

Harley placed his left hand on a surface known as the "sliding table," a table intended to move forward and backward that is affixed to rods with hinge-like hardware called "set plates." As the plaintiff rose, he placed his left hand on the sliding table. The plaintiff's weight caused the table to turn, and the plaintiff lost his balance. Reflexively, the plaintiff put his right hand onto the saw blade, which was still spinning.

The plaintiff contends that the saw was designed improperly, in that the set plates should have encircled the rods, or been longer, so that the sliding table would have been firmly in position and incapable of turning over. Further, the plaintiff argues that the set plates were improperly manufactured, that the saw blade should not have continued to spin as it did, and that warnings relating to both of the alleged defects were insufficient.

On January 2, 1998, the plaintiffs filed a Motion in Limine, seeking to exclude the admission of several types of evidence by the defendant. On February 5, 1998, the defendant filed its own Motion in Limine, wherein it requests that this Court preclude a plaintiffs' expert from testifying and bar plaintiff Susan Harley's loss of consortium claim.

II. DISCUSSION

A. Appropriate Law

Subject matter jurisdiction for this case is based upon diversity of citizenship. 28 U.S.C.A. §1332(a) (1993).

Accordingly, Pennsylvania law governs the admissibility of evidence, because those issues relate to substantive, or outcome determinative, matters. See Yohannon v. Keene Corp., 924 F.2d 1255, 1264-65 (3d Cir. 1991). This Court, therefore, must predict how the Supreme Court of Pennsylvania would resolve these motions. Id.

B. Plaintiffs' Motion

1. Admissibility of Defendant's Compliance with Industry Standards

The plaintiffs seek to prevent the defendant from offering evidence concerning the defendant's compliance with industry standards. Pls.' Mot. at 1. The defendant asserts that this evidence is relevant to show "what years of experience in the industry have taught concerning safety as it relates to a particular product." Def.'s Mem. of Law in Opp'n to Pls.' Mot. in Lim. at 5.

Pennsylvania has adopted Section 402A of the Restatement (Second) of Torts, which establishes strict liability for physical harm caused by a product upon a seller of any product in a defective condition that is unreasonably dangerous to the user or consumer. Webb v. Zern, 220 A.2d 853, 854 (Pa. 1966). In Lewis v. Coffing Hoist Div., Duff-Norton Co., Inc., 528 A.2d 590 (Pa. 1987), the Pennsylvania Supreme Court held that a defendant's compliance with industry standards is inadmissible in a strict liability case.

This rule still applies. Habecker v. Clark Equip. Co., 36 F.3d 278, 282-83 (3d Cir. 1994), cert. denied, 514 U.S. 1003 (1995); Monahan v. Toro Co., 856 F. Supp. 955, 960 (E.D. Pa. 1994). Accordingly, evidence of the defendant's compliance with industry standards is inadmissible at trial.

2. Admissibility of Plaintiff's Prior Workplace Injuries and Smoking Habits

The plaintiffs seek to exclude evidence of four prior workplace injuries that plaintiff Joseph Harley suffered as a carpenter over the last twenty years. Pls.' Mot. at 2. The plaintiffs assert that none of these injuries were to the plaintiff's right hand, and none involved a table saw. Moreover, the plaintiffs seek to preclude evidence that plaintiff Joseph Harley smokes cigarettes, because no medical expert has opined that this habit caused the plaintiff's injury or effected the plaintiff's healing process. In response, the defendant claims that these accidents show the plaintiff's general character for negligence. Def.'s Mem. of Law in Opp'n to Pls.' Mot. in Lim. at 1. Moreover, the defendant asserts that its medical expert, Dr. William Kirkpatrick, opines that "heavy smoking has an adverse effect on the revascularization process to plaintiff's injury site," thus slowing the healing process. Id. at 4.

a. Plaintiff's Negligence

Since the Pennsylvania Supreme Court's decision in Webb, Pennsylvania courts have consistently rejected the introduction of negligence concepts in Pennsylvania's products liability law. See Kimco Dev. Corp. v. Michael D's Carpet Outlets, 637 A.2d 603, 606 (Pa. 1993). In Berkebile v. Brantly Helicopter Corp., 337 A.2d 893 (Pa. 1975), the Supreme Court of Pennsylvania stated:

[t]he crucial difference between strict products liability and negligence is that the existence of due care, whether on the part of the seller or consumer, is irrelevant. The seller is responsible for injury caused by his defective product even if he has exercised all possible care in the preparation and sale of his product.

Id. at 899. Pennsylvania's strict products liability law, therefore, only requires proof on two general elements: 1) that the product was defective when the product left the hands of the seller; and 2) that the defective product was the proximate cause of the plaintiff's injuries. Id. at 898.

To prove causation, a plaintiff must show that the defective product was a substantial factor in bringing about the claimed injuries. Carrecter v. Colson Equip. Co., 499 A.2d 326, 329 (Pa. Super. Ct. 1985). Since a seller is liable for a defective product even if it has exercised due care, Pennsylvania law imposes liability on the seller for all unforeseen consequences caused by its defective products. Berkebile, 337 A.2d at 900. A plaintiff, however, cannot recover "absent proof of causation, as

where plaintiff sustains eye injury while not wearing defective safety glasses." Id. at 898.

In Dillinger v. Caterpillar, Inc., 959 F.2d 430, 440-44 (3d Cir. 1992), the Third Circuit examined the admissibility of evidence of a plaintiff's negligence in a strict products liability action on the issue of causation. The Third Circuit held that under Pennsylvania law a defendant could not introduce evidence of the plaintiff's negligence in failing to prevent an accident that had already been set in motion by a defective product. Id. at 444.¹ In Dillinger, the court found "the evidence compelling that the defect . . . , rather than [the plaintiff's] conduct, triggered the accident." Id. at 442. Accordingly, the Third Circuit concluded that evidence of the plaintiff's negligent conduct should have been excluded. Id. at 444.

The Third Circuit again addressed this issue in Parks v. AlliedSignal, Inc., 113 F.3d 1327 (3d Cir. 1997). The Court of Appeals stated:

1. Despite numerous pronouncements from the Supreme Court of Pennsylvania that have rejected the introduction of negligence principles in strict products liability cases, the Superior Court of Pennsylvania has rendered several decisions that allow the introduction of evidence of the plaintiff's negligence on the issue of causation. See Gallagher v. Ing, 532 A.2d 1179 (Pa. Super. Ct. 1987), appeal denied, 548 A.2d 255 (Pa. 1988); Foley v. Clark Equip. Co., 523 A.2d 379 (Pa. Super. Ct. 1987), appeal denied, 531 A.2d 780 (Pa. 1987) and 533 A.2d 712 (Pa. 1987); Bascelli v. Randy, Inc., 488 A.2d 1110 (Pa. Super Ct. 1985). In Dillinger, the Third Circuit criticized the Superior Court's decision in Foley, which appears to be the lead case on the issue. 959 F.2d at 443. The Court of Appeals stated that "Foley does not accurately reflect the approach the Pennsylvania Supreme Court would follow in a strict products liability proceeding." Id.

In Dillinger, although we did not endorse as dispositive the distinction between plaintiffs who "set [their] accident[s] in motion" and those who merely fail to stop them, we limited our holding to cases in which the plaintiff merely failed to stop his injury from being caused by a product defect. 959 F.2d at 444. This distinction is somewhat artificial, as plaintiff's conduct will often be susceptible to characterization in either category. But assuming that [the plaintiff] . . . "set the accident in motion," we will now address the question of the permissible uses of evidence of plaintiff's conduct where such conduct has actively "set the accident in motion." Id.

Based on the foregoing discussion of the permissible uses of plaintiff's conduct evidence in section 402A actions, we find that the evidence of [the plaintiff's] actions preceding his death were appropriate for the jury to consider only if it first decided that those actions were not reasonably foreseeable or were otherwise extraordinary. In failing to put that test to the jury, the district court gave the impression that the jury's function was to assess the relative contributions of [the plaintiff's] and the machine's defect in causing [the plaintiff's] death. As a matter of law, however, strict liability demands that a plaintiff's foreseeable actions can never displace manufacturer liability when a product defect was a substantial factor in causing the plaintiff's injury.

Id. at 1336.\²

2. At least one district court has refused to follow the Third Circuit's opinion in Parks. See Wilson v. Vermont Castings, 977 F. Supp. 691, 696 (M.D. Pa. 1997) (finding that the Dillinger analysis still controlled under the Third Circuit's Internal Operating Procedures because Dillinger and Parks conflicted). However, this Court agrees with the majority opinion in Parks, which found that Dillinger's holding was limited to evidence of the plaintiff's negligence in failing to prevent an accident that had already been set in motion by a defective product. Parks, 113 F.3d at 1336. Thus, because the two holdings do not conflict, this Court finds that Parks controls.

Accordingly, any evidence of the plaintiff's negligence setting the events in motion in the instant action is not automatically admissible to prove that the plaintiff's conduct, not the defect, caused the plaintiff's injury. Instead, evidence of the plaintiff's conduct is admissible only if the jury finds that "those actions were not reasonably foreseeable or were otherwise extraordinary." Id. at 1336.\³ The defendant seeks to offer evidence of the plaintiff's past negligent conduct, rather than evidence of the plaintiff's negligence setting the events in motion. This type of evidence clearly fails to meet the Parks test. Therefore, the plaintiff's motion is granted with respect to this evidence.

Even if this Court assumes arguendo that the plaintiff's negligent character was not foreseeable or was extraordinary, no court has gone so far as to find that a plaintiff's general character for negligence would be admissible in a strict liability case to prove or to disprove causation. Moreover, to the extent the defendant contends that the plaintiff's past negligence is relevant to his alleged unforeseeable conduct in operating the saw, the defendant's argument must fail. Pennsylvania's "well-established rule of evidence is that the commission of the act

3. "A negligent intervening act, to relieve a defendant from strict liability, must be so extraordinary as not to have been reasonably foreseeable." Harley v. Makita USA, Inc., No. CIV.A. 94-4981, 1997 WL 197936, at * 6 (E.D. Pa. Apr. 22, 1997) (citing Eshbach v. W. T. Grant's & Co., 481 F.2d 940, 945 (3d Cir. 1973); Herman v. Welland Chem., Ltd., 580 F. Supp. 823, 830 (M.D. Pa. 1984)).

charged cannot be proved by showing a like act to have been committed by the same person Where there is neither connection nor relation between prior acts of negligence and subsequent conduct, evidence of the former is not relevant to prove the latter, negligence." Levant v. Leonard Wasserman Co., Inc., 284 A.2d 794, 796 (Pa. 1971) (citations omitted); see Valentine v. Acme Mkts., Inc., 687 A.2d 1157, 1160 (Pa. Super. Ct. 1997). In the instant matter, the defendant seeks to offer evidence of four workplace injuries occurring over a twenty year career, none of which involved the use of a saw, to prove that the plaintiff's conduct at the time of the present injury was unforeseeable. Clearly, evidence of the plaintiff's prior injuries is too attenuated to prove this proposition. Thus, the plaintiffs' motion is granted with respect to the plaintiff's prior workplace injuries.

b. Plaintiff's Smoking Habits

The defendant seeks to offer evidence of the plaintiff's smoking habits to show that the plaintiff's smoking had an adverse effect on "the revascularization process to plaintiff's injury site." Def.'s Mot. in Opp'n to Pls.' Mot. in Lim. at 4. While the plaintiffs claim that "no medical expert has offered any opinions that [plaintiff's] smoking in any way effected the saw injury or his healing from that injury," Pl.'s Mot. at 2, the defendant

disagrees. The defendant contends that Dr. William Kirkpatrick will substantiate the defendant's theory.

"When determining damages for personal injuries in Pennsylvania, it is proper for a jury to consider the failure of the plaintiff to undergo . . . medical treatment that an ordinarily prudent man would have submitted to under the circumstances in an effort to better his condition." Yost v. Union R.R. Co., 551 A.2d 317, 322 (Pa. Super Ct. 1988), appeal denied, 562 A.2d 827 (Pa. 1989) (citations omitted). Moreover, "'one injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of the tort.'" Id. (citing Restatement (Second) of Torts § 918(1)). Pennsylvania courts have yet to address the issue of a plaintiff's failure to mitigate personal injury damages due to his or her refusal to stop smoking after suffering the injury. However, the few courts that have confronted this question have found that smoking might constitute a failure to mitigate thereby requiring a reduction in the amount of recover. See Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129, 1139 (5th Cir. 1985) (applying Texas law); Blanchard v. Means Indus., 635 So. 2d 288, 293-94 (La. Ct. App. 1994) (refusing to reduce damages for failure to mitigate where plaintiff "vastly reduced the number of cigarettes consumed per day," given the psychological and physical addiction to smoking); Coffin v. Board of Supervisors, 620 So. 2d

1354, 1366 (La. Ct. App. 1993) (refusing to reduce damages for failure to mitigate where defendants offered no evidence that plaintiff's failure to stop smoking increased her injury).

As explained above, Pennsylvania law makes clear that a tort-feasor is not liable for harm that a victim "could have avoided by the use of reasonable efforts or expenditure after the commission of the tort." Yost, 551 A.2d at 322. There is no reason to believe that the Pennsylvania Supreme Court would not apply this rule of law to a scenario where a plaintiff fails to quit smoking, against the advise of his or her doctor. In the instant matter, the defendant alleges that Dr. William Graham advised the plaintiff to stop smoking, but that the plaintiff failed to comply with the doctor's orders. Moreover, the defendant contends that the plaintiff's failure to follow his doctor's instructions impeded the healing process. Thus, if the defendant can show that an ordinarily prudent person would have quit smoking pursuant to Dr. Graham's advise and that the plaintiff's failure to do so impeded his healing process, the defendant can offer evidence of the plaintiff's smoking habits as they relate to his injuries.

3. Admissibility of Evidence Concerning the Disrepair of the Saw

The plaintiffs seek to exclude evidence of "general abuse to the saw after sale, specifically referencing some minor damage to the edge of the saw base, damages to the place where the blade

is inserted, and damage to the electrical cord." Pls.' Mot. at 2. The defendant claims that this evidence is "relevant to the issue of whether the set plates were maladjusted and, if so, when the set plates were maladjusted." Def.'s Ans. to Pls.' Mot. in Lim. at 2.

As the Pennsylvania Supreme Court recently stated:

[I]t is not the purpose of § 402A to impose absolute liability. A manufacturer is a guarantor of its product, not an insurer. See Azzarello v. Black Brothers Co., Inc., 480 Pa. 547, 553, 391 A.2d 1020, 1023-24 (1978). To recover under § 402A, a plaintiff must establish that the product was defective, that the defect was a proximate cause of the plaintiff's injuries, and that the defect causing the injury existed at the time the product left the seller's hands. Berkebile v. Brantly Helicopter Corporation, 462 Pa. 83, 93-94, 337 A.2d 893, 899 (1975). The seller is not liable if a safe product is made unsafe by subsequent changes. Id. Where the product has reached the user or consumer with substantial change, the question becomes whether the manufacturer could have reasonably expected or foreseen such an alteration of its product. Eck v. Powermatic Houdaille, 364 Pa. Super. 178, 527 A.2d 1012 (1987).

Davis v. Berwind Corp., 690 A.2d 186, 190 (Pa. 1997). Thus, "establishing 'whether the changes were themselves the cause of the defect' is a critical element of a substantial change defense in a products liability case." Sheldon v. West Bend Equip. Corp., 718 F.2d 603, 608 (3d Cir. 1983) (quoting Kuisis v. Baldwin-Lima-Hamilton Corp., 319 A.2d 914 (Pa. 1974)).

The defendant asserts that its expert witness, Robert Bartlett ("Bartlett"), found several changes in the table saw,

including a long screw that "had been inserted by the plaintiffs' employer to immobilize the sliding table." Def.'s Mem. in Opp'n to Pls.' Mot. in Lim. at 2. Moreover, Bartlett discovered that the "plastic main housing of the table saw was severely battered and broken in several places around the base, including where the cord exists the housing." Id. To the extent that these and other changes to the saw may have caused the defect, the defendant may offer evidence of the changes. Accordingly, the plaintiffs' motion is denied with respect to evidence regarding the disrepair of the saw.

**4. Jury Charge Regarding Assumption of Risk and
"Highly Reckless Conduct"**

The plaintiffs request that this Court refuse to charge the jury regarding assumption of risk or highly reckless conduct. The plaintiffs argue that "[n]o evidence exists that Plaintiff or any person who used the saw encountered or noticed that condition prior to Plaintiff's accident." Pl.'s Mot. in Lim. at 3. In response, the defendant requests "a charge on assumption of the risk and highly reckless conduct," and asserts that it will offer evidence substantiating these defenses. Def.'s Mem. in Opp'n to Pls.' Mot. in Lim. at 5.

The parties' arguments on these issues are premature. At this stage, the Court cannot determine whether a charge regarding assumption of risk or highly reckless conduct is appropriate.

Accordingly, the plaintiffs' Motion is denied with regard to the instant request, with leave to renew at trial.

5. Admissibility of Evidence Concerning Other Complaints

The plaintiffs seek to exclude evidence that the defendant "has not received any [other] claims arising from an accident similar to Plaintiff's." Pls.' Mem. at 4. The defendant asserts that this evidence is admissible under the Pennsylvania Supreme Court's holding in Spino v. John S. Tilley Ladder Co., 696 A.2d 1169 (Pa. 1997).

In Spino, the Pennsylvania Supreme Court discussed the admissibility of evidence regarding the nonexistence of prior claims within a manufacturer's case-in-chief in a design defect product liability action. Spino, 696 A.2d at 1170. The Spino court held "that lack of prior claims evidence may be admitted in a design defect product liability action if relevant to a contested issue of causation." Id. at 1173. The court stated:

evidence of the non-existence of prior claims is admissible subject to the trial court's determination that the offering party has provided a sufficient foundation - that they would have known about the prior, substantially similar accidents involving the product at issue. Clearly, the determination of admissibility turns upon the facts and circumstances of the particular action. As such, the trial court must assess whether the offering party lays a proper foundation by establishing the accident occurred while others were using a product similar to that which caused plaintiff's injury.

Id. at 1173 (citations omitted). The court reasoned that “there is little logic in allowing the admission of evidence of prior similar accidents but never admitting their absence. Clearly, had the [plaintiffs] discovered other accidents involving the [product], such evidence would be admissible subject to the trial court’s discretion concerning similarity of both product and circumstances.” Id. at 1174 (citations omitted).

In the instant matter, the cause of the plaintiff’s injury is clearly in dispute. Moreover, the plaintiffs do not contend that the defendant cannot meet the Spino burden regarding the reliability of its records. Pls.’ Mot. at 4. In fact, the defendant asserts that its “representative will provide ample foundation for such testimony, including the methodology of record keeping, all of which was previously explored by plaintiff’s counsel at deposition.” Def.’s Mem. in Opp’n to Pls.’ Mot. in Lim. to Exclude Evidence of Absence of Prior, Similar Claims at 4. Assuming that the defendant “maintained a reliable product problem log” regarding the item the plaintiff used when he was injured, the Court will admit the testimony at issue. Spino, 696 A.2d at 1174. Accordingly, the plaintiffs’ motion is denied with respect to this evidence.

C. Defendant’s Motion

1. Testimony of Donald Clark Regarding Manufacturing and Design Defect

a. Manufacturing and Design Defect

The defendant seeks to preclude the plaintiffs' expert witness, Donald Clark ("Clark"), from testifying that the table saw contained a manufacturing defect. Def.'s Pre-Trial Mem. at 11. The defendant asserts that "nowhere does Mr. Clark state [in his reports] that (1) a manufacturing defect existed, (2) the basis for any such opinion, (3) that a manufacturing defect was the cause of plaintiff's harm, or (4) the factual basis for such missing opinion." Id. The plaintiffs contend that Clark's opinion gives clear notice that the plaintiffs intend to offer this evidence. Pls.' Brief in Opp'n at 5-6. Moreover, the plaintiffs argue that the defendant has been aware of the plaintiffs' manufacturing defect theory since the plaintiffs filed the complaint. Id. at 2-3.

"The threshold inquiry in all products liability cases is whether there is a defect." Riley v. Warren Mfg., Inc., 688 A.2d 221, 224 (Pa. Super. Ct. 1997) (citations omitted). "This threshold can be crossed in one of two ways: either by proving a breakdown in the machine or a component thereof, traditionally known as a manufacturing defect; or in cases where there is no breakdown, by proving that the design of the machine results in an unreasonably dangerous product, known as a design defect." Id. "While claims asserting a manufacturing defect . . . are specific to the individual product that allegedly caused an injury, design

defect claims are distinguishable in that they allege a defect in all products of the same model made by the manufacturer." Van Buskirk, by Van Buskirk v. West Bend Co., No. CIV.A.96-6945, 1997 WL 399381, at * 3 (E.D. Pa. July 10, 1997). Thus, this Court must determine whether Clark opines that the product was "defectively manufactured, a defect not affecting other products of the same model, [or defectively designed] . . . where the . . . injuries [were] caused by a defect inherent in the design common to all products of that model." Tripp v. Ford Motor Co., No. CIV.A.95-2661, 1996 WL 377122, at * 3 (E.D. Pa. July 3, 1996).

In their response to the defendant's motion, the plaintiffs state that their:

manufacturing defect theory is nothing more than the contention that the set plates were positioned too far from the slide bar at the factory during the saw's manufacture. In the factory pre-set position the set plates did not keep the sliding table attached. This is a defect; a defect present at the time of manufacturing produced by the manufacturing process. That is Plaintiffs' entire "manufacturing defect" theory.

Pls.' Brief in Opp'n at 4 (emphasis in original). More specifically, Clark "found the location of the set plate to be the cause of the rotation of the table under the pressure of [plaintiff's] hand." Id. at 5.

In his September 12, 1996 report, Clark states that "[i]t is [his] engineering opinion that the Makita 2711 Table Saw was and is defective and unreasonably dangerous in design," in four

respects: 1) the set plates "should have more overlap"; 2) there is no warning "telling the user not to put downward force on the sliding table as it can rotate"; 3) the blade brake failed to stop "as intended"; and 4) the defendant failed to include instructions regarding the blade breaking function. Clark's 9/12/96 Report at 2 (emphasis added). While Clark did not explicitly contend that the saw was defectively manufactured, he did state that "the blade break is not functioning as intended." Id. According to Clark, the saw is designed with a blade brake which will stop in about four seconds, but the saw blade at issue failed to stop for approximately nine seconds. Id.

It is unclear from Clark's report whether the failure of the brake to stop as designed is "specific to the individual [saw] that allegedly caused an injury," or found "in all products of the same model made by the manufacturer." Van Buskirk, 1997 WL 399381, at * 3. To the extent that the brake failure is specific to this saw, Clark's reports shows that there was a manufacturing defect; however, to the extent that all Makita 2711 Table Saws suffer from the same deficiency, Clark's report demonstrates a design defect. Although Clark's report is ambiguous, if the defendant wished to clarify Clark's opinion it could have done so through the proper discovery methods. This Court will not preclude Clark from testifying regarding any matter included in his reports. Thus,

this Court will deny the defendant's motion with regard to Clark's proposed testimony concerning a manufacturing defect.

b. The Set plates

The defendant contends that "Clark's opinion that the table saw is defective in design for failure of the set plates to be longer or extending [sic] fully under the slide bar and secured by both screws or use of a slide stopper to replace one or more set plates should also be barred." Def.'s Pre-Trial Mem. at 11-12. The defendant argues that Clark fails to state "that such a design defect caused the subject incident and plaintiff's harm." Id. at 12. Thus, the defendant asserts that Clark should not be allowed to testify as to a design defect, "[b]ecause his reports are bereft of an opinion as to any alleged causal link between the purported design defect and the subject incident and . . . any factual predicate for such missing opinion." Id.

The defendant's argument is meritless. Clark clearly explains the factual predicates underlying his opinions. Clark's 9/12/96 Report at 1-2. Moreover, Clark lists several defects, including the defendant's failure to lengthen the set plates, to secure the set plates by both screws, or to use a slide stopper. Id. at 2, 7. Clark explains that had these defects been cured, plaintiffs' injuries would have been avoided. Id. Thus, Clark included the necessary factual predicates and made the requisite casual connection in his report. Accordingly, the defendant's

motion is denied with respect to Clark's testimony concerning the set plate design defects.

2. Loss of Consortium

The defendant seeks to preclude evidence regarding plaintiff Susan Harley's loss of consortium claim, because the plaintiffs failed to set forth the claim in their complaint. Def.'s Pre-Trial Mem. at 12. The plaintiffs admit their failure, but request permission to amend their complaint. Pls.' Brief in Opp'n at 5-6.

Pursuant to Rule 15(a) of the Federal Rules of Civil Procedure: "A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served." Because the plaintiffs seek to amended their complaint long after the defendant served its responsive pleading, the plaintiffs "may amend [their complaint] only by leave of court." Fed. R. Civ. P. 15(a). Rule 15(a) clearly states that, "leave shall be freely given when justice so requires." "Among the grounds that could justify a denial of leave to amend are undue delay, bad faith, dilatory motive, prejudice, and futility." In re Burlington Coat Factory Secs. Litig., 114 F.3d 1410, 1434 (3d Cir. 1997) (citations omitted); see Lorenz v. CSX Corp., 1 F.3d 1406, 1413 (3d Cir. 1993) (quoting Foman v. Davis, 371 U.S. 178, 182 (1962)).

The Third Circuit has found that "prejudice to the non-moving party is the touchstone for denial of an amendment."

Lorenz, 1 F.3d at 1414. Several courts have found that prejudice exists where plaintiffs seeks to amend their complaint several years after the start of litigation and within a few weeks of trial. See, e.g., Lorenz, 1 F.3d at 1414 (denying motion brought three years after start of litigation); Hewlett-Packard Co. v. Arch Assoc. Corp., 172 F.R.D. 151, 153 (E.D. Pa. 1997) (denying motion brought fifteen months after original pleading was dismissed); Johnston v. City of Philadelphia, 158 F.R.D. 352, 353 (E.D. Pa. 1994) (denying motion to add new theory of liability after close of discovery and on eve of trial); Kuhn v. Philadelphia Elec. Co., 85 F.R.D. 86, 87 (E.D. Pa. 1979) (denying motion after discovery was completed).

In the instant matter, the plaintiffs made their request for permission to amend their complaint on March 3, 1998, as part of their response to the defendant's motion. The plaintiffs' request comes three and a half years after their initial filing, and approximately two months prior to the start of trial. Requiring the defendant to conduct further discovery at this time would be prejudicial to the defendant. See Clark v. Township of Falls, 890 F.2d 611, 624 (3d Cir. 1989). Moreover, reopening discovery at this late date would clearly cause undue delay. Finally, the plaintiff's request is futile, because Susan Harley's claim would be barred by the applicable statute of limitations. See Pierce v. Long John Silver, Inc., No. CIV.A.95-6558, 1996 WL

153564, at * 1 (E.D. Pa. Apr. 2, 1996) (denying motion to amend complaint to include loss of consortium claim after statute of limitations had run, where claim was not included due to a "'clerical error'"); Romah v. Hygienic Sanitation Co., 705 A.2d 841, 856 (Pa. Super Ct. 1997) (finding two year statute of limitations applies to husband's strict liability claim and wife's loss of consortium claim). Thus, the defendant's motion is granted with respect to evidence concerning plaintiff Susan Harley's loss of consortium.

3. Spoliation

The defendant and its expert, Bartlett, had the first opportunity to examine the saw at issue in this case. Pls.' Brief in Opp'n to Def.'s Mots. in Lim. at 12. Although Bartlett initially inspected the saw, the defendant allowed the plaintiffs to videotape the examination. Def.'s Pre-Trial Mem. at 12. In response, the plaintiffs agreed to videotape the examination of their expert, Clark, but they failed to do so. Id. During his examination, Clark removed the set plate and its securing screws, after measuring their exact location. Id. at 13. Although Clark claims to have replaced the parts of the saw to their precise positions by using his measurements, he failed to retain these measurements for the defendant's review. Id. The defendant asserts that these measurements are essential to their defense, and that they are prejudiced by their loss. Id. at 13-14. Thus, the

defendant seeks "to exclude any testimony by Donald Clark as to the plaintiffs' theory of defective manufacture based upon maladjustment of set plates by Makita at its factory or, alternatively, Makita USA, Inc. seeks the Court's standard spoliation charge." Id. at 15.

A party to a law suit, as well as its agents, have "an affirmative duty to preserve relevant evidence." Howell v. Maytag, 168 F.R.D. 502, 505 (M.D. Pa. 1996) (citation omitted); Simons v. Mercedes-Benz of N. Am., Inc., No. CIV.A.95-2705, 1996 WL 103796, at * 4 (E.D. Pa. Mar. 7, 1996). "Where evidence is destroyed, sanctions may be appropriate, including the outright dismissal of claims, the exclusion of countervailing evidence, or a jury instruction on the 'spoliation inference.'" Howell, 168 F.R.D. at 505. Where a spoliation inference is imposed, "evidence of the destruction of evidence is permitted to be presented to the jury, and the jury may infer that the party destroyed the evidence because the evidence was unfavorable to that party's case." Simons, 1996 WL 103796, at * 4.

The Superior Court of Pennsylvania has recently limited the use of the spoliation doctrine in three cases. See Smitley v. Holiday Rambler Corp., No. CIV.A.94-1334, 1998 WL 25591, at *5 (Pa. Super. Ct. Jan. 27, 1998). In fact, the Superior Court recently explained:

In O'Donnell v. Big Yank[, Inc.], 696 A.2d 846 (Pa. Super Ct. 1997), we refused to apply

spoliation where the product liability claim was based on a design defect theory rather than a manufacturing defect. In Long v. Yingling, [700 A.2d 508 (Pa. Super. Ct. 1997)], we refused to apply spoliation against a plaintiff where the allegedly defective product was in the control of the defendant's bailee at the time it was lost. Most recently, in Dansak v. Cameron Coca-Cola Bottling Co., Inc., [703 A.2d 489 (Pa. Super. Ct. 1997)], we refused to apply spoliation where the plaintiff was not at fault for disposing the product.

Smitley, 1998 WL 25591, at * 5.

In the instant matter, it is unclear whether the plaintiffs' claim is based on a design defect or a manufacturing defect. To the extent that the plaintiffs' claim is based on a design defect, where any of the defendant's saws can be used to prove or disprove the defect, the spoliation doctrine is inapplicable. See O'Donnell, 696 A.2d at 849-50; Childs v. General Motors Corp., No. CIV.A.95-0331, 1997 WL 611616, at * 2 (E.D. Pa. Sept. 25, 1997). To the extent that the plaintiffs' claim is based on a manufacturing defect, this Court must apply the factors discussed in Schmid v. Milwaukee Elec. Tool Corp., 13 F.3d 76, 79 (3d Cir. 1994), to determine whether sanctions are appropriate in the instant matter.

In Schmid, the Third Circuit discussed the "key considerations in a product liability case in deciding whether to sanction the plaintiff for destruction of the product." Tripp,

1996 WL 377122, at * 2. The Third Circuit stated that a district court must evaluate the following factors:

(1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future.

Schmid, 13 F.3d at 79.

a. Degree of Fault

In the instant matter, the plaintiffs bear some degree of fault, because they failed to keep Clark's measurements. Further, the plaintiffs should have kept their promise that they would videotape Clark's removal and reinstallation of parts. However, Clark provided a valid explanation as to why he did not videotape his examination: he could not find a good camera angle. Def.'s Pre-Trial Mem. Ex. A. at 1. Moreover, Clark's measurements were not taken for evidentiary purposes; rather, Clark "measured and re-measured the adjustments so as to re-install the set plates at exactly the same location as he found them." Id. at 1. So, Clark may have been justified in failing to retain his measurements for the defendant's review. Finally, Clark thoroughly described his examination for the defendant's benefit. Id. Thus, while the plaintiffs should have ensured that Clark's examination was videotaped or that Clark's measurements were available for the

defendant's review, the plaintiffs' degree of fault is low, especially given the care that Clark took to reinstall the saw to its former condition.

b. Degree of Prejudice to the Defendant

In the instant matter, the degree of prejudice to the defendant is minimal. First, the defendant has not alleged that Clark altered or manipulated the saw in any manner. Thus, the defendant has failed to explain how it was prejudiced. To the extent that the defendant believes that Clark altered the saw during his inspection, the defendant may inquire into Clark's actions during its cross examination of Clark at trial.

Second, the defendant's expert was the first to inspect the saw. While the defendant asserts that Bartlett did not conduct a full examination of the saw during this inspection, the defendant, not the plaintiffs, chose to forego that opportunity.\⁴

Third, the defendant has ample evidence of the saw's condition prior to Clark's inspection. Both parties photographed the saw prior to Clark's examination. Moreover, Bartlett inspected the saw before Clark examined it. Finally, Clark removed only one of the two set plates. The defendant is free to measure the set plates and screws that were not removed. Accordingly, the defendant's degree of prejudice is quite low.

4. The defendant argues that it lacked notice of the plaintiffs' intent to proceed on a manufacturing theory at the time of Bartlett's inspection. Thus, the defendant contends that Bartlett's examination was incomplete. Given that the plaintiff's expert had yet to inspect the saw, it is understandable that there may have been some confusion over the defect alleged in the plaintiffs' claim. However, the defendant has not asserted that Bartlett could no longer inspect the saw to rebut Clark's observations regarding a manufacturing defect. Given the fact that Clark removed only one set of plates, that Clark replaced them in a precise manner, and that the parties have other evidence of the saw's condition prior to Clark's examination, including photographs and Bartlett's report, this Court cannot find that the defendant was prejudiced.

c. Lesser Sanctions; Deterrence

The public "policies behind requiring a plaintiff to preserve an allegedly defective product for the defendant's inspection are (1) to prevent fraudulent claims; and (2) to remove plaintiffs from the position of deciding whether the availability of the allegedly defective product would help or hurt their case." Long, 700 A.2d at 513. This Court finds that these policies would not be advanced by granting the defendant's proposed sanctions.

Here, the defendant's expert witness was the first to inspect the saw. This scenario is distinguishable from those cases where the product was altered or destroyed prior to the defendant's opportunity to inspect it. Moreover, the defendant has had the opportunity to reinspect the saw after Clark's examination. "[U]nlike in cases where the evidence is permanently unavailable, here the [saw] was [partially] dismantled, but not destroyed, and thus defendant has not been deprived of examining it." Childs, 1997 WL 611616, at * 2 (footnote omitted). Further, "other than asserting conclusory statements, the defendant has not demonstrated that it has been prejudiced in any way." Id. Finally, the plaintiff's degree of fault is negligible. After applying the Schmid factors, the defendant's motion is denied as it relates to its request to preclude Clark's testimony or for an adverse inference jury instruction.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH E. HARLEY and : CIVIL ACTION
SUSAN HARLEY :
 :
v. :
 :
MAKITA USA, INC. : NO. 94-4981

O R D E R

AND NOW, this 6th day of April, 1998, upon consideration of the Plaintiffs' Motion in Limine (Docket No. 54), and the Defendant's Motion in Limine (Docket No. 59), IT IS HEREBY ORDERED that the Plaintiffs' Motion is **GRANTED in part and DENIED in part** and the Defendant's Motion is **GRANTED in part and DENIED in part**.

IT IS FURTHER ORDERED THAT:

1) the Plaintiffs' request to preclude evidence of the Defendant's compliance with industry standards is **GRANTED**;

2) the Plaintiffs' request to preclude evidence of the Plaintiff's prior workplace accidents is **GRANTED**;

3) the Plaintiffs' request to preclude evidence of the Plaintiff's smoking habits is **DENIED**;

4) the Plaintiffs' request to preclude evidence regarding the disrepair of the saw is **DENIED**;

5) the Plaintiffs' request regarding a jury charge omitting instructions concerning the Plaintiff's assumption of risk and highly reckless conduct is **DENIED WITH LEAVE TO RENEW**;

6) the Plaintiff's request to preclude evidence regarding other complaints to the Defendant is **DENIED**;

7) the Defendant's request to limit the testimony of the Plaintiff's expert witness, Donald Clark, is **DENIED**;

8) the Defendant's request to preclude evidence regarding Susan Harley's loss of consortium is **GRANTED**; and

9) the Defendant's request to preclude Donald Clark's testimony or for an adverse inference jury instruction is **DENIED**.

BY THE COURT:

HERBERT J. HUTTON, J.