SUMMARY OF TINCHER V. OMEGA FLEX, INC.

On November 19, 2014 the Pennsylvania Supreme Court posted its long-awaited opinion in *Tincher v. Omega Flex*, 2014 Pa. LEXIS 3031 (Pa. Nov. 19, 2014). The 137-page majority opinion, authored by Chief Justice Castille, had four (4) holdings (*Id.* at *1-3):

(a) The 1978 Pennsylvania Supreme Court case ***Azzarello v. Black Brothers Company*, 391 A.2d 1020 (Pa. 1978) is overruled**;

(b) **A plaintiff pursuing a strict liability cause of action must prove the product in question was in a "defective condition"** by showing *either* that (1) the danger is unknowable and unacceptable to the average or ordinary customer, *or* that (2) a reasonable person would conclude that the probability and seriousness of harm caused by the product outweigh the burden or costs of taking precautions. The burden of production and persuasion is by a preponderance of the evidence;

(c) **Whether a product is in a defective condition is a question of fact for the jury** and will only be removed from the jury's consideration where it is clear that reasonable minds could not differ on the issue. The trial court is relegated to determining issues of law and articulating the law for the jury.

(d) **The Restatement (Third) of Torts: Products Liability §§ 1 et seq. will not be adopted by Pennsylvania**.

Facts and procedural history: On June 20, 2007 a fire erupted at Terrence and Judith Tinchers' home, which was the central unit of a 2-story triplex built in 1998-99 and purchased by the Tinchers in 2005.[1] The cause of the fire was due to a lightning strike near the Tinchers' home which caused a small puncture in the corrugated stainless steel tubing ("CSST") transporting natural gas to a fireplace on the first floor. The melting of the CSST ignited the natural gas and fueled the fire causing substantial damage to plaintiffs' home and personal belongings. The CSST was manufactured and sold by defendant Omega Flex as part of a gas transportations system marketed as the TracPipe System. Plaintiffs reported the fire to their insurer, United Services Automobile Association ("USAA") but suffered out-of-pocket expenses because their policy coverage did not cover all of their costs. *Id.* at *3-4.

Plaintiffs filed a complaint against Omega Flex in January 2008, asserting claims sounding in strict liability, negligence and breach of warranty.[2] Plaintiffs alleged that the CSST

[1] The fire was extinguished and there were no physical injuries; the litigation is therefore limited to a products liability cause of action and there are no claims as to personal injuries.

[2] The lawsuit was filed in the Chester County Court of Common Pleas. As noted in a footnote in the majority opinion, plaintiffs also named as defendants R & L Plumbing Contractors, Inc., Joseph Rosati Plumbing, Inc., and

in the TracPipe System was defective and unreasonably dangerous to intended users because its walls are too thin to withstand the effects of lightning. In September 2010, Omega Flex filed a motion *in limine* requesting the application of Sections 1 and 2 of the Restatement (Third) to plaintiffs' strict liability claim, and also proposed jury instructions/findings of fact consistent with the Restatement (Third). Plaintiffs offered proposed jury instructions/findings of fact consistent with the Restatement (Second). The trial court did not resolve the motion pre-trial. The case went to trial in October 2010. Plaintiffs offered expert testimony that opined, *inter alia*, that CSST is inherently defective.[3] Defendant's experts opined that the CSST is not defective or unreasonably dangerous, and in fact meets and exceeds industry standards, which did not anticipate lightning strike as a possible safety concern, suggesting it was unnecessary for defendant to have foreseen any danger from lightning. The jury instructions were consistent with the Restatement (Second), and the jury returned to the courtroom with questions including definitions for "defect" and "defective design."

The jury returned a verdict for plaintiffs, and defendant filed a motion for post-trial relief requesting, among other things, a new trial premised upon the trial court denying its motion *in limine* requesting to instruct the jury using the Restatement (Third), and seeking j.n.o.v. because, it argued, plaintiffs' evidence was insufficient to prove a strict liability claim under the Restatement (Third). *Id.* at *4-18. Defendant argued that the court should overturn *Azzarello*, and adopt the Restatement (Third). Plaintiffs argued that even if *Azzarello* was wrongly decided, the Second Restatement's principles of liability should be retained. The trial court denied Omega Flex's motion and entered judgment on the verdict. *Id.* at *18-23. Defendant appealed to the Superior Court.[4] In September 2012 the Superior Court affirmed the trial court's judgment, and held that the court did not err in declining to adopt the Third Restatement.

Joseph R. Rosati, Jr., individually and d/b/a Joseph Rosati Plumbing & Heating. Omega Flex asserted cross-claims against all co-defendants, but in October 2010 plaintiffs and Omega Flex voluntarily dismissed with prejudice all claims against these parties.

[3] After the plaintiffs' case, Omega Flex moved for a nonsuit, which was denied. In its motion, defendant cited the standard of the Second Restatement and *Azzarello*, assuming that the trial court had denied its pre-trial request to apply the Third Restatement. *Id.* at *10.

[4] The trial court ordered defendant to file a concise statement of errors complained of on appeal. Defendant argued that the evidence at trial was insufficient to prove claims of strict liability under either the Second or Third Restatements, and argued the jury should have been charge premised upon the Third Restatement or the related theory of fireworthiness/crashworthiness. The trial court rejected defendant's arguments, and noted that the Restatement (Third) had not been adopted and plaintiffs therefore had no burden to prove a safer alternate design. In briefings to the Superior Court, defendant argued that the Restatement (Third) expressly incorporates foreseeability standards into the strict liability analysis and requires a plaintiff to establish the existence of a reasonable alternative design. *Id.* at *23-26.

Defendant filed a petition for allowance of appeal limited to the issue of whether the Supreme Court should replace the strict liability analysis of the Second Restatement at § 402A with the analysis of the Third Restatement, and the parties were directed to brief the question of whether, if the Third Restatement were adopted, the holding should be applied prospectively or retroactively. *Id.* at *26-27.

Arguments to the Supreme Court: Omega Flex argued that *Azzarello* should be overruled because it fails to incorporate negligence principles into strict liability, and whether a product is defective cannot be in the abstract, rather "reasonableness" must be taken into consideration. Defendant suggested that the risk-utility calculus be a question of whether the manufacturer departed from the proper and reasonable standards of care (i.e. there shouldn't be a separation between a product defect and a manufacturer's conduct). Defendant also argued that *Azzarello* requires a risk-utility analysis but prevents the jury from reviewing the relevant evidence, effectively not allowing either the jury or the court to actually decide whether a product is unreasonably dangerous because its risk outweigh its benefits (or whether the product is safe for its intended use). Defendant also argued that the word "guarantor" misleads the jury into holding manufacturers absolutely liable for any injuries caused by the product. Defendant urged the court to overrule *Azzarrello* as unsound and unworkable precedent, and to adopt the Third Restatement's approach to strict liability which, in design defect cases, would require the jury to balance the risks and benefits by considering a broad range of factors.[5] Crucially, it would require the plaintiff to prove that the manufacturer could and should have adopted a reasonable alternative design, rather than merely criticize the existing design. *Id.* at *27-36.

Plaintiffs argued that strict liability actions should continue to be governed by the Restatement (Second), and maintained that negligence concepts have no place in strict liability claims because social policy dictates that a manufacturer is the guarantor of product safety (i.e. manufacturers should be held responsible for their products regardless of fault).[6] *Id.* at *36-45.

Court's Analysis: The court discussed its role as an adjudicative rather than policy-making body, and noted that it must show restraint in adopting the Restatement (Third) which would change the common law rules. *Id.* at *46-59. The court analyzed the evolution of products liability in the common law, noting that there has been a gradual trend to expand civil liability

[5] Defendant noted that the Restatement (Third) has been embraced by 5 other jurisdictions.
[6] Plaintiffs submitted alternative arguments as to whether *Azzarello* should be overruled, but maintained that the Restatement (Second) should stand.

for harm to people or property, and discussed causes of action available to plaintiffs by the 1960s in both negligence and breach of warranty. *Id.* at *61-66. The court discussed early cases and the adoption of the Restatement (Second) of Torts § 402A as the common law of Pennsylvania,[7] and noted that in a series of (pre-*Azzarello*) cases, the court "centered on describing in affirmative terms the theoretical basis for strict liability but lapsed, generally, into comparisons with the more familiar negligence and warranty causes of action in which strict liability was rooted." *Id.* at *79.[8] After commenting on several cases in the 1960s and 1970s (*see* footnote 8) the court noted that early trends became apparent, including an increase in cases attempting to distinguish strict liability from negligence, and "to excise negligence principles and terms (such as foreseeability) from strict liability theory..." *Id.* at *89-91.

The court then discussed the seminal 1978 case *Azzarello v. Black Brothers Co., supra*, which held that the terms "defective condition" and "unreasonably dangerous" were issues of law for the trial court, not the jury, but the question of whether a plaintiff proved the factual allegations in his complaint was for the jury as trier of fact.[9] The court ruled that the dispositive question in design defect cases is whether the product was safe for its intended use, and, because a manufacturer is a "guarantor" of the product, a product could be found to be defective "where the product left the supplier's control lacking any element necessary to make it safe for its

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[7] The Restatement (Third) was adopted in the case *Webb v. Zern*, 220 A.2d 853 (Pa. 1966).

[8] By way of example, the court cited *Bialek v. Pittsburgh Brewing* Co., 242 A.2d 231, 235-236 (Pa. 1968) in which, by way of discussing jury instructions, the court effectively ruled that a "plaintiff's theory of the case is relevant and the trial court has discretion to tailor the charge to reflect the evidence and theories of the parties." *Id.* at *79-80. The court also cited *Kuisis v. Baldwin-Lima-Hamilton Corp.*, 319 A.2d 914, 920 (Pa. 1974) (in which the court in an Opinion Announcing Judgment of Court discussed the burden of proof in strict liability cases involving circumstantial, rather than direct, evidence of a defect (e.g. the malfunction theory, adopted in *Rogers v. Johnson & Johnson Products, Inc.*, 565 A.2d 751 (Pa. 1989); *Barnish v. KWI Building Co.*, 980 A.2d 535 (Pa. 2009)) (holding that "[w]hile a plaintiff's hand in a strict liability case will obviously be strengthened by evidence of a specific defect in the defendant's product such evidence is not necessary to take ... the plaintiff's case to a jury."). *Id.* at *80-82. The *Kuisis* court also discussed the crane operator's negligence, determining that it was legally significant as a *potential* superseding cause of that plaintiff's injuries, but ultimately found that operator negligence was not a superseding cause if it was not in the "reasonable range of foreseeability" of the manufacturer. *Id.* at *82-83. The court in *Berkebile v. Brantly Helicopter Corp.*, 337 A.2d 893 (Pa. 1975) clarified that strict liability causes of action revolved around consumer protection, and explained that proof of a manufacturer's or seller's care and alleged breach of care are unnecessary. A plaintiff, the court explained, must therefore prove only that a product was defective, the defect existed at the time the product left the seller's hands, and the defect caused his injuries. The court further held that negligence constructs of reasonable have no place in strict liability causes of action, and the jury should not be instructed as to reasonableness. *Id.* at *84-88. Moreover, a plaintiff's negligence is not a bar to recovery in strict liability, although such evidence may be admissible to rebut contentions of defect and proximate cause. The court also held that "[t]he seller must provide with the product every element necessary to make it safe for use" (i.e. duty to warn). *Id.* at *88-89. The court noted that the lead opinion in *Berkebile* regarding duty to warn was quoted out of context by the *Azzarello* majority as the standard of proof in a strict liability action. *Id.* at *89.

[9] The *Tincher* court called the standard set forth in *Azzarello* "impracticable." *Id.* at *130

intended use or possessing any feature that renders it unsafe for the intended use." *Id.* at *91-94. Following the *Azzarello* decision, cases "reflect[ed] an increasing concern with segregating strict liability and negligence concepts." *Id.* at *94-95.[10] The focus of discussion then shifted to recent cases and the Restatement (Third) relating to products liability, proposed in 1998. The court again stated that it had not yet adopted the Restatement (Third), but noted that several non-precedential opinions called for the court to adopt the Third Restatement or some of its principles.[11] It also noted that the Third Circuit has predicted that if the Pennsylvania Supreme Court were to hear the issue, it would adopt the Third Restatement's strict liability doctrine. *Id.* at *118 (*citing Berrier v. Simplicity Mfg.*, 563 F.3d 38 (3d Cir. Pa. 2009)).[12]

The court restated that it must determine whether *Azzarello* should remain good law, and repeated that plaintiffs and Omega Flex agree that the legal concepts set forth in the *Azzarello* decision "fail to reflect the realities of strict liability practice and to serve the interests of justice." *Id.* at *119-120. The court found that cases decided after *Azzarello* applied the case "broadly, to the point of directing that negligence concepts have no place in Pennsylvania strict liability doctrine; and, as we explain, those decisions essentially led to puzzling trial directives that the bench and bar understandably have had difficulty following in practice, including in the present matter." *Id.* at *121.[13] The court reiterated that "[t]his case speaks volumes to the necessity of reading legal rules – especially broad rules – against their facts and the corollary that judicial pronouncements should employ due modesty." *Id.* at *127. The *Tincher* court also faulted the

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[10] *See, e.g., Lewis v. Coffing Hoist Division, Duff-Norton Co.*, 528 A.2d 590 (Pa. 1987) (holding that a strict liability claim does not sound in negligence and proof of industry standards and reasonable care are irrelevant); *Kimco Development Corporation v. Michael D's Carpet Outlets*, 637 A.2d 603 (Pa. 1993) (comparative negligence of a co-defendant is not a defense in a strict liability claim). *Id.* at *95-101.

[11] The court discussed several of these cases, including the infamous *Phillips v. Cricket Lighters*, 841 A.2d 1000 (Pa. 2003) (holding that a product is not defective if it is safe for its intended user); *see also Pa. Dep't of Gen. Servs. v. U.S. Mineral Prods. Co.*, 898 A.2d 590 (Pa. 2006) (in which the court "rejected the argument that expansion of liability premised upon negligence-based foreseeability considerations was warranted, emphasizing an incongruity with simultaneously constraining a supplier's resort to negligence-based use-related defenses."); *Bugosh v. I.U. North Am. Inc.*, 942 A.2d 897 (Pa. 2008) (*per curiam*) (appeal granted to address questions relating to the strict liability doctrine in Pennsylvania; appeal subsequently dismissed as improvidently granted. A dissenting opinion raised the issue that a "categorical divide between strict liability and negligence principles" is more challenging in cases involving design or warning defect. The dissent argued in favor of a risk-utility approach to limiting supplier liability. The dissent also criticized Azzarello, and suggested potentially adopting the Restatement (Third).). *Id.* at *95-116.

[12] The court also pointed out that *Azzarello* did not find support for its holding in Pennsylvania law or in the Restatement, but rather in a California case, *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121 (Cal. 1972).

[13] The court explained that *Azzarello* and its progeny were premised upon the description of negligence in the Second Restatement and the explicit reference that compensation under Section 402A does not require proof of due care; this then somehow affected a plaintiff's burden of proof in all strict liability cases, regardless of the pertinent facts. *Id.* at *122-123.

Azzarello court for allowing the trial court to serve as the gatekeeper in the initial inquiry of whether a product is even susceptible to a strict liability claim, and the jury to then answer the different question of whether a plaintiff has proved the factual allegations of the complaint. The court also cited the concern that trial courts lack the "expertise to conduct the social policy inquiry into the risks and utilities of a plethora of products and to decide, as a matter of law, whether a product is unreasonably dangerous except perhaps in the most obvious of cases… where a gate-keeper's function is hardly necessary." *Id.* at *132-133.

The court then turned to a discussion of duty in Pennsylvania law, which, in the context of strict liability, relates to the duty of manufacturers and suppliers to the ultimate consumer in a chain of distribution. *Id.* at *140. The law and the Restatement (Second) clarify that this duty requires that the product marketed to consumers must be free from a defective condition unreasonably dangerous to the consumer or the consumer's property. *Id.* at *140-142. A plaintiff must therefore prove that a product was in a defective condition when it was placed in the stream of commerce. *Id.* at *142. Common law demonstrates a balancing of interests with respect to consumers and manufacturers that have led to two tests in the strict liability context: a consumer expectation standard, and a risk-utility standard.

The consumer expectation standard defines "defective condition" "as a condition, upon normal use, dangerous beyond the reasonable consumer's contemplations." *Id.* at *151. Under this standard, a "product is not defective if the ordinary consumer would reasonably anticipate and appreciate the dangerous condition of the product and the attendant risk of injury of which the plaintiff complains…" *Id.* at *152.[14] The consumer expectations test derives from the Second Restatement's commentary on the principles of "defective condition" and "unreasonably dangerous," designed to limit liability. *Id.* at *153. The court noted the limitations of the consumer expectations test, namely that (a) clearly dangerous products would be exempt from strict liability, and (b) jury determinations of consumer expectations regarding the presence of danger are unpredictable. *Id.* at *154-155. The risk-utility standard states that "a product is in a defective condition if a 'reasonable person' would conclude that the probability and seriousness of harm caused by the product outweigh the burden or costs of taking precautions." *Id.* at *157. This standard allows a post-hoc determination of whether a manufacturer's conduct (in

[14] In assessing a "reasonable" consumer's expectations, the court should consider the nature of the product, the identify of the user, the intended use and user of the product, and any express or implied representations by the manufacturer. *Id.* at *152.

manufacturing or designing a product) was reasonable, "which obviously reflects the negligence roots of strict liability." *Id.* at *158.[15] The risk-utility standard also has limitations ("in some respects, it conflicts with bedrock moral intuitions regarding justice in determining proper compensation for injury to persons or property in individual cases"). *Id* at *160-163. Some jurisdictions have combined the consumer expectations and risk-utility standards, either by finding that a plaintiff has stated a claim when either test is met, or by incorporating one of the tests into the other,[16] or by a variation of these approaches. The court noted that the Third Restatement's approach is "based upon a risk-utility determination by requiring proof of a reasonable alternative design." *Id.* at *168.

The *Tincher* court concluded that it would be problematic to adopt the Third Restatement; for example, a product might be defective but no alternative design is available. *Id.* at *175. Another problem is that the Third Restatement "presumes too much certainty about the range of circumstances, factual or otherwise, to which the 'general rule' articulated should apply." *Id.* at *184.[17] Ultimately, the Third Restatement may impede the development in the arena of products liability law, and the court believes that, in the aftermath of the progression of case law post-*Azzarello*, an "incremental approach" is preferable. *Id.* at *185-186. Accordingly, the Second Restatement prevails as the proper articulation of the law.

The court then turned to the standard of proof in strict liability claims in Pennsylvania. The court initially noted the importance that strict liability causes of action are rooted in tort, rather than contract, but reminded that the relevant tortious conduct is inherently different than the conduct found in fault-based negligence claims. *Id* at *189-190. The court held that a cause of action in strict liability requires proof *either* of the ordinary consumer's expectations, *or* of the risk-utility of a product (arguments in the alternative). *Id.* at *191. Strict liability "overlaps in

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[15] The court cited the Wade Factors, articulated by Dean Wade, which discusses factors relevant to the manufacturer's risk-utility calculus involved in designing or manufacturing a product. *Id.* at *158-159.

[16] "[P]roduct 'must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.' . . . [W]hether a product is unreasonably dangerous to an extent beyond that which would be contemplated by the ordinary consumer is determined by the jury using a risk-utility balancing test." *Id.* at *164.

[17] "The principal point is that a jurisdiction is free to adopt a policy that reduces a supplier's exposure to strict liability for a product. But, it would either be naïve or inaccurate to declare that existing decisional law in Pennsylvania expressly articulates, or contemplates, only the general principle in the terms of the Third Restatement. And, if adopted as a broadly applicable legal regime, the Third Restatement would engender a self-fulfilling prophecy by providing for a future restatement, going forward, of only those cases that meet the evidentiary threshold the regime permits." *Id.* at *185.

effect with the theories of negligence and breach of warranty... Essentially, strict liability is a theory that effectuates a further shift of the risk of harm onto the supplier than either negligence or breach of warranty theory by combining the balancing of interests inherent in those two causes of action." *Id.* at *193-195.[18] The court effectively punted the issue of evidentiary issues in strict liability cases going forward, writing that the issue is not currently before the court and, "in light of the complexities and dearth of persuasive authority," the court will not rule at this time. *Id.* at *204. The court wrote that Tinchers' claims illustrated how a manufacturer's conduct and the specific product are not mutually exclusive.[19] Essentially, the court ruled in favor of letting the law play out and develop as cases continue to be heard. *Id.* at *206-207 ("The principal point is that judicial modesty counsels that we be content to permit the common law to develop incrementally, as we provide reasoned explications of principles pertinent to factual circumstances of the cases that come before the Court."). The court instructed attorneys to narrow the issues and provide suggested instructions to assist juries in impending factual determinations. *Id.*

Turning to future provinces of the jury and trial court, the court explained that, at the outset of the litigation, the plaintiff, as "the master of the claim in the first instance," can allege facts to state a cause of action premised upon either a consumer expectations or a risk-utility standard. As the case then progresses, it may become necessary to abandon one of these theories, although the plaintiff may pursue both if the evidence permits him to do so. *Id.* at *207-213. In discussing the appropriate burden of proof in strict liability cases, the court again cited to the California decision *Barker v. Lull Engineering Co.*, 573 P.2d 443 (Cal. 1978), noting that it established that the standard of proof in strict liability cases would be a consumer expectations/risk-utility balancing test. Notably, while the *Barker* court called for the burden of production and persuasion to shift to the defendant in appropriate cases, in order to demonstrate that a product that produces an injury is not by design defective, the *Tincher* court commented that other jurisdictions that subscribe to *Barker's* standard of proof do not shift the burden to the defendant. *Id.* at *213-214. Shifting the burden to the defendant, the court noted, places the risk

[18] But the court noted "that the theory of strict liability -- like all other tort causes of action -- is not fully capable of providing a sufficient deterrent incentive to achieve perfect safety goals is not a justification for jettisoning or restricting the duty in strict liability, whose compensatory objective remains part of the public policy of this Commonwealth." *Id.* at *201.

[19] Where the plaintiffs' allegations alleged that the risk of harm related to TracPipe's thickness was foreseeable and avoidable.

of an flawed decision on the defendant. *Id.* at *215.[20] The court then punted any decision again, writing that the parties did not brief the question of burden-shifting in risk-utility cases and the court therefore did not need to resolve the issue on appeal. *Id.* at *216.

The final punt of the majority opinion was in declining to state whether adoption of the Restatement (Third) would have retroactive or prospective effective since the court decided not to adopt the Restatement (Third). *Id.* at *218. The court did allow Omega Flex to benefit from this opinion's application because it had preserved the claim that *Azzarello* should be overruled to the trial court and on appeal. *Id.* at *218-219.[21]

Based on the foregoing, the court reversed in part the Superior Court's decision and remanded the case to the trial court for further action on the post-trial motions.[22]

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[20] The *Barker* court allows for this burden shifting in situations where public policy warrants such a shift. The *Tincher* court added that it would "consider difficulties of adducing evidence to prove a negative, the parties' relative access to evidence, and whether placing the burden of proof on one party is necessary to help enforce a further right, constitutional or otherwise." *Id.* at 215.

[21] Although Omega Flex would be allowed the benefit of this opinion, the court did not rule on whether defendant would be entitled to additional relief, including j.n.o.v. or a new trial, as that issue was not before the court on appeal.

[22] Justices Baer, Todd and Stevens joined the opinion. Justice Saylor wrote a concurring and dissenting opinion in which Justice Eakin joins. Former Justice McCaffery did not participate in the decision of the case.