported by the record or are legally immaterial. Moyer, for example, had been experiencing HAVS symptoms for nearly five years when he filled out the WorkAbility survey in April 1995 (more than two years before this suit was filed)

¹⁸ Plaintiffs repeatedly emphasize (*e.g.*, Br. 52, 61) Eckel's testimony that he did not *tell* any plaintiff that he had suffered a swaging-related injury. That misses the point, which is that Eckel was called in to study the swaging operation *because the operators had reported that the swager hurt their hands and wrists*; plaintiffs themselves had asked Brush Wellman to investigate the problems associated with the swager. A598.

¹⁹ Mysteriously, plaintiffs attempt (Br. 47 n.11) to capitalize on the omission of Weidner and Williams from our statute of limitations argument. But Weidner had no HAVS symptoms until 1996; accordingly, his claim did not accrue until then. As for Williams: although his hands began to hurt prior to December 1994, the record does not reveal that he possessed any specific information about the cause of that pain. That circumstance distinguishes him from Moyer, Kern, and Sechrist, each of whom clearly had reason to believe, and did believe, that it was the swager that was causing his injuries. See Fenn Br. 45-47. Although we could have argued that Eckel's visit alone was enough to put Williams on notice, it is our view that the argument is far stronger as to the other three plaintiffs. Unlike plaintiffs, we see nothing sinister in our decision to make only those arguments most strongly supported by the record and the law.

and asserted that he was experiencing pain and numbness in his hands that he attributed to working with the swager. A119-A120. The fact that his fingers may not have turned white until later (see Pl. Br. 49, 54) is irrelevant: the statute of limitations “begins to run as soon as the right to institute suit arises *** regardless of whether the full extent of harm is known” at that time. *Adamski v. Allstate Ins. Co.*, 738 A.2d 1033, 1042 (Pa. Super. 1999). See also *Sterling v. St. Michael's School for Boys*, 660 A.2d 64, 66 (Pa. Super. 1995).

Plaintiffs’ chief argument regarding Kern – who was *not* misdiagnosed by any medical authority – is based on a mischaracterization of his testimony. In an attempt to create a conflict with Nurse Krotzer’s notes from her 1993 examination of Kern, in which she diagnosed his condition as “Raynaud’s”²⁰ and stated that she told him to get it evaluated, plaintiffs assert (without any record citation) that Kern testified that Krotzer told him his hand pain was “no big deal.” See Pl. Br. 57. Kern said no such thing. Rather, Kern testified vaguely that the nurse “might have said something. I don’t know. But it was like no big deal.” A170. Kern also could not remember whether the nurse told him to get the condition evaluated by a doctor. A204. As explained in our opening brief (at 46), that is irrelevant: if Kern

²⁰ “Occupational Raynaud’s,” like vibration white-finger, is another term for HAVS. A210.

had exercised appropriate diligence, he would have learned the cause of his injury. Accordingly, the discovery rule does not save his claim.

Finally, plaintiffs accuse us (Br. 59) of “blatantly misstat[ing] the nature of the committee on which Sechrist served” in June 1995. “The purpose of the committee was not to ‘look into the complaints of swagers’ as Fenn represents, but rather ‘to look for a new swager.’” Pl. Br. 59. That exercise in semantics demonstrates the lengths to which plaintiffs go in seeking to preserve their claims. The committee in question was formed in June 1995, shortly after the Reading plant prepared the Memorandum of Justification in May 1995. See pp. 8-9 *supra*. The committee was not merely comparison-shopping among various makes and models of swagers; rather, it was tasked with investigating and resolving the bull block operators’ complaints about “symptoms in their hands and wrists” that they “attributed *** to vibration caused by swaging operations.” A1421-A1424; A156-A157. From Sechrist’s presence on the committee, one can certainly infer that – at a minimum – he discussed the committee’s purpose with his colleagues and with management. At that point in time, Sechrist had worked on the bull block for more than a decade. He had every reason to believe that the “symptoms in [his] hands and wrists” were caused by his work with the swager.

IV. THE DAMAGES AWARDS ARE EXCESSIVE.

Plaintiffs go to great lengths to portray their injuries as being serious and painful. Whatever constraints those injuries may place on plaintiffs' lives, however, the fact remains that plaintiffs are not incapacitated. They have not lost the use of their hands or of any other bodily parts or functions. They certainly are neither disabled nor dead. Accordingly, their multi-million-dollar awards – which are very likely the result of natural sympathy for hardworking men who suffer from various physical problems and injuries, albeit ones that are mostly unrelated to their use of the swager – are not rationally related to their injuries, and are out of step with awards for similar injuries in this and other jurisdictions.

Nearly twenty years ago, this Court explained that jury awards cannot merely be rubber-stamped by reviewing courts. Rather, the courts must look critically to determine whether the award truly reflects the nature of the plaintiff's injury.

[T]his court takes note of the increasing willingness of the appellate courts to review damages awards. There is no doubt that this trend is a response to the increasingly outrageous amounts demanded by plaintiffs and awarded by juries. A jury has very broad discretion in measuring damages; nevertheless, a jury may not abandon analysis for sympathy for a suffering plaintiff and treat an injury as though it were a winning lottery ticket. There must be a rational relationship between the specific injury sustained and the amount awarded.

Gumbs v. Pueblo Int'l, Inc., 823 F.2d 768, 773 (3d Cir. 1987).²¹ In *Gumbs*, the jury had awarded the plaintiff \$900,000 for serious injuries that caused her chronic, intermittent pain and interfered with her daily activities. The district court remitted that award to \$575,000. This Court held that, even as remitted, the award was excessive: it did not reflect the nature of the plaintiff's injury and the fact that she had a number of other ailments that were unrelated to the defendant's conduct. The Court's description of the record before it is notable for its similarity to the record in this case, as described by plaintiffs.

The plaintiff obviously led a busy business and family life [prior to her accident]. She not only enjoyed an accounting practice but operated a secretarial school, maintained a home for her husband, five children, and one stepchild. She looked after a sick mother. She also testified that prior to the fall, she engaged in jogging, tumbling, and tennis with her children. She stated that these activities suffered as a result of her pain. Furthermore, the pain interfered with her sexual relationship with her husband resulting in his drinking to excess and their ultimate separation. On the other hand, at the time of the accident Gumbs had preexisting scoliosis, an osteoarthritic condition of the spine, and weighed about 240 pounds ***. Despite Gumbs' description of subjective pain and suffering, and evidence of a torn ligament and back spasm, certain undisputed facts are illuminating. * * * Gumbs never required hospitalization and she lost no time from work. She did not have to submit to surgery; she suffered no disfigurement. Treatment prescribed for her *** consisted of physical therapy to relieve pain and spasm. Daily, she was able to go to and from her accounting office and climb the twenty-five steps to reach it.

²¹ Federal law governs the question of excessiveness in a diversity case. *Kazan v. Wolinski*, 721 F.2d 911, 913 (3d Cir. 1983).

Id., 774-75. Accordingly, this Court reduced the pain and suffering award to \$235,000.²² Here, as in *Gumbs*, the plaintiffs claim that their injuries cause constant pain and interfere with their daily activities and familial relationships. But here, as in *Gumbs*, the plaintiffs have not been hospitalized; have not required surgery; have not been disfigured; and have lost no time from work. Here, as in *Gumbs*, their awards are grossly excessive.

In assessing whether a jury award is rationally related to the injury sustained by the plaintiff, “the rationale of the court[s] in determining the excessiveness of verdicts with comparable injuries offers us some guidelines.” *Gumbs*, 823 F.2d at 773. Such an analysis compels a finding that the awards here are excessive. In *Williams v. Martin Marietta Alumina, Inc.*, 817 F.2d 1030, 1041 (3d Cir. 1987), for example, this Court held that the jury’s \$317,000 damages award for a herniated disk was excessive. The plaintiff’s injuries were comparable in severity to those claimed here: “Williams testified that he still has pain in his lower back, that it hurts if he stands up and stretches and if he walks for any distance or sits for a long period of time. He testified he cannot sit through a whole movie, and can no longer dance. However, Williams also testified that he is able to walk up to 45

²² See also, *e.g.*, *Hayes v. Cha*, 338 F. Supp.2d 470, 510 (D.N.J. 2004) (relying on *Gumbs* to remit excessive award); *Blakey v. Continental Airlines, Inc.*, 992 F. Supp. 731, 738 (D.N.J. 1998) (same); *Smith v. Delaware Bay Launch Serv., Inc.*, 842 F. Supp. 770, 779 (D. Del. 1994) (same).

minutes before he becomes tired *** and he lives on the third floor and walks up and down the stairs.” *Id.*, 1040 (citations omitted). The Court reduced the pain and suffering award to \$100,000. In *Zimmerman v. Baker-Perkins, Inc.*, 707 F. Supp. 778 (E.D. Pa. 1989), the plaintiff’s hand became stuck in the rotating blades of a mixer, “resulting in multiple fractures, tendon injuries and loss of blood. *** Plaintiff underwent surgery to reattach the hand, and while the hand looks good, it has limited physical function.” *Id.*, 780. The court held that the jury’s \$1.75 million award of economic and pain-and-suffering damages was excessive; it ordered a new trial. See also, *e.g.*, *Jackson Public Sch. Dist. v. Smith*, 875 So.2d 1100 (Miss. Ct. App. 2004) (\$850,000 damages award to student struck by school bus, who suffered serious hand injuries, was reduced to \$400,000); *Horton v. Valley Elec. Membership Corp.*, 461 So.2d 375 (La. App. 1984) (reducing \$55,000 award for severe and permanent burns on hand to \$35,000); *Stone v. Sterling Drug, Inc.*, 490 N.Y.S.2d 468 (N.Y. App. Div. 1985) (\$250,000 award for second and third degree burns to hand was excessive).

Just this year, A.L.R. published a compilation of damages awards for hand and arm injuries, which reveals that the vast majority of such awards are in the five- and low six-figure range. Carl T. Dreschler, *Excessiveness or Adequacy of Damages Awarded For Injuries To Arms And Hands*, 12 A.L.R. 4th 96 (2005).

Even adjusting older awards for inflation, it is manifest that the awards in this case are grossly out of line with comparable cases.

Moreover, the federal courts have routinely reduced awards comparable in size to those at issue here, even where the plaintiffs suffered injuries indisputably more serious than HAVS. See, e.g., *In re Air Crash At Little Rock, Arkansas*, 291 F.3d 503, 511-12 (8th Cir. 2002) (reducing \$6.5 million award to \$1.5 million; plaintiff suffered “very significant PTSD and depression,” as well as physical injuries, as a result of a plane crash); *Scala v. Moore McCormack Lines, Inc.*, 985 F.2d 680, 684 (2d Cir. 1993) (deeming excessive a \$1.5 million award for injuries that required repeated surgeries and hospitalizations and resulted in plaintiff’s confinement to a wheelchair and resulting severe depression; remitting award to \$750,000); *Dixon v. International Harvester Co.*, 754 F.2d 573, 589-90 (5th Cir. 1985) (plaintiff lost his sexual organs in a tractor accident; court noted that “[t]here can be absolutely no question that [his] suffering was initially as intense as the human body and mind can bear,” but set the maximum award for pain and suffering at \$750,000); *Shaw v. United States*, 741 F.2d 1202, 1209-1210 (9th Cir. 1984) (reducing \$2 million award for mental anguish and suffering to \$50,000 where plaintiffs’ child had suffered severe brain damage as a result of defendant’s negligence).

Evidently hoping to justify the jury's exorbitant awards, plaintiffs cite a series of cases in which courts upheld damages awards for injuries that plaintiffs claim are similar to their own. But an examination of their cases reveals that the injuries were far more severe. See *Bennyhoff v. Pappert*, No. 2854 Jan. Term. 1999, 2001 WL 1113030, at *1 (Pa. Ct. Cmmn. Pls. Mar. 1, 2001) (plaintiff, who was hit by an armored car while riding her bicycle, required multiple surgeries and treatments for severe injuries); *Doe v. Raezer*, 664 A.2d 102, 108 (Pa. Super. 1995) (injury to plaintiff's sexual organs had a "dreadful and traumatic impact on the life of [his] family"); *Tesauro v. M.L. Perrige*, 650 A.2d 1079, 1081 (Pa. Super. Ct. 1994) (nerve damage arising from dentist's malpractice prevented plaintiff from opening her mouth, caused severe chronic pain, interfered with talking and eating and necessitated "radical experimental surgery").

Thus, it is clear that there is no "rational relationship" between the jury's multi-million dollar awards and plaintiffs' nondisabling hand injuries. See *Gumbs*, 823 F.2d at 773. The Court should either grant a new trial on damages or remit the awards substantially.

V. POST-JUDGMENT INTEREST SHOULD BE CALCULATED FROM THE DATE ON WHICH JUDGMENT WAS ENTERED.²³

Plaintiffs fail to offer any support for their contention that they are entitled to post-judgment interest calculated from February 28, 2003, the date on which the district court quantified the amount of damages against Fenn, rather than from July 26, 2004, the date on which the clerk actually entered judgment. Indeed, the single case plaintiffs offer to justify their position, *Eaves v. County of Cape May*, 239 F.3d 527 (3d Cir. 2001), does no such thing. In *Eaves*, the district court entered a judgment for the plaintiff for the amount of a jury verdict and an unspecified amount of attorneys' fees. Several months later, the court entered another judgment, specifying the total amount of the award, including attorneys' fees, and holding that post-judgment interest should be calculated from the date of the first judgment. On appeal, this Court held that post-judgment interest should have been calculated from the date of the *second* judgment. It noted that "post-judgment interest does not begin to run under § 1961(a) until the district court *enters* the judgment at issue, *i.e.*, the 'money judgment.'" *Id.*, 532 (emphasis added). A "money judgment" is "an *order entered* by the court or by the clerk, after a verdict has been rendered for [the] plaintiff, which adjudges that the defendant shall pay a

²³ Plaintiffs' response to our argument that Rule 238 damages are unavailable in federal court is limited to a recapitulation of *Fauber* and *Kirk*, decisions that we addressed in our opening brief.

sum of money to the plaintiff to the plaintiff.” *Id.*, 533 (citations omitted) (emphasis added).

Here, plaintiffs correctly observe that the district court quantified the amount of the damages against Fenn on February 28, 2003. However, it was not until July 26, 2004 that the clerk *entered* the *order*, a prerequisite for a “money judgment” that accumulates interest under federal law. Plaintiffs complain that it would be “unjust” and “hyper-technical” to deny them the extra 17 months of interest they request. But plaintiffs easily could have avoided this situation by ensuring that the clerk entered judgment fixing the amount of damages on February 28, 2003. Their failure to do so should not be laid at Fenn’s doorstep.

CONCLUSION

For the foregoing reasons and those discussed in Fenn's opening brief, 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 13,181 words (based on the Microsoft Word word processing system word count function). This Court granted our motion to file a reply brief of up to 13,239 words.

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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